

## **Legislative Sovereignty: Moving from Jurisprudence towards Metaphysics**

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### **Abstract**

Legislative sovereignty is often discussed with one eye on the past and one eye on the procedural functions of law-making in the present. This limits the scope for a conceptual understanding of legislative sovereignty and hinders its theoretical progress. This article argues that legislative sovereignty contains within it the concept of an idol and that understanding the scope and impact of the idol of sovereignty is necessary for future development in this field. Theories from Kant, Nietzsche, von Mises and Derrida are used to offer a divergent critique of legislative sovereignty while the author calls for a move towards a nuanced view of legislative and Parliamentary Sovereignty to account for its idolism. The key factor preventing the development of a truly nuanced and reflective theory of sovereignty is the devotion to former idols which are inoperable and inconsistent with modern geopolitical, inter-state relationships. The author also argues that our knowledge of sovereignty is *synthetic a priori* and that development in this area can only be by reason, as knowledge derived experientially is subject to the Kantian Transcendental Idealism.

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Sovereignty, Parliament, Jurisdiction, Metaphysics, Philosophy of Law

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## Legislative Sovereignty: Moving from Jurisprudence towards Metaphysics

### **Introduction**

The term ‘Brexit’ invariably invokes an emotive response in many; however, prior to 2012, there was no recorded mention of the term in Hansard. The first recorded mention of the word appears in the House of Lords’ Motion to Take Note on the 17 December 2012<sup>1</sup>. During this same debate, Lord McConnell of Glenscorrodale said:

They [referring to young people in Croatia] recognise that in today’s world the pooling of sovereignty—not just the seat at the table, or the benefits that come from the odd grant from the European Commission—is an essential part of contributing to today’s world and looking after our common and individual interests.<sup>2</sup>

At the outset, four years prior to the United Kingdom’s (UK) vote to leave the European Union in 2016, there were debates as to the state of the UK’s sovereignty. It became apparent in that debate, as with many prior debates in the House of Commons and Lords, that there were different views on whether the UK had retained its sovereignty when entering, and remaining in, the European Union (EU). These debates are predicated on a discernible notion of sovereignty that is asserted as a single and universal state; the debates often proceed from the position that it is an obvious truth whether sovereignty is extant or is not. Herein lays the problem: the word sovereignty is itself vague, misunderstood and often misrepresented.

This article aims to distinguish the concept of sovereignty from the noise which often accompanies it in common parlance. It will do this in two parts: firstly, by considering the development of the notion of sovereignty through antiquity, offering historical and politico-legal context to the development of ideas. Secondly, it will consider the current competing arguments relating to sovereignty in the UK Parliament; in doing so, it will progress the discussion of legislative sovereignty to Parliamentary Sovereignty. Although this article is concerned with legislative sovereignty, it is not blind to the inherent connection that legislative sovereignty has with territorial sovereignty (or territorial integrity). It is prudent to note at this early stage that this article will not review the exceptional body of literature which already

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<sup>1</sup> First by Lord MacLennan of Rogart at HL Deb 17 December 2012, vol 741, cols 1394-1396

<sup>2</sup> HL Deb 17 December 2012, vol 741, col 1400

exists concerning Parliamentary Sovereignty and legislative sovereignty more abstractly. The reasoning behind this is twofold: first, there is a substantial body of seminal work in the field of jurisprudence relating to sovereignty. To review this would demand a much longer piece dedicated solely to that cause. Secondly, the author's objective is to debate sovereignty from beyond jurisprudence, drawing on some philosophical ideas from, *inter alia*, Nietzsche, von Mises, and Kant. This is not intended to dismiss the work of jurists currently occupying this field of jurisprudential study; it is intended to complement their work by considering sovereignty from a drastically different vantage point. Notwithstanding this point, some reference will be made to a small number of works on sovereignty throughout this article.

Metaphysics<sup>3</sup> is often defined as knowledge of the first principle of things. Yet Kant believed that the purpose of metaphysics is to contribute to the knowledge that society already possesses, and in doing so create new knowledge.<sup>4</sup> In this Kantian sense, metaphysics is *synthetic a priori* knowledge; *viz.* knowledge which is not predicated on prior experience or definitional truths. Therefore, the objective of metaphysical investigation is the development of new knowledge beyond that which is derived from *a posteriori* knowledge, or the knowledge derived from experience. Metaphysics will be discussed later in this article.

Throughout this article, the term 'metaphysics' will be used as shorthand for the primary or first principle of the matter in discussion; the most fundamental aspect forming part of its being. One might argue that sovereignty is, therefore, the first principle matter in law-making; however, states and sub-state nations without legislative sovereignty in the orthodox sense – such as the devolved nations in the UK and the UK's overseas territories – produce valid laws nonetheless. In this respect, this article will attempt to discern what, within sovereignty, can be considered metaphysical. Legislative sovereignty can be summarised as a collection of law-making powers which exist in relation to a state, and which have no superior or equal<sup>5</sup>. Additionally, seldom is the distinction drawn between a state having sovereign legislative powers, and the value-laden statement that a state 'ought' to have sovereign legislative powers. This is a form of a philosophical problem sometimes referred to as the 'is/ought problem' (often called 'Hume's guillotine'), and it has been discussed by many philosophers and jurists

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<sup>3</sup> The title of this article was chosen in deference to C Douzinas, 'The Metaphysics of Jurisdiction' in S McVeigh(ed), *Jurisprudence of Jurisdiction* (Routledge-Cavendish 2007)

<sup>4</sup> I Kant, *Critique of Pure Reason* (JMD Meiklejohn tr, Dover Philosophical Classics 2003)

<sup>5</sup> This is my own brief summary, it is anticipated that many will disagree with it.

including but not limited to Hume<sup>6</sup>, Finnis<sup>7</sup> and Kelsen.<sup>8</sup> The problem which arises with Hume's guillotine is this: in stating that some action happens, it is not possible to conclude logically that the same action ought to happen always, without inferring a value system or judgment. In converting a positive 'is' statement to a normative 'ought' statement, the 'proposer' asserts that the 'receiver' is under a moral duty or obligation to act in a certain way. This, in turn, encourages the receiver to adopt the proposer's moral position on the subject matter, and then obliges the receiver to comply with the assertion. This author argues that the expression of an obligation masks an attempt to coerce the receiver to act based on the value system of the proposer<sup>9</sup>. For example, the positive (factual statement) 'Jane pays taxes' seems close to, though not interchangeable with, the normative statement 'Jane ought to pay taxes'. This statement seems innocuous in and of itself. However, if the subject matter here is changed, but the same format is maintained, it is possible to change the positive statement 'people reproduce' to 'people ought to reproduce'.<sup>10</sup> Now the deficiencies become apparent; the proposer asserts that there is a moral obligation to reproduce and so prohibits any bar to reproduction<sup>11</sup>.

This is a simplification of Aquinas' basic good of reproduction,<sup>12</sup> which was later critically discussed by Finnis,<sup>13</sup> and demonstrates how converting a positive statement to a normative one can lead to an unworkable, or potentially undesirable, outcome.<sup>14</sup> The outcome in the example above is unworkable, as any person that cannot biologically reproduce, who chooses not to reproduce, is trans, gay or lesbian, could be said to be in contravention of the normative version of the statement, and so contravening a moral obligation (which is predicated on the proposer's ethical system). One logical deficiency which has been discussed widely<sup>15</sup> is that converting a positive statement to a normative one requires the inclusion of a command to

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<sup>6</sup> D Hume, *Treatise of Human Nature* (originally published in 1738, Penguin Classics 1984)

<sup>7</sup> JM Finnis, *Natural Law and Natural Rights* (Oxford University Press 2011)

<sup>8</sup> H Kelsen, *General Theory of Norms* (Oxford Scholarship 1991)

<sup>9</sup> JA Schaler, *Peter Singer Under Fire: The Moral Iconoclast Faces His Critics* (Open Court 2009) 231; R Nozick, *Anarchy State and Utopia* (Basic Books Reprint 2013)

<sup>10</sup> This is linked by some scholar's to the Churches acceptance of Aquinas' theories, and it has been suggested that these are the foundations for the Catholic Church's position on contraception. B Scarnecchia, *Bioethics, Law, and Human Life Issues: A Catholic Perspective on Marriage, Family, Contraception Abortion, Reproductive Technology, and Death and Dying* (The Scarecrow Press 2010) 2

<sup>11</sup> For a more general discussion of this point; see A Wiener Katz, 'Positivism and the Separation of Law and Economics' (1996) 94(7) Michigan Law Review 2229

<sup>12</sup> St Augustine, *The City of God* translated in M Dods, *The City of God: St Augustine* (Hendrickson 2009)

<sup>13</sup> Finnis (no 7)

<sup>14</sup> Though Finnis' position was not consistent with my own in relation to this particular basic good.

<sup>15</sup> D Hume (no 6); JM Finnis (no 7); H Kelsen (no 8)

behave in a certain manner. This, in turn, requires the imposition of a value system – it includes the presupposition that the only way to continue the trend displayed by the positive statement is to adopt a certain ethical and moral position required by the normative version of the statement.<sup>16</sup> The move from stating that something ‘is’ the case, to something ‘ought’ to be the case attempts to impose an obligation on society generally to operate in a certain way. Law, at its heart, has a normative character.<sup>17</sup> Attempting to move from the positive statement: ‘the UK does legislate within its territorial borders’; to seemingly similar, ‘the UK ought to legislate within its territorial borders’ also seems innocuous. However, it hides an assumption which is often overlooked: that assumption is the absolute nature of territorial sovereignty and its connection with legislative powers.

### **Legislative Sovereignty**

This author has previously suggested that sovereignty is not a finite concept<sup>18</sup>, and Allison also provides an excellent view of problems with the notion of Parliamentary Sovereignty in its substantive and formal sense.<sup>19</sup> On this occasion, this author will take a step further by contending that territorial sovereignty has no historical links to legislative sovereignty, and that this matter has long since been forgotten or consigned to the history books. This article will consider authority from antiquity and argue that, historically, law has more in common with borderless law-making, than first imagined. For example, law-making beyond one’s own borders has its origin in ancient concepts such as *universitas humanitatis* and *dominus mundi*.<sup>20</sup>

It may seem contrary to modern thinking that a sovereign state could impose its legal system on other states but this is neither a new nor nuanced position. For example, the Holy Roman Empire in creating *jus gentium* sought to use principles of classical natural law theory to apply some fundamental Roman legal principles across the realms that were conquered, and across those realms that traded with Rome.<sup>21</sup> These principles, which were principles of early natural

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<sup>16</sup> GEM Anscombe, ‘Modern Moral Philosophy’ (1958) 33(124) *Philosophy* 1

<sup>17</sup> M Freeman, *Lloyds Introduction to Jurisprudence* (9<sup>th</sup> edn, Sweet and Maxwell 2016) s.1-003

<sup>18</sup> M Johnson, ‘Models of Parliamentary Sovereignty’ (University of Bristol Law School Blog, 4 December 2017) < <https://legalresearch.blogs.bris.ac.uk/2017/12/the-models-of-parliamentary-sovereignty/>> accessed on the 24 October 2019

<sup>19</sup> JWF Allison, ‘The Westminster Parliament’s Formal Sovereignty in Britain and Europe from a Historical Perspective’ (2017) University of Cambridge Faculty of Law Research Paper No. 47/2018 Available at SSRN: <https://ssrn.com/abstract=3219162>

<sup>20</sup> PG Monateri, *Dominus Mundi Political Sublime and the World Order* (Hart 2018)

<sup>21</sup> M Freeman (no 17) 89

law theory, originally emanated from Greece<sup>22</sup> and were used to justify the creation of *jus gentium*. The term natural law is used above, and yet the principles predate St Augustine's description of the natural law,<sup>23</sup> and so are best described by Cicero in this early form:

[t]rue law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrong-doing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, although neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal a part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by Senate or People, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times [...]<sup>24</sup>

But if the judgements of men were in agreements with nature [...] then justice would be equally observed by all. For those creatures who have received the gift of reason from Nature have also received right reason, and therefore have also received Law, which right reason applied to command and prohibition.<sup>25</sup>

According to Cicero's description above, the natural law reflects a cosmic order of nature and so is universal, irrespective of the individual's biases or their inclinations. It is not confined to a single jurisdiction and the natural law is a moral derivative which sage-like people can discover by the use of their reason alone.<sup>26</sup> As the natural law was universal, it was also considered to be universalisable *viz.* it was possible to take its meaning and extrapolate it widely. Rome's ancient codifiers (Gaius and Justinian), regarded *jus gentium* and the natural law as they perceived it, to be interchangeable if not one and the same thing.<sup>27</sup> The impact of this was that early Rome saw itself as codifying the natural law, at least in part, into *jus gentium* and thus creating a body of universal and extraterritorial law which applied across its territories,

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<sup>22</sup> There is a disparity between Greek and Roman versions of natural law and this may have arisen following the transfer of ideas via the Scipionic circle as described by S Ratnapala, *Jurisprudence* (3<sup>rd</sup> edn, Cambridge University Press 2017) 158-161

<sup>23</sup> Dods (no 12)

<sup>24</sup> Cicero, *De Re Public III* xxii 33 translated by CW Keyes in *Cicero: De Re Publica: De Legibus* (William Heinemann 1928)

<sup>25</sup> Cicero, *De Legibus I* xii 33; translated by CW Keyes in *Cicero: De Re Publica: De Legibus* (William Heinemann 1928)

<sup>26</sup> Ratnapala (no 22) pp.159-160

<sup>27</sup> WW Buckland, *A Text Book of Roman Law from Augustus to Justinian* (Cambridge University Press 1963) p.53

and beyond to include all those who traded with Rome. In this respect, the origin and notion of *jus gentium* is the antithesis of territorial and legislative sovereignty of each independent state.

It is therefore recognised that the concept of state sovereignty is not as ubiquitous throughout history as it may first seem. It has been argued that the concept of sovereignty did not arise in history until (at least in part) the contraction of papal authority which began, in part, with the Concordat of Worms or *Pactum Calixtinum* 1122.<sup>28</sup> De Mesquita convincingly suggests that the contraction of papal authority and the establishment of national sovereignty began (at least to some extent) at this point and some 500 years prior to the treaties of Westphalia, which are often credited as the source of modern territorial and legislative sovereignty.<sup>29</sup> Prior to this contraction, the Pope exercised authority across the world and was also considered to be beyond the authority of the Church. This form of universal jurisdiction was not merely extraterritorial, but a concept of the right to impose law universally and thus the notion that the world was subject to a single legal system and the sovereignty of the papal authority. To contextualise this, the ancient maxim *rex est imperator in regno suo*<sup>30</sup> infers, by its semantic construction, the feudal relationship between subjugated kingdoms and the empire of the emperor. In the same manner, papal authority was seen to extend across the world, as the world was under the jurisdiction of the church, at least as far as compliance with that jurisdiction could be enforced. It is not until much later did the concept of sovereignty – one that may be more recognisable today – appeared on the international stage. To bring a modern perspective on this argument, it can be likened, in part, to Kelsen's theory of the *grundnorm*, or the Basic Norm, in his Pure Theory of Law.<sup>31</sup> Although the comparison is superficial, it is used solely to demonstrate that this author's argument is not at odds with the greater body of theory, and is not intended to be a complete account of Kelsen's theory or that of its critics. Kelsen uses neo-Kantian language in setting out his Pure Theory of Law by suggesting that the world comes to us through the formal categories that we have created in our own mind in an attempt to make sense of the world as it is. It is suggested here that Kelsen draws on Kant's 'Transcendental Idealism'.<sup>32</sup> Transcendental Idealism is a concept that encourages a person to think critically

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<sup>28</sup> M Freeman (no 17) p.195; B Aguilera-Barchet, *A History of Western Public Law: Between Nation and State* (Springer 2011) pp.138-139; P Stein, *Roman Law in European History* (Cambridge University Press 1999) p.43.

<sup>29</sup> BB de Mesquita, "Popes, Kings, and Endogenous Institutions: The Concordat of Worms and the Origins of Sovereignty" (2000) 2(2) *International Studies Review* 93.

<sup>30</sup> Every king, within his kingdom, has the same powers that the emperor has over the world

<sup>31</sup> H Kelsen, *Essays in Legal and Moral Philosophy* (D. Reidel Publishing Company 1973).

<sup>32</sup> R Scruton, *Kant* (Oxford Paperbacks 1982) ch.2-3; S Paulson, 'Kelsen's Legal Theory: the Final Round' (1992) 12(2) *Oxford Journal of Legal Studies* 265

about what, at a metaphysical level, they know and how that incumbent or antecedent knowledge affects the acquisition of new knowledge<sup>33</sup>. Kelsen uses this neo-Kantian persuasion to suggest that normativism is universal and so universalisable, and as such is consistent with the concept of a single legal system for the world; that is to say, monism.<sup>34</sup> Kelsen sees that the basis of laws are legal norms and the basis of these legal norms is the Basic Norm.

The Basic Norm is an extra-legal concept on which all legal norms derived from the Basic Norm rest. As legal norms can only be derived from other norms; the pinnacle of the fountain must, therefore, be extra-legal as the Basic Norm is not derived from any other. Where this Basic Norm is derived from is of great importance to the arguments in this article, and could justify or negate the concept of legislative sovereignty. If the Basic Norm is ‘in conformity’ with the individual state’s legislative sovereignty, it must logically lead one to conclude that the world is a collection of legal orders and is thus pluralistic.<sup>35</sup> It does not logically equate that one would legitimately be able to impose, in peace-time, its Basic Norm on another state, as doing so would be beyond the authority of the individual state and inconsistent with the concept of recognising state sovereignty.<sup>36</sup> On the other hand, if one were to accept that the Basic Norm is founded in international law and international relations, this would lead one logically to conclude that there is monist legal system that occupies each part of the globe and so there are normative values that each system has in common. As there is one sovereign global ‘quasi-legal’ system, then there must also be a sovereign authority (if one uses the concepts espoused by Austin).<sup>37</sup> In this legal system it would be permissible for the likes of the Holy Roman Empire and the Church to assert jurisdiction either extraterritorially or universally if they can proclaim that they have access to (possibly by virtue of reason or hermeneutics of divine inspiration) the Basic Norm, and so are able to champion the normative value that underpins all law. The importance of this development goes beyond the recognition of a state’s law-

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<sup>33</sup> I Kant, *Critique of Pure Reason* (JMD Meiklejohn tr, Dover Philosophical Classics 2003); and R Adams, ‘Things in Themselves’ (1997) 57 *Philosophy and Phenomenological Research* 801

<sup>34</sup> N MacCormick, *Questioning Sovereignty* (Oxford University Press 1999)

<sup>35</sup> I Weyland, ‘The Application of Kelsen’s Theory of the Legal System to European Community Law: The Supremacy Puzzle Resolved’ (2002) 21(1) *Law and Philosophy* 1

<sup>36</sup> H L A Hart, *The Concept of Law* (2<sup>nd</sup> edn, Oxford University Press 1994); A Tucker, ‘Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty’ (2011) 31(1) *Oxford Journal of Legal Studies* 61; for an interesting political science view on this point, see L Beckman, ‘Popular sovereignty facing the deep state. The rule of recognition and the powers of the people’ (2019) *Critical Review of International Social and Political Philosophy* < DOI: 10.1080/13698230.2019.1644583 >

<sup>37</sup> J Dewey, ‘Austin’s Theory of Sovereignty’ (1894) 9(1) *Political Science Quarterly* 31



making powers; it includes the recognition of equality amongst states, irrespective of size.<sup>38</sup> That is not to say that certain states did not colonise others after this point in time, the justification for this is often a version of legal theory espoused by Hobbes and Locke and one to which this article cannot give adequate space.<sup>39</sup> It does represent the move away from feudal overlordship towards recognition of states' territorial integrity.

It is argued that contraction of papal authority is only one part of the development of ideas which later became national sovereignty; the development and recognition of emerging states, the dissatisfaction with feudal law, and the 'departure from the medieval idea of law as being fundamentally custom, and legislation as merely a form of declaring the existence of new customs'<sup>40</sup>, were equally relevant to the development of the idea of a state as an independent entity. The later treaties signed over the period known as the Peace of Westphalia, which was negotiated from 1644 to 1668, formed the basis of territorial sovereignty as we understand it today.<sup>41</sup> The treaties that were signed in the creation of the Peace of Westphalia either reasserted or created five maxims of sovereignty.<sup>42</sup>

The first of these principles has already been mentioned above *viz. rex est imperator in regno suo*. This was not the first occasion that this maxim, or a variant of it, made its way into the philosophical underpinnings of the nation-state. Its origin lies much earlier and can be traced to the caesaropapism times of the late twelfth century.<sup>43</sup> As a tangential point of minor relevance but useful in mapping the remit of authority, around the same period that *rex est imperator in regno suo* began to enter the collective psyche, other maxims were used to attempt to make sense of the emerging independence and authority of the sovereign within their state. The first of which, *rex qui superiorem non recognoscit*,<sup>44</sup> was adapted in juristic matters to mean that the King did not recognise any superior authority in temporal matters,<sup>45</sup> allowing for the involvement of a superior papal authority in spiritual matters to continue. The second

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<sup>38</sup> H Lauterpacht, *Recognition in International Law* (Cambridge University Press 1947)

<sup>39</sup> It has been argued that the philosophies of Hobbes and Locke have been used to justify the taking of land from those communities that had a different relationship with the state and the land, for example colonizing land that was used by nomadic tribes in the Americas. See J Tully, "Rediscovering America" in GAJ Rogers(ed), *Locke's Philosophy: Content and Context* (Clarendon Press 1996)

<sup>40</sup> M Freeman (no 17); D Bederman, *Custom as a Source of Law* (Cambridge University Press 2010) pp 3-41.

<sup>41</sup> DJ Hill, *A History of Diplomacy in the International Development of Europe Vol II The Establishment of Territorial Sovereignty* (Longmans, Green, and Company 1906) p.599

<sup>42</sup> L Peters, *The United Nations: History and Core Ideas* (Palgrave MacMillan US 2015) Ch.5.

<sup>43</sup> J. H. Burns(ed), *The Cambridge History of Medieval Political Thought C.350-c.1450* (Cambridge University Press 1988) p.363

<sup>44</sup> The King himself does not recognize a superior

<sup>45</sup> Burns (no 43)

principle asserted by the Treaties of Westphalia, is *cujus region, ejus religio*.<sup>46</sup> Although this does not add to the field explored by this article (and so will not be discussed further), it does warrant a mention to explore a point later in this paragraph. The third principle is that ‘all states are equal and that no state may interfere with the internal affairs of another’.<sup>47</sup> This principle espouses a standard of equality in sovereignty and supports a state’s legislative and territorial integrity. This is arguably a matter which is taken for granted in the modern-day jurisprudence of sovereignty and legislative authority. However, to move from a position where an emperor could claim temporal authority over the sovereign ruler of a sovereign state, and the Pope could claim spiritual authority over that same said state, to a position where the state was autonomous in declaring its own laws and religion is a vast change in geopolitical arrangements. This is arguably the germ of the notion of sovereignty which we hear today. To note that this germ originated in the seventeenth century, may change some views of the absolute nature which the concept of sovereignty is afforded in modern discourse.

The fourth principle outlines that all disputes are to be settled in a peaceful manner ‘where possible through economic sanctions and through the means of collective security’.<sup>48</sup> This is a progressive perspective whereby states would refrain from engaging in military action to resolve disputes, in order to settle them by means of economic and collective bargaining. It seems though this action would not be out of place in a modern inter-jurisdictional dispute resolution process, and economic sanction is still (at the time of writing) and exceptionally useful tool to deal with disputes between states. The fourth principle will also be revisited shortly. The fifth and final principle is a principle which would be more in keeping with human rights discourse. For the sake of fullness, although it will not be considered in any length, the final principle supports the religious rights of citizens of minority religions not selected by the state, and of prisoners of war to be returned to their country following the cessation of hostilities.<sup>49</sup> This would appear on the face of it to incline towards a particularly liberal and progressive opinion on fundamental rights that are established by a treaty intended to bring about peace. It is progressive in that it aims to protect rights at a time in history when the UK was engaged in selling slaves via *inter alia* the Royal African Company,<sup>50</sup> and women were

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<sup>46</sup> The king determines the religion of his realm

<sup>47</sup> Burns (no 43)

<sup>48</sup> Burns (no 43)

<sup>49</sup> Peters (no 42) 70

<sup>50</sup> KG Davies, *The Royal African Company* (Routledge 1999) 41

still being convicted of witchcraft and sentenced to death.<sup>51</sup> Given that this point refers to rights, it is ostensibly beyond the scope of legislative sovereignty for the purposes of this article.

Of these five principles, two have particular relevance when considering legislative sovereignty from a position beyond jurisprudence; these are the third and fourth principles. These principles are ones that encourage a deeper thought on the philosophical bases for collectivism and how that relates to notions of sovereignty. To explore the substantive content of the fourth principle, this author propose the following question in relation to the resolution of disputes by sanction and collective persuasion: is the notion of collectivism in international sanctions both arbitrary and an over-exaggeration of collectivist ideas. To consider the arbitrary nature of sanctions and its effect on the concept of sovereignty, this article will use several points argued by von Mises. Though his work does not deal with collections of states operating together, Mises' work on the arbitrary nation of collectives generally is of assistance in exploring this area. Mises states:

There is no uniform collectivist ideology, but many collectivist doctrines. Each of them extols a different collectivist identity and requests all decent people to submit to it. Each sect worships its own idol and is intolerant of all rival idols. Each ordains total subjugation of the individual, each is totalitarian.<sup>52</sup>

Mises here is not applying a literal meaning to the words sect and idol which would put a reader in mind of religious matters. Here Mises' idol may be freedom, wealth, prosperity, liberty or libertarianism to name a few. In extolling the virtue of one, or combination of these idols, Mises' suggests that those extolling the idols 'browbeat' those that do not fall into line and agree with the collective. What the collective consists of is an arbitrary concept, as it can simply be reduced to 'which groups agree to subjugate themselves to the idol of the collective'. There is no standard by which the collective is established and no objectively discernible criteria for membership, other than agreeing to pursue or even worship the relevant idol. In terms of international relations, this is readily seen in conflicting opinions between the westernised collectives of states and those who follow easternised traditions. The westernised notion of freedom is diametrically at odds with the eastern counterpart. For example, Brunei Darussalam has recently introduced punishments consistent with a form of sharia law for crimes including homosexual intercourse, theft and adultery. These punishments include lashings,

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<sup>51</sup> C Cabell, *Witchfinder General: The Biography of Matthew Hopkins* (Sutton 2006)

<sup>52</sup> L von Mises, *Theory and History: An interpretation of social and economic evolution* (Ludwig von Mises Institute 2007) p.251

dismemberment of limbs and stoning to death<sup>53</sup>. Brunei Darussalam is not the only nation to extol this idol (to use the words of Mises); other states including Indonesia have similar attitudes towards Sharia law punishments for crimes.<sup>54</sup> There is, therefore, a collective of states created which extol virtues that are inconsistent with, for example, equality and freedom which are the idols of westernised, and other, collectives of nations.

It is possible to propose here that the idol is a metaphysical principle within sovereignty *viz.* it is a concept so inherent within the notion of absolute law-making power within a nation-state, that to imagine authority without a collective idol-driven purpose is to imagine no workable model of authority at all. The idol of a particular form of sovereignty is arrived at by reason alone; if it were to be subject to *a posteriori* knowledge, it would amount to nothing more than emulating an idol previously experienced. To assert one's own view of sovereignty is to develop one's view by reasoning, to consider all that one knows and produce an idol beyond the scope of knowledge derived from experience. Although any reflective account that one produces of alternative models of sovereignty is likely to be analytic, to produce an idol of one's own is likely to be synthetic reasoning. Synthetic reasoning, by contrast, produces an outcome which is entirely beyond the scope of the antecedent or predicate knowledge.<sup>55</sup> For example, one may state that 'the French model of sovereignty produces outcome A', and 'the Spanish model produces outcome B'. Both are analytical in that the outcomes are part of the predicate knowledge, i.e. the knowledge of the operation of sovereignty in those respective states. However, to state that 'a combination of the French and Spanish models of Sovereignty will work in the UK' is to make a synthetic judgement as the concept of those models working in the UK is not part of the predicate knowledge.<sup>56</sup> It is necessary here to set aside some matters which provide obvious areas of criticism (including the morality of coercion and the balance of power in states of differing size, and economic stability or status) to connect the first part of the question above *viz.* arbitrariness, with the second on exaggerating collective ideas. It is argued in reference to the question above that there is no single will of a collective, and rather

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<sup>53</sup> A Liang, 'Brunei's Controversial New Sharia Laws Are Now in Effect' *The Diplomat* (3 April 2019) <<https://thediplomat.com/2019/04/bruneis-controversial-new-shariah-laws-are-now-in-effect/>> accessed 6 April 2019.

<sup>54</sup> M Taylor, 'Brunei urged to halt introduction of strict new anti-LGBT+ laws' *Reuters* (Kuala Lumpur 25 March 2019) <<https://www.reuters.com/article/us-brunei-lgbt-laws/brunei-urged-to-halt-introduction-of-strict-new-anti-lgbt-laws-idUSKCN1R61M9>> accessed 6 April 2019.

<sup>55</sup> Kant (no 4) 7-12

<sup>56</sup> There is a substantial body of literature on this distinction in the realm of logic. See WVO Quine, 'Carnap and Logical Truth' in Quine, *Ways of Paradox and Other Essays* (2<sup>nd</sup> edn, Harvard University Press 1976); J Katz, *Cognitions* (Oxford University Press 1988); J Katz, *The Metaphysics of Meaning* (Oxford University Press 1990); J MacFarlane, 'Frege, Kant, and the Logic of Logicism' (2002) 111(1) *Philosophical Review* 25;

that the will of the most powerful individual within a collective is free to establish the idol or virtue which is to be pursued. Again, as Mises conveys:

It is true that every variety of collectivism promises eternal peace starting with the day of its own decisive victory and the final overthrow and extermination of all other ideologies and their supporters. However, the realization of these plans is conditioned upon a radical transformation in mankind. Men must be divided into two classes: the omnipotent godlike dictator on the one hand and the masses which must surrender volition and reasoning in order to become mere chessmen in the plans of the dictator.<sup>57</sup>

Once more, Mises here refers to the individual with the greatest degree of power as having the ability to coerce others to join their collective. In the same manner, it is proposed that this same principle is workable on the international platform and when dealing with international norms.<sup>58</sup> To use the World Bank as an example, it is a convention that the USA appoints the President of the World Bank and as such the USA appoints a person who has both the authority and audience to espouse its particular view on objectives which is preferable to them.<sup>59</sup> The ability to coerce can come in many forms, and simply having perpetual rights to appoint the president of an international organisation could be sufficient to embed at the top of the organisational structure of the World Bank, the interests of the USA at the expense of others with alternative economic policies.

In slight contrast with the concepts above, Nietzsche saw that the individual is the engine of social and societal change, though to achieve that change the individual would need to retire from the collective in order to divest themselves of the trappings of the collective, and permit themselves to think and act without constraint<sup>60</sup>. This also appears to be imperfect, according to Nietzsche one would need to withdraw from a collective to drive change, and it may be questioned whether the collective would resist change in such a situation. Nietzsche himself indicated that this would be the case when describing the collective ('the herd' as he put it) and their response to the individual who attempts to withdraw from society in order to pursue a greater goal. Furthermore, he denounces the state as an entity in any form; he suggests that the proposition that the state is interchangeable with the people who populate it is a fallacy, and

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<sup>57</sup> L von Mises, *Human Action: A Treatise on Economics* (Ludwig von Mises Institute 1998) 152

<sup>58</sup> See below for more on law as a set of normative statements.

<sup>59</sup> Congressional Research Service, 'Selecting the World Bank President' (8 February 2019) <<https://fas.org/sgp/crs/row/R42463.pdf> > accessed on the 6 April 2019.

<sup>60</sup> F Nietzsche, *Thus Spoke Zarathustra: A book for all and none* (Modern Library 1917) 49

the goals of the state are not the absolute or overarching goals which all within the state must strive towards<sup>61</sup>. In an eloquence known only to Nietzsche, he states:

How should a political innovation suffice to turn men once and for all into contented inhabitants of the earth? [That people think the answer to existential questions might come from politics shows] that we are experiencing the consequences of the doctrine...that the state is the highest goal of mankind and that a man has no higher duty than to serve the state: in which doctrine I recognize a relapse not into paganism but into stupidity. It may be that a man who sees his highest duty in serving the state really knows no higher duties; but there are men and duties existing beyond this — and one of the duties that seems, at least to me, to be higher than serving the state demands that one destroys stupidity in every form, and therefore in this form too.<sup>62</sup>

Given the perspective espoused by both Mises and Nietzsche above, it is possible to settle somewhere in between both these perspectives; that it is possible to create a state entity which contributes to the betterment of a collective of states without attempting to justify itself by reverting to goals which are proposed by those in the most influential of positions. Should this be the case, then it is also possible for collectives to come together to form standards, as was seen in the earlier example of Asian states adopting Sharia law, or in the European Union in a very different sense. Whereas these theoretical hurdles are more easily circumvented, a treaty could be likened to a group of states coming together under an agreed collective aim which they have ratified and assent to be bound by – that collective aim could legitimately be described as an idol. Those collectives create a form of justification for law-making contrary to the points that both Mises and Nietzsche mentioned above *viz.* collectives of any sort are individuals with authority and those wilfully subjugating themselves whilst ostracising others who choose not to conform. The mere notion of legislative sovereignty, therefore, is based on individuals subjugating the majority, by reference to sovereign authority as a justification. In summary, Mises and Nietzsche would suggest that the state could be reduced to a collective of individuals, and those with the influence to bend the will of the collective towards an idol. Conversely, some thinkers have argued that the collective is a misnomer in itself; and have argued that any action of a collective can be reduced to the act or acts of individual persons. The collective cannot achieve anything without a physical person instigating a physical act.

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<sup>61</sup> F Nietzsche, *Untimely Meditations* (Cambridge University Press 1983) III 4

<sup>62</sup> *ibid*

Methodological Individualism grew from this very realisation, and though its primary author, Max Weber, stated ‘it is a tremendous misunderstanding to think that an “individualistic” method should involve what is in any conceivable sense an individualistic system of values’<sup>63</sup>, a substantial debate around the extend of methodological individualism grew from the 1950s onwards.<sup>64</sup> Given its tangential nature, further exploration of the nature of methodological individualism cannot be warranted at this stage, it does pose a question whether any collective can ever act as a body given that the decisions to act and the physical actions that follow are carried out by individuals, and this may have greater ramifications for the area of law-making more generally. This position removes the collectivist nature of law-making and exposes it as nothing more than an individual power-grab in the national legislature. The process of making law is reliant on individuals creating collectives which ostracise non-conformists creating a seemingly collectivist group. However, the process of law-making cannot exist without the act of an individual and the collective within the legislature can easily be reduced to a group of individuals who extol an idol. Whether the idol is the pooling of sovereign powers to create a larger collective, consistent with the direction of the European Union currently, or that of national populism which may extol the idol of self-sufficiency and absolute independence at all cost, the notion of legislative sovereignty is predicated on an idol giving some degree of context to the term sovereignty. Without this context, without an idol, legislative sovereignty cannot be reduced to a single identifiable and workable concept which is universalisable in the modern, global world.

In light of these points above it could be argued that the Treaties of Westphalia were a step not solely in legislative confinement to the physical jurisdiction, and as such the perpetuation of the idea of legislative sovereignty (and of a state sanctioned idol), but also a collection of minor steps in aligning the content of national laws to achieve an overarching objective; that principle being peace which itself could constitute an idol. It is possible that treaty forming is a useful manner to address acts that are abhorrent to collective groups of independent states, though it is recalled that treaties are only functional if ratified by the states concerned, and are extant only with the continuing agreement of each state. Therefore, the treaties are generally supportive of the notion of legislative sovereignty and is not an argument in opposition to it. However, the treaties do not assist with the metaphysical investigation of legislative

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<sup>63</sup> M Weber, *Economy and Society* (University of California Press 1922) 18

<sup>64</sup> K Popper, *The Poverty of Historicism* (Routledge 1960); F Hayek, *Individualism and Economic Order* (University of Chicago Press 1948).

sovereignty; to explore this further, consideration will need to be offered to the more recent actions of states which test the notions of the metaphysical jurisdiction.

Douzinas writes, in his article on the metaphysics of jurisdiction<sup>65</sup>, of the universal jurisdiction that Belgium granted itself to investigate and prosecute war crimes and crimes against humanity, irrespective of where these were committed. This is not a matter which relates to legislative supremacy *per se*; however, it does relate to a state exercising its powers beyond its territorial borders, and therefore is reminiscent of the authority previously enjoyed by the Pope and Emperors. It is this reminiscence which is useful in exploring sovereignty further. For example, in granting itself universal jurisdiction – albeit within a confined set of competencies – Belgium resurrected some behaviours which were pre-Westphalian, and possibly from an era prior to the Concordat of Worms. Douzinas says of universal jurisdiction:

The question of universal jurisdiction is one of the most contested problems in the new times we live in after the collapse of communism. It is associated with the decline of the principle of sovereignty upon which international law was established in the post-Westphalian period. Ours is a period of proliferating jurisdictions, each positioning itself against the horizon of the universal. But every claim to universal jurisdiction soon becomes particular in relation to a wider claim (that of the International Court of Justice), and that again will be dwarfed by the greater universality of the International Criminal Court which will again be contested by the American exception with its implicit claim to an even wider *de facto* universality.<sup>66</sup>

His point here is interesting, and seemingly semantic at the outset, but concealing a far deeper issue. In modern attempts to evoke universal jurisdiction, the universality of the power is challenged and the International Courts of Justice (ICJ), which are generally averse to universal jurisdiction, will reject the universality principle. This gives the ICJ a sense of universal jurisdiction themselves, and one to which the United States of America has often been vocal in its objection. This perpetual clawing at any explicit or implicit attempt at universalising jurisdiction is an argument in favour of the success at the Westphalian regime, specifically the egalitarian sense in a world of crystallised territorial sovereignty. However, the issue penetrates much deeper than this. Here, this author's views expressed above are inconsistent with

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<sup>65</sup> C Douzinas, 'The Metaphysics of Jurisdiction' in S McVeigh(ed), *Jurisprudence of Jurisdiction* (Routledge-Cavendish 2007)

<sup>66</sup> *ibid* at 21



Douzinas' own. Douzinas states that sovereignty is little more than a word used to denote the coming together of communities and the outward portrayal of the adoption by that community of a common standard.<sup>67</sup> On one level, this is consistent with the collective extolling the idol. However, this sense of community is inconsistent with other positions; any statement of goals by a person in authority on behalf of a community is the statement of an individual, to which others offer their allegiance or conformity. The extolling of an idol is a matter with which this author is in agreement with Douzinas on; the collectivism itself contains the inherent flaw. The statement of the collective is not that of the state rather that of the primary voice who can command conformity and allegiance from the majority and instigate the process of ostracising those who will not conform. On the bases that the primary voice, and as such the driver of normative standards, is a single person, Douzinas would seem to infer that sovereignty is therefore vested in the community by command of the voice of an individual. This seems difficult; the singularity that one derives from the work of Mises and Nietzsche above is not consistent with the notion of non-monarchical legislative sovereignty which vest power, in the UK at least, in a representative parliament. Notwithstanding this point, there is merit in what Douzinas goes on to say. He refers to the maxim *ubi societas ibi jus* inferring that a community arises when the law declares itself common to all and states that the jurisdiction of the law is the 'juris diction – the diction of law, laws speech and word'.<sup>68</sup> Here it becomes possible to reconcile the opposing views above. If the individual is removed from the declarative function that was outlined above, and replaced with the law, then sovereignty is commanded by law and law is the singular that gives rise to the legislative and territorial integrity. Douzinas deals excellently with the metaphysics of jurisdiction through the remainder of his article, and this author does not intend to re-tread those boards. For the purpose of this article's nuanced argumentation, dealing in part with the metaphysics of legislative sovereignty, the second part to this essay's question conveyed in the introduction (*viz.* the application of metaphysical discussions to theories of Parliamentary Sovereignty as an invocation of legislative sovereignty in the UK) will be discussed next.

The legislative competence of a sovereign parliament is often described in Dicey's terms as the absolute supremacy of Parliament to make or unmake any laws, and the inability to bind future parliaments.<sup>69</sup> In the UK, this has previously been stated as '[w]hatever the Queen-in-

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<sup>67</sup> Douzinas (no 65) 22

<sup>68</sup> *ibid*

<sup>69</sup> AV Dicey, *An Introduction to the Study of the Law of the Constitution* (London 1959).

Parliament enacts as statute is law'<sup>70</sup> (though this is generally dismissed by authors such as Bogdanor).<sup>71</sup> However, if it were possible to adopt the Dicey's view mentioned above, then it would be possible to state that the UK Parliament has the legislative competence to make any of its laws extraterritorial, or even to make them universal. The vague position of the pure view adopted by Dicey is the subject of much historical debate. However, there are fundamental flaws with this orthodox view which makes it an unworkable concept, and as such does not assist with achieving clarity for the application of legislative sovereignty. For example, this author has previously said that:

[The orthodox] view of sovereignty presents a paradox; if Parliament has unlimited power to legislate, then it can create an Act of Parliament which limits Parliament's own power. However, in limiting its power it is no longer supreme therefore it cannot limit its power as Parliament is always supreme. *Ergo*, Parliament is not supreme because it cannot limit its own power; in doing so it will no longer be supreme. The same argument can be made for Parliament enacting legislation which permanently disbands itself; in doing so Parliament would no longer be supreme and so the orthodox logic fails.<sup>72</sup>

Wade attempts to rationalise this concept of sovereignty<sup>73</sup> by stating that Parliamentary Sovereignty is a political fact controlled and developed by the judiciary.<sup>74</sup> Wade sees, in brief, that Parliament is sovereign but cannot restrict its own sovereignty. Although this author accepts Wade's attempt to 'square the circle', there is a logical inadequacy which arises in the Wade view of Parliamentary Sovereignty also. Set aside the inclusion of the judicial control of the concept for a moment, Parliament cannot be sovereign if there are limits on its power, as to be sovereign requires the existence of no equal or superior in relevant matters. Parliament is therefore not sovereign using Wade's definition, as Parliament is subject to its own conceptual limitations. Therefore, the idol of sovereignty is sovereign, and the politico-legal reality of law-making in Parliament is not. Secondly, if the concept of sovereignty is controlled by the

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<sup>70</sup> NW Barber, 'The afterlife of Parliamentary sovereignty' (2011) 9(1) *International Journal of Constitutional Law* 144; J Goldworthy, *The Sovereignty Of Parliament: History and Philosophy* (Oxford University Press 2001);

<sup>71</sup> V Bogdanor, *The New British Constitution* (Bloomsbury 2009)

<sup>72</sup> M Johnson, 'Models of Parliamentary Sovereignty' (University of Bristol Law School Blog, 4 December 2017) < <https://legalresearch.blogs.bris.ac.uk/2017/12/the-models-of-parliamentary-sovereignty/>> accessed on the 24 October 2019

<sup>73</sup> HWR Wade, 'The Basis of Legal Sovereignty' (1955) 13(2) *The Cambridge Law Journal* 172; for an interesting opinion on Wade and Heuston see Barber (no 70),

<sup>74</sup> HWR Wade, *Constitutional Fundamentals* (The Hamlyn Lectures: Thirty-Second Series, Stevens 1980)

judiciary, the idol of sovereignty is therefore controlled by the judiciary, even if only to some reverential degree. It is reasonable to conclude, using Wade's description that the judiciary are sovereign given that they control the idol of sovereignty, which informs and confines the law-making process in Parliament. These are the author's views and it should be recognised that others may take a more pragmatic view of the matter, without giving credence to separating the concept and function of sovereignty.

If the UK Parliament is not orthodoxly supreme, what therefore is the remit of Parliament's power and can it be said to have adopted a model of sovereignty which is unique. It is difficult to contest that the UK's Parliament has a bare form of sovereignty such as that Douzinas alluded to in the coming together of a community. It is also difficult to rationalise that one person or power can declare that Parliament is orthodoxly sovereign; therefore, what form legislative sovereignty or competence does the UK's Parliament possess? This author contests, in deference to the work of Elliot and Thomas, that there are three discernible and more recent models of sovereignty<sup>75</sup>, each with varying associated degrees of authority afforded to the legislature<sup>76</sup>. It is noted once more that Allison contends for a dichotomous approach to models of sovereignty, and whilst there is merit in this, it is not the approach that this author has chosen to adopt<sup>77</sup>. It is noted here that the following paragraphs often fall out of metaphysics and into *a posteriori* knowledge as a means to test a particular model's ability to stand against criticism. This is an intentional inclusion of experiential knowledge to seek to answer the charge laid down in the introduction.

### ***Model 1 – Sovereignty and the Constitution***

This model is closest to the orthodox doctrine and, overall, is supportive of Dicey's view. It states that Parliament is always sovereign and, as such, it cannot limit its powers; that the courts are required to give effect to the most recent expression of Parliament's will, and that in stipulating 'the most recent expression of Parliament's will', this model supports the idea

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<sup>75</sup> A great deal of credit is offered here to Prof M Elliot and Prof R Thomas as these models are inspired by, and in deference to M Elliott and R Thomas, *Public Law* (3rd edn, OUP 2017)

<sup>76</sup> The following paragraphs contain some comments that I have previously made relating to the limitation of theories on the sovereign powers of Parliament in M Johnson, 'Models of Parliamentary Sovereignty' (University of Bristol Law School Blog, 4 December 2017) < <https://legalresearch.blogs.bris.ac.uk/2017/12/the-models-of-parliamentary-sovereignty/> > accessed on the 24 October 2019

<sup>77</sup> Allison (no 19)

of express and implied repeal.<sup>78</sup> The legislative sovereignty of parliament according to this model is predicated on its ongoing acquiescence towards domestic laws passed previously.

First concerning this model, and obliquely connected with this article's questions, it does not deal particularly well with the ideas of absolute and contingent entrenchment of laws, *vis-à-vis* laws that have generally been thought of as carrying some special status making them somewhat beyond reproach (such as Acts of a constitutional character, such as the Bill of Rights [1688], Human Rights Act 1998, and the Parliament Acts 1911-1949). This model of Parliament's legislative sovereignty would prevent the entrenchment of laws and in doing so it would prevent the law from fostering certainty. It remains silent on the authority of a state to legislate more generally, the limitations of that authority, and the connection of those concepts with the notion of legislative sovereignty. If the model permits the repealing of domestic Acts that are substantially constitutional in nature, it does so at the expense of any certainty in the concept of sovereignty. If one adopts the position that laws themselves confer sovereignty on the state as the 'juris diction' requires conformity of the individuals that make up the community.<sup>79</sup> Then the laws which set out the operative definition of sovereignty adopted by the state will invariably be in the same 'juris diction': the same voice of the law. Despite the commonality of forms, it is difficult to reconcile that laws outlining the operative definition of legislative sovereignty are of the same category of diction as any other law. For example, s3(1) of the Human Rights Act 1998 says '[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.' Subject to some *caveats*, this section requires the courts to read all previous and future legislation compatibly with an individual's Convention rights. This provision is somewhat contrary to the ideas of express and implied repeal in that any future will of Parliament must be read in conjunction with (and be compatible with) the provisions in the Human Rights Act 1998. It could be argued that this is a limitation of future Parliament's abilities to create law. It could also be argued to the contrary that the continuing existence of s3(1) of the Human Rights Act 1998 simply shows that the will of Parliament has not changed, and that each successive Parliament agrees to maintain the original status and intention of the Human Rights Act 1998 because each successive Parliament chooses not to alter the Act. In a

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<sup>78</sup> See *Ellen Street Estates Ltd v Minister of Health* [1934] 1 KB 590 *R v Secretary of State for Transport, ex parte Factortame* (No 2) [1991] 1 AC 603.

<sup>79</sup> This sentence amalgamates positions from the earlier mentioned works of Mises, Nietzsche and Douzinas.

sense, this amounts to a skewed form of continuing Parliamentary acquiescence of the content of the statute book up to the present day.

There are potentially enormous political consequences here; if Parliament's authority to legislate includes the inherent ability to legislate extraterritorially, given that there is classically no connection between territorial and legislative sovereignty, there is some similarity to the pre-sovereignty period, and Parliament could be said to be meddling with the concept of universal jurisdiction in all but name. Enacting laws which extend beyond ones territorial borders adopts a view of sovereignty which permits the universalisation of normative values held by a state, and this is distinctly contrary to the post-*Pactum Calixtinum* arrangement of confining law-making powers to jurisdictional borders. This may seem at first glance as a large leap; however, it is recalled that Parliamentary Sovereignty is used to make laws concerning other jurisdictions. The devolved legislatures of Scotland and Wales are permanent features of the UK's constitution<sup>80</sup>, and the British Overseas Territories are often self-sufficient law-makers in their own right.<sup>81</sup> It is difficult to see that other jurisdictions will be politically content with the UK, or any other jurisdiction taking universal jurisdiction and this can be seen in the reaction to Belgium's attempts to do just that. There is a distinctly familiar action inherent here; Mises stated (above) that '[e]ach sect worships its own idol and is intolerant of all rival idols. Each ordains total subjugation of the individual, each is totalitarian.'<sup>82</sup> Here the term 'totalitarian' is not invoked in the pure sense, rather in the loose definition meaning authoritarianism and of monolithic character. If individual states adopt their own domestic law and sovereignty as their idol, and require the subjugation of the individual, the law is, therefore, Mises' totalitarian authority. It is not in the nature of a totalitarian authority to think kindly of any attempt to subjugate it by another, and yet the declaration of universal jurisdiction is exactly that; the subjugation of one state's 'juris diction' by the 'juris diction' of another. Therefore, any extraterritorial law or universal norm foisted on another state is an attempt to usurp the idol of law and idol of sovereignty recognised by that state, by imposing an alternative idol and, in doing so, undermine the state's autonomy to choose its own totalitarian regime, extolling the virtues of its own particular idol. The notion of legislative sovereignty as an idol accompanied by and extant in jurisdictional integrity begins to take shape. It also becomes evident that the

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<sup>80</sup> Scotland Act 1998, Part 2A; Government of Wales Act 2006, Part A1

<sup>81</sup> House of Commons Foreign Affairs Committee, *Global Britain and the British Overseas Territories: Resetting the relationship: Fifteenth Report of Session 2017–19* (HC1464 2019)

<sup>82</sup> L von Mises, *Theory and History: An interpretation of social and economic evolution* (Ludwig von Mises Institute 2007) 251

theoretical idea of legislative sovereignty is intrinsically linked to any discussion on the state's ability to legislate more generally.

### ***Model 2 – Manner and Form Theory***

The second model of sovereignty is somewhat of a half-way house; it develops the rigid ideas that exist in the first model and the orthodox theory, and attempts to move towards a more pragmatic view of Parliamentary Sovereignty. The main aspects of this model are: Parliament can set rules on how it should make law in the future; Parliament can make it more difficult for laws to be amended or repealed; Parliament cannot make it impossible for a law to be amended or repealed; and, all laws are of equal authority and standing, *viz.* no one Act is above any other. In terms of theoretical development, there is now the exacerbated difference between Parliament and the law and this will be explored shortly.

There is a substantial move in both parlance and logic under the second model, towards attempting to make sense of the practical work of Parliament and the theory of sovereignty. It poses, *inter alia*, the idea that Parliament may, if it sees fit, impose conditions on the amendment or repeal requirements of an Act. It does not, *prima facie*, deal in its totality with the issues of laws which set out the premise for the state's sovereign position. There are two fundamental flaws in the logic to be found in this model. First, if Parliament is supreme and it enacts a law which puts conditions on the way future parliaments may repeal the law, then future parliaments would no longer be supreme, they would be subject to the conditions set by earlier parliaments. This creates a perpetuating diminishment of sovereignty with each passing 'conditioned' Act of Parliament.

Secondly, if an Act has special conditions contained within it for its repeal or amendment, then it is no longer on an even footing with all other Acts. If an extraterritorial Act requires that some political discussions are implemented prior to the Act's amendment, then the conditions within the Act limit Parliament's power save for those circumstances where the conditions are met. By setting conditions which future parliaments must abide by, a law has been elevated to a higher status and so there is an inherent contradiction in the logic adopted by components of this model. Moreover, in the case of *Thoburn v Sunderland City Council*<sup>83</sup>, Laws LJ stated, "Parliament cannot bind successors by stipulating against repeal [...] cannot stipulate against

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<sup>83</sup> [2002] EWHC 195

implied repeal” and “[b]eing sovereign, it cannot abandon its sovereignty”. Laws LJ’s comments were supported in the Court of Appeal in the case of *McWhirter v Secretary of State for Foreign and Commonwealth Affairs*.<sup>84</sup> Though this model is a move towards a more pragmatic approach to Parliamentary Sovereignty, it does not deal adequately with the problems that arise when connecting the theory of sovereignty with the action of claiming legislative integrity. If sovereignty as an idol is exalted, then the judiciary is the arbitrator of fact and law and the legislature, and the legislative function is subjugated. It is seen here, as it was earlier, that claiming a notion of Parliamentary Sovereignty as an overarching idol or principle aim confines the legislative function of law-making to be subject to that idol. Therefore, it is apparent here that the theory of sovereignty is not analogous with the function of sovereign law-making powers. Where a theory of sovereignty exists, and is idolised in the manner abovementioned, the practical aspects of law-making are subject to the idol, and the general consensus up to this point is that the judiciary is the appropriate arbitrator<sup>85</sup> when practical law-making contradicts the idol of sovereignty. In relation to the status of Acts of Parliament, Acts such as the Human Rights Act 1998, the Bill of Rights [1688], or the Magna Carta 1297 do in fact occupy a special position in the UK’s statute book because they deal with matters so fundamental to the way that the UK’s society operates that to change them would change the very makeup of the state, its constitution and in a tangential manner, its legislative sovereignty. Practically, this elevates Acts such as these to some form of constitutional level of importance.<sup>86</sup> It is difficult to overstate the impact of laws such as these on the remit of sovereignty.

It is possible here to use the European Communities Act 1972 (ECA) to demonstrate that Acts relating to other jurisdictions do operate in a manner which would seem to elevate them beyond that of a purely domestic piece of law. The ECA fundamentally changed the relationship between the UK and what is now the European Union and, although the ECA has been repealed by the European Union (Withdrawal) Act 2018, s1, substantial savings have been used which have (for the present time) retained much of the substantive function of s2(1) of the ECA.<sup>87</sup>

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<sup>84</sup> [2003] EWCA Civ 384

<sup>85</sup> Although, Finnis may argue that the judges’ role in this level of politico-legal debate has gone too far: J Finnis, *The unconstitutionality of the Supreme Court’s prorogation judgment* (Policy Exchange 2019)

<sup>86</sup> There are some very interesting positions on this point in J McConalogue, *The British Constitution Resettled: Parliamentary Sovereignty Before and After Brexit* (Palgrave Macmillan 2020)

<sup>87</sup> European Union (Withdrawal) Act 2018, ss1, 2-7, 25, Sch 1 and 8; European Union (Withdrawal Agreement) Act 2020 ss1, 2, 25, 36, 42(7), Sch 5; The European Union (Withdrawal) Act 2018 (Commencement No. 4) Regulations 2019; and, The European Union (Withdrawal Agreement) Act 2020 (Commencement No. 1) Regulations 2020

According to this model, the ECA has the same legal status as all other laws and yet in practical terms, it created the legal framework in the UK for the state's membership of the EU.<sup>88</sup> In *R(Miller) v Secretary of State for Exiting the European Union*<sup>89</sup>, the Supreme Court suggested that EU law would have 'no domestic status' but for s2(1) of the ECA, meaning that all EU law directly applicable and directly effective in the UK flows through one section of one Act. This view is shared in the Supreme Court judgement in *Pham v Secretary of State for the Home Department*.<sup>90</sup> If this model is followed, the ECA, and all abovementioned Acts occupy no special status and so can be repealed in the same manner as any other law without savings as to the substantive law which is provided for by s2(1). This is not the exact same position as that adopted in *Thoburn*; however, given that *Pham* is a decision of the Supreme Court, and that the judgment was handed down in 2015, it is difficult to set it aside in favour of the more readily accepted position in *Thoburn*. If, therefore, the savings that have replaced s2(1) are repealed, it would have the legal effect of disapplying all directly effective EU law to the UK; the consequences of such would be beyond complicated as the UK's international relationships and domestic laws would subsist in a state of limbo.<sup>91</sup>

It is surely difficult to adopt a hard-line approach such as this, stating that all laws are equal irrespective of content when the social, legal and political effects of an Act are so far-reaching that they affect all parts of society, law and politics to some degree. It is artificial to say that the purpose of an Act, and its content, does not have a bearing on its status. For example, to say that an Act which governs the legal relationship between the UK and the EU<sup>92</sup> is on the same statutory footing as an Act that makes holding a fish in suspicious circumstances illegal<sup>93</sup> is difficult to comprehend logically. It is also arguable that an Act which purports to operate extraterritorially, or universally even, should have a similar degree of solemnity that comes with its intention. The purpose of the Act is to interfere to some extent with the jurisdictional integrity of another state and impose an ulterior idol, at least as an equal to that adopted by the recipient state. Therefore, asserting that all laws are equal is disingenuous and produced an unworkable theoretical framework of domestic laws in a global environment. It does not

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<sup>88</sup> C Burke, Ó Hainneson and K Bangsund, 'Life on the Edge: EFTA and the EEA as a Future for the UK in Europe' (2016) 22(1) European Public Law 69

<sup>89</sup> [2017] UKSC 5

<sup>90</sup> [2015] 1 WLR 1591, at [80]

<sup>91</sup> There are no express requirements that need to be met for the ECA to be repealed and the second model is silent on the existence of implied conditions emanating from unwritten constitutional rules or conventions.

<sup>92</sup> *ibid*

<sup>93</sup> Salmon Act 1986, s.32



address those laws which deal with fundamental matters so important that they could be considered constitutionally or geopolitically sensitive. Beatson J has previously said that the Government of Wales Act 2006 and the Human Rights Act 1998 both enjoyed a ‘constitutional status’ in the UK, thus the notion of constitutional statutes can be extended to include those dealing with devolution.<sup>94</sup> Laws of the UK Parliament have specifically asserted that the legislatures of Scotland and Wales are permanent features of the UK’s constitution.<sup>95</sup> The content of these laws and their reception by the courts indicates that they are included in the greater body of law that maps out the UK’s legislative sovereignty and its constitutional nature. If those devolved institutions are permanent institutions, one may reasonably assume that the UK Parliament has confined its own legislative sovereignty in relation to those devolved institutions’ competence. If this is true then model two cannot be accepted without *caveat*.

### ***Model 3 – Unintended Constraints***

The final model aims to draw certainty from the concept of sovereignty but in doing so forgoes part of its own being. This model sees legislative sovereignty concede power to a higher form of rule which controls the ability to make laws. The third model states that: the constitution may contain rules so fundamental that they cannot be removed even by Parliament, and relies on a notion summarised by Lord Denning MR as ‘[f]reedom once given cannot be taken away. Legal theory must give way to practical politics’<sup>96</sup>. It also asserts that a hierarchy exists whereby Parliament is supreme and beneath it is a set of constitutional principles that *de facto* bind Parliament. Finally, the courts should uphold these limits on the UK’s Parliament.

This model moves away from the theoretical aspects found in the orthodox doctrine and attempts to utilise the UK’s unwritten constitution to resolve the debate around the extent of Parliament’s power as sovereign law-maker. However, that does not assist with establishing a coherent theoretical framework which sets out the extent and makeup of legislative sovereignty in the UK. One particular issue with this model is that the UK’s constitution is unwritten and so stating that rules exist within the constitution which governs Parliament’s operation is difficult to discuss at length except in the abstract. This is not uncommon, earlier Kelsen’s

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<sup>94</sup> *R (on the application of Brynmawr Foundation School Governors) v Welsh Ministers* [2011] EWHC 519 (Admin) at [87]; also, see Scotland Act 2016 and Wales Act 2017

<sup>95</sup> Scotland Act 1998 s.63A (inserted by Scotland Act 2016 s.1); Government of Wales Act 2006 s.A1 (inserted by Wales Act 2017 s.1)

<sup>96</sup> *Blackburn v Attorney-General* [1971] 1 WLR 1037

*grundnorm* was mentioned<sup>97</sup> as was the debate as to whether the *grundnorm* is hypothetical or a discernible normative value. In terms of discerning a content and remit of sovereign law-making power, the assertion that the mysteries of the common law contain untapped resources is unenlightening. It is commonly acknowledged that rules exist in the constitution which are so fundamental that they influence Parliament. It is, however, a step further to argue that the rules bind Parliament; if this is the case, then Parliament is no longer sovereign, it is subject to the unwritten constitution that has evolved in the UK over centuries and so the parliaments of previous years which have established these rules have curtailed the powers of the modern-day Parliament. If this was true, the UK would enjoy a form of constitutional sovereignty which was attributed to an unwritten constitution, and can therefore not be reconciled with notions of certainty in matters of a constitutional nature.<sup>98</sup> The difficulty with this disparity is that a curtailment of parliamentary powers may also impact on its legitimate ability to legislate absolutely; it is no longer the supreme parliamentary authority that has previously been discussed. The version of sovereignty which this model concedes is the restrained, emasculated Parliament subject to unwritten, and therefore unquantifiable, rules. There is a degree of operational sense in this, however. The rule of law consists of certain principles – beyond that little more can be agreed upon by theorists of varying substantive and formal positions.<sup>99</sup> Yet the rule of law is invoked when the question turns to the state's fair, just and reasonable behaviour.<sup>100</sup> However, there is more than a semantic difference between declaring that the government has behaved contrary to the rule of law – as was seen in the recent case of *R(Miller) v The Prime Minister*<sup>101</sup> – and that Parliament itself has behaved contrary to the rule of law.<sup>102</sup> It could be argued here that the time has come to set aside the concept of Parliamentary Sovereignty for the sovereignty of the rule of law; however, the difficulty here remains albeit in a different guise *viz.* what therefore is the metaphysics of the rule of law, what are its

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<sup>97</sup> Kelsen, (no 31)

<sup>98</sup> JEK Murkens, 'The Quest for Constitutionalism in UK Public Law Discourse' (2009) 29(3) *Oxford Journal of Legal Studies* 427

<sup>99</sup> In relation to the rule of law for example, see P Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1996) in R Bellamy, *The Rule of Law and the Separation of Powers* (Routledge 2005)

<sup>100</sup> R Rawlings, P Leyland, and A Young, *Sovereignty and the Law: Domestic, European and International Perspectives* (Oxford University Press 2013)

<sup>101</sup> *R(Miller) v The Prime Minister* [2019] UKSC 41

<sup>102</sup> JEK Murkens, 'Democracy as the legitimating condition in the UK Constitution' (2018) 38(1) *Legal Studies* 42

epistemic<sup>103</sup> or axiological<sup>104</sup> positions – if any. How does one take a hermeneutical approach to the rule of law<sup>105</sup>, or how are the tensions between formal and substantive concepts on the rule of law reconciled to give some certainty to its content. This subject does deserve its own discrete research as this may devise a suitable alternative to the concept of legislative sovereignty, which is fraught with theoretical difficulties and historical idiosyncrasies.

Secondly, Lord Denning MR stated that ‘[I]legal theory must give way to practical politics’<sup>106</sup>. This statement assumes that there is a definite line between politics and the law. Contrary to this, the Houses of Parliament are where politics enters, and law emerges and so attempting to establish any definite line beyond that is very difficult, even artificial. Debates in chambers and Houses of Parliament revolve around party politics and personal agendas, though the instruments being debated will become Acts of Parliament and so politics and the law are intrinsically linked. This suggests that, even on a domestic footing, politics is a fundamental part of the process of making law, and that it would be naive to think that making law could be separated from political discourse in the manner inferred by the quote above. Notwithstanding this point, there is a more substantive aspect to the statement by Lord Denning which warrants consideration. The notion of offering something and not being able to retrieve it certainly has a political aspect to it; it would be politically egregious to attempt to withdraw competency from, say, a devolved Parliament against that Parliament’s will. The political aspect is only one part to this issue. For example, if the UK’s Parliament did hold an orthodox form of Parliamentary Sovereignty, then Parliament could legislate to withdraw powers after those powers have been devolved. This assertion may have been argued in history; however, it now has a distinctly colonialist flavour to it. Indigenous people lived in the Americas prior to colonisation and were in many cases nomadic. The UK and Holland (primarily but not solely), saw the nomadic approach to living, and the different style of authority and government as being an absence of land ownership and a lack of government.<sup>107</sup> The Americas were seen as unoccupied and, as the European colonialists perceived their interpretation of land ownership and government as universally recognisable, any nomadic or alternative government structures

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<sup>103</sup> E Tjong Tjin Tai, ‘Rule of Law and Legal Epistemology’ in E Feteris, H Kloosterhuis, J Plug and C Smith(eds), *Legal Argumentation and Rule of Law* (Eleven 2016)

<sup>104</sup> L Zhang, ‘The Connotation of Rule of Law: In the View of Axiology’ in D Li (ed), *Values of Our Times* (Springer 2013)

<sup>105</sup> F Dallmayr, ‘Hermeneutics and the Rule of Law’ (1989-90) 11 *Cardozo L. Rev.* 1449; S Glanert and F Girard (eds) *Law’s Hermeneutics: Other Investigations* (Routledge 2016)

<sup>106</sup> (no 96)

<sup>107</sup> A Bertrand, ‘A colonial factory of property rights: contribution to an archaeology of naturalism’ (2018) 1(1) *Revue Québécoise de Droit International* 5

were considered free from ownership and could be taken and colonised.<sup>108</sup> To argue against Lord Denning MR is to align one's argument with that which justifies colonialism, and in today's society it is rightly abhorrent to do so. The removal of powers that have been handed back to a jurisdiction, or that have been devolved is akin to imposing an idol (as has been mentioned above) on the subjected state or sub-state jurisdiction. The act of imposing an idol on another state is akin to colonisation without physical invasion; the command that a state or sub-state submit itself to the idol of another is the modern incarnation of imperialism and colonisation, without the reliance on ships and artillery. One matter which would require its own investigation here, is whether a sub-jurisdiction inherits the protections suggested under the Westphalian principles, or whether these should be reserved for recognised states.

Thirdly, the statement that Parliament is supreme and yet is controlled by a subordinate set of rules does not fully equate as a logical statement. If Parliament is supreme then only the present Parliament assembled can govern itself, and if there are a subordinate set of rules governing the way that Parliament operates then by virtue of the rules being subordinate, they can, therefore, be changed. If the rules can be changed by Parliament, it is proposed that these suggested rules are guidelines and as such cannot bind Parliament, though it may choose to abide by them. For example, Erskine May's *Treatise*<sup>109</sup> sets out the rules and procedures of Parliament. To assert that these rules bind Parliament is to denounce Parliamentary Sovereignty in its entirety. The rules stipulated in the *Treatise* are rules which describe or specify the working practices of Parliament itself. Paragraph 11.1 states that:

Those powers can be briefly described as: (for the Commons in particular) the power to control taxation and expenditure and to authorise numbers for defence services; the power to legislate; powers to enforce the authority of each House (penal jurisdiction); and power to control their own precincts and proceedings, and power to control aspects of their own membership (exclusive cognizance).

To assert that Parliament is bound by this description is to trivialise Parliament's authority, yet to take the opposing view *viz.* that Parliament can change any of these rules is also naive to the

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<sup>108</sup> *Mohegan Indians v Connecticut* (1705–1773); MD Walters, 'Mohegan Indians v. Connecticut (1705-1773) and the Legal Status of Aboriginal Customary Laws and Government in British North America' (1995) 33(4) *Osgoode Hall Law Journal* 785

<sup>109</sup> Erskine May, *Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (25<sup>th</sup> edn 2019) available online < <https://erskinemay.parliament.uk/> > last accessed 8 November 2019

reasons for their longevity and seemed permanency. The answer must lay in the myriad of options between the two extremes.

Finally, in respect of the courts upholding the limits on Parliament, if Parliament is supreme, the courts have no authority to limit its power or enforce rules on it. In practical terms, would the courts ever see it as their role to intervene in the authority of the democratically elected law-making body? It has been argued in popular media that the courts have already taken on the role of controlling Parliament to some degree as seen in the case of *R(Miller) v Secretary of State for Exiting the European Union*.<sup>110</sup> However, the Supreme Court was concerned with the remit of the government as an executive agency and the use of a prerogative power to begin a chain reaction that would lead to a loss of individual rights; not the authority of Parliament to legislate on what it sees fit. One divergent matter is the courts' power to make orders which apply beyond its jurisdictions. This is beyond the remit of this article; however, it is worth noting that some common law offences such as murder are extraterritorial<sup>111</sup>, and that there may be further need to consider the notion of judicial authority in framing a metaphysical understanding of legislative supremacy, or to consider the metaphysics of judicial law-making. It does leave the distinct impression nevertheless, that the role of the courts is also changing and that no current model of sovereignty adequately explains the adaptability of Parliament or the courts.<sup>112</sup>

Model three has clearly developed to try and provide a pragmatic solution to the UK's unique constitutional situation and the role of Parliament in it; it does offer some interesting points to consider, though there are shortfalls in its ability to adequately describe the constitutional role of the courts, and to map the relationship between Parliament and constitutional rules and conventions. It does not, however, give much assistance in answering the question of whether Parliament has a workable model of sovereignty that has any metaphysical structure supporting its practical nature. It does suggest that theory seems to be out of kilter somewhat with the practical work of Parliament as a legislator, and that there is a lack in orthodox and developed theories of Parliamentary Sovereignty, or acknowledgement of the political and geopolitical

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<sup>110</sup> [2017] UKSC 5

<sup>111</sup> Extensive further discussions on this point can be found in D Hovell, 'The authority of universal jurisdiction' (2018) 29(2) *European Journal of International Law* 427; C O'Meara, 'Should international law recognize a right of humanitarian intervention?' (2017) 66(2) *International & Comparative Law Quarterly* 441; K Grady, 'International crimes in the courts of England and Wales' (2014) 10 *Criminal Law Review* 693; *R. v Venclovas (Rimas)* [2013] EWCA Crim 2182.

<sup>112</sup> R Masterman and S Wheatle, 'Unpacking separation of powers: judicial independence, sovereignty and conceptual flexibility in the UK constitution' (2017) 3 *Public Law* 469

aspects of law-making, and the interconnected nature of legislative jurisdictions across the globe. The approach taken by this model is arguably inconsistent with the term sovereignty *viz.* if Parliament is controlled by the constitution and by the courts it cannot be sovereign in the truest of senses. This model could, therefore, be better described as constitutional sovereignty with a subordinate or subjugated Parliament. In order for this model to proceed along that line, the UK would need to absolve itself of its infatuation with the sovereignty of Parliament and that is unlikely in the near future. The move towards sovereignty of the constitution, or as previously mentioned, of the rule of law has its own difficulties to overcome as the UK could be said to possess a semi-written, uncodified constitution.

### **Sovereignty as a Metaphysical Concept**

Two matters will be considered in this section: first, whether sovereignty is metaphysical in nature, and secondly whether the rule of law is a more appropriate metaphysical source of authority.

It is noteworthy that the progress through the models above has drawn a clearer notion of legislative sovereignty as a metaphysical conception<sup>113</sup>, which consists of statutes that form the remit of a state's sovereign power. It is also noteworthy that the notion of an idol seems to be multifaceted in relation to legislative sovereignty. There appears to be a concept consistent with an idol and each stage in the hierarchy: the idol of each statute, the constitutional idol, and the idol of sovereignty at a more metaphysical level. In deference to Kelsen's *grundnorm*<sup>114</sup>, the use of the idol at 'sovereignty level' creates a normative proposition of legislative sovereignty which is metaphysical *viz.* it is *synthetic a priori*<sup>115</sup> because it is beyond experience and requires reason<sup>116</sup> to discern it. Incidentally, whether the *grundnorm* as Kelsen saw it is metaphysical or not is a matter of much long-standing debate.<sup>117</sup> However, the content and remit of legislative

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<sup>113</sup> Discussed further below

<sup>114</sup> H Kelsen, *Pure Theory of Law* (Max Knight tr, 2<sup>nd</sup> edn, University of California Press 1967)

<sup>115</sup> Kant (no 4)

<sup>116</sup> Here the reference is to Hegelian *aufheben*, or to sublimate – see GWF Hegel, *The Science of Logic* (AV Miller tr, Oxford University Press 1977) p.82-3, and *The Encyclopedia Logic: Part 1 of the Encyclopaedia of Philosophical Sciences* (TF Geraets, WA Suchting, and HS Harris trs, Hackett 1991) paras.86-88

<sup>117</sup> For example, JW Harris, 'When and Why Does the Grundnorm Change?' (1971) 29(1) *The Cambridge Law Journal* 103; J Raz, 'Kelsen's Theory of The Basic Norm' in J Raz, *The authority of law: Essays on law and morality* (Clarendon Press 1979); W.E. Conklin, *The Invisible Origins of Legal Positivism: A Re-Reading of a Tradition* (Kluwer Academic Publishers 2001) 175; P Langford, I Bryan and J McGarry, *Kelsenian Legal Science and the Nature of Law* (Springer 2017) 68; B Bix, 'Kelsen, Hart, and legal normativity' (2018) 34 *Revus*; T Spaak, 'A Challenge to Bix's Interpretation of Kelsen and Hart's Views of the Normativity of Law' (2019) 37 *Revus*.

sovereignty is unique to each state and is predicated on the idol adopted and exalted as the totalitarian constitutional law against which all are subject, even the state's ultimate legislature. This article will briefly consider the arguments above to consider further to what extent sovereignty is a metaphysical concept. Here the author will turn to Kantian Transcendental Idealism (TI) to demonstrate this point further. Above, it was stated that TI aims to separate an object's actual existence (the noumena), from one's appreciation of that same object (the phenomena).<sup>118</sup> Through TI, Kant argues that it is difficult, if not impossible to comprehend the noumenal object as our antecedent knowledge impacts our understanding<sup>119</sup>, reasoning and acquisition of new knowledge. For example, if one was to attempt to describe a football, this would require an understanding of an abstract football<sup>120</sup>, physics (insofar as it pertains to the spherical shape of a ball, its ability to bounce and physical characteristics), the concepts of space and time to determine one's distance or proximity to the football, amongst many other things. Without this antecedent knowledge, it is not possible to comprehend the item.

If there is some error, misunderstanding or shortcoming in the antecedent knowledge, this can impact on the appreciation of the object itself, and so the noumena and phenomena can become distinctly different. Applying this to legislative sovereignty; it can be argued that one's antecedent knowledge will shape one's view of sovereignty, and therefore the noumena of sovereignty is distinct from the phenomena of sovereignty. That is to say that legislative sovereignty that one imagines, or has in mind, or sees in action in Parliament, is not the same as the noumenal concept of sovereignty which is arguably beyond appreciation in its raw state. Any view of sovereignty is predicated on the total knowledge help by the person seeking to comprehend it, and is subject to any shortcomings that the person's antecedent knowledge is harbouring. As sovereignty is not a physical singular item, rather a concept which is a term for a set of powers, deconstructing (in the Derridean sense<sup>121</sup>) sovereignty requires a brief consideration on the limitations of understanding. Hegel sees understanding as a form of knowledge and knowing whose principal role is the dismantling and categorising of matters of

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<sup>118</sup> Here the term 'noumena' refers to Kantian Idealism and the separation of the object itself from our perception of the object. See I Kant, *Critique of Pure Reason* (JMD Meiklejohn tr, Dover Philosophical Classics 2003) ; and L Allais, 'Kant's One World: Interpreting 'Transcendental Idealism'' (2004) 12(4) *British Journal for the History of Philosophy* 655

<sup>119</sup> Here the term understanding is used in the Hegelian sense, see G W F Hegel, *Encyclopedia of the Philosophical Sciences in Basic Outline: Part 1; Science of Logic* (K Brinkmann and D O Dahlstrom trs, Cambridge University Press 2010)

<sup>120</sup> As seen in Plato's idealism, J Dunham, I Hamilton Grant, S Watson, *Idealism: The History of a Philosophy* (Routledge 2011)

<sup>121</sup> J Derrida, *Dissemination* (B Johnson tr, Continuum 1972); J Derrida, 'Force of Law' (M Quaintance tr) in D Cornell, M Rosenfeld, and DG Carlson (eds) *Deconstruction and the Possibility of Justice* (Routledge 1992)

interest into their component parts.<sup>122</sup> This form of labelling and of understanding the whole by virtue of understanding its component parts is of limited use. According to Hegel, who was caustic about the age-old retreat to the safety and certainty of understanding at the expense of reason:

To see that thought in its very nature is dialectical, and that, as understanding, it must fall into contradiction — the negative of itself — will form one of the main lessons of logic. When thought grows hopeless of ever achieving, by its own means, the solution of the contradiction which it has by its own action brought upon itself, it turns back to those solutions of the question with which the mind had learned to pacify itself in some of its other modes and forms. Unfortunately, however, the retreat of thought has led it, as Plato noticed even in his time, to a very uncalled-for hatred of reason (misology); and it then takes up against its own endeavours that hostile attitude of which an example is seen in the doctrine that ‘immediate’ knowledge, as it is called, is the exclusive form in which we become cognisant of truth.<sup>123</sup>

Given that understanding will fail to produce an adequate knowledge of the whole, according to Hegel, it is reasonable to apply this to the concept of sovereignty and state. Understanding the component parts of the concept (that is the component powers), or even understanding its idol in isolation, does not lead to a complete view of the concept of legislative sovereignty, rather it produces a view marred by understanding and limited by one’s own antecedent knowledge. It is through reason alone, therefore, that one can attain a more suitably complete concept of sovereignty, reason that is not predicated on our experience (as this would potentially lead to additional TI issues in experiential limitations), rather reason by virtue of logical argumentation and thought. It is on this basis that this author contends that true knowledge of legislative sovereignty, and the idol that it represents is *synthetic a priori*<sup>124</sup>. It is *a priori* as discerning the idol on which sovereignty is based is not predicated on experience but by the use of logical reasoning. Furthermore, the idol of sovereignty is *synthetic* as the idol of sovereignty is not contained in the body of law-making powers which make up any version of sovereignty discussed in this article. To this extent, the idol that sovereignty is currently pursuing is predicated on, or benchmarked against, the terms of sovereignty set out in Dicey’s orthodox theory. It is against this orthodox that many concepts are benchmarked – it is against

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<sup>122</sup> Hegel (no 119)

<sup>123</sup> *ibid*

<sup>124</sup> P Minkinen, *Sovereignty, Knowledge, Law* (Routledge 2009) ch 3



this orthodox that the author has benchmarked the models above also. This form of privileging is discussed at length by Derrida who argues that human knowledge is predicated on a privileging of one form of knowledge over another. Understanding is privileged over reason as understanding produces certainties and quantifiers; speech is seen as authentic and writing as a transcript of oral discourse; certainty is privileged over ambiguity and the sense of *aporia*.<sup>125</sup> The extent of privileging in the conceptualisation of sovereignty, even within this article, requires dedicated research of its own. However, acknowledging that one's notion of sovereignty is predicated on privileging, is tainted by the need to reduce abstract principles to quantifiable understanding, and is affected by TI, goes some way to demonstrating that analytical knowledge and reliance on *a posteriori* knowledge will not produce noteworthy progress towards a renewed reflection on the idol of sovereignty. The likely development of the concept, idol and, as a result of this, framework of legislative sovereignty is predicated on the development of *synthetic a priori* reasoning, and this author argues that this development lies substantially beyond the realm of jurisprudence, drawing on broader philosophical theory to assist with developing a greater depth of knowledge of sovereignty and its idol. The second and final matter to consider in this part is whether legislative sovereignty should give way to the sovereignty of the rule of law, and whether the rule of law can be considered a form of universal jurisdiction. The difficulty with dealing with this matter in brief, is that it yearns for extensive consideration; whether legislative sovereignty should be considered an unworkable fallacy; is the rule of law, metaphysical; and, should the rule of law be recognised as having universal jurisdiction are each areas of research in their own right. However, there are some comments that can be made with reference to the matters that have arisen in the argumentation in this article. The rule of law suffers its own conceptual difficulties with few agreeing on whether the rule of law is formal or substantive in nature<sup>126</sup>. Many of the same points made above in relation to sovereignty can be made in relation to the rule of law; rather the restate these, more focus will be levied on whether the rule of law could be the substantive fit for Kelsen's *grundnorm*<sup>127</sup>. The problem that arises here, even if the rule of law is devoid of content for the sake of not entering into formal and substantive arguments, is asserting the rule of law has some universal jurisdiction is asserting that one's idol of the rule of law (and its individual

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<sup>125</sup> J Derrida, 'Force of Law', in D Cornell, M Rosenfeld and D Gray Carlson, *Deconstruction and the Possibility of Justice* (Mary Quaintance tr, Routledge 1992); J Derrida, *Aporias* (Thomas Dutoit, Stanford University Press 1993)

<sup>126</sup> Craig (no 99)

<sup>127</sup> This is discussed further by May in C May, 'The rule of law as the *Grundnorm* of the new constitutionalism' in S Gill and AC Cutler (eds), *New Constitutionalism and World Order* (Cambridge University Press 2014)

flaws as seen above) should be recognised and followed by others. Again, one could mark the difference between the noumenal rule of law and that which is phenomenal and subject one each person's individual limitations as thinkers. The same issues seem to arise when one considered the universalisation of any concept which is subject to differing opinions and subject the inherent limitations of human understanding. However, this does leave a substantial scope for further research and development.

## Conclusion

At the outset, this article used a quote from Lord McConnell of Glenscorrodale regarding the pooling of sovereignty to achieve common goals. This concept of pooling appears to be more complex than one may have imagined; to suggest that sovereignty can be pooled it to award sovereignty some noumenal<sup>128</sup> existence beyond that conceptual understanding to which this author has turned his attention. Further research is warranted on the discussion of sovereignty possessing a noumenal state and what that may be. This article has, in considering the metaphysical discussions around legislative sovereignty, partly entered into the noumenal / phenomenal distinction when searching for the first principle of legislative sovereignty, but this cannot be afforded further discussion here. However, it transpires that the conceptual development of sovereignty has fundamental metaphysical flaws in its current incarnations. This is to be expected given that the legislative sovereignty has a far more recent origin than the older notion of universal jurisdiction, even if universal jurisdiction appears to be politically difficult at the present time. Perhaps Lord McConnell's quote provides an option for theoretical and reform in the future. This author has suggested above that there seems to be a reluctance to modernise the concepts around legislative supremacy, to adopt a concept of the supremacy of the rule of law, or constitutional sovereignty with a subordinate legislator. A conceptual understanding of a malleable form of sovereignty, which can be effectively separated from territorial sovereignty and therefore be extant in many places at the same time, is one means of achieving a modern view of sovereignty.<sup>129</sup>

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<sup>128</sup> Kant (no 4)

<sup>129</sup> V Bogdanor, *Beyond Brexit: Towards a British Constitution* (Bloomsbury 2019); M Loughlin, *Foundations of Public Law* (Oxford University Press 2010); M Johnson, 'Parliamentary Sovereignty: Brexit and Schrödinger's cat' (University of Bristol Law School Blog, 23 January 2019) <<https://legalresearch.blogs.bris.ac.uk/2019/01/parliamentary-sovereignty-brexit-and-schrodingers-cat/>> accessed on the 18 November 2019

It appears to be the case that legislative sovereignty is a form of idol. It is not necessary to revisit the full discussion here in relation to the idol of sovereignty, save to say that it is possible that each jurisdiction will hold an idol of sovereignty unique to them. This would pose a problem for a new malleable model of sovereignty, and also for the action of pooling sovereignty. If there is a fundamental discrepancy between idols, this could cause friction between idols when they are pooled together unless the pooling of sovereignty is described as the coming together of sovereignty whilst retaining the individuality of each jurisdiction's idol. This concept is discussed here in the abstract and could benefit from further discrete consideration. The idol of legislative sovereignty was also discussed as a metaphysical proposition, which in Kantian terms is *synthetic a priori*. It is *synthetic a priori* as it is beyond one's experiential knowledge but requires reason to develop and understand the idol as set out above. This is a useful proposition; it separates the experiential function of sovereignty (the making of laws which is within the experience of those conducting the function, and those observing the function) from the notional idol. The notional idol is the premise which guides those who make law, the noumenal form of legislative sovereignty. The comparison is made here with the work of Kelsen and the *grundnorm* as a proposition which spawns phenomenal legal norms, but which is not itself a phenomenal norm.

To turn to a semantic issue next; the words 'supreme' and 'sovereign' indicate statuses with no superior or equal, and this is partly the stumbling block. The concept of supreme law-making is now content-specific. It is commonly accepted that one state cannot legislate universally, as this is beyond their competence. It has been argued above that a unitary Parliament cannot legislate on devolved matters as doing so reinvigorates the long-since defunct justifications for colonisation, and undermining notions of egalitarianism amongst legislators' competency. It is, therefore, now only true to suggest that sovereignty exists within the context of individual powers retained wholly by the UK Parliament, and yet no model adequately offers a nuanced view of sovereignty to align with this. The malleable concept of sovereignty suggested in this article would potentially address this issue. If the UK Parliament's sovereignty is extant but functioning by democratically elected representatives in Scotland, Wales and Northern Ireland, then it is also fair to say that the same could apply to the European Parliament. The fact that sovereignty is not wholly exercised in the territorial boundaries does not mean that it is not exercised in conjunction with the wider legislative sovereignty of the state. The reluctance to forgo the Victorian theories in favour of a nuanced view of legislative authority which is content and context-specific is regrettable. It is for legal educators and jurists alike to throw off

the shackles of unworkable models of sovereignty in favour of a post-colonial, forward-thinking model, cognisant of its historical development and also of its modern incarnation.

The ability to comprehend sovereignty as a set of powers, detached from the jurisdiction that they operate in, and as such movable is key to making the notion of pooling of sovereignty work without creating universal jurisdiction or rights to legislate extraterritorially. It may even be possible to run two parallel concepts of sovereignty to satisfy the discussions earlier in this article: legislative sovereignty as a separate entity functioning in domestic, supranational and intergovernmental organisations; and, the sovereignty of the rule of law as a domestic, or even a universal jurisdiction. These concepts all require further research to contribute to the broader discussion which, especially given that EU law is retained by virtue of savings despite the repeal of the ECA. This procedural repeal, masking a substantive retention offers little assistance to the metaphysical discussions on legislative sovereignty. A quote often attributed to Seneca is recalled which exclaims ‘[w]e let go the present, which we have in our power, and look forward to that which depends upon chance, and so relinquish a certainty for an uncertainty’.<sup>130</sup>

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<sup>130</sup> MM Ballou, *Treasury of Thought: Forming an Encyclopedia of Quotations from Ancient and Modern Authors* (Houghton Mifflin 1884) 521