

## COUNTDOWN TO THE REFERENDUM:

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*A series of articles by Matrix that will explore a number of legal topics surrounding the UK referendum on 23 June 2016.*

### 1: The impact of EU law on the ‘sovereignty’ of the United Kingdom and its Parliament



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#### Synopsis

- *Analyses the concept of ‘sovereignty’, and suggests that the debate around the purported loss of sovereignty by the UK owing to its membership of the EU raises questions of ‘autonomy’ of Parliament and UK courts.*
- *Notes references in legislation and case law to the rights and obligations imposed by EU law only taking effect within the UK by operation of the 1972 Act. Argues (by reference to the Human Rights Act 1998), that the impact of the 1972 Act and EU law are unexceptionable from the perspective of the rule of law.*
- *Explains that EU law in practice relies on implementation in the national court systems of the Member States. In the UK, the Supreme Court has increasingly been prepared to question the correctness of judgments of the CJEU.*
- *Highlights that were the UK to leave the EU, one consequence would be that the UK would no longer have any right to determine either the content of EU law or its interpretation or application within the EU.*

1. The allegation that membership of the EU results in a substantial loss of UK 'sovereignty' was a central topic discussed before the UK joined the European Communities in 1973. It has been raised again by those campaigning for the UK to leave the EU, notably by the Mayor London, Boris Johnson, in his declaration of support for that campaign.
2. The concept of 'sovereignty' contains several strands including at least:
  - (1) the hereditary rights of a monarch, including the power of peace and war;
  - (2) the democratic power of a nation to express its views on fundamental issues; and
  - (3) the power of a nation to establish and to enforce its laws – it is perhaps clearer to refer to this specifically legal power as a power of 'autonomy' rather than sovereignty.
3. Neither the first or second of these meanings is put in issue by membership of the EU: the UK retains its sovereign rights over foreign policy; and the UK electorate has sovereign democratic rights in local and national elections as well as in the forthcoming referendum. Those powers may be exercised wisely or unwisely (consider the lessons learned by the Government and population of Greece in their recent referendum) but they undoubtedly continue to exist.
4. The 'sovereignty' debate raised by Mr Johnson and others raises the third question, the legal autonomy of the UK, i.e. the power of the UK Parliament and Courts to determine the laws affecting the UK.

### ***(1) The Autonomy of Parliament***

5. A distinctive feature of UK law is that primary legislation made by Parliament is not in general subject to any judicial control (the UK courts can of course ***interpret*** primary legislation but, once satisfied as to its meaning, they cannot in general question its validity or applicability within the relevant jurisdiction). Given the extent of control over Parliamentary process exercised by a modern UK Government, that is an attractive feature of the UK constitution from the perspective of the executive branch of Government, in that it can ultimately dictate the rules by which it governs without external control by the UK Courts.
6. Leaving aside the impact of EU law, the autonomy of Parliament remains essentially unfettered by the UK Courts – the [Human Rights Act 1998](#), ss 3, 4 make two modest encroachments on that power: (i) requiring the UK courts to interpret primary legislation so far as possible to conform to the rights guaranteed by that Act (as well as constraining UK public bodies to exercise any discretion afforded by such legislation in accordance with the Convention rights); and, as a last resort, (ii) allowing the courts to make a 'declaration of incompatibility' with such rights. Neither of these features fundamentally

challenges the traditional constitutional position of Parliament – the 1998 Act is of course itself the creature of Parliament; and it is hardly a radical proposition that principles of international law accepted by the UK should so far as possible be upheld in the UK Courts.

7. In many countries, the lack of judicial control over the legislature, and the ability of the executive to control the legislature, are matters of serious concern – to address these, for example in Germany and the United States, the validity of legislation is ultimately subject to constitutional review by reference to fundamental constitutional norms. By contrast, in the UK the lack of such judicial control is a badge of honour.
8. The impact of EU law on the issue of Parliamentary autonomy can be brought into further focus by recalling that: (i) the [European Communities Act 1972](#) is itself an Act of Parliament, albeit of a particular character: *Pham v Secretary of State for the Home Department* [2015] UKSC 19;<sup>1</sup> (ii) the 1972 Act is specifically limited in its scope to issues of law falling within the scope of the EU Treaties, as defined in that Act; and (iii) the [European Union Act 2011](#), s 18 is at pains to emphasise that the rights and obligations imposed by EU law take effect within the UK only by operation of the 1972 Act (or other specific Acts of Parliament).
9. Nonetheless, it is a challenge to the traditional view of the UK constitution that the 1972 Act confers a defined power (and imposes a duty) on the UK domestic courts: (i) to give precedence to binding provisions of EU law over inconsistent UK primary legislation; and also (ii) where appropriate, to grant compensation for those adversely affected by a ‘sufficiently serious’ breach of EU law, including by Parliament itself.
10. While these features of the 1972 Act and EU law do call in question the traditionally unfettered power of the UK Parliament, they are unexceptionable from the perspective of the rule of law. They also make good sense in the context of an international system of treaties that had been consistently found to confer rights directly enforceable in the national courts long before the UK joined the European Communities.

## **(2) The Autonomy of the UK Courts**

11. S 3 of the 1972 Act gives primacy to the Court of Justice in the interpretation of EU law. In the early days of UK membership of the European Communities, this was regarded as a natural (and desirable) feature of membership, allowing

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<sup>1</sup> See § 80: “unless and until the rule of recognition by which we shape our decisions is altered, we must view the United Kingdom as independent, Parliament as sovereign and European law as part of domestic law because Parliament has so willed. The question how far Parliament has so willed is thus determined by construing the 1972 Act.”

the Court of Justice to exercise an overview of the interpretation of the founding Treaties: see, e.g. the principles articulated by Bingham J in *Commissioners of Customs and Excise v Samex Aps* [1983] 1 All ER 1042.

12. However, EU law in practice relies on implementation in the national court systems of the Member States. In the UK, the Supreme Court has increasingly been prepared to question the correctness of judgments of the Court of Justice (see *R (HS2 Action Alliance Ltd) v Secretary of State for Transport & Anor* [2014] UKSC 3); the boundaries between EU law and fundamental principles of national law (see *HS2* and *Pham*, both *supra*); and the circumstances in which it is **bound** to follow an interpretation of the EU Treaties (see *Assange v Swedish Prosecution Authority* [2012] UKSC 22).
13. It would be theoretically possible to take that approach further, presumably by amendment of s 3 of the 1972 Act, but that would naturally lead in turn to a situation where the UK domestic Courts were the ultimate arbiters of issues of EU law within the UK, rather than Parliament or the Court of Justice.
14. Such an approach would raise the question of whether the UK domestic Courts were limited in their interpretation of EU law to principles of EU law itself, or whether there was some higher norm of national or international law against which EU law was to be judged:
  - (1) The former solution (whereby the UK Courts would be accorded pre-eminence in the interpretation of EU law within the UK) would be strikingly inconsistent with the EU Treaties, and in particular with the obligation of the national courts to refer issues of EU law to the Court of Justice as the guardian of the rule of law within the EU under Article 267 of the Treaty on the Functioning of the European Union.
  - (2) The latter solution would approximate to the German or US approach, whereby autonomy ultimately rested not with a sovereign Parliament but with the national courts exercising their authority by reference to fundamental constitutional norms. While this would have merit in emphasising the importance of national courts as the guarantors of the rule of law within their national territories, it would itself carry with it a fundamental challenge to the traditional UK constitutional theory of the sovereignty of Parliament, and would therefore be unlikely to commend itself to the UK Government. In any event, the UK does not currently have a well-defined set of constitutional principles (assuming that the UK does not intend to adopt either the EU Charter of Fundamental Rights or the ECHR, or a national written constitution, as a constitutional document

binding on Parliament itself), so that the basis on which the Supreme Court could discharge such a constitutional role would be unclear.<sup>2</sup>

## Postscript

15. A final point is worth noting – were the UK to leave the EU, one almost inevitable consequence would be that the UK would no longer have any right to determine either the content of EU law or its interpretation or application within the EU – the UK would no longer have voting rights on EU legislation, its Courts could not make preliminary references, and the UK would have no right to participate before the Court of Justice either as a party or in the appointment of Advocates General or Judges.
16. The effect would be that the UK would have very significantly **reduced** influence over the future development of EU law – in so far as any future economic and political relationship required the UK to abide by the terms of EU law (for example the rules of the single market for goods and services), that would amount in practice to a very substantial **loss** of control over the content of rules that would have to be observed within the UK, a point made clearly by Barack Obama in 2014:

“I think it is also hard for me to imagine it would be advantageous for Great Britain to be excluded from political decisions that have an enormous impact on its economic and political life”.
17. In practical rather than theoretical terms, that might be regarded as a significant loss rather than gain in national sovereignty.

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## Further information

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<sup>2</sup> In *Pham*, supra, at §§ 90-91, the Supreme Court tentatively counselled a need for both national courts and the Court of Justice to “act with mutual respect and with caution in areas where Member States’ constitutional identity is or may be engaged”, a sensible approach that suggests that there should be a willingness to compromise on fundamental issues of this kind.