ARTICLES

The Historical Origins of EU Law Primacy, Its Interaction with UK Parliamentary Sovereignty and Brexit Consequences on Other EU Member States

Ben Chester Cheong*

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ABSTRACT: Brexit was designed to restore legislative supremacy, or what is known as parliamentary sovereignty, to the United Kingdom. This *Article* seeks to analyse if this had been done satisfactorily by analysing the interaction of the two major doctrines of *(i* UK parliamentary sovereignty, and *(ii* EU law primacy from the point at which the UK became a part of the EU to the point at which the UK exited from the EU. The *Article* will first consider the doctrine of UK parliamentary sovereignty from the perspective of the UK and provide an analysis of the current position where the doctrine of parliamentary sovereignty stands. This *Article* will then consider the doctrine of EU law primacy and provide a historical analysis of the doctrine, including prevailing views of the primacy doctrine from the lens of Germany, UK and the CJEU. Finally, the *Article* will then attempt to discuss whether Brexit has actually done much to affect the doctrine of parliamentary sovereignty by discussing the UK's international obligations.

KEYWORDS: Brexit – EU law – parliamentary sovereignty – primacy– United Kingdom – constitutional law.

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I. Introduction

Brexit has been a monumental development that sought to return legislative sovereignty to the UK. This single event had resulted in much academic commentary[1] and has led to various UK constitutional developments including the EU Referendum Act 2015, the decision in *Miller*,[2] the European Union (Withdrawal of Notification Act) 2017 and the European Union (Withdrawal Agreement) Act 2020, among others.

This *Article* will first analyse the state of parliamentary sovereignty before and just after Brexit. It will examine the constitutional developments affecting parliamentary sovereignty by contending that the traditional absolutism of parliamentary sovereignty has been evolving over the years.[3] Thereafter, it will analyse the state of EU law primacy as it now stands[4] by comparing the positions in Germany and UK as well as how the CJEU has reacted to EU law primacy over the years.[5] The *Article* will then attempt to discuss whether Brexit has actually done much to affect the doctrine of parliamentary sovereignty by discussing the UK's international obligations.

II. Orthodox views of parliamentary sovereignty

The doctrine of UK parliamentary sovereignty as understood by Dicey is that Parliament has "the right to make or unmake any law whatever; and, further, that no person or body is recognised [...] as having a right to override or set aside the legislation of Parliament".[6] This orthodox view has been described as signifying the "bedrock of British constitutionalism".[7]

However, McLean and McLillan have argued that Dicey's position on UK parliamentary sovereignty was never consistent, having "moved from the doctrine of continuing omnipotence first to an ill-expressed doctrine of popular sovereignty, and then towards

[1] See for instance AL Young and others, 'Europe's Gift to the United Kingdom's Unwritten Constitution – Juridification' in A Albi and S Bardutzky (eds), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (TMC Asser Press 2019) 83.

[2] UK Supreme Court judgment of 24 January 2017 2017/0196 *R (Miller) v Secretary of State for Exiting the European Union* [UKSC] 5.

[3] See R Masterman and JE Khushal Murkens, 'Skirting Supremacy and Subordination: The Constitutional Authority of the United Kingdom Supreme Court' (2013) PublL 800, 820; NW Barber, 'The Afterlife of Parliamentary Sovereignty' (2011) ICON 144, 153 ff; M Tabarelli, 'The Influence of the EU and the ECHR on "Parliamentary Sovereignty Regimes": Assessing the Impact of European Integration on the British and Swedish Judiciaries' (2013) ELJ 340, 346 ff.

[4] C Eckes, 'Protecting Supremacy from External Influences: A Precondition for a European Constitutional Legal Order?' (2012) ELJ 230, 231 ff; S Weatherill, *Law and Integration in the European Union* (Oxford Clarendon Press 1995) 287 ff.

[5] TC Hartley, *European Union Law in a Global Context: Text, Cases and Materials* (Cambridge University Press 2004) 164 ff.

[6] AV Dicey, *The Law of the Constitution* (Oxford 1885) 39 ff.

[7] D Jenkins, 'Both Ends against the Middle: European Integration, Devolution, and the Sites of Sovereignty in the United Kingdom' (2002) TempleIntlCompLJ 1, 1.

self-embracing omnipotence".[8] It follows then that these contradictions mean that no acceptable view of parliamentary sovereignty can be "unequivocally established"[9] and it has been previously observed that Dicey's "continuing sovereignty'[10] model is 'untenable and unrealistic".[11]

On the contrary, Heuston[12] and other scholars[13] argue that Parliament can impose upon itself limitations of "manner and form"[14] to "bind itself (including succeeding Parliaments) either as to the content of future legislation or as to the manner and form in which future legislation must be passed".[15]

II.1. Diceyan orthodoxy observed in *Miller*

The Diceyan orthodoxy of parliamentary sovereignty can be gleaned from the Supreme Court's decision in *Miller*. The Supreme Court in *Miller* has held that the UK Government may not initiate withdrawal from the EU by formal notification to the Council of the EU as prescribed by art. 50 TEU (which allowed for the departure of a Member State) without an Act of the UK Parliament permitting the Government to do so. In other words, the executive could not use its prerogative powers to trigger Article 50 TEU thereby "adopting an implicit logic of popular sovereignty".[16]

While this suggested that the referendum was "advisory" only, it appeared to elevate the sovereignty of parliament[17] as a new statute was required, thereby bringing Parliament into the process. The Supreme Court decision in *Miller*[18] appeared to have preserved the notion of parliamentary sovereignty as understood by Dicey.[19]

However, a contrarian view would be that this was simply a pyrrhic victory for parliamentary sovereignty because it would seem that Parliament would have to vote to give effect to the will of the people expressed through the referendum on 23 June 2016. Under law, it appeared that parliamentary sovereignty as understood by Dicey had been

[8] I McLean and A McMillan, 'Professor Dicey's Contradictions' (2007) PublL 435, 437.

[9] C Turpins and A Tomkins, *British Government and the Constitution Text and Materials* (Cambridge University Press 2012) 79.

[10] See HLA Hart, *The Concept of Law* (Oxford University Press 1961) 145.

[11] I McLean and A McMillan, 'Professor Dicey's contradictions' cit. 436.

[12] RFV Heuston, *Essays in Constitutional Law* (Stevens & Sons 1964) 31.

[13] I Jennings, *The Law and the Constitution* (University of London Press 1959) chapter 1; G Marshall, *Constitutional Theory* (Oxford Clarendon Press 1971) 41 ff; RTE Latham, 'What is An Act of Parliament?' (1939) King's Counsel 152.

[14] See High Court of Australia of 31 May 1932 *Attorney-General for New South Wales v Trethowan* [AC] 526.

[15] C Turpins and A Tomkins, *British Government and the Constitution Text and Materials* cit. 71; see also RFV Heuston, *Essays in Constitutional Law* cit. 29.

[16] M Russell, 'Brexit and Parliament: The Anatomy of a Perfect Storm' (2021) Parliamentary Affairs 443, 447.

[17] AL Young and others, 'Europe's Gift to the United Kingdom's Unwritten Constitution – Juridification' cit. 136.

[18] UK Supreme Court *R (Miller) v Secretary of State for Exiting the European Union* cit.

[19] AV Dicey, *The Law of the Constitution* cit. 39 ff.

preserved, but it was "popular" sovereignty that had won the actual battle in this case, given that even though many MPs expressed their own misgivings about the referendum results, they felt that it must be honoured.[20]

The vote count for the decision to leave stood at 51.9 per cent while the decision to remain stood at 48.1 per cent. On paper, this had been a very narrow margin and one would have expected an important decision such as a decision to leave the EU to require a supermajority vote, given how disruptive the whole process would be should a future pro-European Parliament decide to re-join the EU. It is unlikely that any Parliament can enact legislations to prohibit future Parliaments to re-join the EU, but a clear enigma that Brexit has caused is that it would seem that referendums for important decisions would be necessary going forward, i.e. a "convention".

How one would classify whether a decision is important or not is clearly a knotty problem but it would appear that ceding the sovereignty of Parliament to a supranational body would require a referendum.[21] Yet, since this sovereignty afforded to Parliament emanated from a democratically elected body, it would seem that this authority to carry out acts of such a gravity would require a clear mandate from the electorate or the existing government would risk losing power in a subsequent election if it failed to gauge public support.

II.2. Diceyan orthodoxy observed in *Cherry/Miller (No 2)*

The orthodox view on the doctrine of parliamentary sovereignty appeared to have been preserved again in *Cherry/Miller (No 2)*.[22] This was a case which concerned whether the advice given by Prime Minister Boris Johnson to the Queen that Parliament should be prorogued in the lead up to the UK's withdrawal from the EU was lawful.

It became somewhat necessary for this action to take place given that the parliamentary sessions had become the longest to sit in as a result of the greater scrutiny of Brexit plans.[23] The government's preferred Brexit withdrawal agreement had been rejected three times in early 2019 which raised tensions over the possibility of a no-deal Brexit. This led to the resignation of Theresa May, a fate which David Cameron suffered as well. The case was the second case in the Supreme Court's history to be heard by 11 justices.[24] The Supreme Court ruled unanimously that the prerogative power of prorogation was justiciable and the ongoing prorogation of Parliament was both unlawful and void. The Supreme Court observed that if the power of prorogation was left unchecked, then the

[20] M Russell, 'Brexit and Parliament: The Anatomy of a Perfect Storm' cit. 5.

[21] R Rose, 'Referendum Challenges to the EU's Policy Legitimacy – and How the EU Responds' (2019) Journal of European Public Policy 207.

[22] UK Supreme Court judgment of 24 September 2019 *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* [UKSC] 41.

[23] B Fowler, 'A New Normal? Parliament after Brexit' (2020) Political Insight 41.

[24] C Tridimas and G Tridimas, 'Is the UK Supreme Court Rogue to Un-prorogue Parliament?' (2020) European Journal of Law and Economics 205.

executive could indefinitely prorogue Parliament, undermining its sovereignty and obligation to make and scrutinise laws.[25]

The decision in *Cherry/Miller (No 2)* had received support from Elliot who described the outcome as reflective of the court's preparedness to "treat fundamental principle as something that is neither a mere rhetorical flourish nor something arid and technical to be understood in insolation from the broader constitutional landscape in which it sits".[26] On the other hand, Finn had criticised the decision, calling it "wholly unjustified by law" and that the long standing constraints on abuse take the form of conventions and accountability to the electorate at legally defined intervals and these have been regarded as "sufficient for hundreds of years".[27]

The decision leads to an observation that the doctrine of parliamentary sovereignty is a principle that forms the bedrock of British constitution but it does not exist in a vacuum in exclusion to external developments or political influence.[28] There are institutional safeguards in place to ensure that threats to parliamentary sovereignty continue to be within acceptable limits. From an external perspective and where Brexit is concerned, similar principles have been reflected under section 38 of the European Union (Withdrawal Agreement) Act 2020 where it has been explicitly stated that the "Parliament of the United Kingdom is sovereign".

II.3. Hueston's manner and form observed in the use of referendums

However, while Brexit has enabled the UK to seize its legislative sovereignty from the EU, Brexit has also appeared to be in line with Heuston's views on parliamentary sovereignty from an internal perspective. While the manner-and-form model could subsist in any given legal order,[29] mandating additional requirements to be complied with (such as the need for a referendum) before Parliament may proceed on matters appeared to suggest that Parliament did not enjoy an unqualified power to repeal.[30] An unrelated example would be the UK Fixed-term Parliaments Act 2011 limiting Parliament's sovereignty by mandating a 66 per cent special majority for MPs to be able to vote for dissolution and early general election.[31]

One major example of this weakening of parliamentary sovereignty from an internal perspective would be the European Union Act 2011 which was in a way the catastrophic

[25] UK Supreme Court *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland* cit. 42.

[26] M Elliot, 'The Supreme Court's Judgment in Cherry/Miller (No 2): A New Approach to Constitutional Adjudication?' (24 September 2019) Public Law for Everyone publiclawforeveryone.com.

[27] J Finnis, 'The Unconstitutionality of the Supreme Court's Prorogation Judgment' (28 September 2019) Policy Exchange policyexchange.org.uk.

[28] N Bamforth, 'Current Issues in United Kingdom Constitutionalism: An Introduction' (2011) ICON 79.

[29] HWR Wade, 'The Basis of Legal Sovereignty' (1955) CLJ 172, 176.

[30] *Ibid*. 176.

[31] UK House of Commons Research briefing of 26 November 2011 *Fixed-term Parliaments Act 2011* 3(1).

start of a series of events which ultimately sealed David Cameron's tenure as Prime Minister. The European Union Act 2011 provided that "any comparable Treaty amendments would need to be approved by referendum of the British people".[32] In other words, this was a referendum lock which meant that any proposal that constituted a transfer of competence or power from the UK to the EU would require not only parliamentary approval, but also the approval of the British people in a referendum before the UK Government could agree to it (see example section 6 of the European Union Act 2011).[33] While "there does seem a strong case in logic [...] that there should be a referendum before major legislative powers are transferred upwards to the EU as well as downwards to devolved bodies",[34] it had been previously observed that the Conservative's proposal for referendums on further EU treaties was "absolutely crazy" because many changes might be trivial and entirely in the UK's interests.[35]

While this demonstrated that sovereignty rested with the people, imposing a referendum requirement meant that it would have made it harder for future Parliaments to legislate autonomously. Indeed, this could be criticised on the basis that "it is ironic that an Act purportedly designed to protect the sovereignty of Parliament [has raised] such serious problems for the doctrine [...] in seeking to restore national sovereignty, the European Union Act ha[d], paradoxically, restricted parliamentary sovereignty".[36] The European Union Act 2011 was in a way a double-edged sword where it concerned parliamentary sovereignty and there were facets of Heuston's views on parliamentary sovereignty that could have been gleaned from the European Union Act 2011.

II.4. Popular sovereignty through referendums

The evolution of the doctrine of popular sovereignty through the use of political rhetoric and referendums have appeared to threaten the orthodox view of parliamentary sovereignty from an internal perspective. Adopting an orthodox view of parliamentary sovereignty, it appears that no Act of Parliament can be entrenched.[37] But it is apposite to state that if the people's mandate was sought around the time this constitutional legislation was enacted, then unless that mandate was revoked through the election of a new

[32] S Peers, 'European Integration and the European Union Act 2011: An Irresistible Force Meets an Immovable Object?' (2013) PublL 119, 119.

[33] P Craig, 'The European Union Act 2011: Locks, Limits and Legality' (2011) CMLRev 1881, 1915.

[34] UK House of Lords Report, Select Committee on the Constitution *Referendums in the United Kingdom* (HL 2009-10, Paper 99) para. 77.

[35] *Ibid*. para. 78.

[36] V Bogdanor, 'Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty' (2012) OJLS 179, 190.

[37] See UK Court of Appeal *Ellen Street Estates v Minister of Health* [1934] 1 KB 590 at 597 which stated the principle that "the legislature is unable, according to our constitution, to bind itself as to the form of subsequent legislation".

government with a manifesto completely different from the manifesto of an existing government, future Parliaments should not legislate in contravention of the Act.[38] If this is true, then what we have is a "sovereign (i.e. omnicompetent) Parliament [that] must function in the manner prescribed by existing law in order validly to express its legislative will".[39]

This expression of legislative will can broadly be translated into popular sovereignty. For instance, the UK enacted the European Communities Act 1972 without any referendum but this issue was resolved when the government conducted a referendum on membership of the EU in 1975. In other words, this was a post-decision referendum, perhaps to legitimise governmental decision deemed as controversial. On the other hand, decisions that were controversial in the past, such as the Iraq War and the Falklands War had not been subjected to a referendum, thereby demonstrating an inconsistent use of referendums on major political decisions. The result of the referendum on membership of the EU in 1975 was also much more positive as approximately 67.2 per cent voted in favour that the UK should remain in the EU with a voter turnout of 64 per cent[40] thereby indicating that membership of the EU did enjoy popular support at the time of enactment, but still short of a two-third majority for important decisions (see e.g. the threshold required to impeach the President in the United States).

Another example of how popular sovereignty through the use of referendums could ultimately weaken the doctrine of parliamentary sovereignty can be gleaned from then Prime Minister David Cameron's proposal to use the Parliament Acts mechanism to force legislation for an EU referendum.[41] Facing opposition from the House of Lords, the Parliament Acts mechanism would enable the Commons and the Crown to legislate without the involvement of the Lords after a one-year delay.[42]

But unlike the Parliament Acts procedure which made it easier to legislate, De Smith and Brazier have observed that "imposing a duty to hold a referendum could quite persuasively be analysed as the addition of a fourth Parliament",[43] by making it more difficult to legislate effectively in a particular area.

There are two ways of analysing this proposition. One positive view is that the Parliament Acts permitted a way of circumventing the procedural difficulty of securing legislation when there is a pressing need to do so. After all, the referendum is clearly the highest form of democratic legitimacy as it is premised on the voice of the people. It is the people who will

[38] R Weill, 'Centennial to the Parliament Act 1911: The Manner and Form Fallacy' (2012) PublL 105, 116.

[39] S De Smith and R Brazier, *Constitutional and Administrative Law* (Penguin Books 1998) 95.

[40] UK House of Lords Report, Select Committee on the Constitution, *Referendums in the United Kingdom* cit. 9.

[41] N Copsey and T Haughton, 'Farewell Britannia? "Issue Capture" and Politics of David Cameron's 2013 Referendum Pledge' (2014) JComMarSt 74.

[42] UK Parliament, Parliament Act 1911, section 2.

[43] S De Smith and R Brazier, *Constitutional and Administrative Law* cit. 96.

have the final say over whether the UK continues to be part of the EU. But it must be stressed that referendums in the UK are not binding and they only serve a "consultative" role.[44]

On the contrary, if the Parliament Acts could be utilised to circumvent due process, and force legislation without giving adequate time for public consultation and feedback; or worse, to allow rhetoric to get in the way of common sense, then the constitutional safeguard would be compromised. The astuteness of then Prime Minister David Cameron's decision for an EU referendum had been called into question by sceptics who had previously claimed that "it would be economic suicide"[45] for Britain to leave the EU. Furthermore, a coalition government could find it difficult to claim a strong popular mandate to undertake any drastic political actions. If Parliament was able to readily change the way in which an Act of Parliament is to be passed, then the long-term check and balance and accountability to the people would have been eroded.

Nonetheless, the popular sovereignty model helps in understanding the increasing dependence on referendums in the British constitutional system in order to grant legitimacy to contentious issues proposed by the government especially when the government does not have a strong mandate.[46] This was most clearly demonstrated when Theresa May took over from David Cameron after the referendum result in 2017. Then Prime Minister May made a mistake by calling a snap general election.[47] That election backfired. This resulted in a hung parliament and a minority Conservative government. Without enough parliamentary support, May had no choice but to try and capitalise the executive power to respect the referendum result. There was no clear mandate for the form which Brexit should take, and no solid Commons majority. The Brexit deal put forward by May's government was overwhelmingly defeated by the House of Commons on 15 January 2019, 12 March 2019 and 29 March 2019.[48] Conservative MPs defied the whip and the Conservative Party's splits over Europe were particularly long lasting and deep.[49]

II.5. Parliamentary sovereignty as it stands

The overall argument on parliamentary sovereignty is this. From an external perspective, parliamentary sovereignty appears to have been preserved as a result of Brexit. The

[44] S Nissen, 'European Identity and the Future of Europe' in M Bach, C Lahusen and G Vobruba (eds), *Europe in Motion. Social Dynamics and Political Institutions in an Enlarging Europe* (Sigma 2006) 155, 169.

[45] N Watt, 'Nick Clegg Accepts EU Poll but Says Leaving Would be Economic Suicide' (8 October 2013) The Guardian www.theguardian.com.

[46] M Gordon, 'Referendums in the UK Constitution: Authority, Sovereignty and Democracy after Brexit' (2020) EuConst 213.

[47] M Russell, 'Brexit and Parliament: The Anatomy of a Perfect Storm' cit. 7.

[48] *Ibid*. 9.

[49] P Lynch and R Whitaker, 'Where There is Discord, Can They Bring Harmony? Managing Intra-Party Dissent on European Integration in the Conservative Party' (2013) The British Journal of Politics and International Relations 317.

developments to parliamentary sovereignty as a result of Brexit may thus be an affront to an oft-cited statement of the previous decade that the old absolutism of parliamentary sovereignty is no longer a tenable proposition in modern British constitution.[50]

Yet from an internal perspective, it may seem that the doctrine of parliamentary sovereignty has been eroding in practice. While it is theoretically impossible to entrench any legislation so that they cannot be altered without a supermajority vote, the general practice has been to subject highly contentious constitutional changes to an election or a referendum.[51] As Smith submits, "the notion that a government can claim the right to do anything on which it can get parliamentary majorities is palpably a nonsense".[52] The current reality is that the absolutism of parliamentary sovereignty is being qualified by both an increasingly powerful Supreme Court who has ruled against the government on a number of occasions as well as the concept of popular sovereignty through referendums.

Although the judiciary cannot strike down legislation from a sovereign parliament, it has been prepared to eschew a literal interpretation of the rules. The UK Supreme Court in *Cherry/Miller (No 2)* appeared to be emboldened to exercise their power in order to safeguard "the people's voice to be decisive on constitutional matters".[53]

Indeed Lord Woolf commenting extra-judicially, stated that there are limits on parliamentary sovereignty and the court's "inalienable" role is to "identify and uphold" these limits: "[t]hey are no more than necessary to enable the rule of law to be preserved".[54] Similarly, Lord Hope in *Jackson*[55] states that the constitution is no longer dominated by parliament sovereignty because 'absolute sovereignty' is being qualified and "[t]he rule of law enforced by the courts is the ultimate controlling factor on which our constitution is based".[56]

[50] See S Lakin, 'Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution' (2008) OJLS 709.

[51] UK House of Lords Report, Select Committee on the Constitution, *Referendums in the United Kingdom* cit. 9 ff; England and Wales High Court of 18 June 2008 1/2008/1646 *R (on the application of Wheeler) v Office of the Prime Minister* [EWHC] 1409 (Admin) where it was held that a government promise to hold referendum on EU matters is not enforceable.

[52] R Smith, 'Lawyers Well Placed to Lead Democratic Reform' (9 September 2013) The Law Society Gazette; D Jenkins, 'Both Ends against the Middle: European Integration, Devolution, and the Sites of Sovereignty in the United Kingdom' cit. 2.

[53] R Weill, 'Centennial to the Parliament Act 1911: The Manner and Form Fallacy' cit. 126; see also UK Supreme Court judgment of 22 January 2014 2013/0172 *R (HS2 Action Alliance Ltd v Secretary of State for Transport and another* [UKSC] 3.

[54] L Woolf, 'Droit Public – English Style' (1995) PublL 57, 69.

[55] UK House of Lords opinions of the Lords of Appeal for judgment in the cause of 13 October 2005 *Jackson and others v Attorney General* [UKHL] 56.

[56] *Ibid*. paras 104 ff.

III. Existing views of EU law primacy

Brexit has also affected the doctrine of EU law primacy on other Member States. While the practical effects of the doctrine of primacy of EU law have been firmly established in case law of the CJEU, member states' national courts have had issues with this doctrine. Does this primacy of EU law means "supremacy" of EU law and how would member states react to their supposed loss of sovereignty? It is submitted that these are two distinct concepts: primacy refers to actual conflicts between a national norm and an EU norm in situations concerning individual rights, whereas supremacy refers to the structural relation between the EU's and the Member States' legal orders that manifests itself as institutional conflicts of competence.[57] Primacy is especially important for a supranational organisation such as the EU to function.[58] Primacy is not about who is superior to the other, but more on whether the CJEU has "exclusive competence to decide on the definitive meaning and validity of EU law".[59] Indeed when the CJEU issued an unprecedented press release on the *PSPP* judgment,[60] the CJEU was able to summarise all its well-known case law on the foundational doctrines of EU law without mentioning any of the words "supremacy" or "primacy".[61]

III.1. Heterarchical model of EU law primacy

In an attempt to reconcile domestic constitutional orders with EU law primacy, there have been academic views that the understanding of primacy has to be made under a heterarchical framework in which both the Union and corresponding Member States share the "same horizontal position of power and authority, each playing a theoretically equal role".[62] It is observed that this heterarchical model would be representative of the state of EU law primacy at present.

A distinction has been drawn between the hierarchical and the conditionally hierarchical model. This argument is persuasive because "the conditionally hierarchical model is less rigid and categorical… [and] there is a degree of terminological fuzziness as the same principle is described by two terms, primacy and supremacy, often used

[57] T Tuominen, 'Reconceptualising the Primacy-Supremacy Debate in EU Law' (2020) Legal Issues of Economic Integration 245.

[58] J Lindeboom, 'Is the Primacy of EU Law Based on the Equality of the Members States? A Comment on the CJEU's Press Release Following the *PSPP* Judgment' (2020) German Law Journal 1032, 1034.

[59] *Ibid*.

[60] German Federal Constitutional decision of the Second Senate of 5 May 2020 2 BvR 859/15.

[61] J Lindeboom, 'Is the Primacy of EU Law Based on the Equality of the Members States? A Comment on the CJEU's Press Release Following the *PSPP* Judgment' cit. 1033.

[62] C Mac Amhlaigh, 'Back to a Sovereign Future?: Constitutional Pluralism after Brexit' (2019) CYELS 41, 43; HR Heekeren, S Marrett and LG Ungerleider, 'The Neural Systems that Mediate Human Perceptual Decision Making' (2008) Nature Reviews Neuroscience 467, 476; see also M Huomo-Kettunen, 'Heterarchical Constitutional Structures in the European Legal Space' (2013) European Journal of Legal Studies 47, 48.

interchangeably".[63] The hierarchical model would not have allowed for any tolerance of primacy and would have asserted absolute supremacy.

Conversely, the heterarchical[64] model is concerned solely with primacy and excludes the notion of supremacy. It states that "European integration" is a "common whole but are not part of a single European classical hierarchical pyramid of legal sources. The relationship between them is heterarchical and is instead of the principle of supremacy governed by the principle of primacy".[65] While MacCormick uses the term "supremacy of [EU] law' which creates some consternation, he dilutes this jarring effect by stating that this is not to be construed as a subordination of Member State law to EU law but 'the case is that these are interacting systems".[66]

The difficulty with MacCormick's use of the term "supremacy" can be demonstrated in Avbelj's distinction between the hierarchical and the conditionally hierarchical model. A reason for this distinction can be attributed to the terms primacy and supremacy being used interchangeably.[67] Firstly, both terms as demonstrated are not the same and the conditionally hierarchical model, which is still based on a watered-down version of the hierarchies, cannot be accepted as the distinction between two hierarchical models is superfluous and adds to the confusion. Secondly, the conditionally hierarchical model disguises the absolute power of supremacy in the term primacy. A hierarchy will always involve subordination and this explains the tensions that have arisen between primacy and the constitutional principles of Member States. If one is to reconcile this state of affairs, only the heterarchical model proffers this notion of mutual respect and tolerance.[68]

These interacting systems therefore revolve around the principles of comity and acceptance. Recognising that this model has the most support from national courts, Chalmers states that "this posits that while the authority and reach of EU law is ultimately for national constitutional courts to decide, these courts commit themselves to recognise the special status of EU law [but] on the condition that it does not violate certain constraints of national constitutional law".[69]

[63] M Avbelj, 'Supremacy or Primacy of EU Law: (Why) Does it Matter?' (2011) ELJ 744, 747.

[64] On the understanding of heterarchy, see D Halberstam, 'Constitutional Hierarchy: The Centrality of Conflict in the European Union and the United States' in J Dunoff and J Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press 2009) 326.

[65] M Avbelj, 'Supremacy or Primacy of EU Law: (Why) Does it Matter?' cit. 750.

[66] N MacCormick, 'The Maastricht-Urteil: Sovereignty Now' (1995) ELJ 259, 264.

[67] M Avbelj, 'Supremacy or Primacy of EU Law: (Why) Does it Matter?' cit. 746 ff.

[68] C Mac Amhlaigh, 'Back to a Sovereign Future?: Constitutional Pluralism after Brexit' cit. 43; D Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States' (University of Michigan Public Law Working Paper 111-2008) 3.

[69] D Chalmers, G Davies and G Monti, *European Union Law* (Cambridge University Press 2010) 194.

III.2. UK's perspective on EU law primacy while in the EU

The UK's relationship with the EU while it was still a part of the EU can be gleaned from Lauterpacht who has observed that "the reality of that sovereignty [of the Crown in Parliament] ends where Britain's international obligations begin".[70] Judicial support can be gleaned from Lord Steyn in *Jackson*[71] who has stated that the UK does not have an "uncontrolled constitution" and he cites the *Factortame*[72] decision and the Human Rights legislation as creating "a new legal order".[73] On this view the "absolute" sovereignty of Parliament is "out of place in modern United Kingdom"[74] not because of the common law but because of its contractual obligations: "the UK knew when it joined the European [Union] that priority should be accorded to EC law, and it must be taken to have contracted on those terms".[75]

While the UK was part of the EU, "membership of the United Kingdom in the European Union has required that Parliament recognise some de facto limitations upon the exercise of its sovereign powers, although it still claims the right to re-assert its authority at any time".[76] On the other hand, Bogdanor argues that "sovereignty [...] is not a matter of degree like baldness, but like virginity, absolute. One either has it or one does not. Just as one cannot be a qualified virgin, so also one cannot be a qualified sovereign".[77] Thus it could be inferred that while the UK was part of the EU, parliamentary sovereignty did not exist in modern day Britain as "there [was] now a power over and above that of Parliament" and it had become subordinated "to the law, to in effect, a constitution".[78]

In a 2013 decision of *R (AB) v Home Secretary*,[79] the claimant wished to assert a right concerning the protection of personal data. As this right was not conferred by the ECHR and therefore not protected under the Human Rights Act 1998, the claimant sought to rely on the Charter.[80] The question was whether this right would be applicable in light of the "opt-out" clause under Protocol No. 30. Mostyn J held that the "Charter of Rights is now part of our domestic law... [and] would remain part of our domestic law even if the

[70] E Lauterpacht, 'Sovereignty – Myth or Reality?' (1997) International Affairs 137, 149.

[71] UK House of Lords *Jackson and others v Attorney General* cit.

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

[73] UK House of Lords *Jackson and others v Attorney General* cit. 102.

[74] *Ibid*.

[75] P Craig, 'Britain in the European Union' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (Oxford University Press 2011) 102, 116.

[76] D Jenkins, 'Both Ends against the Middle: European Integration, Devolution, and the Sites of Sovereignty in the United Kingdom' cit. 8.

[77] V Bogdanor, 'Imprisoned by a Doctrine: The Modern Defence of Parliamentary Sovereignty' cit. 186.

[78] *Ibid*. 190.

[79] England and Wales High Court of 7 November 2013 *R (AB) v Secretary of State for the Home Department* [EWHC] 3453 (Admin).

[80] See art. 7 of the Charter of Fundamental Rights of the European Union [2012].

Human Rights Act were repealed".[81] Furthermore, on the question of enforceability, Mostyn J deferred to the CJEU by stating that even if the Human Rights Act were to be repealed, "an identical right would continue to exist under the Charter… and this right is, according to the Court in Luxembourg, enforceable domestically".[82]

Elliot had commented at that point in time that "ridding domestic law of European human-rights influences [would be likely to become] a more complex task than advocates of such a policy [would have] anticipated".[83] Although Kumm had argued that "the EU treaties contain an extensive range of opt-out clauses that allow national actors… to deviate from EU law",[84] the fact that a UK court respected the view of the CJEU instead of relying on Protocol No. 30 which the British government had negotiated[85] suggested that the UK court did not see itself, where it concerned the protection of fundamental rights, deferring to the executive as it would have done in the past.[86] This appeared to suggest that fundamental rights were an essential quality of the rule of law[87] and would be officiously protected by judges,[88] thereby seemingly posing an internal threat to parliamentary sovereignty.[89]

III.3. Germany's perspective on EU law primacy as a Member State

A recent 2020 decision which has caused much consternation and threatened EU law primacy even on the heterarchical model is the German constitutional court's (BVerfG) decision in the *PSPP* judgment.[90] The *PSPP* judgment was in reaction to a number of complaints by German citizens against the European Central Bank's (ECB) quantitative easing programme to authorise Eurozone central banks to purchase government bonds in order to increase money supply and stimulate market activity. Unlike the UK which does not have a written constitution, art. 20 of the German Constitution provides that "the Federal Republic of Germany is a democratic and federal republic, that sovereignty rests with the German people and that the German Parliament is bound by the German Constitution". The

[81] England and Wales High Court *R (AB) v Secretary of State for the Home Department* cit. 14.

[82] *Ibid*. 15.

[83] M Elliot, 'The EU Charter of Fundamental Rights and UK Law' (15 November 2013) Public Law for Everyone publiclawforeveryone.com.

[84] M Kumm and V Ferreres Comella, 'The Primacy Clause of the Constitutional Treaty and the Future of Constitutional Conflict in the European Union' (2005) ICON 473, 491.

[85] See UK Parliament of 19 June 2008 European Union (Amendment) Act 2008 which incorporated the Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community.

[86] See UK House of Lords judgment of 3 November 1941 *Liversidge v Anderson* [AC] 206; see also UK House of Lords of 22 November 1984 *Council of Civil Service Unions and other v Minister for the Civil Service* [UKHL] 3 All ER 935.

[87] R Masterman and JE Khushal Murkens, 'Skirting Supremacy and Subordination: The Constitutional Authority of the United Kingdom Supreme Court' cit. 813 ff.

[88] S Prechal, 'Protection of Rights: How Far?' in S Prechal, B van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press 2008) 155.

[89] See D Oliver, *Constitutional Reform in the United Kingdom* (Oxford University Press 2003) 84.

[90] German Federal Constitutional decision 2 BvR 859/15 cit.

complainants alleged that it was ultra vires and that the participation of the German Federal Bank (Bundesbank) in the programme violated German constitutional law. Prior to the decision, the BVerfG had referred a number of questions to the CJEU. The CJEU issued their findings in the *Weiss* decision[91] and found that the ECB had acted within its mandate. In analysing the case before it, the BVerfG took issue with the CJEU's ruling in *Weiss*[92] and criticised the standard of proportionality review used by the CJEU in examining the issue.

In finding that the standard used was inadequate, the BVerfG proceeded to declare that the CJEU's ruling in *Weiss* was not applicable in Germany as it was not in keeping with the proportionality envisaged by the German Constitution. With the *Weiss* decision declared invalid, the BVerfG found that the ECB and Bundesbank had acted ultra vires. The decision by the BVerfG is an outright rejection of the fundamental principle of EU law primacy.

The *Weiss* judgment is a culmination of the predecessor line of cases including the *Pringle*[93] and the *Gauweiler*[94] cases concerning the Euro crisis case law. Before analysing the *PSPP* judgment,[95] it would be expedient to consider the *Weiss* judgment. In the *Weiss* judgment, it appears that too much reliance was placed on the arguments provided by the ECB to decide on the economic arguments.[96] In *Gauweiler*, Pennesi has criticised the judicial self-restraint of the court, arguing that the historical position of the CJEU was to scrutinise actions by the European institutions and thus accepting the arguments of the ECB without further scrutiny is an anomaly.[97] Mooij has written extensively on the *Weiss* judgment where he observed that the developments in *Weiss* is "unsurprising and mostly follow the *Gauweiler* case".[98] It is clear that art. 119 TFEU allocates the power over economic policy to the Member States and art. 127 TFEU attributes the power over monetary policy to the European System of Central Banks (ESCB). But the distinction between economic and monetary policy has not always been clear. Mooij has criticised the CJEU's deferral to the ECB where economic discretion and expertise of the ECB is concerned but recognises that this is not a legal problem but a policy consideration and that the CJEU is not best placed to deal with this issue.[99]

[91] C-439/17 *Weiss and Others* ECLI:EU:C:2018:1000.

[92] *Ibid*.

[93] C-370/12 *Pringle* ECLI:EU:C:2012:756.

[94] C-62/14 *Gauweiler and Others* ECLI:EU:C:2015:400.

[95] German Federal Constitutional decision 2 BvR 859/15 cit.

[96] A Pliakos and G Anagnostaras, 'Saving Face? The German Federal Constitutional Court Decides Gauweiler' (2017) German Law Journal 213.

[97] F Pennesi, 'The Impossible Constitutional Reconciliation of the BVerfG and the ECJ in the OMT Case. A Legal Analysis of the First Preliminary Referral of the BVerfG' (2016) Perspectives on Federalism 1.

[98] A Mooij, 'The Weiss Judgment: The Court's Further Clarification of the ECB's Legal Framework: Case C-493/17 Weiss and Others, EU:C:2018:1000' (2019) Maastricht Journal of European and Comparative Law 449.

[99] A Mooij, 'The Weiss Judgment: The Court's Further Clarification of the ECB's Legal Framework: Case C-493/17 Weiss and Others, EU:C:2018:1000' cit.

The above developments are in stark contrast to an observation by Schmidt who states that as compared to British parliamentary sovereignty, the "German legally defined concept of sovereignty fits the EU best" as "Germans are used to obey their constitutional court in Karlsruhe" and it is only "a small step to accept that the [CJEU] rules instead".[100] A thorough understanding of this notion of tolerance and respect may be gleaned from a different *Gauweiler*[101] judgment. The salient points are summarised as follows; firstly, the German constitutional court held that European integration is encapsulated in the Basic law and therefore the principle of openness towards EU law applies.[102] Recognising that there seems to be a positive shift in the attitudes of Constitutional courts in European integration, Sarmiento attributes this to "the risk of institutional isolation (both in the international and in the national scene)" as a contributory factor "to catalyse a change of approach".[103]

Secondly, while the court recognises that a shift of political rule to the EU is permitted, it held that the power to exercise supranational powers comes from the Member States[104] and that the primacy of EU law does not mean that the state loses its sovereign statehood or constitutional identity.[105] Therefore, this supports the notion that supremacy of EU law is incorrect because the Member States not only permanently remain the "Masters of the Treaties",[106] they remain sovereign states.[107]

Therefore, it is suggested that primacy has evolved to feature a semblance of mutual respect between the EU and the national constitutions.[108] On this premise, the concept of absolute supremacy of EU law is not plausible as the EU derives its source of power from the Member States and recognition does not equate to giving up its national sovereignty.

How should one reconcile the different approaches by the BVerfG? It would appear that where fundamental rights are concerned, Member States' courts have been more willing to accept the EU legal order. However, where it involves monetary policy, there

[100] SK Schmidt, 'No Match Made in Heaven. Parliamentary Sovereignty, EU Over-constitutionalization and Brexit' (2020) Journal of European Public Policy 779, 782.

[101] German Federal Constitutional decision of the Second Senate of 30 June 2009 2 BvE 2/08 *Gauweiler v Treaty of Lisbon*.

[102] *Ibid*. para. 225.

[103] D Sarmiento, 'Reinforcing the (Domestic) Constitutional Protection of Primacy of EU Law: Tribunal Constitucional' (2013) CMLRev 875, 889.

[104] German Federal Constitutional decision 2 BvE 2/08 *Gauweiler v Treaty of Lisbon* para. 231.

[105] *Ibid* para. 343.

[106] KJ Alter, 'Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice' (1998) International Organization 121, 123 ff.

[107] Cf J Herbst, 'Observations on the Right to Withdraw from the European Union: Who are the "Masters of the Treaties"?' (2005) German Law Journal 1755, 1759 who argues that "Member States are no longer the 'Masters of the Treaties' because they have irreversibly vested… the nationals of the Member States, with a legal heritage of rights".

[108] See also M Payandeh, 'Constitutional Review of EU Law after Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice' (2011) CMLRev 9, 14.

appears to be a clash.[109] It would appear that where economic cooperation is concerned, there are competing interests at stake as it involves taxpayers and feelings of nationalistic sentiments. This is because different governments have different standard of progress or approval ratings where economic development is concerned. For instance, Italy's unwillingness to rein in its fiscal deficit is one example of a growing loss of momentum in the economic integration process.

Indeed, it is very rare for the CJEU to issue a sternly worded press release[110] to deal with the aftermath of the *PSPP* decision.[111] The President of the European Commission, Von Der Leyen, has also threatened Germany with the possibility of infringement proceedings.[112]

It is difficult to predict if this development would have any impact on the EU legal order. No one really knows if an Eurosceptic government in the future would use this development as a catalyst to dismantle the EU. From a more optimistic point of view, the disagreement process is a healthy one, except that the constitutional court should have compelled the government to seek to change the EU legal norm involved by working through the EU political process. Several academics have published a joint statement in defence of the EU legal order and labelled the *PSPP* decision as a "brazen disregard of the authority of the CJEU" and that "allowing national courts to declare that CJEU judgments they deem unacceptable are inapplicable in their countries would destroy the EU legal order".[113] Perhaps this consternation is justified as a result of Brexit which may actually embolden national courts of other Member States to try and regain their legislative sovereignty.

III.4. CJEU's perspective on EU law primacy

While it is not possible to comprehensively illustrate the CJEU's perspective on EU law primacy by tracing through all its case law, art. 4(2) TEU dispels any notion of absolute supremacy of EU law and the causal assumption of the hierarchical model. An application of art. 4(2) TEU can be gleaned from *Sayn-Wittgenstein*,[114] where the CJEU had confirmed that, "in accordance with Article 4(2) TEU, the European Union is to respect the national identities of its Member States, which include the status of the State as a Republic".[115] Briefly this case concerns whether the Austrian authorities were in breach of art. 21 TFEU

[109] T Violante, 'Bring Back the Politics: The PSPP Ruling in Its Institutional Context' (2020) German Law Journal 1045, 1057.

[110] Court of Justice of the European Union, *Press Release Following the Judgment of the German Constitutional Court of 5 May 2020* curia.europa.eu.

[111] German Federal Constitutional judgment 2 BvR 859/15 cit.

[112] European Commission, *Statement by President Von Der Leyen*, ec.europa.eu.

[113] RD Kelemen and others, 'National Courts Cannot Override CJEU Judgments' (26 May 2020) Verfassungsblog verfassungsblog.de.

[114] C-208/09 *Sayn-Wittgenstein* ECLI:EU:C:2010:806.

[115] *Ibid*. para. 92.

in omitting the designation of noble status from the name of a German citizen.[116] Departing from its previous high-handed approach where national provisions that are in conflict with EU law must not be applied, the CJEU held that Austria was justified in not doing so "in order to ensure the attainment of the fundamental constitutional objective pursued by them"[117] on the basis that Austrian legislation wanted to ensure "formal equality of treatment of all citizens before the law".[118]

Two outcomes can be drawn from this decision. Firstly, the *Sayn-Wittgenstein*[119] litigation raises an important precedent that the CJEU has to respect both concepts of Member State's national identity and the constitutional interest that their actions sought to preserve.[120] This demonstrates the legal permeability of EU law with regard to national constitutional law which leads Wendel to argue that "by means of the identity clause, EU law revokes to some extent – and not unlimited – its own claim of primacy within its scope of application".[121]

Secondly, the CJEU has held that it is not a requirement for other Member States to come to a consensus over a constitutional measure adopted by a Member State as a constituent factor of its national identity.[122] This demonstrates that the identity clause is aimed at protecting the constitutional qualities that are uniquely inherent in each Member State.

Thus, these two inferences appear to suggest that EU "primacy" is not "supremacy" and is not based on any hierarchies but on mutual respect as well as tolerance. The identity clause demonstrates a shift from the former supranational view "in which the relations between the EU and the Member States is a zero-sum game (Member States have rescinded sovereign powers and transferred them away to the EU), to a much more intricate mutuality which exemplifies the composite nature of the European constitutional order".[123]

Nonetheless, these interacting systems may result in disagreements as to what constitutes constitutional identity and the consequences must be evaluated to reach a balanced view. A way of answering this is that "the resolution of potential tensions between constitutional law and EU law lies in an overarching balancing test".[124]

The legal basis for this balancing test may be gleaned from art. 4(3) TEU which states that "[p]ursuant to the principle of sincere cooperation, the Union and the Member States

[116] *Ibid*. paras 19 ff.

[117] *Ibid*. para. 93.

[118] *Ibid*. para. 74.

[119] *Ibid*.

[120] A Von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty' (2011) CMLRev 1417, 1424.

[121] M Wendel, 'Lisbon Before the Courts: Comparative Perspectives' (2011) EuConst 96, 135.

[122] C-36/02 *Omega* ECLI:EU:C:2004:614 para. 37 affirmed in case *Sayn-Wittgenstein* cit. para. 91.

[123] LFM Besselink, 'National and Constitutional Identity Before and After Lisbon' (2010) Utrecht Law Review 36, 44.

[124] A Von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty' cit. 1425.

shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties".[125] It further states that Member States are to "refrain from any measure which could jeopardise the attainment of the Union's objectives".[126] Hence it cannot be said that art. 4(2) TEU is a "self-judging"[127] clause as it falls short of conferring unrestrained autonomy upon Member States.[128]

Therefore a duty to respect the constitutional identity of Member States "cannot be understood as an absolute obligation to defer to all national constitutional rules".[129] Then Advocate-General Maduro identifies the differing content under each Member States' national constitution as a possible source of discrimination and proposes that "[j]ust as [EU] law takes the national constitutional identity of the Member States into consideration, national constitutional law must be adapted to the requirements of the [EU] legal order".[130]

Art. 4(2) TEU demonstrates post-Lisbon that the traditional hierarchical structure that the CJEU has sought to rely on in the past has evolved into a compromise where much emphasis is placed on mutual respect and tolerance. Instead, this model of a composite constitutionalism is aligned with the heterarchical model which Avbelj describes above.[131]

This emphasis on mutual respect between co-existing systems has led Huomo-Kettunen to opine that the "heterarchical constitutional structures can be described as communicative [and] soft by their nature since they describe, but do not determine relations between different legal orders"[132] to which Von Bogdandy and Schill argue that a "possible divergence between the CJEU and domestic constitutional courts should be seen as an acceptable price for a heterarchical constitutional structure that is much more suitable for the EU's pluralistic legal architecture than a hierarchical model".[133]

The obscurity surrounding who has the final say over the limits of national identity has to be understood in tandem with a reciprocal obligation of the Union and Member States to accommodate one another. But this is easier said in theory than observed in practice as Brexit, and a breakdown in communication between Member States and the EU has often been observed, even if some of these arguments are merely political rhetoric.

[125] Art. 4(3) TEU.

[126] *Ibid*.

[127] A term coined by S Schill and R Briese, '"If the State Considers": Self-Judging Clauses in International Dispute Settlement' (2009) MaxPlanckYrbkUNL 61, 67.

[128] A Von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty' cit. 1448.

[129] C-213/07 *Michaniki* ECLI:EU:C:2008:544, opinion of AG Poiares Maduro para. 33.

[130] *Ibid*. para. 33.

[131] M Avbelj, 'Supremacy or Primacy of EU Law – (Why) Does it Matter?' cit. 750 ff; see also C Mac Amhlaigh, 'Back to a Sovereign Future?: Constitutional Pluralism after Brexit' cit. 43.

[132] M Huomo-Kettunen, 'Heterarchical Constitutional Structures in the European Legal Space' cit. 50.

[133] A Von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty' cit. 1449.

III.5. Primacy as it now stands

A clear distinction must be made between primacy and supremacy.[134] Two propositions follow; firstly, no hierarchies exist between primacy and the constitutional principles of Member States. Secondly, the relationship between primacy and national constitutions is heterarchical.[135] Taken together, these two propositions suggests that the relationship between the EU and Member States is one of mutual respect and tolerance. Yet, primacy of EU law is integral to the functioning of the single market. Without it, differences in regulatory approaches and standards would render the market system inoperable. It is calamitous if years of harmonisation efforts are dismantled because of nationalistic pride. It is the same nationalistic pride that had originally plunged Europe into both world wars.

The power that the EU has is limited and can only operate to the extent ratified by those conferring the power. In this regard, Lindeboom acknowledges that the doctrinal debate surrounding EU law primacy does not solve "any of the problems associated with a clash of legal orders", but that "this impractical conclusion has some value nonetheless, precisely in what it denies; that one can defend the primacy of EU law legally".[136] It is contended that those who grant the power must retain the higher power to revoke or renegotiate the exercise of that power.[137] As the CJEU's press release following the *PSPP* judgment observed, "[...] ensuring equality of the Member States in the Union they *created*".[138]

The idea of complete supremacy of EU law stems from the fact that it must be placed at the apex of any hierarchy and this is supposedly necessary to demonstrate "an all-encompassing, absolute, unconditional, hierarchical and inherent facet of integration".[139] This correspondingly means that supremacy produces the principle of pre-emption in areas of Union competences, i.e. Member States are prevented from ratifying legislation that conflicts with EU law and are forestalled in taking action of any kind.[140] The principle of supremacy, thus, imposes upon national authorities a strict obligation to interpret all provisos in conformity with EU law but as Garrett argues, Member States could choose to "ignore [CJEU] decisions"[141] to which Claes states that this means they implicitly accept

[134] M Avbelj, 'Supremacy or Primacy of EU Law – (Why) Does it Matter?' cit. 745.

[135] M Huomo-Kettunen, 'Heterarchical Constitutional Structures in the European Legal Space' cit. 50.

[136] J Lindeboom, 'Is the Primacy of EU Law Based on the Equality of the Members States? A Comment on the CJEU's Press Release Following the PSPP Judgment' cit. 1044.

[137] E Oddvar Eriksen and JE Fossum, 'Bringing European Democracy Back In – Or How to Read the German Constitutional Court's Lisbon Treaty Ruling' (2011) ELJ 153, 159.

[138] Court of Justice of the European Union, *Press Release Following the Judgment of the German Constitutional Court of 5 May 2020* cit. (emphasis added).

[139] *Ibid*. 746.

[140] J Weiler, 'The Community System: The Dual Character of Supranationalism' (1981) Yearbook of European Law 267, 277.

[141] G Garrett, 'The Politics of Legal Integration in the European Union' in M Eilstrup-Sangiovanni (ed), *Debates on European Integration: A Reader* (Palgrave Macmillan 2006) 253 ff.

they could be subjected to financial penalties.[142] Indeed, in the *PSPP* judgment,[143] by going against the CJEU, Germany would be at risk of sanctions by the EU.

Yet, Member States can choose not to ratify the conflicting legislation as the principles of subsidiarity and proportionality must be taken into account and Member States' identities have to be respected under art. 4(2) Treaty on European Union (TEU).[144] The CJEU has been careful with the use of the term supremacy and perhaps only two judgments[145] make specific reference to the term supremacy. This impliedly suggests the unpopularity of the term supremacy of EU law from the CJEU's perspective.

Niedobitek acknowledges that the Union is "based on treaties" decided by Member States in which they were the ones who established this new legal order,[146] but then states that correspondingly supremacy of EU law should follow. The supporting argument which he puts forward is that "assuming that the order to apply Union law is based on a national act runs contrary to the doctrine of uniform application of EU law".[147]

However, this ceding of control to the EU does not mean that it is a permanent loss of legislative sovereignty of the Member State because the EU is formed with an understanding that such transfer of powers can be revoked[148] or renegotiated.[149] As Craig and de Burca writes, the proposition that "any norm of EU law trumps any norm of national law… is not generally accepted by Member States".[150] Similarly on issues of *Kompetenz-Kompetenz*; while the CJEU under art. 19 TEU regards this as its task, "virtually all national constitutional or supreme courts determine such questions ultimately by reference to their own national constitutions".[151] Furthermore, Claes has stated that the concept of primacy must be understood to be non-hierarchical and it is only insofar necessary to produce direct effect.[152] Understanding it in that rigid form would make it very difficult to reconcile the doctrinal differences between primacy and parliamentary sovereignty and creates a lot of unnecessary tension.

[142] M Claes, *The National Courts' Mandate in the European Constitution* (Hart 2006) 116 ff; see also N Foster, *Foster on EU Law* (Oxford University Press 2013) 204.

[143] German Federal Constitutional judgment 2 BvR 859/15 cit.

[144] O Pollicino, 'The New Relationship between National and the European Courts after the Enlargement of Europe: Towards a Unitary Theory of Jurisprudential Supranational Law?' (2010) Yearbook of European Law 65, 96 ff.

[145] See case 14/68 *Walt Wilhelm and Others v Bundeskartellamt* ECLI:EU:C:1969:4 para. 5 and case 34/73 *Fratelli Variola Spa v Amministrazione delle finanze dello Stato* ECLI:EU:C:1973:101 para. 15.

[146] M Niedobitek, 'The Lisbon Case of 30 June 2009 – A Comment from the European Law Perspective' (2009) German Law Journal 1267, 1273.

[147] *Ibid*. 1274.

[148] Art. 50 TEU.

[149] Art. 12 TEU.

[150] P Craig and G de Burca, *EU Law, Text, Cases and Materials* (Oxford University Press 2011) 268.

[151] *Ibid*. 269.

[152] M Claes, *The National Courts' Mandate in the European Constitution* cit. 115.

IV. Has parliamentary sovereignty been affected by Brexit?

EU law has ceased to be applicable in and to the UK and the CJEU therefore has no longer general jurisdiction over the UK in relation to any acts that take place on or after 1 January 2021. For completeness, art. 86(1) of the EU-UK Withdrawal Agreement (WA) makes it clear that any cases pending before the CJEU on or after 1 January 2021 will still fall under the CJEU's jurisdiction until they are finalised, which will affect cases such as *Zipvit Ltd (Appellant) v Commissioners for Her Majesty's Revenue and Customs (Respondent)*.[153] The only consolation is that where cases concern EU citizens' rights in the UK, they can continue to be submitted to the CJEU for preliminary rulings until at least the end of 2028 by virtue of art. 158 of the WA. The silver lining here is that fundamental rights at least appear to be given a higher order standing in the grand scheme of things.

While the UK was part of the EU, a conflict could only arise if primacy of EU law inhibited Parliament's ability to legislate. It is thus necessary to differentiate between the nature of parliamentary sovereignty (which is absolute)[154] from actual authority (which may not be absolute). Given the politics at that point and the popularity of campaigning on an Eurosceptic overture, it would not have mattered even if a conciliatory approach of mutual trust and understanding had been employed by both the EU and the UK political order. The common ideology that both doctrines seek to officiously protect is the rule of law except that there are "considerable differences in the approach with regard to rights within the Member States".[155] By attributing the competition between parliamentary sovereignty and EU primacy to upholding the rule of law; this further exacerbates the problem. As Cooke puts it, "legislative and judicial functions are complementary; the supremacism of either has no place".[156]

IV.1. Remodelling conflict as a separation of power

Relying on hindsight, one possible way forward would have been to understand the conflict between primacy and parliamentary sovereignty as involving a separation of powers.[157] For instance, the national court could be seen as being the "primary guardian of

[153] UK Supreme Court judgment of 1 April 2020 *Zipvit Ltd (Appellant) v Commissioners for Her Majesty's Revenue and Customs (Respondent)* [UKSC] 15.

[154] R Kay, 'Changing the United Kingdom Constitution: The Blind Sovereign' in R Rawlings, P Leyland and AL Young (eds), *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013) 103.

[155] S Prechal, 'Protection of Rights: How Far?' cit. 156.

[156] R Cooke, 'The Road Ahead for the Common Law' (2004) The International and Comparative Law Quarterly 273, 278.

[157] J Ferejohn and P Pasquino, 'Rule of Democracy and Rule of Law' in JM Maravall and A Przeworski (eds), *Democracy and the Rule of Law* (Cambridge University Press 2003) 242.

the constitution and individual rights"[158] and they would have balanced the conflict[159] between the CJEU (who asserts primacy) and the Member States (who assert legislative sovereignty). But the only way that this could have occurred would be for the judiciary to acquire "a much more relevant role than it used to have" and to increase "formal guarantees of judicial independence".[160] Prior to Brexit, this could be seen through the assertion by British judges that they would seek to officiously protect the rule of law.

Thus, it is submitted that if one views the conflict between primacy and parliamentary sovereignty as necessary in order to ensure accountability through the separation of powers mechanism, then it could have been easier to develop a mutual acquiescence between the two principles. But this would also require the "conditioning" of ideologies among various political players which can be immensely difficult to achieve.

IV.2. Did Brexit really lead to a truly sovereign parliament?

It is a plausible observation based on the preceding paragraphs that Brexit has not really reclaimed the absolute doctrine of parliamentary sovereignty. From an external point of view where the doctrine is concerned, it appears that the reception to the EU can also be interpreted in terms of how the UK would fulfil its other international obligations. For instance, in 1976, Britain was granted a loan by the International Monetary Fund (IMF). One of the conditions was that the IMF would "have the power to dictate certain aspects of British economic policy" which was not subject to amendment by Parliament.[161] This demonstrates that because the UK derived some "pecuniary benefit" from the IMF, it has to correspondingly cede some control as a form of compromise under customary international law. Lindeboom, for instance, has identified that the CJEU "considers national courts arms of EU law", taking the example of the US federal order as an explanation of how the CJEU conceives of the EU legal order.[162] Yet, this would require cooperation on an entirely new level, and perhaps that was what the early adopters of the EU had envisaged, i.e., closer economic integration over time.

Other more obvious examples would be that national sovereignty had been sacrificed with Britain's membership of NATO[163] and the World Trade Organisation.[164] There

[158] M Tabarelli, 'The Influence of the EU and the ECHR on "Parliamentary Sovereignty Regimes": Assessing the Impact of European Integration on the British and Swedish Judiciaries' (2013) ELJ 340, 342.

[159] K Lenaerts and T Corthaut, 'Towards an Internally Consistent Doctrine on Invoking Norms of EU Law' in S Prechal and B van Roermund (eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* cit. 507.

[160] M Tabarelli, 'The Influence of the EU and the ECHR on "Parliamentary Sovereignty Regimes": Assessing the Impact of European Integration on the British and Swedish Judiciaries' cit. 362.

[161] D Watts and C Pilkington, *Britain in the European Union Today* (Manchester University Press 2005) 111.

[162] J Lindeboom, 'Is the Primacy of EU Law Based on the Equality of the Members States? A Comment on the CJEU's Press Release Following the PSPP Judgment' cit. 1043.

[163] D Watts and C Pilkington, *Britain in the European Union today* cit. 110.

[164] *Ibid*. 110.

are effectively limits on how Parliament can legislate in order not to invite unnecessary censure from the international community, such as economic and trade sanctions.[165] Hence, these examples demonstrate that it is impossible to retain absolute legislative sovereignty where a country is part of a larger group; where in order to derive some form of benefits by virtue of integration, it is inevitable that some form of control must be ceded.[166] But there is also greater accountability and economies of scale through a process of increased dialogue and cooperation.

V. Concluding remarks

In conclusion, both the EU and the UK were affected by each other, and continue to be affected by each other in spite of the nationalistic sentiments. An example would be the EU-UK Trade and Cooperation Agreement, a free trade agreement between the EU and the UK, signed on 30 December 2020 and in force since 1 May 2021. As recent events such as Brexit, the *PSPP* judgment,[167] and the Euroscepticism of Poland and Hungary have demonstrated, if the EU does not obtain the support of the national courts on primacy of EU law, it would be institutionally weaker in terms of its ability to promote the effective application of EU law.[168] Similarly, if Member States were to assert its absolute parliamentary sovereignty on every matter of EU law, then there can be no cooperation.[169]

Recapping on the issues raised in this *Article*, it is submitted that from the UK Parliament's perspective, the concept of absolute sovereignty can no longer be the prevalent view. As demonstrated earlier, Dicey's position on parliamentary sovereignty was never consistent[170] and coupled with the influence of popular sovereignty,[171] parliamentary sovereignty has been weakened, at least from an internal perspective. The UK Supreme Court has also at times appeared to take a contrarian view from the UK Government, especially on matters affect fundamental rights.[172] From an EU law perspective, doctrinally, the understanding of primacy has been watered down and no longer exists in an absolute, no compromise manner, although apparent conflicts continue to exist as the

[165] L Fisler Damrosch, 'Sovereignty and International Organizations' (1997) UC Davis Journal of International Law & Policy 159, 165 ff.

[166] T Ginsburg, S Chernykh and Z Elkins, 'Commitment and Diffusion: How and Why National Constitutions Incorporate International Law' (2008) IllinoisLRev 201, 216.

[167] German Federal Constitutional judgment 2 BvR 859/15 cit.

[168] K Lenaerts and T Corthaut, 'Towards an Internally Consistent Doctrine on Invoking Norms of EU Law' cit. 508.

[169] HR Welsh, 'European Economic Community Law versus United Kingdom Law: A Doctrinal Dilemma' (1974) Texas Law Review 1032, 1054.

[170] I McLean and A McMillan, 'Professor Dicey's contradictions' cit. 437.

[171] UK House of Lords Report, Select Committee on the Constitution, *Referendums in the United Kingdom* cit.

[172] P Bremner, 'The Lisbon Treaty: A Constitutional Document, Not a Constitution – A British Perspective' (2010) Aberdeen Student Law Review 83, 91.

divergent views in the *PSPP* judgment[173] and the *Weiss* judgment[174] have demonstrated. Avbelj has argued that the CJEU must "tame its expansionist case-law that has by now made its integration in disguise more than conspicuous and as such increasingly unfounded".[175] Von Bogdandy and Schill also agree that the EU has to "accommodate a broad range of different understandings of national identity under Article 4(2) TEU".[176]

One can only expect that the other Member States are observing with much interest, and rightly so, to see if the UK would continue to thrive well post-Brexit. If the ramifications are less severe than predicted, this may also become a catalyst for the eventual weakening of the EU. But the converse is true – since the referendum results were not as compelling as it should be, another constituted Parliament down the road might be more sympathetic to the EU. After all, it is still very much a political issue and very dependent on the popularity of campaigning on a Europhile ticket at any given point in time.

[173] German Federal Constitutional judgment 2 BvR 859/15 cit.

[174] *Weiss and Others* cit.

[175] M Avbelj, 'Supremacy or Primacy of EU Law: (Why) Does it Matter?' cit. 763.

[176] A Von Bogdandy and S Schill, 'Overcoming Absolute Primacy: Respect for National Identity Under the Lisbon Treaty' cit. 1449.