



Conflicts Between Community and National
Laws: An Analysis of the British Approach

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Abstract

The paper attempts to study the problem of conflicts between the UK and Community law from a broad legal, historical and political perspective. Initially, the sovereignty in the international law; the European and British legal thought; and finally in the UK constitutional doctrine is analysed. The classical Diceyan explanation is confronted with the principle of supremacy of the Community law, together with the debate on contemporary definition of the Sovereignty of Parliament (e.g. in the light of devolution) and on the British membership in the European institutions. To conclude, the British constitutional system as a whole has been deeply influenced by accession to the EEC, which limited legislative monopoly of the Parliament and imposed the obligation to give precedence to the directly applicable provisions of the Community law. Nevertheless, the British approach to the Community obligations has made possible to protect the national competencies with considerable effectiveness.

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Introduction

Sovereignty is a central issue of the European integration. Although the European Coal and Steel Community was inherently supranational organisation, the integration has been founded by six independent states. Paradoxically, the economic success of the Community transferred the most vital problems of membership from the field of economy to the political domain. The price to be paid for tightening the cooperation was loss of the competencies so far reserved for the sovereign states. The integration designed to strengthen and stabilise the West European states eventually has challenged the concept in a whole of continent. The law is one of the most important instruments of either deepening the continent's unity or protecting the old structures.

The United Kingdom of Great Britain and Northern Ireland¹ is a distinguishable member of the EU according to the criteria of population, territory, economy and - last but not least - influence. Its approach to the issues of the legal integration is recognisable and what is equally important – well discussed by the academic and practicing lawyers. The European challenge for the national independence has in the British context a dramatic impact on the home affairs. Therefore the paper makes effort to describe the concept of sovereignty in the historical and legal context and to characterise the British distinctiveness. According to the well-established tradition of at least three centuries, the Parliament may be described as a buckle fastening together all the parts of the constitutional system. In the end (according to such logic) the limitations imposed by the Communities in the sphere of legislation cannot be separated from, for instance, decrease of its role of the sole law-maker within the UK in the context of devolution.

Having defined initially the doctrine of sovereignty in the international law; the continental; and the insular legal tradition, the paper studies the title question, which constitutes a few detailed problems considering the provisions of the *European Communities Act 1972*; the doctrine of supremacy of the EU law; the judicial practice of the British membership; the parliamentary debates on the EC membership and, finally, the procedure of implementation of the Community law. The adoption of the doctrine of supremacy of the EU law by the UK courts has been preceded by the long-lasting efforts not to surrender the constitutional tradition.

The paper intends to show that the United Kingdom has been trying to defend its constitutional doctrine from the direct conflict with the Community law. Such attempts were visible in the rulings of the British courts. However, the conduct of parliamentary debates in 1960s-1970s proves that this aim was to be achieved within the frames of the UK membership in the European Communities. Moreover, the challenges for the parliamentary supremacy formulated, for instance, by the regional representative bodies or by the judiciary became greatly strengthened during the European integration process. The final outcome is a deep need for the constitutional changes, institutional and doctrinal. Nonetheless, the process of implementing (even if not entirely voluntarily) of the EU law in the UK constitutes a practical (even though limited) instrument of protecting the national interest.

¹ For the purposes of the present paper, the names of the United Kingdom and Great Britain are considered synonymous.

Definition of sovereignty in the domestic and international law

The *Dictionary of English Law* defines sovereignty (sovereign power) as a power in a state to which no other is superior.² However, this is a complex issue. According to the *Oxford Dictionary of Law*, sovereignty means the supreme authority in a state, which is vested in the institution, person, or body that is able to impose law on everyone else in the state and to alter any pre-existing law. The particular way in which it is exercised varies according to the political nature of the state. The executive, legislative and judicial powers may be exercised by different bodies or one of these bodies may retain sovereignty by having ultimate control over the others (e.g. Parliament in the UK). According to the international law, all states should have supreme control over their internal affairs, with exception of limitations imposed by the international law, in particular in the domain of human rights and the law of armed conflicts. No state or international organisation may intervene in matters that fall within the domestic jurisdiction of another state.³

The continental international lawyers define sovereignty of state as conditional on the independence from any external influence, and on the omni-competence, i.e. ability to regulate by law any domain within the state (e.g. L. Ehrlich).⁴ It also means the monopoly of state to rule and govern within its territory (territorial sovereignty). The critics of the abovementioned classical definition emphasise that the attempts to define sovereignty as an unlimited supreme power is anachronistic (e.g. R. Bierzanek, J. Symonides). In their view the problem of sovereignty is of practical nature and not of formal one.⁵ The limits of sovereignty are established by the sovereignty of other states and by the international obligations accepted by the state (in the international relations an absolute sovereignty does not exist). The abovementioned legal definition does not need to comply with the political and economic aspects of the phenomenon.⁶

Historical evolution of the doctrine of sovereignty

The historical roots of an idea of sovereignty stretch back to the fall of the Roman Empire and the attempts to re-establish the universal order in Europe. The conflict between papal and imperial powers to rule the Christendom was a characteristic element of the medieval political universe. In reaction, the local monarchs were willing to establish both a monopoly of regulation and control over their domains and free themselves from the constraints imposed by the potential superior rulers. Louis the Fair of France sponsored a prominent trust of legal scholars to support his claims of sovereignty. The concluding postulate of the era was to proclaim a king to be a holder of

² *Dictionary of English Law*, ed. Earl Jowitt, C. Walsh, Sweet and Maxwell, London, 1959, vol. 2, p. 1656.

³ *Oxford Dictionary of Law*, ed. E.A. Martin, Oxford University Press, Oxford-New York, 2002, p. 469.

⁴ J. Gilas, *Prawo międzynarodowe*, Comer, Torun, 1995, p. 119.

⁵ R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne*, Lexis-Nexis, Warszawa, 2002, s. 121.

⁶ W. Góralczyk, *Prawo międzynarodowe publiczne w zarysie*, PWN, Warszawa, 2002, s. 124. For instance, the doctrine of neo-colonialism assumes that the relations of formally independent former colonies with the highly developed countries remain of subordinate nature from the economic and political point of view.

the supreme power - “*Rex Imperator in regno suo*”.⁷

The political scene of modern Europe was to be dominated by a system of nation states of a new type: based on one dominant nation or (group of nations), promoting its language, culture and the institutions.⁸ The system reached mature shape in the result of the Thirty-Year War. The legal and political thinkers, such as Jean Bodin⁹ and Hugo Grotius¹⁰, codified the set of arguments defining sovereignty. An idea that the interest of a state constitutes independent and supreme being (*raison d'état*) was supported by Niccolo Machiavelli. However, it were the works by Jean Jacques Rousseau that popularised a century later the popular sovereignty, opposed to the royal one. The French Revolution constituted a breakthrough in the sphere of practice.¹¹ The nation state became one of the highest values of 19th-century politics which may be illustrated by the Italian and German reunification in 1850s to 1870s. Moreover, the political map of Europe has been radically redesigned by the creation of new nation states in the course of one hundred years between the congresses of Viena and Versailles.

The Second World War proved that the consequences of misuse of sovereignty understood as an unlimited supreme power can be most disastrous, for the atrocities that took place endangered not only the existence of great social or ethnic groups inside the independent states, but also the international community as a whole. Such observations led to creation of the international organisations aimed to solve the conflicts (e.g. the UN). The precedent rulings of the Nuremberg and Tokyo Trials have also established limitations of sovereignty based on the protection of human rights¹². On the other hand the two-pole nature of after-war world order and the globalised economic development (especially in the Western block; after the Cold War - universally) created the new conditions for economic and political integration as the concept of inter-dependability and pooled sovereignty has been developed. It is argued that since the sovereignty practically postulates an ability to effectively control the nation's fate, it is necessary, under conditions of global politics and economy, to form coherent alliances/blocks in order to retain a real influence on the surrounding. Probably the best applicable example has been established by the European Communities.

⁷ F.H. Hinsley, *Sovereignty*, Watts, London, 1966, p. 126-158, p. 45-125.

⁸ The early examples were France of Louis XI, the Tudor England and Spain of Ferdinand of Aragon.

⁹ J. Bodin, *Les six livres de République*, ed. C. Freymont, Fayard, Paris, 1986, vol. 1-6.

¹⁰ *De iure belli ac pacis libri tres; Grotius Reader. A Reader for Students of International Law and Legal History*, ed. L.E. van Holk, C.G. Roelofsen, The Hague, 1983.

¹¹ F.H. Hinsley, op.cit., p. 126-157;

The French concept of *l'état-nation* (dating back to the Jacobins) is based on conviction that the civic participation should be deemed equal to membership of a ruling nation. The French state could have, according to such a view, only the French citizens, speaking the French language and participating in the French culture (no matter what national or ethnic origin they originally were of). W. Zelazny, *Mniejszości narodowe we Francji. Etniczność, etnopolityka, etnosocjologia*, Tyczyn, 2000, p. 32-81.

¹² The legal term of genocide has been created by R. Lemkin (eminent Polish lawyer before World War II) to enable prosecution of the Nazi leaders. R. Szawlowski; *Rafal Lemkin – twórca pojęcia “ludobójstwo” i główny architekt Konwencji z 9 XII 1948*, „*Panstwo i Prawo*”, 10/1999, s. 74-86.

Concept of sovereignty in the British legal thought

The concept of sovereignty has been in the scope of interest of English and British legal and political thinkers from the Middle Ages and evolved parallel to the Continent. Certain parts of this tradition have been promoted abroad and are generally accepted as the European, or even the world, heritage. Let us indicate Thomas Hobbes and his mastered theory of an omnipotent state created as a protection against chaos, war and violence of the natural, pre-social state of the mankind. His theory led to the concept of the omnipotent sovereign and was often perceived as supportive for the royal absolutism.¹³

On the other hand, the doctrine of sovereignty in a shape that is accepted by the British constitutional law seems to be distinctive in comparison with the continental counterparts. If we consider the structure of Parliament, we discover that the evolution of the system has been happening to great extent within the frames, which were created in 17th century or even earlier. The Civil War and the Glorious Revolution resulted in development of a proper representative government. The monarch definitely lost the right to make law independently of two Houses and to do justice personally and the Cabinet dependent on parliamentary majority emerged. The Courts were consequently supporting the enactments of the Parliament as the sole source of statutory law. In view of Albert Venn Dicey, such a practice illustrated a rule of common law. According to Danny Nicol, it was rather connected with a fact that Parliament remained the only political body able to articulate the sovereign will.¹⁴ An absolutist concept was originally developed to the rank of theory, among others, by Edward Coke and William Blackstone, who explained in *Commentaries on the Laws of England* that, its “*power and jurisdiction (...) is so transcendent and absolute, that it cannot be confined, either for causes or persons, within bounds*”.¹⁵

It is also necessary to notice the role of legal positivism for the development of the doctrine of Parliamentary Sovereignty. It originates from the utilitarian concept of society proposed by Jeremy Bentham and James Mill. Bentham’s idea of codification of laws had also significant influence on his contemporaries and entered the European canon of political ideas. John Austin is a person whose influence remains equally profound, yet limited mainly to the Anglo-Saxon legal thinking. He developed the original Benthamite proposals into a coherent system of precise terms based on a central concept of law as a command of a sovereign, obedience to which shall be enforced. There is paradox that he perceived the constitutional law merely as popular sentiment. In his view, the sovereign may be responsible politically, but never in legal way. However, considering that the positive legal theory explained the lawmaking process in separation from the natural law or the human rights, in the British context such an approach greatly

¹³ T. Hobbes, *Leviathan*, University of Adelaide Library, Electronic Texts Collection, 09.05.2003, <http://www.library.adelaide.edu.au/etext/h/h68l/h68l.zip>.

¹⁴ D. Nicol (*EC Membership and the Judicialization of British Politics*, Oxford University Press, Oxford, 2001, p. 5) indicates that such a genesis of the doctrine is at the same time a source of its strength and of its weakness: “*In the Glorious revolution Parliament triumphed not over the courts but over the Crown. (...) The basic tenets of parliamentary sovereignty do not appear in the Bill of Rights 1689 or in any other statute. Rather, Acts of Parliament were the highest form of law because the judges said they were.*”

¹⁵ A. Le Sueur, J. Herberg, R. English, *Principles of Public Law*, Cavendish, London-Sydney, 1999, p. 99.

contributed to improve the doctrine of Parliamentary Sovereignty.¹⁶

Parliamentary Sovereignty in the United Kingdom

According to the *Oxford Dictionary of Law*, the Sovereignty of Parliament is based on a principle that the legislative competence of Parliament is unlimited. No court in the United Kingdom can question its power to enact any law that it pleases. In practice, Parliament can legislate only for territories that are recognised by international law to be within its competence.¹⁷

According to the classical explanation offered by A.V. Dicey in the second half of 19th century, the sovereign power is held by the Parliament of the United Kingdom on behalf of the British people. The Parliamentary Sovereignty is based on the concept that there is no person or institution that could legally challenge any Act of Parliament; that the Acts of Parliament are the supreme law in the UK and that Parliament can make or unmake any law. According to Dicey's quotation of Coke, "*True it is that what the Parliament doth, no authority on earth can undo.*"¹⁸ According to Hilaire Barnett, Dicey also pointed out that no statute could establish the rule that the courts obey Acts of Parliament, because it is the genuine source of the authority of statute¹⁹. Parliamentary Sovereignty is the fundamental rule of common law, which means that no person or body is recognised by the British law as having the right to override or set aside the legislation of the Parliament. However, in the eyes of a contemporary critic, "*Parliamentary sovereignty was the gift of the courts; and what the courts have given; the courts could conceivably take back*".²⁰

The most important aspects of the discussed theory are Parliament's unlimited law-making power, supremacy of Acts of Parliament and disability to be bound by its predecessor or to bind its successor. The supremacy of Acts of Parliament means that all other means of legal regulation need to comply with them. There are no entrenchments included in the constitution, for it is of material type, and therefore of flexible structure. The Parliament's unlimited law-making power de facto means that any issue of public interest can be regulated, without prejudice to any former regulation, in the statutory way²¹, e.g. "*if Parliament enacted that men should be women, they would be women so far as law is concerned*".²²

In opinion of J. Griffith, the UK government could take any action considered necessary for the country's proper governance provided Parliament sanctioned the required legal

¹⁶ *Jurisprudence: The Philosophy of Law. Textbook*, ed. Lord Templeman, Old Bailey, London, 1997, p. 60-85; J. Austin, *Province of Jurisprudence Determined*, Hackett, Indianapolis-Cambridge 1998, p. 9-33.

¹⁷ *Oxford*, op.cit., p. 469.

¹⁸ A.V. Dicey: *Introduction to the study of the law of the constitution*, Liberty Fund, Indianapolis, 1982, p. 5.

¹⁹ H. Barnett: *Constitutional and Administrative Law*, Cavendish, London-Sydney, 2000, p. 224.

²⁰ D. Nicol, op.cit., p. 5; "*Parliament (...) has, under the English constitution the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or put aside the legislation of Parliament*", A.V. Dicey, op.cit., p. 3-4.

²¹ H. Barnett, p. 225-226.

²² I. Jennings, *The Law and the Constitution*, London, 1959, p. 170.

changes. Consequently, the judiciary regards Parliament as the supreme lawmaker and the role of courts is to enforce the statutes without questioning their validity. Given that the courts pay attention to the latest version of parliamentary will, it is not possible for earlier Parliament to bind its successor. In words of Paul Craig and Gráinne de Búrca, traditionally “*Parliament has the power to do anything other than to bind itself for the future*”.²³ I. Loveland explains that Parliament’s “*unconfined sovereignty is created anew every time it meets, irrespective of what previous parliaments have enacted*”.²⁴ Such an approach explains the doctrine of implied repeal, which obliges the courts to give effect to the latest parliamentary will and to treat the earlier Act as repealed.

It is important to note that Dicey distinguished the legal sovereignty from political sovereignty held by the electorate. The unlimited legal sovereignty was, therefore, de facto limited for the political reasons. In long perspective, the respected law means the commonly accepted law. The author also contrasts the law-making omnipotence of Parliament (even constitutional law can be amended in form of an Act of Parliament), with non-sovereign law-making bodies such as local authorities and legislatures in federal systems. Additionally, there is no precise division between fundamental and non-fundamental laws, for there is no unified constitutional charter. Although Dicey rejected the judicial review of statutes, it was possible for the courts to control the way they were given effect by the executive.²⁵

Ivor Jennings, one of the most prominent critics of Dicey’s views, provided in *The Law and the Constitution* one of the most controversial explanations of the classical concept of unlimited legislative power of the British Parliament. In his view, parliamentary supremacy means essentially two things. Firstly, that Parliament can regulate in a statutory way any part of a public sphere. There are no limitations except political expedience and constitutional convention. He emphasises that, such a consideration of the Parliamentary powers is based on legal principles, not the facts. “*The supremacy of Parliament is a legal fiction, and legal fiction can assume anything.*” Secondly, the supremacy of Parliament means, that it can legislate for all persons and all places. According to Jennings, Parliament may for example prohibit smoking in the streets of Paris. Nevertheless, such an act would be regarded as an offence only according to the English law, not to the French²⁶. Jennings personally thought that legal sovereignty is merely “*a legal concept*”, for “*if sovereignty is a supreme power, Parliament is not sovereign (...) Parliament passes many laws which many people do not want. But it never passes any laws which any substantial section of the population violently dislikes.*”²⁷

The classical theory of sovereignty has been challenged by the modern ones, especially by the ones created after the Second World War. They emphasised the impracticability of the absolutist approach that forces to ignore the raising role of the international law. Its supporters argue that the Parliament can be no longer recognised as a sole and exclusive law-giver, for the country is bound by the growing quantity of the international regulations. Although formally adopted by British statutes, in practice they constitute a

²³ P.P. Craig, G. de Búrca, *EU Law: Text, Cases and Material*, Oxford University Press, Oxford, 2003, p. 301-302.

²⁴ D. Nicol, op.cit., p. 3.

²⁵ A. Le Sueur, J. Herberg, R. English, op.cit., p. 100-101.

²⁶ I. Jennings, op.cit., p. 170-171.

²⁷ I. Jennings, op.cit., p. 148-149.

privileged genre of Acts and are more likely to prevail in the case of possible conflict with the ordinary domestic regulations.

It has been also pointed out that the internal aspects of parliamentary sovereignty shall no longer be binding. The classical concept justifies undemocratic and centralised government (*'elective dictatorship'*). The legal basis for challenging the Acts of Parliament in the courts of justice did traditionally not exist, for the Parliament was presumed to be a perfect legislator. This constitutes an assumption underlining the privileged position of the Commons. There are proposals that the judiciary should have a right to control the constitutionality of legislation, both the primary and secondary.

For instance, R.V.F. Heuston has proposed alternative theory, based on the primary rules which precisely describe the composition and functions of the sovereign, i.e.:

1. There should be a distinction between rules which govern the composition, and the procedure, and the area of power of a sovereign legislature.
2. The courts should have jurisdiction to question the validity of an alleged Act of Parliament on grounds of the composition, and the procedure of a sovereign legislature, and not on ground of the area of power.
3. This jurisdiction should be exercisable either before or after the royal assent has been signified – in the former way by way of injunction, in the later by way of declaratory judgement.²⁸

It should be noted that in view of Lords: Cooke, Laws, and Woolf, the court at present would be able to make an Act of Parliament legally ineffective on the ground of inconsistency with a fundamental constitutional principle. Such an eventuality would be justified, for instance, by an attempt of Parliament to repeal basic human or civic rights. Lord Woolf has written that *"ultimately there are even limits on the supremacy of Parliament which is the court's inalienable responsibility to identify and uphold. There are limits of the most modest dimensions which I believe any democrat would accept"*, namely, the necessity to preserve the rule of law. Such a view contrasts with traditional approach to the judicial review issue known as *ultra vires* principle, which legitimises only the control of legality of governmental decisions. However, it needs to be reminded that the abovementioned opinions were not incorporated into court ruling, thus do not constitute the precedent. In view of Andrew Le Sueur, Javan Herberg and Rosalind English, the proposed solution clearly was to be applied in the most extreme situations only. The authors also point out that the *Human Rights Act 1998* provides statutory basis upon which the courts may declare a statutory provision incompatible with basic human rights, although such an action does not legally bind the Parliament to pass relevant amendments to an Act in question.²⁹

Sovereignty of Parliament in the light of devolution

A fairly new, yet important question has been posed by the relations between the regional representative bodies and Westminster. The term *"devolution"* can be defined after the *Oxford Dictionary of Law* as the delegation by the central government to a regional

²⁸ R.F.V. Heuston, *Essays in constitutional law*, Stevens, London, 1964, p. 6-7.

²⁹ A. Le Sueur, J. Herberg, R. English, op.cit., p. 103-104.

authority of legislative or executive functions relating to domestic issues within the region³⁰. At present, the word is most commonly used in the context of Scotland³¹, Wales³² and Northern Ireland³³.

The regional institutions are competent so far only in the limited areas of power granted them by the establishing statutes. However, the regional autonomy may lead in foreseeable future to the diminishing the role of the centralised British legislative or even support the claims of the Scottish, Welsh and Irish nationalists for independence, either the absolute one or (what would be more probable) as the autonomous parts of the future united European state. Such a trend seems to be effectively strengthened by the policy of the European Union to support regions in the economic, cultural and political sphere.³⁴

The challenge seems to be even greater when we consider the reserve of the British society about the European integration. The numerous efforts have been undertaken by the present Labour government in order to change this approach in recent years. Links between the domestic reforms and the EU context may be observed. Devolution within the UK, changes in the electoral system (greater use of proportional representation), parliamentary reform and adoption of the *European Convention on Human Rights* by the *Human Rights Act 1988* bring the British political system closer to the continental standards.³⁵

It is important to notice a few different aspects of devolution in the European context. On one hand, it seems to be long-awaited opportunity for poorer regions to acquire reasonable support for the development. Considerable sums of money keep flowing to the

³⁰ *Oxford*, op.cit., p. 149.

³¹ The Scottish Parliament (*Scotland Act 1998*, 129 elected members) has limited primary legislative powers over e.g. health, school education, and forestry matters. It may also alter the basic rate of income tax in Scotland by up to three percent. Its competences under Section 29 are described in negative way (the Scottish Parliament is told what it cannot do, rather what it can do). It is the most independent and powerful regional representative body in the UK. Additionally, the Scottish Executive (devolved government of Scotland) needs the support of the majority of MSPs. *Oxford*, op.cit., p. 447, D. Keenan, *Smith and Keenan's English Law*, Pearson-Longman, Harlow, 2002, p. 151, A. Le Sueur, J. Herberg, R. English, op.cit., p. 35.

³² The National Assembly for Wales (the Welsh Assembly; *Government of Wales Act 1998*) has 60 elected members. It does not have legislative or taxing powers, though it exercises a range of functions such as housing, education, economic development, and flood defence, including many of the competences of the Secretary of State for Wales. The official languages of conduct are English and Welsh. *Oxford*, op.cit., p. 536, D. Keenan, op.cit., p. 151; A. Le Sueur, J. Herberg, R. English, op.cit., p. 39.

³³ The Northern Ireland Assembly was established under the *Northern Ireland Act 1998*. It consists of 108 elected members and has limited primary legislative powers in such areas as agriculture, the environment, economic development, health, education and social security. Transfer of power from the Westminster has been made conditional on the progress of peace process. *Oxford*, op.cit., p. 149, 332.

³⁴ The House of Commons Library Research Papers constitute a source of detailed information on many aspects of the devolution, e.g.: E. Wood, *The Scotland Bill: the Scottish Parliament and Local Government*, 98/5; A. Seely, *The Scotland Bill: tax-varying powers*, 98/4; B.K. Winetrobe, *The Scotland Bill: Some Operational Aspects of Scottish Devolution*, 98/2; O. Gay, *The Scotland Bill: Devolution and Scotland's Parliament*, 98/1; B. Morgan, *Scottish Parliament Elections: 6 May 1999*, 99/50; B. Morgan, *Welsh Assembly Elections: 6 May 1999*, 99/51; B.K. Winetrobe, *The Northern Ireland Bill: Some Legislative and Operational Aspects of the Assembly*, 98/77; O. Gay, *The Northern Ireland Bill: Implementing the Belfast Agreement [Bill No 229]*, 98/76; B. Morgan, O. Gay, *Northern Ireland: political developments since 1972*, 98/57; E. Wood, *Regional Government in England*, 98/9; E. Wood, *The Procedural Consequences of Devolution*, 99/85.

³⁵ *Politics: UK*, ed. B. Jones, Longman-Pearsons, Harlow, 2001, p. 675-677.

unemployment-struck regions of Northern England, Wales or Scotland on the basis of the Common Agricultural Policy (CAP) and structural funds. What is even more important, such an aid seems to be in certain cases the only feasible solution. For instance, the Northern Ireland is particularly suffering, on grounds of the economic and political crisis caused by the civil conflict. The membership of the United Kingdom and Éire in the common supranational structure provides this region with an opportunity for financial aid, stability and last but not least – cross-border cooperation at the local and the governmental level. The accession to the European Communities seems therefore to be a suitable solution to many internal problems of the UK.³⁶

However, we also need to consider the impact of the accession on the coherence of the United Kingdom as a single, unitary and centralised state. The referenda on devolution in Scotland (11.09.1997) and Wales (11.09.1997) initiated the transfer of powers from Westminster to Edinburgh and Cardiff. The Scottish Parliament and the Welsh National Assembly were subsequently created. Westminster retains the right to legislate over ‘reserved matters’, which are adjudged to be of United Kingdom-wide concern rather than regional concern. In spite of this, the ability of the UK Parliament to legislate in the devolved areas gradually becomes questionable. Characteristically, an original meaning of word ‘*devolution*’ is to pass property from one owner to another on death, sale, or in any other way.³⁷ Importantly, there has been a convention developed on the basis of the question of Northern Ireland autonomy in the period of 1922-1972, that the UK Parliament would not legislate over devolved areas and, what is more, that domestic affairs of Northern Ireland would not even be debated at Westminster.³⁸

Furthermore, the Labour government has introduced an institution of non-statutory ‘concordats’ with the regional executives as a means of regulating ‘intergovernmental’ relations in the spheres where the precise rules of law are lacking. Among others, they apply to decide what resources shall be provided for the devolved legislatures and how Scotland, Wales and the Northern Ireland shall participate in working out the UK’s position within the Council of the European Union on regional affairs. The ‘concordats’ are to be signed by senior officials and in politically sensitive cases by UK ministers and their counterparts at regional level, though they are not legally binding.³⁹

³⁶ *Northern Ireland: Single Programming Document 1994-99. Objective 1: Structural Development and Adjustment of Regions Whose Development Is Lagging Behind*, European Commission, Luxembourg, 1994. The program described in the document strongly emphasises the need of cross-border co-operation between the North and the South of Ireland. Possibly the acceptable solution of the conflict could be factual British-Irish condominium based on close economic cooperation. See also: A. Martin, *Scotland*, European Commission, London, 1999; *Scotland in Europe. The European Community: Why it began, why we joined, why Scotland must remain in it*, European Commission, Edinburgh, 1984; *Scotland: A European Nation. The Case for Independent Scottish Membership of the European Community*, Scottish National Party, Edinburgh, 1992; J. Simpson, *Northern Ireland*, European Commission, London, 1999; B. O’Leary (et al.), *Northern Ireland: Sharing Authority*, Institute for Public Policy Research, London 1993; *Britain’s European Question: The Issues for Ireland*, ed. P. Gillespie, Institute of European Affairs, Dublin, 1996. The above-listed publications show the interest of the European institutions and the public opinion in the UK, Scotland, Northern Ireland and Ireland concerning possible consequences of the British devolution. The Conservative view in the debate is represented among others by J. Barnes, *Federal Britain: No Longer Unthinkable?*, Centre for Policy Studies, London, 1998.

³⁷ *Oxford*, op.cit., p. 149.

³⁸ H. Barnett, op.cit., p. 259, *Ustroje panstw wspolczesnych*, ed. E. Gdulewicz, UMCS, Lublin 1997, p. 19.

³⁹ A. Le Sueur, J. Herberg, R. English, op.cit., p. 41; O. Gay, *Devolution and Concordats*, House of Commons Library Research Paper 99/84, London, 1999.

On the other hand, it is necessary to remind of so-called 'West Lothian Question'. Although it has been posed under this name for the first time by Tam Dalyell in 1977 the problem is of general concern and has lost nothing of its importance⁴⁰. There is potentially a major conflict between the attempts to transfer much power to the regions and the point of view of the centre, namely England (or at least some parts of England). There is no common pattern ruling the division of powers between the classes of authorities. Furthermore, "England, which has 80% of the UK's population and its largest land area, does not have its own Parliament or government separate from that of the UK as a whole: 'England' has no constitutional status".⁴¹ If the English MPs will have no vote in the regional assemblies on the matters of regional interest, why should, for instance, the Scottish MPs have a vote on the English regional business, which needs to be decided in Westminster, for there is no regional assembly for England? To develop this argument to the extreme, there is a question if the UK survives in a present form of unitary state if such an assembly is created.⁴²

British Constitution and the *European Communities Act of 1972*

The relations between the European Union and the United Kingdom are regulated by the *European Communities Act* of 1972. From a formal point of view, the Act has no special constitutional position. It is due to the fact that the British constitution consists of a set of statutes of specific constitutional content and of ordinary legislative status. This solution results in formal ability to amend the basic law by the simple majority of deputies without meeting the conditions of special legislative path.

Furthermore, the UK legal system is a dualistic one. Accordingly, the domestic and international legal orders are perceived as mutually independent and neither is empowered to change the rules of the other. Any act of the international law that binds the UK externally needs to be subsequently adapted to the domestic system by the proper Act of Parliament, otherwise it is not applicable in the internal law (*doctrine of transformation*). Consequently, it can be also amended or nullified (as far as the domestic dimension is concerned) by a statute. The dualist approach is consistent with the principle of separation of powers as it is understood in Britain. This is because the ratification of treaties is within the prerogative of the Crown, which could legislate without consent of the Parliament otherwise.⁴³

Such a line of argument has been long winning a judicial support. For instance, in 1925 Lord Atkin stated in *Commercial and Estates Co. of Egypt vs. Board of Trade* that the "International Law as such can confer no rights cognisable in the municipal courts".⁴⁴ In 1972 Lord Denning expressed concurring opinion in *Blackburn vs. Attorney*: "We take no notice of treaties until they are embodied in laws enacted by Parliament, and then only to the extent that Parliament tells us".⁴⁵

⁴⁰ T. Dalyell, *Devolution: The End of Britain?*, London, 1977.

⁴¹ A. Le Sueur, J. Herberg, R. English, op.cit., p. 31.

⁴² For the West Lothian Question, see: B.K. Winetrobe, *The Scotland Bill: Some Constitutional and Representational Aspects*, House of Commons Library Research Paper 98/3, London, 1998, p. 14-23.

⁴³ There are also British supporters of the monist approach, e.g. H. Luterpacht; I. Brownlie, *Principles of Public International Law*, Clarendon Press, Oxford 1998, p. 32, 43-47.

⁴⁴ I. Brownlie, op.cit., p. 45-46

⁴⁵ H. Barnett, op.cit., p. 343.

The *European Communities Act 1972* provides the general clause for direct applicability of the European legislation in the UK when it is so designed and assumes the superiority of the Community law in these areas. Specifically, Section 2(2) enables to implement Community law to the British system using Orders in Council or statutory instruments. However, Schedule 2 to the Act sets out a number of powers (e.g. increasing taxation, legislating retroactively) which need to be exercised only by means of primary legislation.⁴⁶ Section 2(4) has gained great importance thanks to the subsequent judicial rulings, which aimed to reconcile new obligations under Community law with the traditional approach to statutory interpretation. Section 3 de facto grants the European Court of Justice (ECJ) decision on the meaning and effect of the EC law the value of precedent within the UK. Section 2(1) aims to introduce the concept of direct effect to the UK legal system. It makes directly enforceable in Britain the Community law of immediate legal effect. When this is the case, there is no need for a fresh act of incorporation to enable UK courts to enforce such Treaty provisions, regulations or directives.⁴⁷

Doctrine of supremacy of the European Community law

Practically, the doctrine of Parliamentary Sovereignty is limited in the relations with the EU by the doctrine of supremacy of the Community law. The doctrine, based on the ECJ's interpretation of the treaties, established a unique nature of the bilateral relations. First of all, the way in which the Community law is applied by national courts is a matter of Community law. According to the European Court of Justice, "*Community law imposes obligations on individuals and confers upon them rights which become part of their legal heritage*". The practical consequence of this opinion is diminishing of the position of the Parliament as an exclusive law-giver for the UK. There was a lot of controversy connected with the doctrine.⁴⁸

The principle that Community law takes precedence over an inconsistent law in Member

⁴⁶ The EU Directives are usually incorporated into the UK law via statutory instruments, subject to annulment by the negative resolution of Parliament (usually within 40 days of laying). The veto of either House is sufficient - otherwise instrument passes into law. However, the necessary debate time needs to be found by an interested parliamentarian (it is easier in the Lords). If positive resolution is required, both Houses need to approve an instrument. In such a case the government provides time for a debate leading to approving resolution. D. Keenan, *op.cit.*, p. 158, 183.

⁴⁷ P.P. Craig, G. de Búrca: *op.cit.*, p. 302-303.

European Communities Act of 1972, Section 2(1): *All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies.*

Section 3(1): *For the purposes of all legal proceedings any questions as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court).*

Balckstone's Statutes on Public Law and Human Rights, ed. P. Wallington, R.G. Lee, Blackstone, London, 2000, p. 53-54.

⁴⁸ A. Le Sueur, J. Herberg, R. English, *op.cit.*, p. 156.

States has been established by two fundamental judgements. The Court stated in case *Van Gend en Loos*⁴⁹ that “*the Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields*”. The doctrine was soon declared in more precise way in case *Costa vs. ENEL*⁵⁰: “*By creating a Community of unlimited duration, having its own legal institutions, its own personality, its own legal capacity (...) and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the States to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves*”.⁵¹

The original Member States do not seem to have fully predicted the role the ECJ was to play in the future as far as the national sovereignty is concerned. Characteristically, under the Treaty of Paris the Court’s ancestor could deliver preliminary rulings on the validity of Community acts, while under the Treaties of Rome its competence were extended to deliver rulings on questions of interpretation.⁵²

The Dutch government maintained that *Van Gend en Loos* was a matter of Dutch constitutional law, thus the ECJ had no authority to decide the case. The Court replied that the real issue was if the Community law should be understood as conferring rights on individuals at the national level, therefore it required a fundamental interpretation of the EEC Treaty. According to D. Nicol, *Van Gend en Loos* transformed “*an entity which appeared to all intents and purposes to be an international trade organisation into a supranational one*”. At second stage; the ECJ’s statement in *Costa vs. ENEL* that the directly effective Community law prevails over the national concluded the basic formation of the supremacy doctrine. Furthermore, in 1970 the ECJ ruled in case *Internationale Handelsgesellschaft* that Community law takes precedence even over the fundamental constitutional law of a Member State.⁵³

Legal practice of the British membership in the European Union

The United Kingdom faced, in opinion of Trevor Hartley, three major constitutional problems when it joined the Communities. Firstly, it had largely unwritten constitution. Therefore it was impossible to amend it in the technical meaning of this term in order to introduce the provisions required by the Treaties. Secondly, the attitude of the United Kingdom towards international law was strictly dualist: there was no general rule of law allowing treaties to take effect in the internal legal system. Thirdly, the principle of Sovereignty of Parliament seemed to contradict with the basis of Community legal system. In the opinion of P.P. Craig and G. de Búrca, “*A basic principle of this nature*

⁴⁹ Case 26/62 NV Algemene Transport en Expeditie Onderneming van Gen den Loos v Nederlandse Administratie der Belastingen [1963] ECR 1.

⁵⁰ Case 6/64 Flaminio Costa v ENEL [1964] ECR 585

⁵¹ A. Le Sueur, J. Herberg, R. English, op.cit, p. 156-157.

⁵² D. Nicol, op.cit., p. 23-25.

⁵³ Case 11/70 Internationale Handelsgesellschaft (1970)

D. Nicol, op.cit., p. 35-38. The rationale of Costa vs. ENEL judgement was that “*The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the Treaty*”; A. Le Sueur, J. Herberg, R. English, op.cit, p. 156-157.

clearly made it very difficult, constitutionally, for the UK to transfer (on a permanent basis [...]) to the European Community institutions a sphere of exclusive legislative power”⁵⁴.

As far as the third issue is concerned, it was possible to have certain doubts specifically on grounds of three questions, namely: to what extent the judges were prepared to accept and apply the Community law; in which manner and to what extent parliamentary Acts were supposed to be compatible with the requirements of Community law; and whether membership of the Community entails an irrevocable relinquishment of parliamentary supremacy⁵⁵.

In 1979, Lord Denning ruled in watershed case of *Macarthys Ltd. vs. Smith* stating that though the Acts of British Parliament are the supreme law, they need to be interpreted in compliance with the EC law, unless the legislator explicitly expresses the opposite opinion: “I have assumed that our Parliament, whenever it passes legislation, intends to fulfil its obligations under the Treaty. If the time should come when our Parliament deliberately passes an Act with the intention of repudiating the Treaty (...) and says so in express terms then I should have thought that it would be the duty of our courts to follow the statute of our Parliament.”⁵⁶

Lord Denning had dealt with the problem of supremacy of the EC law previously in the *Shields vs. Coomes* case, when he was willing to interpret the 1972 Act as clearly intending to give the primacy to the Community law conflicting with the UK law. Nevertheless, he managed to reach in *Macarthys* the most desirable result of preventing the open conflict between British statutes and the Treaties. He avoided a problem of implied repeal by giving a decisive weight to the 1972 Act provisions and to a presumption present in the law of the United Kingdom that the Crown does not intend to break the international law.⁵⁷ Therefore, a UK court should not enforce a later conflicting Act of Parliament if the domestic statute was ambiguous or if it was inconsistent with Community law. According to Lord Denning’s test, whenever there is a doubt which law is to be applied, the conflict is false and the Community law prevails. In the situation of real conflict, the domestic law takes precedence. This opinion established an official line for the British judiciary for the next decade as it managed to create a feasible coherence of both Community and domestic legal systems.⁵⁸ For instance, Lord Diplock referred in the House of Lords case of *Garland v. British Rail* to the provisions Section 2(4) of the *European Communities Act* and to Lord Denning’s approach in *Macarthys*, concluding

⁵⁴ T.C. Hartley: *The Foundations of European Community Law*, Oxford, 1998, p. 250; P.P. Craig, G. de Búrca, op.cit., p. 301-302.

⁵⁵ H. Barnett, op.cit., p. 253.

⁵⁶ *Macarthys Ltd. vs. Smith*, Court of Appeal (Civil Division) [1979] 3 All ER 325; P.P. Craig, G. de Búrca, op.cit., p. 303-304.

European Community Law, West Group, St. Paul, MN, 1993, p. 237. Both the constitutional question posed by the *Macarthy* case and the line of lord Denning’s judgement was discussed during the 1971 debate on the European Communities Bill in the House of Lords. Lord Hailsham representing the Conservative government of the day and Lord Diplock providing the independent juridical opinion finally agreed that from the constitutional point of view the future European Communities Act would not be have special constitutional status, meaning it would be possible to change its provisions by subsequent Act of Parliament; D. Nicol, op.cit., p. 111.

⁵⁷ I. Brownlie, op.cit., p. 48.

⁵⁸ *European Community Law*, op.cit., p. 239.

that the court was obliged to read the conflicting English law in accordance with Community law when possible.⁵⁹

The next stage of legal integration with the European Communities was marked the *Factortame* cases. Lord Bridge's judgement delivered in *Factortame* (No. 1) in Court of Appeal followed the line of Denningian test: "*The presumption that an Act of Parliament is compatible with Community law unless and until declared incompatible must be at least as strong as the presumption that delegated legislation is valid until declared invalid. (...) if the applicants fail to establish their claim before the European Court of Justice, the effect of interim relief granted would be to have conferred upon them rights directly contrary to Parliament's will (...) I am clearly of the opinion that, as a matter of English law, the court has no power to make an order which has these consequences.*"⁶⁰ Despite the efforts to balance the requirements of the UK and Community laws, the British court felt obliged to pay attention to the will of the Parliament rather than to the principle of supremacy of the EC law.

However, in a 1990 ruling the ECJ effectively disqualified the British legislation because it did not comply with the EC law: "*The full effectiveness of Community law would be impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judicial decision to be given on the existence of rights claimed under Community law*". Consequently the Community law needs to be interpreted as requiring the national courts to set aside the rules of the domestic legal system that are perceived as the sole obstacle precluding it from granting the interim relief.⁶¹

The House of Lords adopted the European court view in the precedence of *Factortame* (No. 2). Lord Bridge ruled: "*If the supremacy (...) of Community law over the national law of Member States was not always inherent in the EEC Treaty it was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community. (...) Under the terms of the 1972 Act it has always been clear that it was the duty of a United Kingdom court, when delivering final judgement, to override any rule of national law found to be in conflict with any directly enforceable rule of Community law*".⁶² Paradoxically, the ruling that recognized explicitly the supremacy of the Community law over directly conflicting Act of Parliament emphasised the need to follow the previous Parliament's legislative will. Subsequently, in *Equal Opportunities Commission (EOC)*⁶³ case the House of Lords expanded the right to seek judicial review of the legislation conflicting with the Community law to the applicants

⁵⁹ P.P. Craig, G. de Búrca, op.cit., p. 305.

⁶⁰ H. Barnett, op.cit, p. 351.

⁶¹ *The Queen vs. Secretary of state for Transport ex parte Factortame Ltd.*, Case C-213/89, [1990] ECR I-2433. T.C. Hartley, op.cit., p. 224-225; *European Community Law*, op.cit., p. 197-198, H. Barnett, op.cit, p. 352.

⁶² *Factortame Ltd. vs. Secretary of State for Transport* (No. 2) [1991] 1 AC 603. Lord Bridge also observed that: "[W]hen decisions of the Court of justice have exposed areas of United Kingdom statute law which failed to implement Council directives, Parliament has always loyally accepted the obligation to make appropriate and prompt amendments. Thus there is nothing in any way novel in according supremacy rules to rules of Community law in those areas to which they apply (...)", P.P. Craig, G. de Búrca, op.cit., p. 309. D. Nicol (op.cit., p. 257-261) provides the evidence of considerable ignorance of the British MP's on the implications of legal integration for the UK.

⁶³ *Equal Opportunities Commission v. Secretary of State for Employment* [1994] 1 WRL 409

before any UK court.⁶⁴

According to P. Craig, the effect of the *Factortame* and *EOC* is based on several factors. The considered decisions have questioned, and in relation to the Community law - abolished, the concept of implied repeal (implied disapplication), under which the conflicts of earlier and later norms were automatically resolved in favour of the latter. Furthermore, in case of Parliament's attempt to derogate from the Community obligations, such a wish is required to be explicitly expressed. The reaction of the UK courts can be either to traditionally follow the latest wish of Parliament, what would question further British membership of the European Union; or to refuse the enforcement. However, there is no irreversible rationale why Parliament must be regarded as legally omnipotent.⁶⁵

Though the superiority of the EC law has been practically accepted by the British courts, it has been constantly emphasised that the member states remain the final decision-makers, while the EU performs only the competencies granted in the Treaties. The power of the judiciary to decide the validity of Acts of Parliament may harmonize with the Diceyan vision by the assumption that the UK courts simply follow the relevant provisions of the *European Communities Act 1972*. If Parliament preserves the authority to repeal any regulation concerning the Communities, the British courts remain obliged to recognize its supremacy; therefore the delegation of legislative power to the EU would be withdrawn. Such an argument was originally presented by Harold Wilson, then the Leader of the Opposition, during the 1971 debate on entry to the EC and agreed on by the members of all other major political parties. The probable conclusion would be - since the problem was discussed in context of withdrawal - that British courts loyally give precedence to the Community law in the areas where applicable as long as the UK remains a member of the EU.⁶⁶

British constitutional debate on the European Communities membership

The importance of the entry to the EC for the balance of powers within the UK may be illustrated by three judicial cases of 1968-69. *Padfield vs. Minister of Agriculture* concerned interpretation of the *Agricultural Marketing Act 1958*. The ruling delivered by Lord Upjohn proved that the courts could question the right of Parliament to protect ministers from the judicial scrutiny by using the teleological method of interpretation of statutes. The dissenter Lord Morris observed that if Parliament had intended the minister to refer every serious complaint, it would have so explicitly legislated.⁶⁷ In *Anisminic vs.*

⁶⁴ P.P. Craig, G. de Búrca, op.cit., p. 309.

⁶⁵ P.P. Craig, G. de Búrca, op.cit., p. 310-311.

⁶⁶ A. Le Sueur, J. Herberg, R. English, op.cit., p. 105; D. Nicol, op.cit., p. 73.

⁶⁷ In *Padfield vs. Minister of Agriculture* [1968] AC 997, the Minister was free under the *Agricultural Marketing Act 1958* to refer complaints about the milk marketing scheme to a committee of investigation. The House of Lords rejected the explanation presented by Minister that he was in discretion to refer to complaints. The precedent ruling by Lord Upjohn states that: 'First, the adjective ['unfettered'] nowhere appears in section 19, it is unauthorised gloss by the Minister. Secondly, even if the section did contain the adjective I doubt if it would any difference in law to his powers. (...) the use of that adjective, even in an Act of Parliament, can do nothing to unfetter the control which the judiciary has over the executive,

Foreign Compensation Commission an issue of conflict was right of the court to invalidate an 'ouster clause', i.e. a provision removing decision-making process of a public body from the judicial review. In the House of Lords, the majority decided to adopt strong purposive interpretation of an Act to protect the right of appeal to the court. Nonetheless, such a decision constituted a serious challenge to Parliament's unlimited law-making power.⁶⁸ In *Conway vs. Rimmer*, the House of Lords ruled that the courts were to balance the public and the private interests involved in disclosure of documentation. Previously the courts had treated relevant Minister's declaration as conclusive. Prime Minister Harold Wilson admitted, when inquired in the Commons on the impact of *Conway* on the conduct of government, that the ruling would minimise the claim of Crown privilege.⁶⁹

The European integration has been challenging unequally all the elements of British constitution. Characteristically, in the British context it may be indicated that the judicial branch has been relatively strengthened in contrast to the legislative. Moreover, it has been suggested that this shift in courts' competence has been coinciding with a general shift in the court's approach to the sovereignty of Parliament. Let us indicate adoption of the purposive, instead of the traditional, strictly textual, method of interpretation of the statutes; the impact of the human rights doctrine and the diminishing position of Parliament as the real decision-maker. The latter function has been taken over by the Cabinet. On the other hand, Parliament is also more vulnerable of losing its powers in comparison with the executive. Paradoxically, under the Community system it has been granted an unprecedented scope of delegated legislative powers. These arguments and a fact, that the European Parliament may be perceived as a democratically legitimised competitor makes gradually the Parliament's long-established position endangered. For instance, the government often needs to refer its actions to the Community decisions rather than to the Commons, where it rules a disciplined majority of MPs. It may be concluded, that an absolute sovereign (which traditionally was the Parliament) needs to sacrifice the most in the process that is defined, among others, as pooling the powers.

Characteristically, as far as the human rights are concerned, the higher courts are competent under Section 4 of the *Human Rights Act 1998* to declare statutory provisions incompatible with the *European Convention of Human Rights*. However, such a declaration is not legally binding the Parliament. Nor is the Convention entrenched within the British constitution, which perfectly complies with the Diceyan doctrine. From the political perspective, however, it may be observed that the real impact of convention

namely that in exercising their powers the latter must act lawfully and that is a matter to be determined by looking at the Act and its scope and object in conferring a discretion upon the Minister rather than form the use of an adjective'; D. Nicol, op.cit., p. 52-53.

⁶⁸ In *Anisminic vs. Foreign Compensation Commission* [1969] 2 AC 147, a company complained that the Foreign Compensation Commission had misconstrued the Foreign Compensation Act 1950. The Act stated that 'determinations' of the FCC were not to be questioned in any court of law. In the House of Lords, the majority held that the FCC made an error of law during its inquiry. It was reasoned that that if the Commission trespassed beyond its proper area of inquiry, the ouster provision could be invalidated. Lord Morris dissented on ground that Parliament explicitly expressed the wish to protect finality of FCC's decisions; D. Nicol, op.cit., p. 53.

⁶⁹ In *Conway vs. Rimmer* [1968] AC 910, a former probationary police constable, who had been suing his former superior, had applied to the Home Secretary for the disclosure of documentation crucial for his case. When denied, he appealed to the court to decide the disclosure; D. Nicol, op.cit., p. 54-55.

needs to be much stronger.⁷⁰

Hence the present outcome of the European integration is visible for Britain; it is justified to study what were the expectations of the decision-makers before the entry. During the 1961 debate in the House of Commons, two approaches to the problem of sovereignty revealed. The Prime Minister Harold Macmillan was trying to distinguish between the ‘*economic*’ and the ‘*political*’. He also emphasised that the EEC Treaty was but a commercial agreement.⁷¹ For Pro-Marketeers sovereignty emphasised effective control of the nation’s destiny, even within the frames of the Community when necessary. In contrast, the Anti-Marketeers defined sovereignty as freedom of national choice over laws and policies: “*the freedom of the people of this country to choose their fate and also not to be tied up in any political federation or union*”. However, these approaches did not necessarily contradict each other. For instance, Harold Wilson presented a reluctant support for the British membership.⁷²

Furthermore, during the 1961 debate Lord Dilhorne (Lord Chancellor) presented an opinion that, although there was in the EEC Treaty an implicit degree of supranational authority, the ‘*pooling of authority*’ was strictly limited to the Community’s fields of activity: “*I venture to suggest that the vast majority of men and women in this country will never directly feel the impact of the Community-made law at all.*” He was expecting a minor use of the preliminary reference procedure, given that the United Kingdom could take steps to avoid inconsistency with the Community law, “*so that the need for reference will rarely arise in courts of first instance*”. Additionally, the Lord Chancellor failed to estimate the position of the ECJ within the European system as he perceived EEC arrangements as dependent on international law, rather than constituting a separate legal system. Such a lengthy description of the first Parliamentary stage of the membership debate is necessary to properly illustrate evolution of the British position.⁷³

The second debate in 1967 was supported by the White Paper entitled *Legal and Constitutional implications of United Kingdom Membership of European Communities*. Importantly, it does not indicate in an explicit way the already established in 1967 the rule of supremacy of the Community law and seems to portray the repercussions of accession from the Pro-Marketeer position. Referring to introduction to the UK legal system of the EEC law provisions of direct internal effect, the paper states that: “*The constitutional innovation would lie in the acceptance in advance as a part of the law of the United Kingdom of provisions to be made in the future by instruments issued by the Community institutions (...). However, these instruments, like ordinary delegated legislation, would derive their force under the law of the United Kingdom from the original enactment passed by Parliament.*” It also indicates that the Community law operates only in the fields covered by the Treaties, that is, broadly: customs; agriculture; free movement of labour, services and capital; transport; monopolies; regulation of the coal, steel and nuclear energy industries. “*By far the greater part of our domestic law would remain unchanged.*” It was reported that when Community law directly affects

⁷⁰ The *Convention* is enforced by the European Court of Human Rights, whose rulings have noticeable influence on the ECJ. The document was introduced by the White Paper of the meaningful title of *Rights Brought Home*. A. Le Sueur, J. Herberg, R. English, op.cit., p. 105-106.

⁷¹ D. Nicol, op.cit., p. 28.

⁷² D. Nicol, op.cit., p. 28-29.

⁷³ D. Nicol, op.cit., p. 30-32.

individuals in their private capacities it confers rights rather than imposes obligations.⁷⁴

The paper notes that although the UK final courts would be required to refer questions on interpretation of the Treaties to the ECJ, the Court gives only abstract rulings on the meaning of the relevant provisions. According to the paper, the Parliament will also need to refrain from passing fresh legislation inconsistent with the Community law. *“This would not however involve any constitutional innovation. Many of our treaty obligations already impose such restraints”*. The paper emphasised intergovernmental aspects of the decision-making process under the Treaties: *“neither the objects nor the particular purposes can be extended except by unanimous agreement and any revision of the Treaties to this end requires ratification by all Member States”*.⁷⁵

The problems connected with the European integration seem not to evolve parallel to the development of the Community law. The above-cited paper did not mention the doctrine of supremacy of the EEC law, nor did the cases of *Van Gend en Loos* or *Costa vs. ENEL*. Characteristically, these arguments were also absent during the 1970-75 debates (the final application and the referendum). Such a situation may be partly explained by the fact the British constitution was perceived at this time as mainly politics-based concept, dependent on the will of parliamentary majority of a moment. On the other hand, in the late 1960s the European integration became a political project of the highest priority. Sir Con O’Neill, the leading civil servant negotiator, concluded in his report that: *“What mattered was to get into the Community, and thereby restore our position at the centre of European affairs (...). The negotiations were concerned only with the means of achieving this objective at an acceptable price”*.⁷⁶

During the 1970s debate, strong impact was laid on conferring decisions within the European Communities by means of intergovernmental agreement. The fundamental powers of Member States were to be secured by the Luxemburg Accord, that effectively (though not formally) binds the member states to decide unanimously the issues perceived by one of them as of vital interest. However, in 1996 the BSE crisis led to major argument between the UK and its EU partners. Other member states were concerned about the uncontrolled spread of the disease, its possible transmission to humans and the loss of confidence by their domestic beef producers. As a consequence, an export prohibition was imposed on the UK. The Conservative Government of John Major was blocking much of the EU decision-making for one month in 1996 as a protest, creating considerable diplomatic tensions. However, Britain was finally forced to comply with the EU policy of fighting the disease and limiting its spreading. In practice, the Accord was not followed.⁷⁷

⁷⁴ *Legal and Constitutional Implications of United Kingdom Membership of European Communities*, HMSO, London 1967, p. 8-11.

⁷⁵ *Legal*, op.cit., p. 7-10.

⁷⁶ *Britain's entry into the European Community Report by Sir Con O'Neill on the Negotiations of 1970-1972*, ed. D. Hannay, Frank Cass, London-Portland, Oregon 2000, p. 355.

⁷⁷ *Politics: UK*, op.cit., p. 672.

There are attempts to force the British government to study the implications of potential withdrawal by the UK from the EU. The relevant *European Union (Implications of Withdrawal) Bill* was issued in year 2000 (it did not turn into Act). It provided for appointment by the Chancellor of the Exchequer a Committee of Inquiry to research on the possible impact of such a step on the national economy, security, constitution, and the public expenditure; *European Union (Implications of Withdrawal) Bill 2000* (House of Lords), www.parliament.the-stationery-office.co.uk/pa/pabills.htm, July 2001.

Implementation of the EU legislation in the UK: the House of Commons

According to the provisions of *European Communities Act*, the Community legislation becomes directly applicable within the UK law either by enactment of the Parliament or without. As a consequence it is an issue of a great importance to conduct the parliamentary scrutiny of the European legislation to the greatest possible degree, by means of the debates on the Community issues, the regular ministerial addresses on the decisions reached in the Council of the European Union and during the Question Time. The successive governments have declared not to decide the important European legislative proposals without opinion of the parliamentary European Committees. Nevertheless it may be doubted if such a commitment can be sustained, for instance, in the face of Qualified Majority Vote procedure, which abolishes veto of a single member state.

As far as the specialised instruments to deal with the European affairs are concerned the House of Commons has established a Select Committee on European Legislation which, in co-operation with the Lords' Select Committee on European Community, considers delegated legislation to give effect to the UE law and scrutinises legislative proposals for future Community provisions. There are also two standing committees at the House of Commons to analyse the European questions, each consisting of 13 members. The select committee may support the standing committees with documentation it finds appropriate. In due course, they report to the House on the matters referred to them.⁷⁸

Implementation of the EU legislation in the UK: the House of Lords

The Lords' European Communities Committee was established in 1974. It examines and reports all European legislation which may be of significance for the United Kingdom and assists the government in determining what attitude to take to particular proposals when these are considered by the Council of European Union. Its work is supported by a number of subcommittees and appointed specialist advisers.⁷⁹

The Committee produces yearly about 20 reports that are regarded as being of a higher quality than those produced by its counterpart in the Commons. The chairman refers Community proposals to the subcommittees, distinguishing between 'A-type' (which do not require parliamentary attention - usually 60% of the total) and 'B-type' (requiring parliamentary scrutiny). Noteworthy, all the reports recommended by the Committee are debate on the floor of the House.⁸⁰

The Committee' undertakings are rarely, if ever, criticised. This contrasts with a controversial position of the House as a whole during the political debate of recent years. According to the paper *Modernising Parliament: Reforming the House of Lords* this

⁷⁸ H. Barnett, op.cit., p. 609-610.

⁷⁹ A. Carroll, *Constitutional and Administrative Law*, Financial Times-Pitman, London, 1998, p. 159.

There are subcommittees e.g. for economic and financial affairs; trade and the external relations; energy, transport and the working environment; environment, public health and education; agriculture, fisheries and consumer protection; law and institutions.

⁸⁰ R. Brazier, *Constitutional Practice*, Clarendon Press, Oxford, 1995, p. 252.

function of the chamber shall remain unchanged.⁸¹ The special position of the House's efforts in the domain of European legislation has been appreciated soon after the British accession to the EC. P. Temple-Morris noted that the House of Commons was not able to "adequately scrutinise the increasing volume of EEC legislation and directives; a reformed House of Lords could do so, and thereby point out to the Commons those parts of EEC law to which the Commons should pay particular attention". According to Ivor Richard and Damien Welfare, the Lords' scrutiny is widely praised in the EU, where it is sometimes considered to be the best available.⁸²

The possible explanation of situation when a major role in the vital domain is played by the generally powerless institution shall point out the expertise of the members (especially in government business), the great time and organisational burden that would be laid on the Commons otherwise, and growing quantity of the EU legislation that needs to be dealt with by a specialised institution. Notably, the EU legislation had originally a status similar to the secondary one, which was revised mainly by the Lords.⁸³

Conclusions

The relationships between the Community and British laws may be described by the doctrine of supremacy of the EC law, de facto accepted in the *Factortame* rulings and by the subsequent practice. In view of Rett Ludwikowski, „the coherent and well integrated legal system cannot digest the concept of more than one supreme element. (...) In the situation in which the Constitutions of all Member states were either amended or left flexible enough to accommodate the principle of the supremacy of Community law, the argument that they are still the supreme laws of these countries cannot bring us too far”.⁸⁴ Let us add that the relevant amendments have been introduced also to the applicant countries' constitutions.

To characterize the British approach to the conflicts between the Community and national laws one needs to indicate the numerous efforts that were undertaken not to oppose one system against the other, for reasons concerning the international position of Great Britain and its home affairs. For instance, if the European integration is to develop on the basis of the supreme legal system created by the external legislator, the institutions forming the present UK decision centre need inevitably to sacrifice an important part of their powers. Nonetheless, the integration seems to be a suitable solution of some major social and political problems of permanent character. Furthermore, the British system of implementing the EU law, highly respected abroad, allows influencing the Community law-making process with considerable effectiveness.

Characteristically, Britain's absolutist concept of sovereignty had to face the challenge of

⁸¹ *Modernising Parliament: Reforming the House of Lords*, HMSO, London 1997, p. 38.

⁸² P. Temple-Morris, *Secundus Inter Pares. Some New Proposals for Reform of the House of Lords*, Bow, London, 1977, p. 4; I. Richard, D. Welfare, *Unfinished Business: Reforming the House of Lords*, Vintage, London, 1999, p. 196.

⁸³ For a detailed analysis of the European interests of the Lords and a complete methodology of scrutiny, see *Review of Scrutiny of European Legislation*, Select Committee on the European Union, Session 2002-03, HL Paper 15, London, 2002.

⁸⁴ R.R. Ludwikowski: *Supreme Law or Basic Law? The Decline of the Concept of Constitutional Supremacy*, *Cardozo Journal of International and Comparative Law*, vol. 9, 2002, p. 601-644.

classifying the national constitution rather as the basic law than the supreme one. The opinion of American authors seems to address the problem perfectly: “*The Community may choose to start out by adopting relatively modest and abstract measures in a given area; in time more and more measures may be adopted that become increasingly precise, leaving the member states with almost no scope for individual differences. All this means that more and more detailed policy making gradually shifts to the Community level*”.⁸⁵ As a result, the British doctrine has been revised to remain up-to-date with the political reality of continuing membership of the potential future European state.

⁸⁵ J.D. Dinnage, J.F. Murphy: *The Constitutional Law of the European Union*, Anderson, Cincinnati, 1996, p. 414.

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