

## **Written Evidence for inquiry into the UK's membership of the EU. 22 October 2015**

My experience is as a former UK High Court and Court of Appeal judge (1986-2003) and a former judge of the European Court of Justice (2004-2012). I claim no particular financial or economic expertise.

### **Summary**

- **An attempt to achieve “irreversible” change will fail for legal reasons - whatever the nature of the change.**
- **It is of the essence of the EU, as it has been throughout its existence, that the final word in some domains rests with the European Institutions. This is inconsistent with any national aim to have the final word on all matters resting with the national authorities.**
- **The phrase “Ever Closer Union” does not found any legal obligation.**

### **Irreversibility**

Neither the constitutional law of this country nor that of any other country which I know enables irreversibility of legislation or treaties to be achieved. The very fact that the Government is seeking to change the Treaties ratified by its predecessors shows that there are also *political* problems in achieving irreversibility. This is amply demonstrated by the thousands of “eternal” treaties concluded over the centuries which are no longer in force.

The statement attributed to the Foreign Secretary at the Conservative Party Conference<sup>1</sup> in October of this year

“And let’s not forget the EU Referendum Bill, published, as we promised, in the very first week of this Parliament....

.... sending a clear message that Britain expects a fair deal that delivers genuine and *irreversible* change in Europe;”

asks for what an not be delivered. Perhaps because of this, at the time of writing there is no reference to irreversibility in the EU Referendum Bill. So far as I know the requirement of “irreversibility” has not appeared outside political occasions.

It is important to realise that the EU - like the UK - is in a permanent process of evolution and, no doubt, - again like the UK - always will be. In the EU - as in the UK - there are at any one time constitutional arrangements and individual decisions which give rise to legitimate debate. The EU - like the UK - has mechanisms which permit change if agreed by prescribed majorities of the prescribed fora.

### **Sovereignty**

So far as sovereignty is concerned the root problem - in the immigration field as in many others - is that Member states all want changes but unfortunately not all want the same changes. Often the desires of one Member State diametrically conflict with those of another. Each can manifestly not prevail. The Treaties provide for such differences of opinion to be resolved by

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<sup>1</sup> [press.Conservatives.com](http://press.Conservatives.com) but I have not checked against delivery.

voting and for Member States to be bound by the result of such votes which are sometimes unanimous, sometimes by a weighted majority and sometimes by a bare majority. Any particular Member State will win some arguments and lose others.

Here we come to the nub of the sovereignty problem. Some say that the acceptance of such a binding dispute resolution mechanism is itself an exercise of national sovereignty as is the conclusion of any other treaty. Others say that having to submit to the views of others with whom one does not agree in relation to a particular matter is the very negation of sovereignty.

It is legally perfectly clear as a matter of law that in some areas the last word lies with the European Institutions - legislative and judicial - rather than national institutions. I see no political possibility of this being changed. However there is room for procedures which increase the influence of national Parliaments in the drafting of Union legislation and the taking of Union decisions. The result of this may be decisions which are more to our liking: it may equally be decisions less to our liking.

One must recognise the tension between national parliaments and the European Parliaments. If a Member State's focus is rigidly concentrated on advantaging itself to the maximum degree possible - and that seems to be the position of both sides of the argument in this country and indeed elsewhere - then there will be an emphasis on national parliaments and national Ministers. If the emphasis is on advantaging Europe as a whole then the emphasis will be on the European Parliament and the Commission.

### **Ever Closer Union**

The Government wishes to abandon this country's Treaty Commitment to "ever closer union". While this has been in the Treaties as a general aim since long before we joined it is more in the nature of an aspiration than a legally binding commitment to achieve anything in particular. Although I have judged many cases in which the legality of EU and national legislation and decisions has been in issue, I do not recollect a challenge based on an assertion that the measure in question was in breach of a legal obligation to achieve ever closer union. That said, the thinking of many in the Institutions responsible for decisions will have been influenced by a general desire to discover and then work for what is perceived to be the common interest rather than to advantage a particular Member State.

The phrase compels nothing although it continues to inspire some. It has long been clear to our partners that the UK no longer shares the aspiration for ever closer union in *all* fields, although it does in some - for instance where it objects to some national practice in another member State as interfering with free trade. Thus in particular, the UK has secured opt-outs in respect of the Schengen Agreement and the Common Currency. I see no difficulty in arriving at an acceptable political understanding but no possibility of altering the Treaties before the Referendum Date. That would only be achieved by following the lengthy processes in each Member State for ratifying Treaties.

*November 2015*