
BRITAIN AND THE EU

NEW PERSPECTIVES

A COLLECTION OF ORIGINAL CONTRIBUTIONS

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INTRODUCTION

This collection of pieces (to accompany a discussion event held at the British Academy on 9th October 2014) is designed to advance pro and sceptical views on the future of the European Union. The event was linked to the publication by Oxford University Press of our jointly authored work *EU Law in Judicial Review*. Like Scotland, staying with or leaving the EU is something that can evoke strong passions and political convictions. However, unlike Scotland (the outcome of the referendum remains too close to call as we write this Introduction), there is still time to consider as dispassionately as possible what we might gain or stand to lose by leaving the EU.

EU Law in Judicial Review could hardly have been published at a more appropriate time. In it we state the relationship between EU law and domestic judicial review in objective rather than political terms. Yet it is possible to draw conclusions either way on whether (as the sceptics often maintain) that relationship demonstrates our domestic legal rules to be at the mercy of Brussels and Luxembourg or whether, in truth, UK parliamentary sovereignty is alive and well.

What is undoubtedly clear is that EU law (bringing with it economic and wider obligations) has surfaced before our courts in a way that pleases some and displeases others. Amongst the essays in this short volume, one of the severest critics of the way in which the EU makes law is Dan Tench, who decries the EU legislative process as being democratically unaccountable. Bernard Jenkin, in a scathing attack on the EU, offers a wider political critique but reaches a parallel conclusion that the EU has become “a democratic black hole”. In a similar vein, Carol Harlow refers to the EU’s “democratic deficit”. Matt Qvortrup approaches the difficulties of the EU from a more philosophical perspective, referring to the EU “constructivist conceit” (and fallacy) that a society can be constructed along perfect lines.

Some of the other essays draw upon the link between law and economics and suggest that that link now works unfavourably to the UK. Jacob Rees-Mogg’s piece points to the fact that the Court of Justice of the European Union is, in reality, our Supreme Court as far as EU law is concerned. He observes that the UK Supreme Court lacks the reserve powers of, for example, the German Constitutional Court.

Satvinder Juss takes a human rights perspective, arguing that the question of leaving the EU is inextricably linked with the question of Britain’s continued subscription to the European Convention on Human Rights. For so long as the EU Court continues to accord “special significance” to Strasbourg judgments, calls for

Britain to withdraw from Strasbourg will not ameliorate the protection of human rights in the UK.

Other sceptical contributions focus exclusively on the adverse economics of retaining EU membership without renegotiation. Alan Howarth's contribution focuses on the Eurozone and the problems that it poses for continued integration.

But if there are passionate critics of the EU, there are also its passionate defenders. Hugo Dixon argues the economic case with a degree of granular detail. Sue Cameron argues pragmatically that "more is gained by pooling talents and resources than through spurious sovereignty". Similarly, Laura Sandys advocates an "EU PLUS". She argues that it is possible to remain at the heart of Europe whilst also developing new trading partners around the globe. Stephen Hockman approaches EU membership from what he sees as the need '*to develop the international order at every possible level*' and, in one of the most generous and wide-ranging essays of the collection, Konrad Schiemann, former member of the Court of Justice, urges a wider viewpoint than merely asking "what is best for Britain?" He points to the need for reconciliation of conflicting desires.

Paul Craig's astute contribution takes on the criticisms of "democracy deficit" raised in this volume by Dan Tench, Bernard Jenkin, and Carol Harlow. He recalls that it is the Member States who made the decisions establishing the present institutional structure of the EU and accordingly they should bear responsibility for their choices; it cannot "simply be 'offloaded' ... to the EU". Paul Craig concludes that it is unsurprising that a democracy deficit exists "if Member States are allowed to avoid constitutional responsibility for the direct effects of their own actions... even more so when they direct critical barbs at the EU, while being cognizant that they would reject most changes that could address some of the root cause of the critique."

In a fascinating and highly topical Scottish perspective, Christine O'Neill looks at the EU from the viewpoint of Scottish constitutional law. But even from this viewpoint she reaches similar conclusions to those of Konrad Schiemann. The last paragraph of her essay is worth citing (almost) in full:

"What becomes clear is not that the European Union is an unalloyed good, or that the Westminster Parliament is an unalloyed bad. The question is whether, in sum, membership of the European Union is a 'good' to be preserved despite its imperfections."

Finally, a neutral standpoint is taken by Simon Usherwood whose incisive piece detects a flaw in the Eurosceptic position deriving from a "central paradox" flowing from a zero sum notion of society in which recognition of the benefits of the EU,

warts and all, is denied with a concomitant denial that continued membership may offer more consolations than immediate exit.

Perhaps the main lesson to be gleaned from these different viewpoints is that there is no clear answer but that whatever the resolution is needs to take account of much more than rhetoric. It needs to encompass (judging from these contributions) at least a judicious mixture of law, philosophy, economics, and perhaps wisdom.

Whatever the answer proves to be in 2017 (if there is an answer in 2017) we see it as more than an even bet that there will be a 3rd edition of our book!

Richard Gordon QC
Rowena Moffatt
Editors

17 September 2014

PART 1: EUROSCEPTICISM

Dan Tench

Dan Tench is a partner in the litigation department at Olswang LLP. He has regularly written for and appeared on national media and is the co-founder of UKSCblog – the Supreme Court blog. He is recognised as a leading practitioner in administrative law and media law in both Chambers and Legal 500.

Whatever the merits of the European Union (the EU) from an economic or political perspective, its legal system is unfit for purpose. In particular, the quality of EU law-making and the judgments from the Court of Justice of the EU (the CJEU) is frequently extremely poor.

In the United Kingdom we expect our statutory laws to be clear and the means by which these laws are made to be transparent. We equally expect our court processes to be efficient and to deliver unambiguous judgments delineating clear legal principles. More than anything, we expect there to be a clear demarcation between those who make the laws and those who interpret them. These matters are considered essential to the notion of the rule of law.

All are quite absent within the legal institutions of the EU.

The legislative process of the EU is deeply murky. Draft legislation emerges from the Brussels bureaucracy which, after rounds of consultation, becomes law in a process that is a mystery to all but the most informed Brussels insider. There is no meaningful sense in which this process is democratically accountable.

Just as concerning, the laws produced by this process are often essentially incomprehensible. When these laws are subsequently amended – which many are – the resultant text is often made even worse. To take one example, the amended Technical Standards Directive, a law which requires Brussels to be notified of any changes in certain types of laws or regulations of any Member State, is simply a jumble of jargon.

The uncertainty arising from poor legislative drafting inevitably leads to much litigation. Unfortunately the judicial system administered by the Court of Justice of the European Union does little to help.

Cases typically take years to be heard and even after the hearing it is not unusual for a full year to pass before judgment is handed down. Most cases are decided by what known as a “Chamber”: a panel of three to five judges from across the EU. Since the rules of the Court require complete unanimity, much of the delay

is down to seeking consensus among the judges. This is exacerbated in the most important cases which are adjudicated (with judgments still requiring unanimity) by a “Grand Chamber” of thirteen judges or, in very rare cases, a full panel of all 28 judges.

Secondly, the judgments are usually so poor that they simply add to the confusion.

One problem is that the CJEU rarely sticks to its allotted role. In many cases the Court is asked to opine simply on a point of law on a reference from a court in a Member State. But the CJEU does not always confine itself to resolving the legal point. Particularly in politically-charged cases or those providing an opportunity to expand the EU’s remit, the Court tends to apply the legal principle (sometimes a principle entirely of its own invention) to the facts and effectively tries the whole case, overstepping its remit. This means that all too often the court fails to delineate clear legal precedent.

Another problem is that the Court does not always root its decisions securely in the underlying legislation. In the notorious *Google Spain* judgment this year, the CJEU materially mischaracterised the Data Protection Directive, suggesting that this expressly required erasure of data which are irrelevant (it does not) and basing the judgment (which has had very significant commercial ramifications) on this error.

An even more egregious example of the CJEU’s apparent departure from the written law arose in relation to the EU’s Charter of Fundamental Rights, which came into effect with the Treaty of Lisbon in 2009. The Charter provided for a wide range of individual rights, extending much further than the European Convention on Human Rights.

The UK Government demanded that a specific immunity be included in the Charter stating that “nothing ... in the Charter creates justiciable rights applicable to ... the United Kingdom”.

However the CJEU made short shrift of that, holding that this provision did “not intend to exempt the ... the United Kingdom from the obligations to comply with the provisions of the Charter or to prevent a court of one of those member states from ensuring compliance with those provisions”. Accordingly a Charter which was expressly not intended to apply at all to the UK was held to apply with full force. As one High Court judge noted: “The constitutional significance of this decision can hardly be overstated”.

A further concern is that judgments from the CJEU are often hopelessly unclear. For example, the *Google Spain* judgment required significant changes in the operation of online search engines. In the judgment, the CJEU noted the need to

balance the rights to freedom of expression and privacy, however it typically gave no real guidance as to how to do this. Search engines are simply left to guess where the balance should lie.

One explanation for the opaqueness of CJEU judgments may be the difficulty in forging unanimity amongst such a diverse and often excessively large panel of judges. Judgments have to be equivocated in order to be agreed by all the judges. The wording is initially prepared by judicial assistants, with any one of the judges then being able to veto individuals paragraphs, one reason for the disjointed reasoning in a majority of CJEU judgments.

It is perhaps understandable that an institution which is seeking to unite 28 divergent legal traditions, with multiple different languages, struggles to produce an effective legal system. However, the EU legal system sits above and is constitutionally superior to the domestic UK one. It therefore administers enormous power and while much of European law can seem abstruse, its commercial and governmental effect is immense. Because of the failures of the legal system, businesses, Governments, and individuals in Europe are left in an ever increasing state of uncertainty over what the law of the EU means, and how it is to be applied.

The failures of the EU legal system are so fundamental that they constitute a flagrant violation of the rule of law. Regardless of the position of the UK within the EU, these institutions should be radically and urgently reformed.

Bernard Jenkin

Bernard Jenkin was first elected as an MP in 1992 and now represents Harwich and North Essex. He has previously held the positions of Shadow Transport Secretary (1998-2001) and Shadow Defence Minister (2001-3), and currently chairs the House of Commons Public Administration Select Committee.

We should always remind ourselves why the UK joined what was then called the “Common Market” in 1972. The new Commonwealth was closing its doors to British exports. Our industries were in the grip of powerful trade unions. UK decline seemed endemic. The then six members of the EU represented a major export opportunity, but we were outside customs tariff which averaged 17%. We joined for trade. We also joined on the basis of promises: a promise that the Common Market represented the future of global trade, and that the UK’s “essential national sovereignty would be unaffected”. Today, the balance of advantage looks different. There is little if any direct trade advantage for remaining a member of the EU on the present terms. The direct financial burden of EU membership is some £17bn

gross (£11bn net) and rising. Ten years ago, the then EU Commissioner Lord Mandelson accepted that EU regulation cost 4% of EU GDP. And the EU now hardly looks like the future, being the only significant customs union in the world. And its political decision making is anathema to democracy and accountability.

170 countries in the world now operate in a global market based on trade according to “rules of origin”, and the UK now trades mostly with them, not with the EU. The notion that “60% of our trade is with Europe” is not true. The scare that “3 million jobs depend on trade with the EU” is simply a lie – even the pro-EU CBI no longer makes the claim.

The EU is not a success. It has become the unemployment black spot of the developed world. The Euro has proved disastrous for all but the richest economies, with youth unemployment in some countries in excess of 50%. Angela Merkel pointed out that the EU “accounts for just over 7% of the world’s population, produces around 25% of global GDP and has to finance 50% of global social spending”, but it is locked into unsustainability by the politics of denial and by vested interests of the EU, which in turn are embedded in the Treaties and structures of the EU.

So the EU has also become a democratic black hole, where transparency, legitimacy, and accountability have evaporated – we have seen elected heads of government in Italy and Greece dismissed and replaced by EU-approved appointees; the accounts are never signed off. Nobody is held responsible for the continuing economic and financial chaos, and or for what happens next. The disillusion and anger about the EU extends far beyond the UKIP – even Germany elected some Eurosceptic MEPs – but the drive for “more Europe” continues, because even the UK government hardly dares to confront it.

The Prime Minister told the *Today* programme just before the EU Elections: “They want the Euro, they want to have an ever-closer union, they want no borders in Europe. We don’t want those things. We want to be in Europe for trade and cooperation ... We want our membership of this organisation to be about cooperation between nation states”.

The idea that we have to remain “in” the EU, in order to have “influence” has surely been disproved by history. Staying “in” has seen our influence decline, not increase. We have been “in” for 42 years. The EU has developed to become the opposite of what the Prime Minister says he wants the EU to be.

Advocates of the EU always present the “single market” as indispensable to the UK. Is this really so? The EU Single Market is the never ending pretext for the EU’s harmonisation of standards and laws across the EU. EU Single Market rules now extend well beyond what was the Single European Act 1986, and far beyond what

is necessary to enable borderless trading within the EU.

The constant process of legal and constitutional integration takes powers away from national democracies, and gives it to the Brussels machinery, which is not a democracy. The notion that the European Parliament could take over from national parliaments has been disproved in every Euro election ever held, but is far more powerful than any single national parliament, under the present treaties. And the European Court of Justice regards the treaties (the EU constitution in all but name) as autochthonous, rather than relying on the legitimacy of the constitutions of the member states. This is not what the UK joined for.

Is this “single market” worth this sacrifice in democratic accountability and consent and the loss of transparency and efficiency? The economic importance of Europe to the UK economy is declining. UK goods exports are less than 9% of GDP to the EU and shrinking. We export more to the rest of the world, and that is growing. Even if we were to leave the EU altogether, it would be perverse for the EU to want a “trade war”, because they sell far more to us than we sell to them.

Yet the burdens and costs of the Single Market bear down on 100% of the UK domestic and exporting economy. A Treasury study under the last government is said to have concluded that the total costs of EU membership amounted to a significant 28% of UK GDP.¹ That consists of 7% of GDP on EU protectionism, 12% of GDP on the competition gap with the US, 6% of GDP on EU overregulation, and 3% of GDP on transatlantic barriers to trade. Today’s EU is increasingly a drag on the UK’s performance in the global race.

As the sixth largest trading nation in the world, were the UK to leave the EU Single Market, we would be joining the 170 other nations who trade freely in the global single market. We would regain control of our own markets and over our trade with the rest of the globe.

Carol Harlow

Carol Harlow is Emeritus Professor of Law and a Fellow of the London School of Economics. She is Queens Counsel (honoris causa), a Fellow and Council Member of the British Academy, and an Emeritus Member of Society of Legal Scholars. She was awarded a Leverhulme Fellowship in 2002.

In an In/Out referendum, I should be in a quandary. Life outside Europe will undoubtedly be tough. The economic impact will no doubt be serious and I am

1. See the account of a study by HM Treasury provided in: Lee Rotherham. (2012). *The EU in a Nutshell*. Harriman House. p. 465 and John Redwood. ‘What does the UK pay for the EU?’ 28 July 2012: <http://johnredwoodsdiary.com/2012/07/28/what-does-the-uk-pay-for-the-eu>

not in a position properly to weigh the two sides. There is a lot to lose too in terms of comity and I am neither anti-European nor especially chauvinist.

But the EU as I see it is an anti-democratic system of governance that steadily drains decision-making power from the people and their elected national and sub-national representatives and re-allocates it to a virtually non-accountable Euro-elite. In many ways, this is its purpose. In the so-called Third Pillar, for example, important policy decisions in sensitive areas of civil liberties such as policing or data processing were taken by government officials and ministers with minimal input from parliaments and virtually unremarked by the media and general public. On one occasion, a LIBE rapporteur remarked bitterly that the European Parliament would keep its current role: “discussing without anybody listening and making reports without anybody implementing them” (the Turco Report, 2002). Accountability measures came slowly and under great pressure after policy had been settled behind closed doors, and change stemming from the Lisbon Treaty came after the horse had long bolted and is not yet complete.

The European Commission started life as a regulatory agency attached to a trade bloc, which rapidly turned its regulatory powers on the Member States that had put it in place. Much the same can be said of the centralising Court of Justice, a significant policy-maker in the EU system. The Court is typically dismissive of the important subsidiarity principle, regarding it as a political rather than a legal principle. With the help of the Court, EU competences have steadily expanded with ambiguities normally decided in favour of the Union. Political debate has been steadily eroded, not least because formations of the Council of Ministers have been content to operate in virtual secrecy – sometimes without even publishing an agenda or minutes – and have steadily resisted attempts to open up proceedings to the public gaze and bring the lawmaking process into line with those of a parliamentary democracy. Lawmaking procedure is typified by inter-institutional negotiations and agreements, ‘trialogues’ and ‘conciliation committees’ held behind closed doors, and elitist and untransparent committee procedures, which the general public cannot access.

Can the democratic deficit be cured? It can hardly be cured by the barely representative European Parliament – a body elected on a still-falling average turn-out of around 43% – or by the pretence that the Commission President is in some way representative because he was the candidate of the majority party in the Parliament. It is unlikely to be cured by the European Council or Council of Ministers, bodies notable for talking democracy talk without walking – or even wishing to walk – the walk. It cannot be filled by ‘red’ or ‘yellow’ cards waved fruitlessly by national parliaments in defence of subsidiarity or by a complicated residual power in citizens (in practice NGOs and trade unions) to ask the

Commission (the real lawmaker) to bring forward a legislative proposition. Democracy, in Robert Dahl's sense of popular control over governmental policies and decisions or as a broad array of the rights, freedoms and – most important – the *opportunities* that tend to develop among people who govern themselves democratically, is out of the reach of the EU system of regulatory governance. That is indeed, the reason why governments like it.

So, at the end of the day, I shall cast my vote for democracy.

Matt Qvortrup

Matt Qvortrup, DPhil (Oxon) teaches British politics and Constitution at the Centre for Policy Studies at University College London. He is author of Referendum and Ethnic Conflict (University of Pennsylvania Press, 2014) and has been described as “the world's leading authority on referendums” by the BBC.

Of course, co-operation between nations is in itself a positive. Too many wars have been fought as a result of jingoism and xenophobia. But the problem with the European Union is that it is based on what we might call the *constructivist conceit*; the assumption that we have perfect knowledge and always know the consequences of our actions.

All too often, we have witnessed that our supposed perfect knowledge is subject to ‘the law of unintended consequences’ and that unforeseen events ruined the rosy predictions. The EU – in many ways – is testament to this. All too often the policy failures, such as the Euro-crisis, have grown from the seeds of noble thought.

There is a philosophical reason for this; a lesson from history that was self-evident for the philosophers of British empiricism and related thinkers.

The Scottish philosopher Adam Ferguson observed in 1767 that “nations stumble upon establishment which is indeed the *result of human action*, but not the execution of any *human design*”, and he went on to say that “the forces of society are derived from an obscure and distant origin. They arise before the date of philosophy, from the instincts, not the speculations of men”².

The lesson was simple: because society is so complex, we cannot individually foresee the consequences of our actions. Society does not grow because of carefully crafted plans but is established piecemeal as a result of spontaneous processes of different individuals acting together. Society as a whole is analogous to the prices in the market-place. A complex web of supply and demand, tacit rules, and trust established through institutions determine what the price is. No single individual

² Adam Ferguson (1767) *An Essay on the History of Civil Society*

decides. The same is true for society. As the economist Friedrich Hayek wrote in *Constitution of Liberty*,

“It might be said that civilisation begins when the individual in pursuit of his ends can make use of more knowledge than he has himself acquired and when he can transcend the boundaries of his ignorance by profiting from knowledge he does not himself possess”³.

The problem with the EU is that endless revisions of the Treaty of Rome have been based on the constructivist conceit, and founded upon the assumption that we have perfect knowledge of society. This is contrary to the contention of British empiricism. David Hume – the great Scottish philosopher of the 18th Century – criticised this way of thinking when he observed:

“It is not with government as with other artificial contrivances; where an old engine may be rejected, if we can discover another more accurate and commodious, or where trials may safely be made, even though success may be doubtful. An established government has an infinite advantage by that very circumstance of being established... To tamper, therefore, in this affair, or try experiments merely upon the credit of supposed argument and philosophy, can never be part of a wise magistrate”⁴

These words may appear *altmödish*, backward looking, and even reactionary. But the fact remains that overconfident politicians often have failed to stop and think before they have enacted utopian plans for the future; plans that failed to take into consideration the mere possibility that they could be wrong.

Of course, changes have to be made. The world is not static, and never has been. More than ever, we live in an age of rapid change. Needless to say, these changes will have an impact on the institutions that govern our lives. So far so good! But this does not mean that we should blindly follow principles and ideas that have never been subjected to practical experiences.

The European Union has admittedly enabled people to work in other countries and through this it has enriched our cultural life. But other much less ambitious organisations have done the same. The Nordic Council (a loose organisation comprising Denmark, Finland, Iceland, Norway, and Sweden) has developed a free trade area, a passport union, and an open labour market without developing an undemocratic political superstructure. Piecemeal reform and gradual pragmatism has – in this particular case – achieved the same as countless summits and constitutional revisions of the EU.

³ F.A. Hayek (1960) *The Constitution of Liberty*, London, Routledge, p.22

⁴ David Hume (1754) “The Idea of a Perfect Commonwealth” in David Hume, *Essays*, Indianapolis, Liberty Fund, 1982, p.24.

From the point of view of British empirical philosophy a case can be made for the view that we – in the country of David Hume and Adam Ferguson – should pursue a political future based on the practical lessons rather than on the constructivist conceit of the European Union.

But, to simply leave the EU altogether would not be a prudent course of action. The reactionary is as reckless as the revolutionary. In the spirit of conservative scepticism – with a small c – we could perhaps learn from Edmund Burke who famously wrote the following in *Reflections on the Revolution in France*, “At once to preserve and to reform requires vigorous mind, steady and long attention, powers of comparison and combination, and an understanding rife with expedients⁵”.

Much as one might be sceptical, one should not throw the proverbial caution to the winds out of ill-considered ideological fervour.

Jacob Rees-Mogg

Jacob Rees-Mogg MP has represented the constituency of North East Somerset since 2010. Within Parliament, he sits on both the Procedure Committee and the European Scrutiny Committee, which assesses the legal and political importance of each EU document.

The United Kingdom’s relationship with the European Union is unquestionably troubled. Regular news reports cover some of the details such as hoovers and the misuse of the Arrest Warrant but there are some general principles which need to be examined.

The Euro has faced serious difficulties for the last five years. The economic crisis exposed flaws in the basic design, while the effort to save the currency union has led to recession and high unemployment, especially youth unemployment, in the weaker nations. This has moved the focus of the EU from the single market to the economically more important project of saving the Euro. It has led to calls for greater political integration as the argument that monetary union requires fiscal union is a respectable one.

The effect of this on the UK is that the direction of the EU has become more integrationist and has subordinated the interests of the non-Euro states. Currently this covers ten countries but only the UK and Denmark have a permanent opt out. This means that the protocol being developed to ensure that the eighteen do not force their will on the ten will need revising when it becomes twenty-six

5 Edmund Burke [1790] (1986) *Reflections on the Revolution in France and on the Proceedings in Certain Societies in London Relative to That Event*.

versus two. The EU will not be willing to give the UK and Denmark a veto over all financial regulation. Inevitably, this will need some form of renegotiation as the UK has a disproportionately valuable banking sector which cannot be expected to accept rules designed entirely for the advancement of the Euro.

The structure of the European Union means that the Court of Justice of the EU becomes the Supreme Court in competencies covered by European Treaties. This is not unreasonable in that any internal organisation needs one arbiter of disputes between nations. However, the German Constitutional Court keeps a reserve power if it believes that the CJEU has not applied the Treaties in accordance with the German Constitution. The UK, short of repealing the 1972 European Communities Act, has no equivalent. It would be preferable and a recognition that the EU is a treaty organisation not a state if the UK had a reserve power to determine whether the treaties had been judged fairly in Europe. This could be done either by a reassertion of Parliament’s powers or through the Supreme Court. It would give the UK little more than Germany already claims and would be best done by renegotiation rather than by unilateral action.

One of the founding tenets of the European Union is causing disproportionate problems to Britain. The so-called fourth freedom, the free movement of people, may have worked for a smaller community of equally prosperous nations but it does not work anymore. The UK is an attractive destination for many, as the Eurozone economies have been so weak emigration from Spain has risen along with the continued flow from Eastern Europe. While there may be good economic arguments for welcoming this politically it is troubling for the electorate. It has consequences for the demands on public services and the need for new houses which leads to the loss of green space. It is uncontrollable as the British Government cannot stop other countries in the EU issuing passports to non-EU residents who may then decide that they want to move to Blighty.

These are three matters of principle which need to be renegotiated as they are strongly antipathetic to the British national interest. Simply leaving would also solve the issues but would create other ones. Whatever happens the United Kingdom needs and wants to have friendly relations with its near neighbours. This requires some form of treaty with obligations on either side, agreeing it would be the first duty of any government that left. It is equally in the EU’s interests to have an accommodation with Britain. Hence ‘out’ is a means to an end that is remarkably similar to renegotiation. This reduces the fear of ‘out’, it will not damage and may even benefit the economy but the process of leaving could be more diplomatically damaging than that of re-opening the treaties.

It is, therefore, clear that the current relationship does not work and that leaving

still requires some form of cooperation. This makes the middle way the best choice not least because it retains the option of departing if satisfactory terms cannot be achieved.

Satvinder Juss

Professor Satvinder Juss is a Professor of Law at King's College London and a Barrister-at-Law of Gray's Inn. He also holds the position of Deputy Judge of the Upper Tribunal and is Rapporteur of the Exclusion Clauses of the International Association of Refugee Law Judges.

The reluctance of the European Court of Human Rights (ECtHR) to find violations of human rights in sensitive matters affecting States' interests, as recently demonstrated again in *S.A.S. v France*,⁶ raises the question whether subscribing to the European Convention on Human Rights ('ECHR') should be a pre-requisite of European Union membership, as is now expected under the Treaty of Lisbon.

Although all EU states have signed the ECHR, the European Union is not (yet) a party. However, the decisions of the ECtHR are accorded a special significance in the EU by the European Court of Justice because the ECHR is part of the EU's legal system. In Britain, powerful voices have called for exit from the ECHR. While *S.A.S.* may ironically give them succor, this would be a pyrrhic victory because the reality is that leaving the ECHR without also leaving the EU is not enough.

S.A.S. concerned an unnamed 24-year-old French woman of Pakistani origin who wore both the burqa, covering her entire head and body, and the niqab, leaving only her eyes uncovered. In 2011, France introduced a 'burqa ban' (law no. 2010-1192 of 11 October 2010), arguing that facial coverings interfere with identification, communication, and women's freedoms. Overnight, the full-face veil became the "touchstone issue for many countries".⁷

Yet, in 2003 the German Constitutional Court had already held⁸ that wearing the headscarf has no single meaning and a British Judge has said, "I reject the view, ... that the niqab is somehow incompatible with participation in public life" as it "is worn by choice by many spiritually-minded, thoughtful and intelligent women".⁹ Contrast this with the ECtHR's shrill denunciation in 2001 of the headscarf as

6. *S.A.S. v FRANCE* - 43835/11 - Grand Chamber Judgment [2014] ECHR 695 (01 July 2014)

7. Lizzie Deardon & Ian Johnston, "Symbol of oppression or expression of faith? How viewpoints on the veil vary" *The Independent*, 9th January 2014.

8. Federal Constitutional Court of Germany, judgment of the Second Division of 24 September 2003, 2BvR 1436/042).

9. *R –v– D (R)* [2013] EWCC (unreported, 17th September 2013), at 67. Also now see, *AAN (Veil) Afghanistan* [2014] UKUT 00102 (IAC), See, also Baroness Hale in *R (SB) v Governors of Denbigh High School* [2006] UKHL 15 at paras 94-95.

a "powerful external symbol," which "appeared to be imposed on women by a religious precept that was hard to reconcile with the principle of gender equality."¹⁰ The ECtHR's decision in *S.A.S.* is no more sophisticated. Casting aside arguments of gender equality (one may assume there were no arrests of men in similar circumstances in France), it held France's burqa ban encouraged citizens to "live together"¹¹ this being a "legitimate aim" of the French authorities – as if one citizen had a legitimate expectation to see the face of another!¹²

Britain could leave the ECHR and make its own decisions¹³ but then, insofar as the EU continues to accord special significance to ECtHR decisions, still effectively be bound by them. Meantime, the domestic protection of human rights remains impoverished.

Alan Howarth

Alan Howarth, Baron Howarth of Newport, was a Member of Parliament from 1983 until 2005. He was awarded a CBE for political service in 1982. While in Parliament, he held the positions of Parliamentary Under-Secretary of State for Education and Employment and Minister of the Arts.

David Cameron's proposal for a referendum in 2017 has nothing to do with any foreseeable state of affairs in the EU at that date, and everything to do with the intractability of the politics of Europe in Britain. If there is a referendum in 2017 the British people will not be looking at a European Union which has yet settled down to accommodate the European single currency and its implications.

It is improbable that the decision of the British people would be taken in a calmly reflective frame of mind. The minority of British Europhiles tend to treat membership as an article of faith. They are substantially outnumbered by those who have doubts and indeed resentments about Britain's membership of the EU. Even if they no longer instinctively identify Britishness in terms of the institutions of parliamentary government, the doubters still resent pooling of sovereignty and being "ruled" from Brussels. So unless the bread and butter case for continuing membership is clear and compelling – which it isn't – a majority of voters may feel an urge to get out. The political establishment will advise us to stay in, but there is no longer the habit of deference that caused voters in 1975 to overcome their

10. *Dahlab v. Switzerland* – 42393/98 Admissibility Decision [2001] ECHR 899.

11. At paras 142, 153. For a critique of the 'living together' thesis, see the jointly dissenting judgments of Judges Nussberger and Jaderblom (at paras 1-12).

12. R. Wintemute, "Accommodating Religious Beliefs: Harm, Clothing or Symbols, and Refusals to Serve Others" *Modern Law Review* 2014

13. Satvinder Juss, "Kirpans, Law, & Religious Symbols in Schools", *Journal of Church and State* (OUP, Vol. 55, No. 4, Autumn 2013) at p.785. doi: 10.1093/jcs/css058.

misgivings and vote Yes. The British people may, echoing Churchill, say they are for the open seas.

The single currency is the crux. But for Maastricht we could perhaps have settled for continuing fudge and occasional handbagging, not taking the rhetoric of ever closer union too seriously, negotiating within the system for British advantage, exploiting the benefits of membership for trade and opting out of bits we can't stomach. We did opt out of the Euro, but we can't escape the Euro. The deflationary bias in the Eurozone, the catastrophic effects of a single monetary policy across such disparate economies and societies, culminating in banking and government debt crises, all continue to bear down on our exports and our overall economic performance.

As the eighteen Eurozone countries meet apart from the non-Euro members of the EU to determine major issues of financial and fiscal policy, so we are increasingly marginalized within the EU, while having to live with the consequences of decisions in which we've had no part. Thus we have found ourselves manoeuvred into what it was a cardinal principle of British diplomacy for hundreds of years to avoid: a situation in which the major continental powers combine regardless of British interests.

It is hard to foresee how the minority of non-Euro members can themselves combine to counterbalance the Eurozone while maintaining a coherent EU of 28. Equally it is hard to foresee that the countries of the Eurozone will successfully resolve their political tensions, simultaneously satisfying Germany's requirements for fiscal rigour and reluctance to pay the costs of fiscal laxity elsewhere, while easing social hardship and averting baleful political pathologies in the club med countries. Is it conceivable that there can remain a viable EU in which all work together to agree on issues of trade, the environment, crime, and migration, while financial, fiscal, and associated political issues are decided by the Eurozone countries in a deepening political union? Damage limitation and playing for time by the EU will mean that we shan't know the answers by 2017. Nor is it likely that Britain, with or without the other non-Eurozone members, will by then have worked out an alternative strategy or found a "better 'ole" to go to. It would be better if we didn't cut short the diplomacy by having an "In/Out" referendum in 2017.

It is clear that Britain will never join the single currency. If the Euro is ultimately to survive, the Eurozone will have to move to political integration in a federal state. For the Eurozone countries, economic imperatives will drive political and constitutional change, which Britain will not be willing to share and which will require a radical response by Britain.

The EU will continue to be dominated by the Eurozone countries. They will do their best to salvage the single currency and will probably succeed, at least for some years to come. If British policy is to be characterized by more than passivity and fatalism, we will either have to establish new terms of membership of the EU (well-nigh impossible to achieve on a meaningful basis when the unanimous agreement of the EU is required), or find a way to split the existing EU into two unions of different kinds, or leave altogether. Maybe we can negotiate some kind of looser association with the EU, but we should be asking ourselves what engagements make sense for Britain in a globalised world in which the EU is a diminishing force.

Part 2: For the EU

Hugo Dixon

Hugo Dixon is the author of The In/Out Question: Why Britain should stay in the EU and fight to make it better. He is currently Editor-at-large of Reuters News and the founder of Breakingviews, having previously written for the Financial Times and The Economist.

One of the strongest reasons for staying in the EU is that quitting would be bad for our economy, as we would lose full access to the single market. Eurosceptics have tried to counter this argument by saying we could copy Norway, Switzerland, or Turkey. The snag is that none of these is a good model: Norway has access to the single market but has to follow its rules without a vote on them; Switzerland's banks don't enjoy access to the single market unless they relocate to places inside the EU like London; and Turkey doesn't have access for services, which account for 80% of our economy.

As Eurosceptics have come to realise the weaknesses of these models, they have employed a new argument: Britain is a special case. We are bigger than Norway and Switzerland, and richer than Turkey. We are, therefore, in a position to cut a better deal with the EU than any of them. Clout is important – and we certainly have more of it than Norway, Switzerland, or Turkey. But the problem with this argument is that the EU has more clout than us. Its economy would be six times our size. So we wouldn't be in an equal bargaining position.

Eurosceptics counter by saying we have a big current account deficit with the EU. It exported £267 billion to us in 2012 while we exported £222 billion to it. The other countries would, therefore, be the bigger losers if our trading relationship broke down. So if we hang tough in our negotiations, we'll get a good deal.

There are several problems with this argument. One is that it assumes the only good thing about trade is exports. But imports are beneficial too. If EU exports to the UK were artificially restricted, our consumers would be harmed. They would have to pay more when they shop and would have less choice.

An even bigger problem with the argument is that it ignores proportionality. Britain's exports to the EU represent 14% of our GDP. The rest of the EU's exports to Britain represent 2.5% of its GDP. Neither side would win from a trade war. But we would be hit proportionately much harder.

If we tried to play hard ball, the EU might call our bluff. Imagine a trade war in which exports on both sides dropped by a quarter. Our GDP would be knocked

by 3.5%; the rest of the EU's would shrink by 0.6%. It could take the hit. We would be left reeling.

What's more, negotiations could easily be conducted in an atmosphere of ill will. Immediately after voting to leave the EU, the British people are unlikely to feel all warm and cuddly about their erstwhile partners. Our government would be under pressure to take a tough line. Meanwhile, our former partners would be feeling irritated, almost jilted. Some might urge an equally tough line to put us in our place. Although it would be in both sides' interests to conclude an agreement, bitterness could cloud the talks and result in a poor outcome for everybody.

Contrast this with the atmosphere of talks between the EU and Norway, Switzerland, and Turkey. In none of these cases was the country pulling out of the EU. So despite our greater clout, we might easily get a worse deal.

Often the same people who say we can negotiate a great deal with the EU from the outside say it is hopeless to try to reform the EU from inside. This is odd. We are more likely to maximise our negotiating strength while we are in the club than after we have just snubbed our former allies.

Sue Cameron

Sue Cameron is a columnist for The Daily Telegraph and has previously been a presenter of Newsnight, Channel Four News, and the ITN Parliament Programme. Her journalistic specialism is the relationship between the government and the Civil Service.

Europe today is under threat from all sides. To the East the Russians are at the gates. To the South, there is such turmoil in the Middle East and North Africa that thousands are fleeing across the Mediterranean seeking sanctuary. To the West, America's mood is more isolationist. In Europe, faltering economies could yet go into meltdown.

To want to leave the European Union at such a time seems perverse. And to what end do the Europhobes - I use the word advisedly for we are all Eurosceptics to a degree - demand Britain's exit? To wrest back national sovereignty from Brussels. Yet sovereignty is a chimera, a mirage, a will o' the wisp. It is like a man lost in the desert: he has total control over what he does, complete freedom of action – yet he is powerless.

When he was European Commissioner, Leon Brittan said in 1989: “The concept of total sovereignty is, frankly, a dangerous delusion. Instead you have to ask on a pragmatic basis: how can I most effectively achieve what I want for my country?”

Sometimes the answer will be to take action at the national level. At other times it may be best to reach multilateral agreements. But there will be occasions when the right, long-term answer is to pool sovereignty with others, in order paradoxically, to achieve an objective which may be of paramount *national* (ital.) importance.” He was right then and his argument holds good today.

If Putin invaded the Baltic states, as a NATO member we would be at war with Russia: something much more drastic than anything the EU could impose on us. Yet we do not hear impassioned pleas to leave NATO. Even the Europhobes accept that membership of NATO means less sovereignty but more real-life clout. So it is with Europe.

Take business. The EU gives us access to a market that currently accounts for some 50% of UK exports. If we opted to go it alone, it is almost inconceivable that our erstwhile partners would not put up barriers against us. Discrimination against the City, already mooted by the French, would become much more likely. And as one of the most powerful economies in Europe we could not hope for the same leeway as Norway.

Meanwhile global investors would pull out of Britain if we ceased to be a springboard for the EU market – look at how Scotland’s financial institutions started planning a flight South once independence became a serious possibility. True, our new-found sovereignty outside the EU would allow us to develop bilateral trade agreements with other countries but that would offer small consolation. The whole of Asia accounts for only 16% of our trade.

Some will argue that Brexit would stop our businesses being strangled in red tape. Yet why rage about the regulatory mote in the Eurocrat’s eye while ignoring the bureaucratic beam in our own? On average we produce 2.6 “implementing documents” for every Brussels directive – compared to one in Germany. For example, the original English text version of a 2002 European directive on the levels of pesticide residues in food had 1,167 words. By the time it had been worked over by Whitehall and Westminster, it had 27,000 words of regulations on how it should be implemented in the UK. When it comes to red tape, Britain beats Johnny Continental hollow.

Besides, which bits of red tape – European or British – would we abolish? Do we want industry to be able to pollute our rivers? Do we want to get rid of safety standards in our workplaces? No doubt our cleaning companies were up in arms about the red tape that stopped them sending climbing boys up chimneys in 1875. The issue is not sovereignty but detailed practicalities.

Or, take Human Rights law – not strictly part of EU law. What purpose would be

served by opting out? As the late Lord Bingham, former Lord Chief Justice, once asked: Which rights would we abolish? The right to freedom of expression? The right to a fair trial? Should such rights could be incorporated into a purely English Act, would our judges be any less rigorous in interpreting the law than those at Strasbourg - or any less likely to infuriate politicians and the Right wing press? The idea is pie in the sky.

Of course the European Union needs reform, as does the Strasbourg court. Of course more powers should be handed back to national parliaments and they should exercise greater scrutiny over the Brussels bureaucracy. Yet we should recognise that more is gained by pooling talents and resources than through spurious sovereignty. As in the debate over Scottish independence, we are better together.

The crisis over the Scottish referendum has also underlined collapse of trust in the political elites. Ultimately we can always leave the EU – we may yet have a referendum to that effect in 2017. Renewing our defunct political structures and rebuilding faith in our leaders, both essential to sovereignty in a democracy, will be far harder.

Laura Sandys

Laura Sandys has been the Member of Parliament for South Thanet since 2010 and is the founder of the Conservative pro-EU group European Mainstream. From 2006 to 2010, she was the Director of Security Futures and is currently a Vice-President of the Debating Group.

Europe is the issue that reverses all stereotypes across the political spectrum. It turns the tough into the defeated, while making the most robust of patriots appear uncertain, even nervous on the world stage. ‘Better off Out-ers’ appear fearful of negotiating abroad, unable to succeed in getting their way, and instead choose to loudly ‘beat their retreat’.

UKIP wraps itself in historical mantels, paradoxically referencing our great history of engaging with the rest of the world as an excuse for withdrawal from our near abroad. However, ‘Out of Europe’ as a stated policy would be the first time in modern history that the UK’s aim would be to diminish its influence in Europe – an extraordinary retreat from our national interest. Elizabeth I would be turning in her grave.

In comparison, it is the Euro-realists who are truly fighting for the future of Britain – we are the real ‘toughies’ on Europe. We are the ones who find marginalisation at

the fringes of Europe unacceptable and undesirable. We are the patriots prepared to fight our corner and win on behalf of the British people.

None of us are under any illusions that one-on-one relationships are easy – never mind with 28 partners. No one should think that it is straightforward to achieve what you want in this multi-dimensional game of chess. Yet we have a great and substantiated reputation as an influential player on the world stage, taking a lead in shaping international organisations – and that includes Europe too. Let's not forget that the EU has been shaped by the UK. It was Britain that led the way on the Single Market and on Enlargement, and it was this Government that mapped out plans to protect Member States remaining outside the Eurozone, secured the first ever cut in the EU Budget, and set out a modern, competitive reform agenda for the EU.

We must not delude ourselves either that other international organisations do not come with serious responsibilities as well. We herald NATO as the perfect security organisation, but it would be interesting to explain on the doorstep that if Turkey is invaded by Syria the NATO treaty agreement could require British men and women to defend its borders. Serious actors in foreign affairs recognise that nothing worthwhile in the big wide world of international agreement comes free. Populist politicians are pretending that we can get something for nothing.

Before we run for the European exit we need to properly weigh up the alternatives. Those who want to do a 'runner' claim that the world is about to open their doors to our goods and services and that our influence will increase. I would love to see evidence of how easy it will be to swap our "disastrous" relationship with Europe for such a harmonious set of alliances with every other country around the world – as long as they are not European!

If you are really a ruthless, self-interested hotshot then you want to be at every top table of every membership organisation that you are able to be a part of. You do not want to back away from those that seem a bit tough to deal with!

So for my part I am greedy for the UK, not cautious – I want EU PLUS. I want the 500 million customers that the EU offers PLUS new trading partners and new export opportunities from across the globe. This is not a zero-sum game – in an increasingly competitive world we must go for everything. The British people are worth more than UKIP's 'anything BUT Europe' strategy – we deserve Europe PLUS the rest of the world.

Let's stop being spooked by Europe. The EU is a force multiplier for the UK from trade to defence and energy security. We also have friends and allies who want us at the heart of Europe. The Germans want us in to embed free trade, the French to

project military power. The Americans want "a strong Britain in a strong Europe". It is perplexing that those who share a vision of a stronger Britain on the world stage would trade our position as a leader of the world's largest trading bloc for that of a "Greater Britzerland".

The Europe Question for the UK could not have come at a better or a worse time. Better because we are forced by the global economic situation to look at our role in Europe dispassionately, but worse because the rational would resist navel-gazing and use this crisis to get on with reforming Europe from within. We need have no identity crisis about our membership of Europe or feel that we are in any way diminished by sitting at the top table of the largest trading bloc in the world. We just have a lot of work ahead to help shape a new and ambitious Europe that shares our optimistic, confident, and outward-looking attitude and delivers true benefits to the British people.

Stephen Hockman

Stephen Hockman QC is joint head of chambers at 6 Pump Court. He specialises in environmental and regulatory law and is recognised as one of the leading practitioners in the fields of Health and Safety Law and Energy and Natural Resources.

I approach the question of the future of the EU, and of our relationship with it, from the perspective of an English lawyer with significant international experience. I have been in practice at the Bar for some 40 years, and in 2006 chaired the Bar Council. I am currently co-chair of the International Council of Advocates and Barristers, and I am writing this contribution in Queenstown, New Zealand, the venue for the 2014 World Bar Conference. My specialism is environmental law.

I believe that all the most serious issues facing the world today are essentially international problems, and that none of these problems can be solved unless we continue to develop the international legal order at every possible level.

By way of example of such international problems one can cite the issue of security. This in turn relates to the problem of terrorism and also the relationship between Islam and the West. One can also cite the issue of international financial regulation which nearly led to the collapse of the entire world economy only a few years ago. Thirdly, in my own field, one can refer to the problem of climate change or global warming, and the pressing need for more effective methods of control of greenhouse gas emissions. All these problems are inherently transnational in nature, and all present insuperable challenges to individual national governments.

It is indisputable that in the European Union we have the single most advanced

and successful example of an international legal order which has yet been established. Of course it is true that the stimulus for this was the appalling loss of life and destruction caused by the Second World War. However, what is clear is that this legal order does exist, and unless we are ostentatiously to turn our backs on the world's most serious problems, it is absolutely essential that we continue to participate in and to support this outstanding international development. Only in this way can the long-term interests of our country and our people be protected.

I recognise that it is inevitable that, occasionally and in the short term, participation in the EU will appear problematic for some section of our community. Conventionally the answer offered by pro-Europeans to this concern is to refer to the "pooling of sovereignty". The HS2 case in the Supreme Court, however (2014 UKSC 3), shows that there is another answer to the concern. As Lady Hale said in a recent lecture (Address to ALBA, 12 July 2014):

"At the end of last year we had the *HS2* cases, challenging, on the basis of European Union environmental law, the decision of the government to proceed with plans for a high speed rail link between London, the midlands and eventually the north of England ... The complaint was that the whipping of the vote by the political parties at the second and third readings, the limited opportunity provided by a debate in Parliament for the examination of environmental information, and the limited remit of the select committee following the second reading all conspired to prevent the effective public participation required by article 6(4) of the EIA Directive. The difficulty was that the scrutiny of the Parliamentary process required to assess the justice of these complaints would directly conflict with an entrenched UK constitutional principle. Article 9 of the Bill of Rights 1689 precludes the impeaching or questioning in any court of debates or proceedings in Parliament ... It is, putting the point at its lowest, certainly arguable ... that there may be fundamental principles, whether contained in other constitutional instruments or recognised at common law, of which Parliament when it enacted the European Communities Act 1972 did not either contemplate or authorise the abrogation."

To my mind this flags up a crucial but as yet little recognised development in our constitution, namely that the courts are contributing significantly to the search for long term, progressive and nuanced structural solutions to the gravest problems facing our community.

Sir Konrad Schiemann

Sir Konrad Schiemann was called to the Bar in 1962, becoming a Queen's Counsel in 1980, a High Court Judge in 1986, then serving as a Lord Justice of Appeal from 1995 until 2003. He was a judge of the Court of Justice of the European Union between 2004 and 2012 and is currently a bencher of the Inner Temple.

What is best for Britain? That is the only question which both sides have been addressing in the "In/Out" debate in this country and to which they give different answers. Certainly that is a relevant question but it is not the only question which should be addressed. To go through life only asking "What is best for me, my family, my county or my nation?" when considering proposals for war, environmental measures, tax measures etc. is intolerably self-centred and, in the last analysis, also unlikely to produce the optimum answer even to the question "what is best for me?" We should also ask "what is best for Europe as a whole and also what is best for the world?" Finding the best responses to these questions is often difficult and uncertain but we should try. Problems arise when the answers to all these questions are not the same. In this case, however, substantially they are.

The challenge of any system of government – whether at parish, county, national, continental or world level – is how to reconcile conflicting desires. Because of these conflicts, for each state to insist on an entitlement to whatever it presently wants, irrespective of the desires and needs of others, is clearly not a rule of conduct which every state could adopt and is thus unsuited to be a system of international government. Other nations matter; so do individuals and minorities. Even the strongest power should not, and indeed cannot, impose its will on everyone else. This fact of current political and environmental life is not overcome by insisting on the concept of sovereignty as if that enabled every nation to get whatever it wants.

The major challenges facing the world today are much the same as they have always been and should be approached in the light of a timescale which stretches beyond those of voting age today: how to prevent man's selfishness from making life miserable for others, how to allow as many human beings as possible to develop the potential which is within them, to live together with the minimum of friction and with at least their basic human needs satisfied, and how to control the environment so that it does not threaten all this.

I see the EU as a serious and largely successful attempt to create a new way of regulating international relations without resort to war, of raising standards of living while maintaining a large measure of individual freedom, of safeguarding the most precious of human rights and of legislating for the wider good. The EU has provided a home for ex-Communist and ex-fascist European nations in which

they can pursue these goals. Many are immensely grateful for this.

One of the great achievements of the UK over the centuries has been the universalising, in part by example in part by means of the European Convention on Human Rights, of its generally admired conceptions of human rights – rights to life, freedom from torture, free speech, free elections, fair trials and so on – developed over centuries. In consequence, the EU has these human rights as one of its foundation stones.

Many European countries, lacking that tradition, have seen the enormous advantages of joining the EU and are prepared to submit themselves to its disciplines, including external supervision, in order to obtain those advantages. In some countries where human rights are still under actual or potentially imminent attack, it is of enormous help to be able to refer to outside, internationally accepted, and policed standards. That is what the European Convention provides. The UK can and should continue the process which it helped establish. For the UK to denounce those values by leaving the Convention would encourage potential and actual dictators who do not wish to observe them. It would take something of great value from many people. All this without any commensurate benefit to the UK. It would be a tragedy.

The steady increase of Member States of the EU and of candidate member states shows that many others value the EU and its commitment to human rights. Indeed, countries elsewhere in the world, in South America, in Africa, with problems similar to those which we used to have in Europe, are beginning to adopt features of the European system of governance – common legislation, a common executive and a common court – in order to overcome them.

Systems of governance and substantive laws are not immutable and need changing from time to time. The UK should contribute in a positive fashion to these changes and to the continuing health of the EU. Fortunately if one takes a long term view the interests of the UK, the EU, and the wider world largely overlap and so the task is not beyond us.

Paul Craig

Professor Paul Craig is a Professor of Law and a Fellow of St John's College at the University of Oxford. He has previously held visiting teaching positions in Canada and the USA and is the author of various books including The Lisbon Treaty (OUP, 2010) and EU Law: Texts, Cases, and Materials (OUP, 2011, 5th ed.).

The financial crisis is arguably the most significant challenge to the EU since the inception of the EEC. It has generated an array of political, legal, and institutional

responses the complexity of which is daunting in itself. It is unsurprising that the financial crisis should have brought back to the fore concerns about the very design of the EU's institutional structure and issues of democracy deficit, on which there is already an extensive literature.

This is however matched by an equal dearth of literature concerning constitutional responsibility of Member States for the status quo. Consideration of the causal influences underpinning Treaty reform has not been matched by any attendant analysis of what this should be taken to connote in terms of the constitutional responsibility of Member States for the resultant institutional architecture. This is a serious failing. The fact that far-reaching measures were enacted pursuant to the Lisbon Treaty, and through treaties such as the Fiscal Compact and the European Stability Mechanism, to cope with the financial crisis has led to renewed attention on the democratic credentials of the EU.

It is noteworthy that the discourse concerning democracy deficit is normally presented as a critique of the EU. It is the EU qua real and reified entity that suffers from this infirmity, the corollary being that blame is cast on it. The EU is of course not blameless in this respect, but nor are the Member States, viewed collectively and individually. The present disposition of EU institutional power is the result of successive Treaties in which the principal players have been the Member States. There may well be debate as to the relative degree of power wielded by Member States and the EU institutions in the shaping and application of EU legislation, but there is greater consensus on the fact that Member States tend to dominate at times of Treaty reform. The inter-institutional distribution of power is the result of hard fought battles, the results of which are embodied in Treaty amendment.

Thus insofar as the present arrangements divide EU policymaking de facto and de jure between the Commission, Council, European Parliament, and European Council, this is reflective of power balances that the Member States shaped and were willing to accept. This is readily apparent when considering the initial Rome Treaty and any of the six major Treaty reforms since then. It is powerfully exemplified by the debates concerning institutional reforms in the Constitutional Treaty, which were then taken over into the Lisbon Treaty. It was evident most notably in the battle as to whether the EU should have a single President who would be located in the Commission, or whether a reinforced European Council should also have a long-term President. It was apparent in the debates as to Council configurations, and who would chair them. It was the frame within which the discourse took place concerning the number of Commissioners and the method of choosing them.

Member States bear responsibility for the choices that they have made, individually and collectively, in shaping EU decision-making. Thus insofar as

there is a democratic deficit of the kind considered above responsibility cannot simply be 'offloaded' by the Member States to the EU. Member States cannot carp about deficiencies of EU decision-making as if they were unconnected with the architecture thus created. Recognition of Member State constitutional responsibility also has broader implications for discourse concerning related issues, such as social legitimacy.

The causes of the social legitimacy deficit are complex, but the failure to articulate any developed conception of Member State constitutional responsibility for their actions, whether concerning the EU's overall decision-making architecture or individual decisions made pursuant thereto, is assuredly a factor in this regard. It should come as scant surprise that such a deficit exists if Member States are allowed to avoid constitutional responsibility for the direct effects of their own actions, and offload blame on to the 'other', even more so when they direct critical barbs at the EU, while being cognizant that they would reject most changes that could address some of the root cause of the critique. It should equally come as no surprise that more extreme parties follow the lead of mainstream parties in this respect, which should not be forgotten when engaging in the political soul-searching for causes of the recent EP election results.

Christine O'Neill

Christine O'Neill is Chairman of Brodies LLP and is a recognised expert on public and constitutional law issues in Scotland. She is rated by Chambers and Partners as a Star Individual in administrative and public law, and is the only solicitor advocate in Scotland to be appointed as Standing Junior Counsel to the Scottish Government.

At the time of writing the referendum on Scottish independence is little over a week away and opinion polls suggest a photo finish. By the time this contribution is published the result will be known.

If there has been a Yes vote then what follows will remain relevant but will have to be viewed through a new and different lens. Scotland's membership of the European Union will be, by then, one of many issues on a very broad negotiating table. Equally, thoughts will turn to the implications for "rUK" (as the rest of the United Kingdom has become known in Scotland during the referendum campaign) of an "In/Out" referendum on EU membership in circumstances in which one contiguous territorial neighbour shows no signs of wishing to leave and another, emerging, neighbour is seeking entry to the Union.

Assuming instead that there has been a No vote, continued membership of the EU for Scotland (as part of the United Kingdom) remains a critical issue. Indeed,

anecdotally at least, there appears to be the sort of broad consensus amongst Scottish businesses, the public sector, and civil society which has been so markedly absent from the Scottish independence debate. That consensus is firmly pro-European. Anti-EU sentiment can be found (notably, UKIP gained one of the six Scottish EU Parliament seats in the 2014 election) but it cannot be said to have solidified into anything approaching a movement or campaign in favour of withdrawal from the EU. It may be, of course, that Scots' attention has been directed elsewhere over the last 18 months. And it may be that it is difficult to take entirely seriously those who oppose Scottish independence as a retrograde step which would unnecessarily restrict Scotland's access to markets and the benefits of common citizenship, while at the same time appearing to support the possibility of withdrawal from the EU. But primarily the real world considerations of a smaller economic entity such as Scotland, which is geographically remote from many of its key markets and exports proportionately more (whisky, salmon, and oil and gas to name just a few) than its larger neighbour, revolve around reducing, not creating, barriers to trade. These include freedom of movement to allow workers in to support key sectors and to retain graduates from Scotland's globally recognised universities.

From a constitutional law perspective, one further reason for diffidence towards the prospect of an "In/Out" EU referendum is that, as a Scots lawyer, I find it difficult to generate the sense of grievance about the role of European law which underpins much of the debate elsewhere. In particular, the primacy of EU law and the concomitant impact on the sovereignty of the Westminster Parliament, does not cause me any existential angst. That is a personal perspective but one which is influenced by a number of factors which are peculiar to the Scottish legal system.

The first is historical. A latent "legal nationalism" is evident from many decisions of the Scottish courts, which at times has been expressed as scepticism about the significance of British parliamentary sovereignty. First year students in Scottish law schools are still directed to the observations of Lord President Cooper in *MacCormick v Lord Advocate* (1953 SC 396):

"The principle of the unlimited sovereignty of Parliament is a distinctively English principle which has no counterpart in Scottish constitutional law...Considering that the Union legislation extinguished the Parliaments of Scotland and England and replaced them by a new Parliament, I have difficulty in seeing why it should have been supposed that the new Parliament of Great Britain must inherit all the peculiar characteristics of the English Parliament but none of the Scottish Parliament, as if all that happened in 1707 was that Scottish representatives were admitted to the Parliament of England."

The indignant tone has never carried through to direct judicial challenge to

Westminster legislation but the underlying message – that sovereignty is something of a “foreign” concept – is clear.

In the modern context, the centrality of Westminster has long been replaced in Scotland with governance arrangements which operate in an environment of competing legal orders. So far as the Scottish Parliament is concerned, it is forbidden by the Scotland Act 1998 from legislating on matters reserved to Westminster and in breach of EU law or the European Court of Human Rights. There is no hierarchy of limitation: each can justify striking down primary legislation of the Scottish Parliament and each is a free-standing hurdle for legislators to overcome. At the same time, European Union law which falls within devolved competence (for example in the field of agriculture) is implemented directly by the devolved Scottish administration, effectively bypassing Whitehall. This direct engagement with the EU operates alongside a dynamic relationship with Westminster which has seen almost annual alteration of the boundary between those areas reserved to London and those devolved to Edinburgh.

What becomes clear is not that the European Union is an unalloyed good, or that the Westminster Parliament is an unalloyed bad. The question is whether, in sum, membership of the European Union is a ‘good’ to be preserved despite its imperfections. I’ve no doubt it is.

PART 3: ANALYSING POLITICAL SCEPTICISM

Simon Usherwood

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The UK rolls once more to a critical juncture in its relationship with the rest of Europe. The May 2015 general election offers the potential renegotiation of European Union (EU) membership, followed by a referendum. This marks a high point in the efforts of British critics of the EU to force the direction of debate.

Those critics – the famous ‘Eurosceptics’, to call them by a name they themselves rarely use – come from a wide range of political and social backgrounds: there is no political ideology that unreservedly accepts European integration as it is. That has been a source of strength, as in the broad coalition that fought Euro membership in the 1990s and 2000s, and of weakness. It is that weakness which we might consider here.

The diversity of Eurosceptics provides some resilience in the face of challenges, but it also means that there is little coherence in the critiques of European integration that they provide, nor in the solutions that they propose. In the world of the Eurosceptic, where you sit depends very much on where you stand.

As a result, one of the bigger failings of Euroscepticism has been the inability to articulate an alternative vision of the UK from its present position. Even the pressure for a referendum on membership offers no solution, since that vote would be simply a yes/no decision on EU membership. As the Scottish referendum has amply demonstrated, neither of those options is unified and coherent: in the EU case, does a “yes” to membership mean just accepting everything that comes, and does a “no” mean the UK has no dealings with the EU thereafter? Seen like this, a referendum is simply an opportunity for a debate and a stepping stone towards a new policy, not a destination in its own right.

Despite the incoherence of sceptics, we might point towards a common understanding that they present of how the UK relates to the EU and the rest of the world.

In essence, this is grounded in a zero-sum view of the world, where another’s gain must mean our loss. In this model, ‘Europe’ becomes a battleground and the UK is the knight in shining armour, fighting to defend his honour and win the contest.

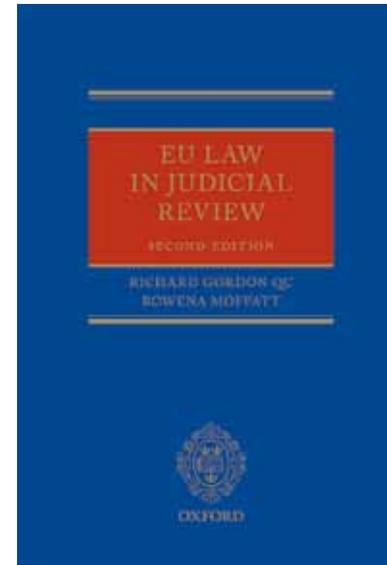
Such a combative approach has a number of consequences, the most important of which is that there is a strong discount on long-term planning, as against short-term gain. This is an attitude that has also affected the approach of successive British governments, picking fights they need not.

The conceptualisation of the UK as an integrated and coherent actor also extends very commonly into the area of post-EU arrangements. The ties that bind at

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