At the “EU Should we stay or should we go?” panel discussion hosted by Brick Court Chambers at Lincoln’s Inn last week, Kate Hoey MP, speaking for the “leave” side in the debate, told the assembled judges, solicitors and barristers in the audience that: “*Lawyers always have so many different opinions*”. She is correct: in the legal community, like the rest of the UK, there is a diversity of opinion on the question of EU membership.

We have formed a group of lawyers, “Lawyers for Britain”, led by Martin Howe QC, who believe that there needs to be a fundamental change in the UK’s relationship with the EU. This cannot be achieved unless we vote “leave” in the upcoming referendum, and then build a new and constructive relationship which preserves our trading links but restores our ability to be governed by our own laws. Here is our case:

1. **The substance and form of Cameron’s renegotiation change very little**. David Cameron’s new deal is not the fundamental change envisaged in Cameron’s 2013 Bloomberg speech.[[1]](#footnote-1) The substance includes some inoffensive but platitudinous provisions on competitiveness, an unwieldy and pointless mechanism for depriving some EU workers in the UK of some of their benefits, a new ability for 55% of national parliaments acting in concert to discontinue EU legislation that will in practice have no impact in any foreseeable circumstance[[2]](#footnote-2) and a limited adjustment to the relationship between the Eurozone countries and the non-Eurozone countries that does not address the concerns that the UK can be outvoted by the Eurozone. As a matter of form, the deal does not and cannot of itself change the EU Treaties; instead it purports to be an agreement to interpret the EU Treaties without changing them, coupled with a promise to embody the deal in the EU Treaties at some uncertain time in the future.
2. **The renegotiation exercise has revealed the UK’s lack of influence and the inability of the EU to reform.** Despite the renegotiation changing little of substance, perhaps it has not been entirely futile. It has revealed the extent to which the UK and its democratically elected government are unable to influence the EU and suggests that the EU is incapable of reform at all. The EU currently faces many evident problems: years of poor economic growth and high unemployment, a dysfunctional currency union, growing political extremism within many EU countries, terrorist attacks and an uncoordinated response to the migrant crisis. The current EU structures are not able to solve these challenges. By electing a government with a specific mandate to reform the EU in 2015, the UK gave the EU the perfect opportunity to consider these difficult questions and begin a process of fundamental change. Regrettably this is not happening.
3. **EU law has supremacy over our laws. This is problematic.** The precursor to the current EU Treaties, the Treaty of Rome, contained no express provision granting EU law supremacy over the laws of Member States. Nonetheless, this principle was gradually developed by the European Court of Justice in a series of judgments, notably *Costa v ENEL[[3]](#footnote-3)* in 1964, in which the ECJ ruled that EU law could not “…*be overridden by domestic legal provisions however framed…*” Even if we were to put in place new legislation to assert the sovereignty of Parliament, this would have little practical benefit. As argued by the former Attorney General, Dominic Grieve[[4]](#footnote-4), any attempt by our own parliaments to challenge the supremacy of EU law would be thrown out by the Court of Justice of the European Union. The supremacy of EU law is not some rarefied theory for lawyers and academics, but has real impacts on our lives. It is the reason why the Scottish government has had such difficulty putting in place minimum pricing legislation for alcohol.[[5]](#footnote-5) It is the reason why the UK parliament cannot reduce VAT on women’s sanitary products without agreement from Brussels.[[6]](#footnote-6) It is the reason why insurance companies in the UK must not charge male drivers more than female drivers for insurance, despite the former being a greater risk on the roads[[7]](#footnote-7). The supremacy of EU law not only directly impacts the lives of ordinary people, but it also undermines our own democratic institutions and processes. Whatever your views on minimum pricing, VAT on sanitary products or how insurers should charge, these are political questions. Political questions are best resolved by our own legislatures, in our own parliaments and assemblies, by politicians answerable to us at the ballot box. By taking away power to legislate in these areas from our law-makers, power is also taken away from the electorate.
4. **Once we concede powers to the EU, it is almost impossible to repatriate them**. The 2015 Conservative Party General Election manifesto contained a commitment to “*reclaim powers from Brussels on your behalf*” [[8]](#footnote-8). The history of the EU is one in which “competences” (EU jargon for the ability to legislate in a particular field) have been gradually transferred by member states to the EU. In every significant treaty in the history of the competences have flowed in one direction, away from the member states towards the EU. As a matter of law, it is technically possible for competences to move back to the member states, though this generally requires Treaty change and therefore the consent of the 27 other member states. As a matter of politics, given the number of different governments involved and their various different ideologies and national priorities, repatriation becomes impossible.
5. **The EU legislative process is complex and remote from the citizen.** The EU legislative process is confusing even for lawyers. Broadly, the right of legislative initiative is vested in the European Commission, which submits legislative proposals to the European Parliament and European Council, who separately conclude their own positions. If the Parliament and Council cannot reach an agreed position, they meet together with the Commission in informal meetings known as “trialogues” to reach a compromise text. From the perspective of democracy and good governance, there are multiple problems with this system. The institution initiating legislation is the one with least democratic legitimacy. Participation in EU elections is woeful, not just in the UK, but across the entire EU. The Council represents the executive governments of the member states, rather than the legislatures of the member states, which are largely unrepresented. Under the qualified majority voting procedure (which has applied in 90% of cases since the Treaty of Lisbon[[9]](#footnote-9)) member states may be outvoted. In fact the UK has been outvoted every time it has voted against a measure in the Council[[10]](#footnote-10). Unsurprisingly, this convoluted process with huge power, far from the citizen, relatively unscrutinised by the media, is a paradise for lobbyists and those large multinational corporations that can afford to be represented by them.
6. **The EU reforms poor laws too slowly or not at all.** The EU rapidly adds regulation to the *acquis communautaire* (EU jargon for the sum total of EU law), but repeals and reforms with reluctance even when laws are manifestly inadequate. For example, the EU Clinical Trials Directive implemented in 2004 contributed to the decline in the number of applications for clinical trials and increased costs and delays in setting up clinical trials in the EU[[11]](#footnote-11). More than a decade later the reformed regulations still have not taken effect. It is far easier for our parliaments and assemblies to change laws that do not work. In an increasingly complex and globalised world with the challenges and opportunities of rapid technological change and scientific advance, the need for agile legislative processes with proper democratic accountability is of paramount importance rather than a luxury.
7. **EU regulatory harmonisation has pitfalls.** In his 2013 Bloomberg speech, Cameron argued: “*Let us not be misled by the fallacy that a deep and workable single market requires everything to be harmonised, to hanker after some unattainable and infinitely level playing field.*”The EU has a tendency to harmonise as much regulation as possible and this has disadvantages as well as advantages. Peter Lilley MP, the minister who implemented the single market has recently said that the single market brings little benefit.[[12]](#footnote-12) Regulation is not merely neutral and technical, but often goes to the heart of how businesses operate and how society is organised, raising political questions that should be part of the democratic process. The EU legislative system is often an unedifying spectacle in which different member states seek to inflict their preferred regulatory approach across the EU, frequently resulting in messy compromises. Harmonised regulation also reduces the ability of local regulators to innovate new regulatory solutions, thereby limiting the ability of policy makers to compare the impact of different regulations and seek a regulatory optimum.
8. **Returning legislative power to our own parliaments and assemblies should be welcomed. It will improve democracy.** We are not criticising every EU law or praising all our own laws, clearly the picture is more nuanced. There are examples of good EU laws and poor laws on our own statute books. However, our own legislative processes are more democratic, closer to the citizen and crucially watched over more closely by the press. Too often our own law-makers hide behind the EU and blame it for unpopular legislation. Forcing our law-makers to take real responsibility for laws rather than simply copying and pasting from Brussels can only be a good thing. Some people argue that we need to be in the EU to maintain high levels of consumer, employee or environmental protection.[[13]](#footnote-13) Implicit in this suggestion is that we are somehow not capable of putting in place sensible laws ourselves and that we need the EU to protect us from our own parliaments and assemblies. This argument is deeply flawed: those of us who believe in high consumer, employee and environmental protection standards should not fear arguing and winning that case in our own democracy.
9. **A leave vote raises many questions, but it is still the best option.** We cannot know the exact consequences of a “leave” vote, it would be wrong to pretend otherwise. Equally, the remain side should not pretend to know the exact consequences of a “remain” vote, particularly in light of the changes to the EU that will take place the next time the Treaties are amended, as set out in the Five Presidents Report[[14]](#footnote-14). However, discussions about how we should be governed, which laws we should live by and our place in the world are to be welcomed and not feared. Over the coming weeks, we and others will be working through these questions from a legal perspective and setting out a vision of how the changes to our legal system and body of law can be managed with the least risk and uncertainty possible.
10. **Are we capable of making our own laws?** There are successful countries all over the globe that are not in the EU and few of these have all our advantages. We should remember that the UK is the fifth largest economy in the world, one of the five largest militaries, a permanent member of the United Nations Security Council, a nuclear power, home of the global language and the world’s financial centre. We have huge cultural soft power in fields as diverse as sport, television, pop music, literature and computer games. We have close historic connections and good diplomatic relations around the globe. Surely we can make our own laws?

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1. https://www.gov.uk/government/speeches/eu-speech-at-bloomberg [↑](#footnote-ref-1)
2. http://www.theguardian.com/world/datablog/2016/feb/10/introducing-camerons-eu-red-card-limited-impact [↑](#footnote-ref-2)
3. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61964CJ0006&from=EN> [↑](#footnote-ref-3)
4. http://www.theguardian.com/world/2016/feb/09/pms-vow-to-assert-sovereignty-of-uk-parliament-is-pointless-says-grieve [↑](#footnote-ref-4)
5. http://www.theguardian.com/society/2015/dec/23/minimum-alcohol-price-in-scotland-could-breach-eu-law-court-rules [↑](#footnote-ref-5)
6. ttp://www.theguardian.com/uk-news/2015/nov/25/tampon-tax-15m-womens-charities-george-osborne-spending-review [↑](#footnote-ref-6)
7. http://www.theguardian.com/money/2012/oct/05/car-insurance-women-rise-premiums-eu-ruling [↑](#footnote-ref-7)
8. <https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf> page 72. [↑](#footnote-ref-8)
9. *www.parliament.uk/briefing-papers/SN06646.pdf* [↑](#footnote-ref-9)
10. https://gallery.mailchimp.com/1026e6b00f73284a7e46eb046/files/20151009\_UK\_influence.pdf [↑](#footnote-ref-10)
11. http://www.cancerresearchuk.org/prod\_consump/groups/cr\_common/@nre/@pol/documents/generalcontent/crukctr.pdf [↑](#footnote-ref-11)
12. http://www.telegraph.co.uk/news/newstopics/eureferendum/12152759/Why-even-David-Cameron-cannot-convince-me-to-vote-to-remain-in-the-EU.html [↑](#footnote-ref-12)
13. http://www.theguardian.com/commentisfree/2016/feb/10/eu-in-health-wildife-european-union [↑](#footnote-ref-13)
14. https://ec.europa.eu/priorities/sites/beta-political/files/5-presidents-report\_en.pdf [↑](#footnote-ref-14)