Cambridge Law Journal, **68(2)**, July 2009, pp. 361–387
doi:10.1017/S0008197309000361 *Printed in Great Britain*

BI-POLAR SOVEREIGNTY RESTATED

C.J.S. KNIGHT*

I. INTRODUCTION

THE continuing debate about sovereignty can be seen to take two different paths. One path might be termed the practical debate, for it is concerned with the practical question of whether, or when, a sovereign Parliament may bind itself. The terminology of legislative supremacy is sometimes used instead of sovereignty, as in the decision of the House of Lords in *R. (Jackson)* v. *Attorney General*.[1] There the substance of the question remained the same, but the form was altered slightly and concerned the differences between "continuing legislative supremacy" and "self-embracing legislative supremacy".[2] Here, the terminology of sovereignty rather than supremacy will be employed because the relevant arguments are more usually couched in these terms.

The second path might be termed the theoretical or true sovereignty debate, for it is concerned with the related question of when, or whether, a sovereign may be legally subject to its own rules. At first sight, the second path looks to deal with precisely the same issue as the first, but the theoretical debate is importantly separate. For, in reality, the practical question of legislative supremacy is a question of the powers of the sovereign body. The theoretical debate goes to the logically prior question of how sovereignty is to be conceived.

It will be argued here that the best way to understand sovereignty in England and Wales[3] is to recognise the dual sovereignty of Parliament and the courts. A consideration of the analysis of Sir Stephen Sedley is invaluable to understanding the argument. Bi-polar sovereignty

* Barrister. The author wishes to acknowledge the invaluable help, advice and criticisms of Sir Stephen Sedley, Professor Paul Craig and, especially, Dr. John Allison. The usual disclaimer most assuredly applies. An earlier, and considerably shorter, version of this article appeared in (2007) 3 Cambridge Student Law Review 44 and the permission of the editors to reproduce some of the material contained there is gratefully acknowledged.

[1] [2005] UKHL 56; [2006] 1 A.C. 262; noted M. Elliott, "The Sovereignty of Parliament, the Hunting Ban, and the Parliament Acts" [2006] C.L.J. 1.

[2] See especially A. Young, "Hunting Sovereignty: *Jackson* v. *Her Majesty's Attorney-General*" [2006] P.L. 187; and *Parliamentary Sovereignty and the Human Rights Act* (Hart, Oxford, 2009). The terminology of "continuing" and "self-embracing" legislative supremacy is that of H.L.A. Hart, *The Concept of Law*, 2nd ed. (Oxford 1994), pp.145–146.

[3] The position may apply to Scotland and Northern Ireland as well, but because of the different constitutional settlements in those regions the submissions here should be taken to apply only to England and Wales unless specifically stated. Lord Hope of Craighead suggested in *Jackson*, n.1 above, that the Scottish conception of sovereignty had never been quite the same as the English Diceyan approach, at [106], and referred to "absolute legislative sovereignty" as an "English principle", at [104].

https://doi.org/10.1017/S0008197309000361 Published online by Cambridge University Press

accords with historical tradition and when restated carefully it is able to meet the challenges made against it – both substantive and semantic – in order to provide a more plausible constitutional account. Bi-polar sovereignty will be presented against a particular theoretical setting: that of the English constitution's long tradition of institutional pragmatism, whereby problems are considered realistically. Effective solutions are evolved rather than focussing on received or doctrinal ideological commitments. Bi-polar sovereignty fits neatly into the English historic constitutional setting and deserves greater attention than it has so far received from English public law scholarship.

II. The English Tradition of Institutional Pragmatism

Bi-polar sovereignty is not a new idea. Neither can it be said to be an especially popular one. It surfaces in various forms occasionally, but is largely neglected as being incompatible with orthodox constitutional theory and Parliamentary sovereignty in particular. In consequence it is harder to find a theoretical setting in which to locate a bi-polar sovereignty conception of the constitution. The most obvious starting point for sovereignty theorists is one based upon the rule of law,[4] or reframing the same point in a slightly different way, the principle of legality.[5]

The approach taken here will focus on a different justification, however, because, as elaborated below, the rule of law or principle of legality justification is not focussed on the changing realities of the English constitution structure as it has developed in recent decades. The argument made in this article presents bi-polar sovereignty as a genuine, if narrow, possibility which can be theoretically justified by reference to the work of Sir Stephen Sedley and W.J. Rees. What their work can provide is an understanding of the functional overlap between Parliament and the courts. The setting against which the overlap is conceived is the constitutional history of institutional pragmatism. One can consider the relationship between the two concepts in the following way: how the restated bi-polar sovereignty presented can work is explained theoretically here in the context of a constitution which has a long history of evolving practical answers to problems, anticipated or actual. Institutional pragmatism as used here is conceived as a readiness to use one institution to compensate for perceived or actual weaknesses in another, or to take on new functions as the institution develops. This conception of institutional pragmatism is

[4] T.R.S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford 1993); *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford 2001).

[5] S. Lakin, "Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution" (2008) 28 O.J.L.S. 709.

https://doi.org/10.1017/S0008197309000361 Published online by Cambridge University Press

largely assumed for the purposes of the more specific argument made here because the concern is with the availability of bi-polar sovereignty as a theoretical concept. Once that argument has been made it will be appropriate, in a future article, to consider how dual sovereignty interacts with or alters other constitutional theories such as the separation of powers.

Four examples will suffice to illustrate what is meant by the English tradition of institutional pragmatism. First, the most well-known example is that of the overlapping functions of the Lord Chancellor who – until the Constitutional Reform Act 2005 came fully into force – straddled all three of the traditional roles of government. As a member and Speaker of the second chamber of Parliament, a member of the Cabinet and the head of the judiciary (as well as a sitting member of the Appellate Committee of the House of Lords)[6] the Lord Chancellor exemplified the English indifference to the strict principle of the separation of powers as derived from Montesquieu. It was a uniquely odd position, inexplicable by reference to any abstract principle, but in practice worked fairly well.[7] Successive Lords Chancellor took their role as head of the judiciary seriously and did not hesitate to defend their brethren in Cabinet when they felt it necessary to do so. Famously, when appearing before the Commons Select Committee, Lord Irvine L.C. made the point that "maturity requires that when you get a court decision that favours you, you don't clap, and when you get a court decision that is against you, you don't boo." In the same session the Lord Chancellor went on to defend his tripartite role on the grounds that "We are a nation of pragmatists, not theorists, and we go quite frankly for what works".[8] Such pragmatism was not thought sufficiently compelling when the role of the Lord Chancellor was completely reformed in the Constitutional Reform Act 2005.[9] However, the judiciary retain a voice in Cabinet through the obligation on the Secretary of State for Justice and Lord Chancellor to "uphold the continued independence of the judiciary".[10] The tradition of institutional pragmatism has, at least to some extent, been maintained.

A second example is the institutional change in the provision of services. As conceptions of the state and its role as provider of certain basic services (such as education and prisons) have altered, successive governments have introduced different institutions to run or oversee those services. The Conservative Major government relied heavily on

[6] Lord Irvine L.C. was the last Lord Chancellor to sit as a judge in the House of Lords.
[7] *C.f.* D. Woodhouse, *The Office of Lord Chancellor* (Oxford 2001).
[8] Lord Irvine L.C. before the Commons Select Committee, 2 April 2003.
[9] On which see: Lord Windlesham, "The Constitutional Reform Act 2005: Ministers, Judges and Constitutional Change" [2005] P.L. 806; "The Constitutional Reform Act 2005: The Politics of Constitutional Reform" [2006] P.L. 35.
[10] Section 3 of the 2005 Act.

https://doi.org/10.1017/S0008197309000361 Published online by Cambridge University Press

placing certain public services an arm's length away from central government departments through the creation of Next Steps Agencies.[11] More recently the Labour Blair government has taken the next step beyond that by further introducing public-private partnerships to run services which fifty years ago would have been considered a vital component of the state (such as public healthcare and rail transport).[12] Control is retained, at least in theory, by a degree of public governance.[13] Governance is the pragmatic response of the constitution to the institutional changes made to reflect the belief that the private sector can provide services just as well, if not better, than the public sector can.[14]

Thirdly, the pragmatism of the English constitution has been reflected quite clearly in the extensive use of convention to achieve constitutional aims. One of the most obvious examples is the way in which the powers of the Monarchy have been gradually constrained by the use of convention. The powers to appoint a Prime Minister and dissolve Parliament are, amongst others, personal powers of the Monarch. Instead of abolishing the Monarchy the institutional pragmatism of the constitution has been seen in the slow but sure limitation of the powers of the Monarch through convention to the extent that if there were a clear case of the convention being broken it might be thought doubtful that the Monarchy would survive. Professor Brazier has described this example of institutional pragmatism as a "constitutional guiding light": that political decisions are politically arrived at.[15]

Finally, the role of the courts is an example of the way in which institutions may evolve to meet the needs of the constitution. Part of the reason the courts have begun to acquire a greater prominence in the sovereignty debate is that in the last twenty-five years or so there has been a marked alteration in the way they have been willing to use their powers. Even before the Human Rights Act 1998 came into force the judges were developing methods of protection for rights. The most obvious way in which the courts developed their role was through the principle of legality and the requirement of clear words in a statute in order to abridge a key right such as access to the courts.[16] But the courts had also been taking a clearer stand on their own independence and

[11] M. Freedland, "Privatising *Carltona*: Part II of the Deregulation and Contracting-Out Act 1994" [1995] P.L. 21.

[12] See *e.g.*: L. McDonald, "The Rule of Law in the 'New Regulatory State'" (2004) 33 Common Law World Review 197; A.C.L. Davies, *Accountability: A Public Law Analysis of Government by Contract* (Oxford 2001) Ch. 1.

[13] R. Rhodes, *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability* (Buckingham 1997).

[14] Whether such an approach in respect of the banking sector can be maintained remains to be seen in the light of the economic downturn.

[15] R. Brazier, *Constitutional Reform: Reshaping the British Political System*, 3rd ed. (Oxford 2008), Ch. 7.

[16] *R.* v. *Secretary of State for the Home Dept. ex p. Simms* [2000] 2 A.C. 115.

https://doi.org/10.1017/S0008197309000361 Published online by Cambridge University Press

stressing the importance of the separation of powers.[17] Not that this was new. The refusal to allow the King to sit in judgment in his own courts in *Prohibitions del Roy* is an early forerunner of judicial assertiveness in the face of executive power.[18] That the developments in the role of the judiciary illustrate the English tradition of institutional pragmatism stem from the observation that the expansion in judicial review has been a necessary corrective to what has been described by Sedley as a "long-term dysfunction in the democratic process".[19] There has been a gradual evolution in the role of the House of Commons away from being a body which genuinely scrutinises governmental measures with consistent rigour.[20] The courts have assumed the responsibility for providing the primary check on executive use of power. The shift in apparent institutional responsibility from the Commons to the courts is a pragmatic development to counter Lord Hailsham's fear of an "elective dictatorship".[21]

The constitutional practice of institutional pragmatism is the setting against which bi-polar sovereignty should be considered. In order to explore bi-polar sovereignty in greater detail the starting point is an examination of the work of Sir Stephen Sedley.

III. The Work of Sir Stephen Sedley

Any suggestion of dual sovereignty would be hopelessly lacking without reference to the extra-judicial writings of Sir Stephen Sedley, at present a Lord Justice of the Court of Appeal. The simplest way to sum up the thesis is to rely on Sir Stephen's own words. He wrote that there was emerging a new "constitutional paradigm" that was:

> … no longer of Dicey's supreme parliament to whose will the rule of law must finally bend, but of a bi-polar sovereignty of the Crown in Parliament and the Crown in its courts, to each of which the Crown's ministers are answerable – politically to Parliament, legally to the courts.[22]

The suggestion is an extremely important one, not least because of the position of its author, and has attracted a good deal of attention. It is often grouped together with the classic suggestions of a higher-order law that might permit the courts to strike down legislation if it was

[17] *R.* v. *Secretary of State for the Home Dept. ex p. Fire Brigades Union* [1995] 2 W.L.R. 464; *R.* v. *Secretary of State for the Home Dept. ex p. Venables* [1998] A.C. 407.
[18] (1608) 12 Co. Rep. 63.
[19] Sir Stephen Sedley, "The Sound of Silence: Constitutional Law Without a Constitution" (1994) 110 L.Q.R. 270, 282.
[20] See also, A. Tomkins, "What is Parliament For?" in N. Bamforth & P. Leyland (eds.), *Public Law in a Multi-Layered Constitution* (Oxford 2003), p.53.
[21] Lord Hailsham, *The Dilemma of Democracy* (London 1978), pp.9–11.
[22] Sir Stephen Sedley, "Human Rights: a Twenty-First Century Agenda" [1995] P.L. 386, 389.

https://doi.org/10.1017/S0008197309000361 Published online by Cambridge University Press

thought to sufficiently breach the rule of law, and more particularly, exclude the role of the judiciary.[23] Lord Irvine certainly treated all four extra-judicial articles as similar expressions of judicial supremacism and famously labelled them as "extra-judicial romanticism".[24]

However, the idea of bi-polar sovereignty is significantly different to the higher-order law suggestion. While higher-order law relates to constitutional theory, it might be more accurately classified as part of a notion of a substantive rule of law[25] with all the writings, legal and theoretical baggage that go along with that debate. In contrast, bi-polar sovereignty is firmly located in constitutional theory. The theory provides a method of questioning the simplicity of the sovereign being the Crown-in-Parliament[26] and seeks to supply a new understanding that better recognises the complexity of the relationship between the judicial and legislative/executive branches. A common law system means that, at least in reality, the courts make law just as the legislature does. Its pronouncements may be altered or overruled by the legislature, but that does not deny the force of the common law.

Nor is Sedley without judicial support for the idea of the courts as a sovereign. Albeit in a case without direct constitutional impact, Lord Bridge of Harwich stated that:

> The maintenance of the rule of law is in every way as important in a free society as the democratic franchise. In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law.[27]

Similarly, in *Hamilton* v. *Al-Fayed* Lord Woolf of Barnes referred to the "wider constitutional principle of mutuality of respect between two constitutional sovereignties".[28] This conception is a beginning for bi-polar sovereignty rather than the finished article, for as we shall see, there much more to the courts as sovereign than interpretation and application of the law. As Sedley has phrased it, it is "in Parliament and the courts, each exercising a discrete though interdependent function of

[23] Lord Woolf, "*Droit-Public* – English Style" [1995] P.L. 57, 67–71; J. Laws, "Law and Democracy" [1995] P.L. 72, 81–93; R. Cooke, "Fundamentals" (1988) N.Z.L.Rev. 158. It should probably be noted that the extra-judicial statements have largely disappeared since the Human Rights Act 1998, answering the fear of the judiciary that a sovereign Parliament could easily override any supposed fundamental rights. Note for instance the reluctance of Lord Woolf to directly repeat his claim in the face of distinct provocation: Lord Woolf C.J., "The Rule of Law and a Change in the Constitution" [2004] C.L.J. 317.

[24] Lord Irvine, "Judges and Decision-Makers" [1996] P.L. 59, 75–78.

[25] P.P. Craig, "Formal and Substantive Conceptions of the Rule of Law" [1997] P.L. 467; T.R.S. Allan, "The Rule of Law as the Rule of Reason: Consent and Constitutionalism" (1999) 115 L.Q.R. 221.

[26] Subject, of course, to the Parliament Acts 1911–49.

[27] *X Ltd* v. *Morgan-Grampian (Publishers) Ltd* [1991] 1 A.C. 1, 48.

[28] [1999] 3 All E.R. 317, 320.

https://doi.org/10.1017/S0008197309000361 Published online by Cambridge University Press

the state, the legislative and the judicial, that the sovereignties of the state reside."[29]

To certain commentators, the idea of sovereignty being conceived in both Parliament and the courts is a step too far on the road to government by judges and away from a democratic system. To this end, Sir Stephen's theory has been questioned by Professor Griffith,[30] as was Sir John Laws' theory of higher-order law.[31] The main problem Griffith has is the way in which Sedley has elevated the courts to the rank of sovereign, but persisted in keeping the executive subject to the dual sovereigns. Sedley says as much: executive government "is subordinate both to Parliament and to the courts".[32] As Griffith points out, it is unrealistic to say that the executive in England does not make law. Even if one excludes secondary legislation as being done under the legislative power, the ability to enter into binding treaty obligations and the exercise of the powers of the Royal Prerogative are done in the name of the Crown by the executive branch of government.[33] However, the response of Sedley is that decisions such as *Lain*[34] enable executive law-making to be subject to both legislative and now judicial control.[35]

At the root of Griffith's objection is that he sees Sedley as having taken an overly legalistic view of the constitution when it is, in fact, political. "Existing laws are a major political element in every society. Constitutions are political structures".[36] It is from this political approach that it seems odd to characterise the executive as being subject to the judiciary and especially to the legislature. But there are two answers to the objection. First, if it is a political truth that the executive and the legislature are so closely fused[37] then one might be forgiven for wondering what the fuss is about. It seems unnecessary to object in one breath to the executive being left out of the sovereignty equation, and in the next assert that it is inextricably tangled with the legislature. While they are so fused then the executive branch has a practical foothold in Sedley's bi-polar sovereignty. Secondly, even if one could show that the executive was in some way left out of legal sovereignty there is nothing to prevent anyone from recognising that the executive is as politically sovereign as the legislature or the judiciary. Griffith is

[29] Sir Stephen Sedley, "The Common Law and the Constitution", in Lord Nolan and Sir Stephen Sedley, *The Making and Remaking of the British Constitution* (London 1997), p.26.
[30] J.A.G. Griffith, "The Common Law and the Political Constitution" (2001) 117 L.Q.R. 42. See, though, the response: Sir Stephen Sedley, "The Common Law and the Political Constitution: A Reply" (2001) 117 L.Q.R. 68.
[31] J.A.G. Griffith, "The Brave New World of Sir John Laws" (2000) 63 M.L.R. 159.
[32] Sedley, note 19 above, 289.
[33] Griffith, note 30 above, 48–49.
[34] *R.* v. *Criminal Injuries Compensation Board, ex p. Lain* [1967] 2 Q.B. 864.
[35] Sedley, note 19 above, 289–290.
[36] Griffith, note 30 above, 59.
[37] W. Bagehot, *The English Constitution* (London 1945), p.9.

https://doi.org/10.1017/S0008197309000361 Published online by Cambridge University Press

certainly correct to stress the political nature of the constitution, but he cannot do so to the exclusion of law. Equally, it cannot be shown that the constitution is a completely legal construct to the exclusion of politics, and if Sedley does this then he is incorrect.[38] In reality, as is so often the case, there is a mixture of law and politics. The executive can be left out of the legal bi-polar sovereignty, but it cannot be ignored in a political account of where constitutional power lies.[39] If one adapted the passage of Lord Bridge to include within it the Queen's Ministers a political reality would be elevated over a legal one. Legally, the power of Ministers is exercised through Parliament in the form of Acts or legislative instruments permitted under Acts; a subordinate role to Parliament. If one follows the political reality analysis to its logical conclusion Parliament itself could be removed from the sovereignty equation because it is so totally controlled by the executive. Such an approach would surely be unsatisfactory, because politics would demolish constitutional principle, and it is submitted that the better position is to focus on the legal sovereignty of the Crown in Parliament and the Crown in its courts whilst understanding the vital political role played by the executive.

IV. The Theory of Sedley Restated

Although it does not appear to be cited in any of Sir Stephen Sedley's work on bi-polar sovereignty, the idea of dual sovereignty is not new. In fact, there is one especially important piece of work which, when combined with Sedley, has a greater impact.

A slightly different kind of dual sovereignty was relied upon in 1950 by W.J. Rees.[40] In his article, Rees asserts that sovereignty is a difficult concept to apply in the face of democracy, federalism and public law, but seeks to explain how a sovereign body can be subject to its own rules. He does so by splitting the sovereign role. By creating a distinction between what he calls the "legal sovereign" and the "coercive sovereign", Rees allows for the sovereign body as a whole to prescribe law and to enforce it against all (including the sovereign).

Rees defines legal sovereignty thus:

> To exercise legal sovereignty, or supreme legal authority, is to determine the actions of persons in certain intended ways by means of a law as previously defined, here the actions of those who exercise the authority, in those respects in which they do exercise

[38] Griffith certainly believes that he does: note 30 above, 44.

[39] The difficulty of defining the executive power is described in A. Tomkins, "The Struggle to Delimit Executive Power in Britain" in P.P. Craig & A. Tomkins (eds.), *The Executive and Public Law: Power and Accountability in Comparative Perspective* (Oxford 2006), p.16.

[40] W.J. Rees, "The Theory of Sovereignty Restated" (1950) 59 Mind 495.

https://doi.org/10.1017/S0008197309000361 Published online by Cambridge University Press

> it, are not subject to any exercise by other persons of the kind of authority which they are exercising.[41]

Coercive sovereignty meanwhile is given this definition:

> A person or a body of persons may be said to exercise coercive sovereignty, or supreme coercive power, if it determines the actions of persons in certain intended ways by means of force or the threat of force, and if the actions of the persons who exercise the power, in those respects in which they do exercise it, are not themselves capable of being similarly determined.[42]

It is probably sufficient to note, without too much further detail, that both notions of sovereignty and statehood (themselves inextricably linked) are usually defined with some notion of a monopoly of legitimate coercive force.[43] The legal sovereign is thereby subject in Rees' work to rules not because of an intrinsic value in their enactment, but because of the availability of enforcement.

How then does the division of sovereignty fit with the English constitutional understanding? It is reasonably clear that the legal sovereign must be the Crown-in-Parliament, or the legislature. What is less clear is the role of the coercive sovereign. Rees himself does not choose to identify either of his creations in the English system, but his examples of coercion concern the army and the police and their respective heads.[44] Geoffrey Marshall follows this, and criticises Rees on the basis that the coercive sovereign is the police and the army and imagines the result to be a situation where the Secretary of State for War would be entitled in Cabinet to instruct the Prime Minister, and indeed Parliament itself, as to what they could and could not do.[45] It is no exaggeration to note the apparent absurdity of such an idea, and it is no wonder that Marshall is so unkeen on it. The sudden promotion of the armed forces and the police to a sovereign role seems little short of preposterous.

Instead of simply rejecting out of hand the work of Rees and the distinction he draws, it would perhaps be constructive to instead search for a different and better fit. It is here that the earlier discussion of Sir Stephen Sedley's bi-polar sovereignty returns to the field of play. Neither Rees nor Marshall appear to have considered the possibility that the role of the coercive sovereign could be played by the courts and the judiciary. When one chooses to define the coercive sovereign in terms of the use of force, there is much less room for the courts to play

[41] *Ibid.*, 508.
[42] *Ibid.*, 511.
[43] M. Weber, "Politics as a Vocation", in H.H. Gerth and C. Wright Mills (trans. and eds.), *Max Weber: Essays in Sociology* (New York 1946), p.77; L. Green, *The Authority of the State* (Oxford 1990), Ch.3.
[44] Rees, n.40 above, 509–510.
[45] G. Marshall, *Constitutional Theory* (Oxford 1971), pp.37–38.

https://doi.org/10.1017/S0008197309000361 Published online by Cambridge University Press

a role. But Rees did not seem to start with an endpoint in sight requiring the use of force. Two pages prior to his definition given above, he stated in relation to the coercive sovereign that:

> Human nature being what it now is, it is necessary, if certain rules are to be obeyed, that they should be capable of being enforced; and, in order that they may be capable of being enforced, it is necessary that there should exist some body of persons sufficiently strong to enforce such rules against any likely opposition within the community.[46]

The wording used in that quote seems to fit the role of the court perfectly adequately. When we ask who enforces the rules of the State, the body of persons to whom the answer leads must be the judiciary. Certainly the police have an important role to play in the case of certain rules, but only the criminal ones and even then whether or not the rule will be enforced against the individual is a decision for the court and the legal processes. It is not entirely clear why it is absolutely required to get from enforcement to the power to use force. It is important that some body of the State has the legitimate capacity to use force, but that need not be the coercive sovereign. Coercion implies rather more subtlety than simply who has the most guns. What the coercive sovereign must be able to do is *enforce* the rule, not *force* the following of the rule. This is a subtle but important difference, for one way lies the sovereignty of the police and army, and the other lies a judicial sovereignty. Coercive sovereignty might perhaps be better relabelled "enforcement sovereignty". A further problem may be raised here. It is important to acknowledge the role of the executive and other State bodies in aiding the enforcement of judgments, either implicitly or explicitly. It is possible, although not conceded here, that the courts may be dependent upon the executive for implementation of their judgments. Even if that were so it would not deprive the courts of the role of enforcement sovereign because the move from coercion to enforcement is more legalistically focussed than on brute strength, with enforcement of the law being done through adjudication and dispute resolution by independent and impartial courts, rather than enforcement by imprisonment or a demand for damages. The courts have the power to require both of those things, but their role as enforcement sovereign stems from their legal role and not their sanctioning power. Where a court is unable to pursue its orders made, for example where an award of damages is unable to be paid by the judgment debtor, as has often been the case in South Africa,[47] the court is still properly the enforcement sovereign because it continues to provide legal answers.

[46] Rees, n.40 above, 509.
[47] L.T.C. Harms, J.A., "Judging Under a Bill of Rights", 2007 Ebsworth Memorial Lecture, delivered 24 January 2007.

https://doi.org/10.1017/S0008197309000361 Published online by Cambridge University Press

Even if the enforcement sovereignty of the courts is accepted as an appropriate fit for the model, Marshall points out a further problem with the distinction Rees draws. If the legal sovereign is able to prescribe rules for every other body, it must be able to bind the enforcement sovereign too. The enforcement sovereign cannot therefore enforce anything in defiance of those rules whilst acting in its official capacity. Marshall concludes that "coercion of the prescriptive Sovereign, even if it can be imagined, can always be legally forbidden by the exercise of prescriptive sovereignty".[48] The courts as the enforcement sovereign and Parliament as the legal sovereign thus deals with one objection – that the Rees model does not represent English constitutional law – but seems to return us to the beginning. We have a sovereign Parliament and the sovereign courts, but the courts may only enforce rules against the sovereign Parliament when the sovereign Parliament does not prevent them from doing so. Combining the work of Sedley and Rees makes a more complete theoretical package, but does not fully answer how a constitution can theoretically have two sovereign bodies.

V. Redrawing the Lines

An objection to be raised at the rather gloomy conclusion of the last section is that it prioritises Rees over Sedley. All that has been done is re-label the Rees categories in line with Sedley's ideas, when what needs to be done is reshape them instead. There is substantial merit in this objection. It was stated above that the real value of bi-polar sovereignty is that it better recognises the functional overlap of the judicial and legislative function in the English common law system. The primary problem with the way in which Rees draws his divisions is that it steadfastly separates the law-making and enforcement roles. On a superficial view it is quite comprehensible. In a constitutional structure which is fully in line with the separation of powers the judicial branch would not overlap with the legislative branch. Neither, it should be pointed out, would the executive.

Fortunately or unfortunately, the English constitution does not and has never subscribed to an apparently simple and straightforward delineation of roles. All three branches of government have a degree of law-making power. We cannot quite so simply separate out a legal sovereign. While it is certainly the case on the majority of occasions that it is the Crown-in-Parliament which makes the law, this does not quite cover every rule that binds the citizen. The courts, through the incremental development of the common law, make the law, as well as

[48] Marshall, n.45 above, p.38.

https://doi.org/10.1017/S0008197309000361 Published online by Cambridge University Press

interpreting the existing rules. A case such as *R* v. *R* cannot be said to be anything other than the highest court altering the law and removing the defence of being husband and wife in marital rape cases.[49] Lord Reid recognised the reality some twenty-five years ago and was careful to note the importance of continuing judicial impartiality.[50] Equally, while it is essential that the courts do not overreach themselves, as the House of Lords reminded the Court of Appeal in the context of sensitive trade union disputes and statutory interpretation in *Duport Steels Ltd* v. *Sirs*,[51] the fact remains that vast swathes of law are entirely judge-made. The bulk of the law of tort and contract and notably almost the totality of the law of restitution remains untouched by the "paralysing hand of the Parliamentary draftsman".[52] The executive too retains significant law-making power, chiefly under the Royal Prerogative and through delegated legislation. Both the prerogative and secondary legislative powers and the common law of the courts may be overturned by an Act of Parliament, but that is simply to recognise where the balance of legislative power lies. The fact that someone may be outbid at an auction does not mean that they are unable to place a bid. Inferiority does not mean non-existence.

A redrawing of the division lines is further aided by the fact that the judicial branch does not technically have a monopoly either. The legislative branch, Parliament, is also a court and it is a court from which there is no appeal. Sir Edward Coke C.J. had previously described Parliament as "the highest and most honourable and absolute court of justice in England".[53] The fact that it has a very small jurisdiction and that jurisdiction is rarely exercised does not mean as a matter of principle that the judicial function of Parliament should be ignored. The fact is that Parliament is the *only* court competent to determine internal disputes, because the Bill of Rights 1689 prevents the interference of the normal courts.[54] Each House of Parliament has complete control over its own proceedings. It has the power to commit persons for contempt against it and this is so even when the contempt consists of nothing more than obedience to the judgment of a court. In the *Case of the Sheriff of Middlesex*[55] the Sheriff who

[49] [1992] 1 A.C. 599. *M* v. *Home Office* [1994] 1 A.C. 377 is another example where the House of Lords permitted the injunction of a Minister of the Crown; and see S. Sedley, "The Crown in its Own Courts" in C. Forsyth and I. Hare (eds.), *The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade* (Oxford 1998), p.253.
[50] Lord Reid, "The Judge as Law Maker" (1972) 12 J.S.P.T.L. 22.
[51] [1980] 1 W.L.R. 142.
[52] P.M. North & J.J. Fawcett, *Cheshire and North's Private International Law* (Oxford 1999), Preface to the First Edition, by G. Cheshire, p.vii.
[53] Co. Inst. I, 109b.
[54] Article 9, Bill of Rights 1689.
[55] (1840) 11 A. & E. 273; K. & L. 140.

https://doi.org/10.1017/S0008197309000361 Published online by Cambridge University Press

attempted to enforce the judgment of the Queen's Bench in *Stockdale* v. *Hansard*[56] – the outcome of which was that the resolution of neither House was, by itself, a law – was committed for contempt on a warrant issued by the Speaker of the House of Commons. On an order for habeas corpus the ordinary courts refused to try and override the jurisdiction of Parliament as a court competent to try internal disputes.

One objection that might be raised is that, in truth, Parliament plays a much greater enforcement sovereign role than has been recognised. Parliament as a court is one thing, but because through the law-making power it has it is Parliament which creates the framework for any enforcement by any part of the state apparatus; it has to be through that creation that any action takes place. However, such an argument mistakes the boundaries of law-making and law enforcement. Enforcement is the application of the law to the facts. What Parliament does as legal sovereign is to frame the relevant questions of law in a particular context, and it is the courts which apply these questions of law to any given factual circumstance. To an individual bringing a civil action it is the court which is enforcing the law, not Parliament.

The very real functional overlap identified here suggests that it should be reflected in the constitutional theory of Sedley and Rees. If one accepts that Rees has drawn a useful distinction between forms of coterminous sovereignty[57] then a better application of the distinction is required. Bi-polar sovereignty provides such a possibility. Sedley supplies the idea of a dual sovereignty of the courts and the legislature, while Rees supplies what the duality involves, and thereby, why it can work effectively. Both bodies have elements of legal and enforcement sovereignty. The executive, on the other hand, does not have any judicial function[58] and that is why Sedley is right to exclude it from his conception of bi-polar sovereignty. It may apparently share in the legal sovereignty, but it does not have a direct role to play in enforcement sovereignty. The reason for continuing to separate out legal and enforcement sovereignty is to alert the observer to the relative roles played by the courts and legislature in each sphere. While the task of both is shared, it is done so on the constitutional understanding that the role of the courts is primarily enforcement of the law, and that the role of the legislature is primarily legal and not to act as a court. The key difference between this understanding and the clear division of Rees is that the courts retain a certain amount of "legal supremacy" and that therefore in very specialised circumstances the courts would have the power to bind the legislature using their legal sovereignty as opposed to the slightly secondary nature of the enforcement

[56] (1839) 9 A. & E. 1; K. & L. 127.
[57] And it is suggested here that he has.
[58] Although it can play an important role in the execution of the judicial functions of the branches.

https://doi.org/10.1017/S0008197309000361 Published online by Cambridge University Press

sovereignty. Just as, in specialised circumstances, Parliament may take a judicial enforcement role, the courts may take a sovereign law-making role. The conclusion presented is really only half a step away from the statement that "the constitution is what the judges say that it is"[59] and that that statement reflects the reality that the judiciary are the final enforcement authority in *any* constitution, and not simply because they may declare themselves to be. The enforcement power is inherent in the pragmatic institutional role of the courts.

It is not proposed here to go into the details and delimitation of the power of the courts, although the point will be returned to below.[60] Such a discussion must inevitably be extremely fact-sensitive. Nor is it strictly necessary to deal with the nature of the power. However, the inherence of the legal sovereignty role stems from the pragmatic and institutional nature of the constitution itself, and *need not* be found in a higher-order law. As Sir Stephen Sedley has suggested in rejecting the metaphysical concept, "there is nothing which determines that the notion of democracy as the higher-order law beneath which constitutions must operate is there for all time."[61] In narrow circumstances the courts have the power to make use of the functions which the constitution has pragmatically afforded to them. The basis of the functional power, the ability to *do* something, has always been there; that is why it is described as inherent. The restatement of bi-polar sovereignty here explains how the power is available in theory, but the institutional pragmatism of the constitution does not require dictation from theoreticians or full compliance with conceptual orthodoxy. The inherence, the lack of theory, with which the courts can act does not require the operation of higher-order law or a substantive notion of the rule of law. Both are quintessentially theoretical constructs rather than institutionally pragmatic in outlook. A similarity in appearance, because of the same possible outcome for the courts, belies the distinction between pure theory and pragmatic evolutionary approaches. Only the latter can truly be said to represent the English constitution. The location of bi-polar sovereignty as a concept in the traditional constitutional structure is vital. That placement must be important, for if the courts can make law that binds the legislature that suggestion is made much stronger by locating it within the constitutional structure and not outside it, appealing instead to a higher idea above the constitution.

[59] A statement made by the Chief Justice Hughes of the US Supreme Court, before his judicial tenure in the 1930's and quoted in: Sedley, note 22 above, 390. See also, H.W.R. Wade & C.F. Forsyth, *Administrative Law*, 8th ed. (Oxford 2000), p.29 (the sentence does not seem to appear in the 9th ed. published in 2004).

[60] Below note 103ff.

[61] Sedley, note 22 above, 389.

https://doi.org/10.1017/S0008197309000361 Published online by Cambridge University Press

VI. The Approach of Coke

Sir Edward Coke C.J. has, as has Shakespeare, such an expanse of work that it can be interpreted to mean almost anything the interpreter wishes it to mean. However, it will be argued here that there is sufficient evidence in his work from which to infer that he could at least contemplate the plausibility of a bi-polar approach to sovereignty.

The famous statement in *Bonham's Case* appears to support the primacy of the common law:

> And it appears in our law books, that in many cases, the common law will controul acts of parliament, and sometimes adjudge them to be utterly void; for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such act to be void.[62]

The ordinary person reading that quote would probably consider the meaning to be reasonably clear: where necessary, the common law will act to prevent a repugnant result. More importantly, it is not suggested that any act of the common law will simply be done through the process of interpretation, for interpretation could not adjudge an Act void, and so Coke C.J. must have seen the common law as being stronger than is commonly believed. The common law has primacy. However, this was not the view of Samuel Thorne, who argued strongly that the passage quoted is merely evidence of a strong constructionist approach,[63] and pointed especially to the words "repugnant" and "impossible to be performed". The reference to "common right and reason" was, apparently, superfluous.[64] Judges are not, even in the seventeenth century, generally given to superfluous comments of such obvious importance but in suggesting that the common law could "adjudge such act to be void" Coke C.J. is surely going beyond even a strong interpretive approach.[65] The common law has probably always had the power to "controul" statutes, for the courts are the final arbiters of what statutes mean, but until the decision in *Factortame (No.2)*[66] any suggestion that an Act of Parliament could be held void for any reason would have been doubted in the extreme, if not dismissed as heretical. The use of the term would seem to take *Bonham's Case* outside of the scope of interpretation. There are at least three other responses to *Bonham's Case*. First, as Goldsworthy points out,

[62] (1610) 8 Co. Rep. 107, 118a.
[63] S.E. Thorne, "Dr Bonham's Case" (1938) 54 L.Q.R. 542.
[64] *Ibid.*, 548.
[65] At least on a contemporary understanding of "void". For an argument that the term meant something closer to an interpretative meaning at the time, see I. Williams, "*Dr. Bonham's Case* and 'Void' Statutes" (2006) 27 Journal of Legal History 111.
[66] *R.* v. *Secretary of State for Transport, ex p. Factortame (No.2)* [1991] 1 A.C. 603.

https://doi.org/10.1017/S0008197309000361 Published online by Cambridge University Press

prior to the Civil War Parliament did not have quite the democratic mandate that it now does.[67] Secondly, the argument cited above is just one of five made by Coke to support his conclusions. Thirdly, Coke seemed to present a different view later on in his life.

In his *Institutes of the Laws of England* Coke referred to the pre-eminence of Parliament:

> Of the power and jurisdiction of the Parliament, for making of laws in proceedings by bill, it is so transcendent and absolute, as it cannot be confined either for causes or persons within any bounds.[68]

The apparent inconsistency between the two statements of Coke can, it is submitted, be resolved plausibly in one way: Coke correctly saw both the courts and Parliament as having sovereign power. In a decision subsequent to *Bonham's Case* Coke C.J. clarified the relationship between the two bodies of the law:

> Statute Law … corrects, abridges, and explains the common law … But the common law Corrects, Allows and Disallows … Statute Law …, for if there be repugnancy in Statute … the Common Law Disallows and rejects it, as it appears by *Doctor Bonham's case*.[69]

Coke presents the two primary sources of law as equals. It has been explained that the relationship is not quite that of equality, for that misrepresents the nature of the functional overlap, but that as a matter of status the analysis is importantly accurate.

When Coke relied upon the work of Bracton in *Prohibitions del Roy*[70] for the importance of keeping the King under God and the law (*Rex…sub Deo et lege*) the Chief Justice was using a philosopher who appears to have taken a similar approach to sovereignty. When Bracton wrote "[l]et him therefore bestow upon the law what the law bestows upon him, namely, rule and power"[71] he appears to be arguing for a delegation of sovereignty to the law (and thereby, the courts). Were this to be followed it would create a system of dual sovereigns. The problem with dual sovereigns is that neither quite have the power they are thought to, for one cannot bind the other.[72] That has been dealt with by reconceptualising the approach of Sedley and Rees, but it is

[67] J. Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford 1999), Ch.5.
[68] Co. Inst. IV, 36.
[69] *Rowles* v. *Mason* (1612) 2 Brownl 192, 198.
[70] (1608) 12 Co. Rep. 63.
[71] *De Legibus* 5b. S.E. Thorne (ed. and tr.), *Bracton on the Laws and Customs of England* (Cambridge, Mass. 1968), Vol. II, p.33.
[72] For this reason Hobbes was unable to contemplate a system of mixed sovereignty: T. Hobbes, "*De Corpore Politico*", Ch.20 in *Human Nature and De Corpore Politico* (Oxford 1994), pp.114–118.

https://doi.org/10.1017/S0008197309000361 Published online by Cambridge University Press

sufficient to note for present purposes that there is support for bi-polar sovereignty to be found in the oldest of authorities.

VII. Objections to Bi-Polar Sovereignty

In his important recent book on the historical English constitution John Allison deals briefly with traditional conceptions of bi-polar sovereignty by presenting three arguments against it from his own approach.[73] Each will be dealt with in turn, along with issues which arise from those arguments.

The first argument presented by Allison is that the courts and Parliament "have evolved to differ in function and legitimacy to such an extent that the same concept – sovereignty – is only superficially applicable to both"[74] and that bi-polar sovereignty blurs Fuller's distinguishing of legislation and adjudication as different forms of social ordering.[75] This is a valid criticism of bi-polar sovereignty as traditionally understood, but the reconceptualisation of the theory here by applying the work of Rees to that of Sedley would seem to deal with the objection by recognising the reality of a limited functional overlap. Legislation and adjudication may indeed be distinct forms of social ordering – it is not necessary to reach a conclusion on that here – but the fact that law-making is a possible function enjoyed by the courts and adjudication is a function occasionally undertaken by Parliament aids a conclusion that sovereignty is accorded to bodies which do both. The balance of the role determines the type of sovereignty the body enjoys. The difference in legitimacy is best addressed under the third argument.

The second argument is that bi-polar sovereignty artificially contrasts the different types of decision-making involved. Acts of Parliament are primarily, and necessarily, abstract and general whereas the courts deal in fact-specific circumstances and are often constrained by precedent.[76] In reality the second argument is coterminous with the first and the response is much the same. When properly understood, bi-polar sovereignty does not artificially contrast the two types of decision-making because a rigid duality is avoided through the recognition of a functional overlap, while the primary functions of the respective institutions remain unchanged. It is important that Parliament is primarily concerned with general and abstract law-making because Parliament's main role is that of legal sovereign. Equally, the courts as enforcement sovereign will be concerned in the first place with

[73] J.W.F. Allison, *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge 2007), pp.216–221. Reviewed Knight (2008) 124 L.Q.R. 336.
[74] *Ibid.*, p.218.
[75] L.L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harvard L. Rev. 353.
[76] Allison, n.73 above, p.218.

https://doi.org/10.1017/S0008197309000361 Published online by Cambridge University Press

particular factual matrices. What is argued here is that the sovereign body as a whole must do both, and that the limited power of each sovereign in relation to the more ordinary power of the other allows the proper use of the term sovereignty. One way of considering the relationship is by seeing the different roles of the courts and the legislature as points on a continuum. The powers of the two institutions together extend across the spectrum and significantly overlap at a point in the middle.[77] The continuum as a whole encompasses the powers of the sovereign. Allison describes the generality and specificity difference as dependent upon a "stark normative contrast" which is "artificial",[78] but it is unclear precisely why it is necessarily so. It is descriptive to say that Parliament generally legislates in the abstract and that courts generally deal with specific fact scenarios. Allison's concerns stem from the nature of legal *disputes* being significantly polycentric instead of bi-polar,[79] but that must be a different issue to the nature of the legal system as a whole. The range of issues raised in the context of an individual case will often be polycentric and the claim that the courts should take on more and more polycentric disputes to resolve questions of common good may be normative, but the description of the diverse decision-making is a different matter.

The third argument is undoubtedly the most powerful and is that "placing the great weight of sovereignty upon the courts, is overly contentious", begging the question of the "adequacy of their training, experience, procedures and political attitudes".[80] The second quoted suggestion is perhaps less convincing, for it would surely apply just as strongly to members of the legislature, if not more so, as the judiciary are at least expected as a requirement of the job to be sufficiently intelligent and have a number of other legal skills demonstrable from their career in practice.[81] Members of Parliament may, and usually do, meet similar standards but there is no inbuilt necessity for it to be so. However, the crux of the argument is about the legitimacy of the courts, although it should be noted that Allison's position was concerned with the traditional conception of bi-polar sovereignty.

The legitimacy of Parliament is derived purely from its democratic credentials, regardless of the fact that the upper chamber of Parliament is unelected and that the British constitution as a whole, as Vernon Bogdanor has stated, "knows nothing of the people".[82] However, even

[77] The metaphor is not quite accurate, as the courts' legislative role is greater than the legislature's judicial role.
[78] Allison, n.73 above, p.218.
[79] *Ibid.*, p.214.
[80] *Ibid.*, p.219.
[81] For the qualifications required to be a Justice of the new Supreme Court see s.25 of the Constitutional Reform Act 2005. Other judicial appointments are carried out by the Judicial Appointments Commission.
[82] V. Bogdanor, *Power and the People* (London 1997), p.15.

https://doi.org/10.1017/S0008197309000361 Published online by Cambridge University Press

when one accepts the democratic basis of Parliament the argument for bi-polar sovereignty cannot simply be trumped by the electoral process. Lord Hailsham L.C. wrote that "it is a pure illusion to suppose that answers will be forthcoming by the mere repetition of the word 'democracy' as if it were an incantation against the evil eye".[83] Furthermore, the implicit result would appear to be that some adherents of Parliamentary sovereignty would discard countries such as the United States of America from a list of democracies because of the possibility of judicial override of legislation. Equally, as the European Court of Human Rights has noted in the context of disenfranchisement of prisoners, a clear choice by a democratic body does not necessarily imply that it is a considered choice in the sense of weighing competing interests.[84] Nonetheless, it is true that no part of the court system is elected and they remain, at least at the very highest level, the most unaccountable part of the state mechanism.

One response is that made by Dicey. Part of the democratic legitimacy of the legislature is that it can, or possibly should, respond to the will of the people, to the extent that such a popular will is definable and not purely aspirational. The courts have a different role. "The legislative action of the Courts represents in truth a peculiar cross-current of opinion, which may in more ways than one modify the effect of that predominant opinion of the day".[85] In the explanation of Dicey the courts have a role to play which is essentially corrective. By being influenced by different opinions to that likely to hold sway in the legislature the court is able to provide a counter-balance.[86] The term balance is instructive, for one sees that the restated bi-polar sovereignty checks and balances power in the pragmatic and institutionally-led manner of the English constitution. Both sovereign bodies have the power to, where necessary, impose their own conceptions of public opinion on the other. The High Court is not a creature of statute, and nor is the Appellate Committee of the House of Lords.[87] Their power has not been granted to them.[88] It has evolved and will continue to evolve in line with the English constitutional tradition of institutional pragmatism. The fact that power is more equally shared between Parliament and the

[83] Lord Hailsham, above note 21 above, p.34.
[84] *Hirst* v. *UK (No.2)*, App. No. 74025/01, Decision of 30 March 2004, at para. [51].
[85] A.V. Dicey, *Law and Opinion in England*, 2nd ed. (London 1930), pp.369–370. For an interesting challenge to Dicey's approach to democracy see: P.P. Craig, "Dicey: Unitary, Self-Correcting Democracy and Public Law" (1990) 106 L.Q.R. 105; and for a limited defence of Dicey see: A. Young, *Parliamentary Sovereignty and the Human Rights Act* (Oxford 2009).
[86] It is worth noting that the High Court of New Zealand has stated that it interprets legislative in light of "a background of societal norms and values that influence the meaning of the statutory words used" which suggests a slightly different approach to public opinion than that of Dicey: *Savril Contractors Ltd.* v. *Bank of New Zealand* [2002] N.Z.A.R. 699, 705.
[87] Although, of course, the new Supreme Court will be.
[88] *R.* v. *Bedwellty Justices, ex p. Williams* [1997] A.C. 225.

https://doi.org/10.1017/S0008197309000361 Published online by Cambridge University Press

courts will require a greater dialogic attitude on both sides to controversial issues.

An interesting, if constitutionally limited, illustration may be drawn from ancient Rome. The Emperor Diocletian redesigned the Roman Empire by splitting it in two between 285 and 324 A.D., although the system reappeared periodically until the fall of the West in 476. The Emperors of the Western Empire and the Eastern Empire were equal in rank, both having the title of Augustus, and their respective legislation was promulgated in both spheres, but each held the power of veto over laws which unduly impinged on the other's territory.[89] Perhaps unsurprisingly, as it involved individuals and not institutions the innovation was relatively short-lived. However, in a different constitutional tradition, institutions were able to alter their traditional role and provide a functional bi-polar sovereignty.

A further aspect to the legitimacy debate is the argument of Sir Stephen Sedley that law is given legitimacy only through judicial recognition. Thus, legislatures "need courts to confer legitimacy on their legislative progeny".[90] He goes on to give three reasons why the courts have been successful in their attempt to increase the profile and use of judicial review. First, "legal reasoning and the judicial sense of what is fair and unfair have a significant measure of autonomy". Secondly, echoing Dicey's argument, the courts look for an expedient outcome, but their definition of expediency "is often less myopic than that of the government", aiming instead for legal consistency. Thirdly, the courts have "considerable public support" for their role.[91] These three reasons go to the legitimisation process by the courts of law, and when the courts take a key role in legitimising the actions of the legislature then it is surely harder to dismiss the legitimacy of their own actions. It can be cross-referenced back to that suggestion that the Crown is answerable "politically to Parliament, legally to the courts."[92] As sovereignty is sometimes split between the political and the legal – Dicey, for example, allotted political sovereignty to the people, but legal sovereignty to Parliament[93] – so may legitimacy be seen in two spheres. Political legitimacy lies primarily in Parliament (or at least the House of Commons) because of its democratic mandate. Legal legitimacy lies primarily in the legal system as a whole, of which the courts are the leading part, because laws are not legitimate unless the courts say that they are. The attractiveness of bi-polar sovereignty is that the while the

[89] J.A.C. Thomas, *Textbook of Roman Law* (Amsterdam 1976), p.26.
[90] Sir Stephen Sedley, "Governments, Constitutions, and Judges" in G. Richardson & H. Glenn (eds.), *Administrative Law and Government Action: The Courts and Alternative Mechanisms of Review* (Oxford 1994), p.36.
[91] *Ibid.*, p.41.
[92] Sedley, note 22 above.
[93] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (London 1961), p.73.

https://doi.org/10.1017/S0008197309000361 Published online by Cambridge University Press

nature of legitimacy is polarised, sovereignty itself is not. There is not the Diceyan separation between political and legal sovereignty: in a bi-polar system it no longer makes sense.[94]

Critics of bi-polar sovereignty may reply that Sedley also states that "judicial sovereignty is a dangerous blueprint for the future".[95] But this bald statement is not inconsistent with bi-polar sovereignty. Sedley ends his article in the next paragraph by referring to the "combination of popular legitimism and common law interventionism".[96] It is the combination of the work of Sedley and Rees together, creating a dual structure of power, which reflects the tradition of institutional pragmatism, rather than sovereignty simply being placed in the hands of the judiciary instead of Parliament.

The functional overlap relied upon here should not be taken too far away from the realities of the constitutional situation. The dual sovereignty derives from the fact that the overlap is available, but Parliament and the courts exercise different competencies in their respective primary functions.[97] The result is entirely institutionally pragmatic. The courts are best suited to adjudication in individual circumstances, while Parliament is best suited to legislating in general and abstract terms rather than targeting persons or issues with specificity. The area in which the legitimacy argument has effect is significant, but small.[98]

It is important to stress one thing that the theory of bi-polar sovereignty presented here is *not* concerned with. It has been mentioned already that the duality of sovereigns is different to and not dependent upon a higher-order law approach. Similarly, it is not necessary to adopt the theory of justice with a fully fledged substantive rule of law that is most obvious in the work of Trevor Allan.[99] Allan has argued consistently for a bi-polar sovereignty with the reason of the common law being able to temper the democratic mandate of Parliament. His theory articulates a substantive and liberal rule of law which is wide enough to encompass an egalitarian and dignitarian focus to the

[94] One might see the executive taking a greater role in the share of legitimacy than sovereignty. Such an approach would be fair for precisely the same reason as bi-polar sovereignty working between the courts and Parliament. There is an overlap of political legitimacy for the executive through its leading members being elected officials, and legal legitimacy through the executive's law-making role. But sharing in the legitimacy does not itself qualify a body for a role as sovereign, particularly where the political legitimacy of the executive is derived purely from that of Parliament.

[95] Sedley, note 90 above, p.43.

[96] *Ibid.*

[97] I am indebted to Sir Stephen Sedley for this point.

[98] It is for this reason that there ought not to be any concern about compliance with Article 6 of the ECHR. A court being able to overturn legislation in narrow circumstances is not incompatible with the need for independence and impartiality. If anything, it provides a stronger compliance with Article 13 and the need for an effective remedy in national courts.

[99] T.R.S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (Oxford 1993); *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford 2001).

https://doi.org/10.1017/S0008197309000361 Published online by Cambridge University Press

common law, and where that rule of law is vindicated primarily through the powerful interpretative possibilities inherent in common law adjudication.[100] Allan is necessarily restricted to arguing that the courts can, albeit strongly, control Parliament through interpretation: "the *meaning*, if not the *validity*, of statutes is always ultimately a matter for courts".[101] Because Allan has insufficiently dealt with the functional overlap of the courts and the legislature he is restricted to an argument from extreme cases or unusual legislation such as *ad hominem* statutes[102] for situations in which the courts may conceivably exercise a strike-down power, because only those cases can be described as violating the rule of law, even when it has as broad a conception as Allan gives it. In Allan's bi-polarity the courts are not truly sovereign in the sense identified by Rees. The role of the courts as enforcement sovereign enables them to declare legislation void because it is incompatible with the constitution. Incompatibility will fall along much the same lines as writers such as Allan or Laws have suggested: Parliamentary legislation corroding the separation of powers, the rule of law (even narrowly understood) or some democratically fundamental rights are likely to be the trigger points. But the argument is not restricted to the apparently dubious extreme case.[103]

One constitutional principle is that of habeas corpus and that detention without trial is illegitimate. Thus in the *A* case,[104] under the restated conception of bi-polar sovereignty, it was possible – but, and this is essential, not *required*, because the legislature is entitled to deference where the courts consider it appropriate – for the courts not only to declare the relevant provisions of the Anti-Terrorism, Crime and Security Act 2001 incompatible, but also void. The *A* case is, it is submitted, the type of case in which it would be appropriate for the bi-polar sovereign powers of the courts to be exercised. The Human Rights Act 1998 removes, at least to a certain degree, the urgency of the debate because the declaration of incompatibility is an adequate judicial tool. The need to allow an interaction between the two branches of government on difficult rights issues provides that it would usually be entirely proper for a court to refrain from exercising its sovereign powers where the law also gives it a softer tool to employ. If the declaration was ignored and detention without trial for foreign nationals had been retained despite the decision in *A*, then recourse to the powers of the bi-polar sovereign may have been the appropriate next step. As yet, the executive and Parliament have not refused to accept a

[100] See also: T.R.S. Allan, "Parliament's Will and the Justice of the Common Law: The Human Rights Act in Constitutional Perspective" [2006] C.L.P. 27.
[101] Allan, *Constitutional Justice*, p.207 (original italics).
[102] *Ibid.*, pp.216–221, 232–242.
[103] Goldsworthy, note 67 above, pp.259–272.
[104] *A (FC) and others* v. *Secretary of State for the Home Dept.* [2004] UKHL 56; [2005] 2 A.C. 68.

https://doi.org/10.1017/S0008197309000361 Published online by Cambridge University Press

declaration of incompatibility.[105] However, it is difficult to delimit the precise situations in which the court can properly act. Allan does not seem to do so. Sir John Laws refers only to freedom of expression in his discussion of higher-order law and fundamental rights in a democracy,[106] although he refers to his arguments being applicable to other rights too.[107] It is clear, and unsurprising, that the main theorists are unwilling to pin themselves down to a definitive list of situations in which the courts may be able to declare an Act of Parliament void. It is not the aim of this article to provide that list, but to better explore the basis from which to reason. The basis from which this author would work is that a case would have to invoke a right of some traditional constitutional standing. Habeas corpus,[108] access to an independent and impartial court,[109] basic political speech[110] and freedom from torture[111] might be thought to be the most obvious examples, but their precise ambit and the possibility of further inclusion is a topic for much fuller discussion elsewhere.

Bi-polar sovereignty is not dependent on the normative conclusions of Allan, Laws or any other so-called common law constitutionalist. Instead, by presenting the legal sovereign, the enforcement sovereign and the functional overlap as the reason why sovereignty works it is arguable that a only a normative theory can displace it. One does not need a substantive rule of law to underlie bi-polar sovereignty – although Sir Stephen Sedley may himself be employing one[112] – but the only option for the judiciary is to retreat "into the long sleep of *Wednesbury* and before, or to develop the role with which we are now becoming more familiar".[113]

VIII. The Semantics of Bi-Polar Sovereignty

Apart from his criticisms, Allison makes an interesting, albeit rather back-handed, concession to bi-polar sovereignty that it works effectively as "rhetoric in the service of a polemical challenge to the traditional conception of sovereignty."[114] While it is to be hoped that the

[105] J. Beatson et al., *Human Rights: Judicial Protection in the United Kingdom* (London 2008), pp.522–533; I. Leigh & R. Masterman, *Making Rights Real: The Human Rights Act in its First Decade* (Oxford 2008), Ch.5.
[106] J. Laws, "Law and Democracy" [1995] P.L. 72, 84.
[107] *Ibid.*, 82.
[108] *A* [2004] UKHL 56; [2005] 2 A.C. 68; *Khawaja* v. *Secretary of State for the Home Dept.* [1984] A.C. 74.
[109] *R.* v. *Secretary of State for the Home Dept. ex p. Simms* [2000] 2 A.C. 115; *R.* v. *Secretary of State for the Home Dept. ex p. Leech (No. 2)* [1994] Q.B. 198.
[110] *Derbyshire County Council* v. *Times Newspapers* [1993] A.C. 534.
[111] *A and others* v. *Secretary of State for the Home Dept. (No. 2)* [2005] UKHL 71; [2006] 2 A.C. 221; *R. (Binyam Mohamed)* v. *Secretary of State for Foreign and Commonwealth Affairs (No.4)* [2009] EWHC 152 (Admin).
[112] Sedley, note 22 above, 391.
[113] *Ibid.*, 395.
[114] Allison, note 73 above, p.218.

https://doi.org/10.1017/S0008197309000361 Published online by Cambridge University Press

argument presented here cannot be dismissed as a polemic others also doubt the terminological exactitude of bi-polar sovereignty even as a rhetorical device. The most interesting analysis on the question comes from Philip Joseph.[115]

Joseph is no traditional sovereignty theorist. He argues strongly and convincingly against any approach that posits an either/or solution to sovereignty. Instead he sees the courts and Parliament engaged in "a collaborative enterprise – the business of government".[116] He is not without some extra-judicial support. Lord Cooke of Thorndon has explicitly endorsed the collaborative enterprise approach[117] and Lord Woolf used the terminology of a "common enterprise" between the courts and Parliament.[118] Joseph argues that sovereignty as an ordinary word cannot permit a duality, and calls such an idea "an oxymoron that is better avoided".[119] He dismisses bi-polar sovereignty as suggestive of "schizophrenic doctrine marked by delusion and inability to distinguish reality from unreality" and reiterates that "neither Parliament nor the Courts is *sovereign* (in the sense of supreme ruler or head)".[120] As such, the term collaborative enterprise better represents the joint functioning of the branches, "espousing complementary goals but responding to different sets of incentives".[121] It should be noted that Joseph avowedly uses 'Parliament' rather than 'legislature' throughout because of the "merged executive and legislative functions under the Westminster system",[122] recognising the political realities relied on in this article.

When Joseph complains that the orthodox sovereignty theory has the unhappy result of "aggrandising legislative power and discounting the constitutive authority of the Courts to develop the law"[123] his complaint cannot pertain to the theory of bi-polar sovereignty presented here because it is at least partially dependent upon the power of the courts to engage precisely in that development process. The substantive argument made in this article is predominantly consistent with – although by no means the same as – the substantive theory of Joseph's collaborative enterprise. It is only in relation to the label that is best employed that the two diverge to any significant degree. It is difficult to argue against Joseph's re-labelling. To do so risks appearing to suggest

[115] Philip A. Joseph, "Parliament, the Courts, and the Collaborative Enterprise" (2004) 15 K.C.L.J. 321. See also: Joseph, "The Demise of Ultra Vires – Judicial Review in the New Zealand Courts" [2001] P.L. 354.
[116] *Ibid.*, 323.
[117] Lord Cooke of Thorndon, "The Road Ahead for the Common Law" [2004] I.C.L.Q. 273, 275.
[118] Lord Woolf, "*Droit-Public* – English Style" [1995] P.L. 57, 69.
[119] Joseph, note 115 above, 333.
[120] *Ibid.*, 334 (original emphasis).
[121] *Ibid.*
[122] *Ibid.*, 321.
[123] *Ibid.*, 335.

https://doi.org/10.1017/S0008197309000361 Published online by Cambridge University Press

that the courts and the legislature are not engaged in a collaborative exercise. They are, and Joseph is entirely correct to posit the business of government as the purpose of that exercise. But that is not unachievable within bi-polar sovereignty, which is also internally reliant upon the two primary legal powerbases of the constitution working together. Sovereignty may have overtones to a few commentators of struggle and contest but there is no inherent reason why it need be so.

The question is whether the use of sovereignty really "disconnects from this reality and impedes constitutional understanding".[124] It is submitted here that it does not. Bi-polar sovereignty better presents the importance of the two branches and the power that they hold in relation to the citizen. A clearer constitutional understanding is possible. Anyone may engage in a collaborative enterprise with anyone else; only the courts and the legislature have a claim to sovereignty in the British state. It cannot be correct to state that the use of the word sovereignty "forces closure on debate about the true relationship of the branches".[125] Any constitutional law student should be able to reel off a substantial list of writings (including those of Joseph himself) to show that whatever the debate on the relationship between Parliament and the courts is, it is avowedly not closed and the use of sovereignty or supremacy does not make it so. Instead, by using bi-polar sovereignty in the sense Rees sees it we are able to better contemplate the relationships between the two bodies and analyse the extent to which one should impact upon the other. For the majority of the time it is to be strongly hoped that the atmosphere will resemble that of a collaborative enterprise, with inter-institutional dialogue playing a vital role in resolving disputes.[126] Such is the pragmatism of the constitution. Even when the temperature rises somewhat, as in the disagreements between senior judges and the government over the Asylum and Immigration Bill and its attempted exclusion of judicial review,[127] the resolution is dialogic rather than a clash of supremacies.[128] Nonetheless, the bi-polar sovereignty model better represents the reality of constitutional power, even if the day-to-day use of that power is collaborative. Joseph thinks two bodies being sovereign is an oxymoron, and the fact that bi-polar sovereignty has been so minimal in the debates for so long suggests that some agree with him. However, the work of Rees and Sedley together

[124] *Ibid.*, 345.
[125] *Ibid.*
[126] There is a wealth of literature on dialogue, but for useful introductions see: L. Tremblay, "The Legitimacy of Judicial Review: The Limits of Dialogue Between Courts and Legislatures" (2005) 3 ICON 617; R. Clayton, "Judicial Deference and 'Democratic Dialogue': The Legitimacy of Judicial Intervention under the Human Rights Act" [2004] PL 33; T. Hickman, "Constitutional Dialogue, Constitutional Theories and the Human Rights Act" [2005] P.L. 306.
[127] Lord Woolf C.J., "The Rule of Law and a Change in the Constitution" [2004] C.L.J. 317.
[128] A. Le Sueur, "Three Strikes and it's Out? The UK Government's Strategy to Oust Judicial Review from Immigration and Asylum Decision-Making" [2004] P.L. 225.

https://doi.org/10.1017/S0008197309000361 Published online by Cambridge University Press

reveals a restatement of bi-polar sovereignty through the recognition of a functional overlap which is both plausible and desirable. Bi-polar sovereignty is an approach which is based in the functions of the courts and grounded in the institutional pragmatism of the English constitutional tradition

IX. Conclusion

The notion of Sir Stephen Sedley that Parliament and the courts have a bi-polar sovereignty in the English constitution is an important and valuable contribution to the debate in constitutional theory. By itself, however, bi-polar sovereignty is insufficient. The traditional theorisation does too little to explain what form of sovereignty the courts have and lacks an explanation of how it relates to the sovereignty of Parliament. By reconsidering the work of W.J. Rees, and adapting it to more accurately portray the English constitutional structure, bi-polar sovereignty is made much stronger. Neither legal sovereignty nor enforcement (or coercive) sovereignty can simply be ascribed to one branch of government. Instead, a deeper truth is revealed. Bi-polar sovereignty always suggested that the courts had a power in relation to legislation in certain circumstances. The restatement of bi-polar sovereignty clarifies how the courts have their power in relation to legislation, situating the development in the light of the setting of an institutional pragmatism which is part of the English constitutional tradition.

Whether or not the courts are, in reality, moving towards recognising their power is open to greater doubt. It might be accurate to adopt the statement of Laws L.J. in *International Transport Roth* that "the British system may be said to stand at an intermediate stage between parliamentary supremacy and constitutional supremacy".[129] It is certainly true that, as Mark Elliott has noted, that "the doctrine of parliamentary sovereignty, in its traditional form, is increasingly under pressure".[130] Europe, devolution, the Human Rights Act 1998 and the judiciary have all played their part in applying the squeeze. The gradual gathering of constitutional pressure is part of the pragmatism of the English constitution. All of the areas which challenge the classic understanding of Parliamentary sovereignty are problems which stem from the rigidity of Parliamentary sovereignty. A focus on institutional solutions to constitutional problems makes it realistic to consider bi-polar sovereignty as a possible corrective – a conception which allows reconsideration of the relationship between Parliament, the courts and

[129] *International Transport Roth GmbH* v. *Home Secretary* [2003] Q.B. 728 at [71].
[130] M. Elliott, "United Kingdom: Parliamentary Sovereignty under Pressure" (2004) 2 ICON 545, 554.

https://doi.org/10.1017/S0008197309000361 Published online by Cambridge University Press

the executive. The functional overlap between the roles of the courts and Parliament is the basis for the courts to fulfil their constitutional role as enforcement *sovereign*, with the sovereign power which that role entails. On bi-polar sovereignty the conclusion of Sir Stephen Sedley in 1994 is only stronger today:

> I suggest that public law now has both the doctrinal strength and the public support to say that this is a matter on which there is no longer a constitutional silence and that the rule of law recognises two sovereignties.[131]

[131] Sedley, note 19 above, 291.

https://doi.org/10.1017/S0008197309000361 Published online by Cambridge University Press