INTRODUCTION: BREXIT AND SCOTS LAW

Aileen McHarg[*]

Leaving the European Union will be the most significant systemic change to Scots law since the creation of the Scottish Parliament in 1999. The essays in this special Analysis section survey some (though by no means all) of the key aspects of the legal system likely to be affected by Brexit. In some of these areas, such as agriculture and fisheries, EU law has been the central source of legal regulation since we joined what was then the EEC in 1973. In other areas, EU law has played a role alongside domestic regulation, in greater or lesser degrees.

At the time of writing (October 2017) – some 16 months after the EU referendum and seven months after formal notification of the United Kingdom's intention to withdraw from the EU was given under Article 50 TEU – it is surprising just how much uncertainty there still is about the likely effects of Brexit. The articles in this section identify three key sources of uncertainty.

The first concerns what sort of relationship, if any, the UK will continue to have with the EU-27 post-Brexit, and what other trade deals we may negotiate in future. In some areas, such as agriculture and fisheries, it seems most likely that we will cease to have a special relationship with the EU-27, and hence will no longer with subject to EU law. In other areas, such as energy, financial services, and policing and criminal justice, it may be in the interests of both the UK and the EU-27 for us to continue to cooperate closely, whether through participation in the EU single market or engagement with EU programmes and agencies, although it is almost certain that this will mean a loss of influence for the UK over decision-making, and it is unclear whether acceptable terms will be negotiable. In other areas still, such as environmental standards, we may be constrained to follow EU law anyway in order to continue to trade with EU Member States. And of course, to the extent that we are no longer subject to EU law, other external constraints, such as environmental or fisheries treaties, World Trade Organisation rules, or the terms of new bilateral trade deals will take on a new significance.

The second area of uncertainty concerns the continuity of effect to be given to existing EU law. The European Union (Withdrawal) Bill seeks to maximise legal certainty by providing for continuity of effect of both EU-derived primary and secondary legislation, and for directly-effective regulations, decisions and tertiary legislation, as well as for rights and obligations arising under the EU treaties or the general principles of EU law. However, there will be important exceptions to the principle of continuity of effect. For one thing, there are specific exclusions from the concept of "retained EU law", most notably the Charter of Fundamental Rights. The status of retained EU law in the legal system will also be different from that of EU law. The principle of supremacy will continue to apply, but only in respect of other domestic legislation enacted prior to exit day. Post-exit day, retained EU law will be able to be amended by domestic legislatures (subject to any external legal constraints). In addition, the Bill as introduced provides that there will be no right of action in domestic law based on breach of the general principles of EU law, nor any right to challenge retained EU law for invalidity, nor to seek damages under the *Francovich* principle. In short, as the essays on human rights and environmental law make clear, the superior remedies currently available to secure compliance with EU rules will most likely no longer be available after Brexit.

Moreover, in areas where we currently participate in EU agencies (such as police co-operation, energy regulation or the EU-ETS) or depend on EU-level funding (such as agriculture or low-carbon energy) or where current arrangements are premised upon reciprocity between Member States (such as free movement of persons, or the Common Fisheries Policy), simple continuity of effect will no longer be

[*] Professor of Public Law, University of Strathclyde.

possible. In these areas, new domestic regulatory and financial arrangements will be required, to be put in place either through new primary legislation, or by using the extensive secondary legislative powers conferred upon ministers by the EU (Withdrawal) Bill to "correct" the statute book so as to make it workable after Brexit. In the guise of "correction", ministers may also be tempted to use their delegated powers to get rid of rules, for instance in the employment field, to which they object in substance.

The final area of uncertainty concerns whether repatriated powers will be exercised in future at UK or devolved level. The approach taken in the EU (Withdrawal) Bill is to replace the current obligation on the devolved legislatures and governments to comply with EU law, with a new duty not to modify retained EU law. This has the effect of returning all competences currently exercised at EU level to the UK level in the first instance, though this is subject to a power exercisable via Order in Council for UK ministers to remove certain pieces of retained EU law from the scope of the restriction. This means that, even in areas like agriculture, fisheries and environmental regulation, which are otherwise within devolved competence in Scotland, the devolved institutions will be obliged to continue to apply EU law (subject to any modifications made by the Westminster Parliament or UK ministers).

The UK Government justifies this approach on the basis that new UK frameworks will be required to replace the common frameworks currently provided by EU law, in order to protect the UK's single market, and to facilitate new trade deals or other international co-operation. However, the Scottish and Welsh Governments have made clear that they will not consent to the Bill in its current form,[1] and the approach may therefore yet be altered. In addition, there may be pressure for further devolution of repatriated powers currently falling wholly within reserved competences, such as in relation to employment, energy or immigration, either to achieve a more rational division of competences, or to enable the Scottish Government to protect its policy interests when the supportive framework of EU law is removed.

The uncertainty caused by Brexit, and the likely loss of influence for the UK and Scottish governments that it will entail, mean that most of the authors in this section are pessimistic about its impacts on the areas they discuss. Nevertheless, Brexit may bring with it the opportunity for legal and policy innovation. For instance, the UK and Scottish financial services sectors may be able to develop niche areas of business to compensate for the potential loss of business to the EU-27. And Brexit is only one influence, albeit an important one, on the likely future development of law and policy in each sector. Given that, at the time of writing, a lengthy transition period beyond the two-year Article 50 negotiation period is one option being discussed, it may well be some considerable time before we are able to discern just how significant an impact Brexit will ultimately have on Scots law.

[1] Scottish Government, *Legislative Consent Memorandum: European Union (Withdrawal) Bill*, LCM-S5-10, Session 5 (September 2017), available at: http://www.parliament.scot/S5ChamberOffice/SPLCM-S05-10-2017.pdf; Welsh Government, *Legislative Consent Memorandum: European Union (Withdrawal) Bill* (September 2017), available at: http://www.assembly.wales/laid%20documents/lcm-ld11177/lcm-ld11177-e.pdf.