

Brexit, Devolution and Human Rights – Roundtable

Event Report

Date: 7 November 2017

Venue: The Bingham Centre for the Rule of Law

Organisers:

- This roundtable event was convened by Lucy Moxham (Bingham Centre for the Rule of Law) and Dr Tobias Lock (University of Edinburgh). We are grateful to Dentons UKMEA LLP, and the Europa Institute and the Global Justice Academy at the University of Edinburgh for sponsoring this event.

Speakers:

- Murray Hunt (Bingham Centre for the Rule of Law)
- Adam Brown (Dentons UKMEA LLP)
- Angela Patrick (Doughty Street Chambers)
- Dr Jo Murkens (LSE)
- Professor Alan Page (University of Dundee)
- Dr Jo Hunt (Cardiff University)
- Professor Christopher McCrudden (Queen's University Belfast)
- Dr Tobias Lock (University of Edinburgh)

Chairs:

- Part 1: The Baroness Kennedy of the Shaws QC
- Part 2: The Baroness O'Neill of Bengarve CH CBE FBA

Background:

This roundtable meeting followed on from two previous events:

- A workshop on 27 October 2016 at Edinburgh Law School on 'Brexit and the British Bill of Rights', co-organised by the Bingham Centre, the Europa Institute and the Global Justice Academy of the University of Edinburgh, and the Human Rights Centre at Queen's University Belfast. A research paper edited by Dr Tobias Lock and Dr Tom Gerald Daly, '[Brexit and a British Bill of Rights](#)', presents key themes from the workshop. The workshop was supported by the Thomas Paine Initiative.
- A roundtable on 27 April 2017 at the Bingham Centre for the Rule of Law on 'Brexit, Devolution and Human Rights', organised by the Bingham Centre, together with the Europa Institute and the Global Justice Academy at the University of Edinburgh. A report from that event is available [here](#).

This third event provided an opportunity for academics, practitioners and parliamentarians to discuss the legal and political challenges of Brexit in light of the publication of the [EU \(Withdrawal\) Bill](#) (the 'Withdrawal Bill') and the release of several government position papers on Brexit over the summer. The first part focused on the impact of EU withdrawal on the UK constitution. The second part looked in more detail at the implications of the Withdrawal Bill for Wales, Scotland and Northern Ireland.

INTRODUCTION

Murray Hunt (Bingham Centre for the Rule of Law) gave some opening remarks. He noted that the subject of the roundtable was a matter of huge significance and concern, and referred to the [Expert Working Group on the EU \(Withdrawal\) Bill and the Rule of Law](#) which has been convened by the Bingham Centre in partnership with the Constitution Unit at UCL. The Working Group has been meeting in Parliament in anticipation of the Bill reaching Committee Stage and is chaired by Dominic Grieve QC MP, who has become a focal point for many amendments to the Bill. In particular, the Group has been considering whether amendments tabled to the Bill so far address all the rule of law issues which the Bill raises and a number of significant gaps have been identified in this regard. At the [second meeting of the Working Group](#) on 30 October 2017, the Group examined the implications of the Bill's proposals for devolution, and it would therefore be particularly interesting to hear what discussions at the roundtable bring to light in relation to possible amendments to the Bill or possible improvements to already tabled amendments to the Bill in relation to devolution.

Adam Brown (Dentons UKMEA LLP) gave an introductory speech and spoke in a personal capacity. He noted that the legal frameworks of devolution in the UK have been shaped by EU law, and have evolved alongside the embedding in UK law of the Human Rights Act and the various fundamental rights recognised by EU law. This raises questions about what happens when you move some of this scaffolding, and about the impact that EU withdrawal will have on both the devolution settlements and on "rights".

Brown quoted the House of Lords EU Select Committee which [called](#) for any future reform of the devolution settlements to be underpinned by "a clear and agreed framework of principles". He noted that it is not yet clear that the Withdrawal Bill, which is almost by default a reform of devolution, will be informed by any such clear and agreed framework of principles. Instead, he commented, the Bill appears to open up at least a risk that a lot of important legal rights could be determined by ministers acting on a case-by-case and potentially ad hoc basis. By this mechanism, ministers could end up deciding both the extent to which devolved legislators can legislate in specific areas covered by "retained EU law", and how far various rights protected by EU law continue to be enforceable at all in the UK. Brown considered that to be more significant than the inclusion of Henry VIII powers per se.

In Brown's view, negotiating the terms of the future partnership between the UK and EU would not be made easier by the possible appearance of devolved rules that conflict with retained EU law; and we should avoid any domestic laws that could conflict with whatever EU law rules the UK may be required to adhere to as part of any long-term trade and cooperation agreement with the EU. Brown noted that whatever happens, there will be room for disputes in some cases about whether a proposed provision or approach is in fact compatible with retained EU law. However, it is not clear how these sorts of disputes would be resolved if the Court of Justice of the European Union (CJEU) no longer holds sway.

Brown noted that some proposed amendments to the Bill seek to fill perceived gaps by for example incorporating the provisions of the [EU Charter of Fundamental Rights](#). He questioned

whether this approach would work (or would work any better) than a general extension of a duty on UK courts to have regard to the continuing CJEU jurisprudence. He also asked whether there is a risk that post-Brexit devolution will result in a judicialisation of the development of public policy to an undesirable extent.

Finally, Brown noted the broad range of pressing issues raised by Brexit for Northern Ireland. Alongside the practical implications of withdrawal for the everyday lives of those living on both sides of the Irish border, he noted that there are deeper and more intractable issues. He concluded that there may be a long way to go before the objective of respecting the [Belfast \(Good Friday\) Agreement 1998](#) in all its parts is properly considered, let alone adhered to in the Brexit process.

PART 1. THE IMPACT OF EU WITHDRAWAL ON THE UK CONSTITUTION

Chair: The Baroness Kennedy of the Shaws QC

Angela Patrick (Doughty Street Chambers) gave a brief introduction to the Bill. She recapped broadly some of the key provisions: Clause 1 will repeal the European Communities Act 1972, Clauses 2-9 will introduce, in a bipartite model, a means of piping what will become EU retained law into domestic law and will provide for ministers to amend EU retained law on a day after exit day. Exit day will be, as per the Bill, whatever day ministers determine it to be and may be different days for different purposes. Clauses 10-11 and the associated schedules deal with the devolution settlement and how those bipartite functions of either bringing EU law in or allowing the executive to amend that framework after we exit into the devolution settlement. Patrick noted that both the Scottish and Welsh administrations have been very blunt about the fact that the proposed mechanism does not work and that they will not give legislative consent to the current model.

Patrick noted that the problems in the Bill are manifest. She identified three headline issues which broadly seem to mirror the three principles set out in the statement of the [Joint Ministerial Committee on EU Negotiations](#), highlighting how flawed the negotiating position has been thus far and that has trickled down into the language of the Bill: (i) legal certainty; (ii) the acknowledgment of the potential constitutional precedents which the Bill might set; and (iii) the stability of the devolution settlements.

On legal certainty, Patrick commented that the language of Clauses 2-7 is so broad and indeterminate that it is not clear how courts might approach an interpretation of “EU retained law” and other concepts in the Bill. An example given was the “correcting” power in Clause 7 of the Bill which would grant Ministers the power to make statutory instruments to prevent, remedy or mitigate any failure or deficiency in retained EU law arising from Brexit. She noted that it would be difficult to determine whether something is deficient or failing so as to trigger this ministerial power – and that this lack of legal certainty has been highlighted not only by academic scholars, MPs and peers, but also cross-party groups.

On the question of constitutional precedents, Patrick noted that while it is clear that a Bill of some kind would be needed in order to deal with the legacy of our membership of the EU, she stressed that this is not the Bill. The Bill appears to be incredibly overbroad and does create powers which are unprecedented, and it does so in a way which does not even grapple with the simplest of domestic public law questions. Academics have outlined the difficulties of bringing instruments of EU law into domestic law with no further consideration about their nature or their nature post exit day. Decisions, CJEU case law, regulations and treaty provisions etc., are all to be treated as one homogenous amalgam of EU retained law with no clarity as to what is an instrument of primary or secondary legislation, and what this will mean for the effects of this body of law post-exit.

Patrick also emphasised that there is not enough in the Bill particularly in the current political climate to provide sufficient clarity around how the post Brexit settlement will require judges to step in, to consider not only case law coming from the CJEU pre Brexit, but also case law which evolves thereafter. For example, she commented that the provision in the Bill which permits a domestic court to refer to post-exit CJEU case law where “it considers it appropriate to do so” (Clause 6(2)) is problematic because “appropriate” is likely to mean very different things to different people. Patrick also gave the example of Schedule 1(1) to the Bill which concerns challenges to the validity of EU law.

On devolution, Patrick commented that this topic had been written about by many others and that she would not go into this in detail. However, she noted that the decision to withdraw from the EU had put the question of Scottish independence back on the table for many.

Dr Jo Murkens (LSE) addressed the impact of the Withdrawal Bill on the UK constitution, and in particular how the Bill fits within the wider constitutional framework. He noted that the constitution and what we know about the constitution does not really tell us how to conceptualise or deal with the Bill, because the starting point is either one of constitutional stability or the recurring narrative of the UK constitution as flexible.

Murkens noted that the Bill does alter the relationship between Westminster / Whitehall and the devolved institutions. He used the examples of Clause 11 and Schedule 2. Firstly, Clause 11 prevents the devolved parliaments from altering retained law, even in areas that are devolved. After exit day devolved parliaments will be prevented from legislating incompatibly with retained EU law. Whereas now what is devolved and what is not devolved is perfectly clear, after exit day, that distinction and the meaning of devolved competence will become unclear. This suggests that there is legal evidence for the political statement of the power grab by Westminster. Secondly, Schedule 2, paragraph 1(1) to the Bill provides for devolved Ministers to make regulations to prevent, remedy or mitigate any failure or deficiency in retained EU law arising from Brexit and under paragraph 1(2) this power may also be exercised jointly with UK ministers. So after exit day delegated powers will be shared between the centre and the regions. Murkens noted that once again it is impossible to identify clear boundaries of competences as the transfer of competences can only take place by consensus, which is not how things currently operate and is a complete violation of the devolution settlement.

Murkens noted that this gives rise to a broader constitutional question – To what extent can the UK government act without consulting or without the agreement of Scotland and Wales on European matters? Is this a political or constitutional problem? How do we assess the constitutionality of a moving object (whether it is devolution or EU withdrawal) under a permanent and stable constitution? For example, has the codification of the Sewel Convention embedded the Scottish parliament in the UK constitution or is it without legal substance as per the majority of judges in *Miller*? For example, what is the constitutional significance of devolution, does it mark a rupture with the UK public law tradition or is it merely an ad hoc addition to the continuing structure? If the UK constitution is as flexible as we are frequently told, why is it so hard to accommodate alternative sites of power? Why is it so hard to accommodate different social attitudes and constitutional arrangements regarding human rights and EU membership in Scotland, Wales and Northern Ireland?

Murkens suggested that a radical solution is to recognise that the UK is no longer, if it ever was, a centralised nation state with a union constitution, but that is rather a divided state-nation, with multiple identities and a fragmented constitution. He proposed that a solution might be to adopt consociational theory that accommodates stateless nations such as Scotland, Wales and Northern Ireland, and to start thinking about self-government, shared government, cross border, confederal and federal arrangements as part of our constitution, and not as something external or added on to our constitution. This leaves us with a dilemma – if the consociational solution is successful, then parliamentary sovereignty is no longer permanent; but if

parliamentary sovereignty is permanent, then consociational sovereignty is impossible. So, in Murkens' view, the only solution is radical constitutional design which is made impossible by parliamentary sovereignty but if our constitution is flexible, then it has to be possible. He concluded that the Withdrawal Bill is not only bad for the rule of law and for politics, but also for the country.

Professor Alan Page (University of Dundee) spoke about the potential of Brexit to weaken the UK's territorial constitution and focused on three issues which raise particular problems from the point of view of the devolved nations. He began by noting that Brexit has the potential if not to subvert then to certainly weaken the UK's territorial constitution, first because it would alter the balance of powers and responsibilities between the UK Parliament on the one hand and the devolved legislatures on the other. He drew this conclusion from an analysis he had carried out for the Culture, Tourism, Europe and External Relations Committee of the Scottish Parliament ['The implications of EU withdrawal for the devolution settlement' \(4 October 2016\)](#), which showed that the majority of EU competences would fall to Westminster Parliament rather than to the devolved legislatures.

Page identified a second reason why the territorial constitution would be weakened by Brexit, and this was because of the weakness of the UK's system of inter-governmental relations. One of the purposes of a properly functioning system should be to ensure that the interests of the devolved nations are taken into account in the exercise of non-devolved or reserved responsibilities; and that is a role that the current system performs patchily at best. He also noted that there is a sense in which the Withdrawal Bill has either been drafted without a proper understanding of devolution law or else with scant regard to the principles on which the devolution settlements are based. Page wanted to give particular attention to three issues: (i) Clause 11 and the destination of repatriated competences; (ii) the proposed power of UK ministers to legislate in the devolved areas; and (iii) the protection of the devolved nations' interests in relation to reserved matters.

First, Page considered Clause 11 and the destination of repatriated competences. Page briefly reiterated that under Clause 11 of the Withdrawal Bill the obligation on the devolved institutions to act compatibly with EU law will be replaced with an obligation to act compatibly with retained EU law. He assumed that the justification for this provision was the need to ensure legal certainty, so that there would be no change in the legal position immediately after midnight on exit day. However, he noted that this justification overlooks, whether by accident or by design, the fact that the current obligation is rooted in the UK's obligations as a member state – it is about ensuring that the UK does not end up in breach of its EU obligations as a result of action on the part of the devolved administrations. End EU membership and the obligation loses its original justification, prompting suspicion, certainly on the part of the Scottish and Welsh governments, that Clause 11 is not so much about legal certainty as about stripping the devolved administrations of the leverage they would otherwise possess when it comes to the negotiation of common frameworks. He also noted that the devolved administrations fear that Whitehall Departments would try to keep these repatriated competences rather than passing them on to the devolved nations. Page also noted concern about the grafting of a conferred powers model onto a reserved powers model which could reduce the intelligibility of the settlement. Page emphasised the part played by the reserved matters in maintaining the UK single market. He proposed a combination of the existing reservations and a 'standstill agreement' whereby the UK government and the devolved administrations agree not to introduce (in the words of the Prime Minister) 'new barriers to living and doing business within our own Union', whilst the common frameworks and any necessary revisions to retained EU law are being worked out. He suggested that this would preserve the integrity of the UK single market whilst avoiding the damaging consequences of Clause 11.

The second issue which Page addressed was the proposed power of UK ministers to legislate in the devolved areas. He noted that this represents a radical departure from the principles on

which the devolution settlement is based – There is no subordinate law making equivalent of the power of the UK Parliament to make laws for Scotland. However, under the Withdrawal Bill, UK ministers will gain powers to correct deficiencies in retained EU law, to ensure continued compliance with the UK’s international obligations, and to implement a withdrawal agreement in devolved as well as reserved areas. Page stated that it is contrary to the principles on which the devolution settlement is based therefore for these powers to be exercisable, as is currently proposed, subject only to a non-binding requirement of consultation with Scottish ministers and with no provision for Scottish parliamentary scrutiny. Instead, as the Scottish and Welsh governments have proposed, these powers should only be exercisable with the consent of the Scottish or Welsh ministers.

Third, Page considered the protection of the devolved nations’ interests in relation to reserved matters. He noted that the UK’s intended withdrawal from the EU raises in a new and acute form the question of the protection of the devolved nations’ interests in relation to matters decided at Westminster. The negotiation and conclusion of trade agreements with non-EU countries, in particular, is likely to be a matter of keen interest to Scotland and the other devolved nations. He noted that the [2013 Memorandum of Understanding](#) between the UK government and the devolved administrations undertakes to involving them as fully as possible in discussions about the formulation of the UK’s policy position on all EU and international issues which touch on devolved matters (paras 18 and 20). However, whilst the Joint Ministerial Committee machinery has been put in place for involving the devolved administrations in (UK) decision-making on EU matters, no comparable machinery exists for involving the devolved administrations in UK decision-making on international matters. The lack of such machinery and with it the overhaul of the ‘not fit for purpose’ system of inter-governmental relations, both need to be addressed as a matter of urgency.

PART 2. THE IMPLICATIONS OF THE WITHDRAWAL BILL FOR WALES, SCOTLAND & NORTHERN IRELAND

Chair: The Baroness O’Neill of Bengarve CH CBE FBA

Dr Jo Hunt (Cardiff University) made some observations around the experiences of Wales as regards the Withdrawal Bill, before focusing on the continuation of the maintenance and protection of rights within the territorial constitution. She began with a couple of observations about the Withdrawal Bill more generally. First, she noted that the Bill is supposed to be transitional – to set the framework for a smooth transition out of EU membership and its legal structures, and into realms as yet unknown – but that the Bill is potentially locking in a new structure for devolved governance, and it is one which may prove potentially difficult to redefine, except from the top down. Second, from a devolved perspective, Hunt noted that the Bill could be seen to demonstrate at best a profound insensitivity towards devolution – and there is much in the Bill which could be viewed as an outright provocation to the existing and assumed settlement and distribution of powers through the devolution legislation. That settlement has been repeatedly endorsed through successive referenda in Wales and across the other devolved nations. The Welsh government and its Assembly have sought to defend their interests in the face of these provocations through a variety of means, in the political and the legal realms. The Welsh government has sought over the last year to launch debates about the future of the UK and its territorial constitution. For example, the First Minister launched a paper titled [‘Brexit and Devolution: Securing Wales’ Future’](#) in the summer, which included proposals on new inter-governmental machinery. Hunt suggested that the current systems we have are not going to be fit for purpose going forward.

Substantively, Hunt commented that the Welsh government has also made a commitment to maintaining current levels of social and environmental rights, and to no diminution on quality of life issues. However, there are now concerns about its legal capabilities to do that even though competence currently exists across some of those policy areas at least. But what is

currently within devolved competence is now being put in question by the Withdrawal Bill. In addition, as consequences of Brexit start to be felt, Wales is also moving from its existing model of conferred powers allocation to the model of reserved powers that we see in Scotland. Until now, Wales has sought to operate effectively within that system of conferred powers and has done so robustly in reaching out and pulling in areas that on the face do not fall within its conferred powers. There are so-called "silent areas", such as employment. So we face Wales moving from that conferred model which has perhaps given it more flexibility up until now, to the more clear cut model of reserved powers, but at a time when perhaps competence in those areas like employment might be felt to be needed more than ever, if we are going to see challenges to the social rights that are currently underpinned through EU legislation. Hunt noted that one of things we have also seen politically and gaining momentum over the summer is joint working between the Welsh and Scottish governments to defend their common interests in really an unprecedented way, and strong interactions between their parliaments. They have found a space to work together to challenge aspects of the Withdrawal Bill that are seen as most damaging to devolution. The governments have proposed a series of joint amendments to the Withdrawal Bill, and also joint statements and joint laying of legislative consent memoranda. Both the Welsh and Scottish governments have made clear that they will not be able to recommend Legislative Consent Motions whilst Clause 11 remains in the Bill, that it is an absolute red line.

As with the Bill generally, Clause 11 is presented as being about maintaining continuity and stability in the law, whereas at the same time it ensures that the UK government has substantially limitless powers to make changes across reserved and devolved areas. It replaces the obligation to legislate in compliance with EU law with a new constraint which sees the devolved administrations required to comply with 'retained EU law', which results (with very limited exceptions) in them being blocked from introducing any change to this inherited law even where it falls within devolved areas. The rationale here is that retained EU law creates a series of frameworks for the UK which, amongst other things, ensures sufficient commonality of approach across the UK for its own single market to operate effectively. Prospectively, these frameworks can minimise divergence in matters that may be covered by international trade deals. So Clause 11 creates this transitional 'freezing' of existing EU-derived common frameworks unless and until such time there is an agreement to lift them and then competence can be unlocked. However, Hunt stressed that even if the approach was to work in this clear binary 'maintain or remove' option, it would still be unwelcome because it is this return to a conferred powers model, where powers would be re-reserved and then potentially released in a piecemeal way and she noted there is a lack of clarity and coherence about how that might play out.

Hunt suggested that it will not be this clear cut. She noted for example that there are in Wales 64 areas where at the moment devolved competence and EU law intersect and which may give rise to current common frameworks, where there is an overlapping of responsibilities at EU, UK and devolved levels. We know that there is going to be sectoral legislation which will amend various aspects of these existing common frameworks. If that is done via primary legislative then Hunt noted that at the very least the devolved nations will have some involvement through LCMs and practices around that. But it is a very far cry from their opportunities to participate in decision-making that are offered to it through EU governance structures. There would be a different system of engagement for the devolved nations and a different mind-set. For example, she noted that the principle of subsidiarity is constitutionally embedded within the EU's order and it has sensitivity to regional and local concerns.

In addition, Hunt noted that EU law and EU governance is also committed to mainstreaming equality; and that the notion of EU governance brings with it a commitment to embedding a range of rights in the system. At worst, the existing frameworks may be changed, redefined or removed by UK ministers using secondary legislation and in way that may involve no effective devolved scrutiny or control. Statutory instrument consent motions already exist in the Welsh system but there is no recognition in the Withdrawal Bill that these might be worth incorporating.

Hunt noted that there is nothing in the Bill about how joint working will operate in the future; nothing about how new common frameworks might be made or administered; and nothing substantively about the objectives and priorities of this UK internal market and nothing about how much tolerance for differentiation there might be in that notion of the UK internal market or of the values that that market notion might encompass. At the moment, the devolved nations are being asked to take a lot on trust, but may be finding that difficult to accept. Hunt noted that we have seen Wales seeking not only political but legal means to try to defend their position. For example, the Welsh Assembly has indicated its support for the introduction of “continuity legislation” where Wales will seek to transpose EU law within the scope of devolved competence into Welsh law as a pre-emptive strike against the Withdrawal Bill. Hunt noted that this is unsatisfactory and an incredibly disappointing reflection of the state of relations in our territorial constitution.

Professor Christopher McCrudden (Queen’s University Belfast) spoke about the Good Friday Agreement issues, in particular the issue of rights. He began by setting these in the context of four other issues relating to Northern Ireland. First, issues relating to the Common Travel Area. Second, border issues such as trade. Third, constitutional issues including the operation of the Sewel Convention (here the question is whether in the absence of there being a government in Northern Ireland the Assembly would be asked to vote on a LCM and then whether a LCM would be passed, and in his view a LCM would not be passed) and the role of parliamentary sovereignty. Fourth, the question of “special status” for Northern Ireland and whether it retains some continuing involvement in the EU or EEA following UK withdrawal.

In terms of challenges, McCrudden first recalled the negotiating position of the EU-27, which states that there must be no diminution of rights in Northern Ireland caused by the UK’s departure from the EU, including in the area of protection against forms of discrimination currently enshrined in EU law. He then went on to identify substantively the rights which would be affected by exit and he identified three groups of rights: (i) EU-underpinned rights that relate to the Good Friday Agreement (including for example equality and non-discrimination rights, the Common Travel Area, and citizenship rights); (ii) EU fundamental rights and general principles, including those in the EU Charter of Fundamental Rights; and (iii) more directly rights deriving from EU law (for example labour and employment rights). Second, McCrudden noted that we have not yet focused on the right to an effective judicial remedy which is currently guaranteed under EU law. This whole set of EU-based remedies includes disapplying contrary national law, “Francovich” damages, and the ability to have direct effect in domestic courts – this will all disappear. Leaving aside the first point about the substance of the rights, there is also a major problem that individuals will not get an effective judicial remedy of the kind that they previously had. Third, McCrudden noted the issue of the effect on the extent and nature of Northern Ireland devolved powers. In one sense, the powers of the Assembly are increased because the restriction on the exercise of devolved powers is removed – if we leave without this Bill under a “hard Brexit”. However, on the other hand it decreases the devolved powers (discussed above).

Fourth, McCrudden noted a point arising out of the future arrangements – the question of whether as a result of pressure to reduce non-tariff barriers, there will be a reduction of rights protections in Northern Ireland. Fifth, in terms of the Good Friday Agreement in particular, there is a provision which requires the equivalence of rights in Northern Ireland with the Republic of Ireland, which will be lost as the Republic of Ireland will continue to be an EU member state. Finally, exit will reduce the *political* constraints currently operating on UK withdrawal from the [European Convention on Human Rights](#) (ECHR). Given that the commitment in the Conservative party manifesto is only to continue membership in the ECHR for the duration of this Parliament, this is a major political implication of exit. Taken together, McCrudden considered that these challenges are from a Northern Ireland perspective really very significant. Given the importance of rights in the Northern Ireland context, in particular given the idea that rights were part of the Good Friday Agreement, this list taken together has the potential to be highly destabilising.

McCrudden then provided a number of possible solutions to the challenges outlined. First, he observed that a serious equality impact assessment under the Northern Ireland Act could be carried out of the effect of Brexit, on equality rights at least, in Northern Ireland. Second, as regards UK policy frameworks, McCrudden suggested there should be no reduction in devolved powers in the area of rights. He noted that the perception is that there will be a reduction in devolved powers because of these common policy frameworks and Clause 11; and stressed that if this is not the case then this should be clarified in the legislation. Third, he noted that the issue of Northern Ireland born holders of Irish passports is a highly complicated area. Fourth, other possible inclusions would be a non-regression guarantee that existing rights will be retained in perpetuity (including against trade agreements) as well as provision for the automatic mirroring of future EU rights developments in Northern Ireland law, in order to guarantee equivalence with the Republic of Ireland.

In terms of other potential solutions, McCrudden noted the ongoing discussion about a Bill of Rights for Northern Ireland. There is an obligation under the Good Friday Agreement to incorporate the ECHR into Northern Ireland law which – alongside additional rights to reflect the particular circumstances of Northern Ireland – would constitute a Bill of Rights for Northern Ireland. In this regard, the Northern Ireland Human Rights Commission delivered advice on a Bill of Rights to the Secretary of State for Northern Ireland in December 2008, but little progress toward adopting a Bill of Rights has been made since then. McCrudden queried whether this current debate might be revisited in the context of a discussion about a Bill of Rights in order to guarantee previous EU underpinned rights, more particularly incorporating the EU Charter of Fundamental Rights into domestic law. In terms of equivalence between the Republic of Ireland and Northern Ireland, he noted that the Good Friday Agreement also provides for a joint committee between the two human rights commissions, North and South, which could lead to an all-island articulation of rights and their guarantee.

Finally, as regards the issue of an effective judicial remedy, McCrudden further observed that if the aim is to replicate the current rights, then this would need to include enforcement at the domestic level, including the ability to declare contrary national law unlawful (which replicates the current EU position). Clearly the CJEU is one potential option, but this seems to be a red line. However, there will need to be an alternative to the CJEU, which would involve an international or quasi-international body.

In conclusion, McCrudden recalled the negotiating position of the EU-27, which states that there must be no diminution of rights in Northern Ireland caused by the UK's departure from the EU. He suggested that this seems to require clearly a separate chapter on Northern Ireland in any Withdrawal Agreement, with the Good Friday Agreement or its essential parts incorporated in that Agreement.

For further information see [Christopher McCrudden, 'The Good Friday Agreement, Brexit and Rights'](#), Royal Irish Academy-British Academy Brexit Briefing Paper, October 2017.

Dr Tobias Lock (University of Edinburgh) spoke about the rights implications of EU withdrawal in the Scottish context. He recalled the currently existing rights constraints on the Scottish Parliament and government, namely sections 29 and 57 of the Scotland Act 1998, which provide that the Scottish Parliament cannot legislate contrary to Convention rights and that the Scottish government cannot make subordinate legislation or do any other act which would be contrary to Convention Rights. At present, the same constraints exist in relation to EU law, which of course contains a number of rights itself, including the Charter of Fundamental Rights. Whilst the Charter only operates within the scope of EU law, it does guarantee a number of rights not found in the ECHR including, for example, an express right to protection of personal data and a stronger fair trial guarantee. He noted that much of what is in the Charter is potential – much of it has not yet been litigated or decided upon by the CJEU. Lock also noted that there is a

large body of secondary EU legislation dealing with areas such as equality and anti-discrimination law, labour law and social rights, and so on, which constrain the Scottish parliament and government.

Lock then discussed some key provisions of the Withdrawal Bill in this respect. Clause 5(4) provides that “The Charter of Fundamental Rights is not part of domestic law on or after exit day”. So the Charter would not constitute part of “retained EU law” under the Withdrawal Bill. Does this mean anything? Lock suggested it potentially means broader powers for the Scottish Parliament as a consequence. But it is not quite clear because Clause 5(5) of the Bill provides that this “does not affect the retention in domestic law on or after exit day ... of any fundamental rights or principles which exist irrespective of the Charter”. In addition, Schedule 1 paragraph 2 of the Bill provides that “No general principle of EU law is part of domestic law on or after exit day if it was not recognised as a general principle of EU law by the European Court in a case decided before exit day”. Is the power of the Scottish parliament affected in reality? Lock suggested that it is probably not enhanced insofar as regards rights that have been recognised so far (mainly, for example, civil and political rights found in the ECHR), but might be enhanced as far as novel rights in the Charter are concerned. However, there is no legal certainty about the exact contours of those rights as general principles. In addition, Schedule 1 paragraph 3 of the Bill provides that “There is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law”. Does this mean that post Brexit we can no longer bring a case arguing that an Act of the Scottish Parliament is not law because it violated one of the EU general principles that have been retained as EU law?

As regards rights found in secondary legislation, Lock noted that these are of course susceptible to being altered either by the government under Clause 7 of the Bill or in the longer run by Parliament itself. He noted that the main concern in Scotland is that certain rights protections will disappear from the UK legal landscape in the long-term after Brexit and that there is nothing that we can do about it. Lock gave the example of the Working Time Directive, which he predicted would be lost within the next five years.

Can we do something about this from a Scottish perspective if we wanted to?

Lock suggested that one option could be for Scotland to adopt a Scottish Bill of Rights, within certain limits. He also noted a [speech by Nicola Sturgeon](#) in September 2017 in which she announced that Professor Alan Miller, former chair of the Scottish Human Rights Commission, will chair an expert group to give independent advice to the Scottish Government and which will make “recommendations on how we can protect and enhance economic, social, cultural, environmental and other rights”. Sturgeon also stressed that the Scottish Government would “oppose vigorously any attempt to undermine the Human Rights Act or withdraw from the European Convention on Human Rights”. Lock noted that [three guiding principles have been affirmed](#): (i) non-regression; (ii) mirroring developments in the EU, with the aim that no one in Scotland should be left behind; and (iii) Scotland’s progressive journey concerning rights post-devolution should continue. Lock concluded that there seems to be a desire on the part of the Scottish government to do something on these questions, to make clear that Scotland is more progressive in this area.

This report was prepared by Lucy Moxham, Associate Senior Research Fellow at the Bingham Centre, with assistance from Olivia Percival, a Research Assistant at the Centre.