EU Membership Versus Parliamentary Sovereignty: Argumentative Essay

The primary objection to EU membership and the limits it placed on parliamentary sovereignty has been specifically focused on the erosion of parliament's law-making powers. While it is true that the UK will not be under the formal obligation to conform to EU law there are other hurdles to regaining a constitutional settlement in which parliamentary authority is unobstructed; the largest hurdle being the judiciary. Common law has traditionally placed the role of the judiciary as secondary and limited as part of the constitutional settlement of the 1688 Glorious Revolution. However, growing post-war, European integration as well as declining socialist politics in place of ideological liberalism has encouraged a constitution in which fundamental tenets have become increasingly justiciable.

Bickerton identifies the 1970s as an important turning point across Europe, as left political parties increasingly resorted to supranational rules and bodies to tackle price and wage inflation and industrial unrest . This turn away from the nation state towards supranational frameworks occurred at the same time as left political parties across much of Europe pursued less ambitious and less transformative policies in national arenas. This is the vital context for understanding why much of the left are now willing — as Bickerton puts it — 'to strike a bargain with judicial power' .

Promotion by the left of judicial authority piqued under the Blairite government's passage of the Human Rights Act 1998 enabling the ECHR provisions and ECtHR case law to be considered in domestic courts. This has been a major step in conferring power from parliament to the judiciary as the HRA has altered and expanded the kind of reasoning required of domestic courts in critiquing parliamentary legislation. Considerations now include how rights should be understood; proportionality; ECtHR case law; and whether it is possible to read and give effect to legislation in line with convention rights or whether it ought to be declared out of line. This restriction to parliamentary power has been recognised amongst Conservative MPs and has prompted many to support a retraction of the HRA in favour of something more "British"- even included in the 2015 manifesto which some may identify as a signifier that parliament is still in control of the power it gives to the judiciary.

However, even in the event of a repeal of the HRA in an attempt to expunge European influence; there remains the question that Peter Munce correctly asks of how a 'British Bill of Rights…preventing judge-made law' will in its place 'ensure that the judiciary does not encroach any further upon the power of Parliament?'. The UK would also remain a signatory to the European Convention on Human Rights ('ECHR') and be subject to the jurisdiction of the European Court of Human Rights ('ECtHR'); pulling out of such a treaty would prove dangerous for diplomatic relations with Europe and could even result in being removed from the Council of Europe. Although it is true that parliament may choose to overrule (or disregard) the domestic judgement and the ECHR, the intent behind the treaty was to expose such action to the criticism with an acute awareness of rights and would remain at some level an obstruction; and even more so under the current conditions of an ever-powerful judiciary.

More significantly, there has also been an unintended "spill-over" effect of European integration

unimagined by parliamentarians in 1972 where domestic courts impose constraints to parliamentary sovereignty even outside the realm of ‘rights’ and Europe. A notable example being Evans ; where 5 Supreme Court judges dismissed the Attorney-General’s exercise of section 53 of the Freedom of Information Act 2000 which permitted a minister or Attorney-General to override a decision by an information commissioner or tribunal. This occurred under the reasoning that public interest outweighed confidentiality and was put forth by the judges that overriding the tribunal was unconstitutional. This created an unsteady premise which suggests that it is unconstitutional for ministers to override a court; and ruled as such not even under the justification of upholding rights- but competing public interests. Such a precedent is indicative of how power has transferred from parliament to the judiciary, outside the realm of the EU, in-turn meaning Brexit will not have the jurisdiction to remedy such a shift.

There is also the case of Miller to consider. While Keith Ewing views Miller as a case which takes parliamentary sovereignty “decades back” in its protection of parliament from an overreaching