Przegląd Prawa Konstytucyjnego
-----ISSN 2082-1212-----
DOI 10.15804/ppk.2022.06.37
-----No. 6 (70)/2022-----

Natalie Fox[1]

Regaining Sovereignty? Brexit and the UK Parliament[2]

Keywords: Brexit, the doctrine of parliamentary sovereignty, Art. 50 of the EU Treaty, Human Rights Act, judicial activism
Słowa kluczowe: Brexit, doktryna suwerenności parlamentu, Art. 50 Traktatu o Unii Europejskiej, ustawa o prawach człowieka, aktywizm sędziowski

Abstract

The flexible formula of the British Constitution results in a relative openness to external influences. Notwithstanding this fact, the United Kingdom's (UK's) membership in the European Union's (EU's) structures (1973–2020) resulted in a progressive limitation of the doctrine of parliamentary sovereignty. Brexit will not reverse the effects of the 'soft' modification of the foundations of the UK's system, which occurred in the sphere of the practical implementation of the competencies of the branches of governance. *Prima facie*, the decision on the UK's withdrawal from the EU should result in a 'renaissance' of the traditional doctrine of Westminster sovereignty, per A.V. Dicey. However, judicial activism, continued validity of the European Convention on Hu-

[1] ORCID ID: 0000-0002-4513-7997, Ph.D., Jagiellonian University in Krakow. E-mail: natalie.fox@uj.edu.pl.

[2] This paper presents the results of Research Project no. 2018/29/N/HS5/00685, financed by the National Science Centre (Poland). The proofreading of this paper was funded by the Faculty of Law and Administration of the Jagiellonian University, granted to the Priority Research Area Society of the Future under the programme 'Excellence Initiative – Research University' at the university. The theses of this article were presented during the Eighth Annual Conference of International Law ICON•S Global Problems and Prospects in Public Law, 62, panel session: Legislatures and Legislation, July 4–6, 2022.

man Rights (incorporated on the basis of Human Rights Act 1998) and the irreversible consequences of the devolution of competencies in the UK for Wales, Scotland and Northern Ireland are the factors that hinder the possible revitalisation of the sovereignty of the British Parliament.

Streszczenie

Odzyskanie suwerenności? Brexit i Parlament Zjednoczonego Królestwa

Elastyczna formuła brytyjskiej konstytucji skutkuje względną otwartością na wpływy zewnętrzne. Tym niemniej, członkostwo Zjednoczonego Królestwa w strukturach Unii Europejskiej (1973–2020) skutkowało postępującym ograniczaniem doktryny suwerenności Parlamentu. Brexit nie odwróci skutków "miękkiego" modyfikowania fundamentów ustroju Zjednoczonego Królestwa, które częstokroć miały miejsce w sferze praktycznej realizacji kompetencji poszczególnych segmentów władzy państwowej. *Prima facie*, decyzja o wystąpieniu ZK z UE powinna skutkować "renesansem" tradycyjnej doktryny suwerenności Westminsteru w ujęciu Diceyowiskim. Jednakże aktywizm sędziowski, dalsze obowiązywanie Europejskiej Konwencji Praw Człowieka (inkorporowanej na podstawie ustawy o prawach człowieka z 1998 r.) oraz nieodwracalne skutki powstałe w wyniku dewolucji kompetencji w ZK na rzecz Wali, Szkocji i Irlandii Północnej stanowią czynniki hamujące ewentualną rewitalizację zasady suwerenność parlamentu brytyjskiego.

*

I. Introduction

In the case of the United Kingdom of Great Britain and Northern Ireland (UK), the crucial problem concerned the restriction of the doctrine of parliamentary sovereignty fundamental to the British Constitution. In this paper, it is deemed necessary to discuss the role of the UK Parliament in the British legal system in the context of the principle of its supremacy. Undoubtedly, one of the manifestations of the modification of the doctrine of parliamentary sovereignty was the EU law. The aim of this paper, on one hand, is to demonstrate that the UK's membership in the EU's structures (1973–2020) resulted in a progressive limitation of the Parliament's sover-

eignty[3]. It has been customary to assume that EU membership limits the scope for practical implementation of this constitutional principle, which should be classified as an axiom of the British legal order. On the other hand, it is also argued in this paper that Brexit will not reverse the effects of the 'soft' modification of the foundations of the UK's system, which occurred in the sphere of the practical implementation of the competencies of the branches of governance. Essentially, judicial activism, continued validity of the European Convention on Human Rights (incorporated on the basis of Human Rights Act 1998) and the irreversible consequences of the devolution of competencies in the UK for Wales, Scotland and Northern Ireland are the factors that hinder the possible revitalisation of the sovereignty of the British Parliament.

II. Limitations of the doctrine of parliamentary sovereignty in the context of the UK's membership in the EU

To understand the central nature of the doctrine of parliamentary sovereignty in the British constitutional law, it is necessary to draw attention to the relations among the major constitutional bodies of the state in the context of the UK's membership in the EU. In this context, the question arises regarding the extent to which the British accession to the European Communities in 1973 has affected the functioning of the organs of the state, particularly the mutual relations between the legislative and the executive branches of the government, as well as the systemic position of the judiciary in relation to the other two branches. The complexity of the issue is further exacerbated by the fact that the British legal order does not provide for a one formal binding docu-

[3] It is with reason that this limitation of the superior role of Westminster can be assumed to have come about as a result of the self-binding and autonomous decision of the legislature. Thus, it indicates in the doctrine (according to R. Gordon) that it does not constitute a limitation of sovereignty *per se*, but merely a modification of it. As D. Oliver notes, the doctrine of sovereignty has not ceased to exist at all in the UK as a result of its EU membership but is now in a state of abeyance. See: R. Gordon, *Constitutional Change and Parliamentary Sovereignty – the Impossible Dialectic*, [in:] *The British Constitution: Continuity and Change. A Festschrift for Vernon Bogdanor*, ed. M. Qvortrup, Oregon 2015, pp. 153–154; D. Oliver, *Constitutional Reform in the United Kingdom*, Oxford 2003, p. 84.

ment of constitutional import that would define the existing structure of the political system. The method of operation of the basic institutions of the state and their competencies are defined in the UK primarily by statute law, *common law*, including court rulings, constitutional conventions, as well as the principles of the constitution[4]. These are the components that constitute the concept of the British Constitution in the material sense.

Undoubtedly, apart from the devolution reform of 1997 under Prime Minister T. Blair or the constitutional reform of 2005[5], resulting in a change in the traditional powers of the state authorities in the UK, the process of European integration has also significantly affected the adopted constitutional solutions that are functioning in the British political system. With the UK's accession, the relations among the various branches of government within the European Community structures changed. The modifications of the regulations shaping the framework of the UK's system related to the EU membership are generally in line with the trend started in the second half of the 20th century – towards the disunification of a relatively stable system. Already in the pre-accession period, the phenomenon of devolution, as well as the acceptance of the citizen participatory formula in the form of a referendum[6], constituted an important foreshadowing of the change in the British constitutional law. As a result of the UK's membership in the EU, significant modifications were introduced to the system of exercising state power, and the changes related to decision making in the EU influenced the political positions of many constitutional bodies. The changing relations among the three branches of government in the UK resulted from the existing impact of EU legislation on the UK constitutional law.

In fact, it was possible to observe in the UK that its membership in the EU resulted in the reduced powers of the legislative authorities while strengthening the role of the executive branch of government. The reinforcement of the position of the executive branch at the expense of the reduction in the pow-

[4] For exemplification purposes, one should invoke the *common law* governing the existence and controls of royal prerogatives, as well as statutory provisions (i.e., Bill of Rights 1689), which confirm the constitutional (legislative) powers of the UK Parliament.

[5] It is telling that before the reform that took place under Constitutional Reform Act 2005, the Lord Chancellor united in his hand the competencies belonging to the three legal spheres of state operation. See: D. Woodhouse, *The Office of Lord Chancellor*, Oxford-Portland Oregon 2001, *passim*.

[6] In the UK, the referendum, in practice, lost its strictly consultative character.

ers of the Parliament is probably the greatest impact on the internal constitutional regulations after the UK's accession to the EU. It was particularly visible in the democratic scrutiny of legislative and political decisions adopted by the EU institutions exercised by Westminster. In this context, the problem of limiting the fundamental doctrine of sovereignty of the British Parliament arose. The EU legislation had broken the principle of supremacy and had modified the systemic position of the judiciary. The judges had ceased to rule solely on the basis of the British national law, but they also did so on the basis of a parallel EU legal order (e.g., Factortame litigation[7]). Thus, safeguarding the principle of the effectiveness of the EU law, as well as the need to implement the principle of loyalty and sincere cooperation written into the Treaty of the European Union (TEU), further limited the role of Westminster, strengthened the role of the judiciary (including the UK Supreme Court) as a guarantor of the effectiveness of the EU law, and revised the content and scope of the powers of the executive branch by including a broad range of legislative powers. Against this backdrop, the establishment of the principle of a direct effect of the law introduced by the EU bodies and institutions undoubtedly limited the law-making activity of the state. The doctrine of parliamentary sovereignty has long been controversial and currently assumes different interpretations in line with the adopted perspective, as the UK's accession to the EU has changed its previous understanding about the said doctrine. With the gradual 'adaptation of foreign law' (i.e., EU law), this fundamental principle of the British system has been shaken[8]. This was reflected not only in the recognition of the primacy of the application of Community law over national law, which was also binding for national courts, but also in the unprecedented recognition of the binding of the British Parliament in its legislative activity by earlier laws, namely European Communities Act 1972 (ECA 1972) and European Union Act 2011 (EUA 2011) as acts of constitutional import[9].

[7] See: significant cases e.g., *R v. Secretary of State for Transport, ex parte Factortame Ltd (no. 1)* [1990] 2 AC 85 and *R v. Secretary of State for Transport, ex parte Factortame Ltd (no. 2)* [1991] 1 AC 603.

[8] A. Twomey, *Implied Limitations on Legislative Power in the United Kingdom*, "Australian Law Journal" 2006, no. 1, pp. 40–43.

[9] These implementation acts were repealed on 31 January 2020 by the European Union (Withdrawal) Act 2018, although the effect of ECA 1972 was 'saved' under the provision of the European Union (Withdrawal Agreement) Act 2020.

III. Potential changes to the concept of parliamentary sovereignty after Brexit

On Thursday, 23 June 2016, the UK decided to leave the EU in a process called 'Brexit'. The British citizens' decision in the in-out referendum on the EU membership, resulting in the application of the mechanism provided for in Art. 50 of the TEU, prompted certain modifications on both the legal and the political levels. The unprecedented nature and the implications of the decision made at that time require characterisation of the predicted consequences for British constitutional law. Key factors, such as the inclusion of the UK under the jurisdiction of the EU institutions, the process of legislative harmonisation, the unprecedented recognition of the binding of the British Parliament in its legislative activity by an earlier act, the constitutional rank of implementation statutes, as well as the principle of applying Community law before the national law, have modified the approach to the traditional stance on the principle of parliamentary sovereignty. Against this backdrop, these questions arise: Will Brexit automatically reverse the effects of a process that has lasted for over four decades? Will the repeal of the two acts (i.e., ECA 1972 and EUA 2011) implementing EU law in the internal legal order of the UK make the restrictions on the principle of parliamentary sovereignty (created during the accession period) reversible? The first withdrawal agreement seemed to have been reached together with the adoption of European Union (Withdrawal) Act 2018 (EUWA 2018). The regulations contained in EUWA 2018 both provided for the repeal of ECA 1972 on the 'exit day'[10] and required the statutory consent of the UK Parliament to accept any withdrawal agreement negotiated between the UK government and the EU. The fate of the EU Charter of Fundamental Rights was also determined by the decision that it would no longer constitute a part of the UK law[11].

The final agreement enabling the completion of the procedure for withdrawing from the EU structures was developed as a result of the adoption of the European Union (Withdrawal Agreement) Act 2020 (EUWA 2020). Based on it, the implementation of the withdrawal agreement in the domestic legal order negotiated by Her Majesty's Government, pursuant to Art. 50 (2) of the TEU in accordance with Art. 218 (3) of the Treaty on the Functioning of the

[10] Art. 1 of EUWA 2018.

[11] Art. 5 of EUWA 2018.

European Union (TFEU), was concluded on behalf of the EU by the European Council, acting by a qualified majority, after obtaining the consent of the European Parliament. The signing of this agreement, together with the 'Political declaration'[12] formally ended the Brexit negotiations. The agreement was also accompanied by the 'Protocol on Ireland/Northern Ireland'[13], which allowed the UK to avoid the 'hard border' by keeping Good Friday Agreement 1998 in force in all its dimensions and ensuring the integrity of the EU single market. The UK formally left the EU on 31 January 2020, but the 'implementation period' lasted until 31 December 2020. During this period, the existing relations between the EU and the UK were maintained, with the latter still treated as a member state, which was important to allow adequate time to negotiate future relations. The regulations contained in EUWA 2020 reflect the new post-Brexit legal reality, but the constitutional implications of the adopted regulations will most likely become transparent in the next dozen or so years.

It is commonly known, that during the UK accession in the EU the role of the British statute was somewhat dormant by the primacy of EU law over domestic law. With the UK's withdrawal from the EU, EU legislation ceased to be part of the British Constitution. Considering the amalgam of legal circumstances and those related to the systemic practice, a simple derogation from the system of acts incorporating the *acquis communautaire*, including the values anchored in them, may not result in an automatic reversal of certain processes. There are a number of factors why the possible revitalisation of the doctrine of parliamentary sovereignty will not be feasible. First of all, limiting the principle of sovereignty while strengthening the position of the judiciary resulted in increased judicial activism. Supporters of increased judicial power claim that in recent years, the Parliament and the executive branch of government have become ever more constrained by the courts and other constitutional institutions[14].

---

[12] See: Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom (19 October 2019).

[13] See *Declaration by Her Majesty's Government of the United Kingdom of Great Britain and Northern Ireland concerning the operation of the 'Democratic consent in Northern Ireland' provision of the Protocol on Ireland/Northern Ireland* (19 October 2019).

[14] See J. Limbach, *The Concept of the Supremacy of the Constitution*, "Modern Law Review", January 2001, no. 1, pp. 4–5.

Some statutes, such as ECA 1972, EUA 2011, HRA 1998 and the devolution legislation, provide legal and political limits on Westminster. Many of these legal limits are in the hands of the judiciary through the rule of interpretation, the hierarchy and the new remedy of the declaration of incompatibility. Judges already exercise a significant level of control over the UK Parliament[15]. In particular, the outcome of the judgement, the so-called Miller Case I[16], contributed to the partial revision of Parliament's position in relation to the executive branch. It showed that the courts had been forced to draw the boundaries of constitutional competence between the executive branch and Parliament, in the sense that they had consistently backed Westminster. Second, continued validity of European Convention on Human Rights (ECHR) incorporated on the basis of the HRA 1998, and its novelisation triggered a wide political debate. In December 2021, the Government published a consultation on its proposals to replace HRA 1998[17] with a Bill of Rights. On 22 June 2022, the Secretary of State for Justice, Dominic Raab, published the Bill of Rights Bill[18]. This would repeal and replace the HRA 1998, which incorporates and makes the rights and freedoms contained in the ECHR domestically enforceable. The ECHR sets out a list of rights and guarantees which the UK has undertaken to respect. Concededly, the European Court of Human Rights' decisions are not binding, however, many human rights' decisions are considered so important that they become part of the EU law, which until recently was binding in the United Kingdom during the period of accession. It is a concern that the HRA 1998 may have drawn the UK courts into ruling on issues better suited to political resolution. There are also concerns the HRA undermines parliamentary sovereignty by requiring the court to interpret UK legislation compatibly with Convention rights where possible. Legal experts and human

[15] See W.H. Dunham, *The Spirit of the British Constitution: Form and Substance,* "The University of Toronto Law Journal" 1971, no. 1, p. 45.

[16] *R (Miller) v. Secretary of State for Exiting the European* [2017] UKSC 5.

[17] The HRA 1998 effectively incorporated the European Convention on Human Rights (ECHR) into UK law. The UK has been signatory to the ECHR since 1953. The HRA enables people to bring claims relating to breaches of their human rights in the UK courts, and requires public bodies to act compatibly with human rights.

[18] A long title: A Bill to reform the law relating to human rights.

rights campaigners have argued that the rational put forward for reform is not well reasoned[19].

Admittedly, Brexit did not prevent cases being taken to the ECHR, but the repeal or amendment of the HRA might render European Court of Human Rights' decisions less effective. For sure, the amending or repealing the HRA 1988 will undermine the protection of human rights in the UK. Third, when considering if devolution has limited Parliamentary sovereignty, it is essential to look at the effects that has had on the UK. Westminster is sovereign in respect to legislative devolution, meaning that it is able to pass legislation for all parts of the UK (England, Wales, Scotland and Northern Ireland), including in relation to devolved policy areas. So, as long as the UK Parliament's can repeal the devolution statutes and can legislate on all issues, it holds to be sovereign. In practice, sovereignty of the Parliament is limited as it needs "the permission" of the region before legislating[20]. In the vast majority of cases, the legislative consent convention has operated without controversy. However, disputes became more frequent in the aftermath of the 2016 EU referendum. As an example, in February 2022, the Scottish Parliament voted to deny consent to the Elections Bill claiming that this legislation would threaten free and fair elections in Scotland. In June 2022 the Lord Advocate referral a draft independence referendum legislation to the Supreme Court of the UK[21].

This is evident through the fact that Parliament has to take into consideration the perspectives of the region. The UK accession to the EU structures

[19] D. Lock, *Three Ways the Bill of Rights Bill Undermines UK Sovereignty,* "U.K. Constitutional Law Blog" 27th June 2020, https://ukconstitutionallaw.org/2022/06/27/daniella-lock-three-ways-the-bill-of-rights-undermines-uk-sovereignty (9.09.2022) and A.L. Young, *Parliamentary Sovereignty and Human Rights Act,* Oxford-Portland, Oregon 2009, pp. 12–14.

[20] E.g., Westminster does not legislate on a matter that has been transferred to the Scottish Parliament without first obtaining its consent. When the UK government plans to introduce a bill with provisions that fall within the scope of the Sewel convention, it is expected to consult with the devolved administrations early in the process, to ensure that devolved views are taken into account. It can be argued that in some sense there is an 'unspoken' rule that Parliament are not to legislate on devolved matters.

[21] The reference to the Supreme Court is possible under Schedule 6 of the Scotland Act 1998. Par. 34 states that the Lord Advocate 'may refer to the Supreme Court any devolution issue which is not the subject of proceedings'.

has undoubtedly resulted in the growing role of regional representation on the international forum so far, in particular as a result of full participation in the process of defining the directions of EU regional policy development (e.g. in the EU's Committee of the Regions). It should be assumed that while from a legal point of view the UK parliament may interfere and cancel devolution arrangements, taking into account political considerations it is not possible in practice. The strong position of the decentralised parts was visible in the context of the events related to the withdrawal of the UK from the EU to date. In particular, Scotland and Northern Ireland demanded increased participation in deciding on the future of British integration in the EU structures. Undoubtedly, Brexit has become a significant factor that will most likely affect the future development of devolution.

IV. Conclusions

Prima facie, the decision on the UK's withdrawal from the EU should result in a "renaissance" of the traditional (orthodox) doctrine of Westminster sovereignty, per A.V. Dicey[22]. However, the UK's membership in the EU has significantly limited the practical implementation of this principle. The changing relations among the three branches of the government in the UK have resulted from the existing impact of EU legislation on the British constitutional law. The content and scope of the powers of the executive branch have been revised, with a wide range of legislative powers attributed to it. Furthermore, membership of the UK in the EU resulted in the phenomenon of judicial activism when adjudicating in cases where there was an obvious conflict of the national law with the EU law. The implementation of EU legislation allowed the courts to use more flexible rules of interpretation than previously recognised and applied in the British judiciary. The withdrawal of the UK from the EU will not remove the judicial threat to parliamentary sovereignty but, on the contrary, will *de facto* deepen its further erosion. UK's membership in the EU brought about a fundamental change in thinking in the jurisprudence of British judges. Current constitutional practice shows that certain mental

[22] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, Indianapolis 1982, *passim*.

changes cannot be reversed. There also appears a certain Brexit paradox, which consists in the fact that, on the one hand, the UK tried to 'take back control' over its legal system, but on the other hand, it agreed to the contractual provisions of the EUWA 2020, which *in fact* to a large extent, but not completely, reflect the internal provisions of the EU. Remaining outside the integration area continues to replicate certain legal solutions already existing in the EU.

Moreover, as shown by the example of the Miller Case I ruling, the modern form of a referendum is also a significant factor lessening the importance of the principle of sovereignty. Not only did the decision by the sovereign to withdraw from the EU influence the formal shape of the system of legal sources in the British legal order through the formal derogation of the EU law, but also the processes conducted in the extra-legal sphere, which could not be considered null and void. In this context, an important issue is the real impossibility of rejecting certain values of the EU that have permanently penetrated into the British legal order. In view of the above, it should be concluded that Brexit will not lead to a 'regaining' sovereignty. Additionally, any views that justify a possible revitalisation of the doctrine of sovereignty do not reflect the functioning of the system in its practical dimension. Theoretical (orthodox) doctrine of parliamentary sovereignty has little connection with constitutional practice which requires reassessment as the gap between constitutional theory and 'political reality' has become too wide. Nevertheless, in the current legal and political reality, it is too early to unequivocally prejudge the *pro-futuro* ramifications of Brexit in this regard.

Literature

Dicey A.V., *Introduction to the Study of the Law of the Constitution*, Indianapolis 1982.

Dunham W.H., *The Spirit of the British Constitution: Form and Substance*, "The University of Toronto Law Journal" 1971, no. 1.

Gordon R., *Constitutional Change and Parliamentary Sovereignty – the Impossible Dialectic*, [in:] *The British Constitution: Continuity and Change. A Festschrift for Vernon Bogdanor*, ed. M. Qvortrup, Oregon 2015.

Limbach J., *The Concept of the Supremacy of the Constitution*, "Modern Law Review", January 2001, no. 1.

Lock D., *Three Ways the Bill of Rights Bill Undermines UK Sovereignty*, 'U.K. Constitutional Law Blog' 27th June 2020, https://ukconstitutionallaw.org/2022/06/27/daniella-lock-three-ways-the-bill-of-rights-undermines-uk-sovereignty.

Oliver D., *Constitutional Reform in the United Kingdom*, Oxford 2003.

Twomey A., *Implied Limitations on Legislative Power in the United Kingdom*, "Australian Law Journal" January 2006, no. 1.

Woodhouse D., *The Office of Lord Chancellor*, Hart Publishing, Oxford-Portland, Oregon 2001.

Young A.L., *Parliamentary Sovereignty and Human Rights Act*, Oxford-Portland, Oregon 2009.