



City Research Online

City St George's, University of London

Citation: Lock, T., Boyle, K., Greene, A., Harvey, D., Jancic, D., Kramer, A., McCall-Smith, K., Miller, N., O'Connor, N., Pritchard, H., et al (2019). Brexit, Rights and Devolution. Edinburgh, UK: The Brexit and Rights Engagement Network.

This is the published version of the paper.

This version of the publication may differ from the final published version. To cite this item please consult the publisher's version.

Permanent repository link: <https://openaccess.city.ac.uk/id/eprint/22266/>

Copyright and Reuse: Copyright and Moral Rights remain with the author(s) and/or copyright holders. Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge, unless otherwise indicated, provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way. For full details of reuse please refer to [City Research Online policy](#).

**The Brexit and Rights
Engagement Network
(BREN)**

Brexit, Rights and Devolution

Report of a roundtable held on 7 December 2018
at the Bingham Centre for the Rule of Law, London

Compiled by Tobias Lock (University of Edinburgh)
and Ellis Paterson (Bingham Centre for the Rule of Law)



THE UNIVERSITY of EDINBURGH
Edinburgh Law School



Table of Contents

ABOUT BREN	5
INTRODUCTION.....	6
A. ADJUDICATION AND ENFORCEMENT OF RIGHTS UNDER THE WITHDRAWAL AGREEMENT AND THE EUWA.....	7
1. Future adjudication of EU derived rights in the UK	7
What’s the law?	7
What’s the problem?	7
What’s the future?.....	8
2. Enforcement of rights guarantees in the Withdrawal Agreement.....	10
3. Brexit and the interpretation of domestic rights.....	13
What do we mean by domestic rights?	13
Interpretation of domestic rights	13
Working Time Directive	14
Judicial interpretation post-Brexit	15
Conclusion.....	15
4. Discussion.....	16
The binding character of the new arbitration panel.....	16
The backstop and the single market.....	16
“Mini-victories” for the UK and the EU.....	16
How well understood is the Withdrawal Agreement by UK legislators?.....	17
What would be the effect of ‘leave to remain’ in the end? Would it be merged with UK immigration rules?.....	17
Different interpretative approaches in the CJEU and UK domestic courts	18
B. ADJUDICATION AND ENFORCEMENT OF RIGHTS: OPTIONS FOR THE POST-BREXIT FUTURE	19
1. Content of rights review after Brexit: substance or process?	19
Introduction	19
The First BREN Roundtable	20
Brexit and the Future of the ECHR and Human Rights Act 1998	21
Recent Developments.....	23
2. Human rights reform: adjudication and enforcement of economic social and cultural rights? ..	26
Introduction	26
Case study: Northern Ireland	26
Economic, social and cultural rights	27
What could happen in future?	27
Conclusion.....	28

3. Time for devolved bills of rights?	29
4. Discussion.....	30
Future UK-EU cooperation in security matters.....	30
Level of commitment to the European Convention on Human Rights (ECHR).....	30
What might a Scottish Bill of Rights look like?.....	31
Potential issues with the shared legal system of England and Wales	31
The future of dialogue between the CJEU and domestic UK courts.....	32
C. POSSIBLE DEVELOPMENTS AND OPPORTUNITIES PROMPTED BY BREXIT	33
1. Brexit and rights under the Good Friday Agreement	33
Human Rights and the Good Friday Agreement.....	33
Brexit and Human Rights	34
Repeal of the Human Rights Act and withdrawal from the ECHR?	35
Conclusions	36
2. Incorporating international human rights in a devolved context.....	37
Incorporating International Human Rights in a Devolved Context.....	37
What is meant by ‘incorporation’?	38
3. Criminal law cooperation, Brexit and devolution: the way ahead	41
Some introductory remarks	41
Taking stock – where are we at the moment?	41
Where do we want to go from here?	42
Key elements to ensure a rights-based approach to future cooperation in criminal matters	44
4. Discussion.....	45
International agreements and (parliamentary) sovereignty	45
Northern Ireland: self-determination, history, and the role of the ECHR	46
D) SPECIFICS FROM THE DEVOLVED PARTS OF THE UK	48
1. Brexit and Wales	48
Political Context	48
EU (Withdrawal) Act 2018 and the Intergovernmental Agreement in Action.....	50
Repeal of the Law Derived from the EU (Wales) Act 2018	51
Early Operation of the Agreement.....	52
Conclusion.....	53
2. Brexit and Scotland	54
Scotland and the EU.....	54
Scotland and the UK.....	57
Conclusions	59
3. Discussion.....	60

BREN: Brexit, Rights and Devolution

The need for a legislative consent motion..... 60

Providing robust answers to independence questions..... 60

The EU Charter and continuity legislation in Wales and Scotland..... 60

Popular awareness of the devolution settlements..... 61

The executive-legislative balance in Scotland and Wales..... 61

The ‘keep the pace’ clause in the Scottish Continuity Bill 62

ABOUT BREN

The Brexit and Rights Engagement Network (BREN) comprises a group of early career legal researchers exploring the areas of rights, devolution and Brexit. The network is supported by a British Academy Rising Star Engagement Award and led by Dr Tobias Lock of Edinburgh Law School (since 1 January 2019 at National University of Ireland, Maynooth). It aims to provide younger scholars with an opportunity to share the findings of their research with an external audience of stakeholders.

BREN consists of the following members:

Dr Katie Boyle, Associate Professor, University of Stirling

Dr Alan Greene, Senior Lecturer, University of Birmingham

Darren Harvey, Early Career Fellow in EU Law, University of Edinburgh

Dr Davor Jancic, Lecturer, Queen Mary, University of London

Dr Amanda Kramer, Research Fellow, Queen's University Belfast

Dr Tobias Lock, Senior Lecturer, University of Edinburgh (BREN Coordinator)

Dr Kasey McCall-Smith, Lecturer, University of Edinburgh

Nina Miller, PhD researcher, University of Glasgow

Niall O'Connor, Lecturer, University of Essex

Dr Huw Pritchard, Lecturer, Cardiff University

Dr Anni Pues, Lecturer, University of Glasgow

Dr Kirsteen Shields, Lecturer, University of Edinburgh

Dr Adrienne Yong, Lecturer, City, University of London

Dr Rebecca Zahn, Senior Lecturer, University of Strathclyde

INTRODUCTION

This report records the final meeting and roundtable of the Brexit and Rights Engagement Network (BREN) on Friday 7 December 2018 at the Bingham Centre for the Rule of Law in London. Attendees at the roundtable included network members, fellow academics, representatives of the UK Government, the Northern Ireland Human Rights Commission, law firms, civil society, and NGOs.

This roundtable followed two successful roundtables held at Edinburgh and Belfast earlier in the year. It combined the topics of both and brought all available network members together. The purpose of the roundtable was to ignite debate amongst legal scholars and policy makers, and others working in a rights and devolution environment relating to interpretation, adjudication and enforcement of rights in the lead up to, and following “Brexit Day,” (29 March 2019).

This report is split into four sections mirroring the programme of the day. Part A considers the adjudication of EU rights, but also their enforcement under the 2018 Act and the Withdrawal Agreement. Part B is dedicated to the same broad theme but focuses on ‘options for the post-Brexit future’. Part C deals with possible development and opportunities as far as rights and devolution are concerned; and Part D shows how Brexit affects the devolution settlement.

Most of the contributions to this and the other roundtables have been published as blog posts on the Europa Institute’s Europeanfutures blog.

They can be found here: <http://www.europeanfutures.ed.ac.uk/topics/bren>

Furthermore, there are audio recordings of the roundtable available, which can be found here: www.europa.ed.ac.uk/bren

A. ADJUDICATION AND ENFORCEMENT OF RIGHTS UNDER THE WITHDRAWAL AGREEMENT AND THE EUWA

1. Future adjudication of EU derived rights in the UK

Dr Adrienne Yong, City, University of London

Focusing specifically on deportation and the right to remain in the current climate within the UK, since the inaugural BREN conference, some of the previously ‘missing parts’ that Yong had spoken about prior had now been found. Yong thus considered these in light of future adjudication of rights post-Brexit with the background of existing EU and UK law this time round.

What’s the law?

Firstly, the stark contrast was drawn between European position on deportation, which tends to be protective and only permits expulsion on grounds of public policy or security¹ compared with the position in the UK, where there is a presumption of automatic deportation if the foreigner is convicted of an offence.² The level of protection increases the longer a resident has been living in a member state. An expulsion decision can only be taken against those who have been living in the Member State for more than 10 years or for minors in the event of “imperative grounds of public policy.”³ However these grounds are open to interpretation by the Member State.⁴ The case of *Tsakouridis*⁵ highlights that a Member State cannot expel a resident purely based on a prior conviction. Going even further, the case of *PI*⁶, a long-term Italian resident was convicted for sexual assault and rape of a minor within his family and was not deported because the matter was not of interest in terms of public security.

What’s the problem?

Yong firstly addressed changing attitudes towards EU free movement. She highlighted that societal sentiments were helping to drive an increasingly harsh deportation policy, citing changing attitudes towards free movement since the Maastricht Treaty. She also cited an amplification in xenophobia dominating the Brexit vote, as well as a widespread increase in right-wing populism. She

¹ Directive 2004/38, Article 28.

² UK Borders Act 2007, s32(1).

³ Directive 2004/38, Article 28 (3).

⁴ Directive 2004/38, Article 28 (3).

⁵ C-145/09 *Land of Baden-Württemberg v Panagiotis Tsakouridis* [2010] ECR-I 11979.

⁶ C-348/09 *P.I. v Oberbürgermeisterin der Stadt Remscheid* (judgment of 22 May 2012).

highlighted that the number of EU citizens being deported from the UK has sharply increased from 3435 in June 2015, to 5301 to June 2017.⁷

Secondly, Yong discussed the issue of EU rough sleepers being deported. As set out above, the EU position on the right to remain is that deportation is generally only on serious or imperative grounds of public policy or public security. However, the UK Home Office had taken the decision that homelessness could be shoe-horned into this policy concern and that the presence of homeless EU citizens living in the UK was contrary to public policy. This was challenged in the case of *Gureckis and Others*⁸ where it was held that the Home Office policy on ejecting rough sleeping EU residents was contrary to EU law, and furthermore “[a]ccommodation, or the lack thereof, in the host Member State had no connection to freedom of movement rights and requirements, and was not a factor taken into account in the Treaties or Directive.”⁹

Finally, Yong referenced to Theresa May’s interview with the Telegraph in 2012, in which she vowed to create a ‘hostile environment for illegal immigrants’¹⁰ and admitted that this has been further evidenced by the current increase in deportation of EU migrants as well as Windrush scandal. Further, Operation Vaken was discussed – and Yong highlighted that only 11 people left the UK voluntarily. Unsurprisingly, given the government’s stance on immigration and increased number of deportations, the UK was investigated by the EU over their deportation of EU citizens.¹¹

What’s the future?

There are currently three documents published on the future UK-EU relationship – the Home Office’s EU settlement scheme guidance¹² (specific to citizens), the Withdrawal Agreement¹³ and

⁷ How many people are detained or returned? <https://www.gov.uk/government/publications/immigration-statistics-april-to-june-2017/how-many-people-are-detained-or-returned> Accessed 10/07/18.

⁸ [2017] EWHC 3298 (Admin).

⁹ [2017] EWHC 3298 (Admin), paragraph 98 per Mrs Justice Lang.

¹⁰ Theresa May interview: ‘We’re going to give illegal migrants a really hostile reception’ <https://www.telegraph.co.uk/news/uknews/immigration/9291483/Theresa-May-interview-Were-going-to-give-illegal-migrants-a-really-hostile-reception.html> Accessed 11/07/18.

¹¹ Brussels investigates UK over deported EU citizens <https://www.theguardian.com/politics/2017/sep/30/brussels-uk-deported-eu-citizens> Accessed 11/07/18.

¹² Home Office, ‘EU Settlement Scheme: Statement of Intent’ (21 June 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718237/EU_Settlement_Scheme_SOI_June_2018.pdf> accessed 1/8/18.

¹³ ‘Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018’ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759019/25_November_Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf [accessed 7/1/19].

the Political Declaration on the EU and UK's future relationship¹⁴ (both general). At this point, there is still a fair amount of confusion as to whether there will be a deal or no deal scenario, which makes the situation for citizens slightly more unclear.

In the Withdrawal Agreement, there is no real protection from expulsion for EU citizens, and this suggests that there may well be no guarantees for EU citizens in the final Brexit deal. This is because the UK stance and law on immigration is more punitive. Yong outlined three main issues still to be tackled. Firstly; there is no clear position on protection for *Zambrano* carers,¹⁵ individuals who care for EU citizens, but are not themselves EU citizens, second; the reality that under British law there is little protection from expulsion for EU citizens resident in the UK, and these people would otherwise be protected under EU law, and thirdly; that the Home Office have taken a hard line in their Settled Status guidance, and effectively, no foreign criminals can settle in the UK.

Something relatively recent that warranted discussion was also the political declaration, which included some details about citizens' rights. However, as Yong noted, the statements were contradictory. The free movement of persons was to come to an end, however, the four fundamental freedoms were to remain indivisible, which was a contradiction in terms that would have to be resolved.

Yong concluded by outlining that it is crucial to ensure adequate protection of citizens' rights post-Brexit but that much is left unclear until we have a clearer understanding of the relationship between the UK and the EU – whether this was a deal or no deal, and what the political declaration comes to mean in reality during the transition period.

¹⁴ 'Political Declaration Setting Out the Framework for the Future Relationship Between the European Union and the United Kingdom'

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/759021/25_November_Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_Europe_an_Union_and_the_United_Kingdom.pdf> accessed 7/1/19.

¹⁵ C-34/09 *Zambrano* [2011] ECR-I 01177.

2. Enforcement of rights guarantees in the Withdrawal Agreement*

Dr Davor Jancic, Queen Mary University of London

From February to November 2018, the draft withdrawal agreement (WA) saw a number of important changes. One of the most striking ones concerns dispute resolution.

I argue here that the legal solution found is part of a delicate compromise that represents a mini victory for the UK but one which is fragile due to its uncertain compatibility with EU law.

Throughout Brexit negotiations, the EU was adamant to maintain the jurisdiction of the European Court of Justice (ECJ), while the UK insisted on ending it.

The EU's concern was to protect the autonomy and effectiveness of EU law, while the UK's was the reverse: any degree of ECJ jurisdiction frustrates the infamous goal of taking back control and giving power back to Parliament.

The WA initially placed the ECJ at the heart of UK-EU dispute resolution. If consultations within the Joint Committee were to fail, the matter would go directly to the ECJ.

The latest version replaces the ECJ with arbitration under the auspices of the Permanent Court of Arbitration.

This is a significant concession by Michel Barnier and an important diplomatic triumph for Theresa May, who has repeatedly argued that disputes cannot be resolved by the court of either party, and for Boris Johnson, who has vocally advocated the option of arbitration.

The ECJ indeed no longer plays a central role (Article 167 et seq WA).

If the Joint Committee cannot decide within three months, an arbitration panel may be set up. A list of arbiters is then put together: the UK and the EU each nominate ten persons to act as panel members and another five are nominated jointly to act as panel chairpersons. From this pool of 25 arbiters, a five-member panel is appointed for each dispute.

Yet the ECJ retains limited jurisdiction. This is only activated if and when the arbitration panel encounters a question on the interpretation of a concept or provision of EU law, or a question

* This text was published by *The UK in a Changing Europe* on 10 December 2018 as an *Analysis* entitled "Brexit and dispute resolution: the UK's mini victory?", available at <http://ukandeu.ac.uk/brexit-and-dispute-resolution-the-uks-mini-victory/>.

on Britain's compliance with ECJ judgments handed down against the UK during or after the transition period.

The ECJ's compliance jurisdiction stems from: (a) the right for UK courts to request preliminary rulings from the ECJ for 8 years after the transition period, and (b) the right for the European Commission to bring the UK before the ECJ for 4 years after the transition period for infringements of EU law that happened before the expiry of the transition period.

If such a question arises, the arbitration panel 'shall' refer it to the ECJ, the ECJ 'shall' give a ruling, and the ruling 'shall' be binding on the panel. The use of mandatory language is part of the trade-off: substantively, the ECJ decides; formally, the arbiters do. Therefore, while the ECJ decides about EU law, the arbiters decide the dispute.

This, however, raises legal dilemmas. If asked for an opinion under Article 218(11) TFEU, it is uncertain whether the ECJ would reject the WA given how strongly it has defended its authority as the ultimate interpreter of EU law.

In 1991, it rejected the establishment of the EEA Court because its jurisdiction would bind the ECJ, because it would use different interpretative methods, and because referrals to the ECJ were neither mandatory nor binding.

A revised and narrower EFTA Court was subsequently endorsed owing to explicit assurances that ECJ case law would not be affected. Brexit dispute resolution is inspired by the EEA model. However, while the EEA Agreement (Article 111(3)) merely enables referrals to the ECJ, the WA makes it obligatory.

In 2014, concerns about authority, autonomy and discretion similarly led to the ECJ's rejection of the EU's accession to the ECHR.¹⁶

Earlier this year in *Achmea*,¹⁷ the arbitral tribunal envisaged under a bilateral investment treaty between Slovakia and the Netherlands was outlawed because the tribunal could not refer matters to the ECJ.

Maintaining the right to refer to the ECJ was also why the Benelux Court of Justice was acceptable, while the displacement of the same right was why the Unified Patent Litigation System was not.¹⁸ The WA, again, mandates referrals to the ECJ.

¹⁶ Opinion 2/13 *EU Accession to the ECHR* ECLI:EU:C:2014:2454.

¹⁷ Case C-284/16 *Achmea* ECLI:EU:C:2018:158.

¹⁸ Opinion 1/09 *European and Community Patents Court* ECLI:EU:C:2011:123.

Yet although these observations may seem to bode well for the WA, here is why it may falter.

First, arbiters have the discretion to decide whether a question of EU law arises and they may refuse to request the ECJ's interpretation when they find that it does not (Article 174(2) WA).

The only remedy is to ask the panel to review its assessment. This is problematic because the exercise of such discretion involves deciding about EU law, which only the ECJ can do.

Second, in case of non-referrals by national courts, the state could exceptionally become liable for damages under *Köbler*, whereas the arbiters reign free.¹⁹

Therefore, the ECJ's power over UK-EU withdrawal disputes has shrunk. But even with peremptory safeguards and the burden of political pressure, the ECJ may still not buy it.

¹⁹ Case C-224/01 *Köbler* ECLI:EU:C:2003:513.

3. Brexit and the interpretation of domestic rights.

Niall O'Connor, University of Essex

What do we mean by domestic rights?

It has never been possible to distinguish between EU rights and domestic rights. Firstly, there are certain types of EU law, such as directives, which must be implemented into national law before they can take effect, therefore these laws become domestic from the moment they are introduced into that member state by domestic legislation. Secondly, the European Communities Act 1972 instructs member states to implement EU law as if it were national law.

Post-Brexit, any distinction between domestic and EU disappears. This is because the EU Withdrawal Act expressly domesticates certain EU rights. We will then have 'pure domestic law' which does not come from Europe and therefore will not be affected by Brexit. The second category is 'retained EU law,' that which has been domesticated – aspects of treaties and EU law.

Interpretation of domestic rights

Firstly, why does a right need to be interpreted? Legal sources may require to be interpreted due to a lack of clarity or some substantive gaps to be filled. Judicial interpretation can be controversial. This is because judges are usually unelected, and, especially in the case of supranational courts, some might accuse them of interfering in domestic decision making.

There are different approaches to interpretation. British courts tend to take a *literal* approach. This means that they base their interpretation on the actual wording of text. Conversely, EU courts take a purposive approach, considering the wording firstly, but also looking at the purpose and objectives of rights, interpreting in accordance with these objectives. This purposive approach is not unsurprising, given that there are 24 official languages of the EU, therefore it can be difficult for a given word to mean the same in all Member States and in all languages. As a rule, EU law is often drafted in very general terms meaning that such terms can be left to Member states to interpret and apply as they see fit. The European Court of Justice confirmed their approach in *van Gend & Loos*²⁰, when interpreting treaties, it is necessary to consider the "spirit, general scheme and the wording" of the treaty. The Court also takes the same approach when interpreting EU legislation.

²⁰ ECLI:EU:C:1963:1.

Working Time Directive

O'Connor moved on to focus on employment law, due to its susceptibility to changes post-Brexit, taking the Working Time Directive as an example. The 4th recital to the Directive reads: The improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely economic considerations.²¹ The ECJ has repeatedly held that the Directive must be applied in accordance with this objective, but also refers to human rights objectives. In *ANGED v FASGA*²², the Court referred to Art 31(2) of the Charter of Fundamental Rights²³, confirming its worker friendly approach in relation to the Directive.

Directives need to be implemented by Member States, the UK's implementation took the form of the Working Time Regulations 1998. These are domestic law, and British courts have responsibility for interpreting the legislation, but are not given a free hand. As the Regulations are implementing EU law, they fall within the scope of EU law. There are two consequences to this. The first is when a national court is interpreting law which implements EU law, it must use the same purposive approach as the ECJ, because national law within the scope of EU law, must be interpreted insofar as possible with EU law. The second consequence is that if national courts have a doubt as to the underlying directive, they may be required to ask for a preliminary ruling to the ECJ. If a piece of legislation is within scope of EU law, even though domestic law, it must be implemented insofar as possible with EU law.

Outside of this, national courts are entirely free to take their own approach to interpretation, and as already highlighted, British courts take a literal approach, and generally only depart from the wording if it is unclear. The judiciary have relied upon contract law tests, applying these in the employment law context, even if such tests are not outlined in legislation. This can sometimes undermine the employee protective purpose of the legislation. When we consider unfair dismissal, courts grant significant leeway to employers in deciding whether a dismissal was reasonable, using the 'band of reasonable responses' test.²⁴ This could be argued to ignore the employee-friendly purpose of the legislation.

²¹ Working Time Directive (2003/88/EC).

²² [2012] IRLR 779.

²³ "Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave." Charter of Fundamental Rights of the European Union, Article 31(2).

²⁴ See *Iceland Frozen Foods Ltd v Jones* [1982] ICR 17, per Browne-Wilkinson J at 24F-25A.

Judicial interpretation post-Brexit

The question therefore arises, will UK courts apply a non-purposive approach to EU derived domestic law. The answer is of course – maybe? The EU (Withdrawal) Act sets out that domestic law (which derived originally from the EU) is now domestic law.²⁵ Seemingly, British courts may now be free to use literal approach in their application to the Working Time Regulations, for example.

Furthermore, there is no need to apply domestic law, having regard to EU law, nor is there a requirement or ability to refer a question to the Court of Justice – domestic courts become the sole interpreter of rights in the UK.²⁶ However, national courts should interpret retained EU law in accordance with existing ECJ case law, and this includes the purposive approach. The court can also have regard to future EU law if it wishes to do so.²⁷

However, domestic courts can depart from existing ECJ case law if it considers it ‘right to do so.’²⁸ Finally, the 2018 Act also removes the Charter as a tool of interpretation.²⁹

Conclusion

The effect of Brexit on rights interpretation is yet unclear, but what we do know that it will be solely British judges interpreting such rights. The purposive approach to rights may also be lost over time. However, British courts have historically looked to other jurisdiction to help interpret rights, and this will probably continue. A more urgent issue is that EU law has been removed from the hierarchy of norms, meaning that courts can weaken or depart from EU rights.

²⁵ European Union (Withdrawal) Act 2018, s2.

²⁶ European Union (Withdrawal) Act 2018, s6(1).

²⁷ European Union (Withdrawal) Act 2018, s6(1).

²⁸ Ibid, s6(5)

²⁹ Ibid, s6(6).

4. Discussion

The binding character of the new arbitration panel

The first question concerned the binding character of the arbitral tribunal. The EU Withdrawal Agreement states that where a dispute submitted to arbitration raises a question of Union law, the arbitral panel *shall* request the CJEU to give a ruling on the question. The question sought to clarify the strength of the referral power, and whether any potential ambiguities could be removed through domestic legislation in the future.

In response to this, Dr Davor Jancic noted that if there is indeed domestic legislation regarding the implementation and scope of the arbitration panel, the CJEU may not be satisfied with this solution as it opens up space for other actors to determine *when* a question of Union law arises or not, and that itself is a question of Union law. However, there is no overarching authority on who would judge that the arbitration panel manifestly breached its duty. These are key questions that will need to be looked at in greater detail later on in the process.

The backstop and the single market

An audience member asked Dr Adrienne Yong about the fact that the four fundamental freedoms are linked together, and whether the backstop would break up those fundamental freedoms. Dr Yong responded that at the moment, the situation was still unclear. There is both the inclusion of the indivisibility of the four freedoms and the determination of the UK on ending free movement of persons in the Political Declaration. If the backstop departed from free movement also, it doesn't make sense as to why there would be so much conflict.

"Mini-victories" for the UK and the EU

In his presentation, Dr Jancic referred to the UK's "mini-victory" in the Withdrawal Agreement regarding dispute resolution. A member of the audience invited the speakers to consider other "mini-victories," either for the UK or the EU.

Dr Yong suggested that mentioning the end to the free movement of persons in the Political Declaration is a small victory for the UK, yet it could also be considered a victory for the EU that they were able to include the indivisibility of the four fundamental freedoms in the same document.

Dr Jancic also noted that the customs arrangement that was reached enables the UK to conclude treaties with third countries to some extent. While this may mean more restrictions when it comes to trade agreements on goods, there could be more freedom for the UK when it comes to services. In a sense, this is another mini-victory.

Niall O'Connor however pointed out a 'hollow victory' – the express exclusion of the Charter in the UK. He listed three reasons. Firstly, existing EU law that will be retained has already been interpreted using the Charter. Secondly, the general principles will continue to apply, a significant number of which are reflected in the Charter. Lastly, the Political Declaration emphasises that the EU and its Member States continue to be bound by the Charter, which constrains their future relationship with the UK.

How well understood is the Withdrawal Agreement by UK legislators?

The panel were asked to reflect on the above question. Dr Jancic commented that it would appear that MPs were not sufficiently well informed throughout the Brexit negotiation process, which culminated in the UK Government being found in contempt of Parliament for the first time on 4 December 2018.³⁰ However, Parliament does pay attention to the developments and analysis of EU law through its committees, which publish reports and have been active in analysing documents published in the negotiation process. He concluded that some committees are 'quite agile' when it comes to analysis, but the level to which this trickles down to other members of Parliament who are not on those committees is questionable.

What would be the effect of 'leave to remain' in the end? Would it be merged with UK immigration rules?

Dr Yong said that again, this situation is unclear. She commented that the primary issue is that the EU is trying to fight for retaining more of a status for EU citizens, but the immigration White Paper had been significantly delayed.³¹ Upon its publication the situation will become more clear. However, according to Dr Yong, it appears that the UK is going down a route where people will be subject to normal UK immigration rules, and this will certainly be the case if there's no deal.

³⁰ The Guardian, *MPs find government in contempt of parliament in historic motion – video*, 5 Dec 2018, available at: <https://www.theguardian.com/politics/video/2018/dec/05/mps-find-government-contempt-of-parliament-historic-motion-video>

³¹ The Immigration White Paper has since been published on 19 December 2018, and is available here: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/766465/The-UKs-future-skills-based-immigration-system-print-ready.pdf

Different interpretative approaches in the CJEU and UK domestic courts

Niall O'Connor's presentation outlined the different interpretative approaches, from literal (domestic courts) to purposive (the CJEU). An audience member noted that Article 31 of the Vienna Convention on the Law of Treaties, says that the object and purpose of an international legal instrument is important if it cannot be read or placed on its wording alone. They asked whether Mr O'Connor had compared the CJEU's rulings with other international court rulings and how this affects domestic law.

Mr O'Connor responded that there is nothing particular about the CJEU's purposive approach, as a similar approach is taken by the European Court of Human Rights. However, he pointed out that where the conflict becomes very clear is not with treaties, but with legislation. In this situation it is easier to distinguish the CJEU's purposive approach to interpreting legislation from the British literal and common law-oriented approach.

B. ADJUDICATION AND ENFORCEMENT OF RIGHTS: OPTIONS FOR THE POST-BREXIT FUTURE

1. Content of rights review after Brexit: substance or process?

Mr Darren Harvey, University of Edinburgh

Introduction

In order to ensure that human rights are adequately protected within a given legal system, there must be effective means of ascertaining what rights mean in a given context and, ultimately, avenues for them to be enforced where they have allegedly been infringed.

It is clear that political mechanisms such as Parliamentary input into legislation, scrutiny of legislative proposals by select committees, investigations by ombudsmen etc. all have a role to play in this endeavour.

Additionally, it is generally (although not universally) accepted that courts make a vital contribution to the protection of human rights through their powers of adjudication and enforcement.

That being said, the ways in which courts interpret the substantive content of human rights and subsequently apply them in a given dispute has consequences for the level of human rights protection within a given legal system.

For example, it makes a difference whether the right to freedom of thought, conscience and religion is interpreted broadly or narrowly. If it is interpreted broadly, that right will, in principle, protect a wide range of beliefs and convictions. Consequently, actions taken by legislatures or executives which restrict the worshipping practices of relatively new religions such as Mormonism or the Raëlian Movement will engage the right to freedom of religion. In contrast, if interpreted narrowly to cover only the major, ancient religions of the world, it is clear that a number of people who hold beliefs and convictions different from those established religions will not benefit from the protection of that right.

It follows that the way in which rights are interpreted by courts has an impact upon those protected (or not protected) by that right, as well as upon the range of permissible actions that may be taken by those exercising public power.

Furthermore, given that many of the rights protected by instruments like the European Convention on Human Rights (ECHR) are not absolute in nature, they can, in certain circumstances, be restricted by public authorities in the pursuit of public interests. For example, the right to freedom of expression may be curtailed so as to prevent disorder and crime.

In such cases, courts have a role to play in scrutinising whether restrictions placed on human rights of this nature are proportionate and thus legally justified. Once again, the manner in which the courts conduct this proportionality assessment has implications for the level of human rights protection.

Simply stated, light-touch or deferential review tilts the balance in favour of the public body that is placing restrictions upon the rights of the individual. In such cases, courts will not subject the merits of legislative or executive action to close judicial scrutiny, with the consequence that such action will ordinarily be found to be proportionate. In contrast, subjecting laws which restrict human rights to rigorous or strict proportionality review tilts the balance in favour of the individual. Courts will examine closely the merits of the contested measure and its impact upon the rights in question, with a compelling justification often being necessary to convince the court that the measure is proportionate.

The point here is not that the intensity of judicial review of alleged infringements of human rights by public bodies should always be strict. There are, of course, many compelling reasons for curtailing non-absolute rights in the pursuit of protecting legitimate public interests. There are also many good reasons for judicial deference to decisions of political actors based upon the separation of powers, institutional capacity, democratic legitimacy etc. Instead, the point is that, generally speaking, the intensity of judicial review of legislative or executive action can carry direct implications for the level of human rights protection in a given legal order.

But what, if anything, does all of this have to do with Brexit?

The First BREN Roundtable

During the first BREN roundtable event in Edinburgh, there was considered discussion of the UK Parliament's decision not to retain the EU Charter of Fundamental Rights (CFR) in domestic law post-Brexit via the European Union (Withdrawal) Act 2018 (EUWA).

Many colleagues noted that this decision could lead to a diminution in human rights protection in the UK following its withdrawal from the EU. Substantively, there is a risk that not all of the rights contained in the Charter will find their way onto a domestic statutory footing post-Brexit.

Furthermore, from a procedural perspective, ending the primacy and direct effect of EU law in the UK will remove an incredibly effective mechanism for enforcing CFR derived human rights in national courts. Finally, the expansive interpretation given to the meaning of many of the CFR's rights by the CJEU (e.g. the right to respect for private and family life and the right to the protection of personal data) will no longer directly bind the UK courts. There is a possibility, therefore, that divergent interpretations of rights by the UK courts could lead to a diminution in rights protection along the lines suggested above.

Brexit and the Future of the ECHR and Human Rights Act 1998

In addition to discussing the refusal to incorporate the Charter into domestic legislation, my own remarks at the first BREN event posited that the political climate was perhaps then favourable for those long opposed to the Human Rights Act (HRA) 1998 to make their voices heard.

The starting point for this discussion was the promise made by the Conservative Party in its 2017 general election manifesto to neither repeal nor replace the HRA 1998 while the Brexit process was underway. The manifesto also stated that a Conservative government would remain signatories to the ECHR for the duration of the next Parliament. However, it continued, "we will consider our human rights legal framework when the process of leaving the EU concludes."

This time-limited and somewhat equivocal commitment to the ECHR and HRA 1998 should be read alongside the Conservative Party's 2015 paper on "Protecting Human Rights in the UK". According to that document, the interpretation of many of the ECHR's provisions by the European Court of Human Rights (ECtHR) - which the UK courts have then followed - has not been faithful to the original meaning of the text as initially drafted in the 1950s. The ECtHR is accused of having overstepped the mark by treating the ECHR as a "living instrument" - interpreting Convention rights in an expansive way so as to render them applicable to situations the framers of the Convention never had in mind. Over time, there is said to have been mounting concern at the ECtHR's "attempts to overrule decisions of our democratically elected Parliament and overturn the UK courts' careful applications of Convention rights" and it is alleged that the ECtHR has "not struck the appropriate balance between individual rights and responsibilities to others."

As a solution to these problems, a draft British Bill of Rights is envisaged, which would repeal the HRA 1998 and, inter alia, seek to:

- Put the text of the original Human Rights Convention into primary legislation;

- Break the link between the UK courts and Strasbourg. In the future, UK courts will no longer be required to take Strasbourg case law into account. Instead, UK courts will interpret rights “as clarified by Parliament”;
- “Clarify the Convention rights, to reflect a proper balance between rights and responsibilities. This will ensure that they are applied in accordance with the original intentions for the Convention and the mainstream understanding of these rights”; and
- Limit the use of human rights laws to the most “serious cases” that involve criminal law and the liberty of an individual, the right to property and similar “serious matters”. There will be a threshold below which Convention rights will not be engaged, ensuring UK courts strike out trivial cases.

Based on these proposals, a British Bill of Rights drafted along these lines would unquestionably seek to restrict the scope and content of rights as currently interpreted by the ECtHR and UK courts. By emphasising an originalist understanding of the ECHR, instructing UK courts on how to interpret certain Convention rights, and restricting rights-based judicial review proceedings to “serious” cases, it is clear that enhancing the scope of rights protection is not the principal objective of the exercise.

Notably, the 2015 document also states that the intention would be for the UK to remain signatories to the ECHR whilst seeking assurances from the Council of Europe that the proposed British Bill of Rights was Convention compliant. However, in the event that no agreement to this effect can be reached, “the UK would be left with no alternative but to withdraw from the European Convention on Human Rights.”

Whilst not official government policy at the moment, it is notable that withdrawal from the ECHR entirely was also the preferred course of action for the current Prime Minister in 2016, who as the then Home Secretary argued during the Brexit referendum campaign that “if we want to reform human rights laws in this country, it isn’t the EU we should leave but the ECHR and the jurisdiction of its Court.” Similarly, Dominic Raab (who was appointed and subsequently resigned as Brexit Secretary in the period between BREN events) has hinted at ECHR withdrawal as a last resort as part of his longstanding opposition to the HRA 1998 and desire to replace it with a British Bill of Rights.

Recent Developments

Against this background, two recent, Brexit-related developments seem to have considerably improved the chances of the UK remaining signatories to the ECHR and, quite possibly, ensured the continued existence of the HRA 1998 as well.

The UK-EU Withdrawal Agreement and the Future of the Human Rights Act 1998

The first major development concerns the agreement on the final text of a proposed UK-EU Withdrawal Agreement to be concluded under Article 50 TEU. According to Article 4(1) of the Protocol on Ireland/ Northern Ireland attached to that proposed Agreement:

“The United Kingdom shall ensure that no diminution of rights, safeguards and equality of opportunity as set out in that part of the [Belfast Agreement 1998] entitled Rights, Safeguards and Equality of Opportunity results from its withdrawal from the Union...”

Under the Rights, Safeguards and Equality of Opportunity section of the Belfast Agreement/ Good Friday Agreement (GFA) 1998:

“The British Government will complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency.”

On the one hand, the mere obligation to incorporate the ECHR into domestic law and to provide for access to the courts and remedies does not seem to require that this be done through the specific mechanism of the Human Rights Act 1998. On the face of the text of the GFA, at least, it seems possible for a British Bill of Rights to incorporate the rights of the ECHR into domestic law and continue to provide for access to the courts and other remedies in a manner that is compliant with the GFA.

On the other, in light of Article 4(1) of the Protocol on Ireland/Northern Ireland, one wonders whether the commitment to “no diminution of rights, safeguards and equality of opportunity” as set out in the GFA might preclude a British Bill of Rights of the sort discussed above. For example, would repealing the HRA 1998 and replacing it with a British Bill of Rights that instructed the courts to interpret, say, the right to family life more restrictively constitute a “diminution” of rights and safeguards under the GFA? Similarly, would UK legislation instructing the UK courts to adopt

an “originalist” interpretation of Convention rights, or mandating that only “serious” human rights infringements be heard by UK courts not also create a de facto diminution of rights?

The Political Declaration on UK-EU Future Relationship and the Human Rights Act 1998

Provided it enters into force, Article 1(4) of the Protocol on Ireland/ Northern Ireland provides that the Protocol is temporary in nature and applies unless and until it is superseded, in whole or in part, by a subsequent agreement. Accordingly, the UK’s commitment to no diminution of rights, safeguards and equality of opportunity persists for as long as the Protocol remains in force.

This brings us to the future UK-EU relationship as envisaged in the Political Declaration that accompanies the proposed Withdrawal Agreement. As the Declaration makes clear, the future relationship should be “underpinned by shared values such as the respect for and safeguarding of human rights and fundamental freedoms, democratic principles, the rule of law and support for non-proliferation. The Parties agree that these values are an essential prerequisite for the cooperation envisaged in this framework.” Furthermore, the future relationship should “incorporate the United Kingdom’s continued commitment to respect the framework of the European Convention on Human Rights (ECHR).”

Given that it is non-binding, it is not surprising that the fundamental rights section of the political declaration on the future UK-EU relationship is framed in general terms. Whilst continued respect for the “framework” of the ECHR seems to confirm that any future UK-EU relationship is dependent upon the UK continuing to be a signatory to the Convention, it is not clear whether this necessarily requires continued incorporation of its provisions via the HRA 1998. Indeed, it is to be noted that the original outline of the declaration referred simply to the UK’s commitment to the ECHR. By replacing this unambiguous commitment with an undertaking to “respect the framework” of the ECHR, it is at least conceivable that the UK government wanted to leave open the possibility of repealing the HRA 1998 and/or replacing it with British Bill of Rights of the sort discussed above.

Whether such a move would be welcomed by the EU side is very much open to debate and will depend on the precise wording of any future Treaty dealing with UK-EU relations (should one be agreed). From a domestic perspective, the recently published report of the House of Lords European Union Committee on the Withdrawal Agreement and Future Declaration calls on the Government “to explain the significance, if any, of the reference to the UK’s commitment to the ‘framework’ of the ECHR, rather than to the ECHR itself.”

BREN: Brexit, Rights and Devolution

For the time being, however, should the UK-EU Withdrawal Agreement enter into force, the UK appears to be legally obliged not to repeal the HRA 1998 and/or replace it with a British Bill of Rights, if the effect of doing so would be a diminution of rights, safeguards or equality of opportunity.

Whether ironic, intentional or inadvertent, the Brexit process, led by a remainder Prime Minister who has long been sceptical of the ECHR, might just end up saving the Human Rights Act.

2. Human rights reform: adjudication and enforcement of economic social and cultural rights?

Dr Katie Boyle, University of Stirling

Introduction

Boyle introduced her presentation with four questions relating to human rights reform through the lens of Scotland, asking the attendees to reflect on these. There is a danger that the UK as a whole is on a different level to the devolved jurisdictions. As the UK is engaging in supranational issues in relation to sovereignty, it is in growing risk of further fragmenting the United Kingdom. It must be said much of the discussions is speculative, when engaging with human rights in future, and post-Brexit future, which rights and remedies will exist. However, it is important to ask questions about which structures will exist in such a future.

- 1) What kind of constitutional legal structures are possible within the limited competence of devolution at the devolved level and within the unique constitutional arrangements at the UK national level?
- 2) What roles can be played by the different institutions of governance, namely the legislature, the executive and the judiciary in the enforcement of human rights, in particular, in relation to economic, social and cultural rights?
- 3) What is required of a legal culture that facilitates the adjudication and enforcement of human rights, reflecting on what this means including types of rights, duties, degrees of review which might be applied by the court and what is meant by effective remedies?
- 4) What are the potential barriers to human rights reform and the enforcement of economic and social rights through adjudication?

Case study: Northern Ireland

Boyle outlined that she had previously examined the enforcement (or lack of) on human rights in Northern Ireland. She considered the whether a lack of enforcement of such rights could have an impact on peace in a conflicted democracy environment. Through this lens, it became clear that the rights structures that exist in the UK and Northern Ireland only covers a selection of the rights available at an international level. It can therefore be said that these jurisdictions' treatment of human rights does not reflect the full body of international human rights law, only taking rules from the European Convention on Human Rights or from EU law. Subsequently having done work with the Human Rights Commission, she considered this question across the other UK jurisdictions, assessing a major gap at the domestic level compared with what is envisaged at the international level.

Economic, social and cultural rights

A question therefore arises – does enforcement of economic and social rights take place? Such rights can be classified generally as those covering health, education, social security employment and housing. However, these rights tend to be shoehorned into other enforcement mechanisms in the UK. There might be a statutory framework, such as the ‘National Minimum Wage’, but when measured against international human rights law, the UK position falls short of what is expected internationally. Conversely, the UK would say that this was an example of the UK meeting its social, economic and cultural rights.

These rights can be enforced through the common law. For example, Lady Hale introduced ‘best interest’ of the child, referring to the International Convention for the Rights of the Child in *ZH Tanzania*³². In the UNISON³³ case on tribunal fees, the Court outlined what it is to have a social minimum, in respect of allowing access to justice to employment tribunals through removing tribunal fees once more. Economic, social and cultural rights are also adjudicated upon in the realm of equality law. The Equality Act 2010 has facilitated this. If businesses do not comply with the public-sector equality duty, the court can quash their decision.³⁴ However, it should be minded that this is not a substantive right, merely a procedural one.

Boyle summarised that politicising economic, social and cultural rights takes place at all levels, but with insufficient protections compared with the international dimension. She highlighted that perhaps this difference in protection can help us understand why remedies differ in different jurisdictions. Depending on the law on which you are relying, the remedy may be different. A question therefore arises as to what could be lost in relation to remedies.

What could happen in future?

Access to effective remedies could be guaranteed through a renewed constitutional arrangement, with clearer rules for courts on what expected in terms of what is protected and how to be enforced.

Prior to the referendum, it was noted that there were small discrepancies between different jurisdictions in UK. Depending on where you live, there might be different types of remedies. Devolution engages very much with economic, social and cultural rights.

Given that we are facing significant changes under Brexit, and that a Bill of Rights remains a potential option on the table in the future, there is much more major constitutional upheaval at play. The slight differences could result in much bigger changes in different jurisdictions of the UK.

There has also been discussion in light of the British Bill of Rights, as to whether protection should or can be different in the devolved jurisdictions, for example, there is already a duty to have due regard to convention on rights of child in Wales, and in Scotland, social security is considered to a human right under

³² *ZH (Tanzania) (FC) v Secretary of State for the Home Department* [2011] UKSC 4

³³ *UNISON v Lord Chancellor* [2017] UKSC 51

³⁴ Equality Act 2010, s149

the new devolved legislative framework. The First Minister of Scotland has endorsed the recommendations of the FM Advisory Group on Human Rights Leadership, including the recommendation to incorporate economic, social and cultural rights in devolved areas. Therefore, the devolved jurisdictions are already more progressive than the UK-wide treatment of human rights.

Furthermore, in Northern Ireland, human rights are foundational. This is as a result of the Peace Agreement and international treaty which the UK signed up to. We can also consider the Supreme Court case relating to abortion in Northern Ireland.³⁵ This highlights a disjointed approach to healthcare across the jurisdictions. Human rights are left as 'bargaining tools' in politics. Scotland appears to be committed to protecting human rights and Wales has already taken steps in that regard. However, it appears that the UK, when considered as a whole, is entering a space of regression.

Conclusion

It is important to consider what arrangements might exist in the future and how adjudication might operate. It is necessary to think about the substance of rights and remedies facilitated. If no remedies are available, then there is no enforcement. Ultimately, what will this mean for people who live in different areas of the UK and have access to different rights depending on where they live.

³⁵ *Trinity Term* [2018] UKSC 27.

3. Time for devolved bills of rights?

Dr Kirsteen Shields, University of Edinburgh

The UK government is chasing an illusion of sovereignty via Brexit, but it is a change that will come at the expense of our rights. Westminster will remove one of the few, and relatively new, limits on its powers when it revokes membership of the EU. In terms of environmental regulation, employment conditions and social and economic rights, the EU has acted as a steadying hand to the exploits of parliament.

The UK does not have a written constitution but in recent years “quasi-constitutional” documents have set limits, including the European Communities Act of 1972 (EC Act), the Human Rights Act 1998 and the Scotland Act 1998. They are quasi-constitutional laws because they change the relationship between the people and the state and place some limits on parliament.

These are not permanent limitations, however, as we see with Brexit and the likely repeal of the EC Act, and so do not serve society in the way that a true constitutional text can. An obvious comparison is the written constitution in the US, which can be invoked to limit what government can do.

In turning away from Europe and European jurisprudence, the UK is switching to a more reductive catalogue of rights. Human rights, as they stand, are short-hand for more expansive obligations for the state.

There is particular cause for concern in relation to economic, social and cultural rights — for instance, the right of housing, the right to an adequate standard of health and the right to education — because these lack strong constitutional guarantees. The inevitable economic fallout from Brexit coupled with inadequate social protections and financing from within the UK state will expose the gaps and the failings of the constitutional infrastructure.

In light of this rights vacuum, the idea of a written constitution for the UK has been floated for a long time, but it is unlikely in general, and it is specifically unlikely to contain economic, social and cultural rights provisions. At the devolved levels, however, the Scottish, Welsh and Northern Irish assemblies could pass their own bills of rights.

Now is a good time to consider a Scottish bill of rights. The safety net of European regulation for economic, social and cultural and environmental rights that has filled the cracks in the UK’s constitution will soon be gone. These rights matter, especially for people on the bottom rungs of the social ladder, but sooner or later they matter for everyone else too.

4. Discussion

Future UK-EU cooperation in security matters

The future of the European Arrest Warrant and the Charter was raised in the context of rights protection.. If the UK retained the Charter, it was suggested that this may retain a continuing human rights standard for criminals, and not a ‘higher level’ of standards. Could the ECHR play a role in this, too?

Darren Harvey responded by saying that for any future UK-EU cooperation in security matters, the UK would have to give an undertaking to commit to staying in the Convention system. This is because the CJEU has suggested in its case law that security and judicial cooperation could take place with third countries, provided that the third country has an equivalent level of protection standards. In the R.O. judgment it states specifically that if a state is signatory to the ECHR, you can assume that the state provides equivalent protection to the substantive content of rights contained in the EU Charter.³⁶

Level of commitment to the European Convention on Human Rights (ECHR)

An audience member sought the panels’ thoughts on the wording in the Political Declaration that the UK will continue to “respect the framework of the ECHR,” and what level of commitment this suggested.

Firstly, Mr Harvey stated that the the House of Lords EU Select Committee published a report on the 5 December 2018 on ‘Brexit: The Withdrawal Agreement and Political Declaration’ in which they asked the Government to clarify the meaning of the above. Dr Katie Boyle noted that referencing the framework, rather than the treaty itself, is typical negotiation language. For example, the Scottish Government’s recent commitment to the UN Convention on the Rights of the Child was a commitment to incorporate the principles of the Convention, rather than the actual Convention. It creates space for negotiation.

Dr Tobias Lock pointed out that paragraph 83 of the Political Declaration (“continued adherence and giving effect to the ECHR”) seems to be a lot more concrete than the initial “framework” comment. However how this will manifest in the future remains to be seen.

³⁶ *Minister for Justice and Equality v R.O.*, C-327/18, 19 September 2018

What might a Scottish Bill of Rights look like?

On the topic of a potential Scottish Bill of Rights, the panel members were asked what this may look like. Would it look similar to the South African Bill of Rights? Or take the shape of an incorporation of international standards of social rights? Moreover, is such a distinction relevant?

Dr Boyle said this question comes down to different models of incorporation. A narrow model would see the direct incorporation of a treaty into domestic law, and a wider model could include the recreation of rights which are inspired by international law, but domestically conceived. It is within the scope of the devolved legislatures to take steps to incorporate international treaties, but the question of ‘direct’ incorporation is still unclear. She hoped that this question would be answered at the Supreme Court hearing of the Scottish Government’s EU continuity bill, due to take place on the 13 December 2018.³⁷ The ‘due regard’ duty in Wales could also be deemed a softer form of incorporation, or implementation. However, if the the devolved jurisdiction wanted to go for full incorporation, there is a constitutional question still to be asked on whether they have the competence to do that.

Adding to this, Dr Kirsteen Shields said that the Scottish Parliament has been pushing the envelope in terms of its powers in directly referencing the ICESCR in domestic legislation, such as the Community Empowerment (Scotland) Act 2015. This has introduced ICESCR language into the Scottish Parliament and this hasn’t been contentious or challenged. The international covenant has become a reference point throughout the Scottish Parliament’s work, which is a form of soft incorporation. She hoped the next step would be something stronger.

To finish the discussion, Dr Boyle said that she hoped the Supreme Court case would provide an answer on whether or not devolved legislatures can bind themselves, thus clarifying what the devolved jurisdictions can do in terms of creating devolved Bills of Rights.

Potential issues with the shared legal system of England and Wales

An audience member drew attention to the fact that England and Wales shared a legal system, and that this could potentially cause problems for entrenching rights in the future in the Welsh devolution settlement.

³⁷ THE UK WITHDRAWAL FROM THE EUROPEAN UNION (LEGAL CONTINUITY) (SCOTLAND) BILL – A Reference by the Attorney General and the Advocate General for Scotland (Scotland) [2018] UKSC 64, available at: <https://www.supremecourt.uk/cases/uksc-2018-0080.html>

Dr Shields said on the justice and rights issue, it is not clear whether it is desirable for justice to be devolved to the Welsh Assembly. Following on from this, Dr Boyle noted that if court structures are reserved, this might preclude a jurisdiction from making the adjustments that are needed to take into account economic and social rights. Such rights require the court to act in different ways.

Social rights require adjustment in that it is the recommended practice is to deal with cases and remedies more systemically and on a collectively structural remedy basis. If there is not adequate control over the courts and a new system is introduced that expects that, a state needs to be able to respond. The danger is that if courts aren't equipped to deal with social rights adjudication, a situation may arise as in Brazil, where cases were brought by wealthier people to claim health rights and actually created greater inequity in distribution of resources.

The future of dialogue between the CJEU and domestic UK courts

It was brought up that the UK judiciary may eventually lose its ability to have some sort of dialogue with the CJEU. The relationship with the ECHR would ensure one form of dialogue with an external system. With Brexit, the judiciary may lose another potentially valuable development in judicial culture.

Dr Katie Boyle said on the dialogue point that deliberation in adjudication is an important part of democracy, in all directions. If the CJEU no longer had a direct dialogue role, there is still the possibility of it playing an interpretive role in jurisprudence in the same way that comparative law plays a part. However, the dialogue is not quite the same, and that aspect of deliberative democracy will be lost.

Mr Harvey pointed out that judicial dialogue within the EU framework is formalised in preliminary reference procedures. With the ECHR, it is a much more informal type of adjudication. The preliminary reference procedure fosters a more proactive approach in a formalised way. He also noted that the CJEU are presently in the process of putting together a new database of all judgments of the Member States' highest ranking courts. This will not only include the questions those courts put forward to the CJEU, but also a summary in English of how those national courts have then handed down a judgment based upon it. This information will be publicly available. The UK is not going to be a part of that, and Mr Harvey considered this to be another loss in the overarching idea of judicial dialogue. Dr Lock also commented that the database goes even further, incorporating all sorts of decisions of courts of all levels handling EU law.

C. POSSIBLE DEVELOPMENTS AND OPPORTUNITIES PROMPTED BY BREXIT

1. Brexit and rights under the Good Friday Agreement

Dr Alan Greene, University of Birmingham

As the Brexit negotiations reach their endgame, the border on the island of Ireland has become the main stumbling block. The so-called ‘Irish question’ is, however, much more multi-faceted than just the issue of ‘border checks’. The Good Friday Agreement (GFA) which has brought relative peace for the past two decades has a number of different facets that will potentially be negatively impacted by Brexit. This short post will focus on one of these aspects— the protection of human rights—and underline why, despite the protestations of so-called ‘hard Brexiteers,’ close alignment between the UK and the EU will be necessary following Brexit. Whether this will actually occur is, however, another question.

Human Rights and the Good Friday Agreement

The GFA gives express recognition to the European Convention on Human Rights (ECHR)— an international treaty under the auspices of the Council of Europe and separate to the European Union (EU). UK membership of the Council of Europe therefore is not *prima facie* affected by Brexit. That stated, while sources of EU human rights law such as the Charter of Fundamental Rights (CFR) are not expressly mentioned, the GFA assumes that both parts of Ireland would remain in the EU.

The GFA requires ‘equivalence’ between the human rights protection in both jurisdictions on the island of Ireland. Both Ireland and the UK have thus incorporated the ECHR into domestic law through the European Convention on Human Rights Act 2003 and the Human Rights Act 1998(HRA) respectively. Equivalence does not mean ‘identical’, however, as the ECHR permits variations in rights protection from country to country so long as states stay within their ‘margin of appreciation’. There are already quite marked distinctions in human rights protection north and south of the border; notably, marriage equality, and abortion rights too [in the near future](#). The principle of equivalence in the GFA is further complemented by the principle of ‘non-diminution’: that rights protection in both jurisdictions may progress but not regress. Under the terms of the GFA, Brexit therefore needs to be delivered in a way that ensures an equivalence of rights protection north and south and without resulting in a diminution of rights.

Brexit and Human Rights

Despite the prominence given to the ECHR in the GFA, this does not mean that Brexit will have no impact on human rights in the UK, and Northern Ireland in particular. Firstly, while many of the rights in the CFR overlap with the ECHR; de Mars et al. note that the EU's CFR is much more robust and substantive in areas such as data protection, workers' rights and equality law.³⁸ Section 5(4) of the European Union (Withdrawal) Act 2018, states that the CFR will not be part of domestic law on or after 'exit day' of 29 March 2019 meaning that without the 'constraints' of the CFR, the UK will be free to chip away at EU rights protection as it amends its laws, free from the 'red tape' of the EU. Furthermore, section 8 of the EU Withdrawal Act empowers government ministers to amend a broad array of legislation with minimal parliamentary approval—so called Henry VIII powers. In so providing, the role of parliament as a forum for resolving disagreements over human rights—a key factor that is often advanced to normatively justify the UK's political constitution—is curtailed and circumvented.

A further factor to note is that rights do not vindicate and protect themselves; rather, mechanisms are needed to give effect to them. In this regard, the machinery of the CFR and ECHR are notably different. Under the HRA, British courts are empowered to find acts of public authorities unlawful if they breach the rights contained in the ECHR. In addition, the HRA gives courts the power to interpret legislation compatibly with the ECHR and, where this is not possible, to issue a declaration of incompatibility against the offending statutory provision. A declaration of incompatibility does not, however, affect the validity of the provision; rather, it is left to Parliament to decide how, if at all, to remedy the breach. Under the ECHR system, an individual can also take a case to the European Court of Human Rights (ECtHR); however, they can only do this as a last resort once 'all domestic remedies' have been exhausted. And again, a judgment of the ECtHR does not invalidate the domestic laws of a state.

In contrast, where a part of UK domestic law offends EU law—including the CFR—courts must 'disapply' it which, while not the same as invalidating a piece of legislation, has the same practical effect in a given case. In addition, domestic courts can refer a question on the interpretation of EU law to the European Court of Justice at any stage in the proceedings. Domestic remedies do not need to be exhausted first. The protection of rights under the EU system therefore can be more immediate and impactful than the ECHR system and will thus be denied to individuals living in Northern Ireland once the UK exits the EU.

³⁸ Sylvia de Mars et al, *Bordering two unions*, Bristol University Press 2018.

For these reasons, Brexit must be delivered in a way that maintains the provisions of the GFA and this been reaffirmed by both the UK and the EU during the course of the Brexit negotiations. There is a degree of flexibility in the terms of ‘equivalence’ and non-diminution’; however, this space is not so wide as to allow anything other than close alignment between the UK and the EU after ‘exit day’ on 29 March 2019 in order to vindicate the requirements of the GFA.

Repeal of the Human Rights Act and withdrawal from the ECHR?

Brexit and the rhetoric of ‘taking back control’ has revealed a hostility towards international norms in certain corners of UK political and media discourse. While Brexit does not ostensibly affect the UK’s membership of the ECHR, there are indications that it may be next in the cross-hairs. Firstly, the Conservative Party’s 2017 manifesto³⁹ contained a proposal to derogate from the ECHR for British armed forces overseas, the legality of which would be highly questionable at best.⁴⁰ While this proposal has not been implemented, it raises the spectre of a future clash with the ECtHR on this point and a potential ground for the UK to withdraw from the ECHR entirely. Secondly, during the 2017 election Theresa May threatened to ‘rip up’ human rights protections following a spate of terrorist attacks during that campaign.⁴¹ This rhetoric corroborates May’s noted dislike of the ECHR which she vocalised during the 2016 referendum campaign, arguing that the UK should stay in the EU and withdraw from the ECHR instead.⁴² Thirdly, there have been a number of press reports suggesting that withdrawal from the ECHR is on the political agenda following the completion of Brexit.⁴³

Consequently, while the case may be made that Brexit has sated the appetite of Euro-sceptics to the extent that repeal of the HRA and withdrawal from the ECHR is no longer on the cards, the continued attacks on the HRA and ECHR following Brexit would suggest that this may not be the case. Were such a development to arise, this would be a flagrant breach of the GFA.

³⁹ <https://www.conservatives.com/manifesto>.

⁴⁰ See Alan Greene, The UK Government’s Proposed ‘Presumption to Derogate’ from the ECHR: Submission to the Joint Committee on Human Rights, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2942210.

⁴¹ <https://www.theguardian.com/politics/2017/jun/06/theresa-may-rip-up-human-rights-laws-impede-new-terror-legislation>.

⁴² <https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum>.

⁴³ <https://www.theguardian.com/commentisfree/2017/jan/03/european-convention-human-rights-threat>.

Conclusions

The protection of human rights is fundamental to the GFA and it is difficult to see how anything less than close alignment between the UK and the EU following Brexit will deliver on the GFA's requirements of 'equivalence' and non-diminution of rights protection on the island of Ireland. Under the fundamental British constitutional principle of parliamentary sovereignty, however, such a requirement cannot legally constrain Parliament's capacity to legislate as it sees fit. Brexit is stress-testing the UK constitution in a number of ways; in particular, [the heavy emphasis that the UK Constitution places on conventions and controls](#) that are political rather than legal. While it remains to be seen what form the UK's withdrawal from the EU will take, the developments and rhetoric to date do not bode well for the standard of rights protection currently enjoyed by those living in the UK. Brexit also acts as a litmus test for the UK's commitments to its other international human rights obligations—namely under the ECHR. If the UK's withdrawal is executed in such a manner that it leaves the principles of 'non-diminution' and 'equivalence' in tatters, this would not bode well for the UK's membership of the Council of Europe, notwithstanding the express vindication the ECHR is given in the GFA.

2. Incorporating international human rights in a devolved context

Dr Kasey McCall-Smith, University of Edinburgh

Incorporating International Human Rights in a Devolved Context

International human rights treaties universally contain a call to States parties to give legal effect to the obligations found in the treaty text. Article 2(2) of the International Covenant on Civil and Political Rights, for example, obliges states ‘to adopt such laws or other measures as may be necessary to **give effect** to the rights recognized in the present Covenant’. However, as has been often noted, a treaty *entering into force* and a treaty being *in force in* the State are not the same. Up to now, the UK approach to implementing international human rights treaties epitomises this distinction; it has ratified 11 UN human rights treaties and associated optional protocols plus a number of the Council of Europe human rights treaties, but has never directly incorporated any of them into its national law, save the European Convention on Human Rights. Thus these unincorporated treaties generally are not enforceable in national law. This reflects the common approach to international human rights treaties exercised by many States.

The UN Convention on the Rights of the Child (UNCRC) is a prime example. As the most widely ratified international instrument, the content of the UNCRC has been voluntarily accepted by 196 States. The impressive number of States parties belies the reality of practical implementation across the constituent States parties as each State has its own particular view as to which rights children may exercise and who, in fact, is a child. The practical difficulties in implementation stem from a range of legal and political realities defined by the culture in which each government operates.

‘Implement’ is a flexible term

Most States that have made some effort to incorporate human rights treaties have been selective in implementing – giving effect to – obligations, opting for an *à la carte* selection of rights protections rather than the full menu of rights. And while international law demands that States parties comply with their human rights treaty obligations ‘in good faith’, the law does not dictate the method through which treaty obligations are recognised at the national level. There are variable, flexible approaches to translating human rights obligations into national law. In terms of implementation in the UK, the distinct devolution settlements pose further layers of legalities to navigate when it comes to incorporating human rights treaties.

What is meant by 'incorporation'?

In terms of human rights treaties, **incorporation** is often viewed as a narrow conception of implementation, focusing predominantly on enforceability in national law and precisely linked to a legal recognition of the treaty obligations through law reform and judicial decisions. However, incorporation must also be understood in a broader sense in order to appreciate that incorporation can only be effective if a multitude of approaches are taken to fulfil the promise of incorporation and the ultimate realisation of human rights.

There are **three** general approaches to human rights treaty incorporation: direct incorporation, indirect incorporation and sectoral or piecemeal incorporation. **Direct incorporation** holds that through transformation or transposition, the treaty will form part of the national law, be binding on public agencies and enforceable in court. This method of incorporation may be on a treaty-by-treaty basis or applicable to all treaties or certain types of treaties. The UK Human Rights Act 1998 is often cited as a good example of the treaty-by-treaty approach to direct incorporation where the Act outlines that it is intended 'to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights'.

Indirect incorporation, alternatively, gives the treaty some effect in national law by means of another legal mechanism. This is generally achieved through a constitutional reference to ratified human rights treaties, however, effectiveness will be tempered based on whether the provisions have 'direct effect'. For example, France is a monist State and ratified human rights treaties take precedence over domestic law once published. However, treaties such as the UNCRC are viewed as non-self-executing and not directly justiciable without further action by the French parliament. Thus, indirect incorporation without further comprehensive implementing legislation undermines the fact that the treaty is 'part' of the national law as there is no real enforcement potential.

The third approach is a **piecemeal or sectoral approach**, which sees various provisions of the treaty being integrated into national laws that are related to the subject matter of the specific treaty provisions but at some level less than incorporation of the full treaty. For example, Australia's Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010 specifically amended the Australian Criminal Code in order to directly incorporate certain provisions of the UN Convention against Torture and makes specific reference to the International Covenant on Civil and Political Rights. Some observers would argue that this is not 'incorporation' at all, but cherry-picking of obligations and, as is often the case, done without direct reference to the treaty.

Incorporation in the devolved nations

In the wake of the Brexit referendum in the UK, devolved nations have been scrambling to ascertain how best to protect human rights in a post-Brexit Britain. Each nation's approach to human rights protection is driven by its specific constitutional arrangement and internal politics. Navigating the devolved competences necessary to realise human rights is becoming increasingly complex as a result of poor UK government leadership and its failure to clarify positions of economic and social rights as well as civil and political rights in a post-Brexit world.

For this reason, incorporation of human rights treaties is a topic of increasing interest. For example, across the devolved nations different approaches have been exercised or mooted in regard to incorporation of the UNCRC. Globally, piecemeal or sectoral incorporation appears to be the predominant approach to implementing the UNCRC and has thus far been the approach taken in Scotland. The current Children (Equal Protection from Assault) (Scotland) Bill before the Scottish Parliament exemplifies the piecemeal approach and is designed to give effect to UNCRC Article 37 by prohibiting corporal punishment of children, which is considered to amount to cruel, inhuman or degrading treatment. The Scottish Government has repeatedly committed to incorporating the 'principles' of the UNCRC in Scotland while explicitly avoiding a commitment to direct incorporation.⁴⁴ In Wales, indirect incorporation has been the path chosen to give effect to the UNCRC through an obligation of due regard on Welsh ministers following the adoption of the Rights of Children and Young Persons (Wales) Measure 2011. Wales has further entrenched children's rights protections through a variety of piecemeal measures. Northern Ireland has also typically followed the piecemeal approach to safeguarding children's rights but has not gone as far as either Scotland or Wales in terms of government commitment to incorporating of the UNCRC. Its Children's Services Co-operation Act (Northern Ireland) 2015 provides that 'regard is to be had to any relevant provision of the [UNCRC]' when determining the well-being of children under the Act. In these devolved contexts, it will take a longer period of study before a firm assessment of these approaches can be made.

In these challenging times it is incumbent upon devolved governments to fill the gap left by the UK government and ensure human rights protections for their inhabitants, children or otherwise, through incorporation and other measures of human rights implementation. The range of measures must also acknowledge the 'living' dimension of human rights treaties and therefore be agile

⁴⁴ <https://beta.gov.scot/binaries/content/documents/govscot/publications/publication/2018/09/delivering-today-investing-tomorrow-governments-programme-scotland-2018-19/documents/00539972-pdf/00539972-pdf/govscot:document/>.

enough to accommodate the evolution of rights. Implementation is therefore a holistic term encompassing incorporation and other actions with far-reaching implications trickling into every aspect of a State's social and governance structures. With those structures in flux in the UK, the devolved nations must re-evaluate their individual approaches to human rights protection and survey not only what will be lost in post-Brexit UK, but also all that there is to gain by securing a human rights forward future.

3. Criminal law cooperation, Brexit and devolution: the way ahead

Dr Anni Poes, University of Glasgow

Some introductory remarks

What kind of rights are important to us? What kind of society do we want to be in the 21st century? Can Brexit, and if so how can Brexit provide a chance to become that society that we want to be? Where do we want to go from here? That should be our key concern in the entire Brexit debate. When we go back to what human rights are about, it is about realising human dignity in all its different shades. The human rights regimes crucially evolved after the Second World War and the unprecedented atrocities that had shaken the whole world. We are now in a different century, in a different setting but must not forget these key ideas that lie at the heart of the human rights regimes, indeed, the very sophisticated human rights regimes that we have today. Against this background, let us turn to the area of criminal law, to police and justice cooperation in criminal matters. This area might provide some unexpected scope for the conversation about rights and values that should be had.

In what follows, this contribution will outline in a first part, where we are at the moment, what the key features of cooperation in criminal matters are and where devolved areas are concerned. It will also outline those elements of future cooperation as provided for in the draft withdrawal agreement and also address the case of a no-deal Brexit. This stock-taking exercise will be followed by outlining, if and how there might be scope for human rights protection and reflect on a future picture of criminal law cooperation across borders. This is an area, where we have a system with different layers of governance that need to work together. Justice and policing are devolved matters, at least in Northern Ireland and Scotland, which have their distinct systems. Extradition, transnational legal assistance, and data protection are reserved competencies. Yet, in the 21st century data is crucial for effective policing, because the shape of crime and of security threats has changed dramatically through the increased importance of cyber activities.

Taking stock – where are we at the moment?

The withdrawal agreement would contain a continuation of the *status quo* with regard to criminal legal matters.⁴⁵ It would secure a continued application of all relevant EU-Directives in the area

⁴⁵ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, as endorsed by leaders at a special meeting of the European Council on 25 November 2018 (hereafter Withdrawal Agreement), Title V.

that the UK has opted in to. This means that the UK would be able to continue using the European arrest Warrant, have access to joint policing teams and use all relevant data sets. The contribution here will not delve into the technical details of these arrangements to date in favour of focusing on the bigger picture that we should be concerned with. If the withdrawal agreement is supported in parliament, this would mean that judicial and police cooperation in criminal matters will continue throughout the transition period. This would provide us – ‘us’ as those concerned with human rights protection and rights based approaches – with time to have the conversation about where we want to go, how to argue for effective rights protection, and identify pathways towards effective rights protection. The No-Deal scenario, for any matters related to police and justice cooperation, would be a disaster, a real security threat. While caution has to be taken to summarize any criminal matters under the label of security, the danger would be the significant gaps that a no deal scenario would create. The entire judicial cooperation would be thrown back to tools from the 1950’s.⁴⁶ In simple terms it would leave the police chasing Porsche drivers with a horse cart.

Where do we want to go from here?

The EU/UK Political Declaration entails a commitment to a very strong security partnership and includes criminal law cooperation. It outlines three different areas, (1) data exchange, (2) operational cooperation of law enforcement agencies and judicial cooperation, and lastly (3) the entire area of combatting money laundering and counter-terrorism financing. In this contribution, I will zoom in on the second area, law enforcement and judicial cooperation as these are at the heart of devolved competencies. Paragraph 83 of the Political Declaration is probably the strongest of all references to the Human Rights framework within the Brexit-related documents. It provides that such cooperation is ‘underpinned by the adherence and giving effect to the European Convention on Human Rights’ (ECHR), commits to the protection of personal data as a prerequisite for cooperation- a point where the ECHR cannot offer any protection as this was not an area relevant at the time of creating the ECHR but where Article 7 of the EU Charter of Fundamental Rights offers individual protection. The EU and the UK would further commit to *ne*

⁴⁶ E.g. the 1957 European Convention on Extradition; 1959 Convention on Mutual assistance in Criminal Matters; a series of bilateral agreements on mutual legal assistance such as the 1988 Agreement between the Government of Great Britain and Northern Ireland and the Government of Ireland concerning Mutual Legal Assistance in Relation to Criminal Matters. For a full list of treaties the UK is party to see https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/516418/Treaty_List.pdf.

bis in idem and procedural rights and reflect the EU's commitment to the Charter of Fundamental Rights.⁴⁷

With this in mind, it is pivotal to reflect on the contentious human rights issues that we can identify and where we might also find that the current EU system of cross-border cooperation requires a strengthened rights framework. The European Arrest Warrant, for example, was very much driven by a strong law enforcement narrative, swiftly introduced as part of the wave of legislation following 9/11. It took nearly a decade from there for other legal standards to catch up and for the EU framework to reflect that mutual recognition requires that all participating countries need to implement the same procedural minimum standards. Strong legislative action at the European level only started from 2010 onwards providing for a base line of fair trial rights.⁴⁸

Procedural rights in criminal matters mean individual rights protection. They do not just mean protection for those 'unwanted criminals' but anyone, because anyone can find him- or herself subjected to an investigation even if entirely innocent. To provide an example of how this remains to be of key importance to all of us: We will all have been customers of some company that has in the past been subject to data theft, British Airways, Marriott Hotels, or children playing Fortnite, all of those incidents of data theft saw thousands and thousands of people being effected by data theft. The amount of data stolen and available on the web means that basically entire identities have been stolen, names, email and addresses, passport details, credit card details, as well as other personal data such as your date of birth. Crime in the 21st century has moved into cyber space, if your identity has been stolen you might very quickly find yourself at the heart of an investigation, standing accused of some cybercrime, because your email might have been used for fraudulent activity without you ever realising. Such cyber dimension requires swift action and cooperation of law enforcement agencies across borders.⁴⁹ However, the need for effective law enforcement often leads to the danger of overlooking the importance of individual protection against data surveillance.

Reference to the ECHR in any future treaty on police and justice cooperation alone will not safeguard procedural standards that ensure effective rights protection in cross-border cooperation.

⁴⁷ Political Declaration setting out the framework for the future relationship between the European Union and the United Kingdom (hereafter Political Declaration), para 83.

⁴⁸ E.g. Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

⁴⁹ United Nations Office on Drugs and Crime, Comprehensive Study on Cybercrime, 2013, ix: 'Reliance on traditional means of formal international cooperation in cybercrime matters is not currently able to offer the timely response needed for obtaining volatile electronic evidence. As an increasing number of crimes involve geo-distributed electronic evidence, this will become an issue not only for cybercrime, but all crimes in general.'

Not only does the ECHR not contain any data protection provisions, the European Court of Human Rights has held in the past that extradition does not fall within the scope of protection under article 6 of the ECHR.⁵⁰ This serves as an example how the existing framework only provides limited rights protection. It is therefore important to lead a debate now on how individual rights protection can effectively be implemented, when a new future legal framework is under negotiation.

Key elements to ensure a rights-based approach to future cooperation in criminal matters

Such negotiation will require meaningful cooperation between the UK Government and the devolved Governments in Northern Ireland and Scotland, because of the complex multi-level governance with regard to the different elements of cross-border police and justice cooperation. Only such cooperation will ensure an effective arrangement. At the heart of any effective law enforcement must also be the rule of law. The rule of law requires not just effectivity but also rights protection and the recourse to remedies. Where there is legal force, there must be judicial control to ensure accountability for any breaches of rights.

A last key suggestion proposed here is that the UK should aim for a future agreement that is not framed as a security treaty but as a treaty on law enforcement and judicial cooperation. Such a treaty should embed a regime of procedural rights for the accused; it should furthermore include rights and protection provisions that are not strictly speaking criminal matters alone – and yet are closely related, such as protection orders for victims of abuse.⁵¹ Similarly, victims' rights should find a way into a future treaty to ensure that the law effectively protects all those affected.⁵² These are key issues that require a bigger debate on where do we want to go as a society and which values do we cherish.

⁵⁰ *Peñaflor Salgado v. Spain*, 65964/01, 16 April 2002.

⁵¹ EU Directive 2011/99/EU on the European Protection Order.

⁵² A legal framework on victims' rights has only recently started to emerge. At the EU level, this includes the Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.

4. Discussion

International agreements and (parliamentary) sovereignty

A number of questions for this panel pertained to the sovereignty issue. For example, signing up to new commitments with other states will always capture the sovereignty argument in that the UK might not want to be subject to a third country or organisation's rules. A second question concerned sustained hostility towards the direct effect and influence of EU legislation within the UK, and whether or not this same hostility may occur toward other international covenants in the future.

On the initial point, Dr Anni Poes said that we may potentially have to rethink what sovereignty entails in a globalised world, where so many different elements move across borders. She noted that even the most 'hardcore Brexiteer' wants free trade, and despite the fact the rules might be different, there is still movement occurring. This includes movement of crime across borders, and to tackle that states must understand that sovereignty is not just thinking within one's own box, but acting as one part among many. She concluded that we should think of sovereignty as safeguarding the rules we consider to be important and to not have these subjected to too much political discretion. Judicial oversight is important in safeguarding the rule of law, and if we do not like the CJEU, then we should be creative and look to other human rights bodies, or think up a new judicial panel to ensure we have proper judicial oversight over criminal law cooperation.

Dr Kasey McCall-Smith believes that there is a lot of confusion as to what sovereignty means from a domestic perspective, and with the UK's engagement in the international arena. She stresses that each time the Government or Parliament acts to engage in the international level, this is also a sovereign decision and a sovereign act. The situation the UK has created is also a sovereign exercise of power in the international system. On the second point, Dr McCall-Smith noted once more that it is a sovereign decision to join international covenants, and part of the fallout from committing to such a system is incorporating and giving effect to the treaties and covenants that the state joins. Once again, it is a sovereignty issue. Incorporating human rights treaties will take a great deal of hard work, but for Dr McCall-Smith, this is about the political will, and about where and what we want to be as a society.

Dr Alan Greene also framed the issue from a parliamentary sovereignty perspective. He believes that there is a lot of confusion in the UK about parliamentary sovereignty. Essentially, it is a very

internally-oriented principle relating to the internal constitutional organs of the UK (Parliament, the courts, the monarchy), and lacks the bigger meaning that some MPs seem to ascribe to it.

Dr Greene states that there is the mistaken belief that the UK can sign international law agreements, and do nothing. With UK domestic law, this is possible. However, in international law, it is not. He uses the Good Friday Agreement ('GFA') to illustrate this: while the GFA is very much a constitutional document between Northern Ireland and Ireland, it is also an international agreement that the UK has signed up to, so there is a limit as to what the UK can do regarding the GFA. He also noted that there could be tensions arising between parliaments of potentially equivalent legitimacy in relation to the devolved institutions. The Westminster Parliament has potentially opened up a schism in the democratic legitimacy between the parliaments, parliamentary sovereignty, and the People, broadly construed.

Northern Ireland: self-determination, history, and the role of the ECHR

Several of the questions during this session were focused on Northern Ireland. Two questions concerned the possibility of Northern Ireland exercising self-determination in the context of the present Brexit scenarios.

Dr Greene provided a unique perspective on the de-politicisation of the Irish border following the GFA. If the hard border comes back, he commented, everything becomes politicised again. If separating Northern Ireland from the rest of the UK, results in a change of constitutional status without the consent of the people, then why is not leaving the EU also a violation of that principle of consent? There is a clash between the UK 'taking back control,' or jettisoning Northern Ireland. In the event of a hard Brexit, support for a united Ireland will increase.

These were key considerations for Dr Greene as he felt the history of Ireland had been 'lost' in Brexit discussions. Priti Patel MP's comment that day that food deliveries should be blocked to parts of Ireland shows a blatant disregard for the crippling famine that devastated Ireland in the mid-1800s.⁵³ Similarly, Dr Greene said the lack of compromise between unionists and what was essentially a devolution settlement led to the partition of Ireland relatively quickly. These are historical events worth paying attention to in the Brexit conversation but these have been left off the table. His final point here was that it is important to remember in the Ireland-UK Brexit

⁵³ BBC News, *Patel comments on no-deal Brexit in Ireland criticised*, 7 Dec 2018, available at: <https://www.bbc.co.uk/news/world-europe-46488479>

discussions that it is not simply the UK negotiating with Ireland, but the UK negotiating with the Union as a whole.

Lastly, Dr Greene was asked about the ECHR and whether he believed there were similarities between the EU supporting Ireland, and ECHR support in preserving the integrity of the Convention. Dr Greene said he was not as hopeful with the Council of Europe situation. Despite being in the GFA, the Council of Europe's position is not as robust as the EU and is going through a 'legitimacy crisis' at present. If the UK wanted to leave the Council of Europe in breach of the GFA, he did not believe that the Council were a robust enough organisation to be able to withstand it.

D) SPECIFICS FROM THE DEVOLVED PARTS OF THE UK

1. Brexit and Wales

Dr Huw Pritchard, Cardiff University

Compared to the litigation on the Scottish Bill and the significant issues regarding Northern Ireland, we are almost seeing Wales fitting into the new realities of Brexit and some semblance of putting the new constitutional structures of Brexit to work. This is not to say that the Welsh Government or National Assembly are supportive of Brexit, far from it. The National Assembly voted on Tuesday, 4 December, on a strong motion to reject the Withdrawal Agreement and Political Declaration. It is more that they have exhausted the legal responses available to it and the voice of devolved administrations are currently diminished as the Withdrawal Agreements is debated in the Commons.

There also remain fundamental questions regarding the territorial constitution for the whole UK. Although that is somewhat less prominent than matters in Scotland and Northern Ireland, they are still significant when considering the space for devolution in the UK constitution without the foundation of the EU and the conflicting views from central and devolved governments over what devolution is and what that space should be.

The process of devolution in Wales has resulted in a layered constitution built on the shifting foundation of the Government of Wales Act 2006. The patching of different models and powers through legislation, and intergovernmental agreements.

A new reserved model of devolution was introduced by the Wales Act 2017. It came into force in April this year as the latest amendment to the 2006 Act. This introduced some level of symmetry across devolved dispensations. However, the design of the 2017 Act paid little attention to the looming consequences of Brexit which meant that constitutional process would continue but with much more uncertainty.

On top of that, we can add potential regulations through the EU (Withdrawal) Act 2018 and the accompanying Intergovernmental Agreement between the UK and Welsh Governments. This makes a complicated constitutional structure that we are starting to see in action.

Political Context

The Welsh Government began Brexit discussions in a difficult position between being in favour of remaining in the EU and an electorate that voted to leave. The joint White Paper between the

Welsh Government and Plaid Cymru, *Securing Wales' Future*,⁵⁴ was pitched as 'protecting Wales' vital interests and future prosperity' and making Wales' voice heard.

They highlighted six priority areas:

- i. Continued participation in the Single Market
- ii. A balanced approach to immigration linking migration to jobs and good properly-enforced employment practice which protects all workers
- iii. Need for the UK Government maintain promise that Wales would not lose funding
- iv. Maintaining the social and environmental protections and values, and workers' rights
- v. Consideration of transitional arrangements to ensure the UK does not fall off a cliff edge in its economic and wider relationship with the EU at the point of exit.
- vi. A fundamentally different constitutional relationship between the devolved governments and the UK Government – based on mutual respect, reaching agreement through consent

In the debate in the Assembly on Tuesday, Mark Drakeford emphasized that the Withdrawal Agreement and Political Declaration so far falls short of most of these priorities or does not show a clear commitment – except for provisions for a transitional period.

However, it's the final one, UK constitutional relationships, that I want to focus on mostly here. Constitutional reform has consistently been championed by Carwyn Jones, now former First Minister. This is partly because of the traditional weaknesses of the devolution dispensation which has required continued reform, but also because Welsh Labour wants devolution to work within the UK as a union.

With that in mind, the Welsh Government published a white paper with specific focus on governance.⁵⁵ In their view, this means new arrangements for consultation, joint decision making and joint delivery; redesigning inter-governmental relations to support shared governance through an UK Council of Ministers; and a Convention on the Future of the UK. Thus, we see the Welsh Government not only putting forward the protection and maintaining provision for Wales, but also offering a vision for future governance for maintaining the UK as a whole.

⁵⁴ Welsh Government, *Securing Wales' Future: Transition from the European Union to a new relationship with Europe* (WG30683, 2017).

⁵⁵ Welsh Government, *Brexit and Devolution* (WG31924, 2017).

EU (Withdrawal) Act 2018 and the Intergovernmental Agreement in Action

The Welsh Government argued that the Withdrawal Bill as initially drafted did not respect devolution, nor reflect the devolution settlement within its provisions. According to the Welsh Government's refusal to recommend consent it was due to:

- i. Unacceptable wide powers for UK Ministers to amend the devolution settlement and devolved law through regulations in clauses 7-9 without the need for consent or approval from devolved institutions
- ii. Clause 10 restricted Welsh Ministers' powers to correct domestic EU law (and no powers to amend direct EU law)
- iii. Clause 11 restricted devolved legislative competence by retaining powers centrally, with an ambiguous promise about devolving further powers at an undefined time in the future. This meant a potential significant change to the new competence of the National Assembly more or less as the new competence under the Wales Act 2017 came into force.
- iv. The lack of parity across the UK given that Ministers of the Crown would have unlimited and sovereign powers to change the law in England while devolved administrations were constrained.

However, reaching an agreement with the UK Government was always the priority and intention of the Welsh Government and they always maintained that the Withdrawal Bill was the correct mechanism to legislate on Brexit.

This was achieved by commitments to amend the EU (Withdrawal) Act and an Intergovernmental Agreement. This goes some way to alleviate the Welsh Government's key concerns to some of the Welsh Government's vision of shared governance and respect – to some extent! Mainly by introverting the original Bill by allowing all powers to be within the competence of the Assembly but with a mechanism to transfer those powers to the UK Government to prepare common frameworks in some areas.

- i. Temporary restriction on legislative powers of the Assembly in devolved areas where common frameworks are required in 24 areas.
Section 12 of the EU (Withdrawal) Act allows the UK Government, through regulations, to prepare common frameworks in those areas. This is done through a sunset clause where regulations restricting competence can only be made for up to 2

years from exit day and will only exist for a maximum of 5 years. This sunset clause gives much more protection than the original Bill.

As part of the statutory process, there needs to be a ‘consent decision’ from the National Assembly on laying the draft regulations. However, a ‘consent decision’ can mean that the National Assembly agrees to the laying of the draft, or does not agree or refuses to consent to the laying of the draft.

This is a significant different approach to the principle of consent than one would expect.

- ii. The agreement also committed to allow Welsh Government to amend directly applicable EU law
- iii. In exercising its own powers, the UK Government committed to consulting the Welsh Government when exercising concurrent powers and to ‘not normally’ exercise its powers to amend retained EU law in devolved areas without the agreement of devolved governments. Thus, implementing a Sewel type convention on some secondary legislation.
- iv. In the agreement the UK Government agree not to bring amendments to legislation in England as far as constraints remain on devolved institutions.
- v. Frameworks in areas outside the 24 identified for statutory frameworks are listed for non-statutory frameworks or for no requirement for a joint framework.

The agreement initiated a considerable negative public response in Wales. It was seen as the Welsh Government voluntarily handing powers to Westminster. The negative response could also be partly due to Wales agreeing while Scotland maintained their ground.

However, let’s not dismiss the inter-governmental agreement in its entirety. On the face of it, there are significant changes in the approach to devolved competence from the initial clause 11, and it is a compromise that the Welsh Government saw as acceptable.

Repeal of the Law Derived from the EU (Wales) Act 2018

In the period of negotiations between the Welsh Government and the UK Government regarding the Withdrawal Bill, the National Assembly passed a Welsh Continuity Bill – the Law Derived from the EU (Wales) Act 2018.

The Welsh Continuity Bill is narrower than its Scottish counterpart. The Welsh Bill is designed to mirror the EU (Withdrawal) Act so that they operate alongside each other. It seeks to carve out

devolved areas from the UK's definition of 'retained EU Law' so that they are retained or restated at a devolved level. It provides an alternative source for Welsh law derived from the EU in devolved subject areas so that it gives more flexibility for Welsh Ministers to amend legislation following withdrawal or to maintain alignment with EU standards outside the restriction in Schedule 2 of the Withdrawal Act.

An expectation as part of the Intergovernmental Agreement was that this Act would be repealed. Mindful of this, the Act itself contained procedures for the Government to bring forward regulations to repeal the Act. However, with the Scottish Continuity Bill referenced to the Supreme Court and much of the agreement based on intergovernmental relations, there was a line of thought of the opinion that retaining the Welsh Continuity Act on the statute book could serve as a safety net to remedy any failures in the intergovernmental process, depending on the judgment of the Supreme Court in the Scottish case

It is slightly curious why the Welsh Government did not wait for the Supreme Court judgment before repealing the Continuity Act. In his statement to the Assembly, Mark Drakeford justified the decision by noting:

- i. The full leverage of the LDEU Act had been used to get the agreement that put Wales in a good constitutional position
- ii. There were changes to the statute book that needed to be made now in time for 29 March
- iii. The LDEU does not assist in the content of the Withdrawal Agreement or Political Declaration which is the main point of contention now

Significantly for this forum perhaps is that this means that Welsh Government has forfeited the potential to retain the EU Charter if the Supreme Court finds that to be within competence for Scotland next week.

This means that the Welsh Government is now fully committed to the framework of the EU (Withdrawal) Act and the Intergovernmental Agreement.

Early Operation of the Agreement

The UK Government is required to prepare quarterly updates on the progress of common frameworks.⁵⁶ The first from November 2018 shows a positive start of intergovernmental co-operation with development of Framework Project Boards and further use of the JMC (EN).

⁵⁶ Cabinet Office, The European Union (Withdrawal) Act and Common Frameworks 26 June 2018 to 25 September 2018 (November 2018).

Significantly, it seems that some of the areas that were envisaged that would require a statutory framework under section 12 may now be able to be implemented through non-legislative intergovernmental coordination. The ‘freezing’ provision under section 12 has not yet been used. For example, the Agriculture Bill transfers powers to the Welsh Government to prepare a replacement scheme to CAP for agricultural support (Schedule 3) with room for the Assembly to prepare its own Agricultural Bill later. To manage the common elements of such schemes across borders and across the UK, the Governments now aim to put in place an administrative framework, rather than a legislative framework for managing agricultural support payments.

As part of this process, we are proposing to develop an administrative framework for co-ordinating agricultural support spending and changes to marketing standards. The aim of this is to ensure effective co-ordination and dialogue between the administrations on how any changes to legislation in one part of the UK may affect other parts.⁵⁷

Doing so through agreement is consistent with the intergovernmental agreement and reduces the need to formally ‘freeze’ the legislative powers of the Assembly. However, the legitimacy of this could depend on how much co-ordination the Welsh Government commits to through intergovernmental means. The Assembly would lose their consent function under section 12 if the Governments agree inter-governmentally rather than through regulations. Thus, giving power to the executives to cooperate between themselves and little room for the National Assembly to scrutinize the effectiveness of the Welsh Government.

Conclusion

After a much-awaited move to a reserved powers model in Wales, that came into force in April 2018, Brexit is likely to mean that this model will not provide the long-term and simpler dispensation that was intended. The requirements to deal with Brexit have already made major changes to the dispensation in Wales through statutory and non-statutory means.

The final form of section 12 of the EU (Withdrawal) Act provides a statutory mechanism that better recognises the landscape of devolution within the UK constitution. However, the potential scope for intergovernmental arrangements in dealing with common frameworks and regulations could lead to shifting the balance substantially in the favour of the executive and outside the scrutiny of the National Assembly. As a result, despite a new devolution dispensation, the challenge of the complexity of the constitution in Wales is likely to remain.

⁵⁷ <https://www.gov.uk/government/publications/agricultural-framework-progress-update-joint-statement/agricultural-framework-progress-update-september-2018>

2. Brexit and Scotland

Dr Tobias Lock, Edinburgh University

With little less than four months to go before the UK leaves the EU on 29 March 2019, the position of Scotland vis-à-vis the EU is not much clearer than it was in the immediate aftermath of the EU referendum more than two years ago. The Scottish Government has put the question of a second independence referendum on the back-burner and discussions around a differentiated Brexit deal for Scotland have died down. Recent months saw the passage of the EU (Withdrawal) Act without the consent of the Scottish Parliament and a challenge to the Scottish Parliament's EU Continuity Bill before the UK Supreme Court.

Time to take stock therefore: in legal terms, what has Brexit meant for Scotland so far and what developments can we expect? In how far does the draft Withdrawal Agreement published in November with its UK-wide customs backstop, but greater regulatory alignment for Northern Ireland, affect Scotland and influence discussions around a 'special status'?

Scotland and the EU

Shortly after the EU referendum, Scotland's First Minister Nicola Sturgeon announced that she intended 'to take all possible steps and explore all options [...] to secure our continuing place in the EU and in the single market in particular', which resulted in a white paper by the Scottish Government outlining various options for a differentiated Brexit for Scotland. It is no secret that these early attempts at changing the Brexit dynamics by coaxing the UK Government either into a soft Brexit with continued participation in the single market or, at least, into negotiating single market membership for Scotland, were not successful.

Differentiated Brexit?

The key legal difficulties with a differentiated Brexit for Scotland – though not unresolvable – were identified early on: if Scotland remained in the single market, this could lead to regulatory divergences between the rest of the UK and Scotland, potentially hindering trade between them. Furthermore, it would require a differentiated immigration policy for Scotland; and devolution of almost all domestic law-making powers.

Piggy-backing on the Irish backstop?

The draft Withdrawal Agreement between the EU and the UK might itself provide a ready-made solution. It contains the (in)famous backstop in the Protocol on Ireland/Northern Ireland. In a nutshell, the backstop provides that the EU's and the UK's customs territories form one single customs territory. In addition, the backstop contains a number of level playing field provisions that oblige the UK to make operational the EU's state aid rules and certain rules on taxation. Moreover, the UK promised not to regress on environmental and labour and social standards. If the backstop becomes operational – which neither side purport to want – or if the future relationship takes the backstop as its starting point – which the Political Declaration wants to build and improve upon – then Scotland like the rest of the UK would remain in a single customs territory with the EU. This means that there would not only be no customs duties applicable for goods traded between the EU and the Scotland, but also no other customs-related checks, such as on rules of origin. However, there would still be a need for regulatory checks as there would be no automatic regulatory alignment for product standards.

The regulatory alignment goes further, however, as far as Northern Ireland is concerned. For Northern Ireland, the Protocol envisages full regulatory alignment with the EU on goods. Article 7 of the Protocol makes it clear that the UK is not prevented from ensuring unfettered market access for goods from Northern Ireland moving to Great Britain. Hence there would be no trade barriers for goods originating in Northern Ireland. The same cannot, however, be said for goods moving from Great Britain to Northern Ireland. Here Article 7 (2) of the Protocol merely states that the EU and UK shall 'use their best endeavours' that there should be no controls on goods at ports and airports of Northern Ireland.

Might the Irish backstop therefore provide a ready-made solution for Scotland?

Assuming the UK Government and EU agreed, would an extension of the Irish backstop be desirable for Scotland? And would it be acceptable for the EU? As for the latter, it might encounter allegations of cherry-picking, but then the EU has considerably softened its position by agreeing a UK-wide backstop on customs already.

Nonetheless, it is important to reiterate that the backstop is tailor-made for the unique situation of Northern Ireland: it is the only part of the UK sharing a land border with an EU Member State; and its violent history makes the avoidance of a visible border infrastructure a key concern in light of fears that any such infrastructure might become the target of attacks. This is reflected in the language of the Protocol on Ireland/Northern Ireland, which contains numerous

references to the Good Friday/Belfast Agreement and the peace process. Crucially, the Protocol does not reference the fact that Northern Irish voters – like voters in Scotland – voted for ‘remain’ in the referendum.

The first thing to reiterate of course is that it is the main purpose of the backstop to keep the border between Ireland and Northern Ireland invisible. This means that it is (largely) restricted to trade in goods.

Hence its attractiveness for Scotland might prove to be rather limited. Scotland has a strong service industry and should be keen to be part of the single market for services and – due to its demographic situation – it has also expressed a desire to continue to be part of the free movement of people. Piggybacking on the Northern Irish would therefore at best half-satisfy the original demands of the Scottish Government.

Furthermore, it could result in barriers to goods trade between Scotland and England. While under the backstop Scotland and England would be in the same customs territory, they would possibly end up in different regulatory spheres. This might make checks on goods crossing the English-Scottish border a necessity, which might prove unattractive to unionist voters in Scotland.

Indyref 2?

The First Minister had promised an update on whether she wants to call another independence referendum in October, which has now been delayed until the new year. Should she opt for it, there would be two key challenges as regards Scottish EU membership. First, the time-frame would be tight. Independence before 29 March 2019 would be practically impossible and could at best be achieved before the end of an extended transition period by 31 December 2022, but whether Scotland could then – fairly seamlessly accede to the EU – is questionable. Single market membership via EEA/EFTA might be the more achievable solution in the shorter term. Second, a key question in any independence referendum is likely to be the English-Scottish border: will there be customs (and other) checks or not if Scotland is in the EU or EFTA/EEA? Much will depend on how the future EU-UK relationship develops, in particular whether the UK-wide backstop will become operational or superseded by a similar customs arrangement. But as long as there is no certainty over these fundamentals, voters might consider a second independence referendum to be premature.

Scotland and the UK

By contrast to the Scottish-EU relationship, quite a few developments have occurred in the Scottish-UK relationship, which may have long-term implications for the devolution settlement. Brexit was always going to affect the powers of the Scottish Parliament, which is currently prevented from legislating in a manner that is contrary to EU law. Furthermore, there are a number of substantive policy areas that are technically devolved, but largely determined by EU law: these include agriculture, the environment, fisheries and certain aspects of civil and criminal law (in particular on cross-border issues). In theory, Brexit should mean that these ‘come back’ to the Scottish Parliament.

European Union (Withdrawal) Act

During the passage of the European Union (Withdrawal) Bill, there were fears of a ‘power grab’ by Westminster as far as these devolved, but EU-determined powers were concerned. The original Bill envisaged that the Scottish Parliament should continue to be prevented from legislating on these matters putting Westminster in control of releasing those powers back to Scotland at its discretion. This resulted in the Scottish Parliament and the Welsh Assembly refusing to grant legislative consent to the Bill (on which later). The UK Government then presented an amended provision, which we now find in section 12 of the EU (Withdrawal) Act. According to this amendment, there is no longer a blanket restriction on the Scottish Parliament when it comes to legislating on retained EU law that falls into devolved competence. Instead the UK Government has the power to designate which elements of retained EU law shall be outside the competence of the Scottish Parliament and thereby amendable by the UK Government. While in practice the UK Government could choose to do this with regard to all retained EU law that is devolved, there are procedural hurdles that may make this difficult. First, the UK Government must seek a consent decision from the Scottish Parliament (though importantly, it can ignore it if the Scottish Parliament does not consent); second, the power to reserve retained EU law can only be used for two years from exit day; and third, any such restriction ceases to have effect five years after its entry into force. This means that, at the latest, seven years after Brexit the Scottish Parliament will have full powers to legislate on all devolved matters currently dealt with by EU law.

European Union (Withdrawal Agreement) Bill

Further changes of this kind may become necessary through the EU (Withdrawal Agreement) Bill, which will need to enable the transition period to happen. During the transition period EU law must be given the same effects as now – that is primacy and potentially direct effect. At the UK level, the Government’s white paper ‘Legislating for the Withdrawal Agreement’ says that while the ECA 1972 will be repealed (as planned) the effects of s. 2 ECA 1972 will be saved. The question then is whether the relatively robust way in which the doctrine of primacy is enshrined at the devolved level in s 29 of the Scotland Act will be maintained for the transition period. If so, this would trigger a Sewel motion.

In a similar vein, it will remain necessary to enable Scottish Ministers to continue to implement EU Directives that concern devolved powers.

Sewel Convention

By contrast to the Welsh Assembly, the Scottish Parliament did not grant legislative consent to the EU (Withdrawal) Bill under the so-called Sewel Convention. That Convention – as laid down in section 28 (8) of the Scotland Act – says that it ‘is recognised that the Parliament of the United Kingdom will not normally legislate with regard to devolved matters without the consent of the Scottish Parliament.’

As confirmed by the UK Supreme Court in *Miller*, the Convention is not legally binding, so that the fact that Westminster ignored the Scottish Parliament’s refusal to give its consent has no legal consequences. The fact that Westminster legislated notwithstanding Holyrood’s refusal – without debating that refusal in any detail – was unprecedented and raises fundamental questions over the future of the Sewel Convention (a discussion can be found [here](#)).

Common Frameworks

Section 12 of the EU (Withdrawal) Bill means that at the very latest seven years after Brexit, the Scottish Parliament and the other devolved legislatures will gain full legislative powers over all devolved matters currently dealt with by EU law. This fact points to a further likely development: common frameworks. Both the devolved and central governments recognise that in certain devolved areas there will be a need for common approaches, e.g. on the question of agricultural subsidies, in order to preserve the functioning of the UK’s own internal market (itself a concept needing further development). The big question will be how these common

frameworks will be developed. Will they be underpinned by a need for consent or will they be Westminster-imposed?

Many of the questions surrounding devolution will soon be informed by the Supreme Court decision on the Scottish EU Continuity Bill. The Scottish Parliament adopted that Bill – in its approach very similar to the EU (Withdrawal) Act – in order to plug any gaps in Scots law in case the adoption of the EU (Withdrawal) Act would be delayed. The UK Government challenged the validity of the Bill before Supreme Court. This will give the Supreme Court an opportunity to clarify the limits of devolved competences. As the UK Government advocated a rather narrow understanding of these powers, the Supreme Court's judgment could have far-reaching consequences.

Conclusions

While this short blog post could not do justice to the intricate details of any of the developments outlined, it aimed to show that for Scotland Brexit is playing out on two levels. At the EU-level not much concrete has happened so far; and until the Withdrawal Agreement is adopted nothing will. If the Scottish Government remains serious about achieving a differentiated Brexit, however, it will then be necessary to renew its efforts to bring this across.

At the UK-level, the devolution settlement is in flux and it will remain to be seen whether Westminster will firmly establish itself in the driving seat or whether Scotland and the other devolved nations will gain true additional powers. Much will depend on the outcome of the Supreme Court's decision; but a lot will also depend on the precise governance of those common frameworks: will Westminster manage to impose these from above or will they be a truly collaborative effort amongst equals?

3. Discussion

The need for a legislative consent motion

A brief question was addressed to both Dr Huw Pritchard and Dr Tobias Lock on the need for a legislative consent motion regarding implementation of the Withdrawal Agreement. Dr Pritchard said it would likely be expected, particularly if s.29 of the Scotland Act 1998 was changed, as this would have changed the devolution settlement.

Providing robust answers to independence questions

One audience member considered the difficulties the Scottish Government has in considering a second independence referendum. They noted that if such a referendum takes place, and is lost a second time, then it would be 'over' for the Scottish Government. Carrying this point forward, Dr Lock agreed with the sentiment, but said the challenge now is to find credible answers for the difficult questions that the EU situation now raises. In the past, it was believed that if Scotland left the UK, it would remain in the EU with the UK, and there would be no free movement or border issues. However, the landscape has completely changed, and the challenge now is to find solid answers to these new questions.

The EU Charter and continuity legislation in Wales and Scotland

This question concerned the possibility of continuity legislation in Wales and Scotland that would have the effect of retaining the EU Charter. Failing the effect of continuity legislation, what future prospects might there be to integrate the Charter in some form? The audience member stated that they had asked Mark Drakeford AM about the possibility of this and he remarked that it might be something the Welsh Assembly is considering.

Dr Pritchard stressed that Mark Drakeford AM was in the middle of a leadership contest (he is now the First Minister of Wales), so it was perhaps in his best interests to keep the question afloat and open. Dr Pritchard also noted that the big issue in Wales in retaining the Charter in part or in full is that the Charter would apply in Wales, but not in England, and these are within the same legal jurisdiction. For this reason he believes it is unlikely that the Charter will not apply in Wales.

Regarding Scotland, Dr Lock felt that retaining the Charter in and of itself in a devolved context is only going to achieve so much in practice. It may strengthen environmental claims, but the bigger issues are likely not going to be very much affected as you have to be acting within the scope of EU law putatively. He did note however that the First Minister's Advisory Group on Human Rights Leadership, of which Dr Lock is a part, planned to recommend stronger incorporation of economic and social rights as a

reaction to the Charter falling away, but will not be recommending that the Charter is kept wholesale as this doesn't make a lot of sense in a post-Brexit context.

Popular awareness of the devolution settlements

As devolution questions have played a big role in Brexit considerations, one audience member asked to what extent those living in devolved nations have a sense of the constitutional changes taking place, and whether there is any discontent about this.

Answering on Wales, Dr Pritchard said that knowledge of the devolution settlement is quite weak. The public generally don't know what's devolved and what is not, who does what, where responsibility lies, who is accountable for it. He believed devolution issues weren't 'bringing people out on the streets.'

Dr Lock felt that the population at large doesn't understand the ins-and-outs of the devolution settlement, which is quite complex. However, in Scotland, the independence movement is much stronger. Those that are politically engaged are aware of devolution issues, but Brexit itself is complicated and this adds another layer of complexity. The Brexit minister, Mike Russell, is quite vocal and will draw attention to devolution and Brexit issues. Overall, Dr Lock felt the easier argument to make in Scotland was the fact that people are more upset that they voted to Remain and now they will be leaving the EU.

Adding to the above observations, an audience member pointed out that the present government in Scotland is a pro-independence government, whereas in Wales, the government is clearly pro-devolution, but also very pro-union. The politics of such arrangements will influence the population and the amount of general awareness that exists within the devolved jurisdictions of their respective settlements.

The executive-legislative balance in Scotland and Wales

This question followed from Dr Pritchard's observation on the executive-legislative balance in Scotland and Wales. Concerns have been raised about this balance at the UK-level in relation to the EU Withdrawal Act, but it appears that in the devolved jurisdictions, this balance may be even more skewed toward the executive. Were there any concerns about accountability in this scenario?

Responding first, Dr Lock noted that Westminster itself is an executive-driven system. In Scotland, the government is a minority government. This requires the SNP to listen to the Green Party in order to retain support, but there doesn't seem to be any unhappiness about this situation.

In Wales, Dr Pritchard said that the Welsh Government doesn't suffer much defeat and politics is quite consensual. He commented that Plaid Cymru can be a force, but they generally, if they get something in return, will support the Welsh government.

The 'keep the pace' clause in the Scottish Continuity Bill

The final question of the session concerned the 'keep the pace' clause in the Scottish Continuity Bill, which is Scotland's attempt to keep the Scottish legal system in sync with that of the EU's. The question sought clarification on what may happen if parts of the bill stood and others fell.

Dr Lock said there is no coordinating mechanism for the situation where the EU Withdrawal Act entered into force clashed with the Scottish Government's executive power to adapt or implement EU Directives that came out after Brexit (by way of Statutory Instrument) for up to two years. Such a power would be repealed by any EU Withdrawal Agreement Act that came into force and would freeze those powers for the Scottish Government during transition.

However, the lack of coordinating mechanisms for this could lead to a lot of legal uncertainty, so this is an interesting area to watch.