Sovereignty and Europe – The British Perspective

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Introduction

In January 2013, 40 years after the United Kingdom (UK) joined the European Union (EU), the British prime minister David Cameron called for a radical reform of the EU and announced that, should the Conservative party win the

1. The author has decided not to include an analysis of the impact of the European Convention on Human Rights (ECHR), incorporated in British law by the Human Rights Act (HRA) in 1998, because of the magnitude of the topic and the article’s technical constraints. On the issue of parliamentary sovereignty and the ECHR, see Alison Young, Parliamentary Sovereignty and the Human Rights Act, Oxford: Hart Publishing, 2008; Aileen Kavanagh, Constitutional Review under the UK Human Rights Act, Cambridge: Cambridge University Press, 2009; Iris Nguyên-Duy, La souveraineté du Parlement britannique, Paris: L’Harmattan, 2011, pp. 528–588. The HRA gives British courts the power to issue declarations of incompatibility when legislative provisions are in contravention of the rights guaranteed by the HRA. While some critics of parliamentary sovereignty (among others, several judges in Jackson v. Attorney-General [2005] UKHL 56) have asserted that it could not be reconciled with the expanded judicial role under the HRA, it is possible to affirm that, since the sovereign Parliament has enacted the HRA, it can also repeal it at any time. Moreover, the Act does not give the courts the power to disapply or invalidate Acts of Parliament, it only gives them considerable latitude to interpret them. Interestingly enough, on 3 March 2013, the British Justice Secretary, Chris Grayling, and the British Home Secretary, Theresa May, announced that they wanted the UK to withdraw from the ECHR by 2015, in order to let the British courts interpret the law without any interference from the European Court of Human Rights (ECtHR) in Strasbourg. Lady Hale, one of the members of the British Supreme Court warned against repealing the HRA, as it would require Britain to leave European institutions, such as the Council of Europe and the EU. – Joshua Rozenberg, “Judges would regret Human Rights Act Repeal, warns Lady Hale”, The Guardian, 14 March 2013, accessed 14 April 2013, http://www.guardian.co.uk/uk/2013/mar/14/judges-regret-human-rights-act-repeal.
next national election in 2015, he would hold an “in-out referendum” on the United Kingdom’s future in Europe by the end of 2017.2

Ever since its entry into the then European Economic Community in 1973, the United Kingdom has constantly shown ambivalence, even reluctance, towards an “ever-closer” European political and economic union and has gained a reputation for being at odds with nearly all major European initiatives. Even though the UK has been an active proponent (and beneficiary) of some EU policies,3 still is an influential member of the EU and diligently complies with most of its EU obligations,4 it also remains one of the less integrated EU member-states because of its numerous reservations and opt outs. Even in 2013, the UK still defines its relationship with the EU in terms of intergovernmental cooperation more than in terms of supranational European cooperation and integration. This attitude of rejection of deeper EU integration may be explained by at least three factors: a British ‘islander mentality’, British history (the UK is a former imperial power) and, above all, a strong attachment to its sovereignty.

From a constitutional perspective, the issue of sovereignty is indeed at the heart of the British resistance towards more European integration, and it is recurring in most of the legal, political and academic debates on the topic.

In order to understand the constitutional implications of the EU membership for British sovereignty, one first has to grasp what the concept of sovereignty means for the British. We will then study the first major challenges to British sovereignty and the way they were tackled by the UK, before we present the main instruments or mechanisms used by the UK to protect its sovereignty from the EU integration process. In the last part of this article, we will reflect on a new constitutional challenge—a potential paradigmatic shift in terms of sovereignty: the use of referenda to settle European issues.

1. The British concept(s) of sovereignty

Due to the idiosyncratic institutional and constitutional characteristics of the British legal system, the concept of ‘sovereignty’ is far more complex than what one can imagine. The term ‘sovereignty’ covers three different notions, both co-
existing and intertwined: national sovereignty, parliamentary sovereignty and popular sovereignty.

National sovereignty, meaning sometimes ‘national independence’, might be described as the external dimension of sovereignty, as opposed to its internal dimension, parliamentary sovereignty (also called parliamentary supremacy or legislative supremacy).

The British attachment to national sovereignty is an important source of resistance to the external challenges posed by the growing global interdependence in general and membership to the EU in particular. However, as Ian Harden explains, “the popularity of the term ‘national sovereignty’ must not be taken to imply that this connection has any definite constitutional form. ‘National sovereignty’ has no constitutional or legal meaning separate from ‘Parliamentary sovereignty’ or ‘state sovereignty’.”

In a representative democracy such as the British one, the power, formally and actually, resides in the Queen-in-parliament. Indeed, because Britain lacks a codified Constitution, ‘parliamentary sovereignty’ remains the ‘keystone’ of the whole British legal system. The doctrine of parliamentary sovereignty entails that the British Parliament possesses sovereign—legally unlimited—legislative authority. Parliament is a symbol and the “expression of both the ‘nation’ and of the idea that government should be accountable to the representatives of the nation.”

Among the various attempts to define parliamentary sovereignty, the most persistent one and one that, for many, has imposed itself as a dogma, is the one formulated by Albert Venn Dicey in 1885. According to Dicey, Parliament has the ultimate legislative authority. It has “the right to make or unmake any law

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5. Member States are expected to share or ‘pool’ sovereignty in particular areas, in order to achieve shared objectives or to solve common problems by taking collective decisions.
7. The UK is a constitutional monarchy (or, more accurately, a representative monarchy) with a parliamentary system.
8. More accurately, the British constitution is “partly written and wholly uncodified”, since the UK does not have a single, written constitution. If the British Constitution were summed up in eight words, these would be: "What the Queen in Parliament enacts is law".
10. Understood here as a ‘short-cut’ for the ‘Queen in Parliament.’ One can eventually refer to the ‘Crown in Parliament,’ in order to emphasise that the Monarch only plays a symbolic role in the exercise of the sovereign power and that the Government has taken her place in this sovereign tripartite entity.
11. The Parliament, composed of the House of Commons and the House of Lords, passes the legislation and the Queen grants her royal assent to the legislation passed by Parliament.
whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.”13 There is a positive and a negative side to this definition. On the one hand, sovereignty entails that “[a]ny Act of Parliament, or any part of an Act of Parliament, which makes a new law, or repeals or modifies an existing law, will be obeyed by the Courts.” On the other hand, it means that “[t]here is no person or body of persons who can, under the English constitution, make rules which override or derogate from an Act of Parliament, or which (to express the same thing in other words) will be enforced by the Courts in contravention of an Act of Parliament.”

There is still a contentious legal debate over the precise meaning of parliamentary sovereignty—and its consequences in the UK today. According to the orthodox ‘continuing’ sovereignty doctrine, also known as the doctrine of ‘self-embracing’ sovereignty, a properly constituted parliament cannot bind its successors (i.e. the next elected parliament) and a parliament may repeal any previous legislation by passing an ordinary act. The only limit to Parliament’s legal power is that “it cannot detract from its own continuing sovereignty” (Sir William Wade).14 Parliament is legislatively omnicompetent, it is the supreme legal authority in the UK. However, according to the ‘new view’ of the doctrine, advocated by Sir Ivor Jennings, R.F.V. Heuston and Geoffrey Marshall, whilst there are no substantive limits to Parliament’s legislative power, Parliament can bind itself in terms of manner and form of legislating (procedural entrenchment is possible).15 Needless to say, the consequences of such a fundamental constitutional doctrine for understanding the relationship between the European Union and the UK are huge.16

As for ‘popular sovereignty,’ one could say that the people are the political sovereign, while parliament embodies the legal one.17 Parliament is chosen by the

16. The devolution of powers to bodies such as the Scottish Parliament or the Welsh Assembly, the Human Rights Act 1998, the decision to establish a UK Supreme Court in 2009 (ending the House of Lords function as the UK’s final court of appeal) and, of course, the UK’s entry into the EU in 1972 are political developments that have lead Parliament to pass laws that affect—but do not fundamentally undermine—the principle of parliamentary sovereignty, since Parliament could repeal any of the laws implementing these changes, at least in theory…
17. John Bell, “Que représente la souveraineté pour un Britannique?”, Pauvretés, vol. 67, 1993: 107. However, it has to be kept in mind that, for historical reasons, “after the people had asserted their claims in the American and French revolutions, the reaction in Britain was one of profound distrust of the masses and fears for safety of the country’s venerable and ancient institutions in the face of popular sovereignty […] Our modern symbols of national identity did not evolve from those historic claims to the ‘rights of freeborn Englishman;’ they were constructed from
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The electorate and the will of the people is usually expressed by an Act of Parliament. Indeed, according to Dicey’s doctrine of sovereignty, sovereignty is legally manifested in the sovereign Parliament.

It is important to understand that “[c]oncerns about national and parliamentary sovereignty are mutually reinforcing components in the institutional and cultural-normative interaction between British politics and the European Union.”¹⁸ Indeed, the British membership to the EU raises important constitutional issues, notably as to how this membership could be reconciled with the principle of the legislative supremacy of Parliament. Interestingly enough, sovereignty was not considered to be an issue before the accession.¹⁹ It was only a matter of time, after the UK had decided to ratify the treaty, before the inherent conflict between the doctrine of parliamentary sovereignty and the principle of supremacy of EC law became evident. But, even then, the issue of sovereignty was described “not as an impediment to British Membership but as a technical problem of a novel kind which may demand a solution.”²⁰ This demonstration of British pragmatism illustrates quite well how the British found a way of handling the problem, every time the EU tried or tries to expand its influence and supremacy over the British legal system.

2. The main challenges to sovereignty

The EU legal order is constantly evolving, as is the British legal system. Since they are more or less bound by this dynamic, it did not take long for antagonisms to appear during the initial accession process. These were accentuated by the emergence of a quasi-judicial review of the conventionality of British Acts in the 1990s.

¹⁹. The British Government came to the conclusion that there was “no question of erosion of essential national sovereignty” in their white paper in 1967 (Government White Paper, The United-Kingdom and the European Communities, Cmnd. 4715, 1967, § 29), that the “ultimate sovereignty of Parliament” would not be diminished or abrogated (Mr. Rippon, 831 HC Official Report (5th Series) col. 278, Februar 15, 1972), and that the constitutional innovations would be limited.
The European Communities Act of 1972 and its impact on parliamentary sovereignty

The UK signed the Treaty of Accession in 1972, but an Act of Parliament was necessary in order to give full effect to EU law. By enacting the European Communities Act (ECA) in 1972,21 thereby incorporating Community law into domestic law and making it “equal in force to any statute,”22 the British Parliament incorporated at the same time, by a single legislative act, two revolutionary principles: the principle of direct effect established by the European Court of Justice (ECJ)’s decision Van Gend en Loos of 1963 and according to which Community law confers rights and duties directly on the individuals and national courts are obliged to interpret all legislation in compliance with Community law; and the principle of primacy of EU law, established by the ECJ’s decision Costa v. ENEL of 1964, according to which Community law is superior to national laws and takes precedence in case of conflict with national legislative provisions even posterior.

The passage of the Act was, for some, a lethal blow to parliamentary sovereignty or the sign that Parliament had abdicated its sovereignty.23 However, the defenders of the doctrine were able to claim that the limitations of legislative sovereignty consented to by Westminster when enacting the ECA were voluntary, temporary and retractable. The British Parliament could, theoretically at least, decide at any time to withdraw from the EU. Hence Parliament is still sovereign. Indeed, formally, the ECA is an ordinary Act of Parliament that serves as a basis for the relationship between the UK and the EU. There are no provisions in the Act that impede Westminster from modifying or repealing it. And, technically, Parliament can decide to enact any legislation inconsistent with applicable EC laws as it wishes, as long as it makes it clear, either by express words or by necessary implication, that this was intended and that the legislation should apply, notwithstanding the inconsistency.24

21. Only a small majority (of 8 votes) voted in favour of the ECA.
24. Section 2(1) ECA establishes the legal basis for directly applicable EU laws in domestic law. Its aim is to make the principle of direct effect of EU law part of the British legal system. A law which is to be given direct effect under the EU treaties, is to be directly enforceable in the UK. Section 2 (4) ECA is particularly problematic, since it could entail that EC law takes precedence over posterior Acts of Parliament and that the principle according to which “Parliament cannot bind its successors” would be undermined. There are at least three interpretations of section 2 (4), the main one being that section 2 (4) suggests that a posterior Act of Parliament must be construed and given effect in such a way as to be consistent with EU law. “[I]n so far as it relates to future legislation, s. 2 (4) only expresses a rule of construction which must give way to a contrary intention. […] It is therefore suggested that no theoretical or practical problem of sovereignty arises in this context.” - Lawrence Collins, European Community Law in the United-Kingdom, London: Butterworths, 1990: 28.
Even though it only has 12 sections, the ECA is more complex than it seems. It is crafted so that it satisfies both parties (especially the European institutions in the long term) and it provides for different levels of interpretation. That is what was demonstrated by the Factortame case-law.

The Factortame case (1991)

Even though the principle of EU supremacy is in direct contradiction with parliamentary sovereignty which expressly prohibits British courts from ‘disapplying’ Acts of Parliament, the courts managed to reconcile this somewhat paradoxical situation in a famous series of litigation in the 1990s, the Factortame cases.25

The decision of the House of Lords in R. v. Secretary of State for Transport ex parte Factortame Ltd (No. 2)26 (Factortame) concerned the relationship between the legislation of the sovereign British Parliament and European Community law. It presented the most memorable challenge to the sovereignty of Parliament in the British courts,27 since the choice left to the courts seemed to be to adhere either to the principle of parliamentary sovereignty and uphold the statute at stake or to the principle of supremacy of EU law and to set aside the Act.

In a preliminary ruling, the ECJ held that the British courts had to set aside the Merchant Shipping Act 1988 (UK)28 because it was in conflict with EU law. The ECJ concluded that interim relief had to be granted and that this obligation overrode any conflicting domestic principle.29

The House of Lords partially ‘disapplied’ the Merchant Shipping Act, arguing that the ECJ had held some of its provisions inconsistent with EC laws that were operative within the UK by virtue of s. 2 (1) of the ECA. They further explained

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27. See for example J. Goldsworthy, Parliamentary Sovereignty. Contemporary Debates, p. 287.
28. 95 Spanish fishing vessels, formerly registered as ‘British,’ were not able to comply with the new re-registration requirement of predominantly British ownership contained in the Merchant Shipping Act 1988 because they were managed and controlled from Spain. They challenged the Act on the basis of breach of the EC treaty (discrimination by nationality). But the Act in itself was not contradictory with EU law. Parliament did not intend to contradict EU law. On the contrary, it attempted to give effect to the fishing quotas required under EU law.
that, according to s. 2 (4) of the same Act, all British legislation, even primary legislation, *i.e.* Acts of Parliament, whether past or future, shall have effect "subject to" directly applicable EU law.

Many perceived *Factortame* as a decision in which the supremacy of EU law over British law had been confirmed and in which parliamentary sovereignty had been significantly undermined. However, there was no breach of parliamentary sovereignty. The courts did not strike down the Act, they tried to interpret it in a manner compatible with the British obligations under EU law. By setting aside the law, the House of Lords was in fact enforcing the will of Parliament to voluntarily limit its sovereignty:30 according to the *ECA*, the courts have the duty to interpret British law in accordance with EU law. Although the principle of *lex posterior derogat priori* should have normally applied, the *ECA* was considered to be a special constitutional statute which could not be overturned by a subsequent statute without an express parliamentary statement.31 This way, the House of Lords was able to both uphold the principle of parliamentary sovereignty (the will of the sovereign Parliament was respected) and to enforce the principle of the supremacy of EU law.32

3. The persistent effort to protect British sovereignty

The *ECA* gave the force of law to the existing Community legislation and obliged the UK Government to incorporate into domestic law future legislative acts from the EU. The Single European Act (came into force in the UK in 1987), the Maastricht Treaty (1993), the Amsterdam Treaty (1999), the Nice Treaty (2003) and the Lisbon Treaty (2009), comprising the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), extended these obligations.

Whenever the UK faces deeper political or economic EU integration that would have significant institutional, political and/or economic implications for the UK, different methods and mechanisms have been implemented, either alter-

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30. Lord Bridges famously stated that "whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary".

31. Later, in the case *Thoburn v. Sunderland City Council* (2002), certain statutes, such as the *Magna Carta* or the *ECA*, were perceived as having a certain constitutional importance that protected them from repeal by implied repeal. The sovereignty of Parliament was nevertheless preserved, because Parliament could, at any time, make its intention to overrule any statute clear, 'express.' [2003] QB 151; [2002] 3 WLR 247; [2002] 4 All ER 156.

32. Another way to put it would be that the decision *Factortame* could be seen by some as "revolutionary" (Sir William Wade) in that it represented an exception to the rule that Parliament cannot bind its successors or its consequences could be dampened by stating that section 2 (4) can be read as "a rule of construction for later statutes, so that any such statute has to be read [whatever its words] as compatible with rights accorded by European law." Sir John Laws, "Law and Democracy," *Public Law*, 1999: 72, 89. Because it is the *Parliament* that gave these instructions in the *ECA*, the ultimate sovereignty of Parliament has been upheld.

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natively or cumulatively, to protect the country’s interests and its (parliamentary) sovereignty.

Reaffirming the dualist system and its implications for EU law

According to the dualist system, Public International law and national law are two separate systems, each supreme in its own sphere. Consequently, an international treaty is not self-operating or self-executing: in the case of the UK, treaties have no special status and the rights and obligations they create take effect in domestic law through the legislation enacted to give them effect (statutory incorporation). EU law applies in the UK because, and only because, the Parliament has incorporated it into British law by enacting Acts. The status of EU law in the UK thus depends on one initial, single Act of Parliament, the European Communities Act 1972, and on other Acts or subordinate legislation.

Interestingly, this conception has been recently confirmed by section 18 of the European Union Act 2011 (EUA).33 By expressly reaffirming that the status of EU law in British law depends on continuing statutory basis, this legislative provision, also known as ‘the sovereignty clause’, states that the status (and fate) of EU law depends on the will of the sovereign Parliament and gives a clear signal that this should be respected. The apparent prosaicism of this statement, declaratory of the existing legal situation, actually hides a real manifesto in defence of parliamentary sovereignty, since the EU is not recognized as an autonomous and supreme legal order and since the ultimate decision clearly pertains to Parliament.35 It also reminds us, in a condensed manner, that no government can surrender powers to Brussels without national (parliamentary, and in some cases, even popular) con-

33. “Directly applicable or directly effective EU law (that is, the rights, powers, liabilities, obligations, restrictions, remedies and procedures referred to in section 2 (1) of the European Communities Act 1972) falls to be recognized and available in law in the United Kingdom only by virtue of that Act or where it is required to be recognized and available in law by virtue of any other Act.”

34. It was originally meant to reaffirm, and entrench, the sovereignty of the British Parliament and to prevent the British courts from imposing their own view of parliamentary sovereignty as a Common law principle, as expressed obiter in A. v. Jackson (2005). Section 18 would have been a provision that underlines “that what a sovereign Parliament can do, a sovereign Parliament can always undo” (Lord Howell, Ministerial Statement, 6 October 2010, https://www.gov.uk/government/news/eu-bill-to-include-parliamentary-sovereignty-clause?view=PressRelease&id=22976666.). However, in the final text, all references to parliamentary sovereignty have been omitted.

35. The explanatory notes for the EU Act indicate that this declaratory provision was meant to address “concerns that the doctrine of parliamentary sovereignty may in the future be eroded by decisions of the courts” and that its content “will provide clear authority which can be relied upon to counter arguments that EU law constitutes a new higher autonomous legal order derived from the EU treaties or international law and principles which has become an integral part of the UK’s legal system independent of statute.” European Union Act 2011, Explanatory notes, accessed 12 April 2013, http://www.legislation.gov.uk/uksi/2011/12/notes. However, nothing is said about the relationship between EU law and domestic law in the event of a clash between the two. For a critique of section 18 (and other aspects of the EUA), see Paul Craig, “The European Union Act 2011: Locks, Limits and Legality,” Common Market Law review, vol. 48, 2011: 1915; Richard Glancey, “A ‘Sovereignty’ clause for the UK – essential Act, empty words or hidden agenda?”, Web Journal of Current Legal Issues, 1, 2011, http://webjcll.ncl.ac.uk/2011/issue1/glancey1.html (accessed 15 Apr. 2013).
sent. Section 18 EU Act manages to protect parliamentary sovereignty while not altering the existing relationship between EU law and domestic law.

**Parliamentary authorisation or control**

Ever since its entry into the EU, the UK has developed an intricate system of scrutiny procedures of European legislation (select committees), and other mechanisms.36

In June 2008, the Parliament enacted the *European Union (Amendment) Act 2008* in order to incorporate the provisions of the Lisbon Treaty into UK law while preventing the Lisbon Treaty from further undermining the sovereignty of Parliament.37 Two sections of the Act in particular are meant to protect and maintain parliamentary sovereignty. Section 5 imposes the prior authorization of Parliament before the ratification of any treaty amending the founding treaties of the EU. It applies only to the amendments made under “the ordinary revision procedure.” Section 6 of the Act, entitled “Parliamentary control of decisions,” requires the approval of Parliament for amendments made under the “simplified revision procedures,” also known as “paserelles,” and certain other decisions.38 More generally, the fact that the British government has to seek parliamentary approval before ratifying any changes to the founding treaties reasserts the sovereign (status and) power of Parliament.

The *EUA* of 2011 also enhances and extends parliamentary control and scrutiny over EU decision-making. Democratic scrutiny over the British Government’s activities in relation to the EU is strengthened by three main control procedures: some decisions will require approval by both an Act of Parliament and a national referendum;39 some will require approval by primary legislation (an Act of Parliament alone); others will be subject to lesser forms of parliamentary approval procedure.40

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37. Technically, it added the Lisbon Treaty to the treaties listed in section 1 (2) of the ECA.

38. The ‘paserelle clauses’ are a category of provisions that allow derogations from the legislative procedures initially provided for by the Treaties. Under certain conditions, they allow a shift from special legislative procedures to ordinary legislative procedures, as well as a shift from unanimity vote to qualified majority vote, making it easier to amend the founding treaties and to bypass the veto of a Member State. While article 48 of the Treaty of the European Union introduces a general *paserelle* clause applicable to all European policies, six other *paserelle* clauses, related to specific European policies, may be activated and present certain procedural particularities.

39. See infra.

The opt-outs

When participating to international and supranational organisations, the States choose sometimes to opt out of certain functions or policy areas. As Rebecca Adler-Nissen puts it, “opt-outs are seen as symbols of national sovereignty and hence democracy reflecting […] an ideological assumption of ultimate authority over the internal operation of the polity.”

When the Maastricht treaty was concluded in 1992, the UK obtained an opt-out from the Agreement on social policy (“Social Chapter”). The Social Policy Protocol to the Treaty of Maastricht (TEU) thus embodied an opt out in favour of the UK that lead to the creation of a ‘twin-track’ EU social policy, since the UK did not want to be bound by the Agreement. This opt-out, negotiated by the then Prime Minister John Major, is a typical example of the UK protecting its sovereignty. However, this opt-out was terminated by the newly elected Blair government in May 1997.

A few years later, the UK obtained an opt-out from the Schengen acquis (abolishing controls and checks at the national borders of the Member States) and the new Title IV TEC dealing with “Visas, asylum, immigration and other policies related to free movement of persons”.

It was also granted an opt-out from the third stage of the Economic and Monetary Union (EMU) replacing national currencies with a single one, the euro.

The Charter of Fundamental Rights of the European Union, signed in 2000, gathers, in a single text, the whole range of civil, political, economic and social rights of European citizens and all persons residing in the EU. It does not create ‘new rights,’ but mainly codifies existing ones. Article 6 TEU, as amended by the Lisbon treaty, makes the Charter of Fundamental Rights legally binding on the Union and its institutions, as well as on the Member States as regards the implementation of EU law. The Charter has the same legal value as the European Union treaties, becoming, as such, part of the primary law of the EU. Since this implies that the Charter’s provisions are potentially enforceable by the European Court of Justice as well as by the national courts when EU law issues are at stake, they have to refer to the rights and principles of the Charter in their interpretation of legislation. However, both the UK and Poland negotiated a Protocol 7 that provides for a different application of the Charter in their respective countries. The UK was particularly afraid that it would be bound with new enforce-


43. These rights are listed under six major headings: Dignity, Freedoms, Equality, Solidarity, Citizens’ Rights and Justice.
able rights and that the Charter would endanger the doctrine of parliamentary sovereignty. This fear is reflected in the main provisions of the protocol, which is often referred to as an ‘opt out’ from the Charter, even though it is, technically, supposed to be a mere ‘clarification’ of the application of the Charter, with a reiteration of the reservations included in article 6 TEU. With this protocol, the British government aimed at ensuring that the powers of the ECJ did not extend over UK law and that the sovereignty of Parliament was thus preserved.

These four examples of British ‘opt-outs’ emphasize the will to protect key-elements or characteristics usually associated with British national sovereignty: people, territory and money. The opt-outs symbolise the will of the UK to retain its political and legal authority over them.

The right to withdraw from the EU

The Lisbon treaty, ratified by the UK in 2008, introduced a new article 50 in the Treaty on European Union that explicitly confers the Member States the right to withdraw from the EU. At a domestic level, the British Parliament would have to pass an Act to withdraw from the EU. In parallel, on the European level, the UK would have to comply with the Lisbon Treaty’s withdrawal procedure, according to which the State has to notify its intentions to the European Council and a withdrawal agreement has to be negotiated between the State and the EU.

44. Article 1(1) precludes the ECJ and any Polish or British court from finding that “laws, regulations or administrative provisions, practices or action” of these countries are inconsistent with the Charter. And article 1(2) of the Charter affirms that Title IV of the Charter, the “Solidarity” chapter of the Charter, containing economic and social rights, does not create “justiciable rights,” “except in so far as Poland or the United Kingdom has provided for such rights in its national law.” This last sentence is quite opaque and yet it seems quite clear at the same time that this part of the protocol is an opt-out from these social and economic rights. Moreover, article 2 of the Protocol states quite clearly that the Charter does not go further than pre-existing national law.


47. By the end of May 2014, the UK will also have to decide whether to opt into the body of unamended police and criminal justice measures adopted under the pre-Lisbon ‘third pillar’ arrangements (approximately 133 measures or arrangements, among which the EAW, access to police databases, membership to Europol and Eurojust and prisoner transfers) “en bloc,” or to opt out of it. These originally non-binding agreements were converted by the Lisbon treaty into instruments that will be enforceable by the European Commission and by the ECJ after November 2014. If the UK decides to opt out, all these measures will not be applicable anymore to the UK from 1 December 2014. But if the UK were to opt in, then the “infringement powers of the Commission and the European Court of Justice” would apply to these measures and the UK would have to accept the Commission’s enforcement powers and the Court’s jurisdiction. Accessed 27 March 2013, http://www.europarl.org.uk/ressource/static/files/sn06268–1–pdf (accessed 27 Mar. 2013).
The Treaties would cease to apply either from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification.

Such a provision confirms that the UK remains bound by the EU law as long as the UK wishes and as long as the Parliament does not decide to repeal the ECA. But which procedure would the UK have to follow? Would an Act passed by the sovereign Parliament be enough or should a referendum be organised as well? Could the use of referendum challenge British sovereignty as it is currently understood?

4. The referendum issue: a paradigm shift in the justification of British sovereignty?

A total of 11 referendums have been held in the UK since 1973, two of them at national level. But the ‘referendum lock’ mechanism inserted in the EUA seems to open for the potential organisation of many more national referendums in the future—not to mention the ‘in-out referendum’ on European membership the British Minister is keen on organising by the end of 2017, if the Conservative party is re-elected.

The ‘referendum locks’ of the European Union Act 2011

The purpose of a referendum is generally to allow the people, more precisely the voters, to express their opinion on a major constitutional issue, to give them a greater participation in politics. The EUA provides for a complex system of democratic scrutiny according to which a referendum must be held before (not after) there can be any amendment to the TEU or significant transfers of powers from Parliament to the European Union. These referendum locks are contained in sections 2, 3 and 6 EUA. On the one hand, they are (too) broad in scope

48. In 1975, the British held their first national referendum, on whether the UK should remain in the European Community as it was then. The referendum was organized after the British had already entered the European Community. The second nationwide referendum, the so-called ‘alternative vote referendum’ (on the voting system for electing MPs), took place in May 2011. The electorate had the choice between the current first past the post system or an alternative. 68% of the electors voted in favour of the first past the post system for general elections. The Scottish Government plans to hold a referendum on the independence of Scotland by the end of 2014. On referendums in the UK, see House of Lords Select Committee on the Constitution, Referendums in the United Kingdom, HL Paper 99, 2010, http://www.publications.parliament.uk/pa/ld200910/ldselect/ldconst/99/99.pdf and V. Bogdanor, The New British Constitution, Oxford: Hart Publishing, 2009, Chapter 7 (accessed 5 Apr. 2013).

49. Three main categories of measure will require approval by both referendum and primary legislation: 1) treaties adopted so as either to amend the existing TEU or TFEU in accordance with the EU’s ‘ordinary revision procedure’ or to replace the existing TEU or TFEU altogether, whenever the relevant treaty provides for one or more of the changes listed in section 4 of the EUA; 2) decisions adopted by the European Council under the ‘simplified version procedure’ provided for by art. 48(6) TEU, again according to the list of changes of section 4 EUA; 3) measures dealt with under section 6 EUA. NB: Most of the ‘trigger events’ identified in section 6 involve changes to the EU’s voting rules. See M. Gordon and M. Dougan, “The United Kingdom’s European Union Act 2011”, p. 10–12.
and they create an excessive scheme of control, potentially involving ‘the people’ too frequently. Instead of reserving the use of referendums to fundamental matters of constitutional importance, the EU opens for too many ‘trigger events,’ many of them technical, marginal and not obviously relating to the common understanding of ‘national interest.’ Apart from the practical and economic challenges related to the organisation of such events, a potentially more problematic consequence of frequent use of referendums could be both voters’ fatigue and disillusionment. On the other hand, the EU leaves a large margin of appreciation to the Government and Parliament: if the proposed revision and transfer of competences are deemed insignificant or minor, a referendum is not required. There are also three important exclusions: the codification of an existing competence, EU enlargement and competences that apply only to other Member States.

The implications of referendums for the British legal system in general and parliamentary sovereignty in particular

Two constitutional issues related to the ‘referendum locks’ of the EUA, that may affect parliamentary sovereignty, are the possible emergence of a new constitutional convention and the potentially new ‘status’ of the people in the British legal system.

50. According to Vernon Bogdanor, “by analogy with the referendums on devolution, there does seem a strong case in logic for arguing that there should be a referendum before major legislative powers are transferred upwards to the EU as well as downwards to devolved bodies.” – V. Bogdanor, The New British Constitution, p. 189.

51. Moreover, low turn-out rates could in the long run amount to a dilution of democratic legitimacy. But there are already examples of political strategies and solutions found by the British government to avoid organising a referendum even when the planned transfers of competences are ‘significant.’ In October 2011, the British Foreign Secretary decided that the decision made at the European Council of 24-25 March 2011 to amend Article 136 TFEU (in order to help set up the European Stability Mechanism to provide financial assistance to Euro area countries in crisis) did not fall within section 4 of the EUA because it is a provision that only applies to Euro area Member States. Thus no referendum was required in the UK. In December 2011, David Cameron chose to veto EU treaty changes that would have amounted, in the end, to a new fiscal compact and greater financial integration, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/126658.pdf (accessed 16 Apr. 2013). Some analysed the Prime Minister’s veto as a way to avoid having to organise a referendum (according to the EUA) which would have weakened the governmental coalition.

The emergence of a new constitutional convention?

The mechanism of ‘referendum locks’ included in the EUA and “the emergence of the referendum as a more systematic feature of the constitution” seem to confirm Vernon Bogdanor’s analysis of the direction taken by constitutional change in the UK, i.e. towards formal and legal popular sovereignty. According to Professor Bogdanor, we are witnessing the emergence of a new constitutional convention according to which a referendum would have to be held either “for any significant devolution of power away from Westminster” to devolved institutions or even to European institutions or “when a wholly novel constitutional arrangement is proposed.” The political actors seem to have (unwillingly?) created an expectation in the public that they are to be consulted, by referendum, on major constitutional issues.

However, a constitutional convention requires a continuous practice that cannot be observed in the UK. Even if the use of referendums in the context of the devolution reforms has been more systematic since the end of the 1990s, it has not been the case in the context of British membership to the EU. Moreover, no referendum was organised for the Human Rights Act 1998 or the Constitution Reform Act 2005 which created the new Supreme Court. Neither were referendums organised before greater fiscal powers were devolved to the Scottish Parliament under the Scotland Act 2012, or before the European Union Act 2011. Thus it cannot be concluded that the use of referendum for significant constitutional moments is a constitutional convention firmly established.

Towards a new ‘status’ for the people? Direct democracy as a threat to parliamentary sovereignty?

The concept of ‘people’ seems to be more present than ever, with the increased use of national and local referendums, public consultations during the preparation of constitutional reforms (especially with Tony Blair and Gordon Brown), and now with the referendum locks and the in-out referendum promised by the current Prime minister. The British government seems to be (re)discovering the ‘people’.


On the compatibility of the referendum locks with parliamentary sovereignty, one may wonder whether it can be reconciled with a ‘manner and form’ understanding of the doctrine. More generally, can a potentially more frequent use of this instrument of direct democracy amount to a threat to parliamentary sovereignty? *A priori*, the answer is negative: a referendum does not replace but supplements the way representative democracy works. However, since a legislative measure undergoes an extra scrutiny process (the referendum) before it is passed by Parliament, professor Bogdanor has analysed it as follows: “*the people, acting through referendum, take on the function of a third chamber of the legislature, in addition to the lower and upper houses.*” And concluded that “[i]n seeing to restore national sovereignty, the European Union Act has, paradoxically, restricted parliamentary sovereignty.” Though appealing, this idea of the people acting as a “third chamber” in Parliament, and sharing power with the governing institutions, has to be rejected. The tradition of representative democracy in the UK is firmly established and the referendums remain a weapon for the political class, not the people. It could be seen less as a device inserted in the *EUA* to secure or restore the people’s faith in politics, than a way to send a message to the EU, signifying that the British people backs up (or eventually rejects) any decision to transfer more powers to the EU. Moreover, as a consequence of the *EUA*, the people’s participation would be limited to EU matters (eventually to devolution matters as well).

There is a positive and a negative way to look at a referendum: it threatens representative government and checks it (two competing sovereignties?). Or it remedies its defects by supplementing it, giving it some legitimacy (two complementary sovereignties?). On the one hand, by giving more weight to the will of the people (and letting them veto a legislation *via* a referendum), parliamentary sovereignty risks being undermined. But that is not a real problem in a country with a strong representative tradition, where referendums seem to be advisory and not binding. On the other hand, the use of referendum might contribute

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56. Until 2011, there were no examples of legislative procedural entrenchment in the UK. Examples could only be found in Commonwealth countries. See the famous *Trewhaven, Harris and Ranasinghe* cases. The fact that the *EUA* is a prospective statute designed to prevent the British government from signing up to a new treaty or amending an existing treaty without a referendum seems to violate the rule that Parliament cannot bind its successors. But we can apply the same reasoning as the one for the *ECA*. See supra.


59. But, as Vernon Bogdanor puts it, “[i]n a country with an uncodified constitution, (…) it is not possible to derive definite answers to these questions”. V. Bogdanor, *The New British Constitution*, p. 174.

60. One important consequence of the doctrine of parliamentary sovereignty is that there can be no formal or legal constitutional checks upon the power of Parliament.

61. That is why the then leader of the House of Commons, Edward Short, was able to tell the House of Commons, just before the 1975 referendum (it was held because the government wanted to overcome opposition in
to reinforce parliamentary sovereignty by giving more legitimacy to the political decisions taken by the government and parliament and by protecting them from significant transfer or loss of power.

Since a referendum can fulfil two seemingly contradictory purposes, it all depends, in the end, on who decides to use this weapon and when.\(^{62}\)

**Conclusion**

"We have our own dream and our own task. We are with Europe, but not of it. We are linked but not combined. We are interested and associated but not absorbed."\(^{63}\)

These words written by Sir Winston Churchill in 1930 still seem to have an echo today and to sum up quite well the present relationship between the UK and Europe. It is undoubtedly a complicated one and qualifying the UK as an “awkward partner” is not farfetched.\(^{64}\) Among the various reasons that make the British membership problematic, the main one remains the will to preserve ‘sovereignty.’ Indeed, the UK has shown great ingenuity in developing an array of methods and controls mechanisms in order to preserve it, while continuing the cooperation with Europe. With the prospect of an in-out referendum in the near future, the relationship between the EU and the UK seems to be yet again reaching a crossroad. It is difficult to deny that there is an ever growing gap between the *de jure* sovereignty of Parliament and the *de facto* supremacy of EU law in British law, which might eventually result in a more radical step taken by the UK, out of the EU.

Yet, while the UK tries to protect itself from an external ‘menace,’ the most dangerous challenge to parliamentary sovereignty will probably come from the inside, with, on the one hand, the British people, if referendums are organised

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62. Ultimately, the parliament could decide to amend the EUA. For a contradictory opinion, see Memorandum by Unlock Democracy, http://www.publications.parliament.uk/pa/ld200910/ldselect/ldconst/99/10011302.htm (accessed 13 Apr. 2013): “Referendums are one of the few ways in which under our current constitutional settlement Acts of Parliament can be entrenched. This is not to say that the Acts are codified, just that if a measure has been endorsed in a referendum it would not be politically possible to repeal it without a further referendum. This is particularly significant as it ensures that constitutional changes, such as devolution, have some time to establish themselves rather than being subject to an immediate repeal if there was a change of government.”


more systematically, and, on the other hand, the British courts (headed by the UK supreme court) who, *inter alia*, have the duty to give effect to directly applicable European Union law and to interpret domestic law consistently with European Union law…

**Abstract**

The relationship of the United Kingdom with the European Union is a paradoxical one: It chose to join the EU 40 years ago, but has ever since quasi-systematically resisted any further major integration process. The article’s main thesis is that the will to protect sovereignty is at the heart of this effort. The UK has resorted to various methods, processes and mechanisms: reference to the dualist system, parliamentary authorisation and scrutiny, opt-outs, but also the so-called ‘referendum locks’ in 2011. However, by opening for the direct consultation of the people before any significant transfer of power to the EU, the UK might have awaken a ‘monster’ that may undermine parliamentary sovereignty instead of supporting it. Ultimately, the UK could decide to withdraw from the EU, but it is difficult to know whether an Act of the sovereign Parliament would be sufficient or whether a referendum needs to be organised.

**Résumé**

Les relations entre le Royaume-Uni et l’Union européenne sont paradoxales : Le Royaume-Uni a choisi de rejoindre l’Union il y a 40 ans et dans le même temps a résisté de façon quasi-systématique à toutes les tentatives de renforcement de l'intégration européenne. Cet article soutient que l'essentiel des mesures ingénieuses mises en œuvre par le Royaume-Uni à cet effet peut se justifier par la volonté de protéger sa souveraineté, incarnée dans le Parlement souverain : rappel de la tradition dualiste, négociation de réserves, développement de différentes procédures de contrôle et, récemment, création de « verrous référendaires ». Néanmoins, le mécanisme de consultation directe du peuple, institué par le European Union Act en 2011, pour ralentir ou bloquer les transferts de pouvoirs à l’Union européenne, pourrait reconnaître au peuple un rôle plus important et avoir, à terme, des conséquences négatives sur la conception britannique de la souveraineté.