



THE EUROPEAN UNION BILL

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On behalf of the APPG on the Constitution.

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1 Proposals at a glance

Proposed changes	Current situation
<p><i>Binding referendum</i></p> <p>A binding referendum will be held before any 'significant' transfer of power or competence from the UK to the EU, including any such transfer as a result of the amendment of the Treaties of the European Union.</p>	<p>No referendum is required.</p>
<p><i>Act of Parliament</i></p> <p>An Act of Parliament will be required before the UK can agree to specified decisions provided for by the TEU and TFEU (including any passarelle clause).</p>	<p>Decision making in specified areas can change from requiring unanimous votes in the European Council to requiring only a qualified majority, without consultation with the UK Parliament.</p>
<p><i>Parliamentary sovereignty</i></p> <p>Clause 18 of the Bill provides that EU law is given effect in the law of the UK only by virtue of an Act of Parliament.</p>	<p>Case law has upheld that EU law is given effect in the law of the UK only by virtue of the European Communities Act. The principle is not provided for by statute.</p>

Terms

Treaties of the European Union (The Treaties) – Treaty of the European Union, Treaty on the Functioning of the European Union, and the Treaty Establishing the European Atomic Energy Community

Passerelle clause - a clause within the Treaties that allows the European Council to replace unanimous voting in the Council of Ministers with qualified majority voting (QMV) in specified areas, without consultation with national parliaments.

2 Policy history and passage of Bill

2.1 Liberal Democrat manifesto:

“Remain committed to an in/out referendum the next time a British government signs up for fundamental change in the relationship between the UK and the EU.”

3.1 Conservative manifesto:

“In future, the British people must have their say on any transfer of powers to the European Union. We will amend the 1972 European Communities Act so that any proposed future Treaty that transferred areas of power, or competences, would be subject to a...’referendum lock’.”

“We will introduce a United Kingdom Sovereignty Bill to make it clear that ultimate authority stays in this country, in our Parliament. “

4.1 Labour manifesto:

“Britain is stronger in the world when the European Union is strong ... Britain succeeds when it leads in Europe and sets the agenda for change.”

5.1 Coalition agreement:

“We will ensure that there is no further transfer of sovereignty or powers [from the UK to the EU] over the course of the next Parliament. Any proposed future treaty that transferred areas of power, or competences, would be subject to a referendum on that treaty – a ‘referendum lock’... The use of any passerelle would require primary legislation.”

“We will examine the case for a United Kingdom Sovereignty Bill to make it clear that ultimate authority remains with Parliament.”

6.1 European Union Bill **First Reading:** 11th November 2010

Stated aim:

“To ensure that the British people and Parliament would have more say on proposals to transfer power and competence to the EU.”

7.1 **Second Reading.** Bill passed with a majority of 135 votes: 7th December 2010

8.1 **Committee Stage:** 5 sittings of the whole house. No successful amendment.

9.1 **Report Stage:** 8th March 2011.

3 Some issues for debate

3.1 Is parliamentary sovereignty at risk?

3.1.1 The Bill's explanatory notes say it puts parliamentary sovereignty on a statutory footing in order

“to address concerns that the doctrine of Parliamentary sovereignty may in the future be eroded by decisions of the courts”.

3.1.2 Parliamentary sovereignty is at risk:

The Bill's explanatory notes argue that parliamentary sovereignty is a construct of common law, making it open to revision by the courts:

“Clause 18 of the Bill places on a statutory footing the common law principle of Parliamentary sovereignty with respect to directly applicable or directly effective EU law.”¹

- In evidence to the European Scrutiny Committee it was put forward that:
 - a) The legislative supremacy of Parliament is ultimately to be decided by the courts as being *“derived from normative arguments of legal principle, the content of which can and will vary across time”.*²
 - b) The courts could in extreme cases, for example where the rule of law was infringed, disapply the offending provision of an Act of Parliament.
 - c) The ability of an Act of Parliament to disapply the ECA has not been tested;

“The difficulties come—they were seen in the Thoburn case to be difficulties that the courts could deal with—if it is the intention of Parliament to depart from European Union law, how it should do that and, when it has done that, what the effects of it will be as a matter of United Kingdom constitutional law. Those difficulties have not been fully resolved by the Thoburn case.”³

3.1.3 Parliamentary sovereignty is not at risk:

3.1.3.1 Evidence to the European Scrutiny Committee criticised the statement that parliamentary sovereignty is a common law principle, with many arguing instead that it is a “judicially recognised political fact”.

¹ The European Union Bill Explanatory Notes, pg. 2

² Professor Craig in oral evidence to the European Scrutiny Committee.

³ Professor Bradley in oral evidence to the European Scrutiny Committee.

3.1.3.2 The Scrutiny Committee concluded that

“The legislative supremacy of Parliament is not currently under threat from EU law.”⁴

- The fundamental legal basis of the UK’s relationship with the EU rests with the domestic, not the European, legal powers. European Law is only supreme by virtue of the European Communities Act.
- Only in the case of *Thoburn v Sunderland City Council* (2002) was the alternative view advanced (by Eleanor Sharpston QC). Counsel for Sunderland City Council, Sharpston argued that EU law is a higher legal order that had become entrenched autonomously in the national constitution. Lord Justice Laws ruled against this claim.
- The Laws’ judgement was only a first decision of the Divisional Court and as such could be overturned. Evidence given to the European Scrutiny Committee suggested that this was unlikely to happen:

“Parliament may by statute make or unmake any law, including a law that is violative of international law or that alters a principle of the common law. And the courts are obliged to uphold and enforce it.”⁵

“The argument that EU law could somehow oust Parliamentary sovereignty as the cornerstone of the UK constitutional order—particularly when expressed in terms of a slow-burning judge-led plan to recognise the EU as a self-authenticating entity whose authority is substituted for that of the UK (or any other Member State)—is essentially political in nature.”⁶

- Parliament can legislate contrary to EU law:

“Provided it makes its intention clear, Parliament can legislate contrary to Union law. It can restrict or abolish the power of the European Court to give judgments that are legally binding in the United Kingdom. ... If the Act was appropriately drafted, there would be no way in which its effectiveness could be challenged in the courts of the United Kingdom.”⁷

3.2 Does a statutory provision offer any additional protection to the principle of parliamentary sovereignty?

3.2.1 Clause 18 is only a restatement of the doctrine of dualism.

The sovereignty clause (Clause 18) writes in statute that it is only by virtue of an Act of Parliament that directly applicable or directly effective EU law is recognised and available in law in the United Kingdom.

⁴ *The European Union Bill and Parliamentary Sovereignty*, European Scrutiny Committee Report, pg. 35

⁵ Professor Tompkins in written evidence to the European Scrutiny Committee

⁶ Professor Dougan in written evidence to the European Scrutiny Committee

⁷ Professor Harley in written evidence to the European Scrutiny Committee

The Bill's explanatory notes argue that the clause is **declaratory** of the dualist nature of the UK's Constitution, by which EU law is only enforceable under national law because the ECA makes express provision for it to be so:

*It does not alter the existing relationship between EU law and UK domestic law... The rights and obligations assumed by the UK on becoming a member of the EU remain intact.*⁸

3.2.2 The clause has symbolic effect

*"The clause has value, because it emphasises that this is the law and this is the constitutional position... it has value even though, strictly speaking, it does not change anything."*⁹

3.2.3 The clause serves no purpose

*"I am not persuaded that there is a need for this even as a declaratory measure for the avoidance of doubt. If this is enacted, we can be certain that if at a future date the UK Parliament wished to revoke the 1972 Act to enable Britain to leave the EU, an Act to do so would be upheld by United Kingdom courts. However, is there any real doubt about this at the present time?"*¹⁰

3.2.4 The clause is not practicable

Parliamentary sovereignty cannot be put on a statutory footing because an enactment containing a provision declaring Parliamentary sovereignty would necessarily presuppose that Parliament already has the sovereign authority to enact it.¹¹

3.3 The Referendum lock

3.3.1 The referendum lock protects the will of the British public

- In the Queen's Speech, the Coalition argued that a referendum lock would ensure that:

"No Government will be able to pass more powers to the EU unless the British people have agreed that they should".

- It counteracts the claim that incremental change threatens to establish a federal Europe by stealth.

3.3.2 "Locking the stable door after the horse has bolted"

The essential transfer of competence from the UK to the EU has already occurred. Imposing a referendum lock to protect vestigial reserved powers can only have symbolic significance.

⁸ Explanatory notes, paragraph 109.

⁹ Professor Hartley in written evidence to the European Scrutiny Committee.

¹⁰ Professor Bradley in written evidence to the European Scrutiny Committee.

¹¹ Argument made by Professor Goldsworthy in evidence to the European Scrutiny Committee.

3.3.3 The referendum lock is incompatible with parliamentary sovereignty:

The referendum lock is an attempt “to persuade the current Parliament to bind its successors in a manner which runs counter to accepted understandings of our constitutional order.”¹²

3.4 The definition of ‘significant’

- A transfer of power or competence from the UK to the EU may be deemed insignificant by the Minister and as such not require a referendum.
- Whether the ‘significance condition’ has been met must be reasoned in a ministerial statement and laid before Parliament.

As with all Ministerial decisions, it would be possible for a member of the public to challenge the decisions of the Minister in such a statement.¹³

4 Useful References

The European Union Bill

<http://services.parliament.uk/bills/2010-11/europeanunion.html>

Explanatory Notes

<http://www.reconstitution.org.uk/ent/documents/2011/02/22/44/file/EUbillnotes.pdf>

European Scrutiny Select Committee Reports

The EU Bill and Parliamentary Sovereignty

http://www.reconstitution.org.uk/ent/documents/2011/02/21/41/file/ESC_2nd_report.pdf

The EU Bill: Restrictions on treaties and decisions relating to EU

http://www.reconstitution.org.uk/ent/documents/2011/02/21/42/file/ESC_1st_report.pdf

¹² Professor Dougan in written evidence to the European Scrutiny Committee.

¹³ Explanatory Notes. Paragraph 82.