
ILPA has commissioned a series of position papers on legal issues relevant to the EU referendum. Each paper is accurate at the date of the position paper.

The purpose of the papers is to help inform the debate about the EU referendum, and they are available to be used as a resource by both ILPA members and the general public.

The position papers have been produced by legal experts in the relevant fields and ILPA is very grateful to all those who have contributed to this work.

Copies of the other position papers can be found on the ILPA website at www.ilpa.org.uk

Nicole Francis, ILPA Chief Executive Nicole.francis@ilpa.org.uk

Jonathan Kingham, Chair, ILPA EU Referendum Sub Group

Immigration Law Practitioners' Association www.ilpa.org.uk 020-7251 8383 (t) 020-7251 8384 (f)

Sovereignty and legitimacy: the UK and the EU

Adrian Berry, barrister, Garden Court Chambers and Rowena Moffatt, barrister, Doughty Street Chambers, 29 April 2016

Introduction

The relationship between the UK and the EU raises issues about the UK as a sovereign power, and as to the legitimacy of the EU and its institutions. A concern common to both issues is that power ought to be exercised on a democratic basis.

Sovereignty

What is sovereignty?

Sovereignty is concerned with who holds and exercises authority. As a term, it does not always help identify which people or institutions wield actual power.

Sovereignty has an internal aspect. In the UK, sovereignty is commonly understood to rest with the Crown in Parliament. It also has an external aspect—a state is sovereign when it has legal and political freedom from external control. The UK, in common with other states in the international legal order is recognised as being a sovereign power. No other state or organisation has authority over it or exercises power coercively over it so as to render its sovereignty illusory. That said, the fact that a state such as the UK is sovereign says little about the constraints to which it may be subject. Both the USA and Mali are sovereign states. Yet each possesses a different measure of power and is subject to different constraints.

Sovereignty and the EU

As a sovereign state the UK has the authority to enter into international agreements with other sovereign states. It has exercised a power to do so by making treaties with other sovereign states in Europe so as to create and maintain the EU. The UK is free to withdraw from those treaties at any time. It is also free to remain within and continue to participate in the EU.

The EU is a body created by multilateral treaties made between sovereign states. In making those treaties the states concerned have decided that certain activities are best done together. Accordingly, they have decided to confer particular powers on EU institutions to further that objective.

In areas where states have agreed that the EU is to have a role, the EU has powers to:

- make rules and regulations (a legislative function)
- to make decisions (an executive function), and
- to adjudicate upon disputes and interpret those rules so that they are uniformly applied (a judicial function).

However, the Member States remain the ultimate arbiters of the EU's fate. They may revise the EU treaties to take powers away from it. They may terminate the treaties, in which case the EU would cease to exist. Individual states may withdraw from the EU or, perhaps, simply denounce the treaties and cease to be bound by them. The final say rests with states. Their authority to exercise that power comes from their status as sovereign states democratically accountable to their electorate and people.

How EU law works

The EU has a legislature, a law making institution, whose laws bind its Member States. EU law is composed of primary and secondary legislation. EU primary legislation is found in [treaties](#). The two which govern the EU are the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).

EU secondary legislation is comprised of three sorts of rules:

- Regulations
- Directives, and
- Decisions.

Regulations and Directives set out rules that apply to all, whereas Decisions are directed at specific authorities or individuals. Regulations are directly applicable, which means they enter into UK law directly without the need for separate UK legislation. Directives require transposition into domestic law, leaving Member States with choices over the form and method of legislation to be used to transpose them.

EU law applies only where the EU treaties (as interpreted by the courts) say it does. The EU treaties are made by Member States acting as sovereign states and are binding international agreements between them.

The EU treaties include statements about the EU's areas of competence, its objectives, its institutional rules, and the relationship between the EU and its Member States. Where there is no EU competence over an area of policy, EU law does not apply. Every action taken by the EU, including the making of secondary legislation, must have its legal basis in the EU treaties.

Unlike EU primary legislation, which is made by the Member States, EU secondary legislation is made by the EU legislature. The majority of such secondary legislation is made under the 'ordinary legislative procedure' (Article 294 TFEU). For the purpose of this procedure the EU legislature is composed of two bodies:

- the European Parliament (directly elected by EU citizens), and
- the Council of Ministers (ministers from the governments of each Member State).

Legislation is proposed by the European Commission (a body with both administrative and executive functions) but is made by the Parliament and the Council of Ministers.

National parliaments also have a role to play. They may not veto EU legislative proposals but the 'yellow' and 'orange' card system permits them to require a proposal to be reviewed or stopped if a sufficient number of them object to it.

Both the European Parliament (generally by simple majority) and the Council of Ministers (generally by qualified majority, occasionally by unanimity) must accept a legislative proposal for it to be enacted. There can be up to three readings of a legislative proposal by each institution. A conciliation committee, composed of members of each institution, seeks agreement if the proposal is rejected following the second reading. Rejection by either

institution on the third reading terminates the legislative process. The majority of EU legislation is adopted after the first reading.

The areas covered by EU law are numerous. They include not only sectors related to the internal market, such as competition and trade, but also areas as diverse as agriculture, employment, the environment, transport and asylum.

The UK Parliament and EU law

The UK Parliament has decided that primary and secondary EU legislation has the force of law in the UK. It has done so by enacting the [European Communities Act 1972](#) (ECA 1972).

ECA 1972, s 2(1) permits EU law to operate in the UK. It gives effect to directly applicable EU laws, as well as those EU laws that need to be transposed into UK laws.

Through ECA 1972, ss 2(4) and 3(1), the UK Parliament has made provision for EU laws to prevail over inconsistent national laws. The UK Parliament made this law and the UK Parliament has the power to revise or repeal it. Thus EU law prevails over national law only for so long as the UK Parliament permits it to do so. The UK Parliament retains control.

Under ECA 1972, where necessary, national institutions must interpret national laws compatibly with EU law. In the rare case where such interpretation is not possible, they must dis-apply national law. The purpose of making EU law prevail over national law in each Member State is to enable EU law to be applied uniformly and consistently across Member States. It is the states themselves (including the UK) that have decided that EU law should so operate.

The supremacy of EU law over conflicting national law is a defining feature of the EU legal order. Does this mean that the UK is no longer sovereign? The answer is 'no'. On the international plane, the UK is free to withdraw from the EU or to terminate its agreement to be bound by the EU treaties. Domestically, Parliament may repeal ECA 1972. Sovereignty in both its external and internal aspects has been preserved.

Three inter-related observations may be made about sovereignty in the EU context. First, as is clear from both the terms of ECA 1972 and domestic Supreme Court judgments (see for example *Assange* [2012] UKSC 22 and *HS2* [2014] UKSC 3), the decision to give EU law supremacy over national law, as well as the decision over the future of the UK's membership of the EU lies with the UK—that is to say with its Parliament and government.

Secondly, while the supremacy of EU law circumscribes the UK's freedom of action in certain respects, pooling powers with other states and delegating them to EU institutions does not detract from the UK's status as a sovereign state. As a sovereign power, the UK has chosen freely to pool powers over particular areas of policy and may choose to stop doing so in the future. Of course, pooling powers can mean a Member State not getting what it wants in all instances. The UK will not always get its way on particular points at the law making stage and, unless it has secured the power to opt-out to any measures (as it has in the areas of third-country immigration to the EU, asylum and criminal justice) it will have to abide by the resulting measure. But compromise is an inevitable part of most deals, and since entering the European Economic Community (as it then was) the UK has considered that it is better to continue to sign up to the deal, and to work on and negotiate each new measure as best as it can in the national interest, rather than to walk away and lose all of the benefits. Were it to be outside the EU, the UK would still have to make deals with the EU on matters currently decided within the EU. In doing so, the UK would not always get its way and would have to compromise in order to secure the best outcome.

Thirdly, there are often sound reasons for Member States to leave regulatory decision-making at the EU level—particularly in relation to subjects that are cross-border in nature and which affect the interests of other Member States. Matters such as trade in goods and services, customs controls, and environmental protection are cross-border in nature and readily lend themselves to close co-operation through multi-lateral institutions such as the EU.

With these considerations in mind, it is important to disentangle the UK's status as a sovereign state from the question of the definition and articulation of its national interest through the powers at its disposal.

Concerns about the EU's law making powers may be dressed up as concerns about sovereignty, but are more likely to be, in fact, concerns about the content of the national interest and the methods by which it may best be furthered.

Legitimacy

As we have seen, the EU exercises power to the extent permitted to do so by Member States. Even if, as is the case, the ultimate source of power or sovereignty may be said to reside in the Member States, is the power exercised by EU institutions legitimate?

Questions about legitimacy may be divided into those concerning the quality of the system issuing the power (legitimacy of process), and the quality of the power itself (legitimacy of substance).

Legitimacy of process: a democratic deficit?

As regards the legitimacy of its processes, a common criticism of the EU system is that it has a democratic deficit in its legislative and decision-making processes, as compared to the equivalent processes in its Member States. A system of legislation and decision-making that lacks adequate democratic processes may lack accountability and legitimacy.

In modern liberal democratic states, the dominant conception of democracy is representative—whereby citizens delegate power to govern to representatives who are elected periodically. The EU system, albeit that it is a creation of international agreements between states, has democratic elements in its legislative and decision-making processes. It has a representative parliament, the European Parliament, that is directly concerned in making EU legislation and which scrutinises the decisions and actions of other EU institutions. EU citizens elect Members of the European Parliament (MEPs), allocated in proportion to the population size of each state.

Among the EU institutions, there is also the Council of Ministers—composed of ministers from the elected governments of each Member State. The Council of Ministers has decision-making powers and, together with the European Parliament, makes EU laws. In addition, there is the European Council, composed of the heads of government of each Member State. Both the Council of Ministers and the European Council are composed of ministers who enjoy democratic mandates in their own states.

Thus, while the EU is an international organisation, nonetheless it has democratic features and operates on democratic principles. What is the case, therefore, that it lacks democratic legitimacy?

A number of reasons may be advanced. First, there are institutional considerations. The role of the European Commission (a body composed of nominees rather than elected representatives) in proposing legislation may be seen as inconsistent with democratic accountability. However, as legislation is made by the Council of Ministers and the European Parliament, this reason is hard to sustain. In addition, although the legislative role of the European Parliament has increased incrementally over the years as Member States have chosen to confer greater powers on it, it is often seen as not scrutinising the actions of EU institutions as effectively as national parliaments scrutinise their own governments.

Moreover, turnout for European Parliament elections is consistently very low, weakening the democratic mandate of the institution. In [2014](#), MEPs were elected with a Europe-wide turnout of 42.6%.

Finally, there are concerns about the effectiveness of the scrutiny of EU institutions by EU citizens themselves. For many EU citizens, Brussels seems very remote culturally, geographically, and linguistically. There is also very little media scrutiny of the actions of EU

institutions. For example, there is no well-known, EU-wide newspaper or press agency reporting on the work of the EU institutions, and the latter are seen to lack openness and transparency as a result.

Legitimacy of substance

As regards the legitimacy of its substantive policy-making, the question of the socio-economic benefit of the EU features prominently on both sides of the Brexit debate. Yet, to a large extent, any answer to the question of whether or not the EU institutions enjoy substantive legitimacy depends on the particular circumstances of each person or persons affected by EU laws, policies and decisions. For example, farmers and employees, who largely benefit from protective EU rules, are likely to experience more socio-economic benefit from membership than a small or medium-sized business faced with EU regulation and employment protection laws. This makes it difficult to claim that the substance of EU law is a reliable touchstone of legitimacy on a wider basis.

Popular 'buy-in'

There is a final aspect to legitimacy that requires consideration. Even if the system of power and the use of the power itself can be said to be objectively 'good', can the system still be said to be legitimate if only modest numbers of EU citizens demonstrate subjective or popular 'buy-in'?

It may be observed that a system has legitimacy only if it can be said that there is a willingness on the part of a sufficient number of people to obey those in power because they have sufficient faith in them. Popular trust in the EU is challenged significantly by the economic downturn, by the Eurozone crisis and by the forced migration crisis. Can the EU be considered a legitimate source of public policy making if a large number of its citizens say otherwise?

To assert that the EU does not have legitimacy in these circumstances is troubling for at least two reasons. First, to do so subsumes the legitimacy debate wholly within the referendum itself. It reduces the question of legitimacy to a simple 'yes' or 'no' vote—a vote for Brexit would conclude that the EU has no legitimacy, whereas a vote to remain would decide the opposite. As seen from the discussion above, legitimacy is a concept far denser than such a binary decision-making process allows. Further, the question of whether the EU institutions are legitimate is arguably a prior question to whether or not the UK should remain an EU Member State.

Secondly, in general terms and in part due to the absence of proper media coverage, the EU remains relatively unknown and little understood in the UK.

There is no denying that the EU currently faces significant challenges. That said, in terms of assessing its legitimacy, it is important to bear the following in mind:

- the UK is a sovereign state and will continue to be so if it remains in the EU, and
- the EU system, although a multilateral treaty arrangement between states, has democratic features that reflect, without usurping, the democratic traditions found in its Member States.

For some, perceived problems relating to questions of legitimacy may be addressed best by institutional reforms. For example, there is a [suggestion](#) that MEPs should be chosen by national parliaments rather than by direct election.

As regards popular buy-in, while a culture of misinformation and a lack of information about the EU persists, the numbers of those considering the EU favourably will be restricted artificially. There is a risk that the EU is a system not properly understood in the UK—a state of affairs that would ill-equip British citizens to make an informed choice in the referendum.