

The Intellectual case for Brexit: a lawyer's view.
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Thank you for inviting me to speak to you tonight. I think of myself as reasonably international and “European” in the sense that: we have a house in France; I speak French pretty well; I have travelled to most of the EU countries apart from Estonia, Latvia, Malta and Denmark. I represented the UK judges in the International Association of Judges for 11 years, then I worked closely for 5 years with judges from other Council of Europe countries particularly on the relationship between judiciaries, the executive and the legislature. That is a problem we all face even if judges in other countries are not often directly called “enemies of the people”.

I am NOT for Brexit simply because the European Commission makes silly proposals, such as that in 2013 to ban olive oil from being served in saucers or jugs in restaurants for public health reasons. The laughable proposal was dropped, of course. I am a rather reluctant BREXITEER; after all, I voted in 1975 to “remain”. But, having thought about it a lot before the 2016 referendum, I concluded I must vote for “leave”, even though I did not know then, nor do I know now, what the future might bring outside the EU, any more than I know what would have happened if the UK had stayed inside the EU in the future.

I want to start by asking the audience: who has read the two Treaties? The Treaty on European Union “TEU” – the Maastricht Treaty as updated by the

Lisbon Treaty and the Treaty on the Functioning of the European Union
“TFEU” – the Rome Treaty as updated from time to time up to and including
Lisbon? [The answer was about 10 people out of an audience of about 200].
Those two treaties are just that: agreements between states at the level of
public international law. They would have no effect in English domestic law
unless they are given it by virtue of an Act of Parliament: in this case the
European Communities Act 1972. That is why, when that Act is repealed,
neither the Treaties nor anything that arises from them will have any force
of law in the UK.

**I start by asking some questions about what YOU and other citizens of
member states of the EU want from it. FIRST QUESTION: Do you want a
Federal state?**

The vast majority of EU citizens answer NO. This is perhaps not surprising
when the latest version of EuroBarometer (autumn 2017) run by the
European Commission records that 59% of UK citizens distrust the EU; 56%
of French citizens also as do 52% of Italian citizens and even 42% of German
citizens do so. And overall 50% of European citizens say that their voice
does not count at the European level.

BUT the preamble of the TEU states its objective as being: “European integration”; Article 3 sets out the EU’s aims of which perhaps the most important is: an economic and monetary union, whose currency is the Euro – from the last of which the UK obtained a derogation in 1992. Realistically the UK never was and never would be a part of that union.

Those two matters: “European integration” and “economic and monetary union” are what constitute the bases of the “European project” that we hear so much about from politicians and others.

In essence they are two sides of the same coin: political and economic integration; or bluntly: a federal Europe. Either that or the phrase “Ever closer union among the peoples of Europe” is meaningless.

Hence it is inevitable that I ask the first question: do you want to be a part of a” Federal Europe”

**I DO NOT WISH TO BE A PART OF A FEDERAL EUROPE EITHER OPENLY
ADVANCED OR BY STEALTH UNLESS OPENLY AGREED TO BY A MAJORITY
OF THE EUROPEAN ELECTORATE.**

NEXT QUESTION: who has ever asked the “peoples of Europe” if they want to be a part of a Federal Europe? Or on what terms?

Answer: no one.

One could imagine a Europe wide referendum on setting up a Federal

State: and, if the answer is positive, then the creation of a truly Federal Parliament and government; with an economic and monetary policy to match.

It won't happen. It is quite clear that the peoples of France, Germany, Italy, the Netherlands, Denmark, Sweden, Spain and Greece – **at the least** – don't want that.

AND apart from anything else: I understand that being a part of a larger federal union would be contrary to the German constitution; there would have to be a vote to enable a change to be made. A good friend of mine, a German professor of law, assures me that, in her opinion, (and she is much younger than me), Germany would be unlikely to vote for that.

So I come to my THIRD QUESTION: what are we therefore left with by the current arrangements as set out in the TEU and TFEU? DO I WANT TO BE A PARTY TO THAT AND IF SO WHY NOT?

The EU is not a state, but it acts as a state does: it has legal personality, at least so far as the parties to the Treaties are concerned: Art 47 TEU.

It has all the apparatus of a state: it has a parliament; it has an executive in the form of the Commission and it has a constitutional court – the ECJ.

Even though the project for a “constitution” of the EU was rejected in 2005 and the Treaty of Lisbon substituted for it, the effect of those the TEU and the TFEU together was to create a “constitution”. And in today’s *Times* (22 February 2018), the distinguished constitutional lawyer Prof Vernon Bogdanor refers to “the Constitution of the European Union”. So the EU has a constitution in all but name.

So: the EU acts as a state.

Art 10 of the TEU asserts that “the functioning of the Union shall be founded on representative democracy” and its citizens are to be “directly represented at Union level in the European Parliament”.

The fundamental problem with the EU as it is presently constituted is that whatever its functioning may be said to be “founded upon” it does NOT IN FACT function as a representative democracy as we know it.

Of course, as Cardozo J famously said in *Louks v Standard Oil* in 1921: “we are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home”. The EU does not have to replicate the British model or the French one or German one. But, to my mind, if it is to have legitimacy, it does have to come near to being democratic.

IT DOES NOT DO SO. WHY:

First: the “competences” of the EU are very wide indeed, particularly if you include those that are “shared” with the Member states, who are only allowed to use that competence to the extent that the EU does not: Arts 2,3 and 4 of the TFEU. (Shared competences include social policy and “economic, social and territorial cohesion”).

WHO DECIDES WHEN THE EU HAS TAKEN OVER A SHARED COMPETENCE

in contravention of the principle of “subsidiarity” – or leaving things to Member States? **The answer is tucked away in a Protocol to TFEU. It is the Council or the EU Parliament:** but in a dispute “subsidiarity” only wins if there is a majority of 55% of the Council or a majority of votes in the EU Parliament.

What turkeys are going to vote for Christmas?

I CANNOT HELP recalling that evocative phrase of Lord Denning in 1974 in the early EU law case of *Bulmer v Bollinger* when he described the effect of the Treaty of Rome: “the treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back”. The competences of the EU cannot be held back; they will override those of the Member States.

Secondly, within those competences, the EU can and does legislate so as to affect the rights, not just of states, but of individuals and companies.

The most obvious is the European Charter of Fundamental Rights.

As Professor Vernon Bogdanor put it in an article in today's *Times*, "since 2009 **the EU Constitution** has included the Charter". Note the word "Constitution": not an idle slip of the pen I think. The ECJ has decreed, since the 1960s, that the treaties and all EU legislative acts have "direct effect" on individuals and they can be enforced by them. The UK discovered, from the **Factortame** litigation in the 1990s, if not before, that the ECJ regards all domestic laws of Member States to be subordinate to the Treaties and the views of the ECJ are final.

In the **Benkharbouche** case in the SC in 2017, the UK Supreme Court held that the effect of Art 47 of the Charter is that if a domestic Act of Parliament is incompatible with one of the rights set out in the Charter, then, in the inelegant phrase of Lord Sumption, that Act must be "disapplied".

The UK Parliament is, indeed, no longer sovereign.

The German Constitutional Court may challenge those views one day, as it threatened in 2015 in the **Gauweiler** case about the powers of the ECB, but that has not happened yet.

Thirdly, how are European Union legislative acts brought about? This is the crux of my problem with the EU: The method is enshrined in Art 17 of the

TEU, it is the European Commission which shall promote the general interests of the Union; it is the Commission that will exercise “co-ordinating, executive and management functions, as laid down in the Treaties”. THE **KEY PHRASE is in ART 17(2)**. It is that “UNION legislative acts may only be adopted on the basis of a Commission proposal except where the Treaties provide otherwise. Other acts shall be adopted ***on the basis of a Commission proposal*** where the Treaties so provide”.

So it is the Commission that takes initiatives to promote the general interests of the Union; it is the Commission that **MUST** propose anything that becomes a Union legislative act.

THE COMMISSION IS effectively the government of the EU because that is where policy originates; it is where EU legislation originates.

THAT body and its policies and its initiatives have NOT been democratically chosen. Nor has its President.

By Art 17 of the TEU, The President of the Commission is selected by the European Council. The European Council has to “take into account” the elections to the European Parliament and hold “appropriate consultations” but it then proposes to the Parliament its candidate “by a qualified majority”. The Parliament can reject the candidate, but then the same process is repeated.

The Council (of member states' representative ministers) proposes the Commissioners in conjunction with the President – elect.

So those that decide EU policy are NOT elected. They can only be got rid of by dismissal of the WHOLE Commission, pursuant to Art 17(8); otherwise the Commission and its President have 5 years in office.

Their subordinates, the civil servants who make up the European Commission are, of course, not elected.

That is my biggest difficulty with the EU.

To summarise:

Its competences are very wide ranging.

It directly affects the lives of all of us.

Yet those that decide the policy, the Commission and its President, are not elected.

Compare it with, say, the French system: the President is directly elected on a platform of proposals; he can implement proposals those through the Assemblée Nationale and the Sénat or, to a limited extent, by presidential decree. He is elected every 4 years – no ladies yet!

Or the German system: the chancellor is nominated by the President of the Federal Republic from the party that has the largest number of votes in the general election and the Bundestag confirms that. She then has to

get together a government after thrashing out a joint programme based, effectively, on who has won what seats on what policies in the general election.

BUT – you restate – the European Parliament has a control over legislation.

I disagree:

It is all governed by Art 294 of the TFEU.

First, it is the Commission that proposes e.g. a regulation to the Parliament and the Council – i.e. the representative ministers, not the heads of government/state who compose the European council. Secondly, that proposal goes to a first reading in the Parliament. If all is well, it goes through. So that is the Commission's policy; not that resulting from the programme of elected representatives or an elected government.

There can be disagreements: and the Parliament can reject proposals: but it cannot initiate them.

This is what has rightly been called “the democratic deficit” of the EU: to my mind it fundamentally undermines the legitimacy of the EU as an institution that so affects our lives.

Are those objections enough to pull the house down so to speak?

I would say that it depends on whether you think that democracy should be at the basis of government. I do. To put it in dramatic terms: I am not

prepared to sell my birthright to a democratic government for a mess of EU potage.

I come back to Professor Bogdanor's article to show to you the far reaching effect of the current arrangements.

The European Charter goes a lot further than the ECHR. For example, it creates a right "to engage in work: Art 15; a right to "conduct a business" ART 16; A right of workers to "information and consultation in good time" art 27; that every family shall "enjoy legal, economic and social protection" (tout court): Art 33; and a right to an effective remedy and a fair trial: Art 47. If any Act of a domestic Parliament is contrary to any of those rights (as interpreted, finally, by the ECJ) then, according to the Supreme Court decision in the *Benkharbouche* case, the domestic law is struck down. Parliament is not supreme.

Who has decreed that the UK should give up parliamentary sovereignty not just on the rights of fishermen (*Factortame*) or other esoteric taxation or economic issues (when VAT is applicable or not), but on such rights that are so wide-ranging?

Vernon Bogdanor says that the effect of Brexit will mean that "our rights will be dependent on a sovereign Parliament" instead of the decision of judges, either in the UK or in Luxembourg.

Personally, I would rather that ultimate decisions are made in democratically elected Parliament, rather than in the courts. That is my view of the world: I trust democracy; but I fear that the European Union does not.