

Brexit and the British Bill of Rights

A research paper edited by
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Executive Summary

The aim of this research paper is to explain the mechanism and consequences of the United Kingdom's exit from the European Union ('Brexit') and the plan to establish a British Bill of Rights.

The key points of the research paper are:

- The issue of consent regarding the initiation of Article 50 of the Treaty on European Union (TEU) to formally trigger the Brexit process under EU law is highly complex, relating to five cross-cutting dimensions:
 - (i) the involvement of the UK Parliament in the Brexit negotiations;
 - (ii) the consent of the Northern Ireland Assembly to Brexit;
 - (iii) the consent of the Scottish Parliament;
 - (iv) the need for unanimous agreement by all EU Member States should the UK wish to reverse the triggering of Article 50; and
 - (v) the possible need to obtain the consent of the Republic of Ireland to Brexit as a fundamental alteration of the Good Friday Agreement.
- Brexit presents a clear reduction in formal protection of fundamental rights in the UK through discontinued application of the EU Charter of Fundamental Rights and Freedoms;
- Whether this reduction in rights protection can be addressed by other measures at the national level, particularly the inclusion of 'lost' EU Charter rights in a British Bill of Rights, is questionable;
- Brexit, a BBR, and other related policy pledges seeking to reduce the application of international human rights law to UK actors, taken within the current context and their likely consequences, represent a weakening of the human rights protection framework as a whole – a certain 'disentrenchment' of human rights, reversing the decades-long trend toward incremental expansion in the right protection afforded to individuals across the UK.

- Various existing government policy proposals aimed at ‘freeing’ the UK from intervention of the European Court of Human Rights appear to be rooted in misconceptions concerning the nature of the ECHR and international human rights law more generally.
- Regarding plans to repeal the Human Rights Act (HRA) and its replacement by a British Bill of Rights (BBR), this would not free the UK from its obligations to comply with the judgments of the European Court of Human Rights in cases where the UK is a respondent party. In fact, it might lead to an increase in the number of successful applications to the Strasbourg Court, diminish the possibility for meaningful dialogue between the Strasbourg Court and the British courts, and thereby amplify rather than lessen the impact of Strasbourg case-law. The only viable way to remove such obligations is for the UK to denounce (leave) the European Convention on Human Rights (ECHR).
- Repeal of the HRA, its replacement with a BBR, and other related policy pledges seeking to reduce the application of international human rights law to UK actors, all ultimately appear to set a path toward withdrawal from the ECHR.
- In this connection, it was noted that UK withdrawal from the ECHR system would be likely to lead to withdrawal from the Council of Europe, which would significantly undermine the UK’s reputation as a state that cares about human rights protection. The UK would be only the second country in Europe which is not a member of the Council of Europe; the other being Belarus with its very problematic human rights record.
- Withdrawal by the UK would represent the first time a long-established Western democracy has left a major international human rights regime. Such a move would place the UK in the company of Greece under military rule in December 1969, when it left the ECHR system and Council of Europe, or more recently, Venezuela under Hugo Chávez, which denounced the American Convention on Human Rights in 2012 in order to leave the jurisdiction of the Inter-American Court of Human Rights.
- Brexit poses real threats to the fragile peace in Northern Ireland, given that EU membership is central to the Good Friday Agreement, and given that EU law is

dominant in areas that are clear ‘flash points’ for discord between the parties in the consociational government, such as equality legislation.

- Plans for repeal of the HRA, its replacement by a BBR, and other related policy pledges, pose threats not only to rights protection in the UK, but also to the rights protection (albeit limited) provided by the ECHR system in other states of the Council of Europe, given that UK withdrawal from the ECHR would be likely to trigger withdrawal by other states, such as Russia and Azerbaijan.
- The most fundamental conclusion from the workshop is that the current governmental approach to Brexit and a British Bill of Rights does not adequately appreciate, or address, the extraordinary complexity of human rights protection in the UK, which enmeshes protections across the international, EU, State, devolved, and bilateral planes. Until, and unless, policy formation begins to fully grapple with this complexity, serious rule of law and legitimacy questions will hang over the solutions presented by the Conservative government to the current constitutional entanglement.

Foreword by the editors

The Conservative Party manifesto of 2015¹ contained two key policy pledges: the holding of a referendum on the UK's continued membership of the European Union (EU);² and a plan to repeal the Human Rights Act 1998 and replace it with a British Bill of Rights.³ The Conservative government elected in the general election of 7 May 2015 has delivered on the first pledge, although the consequences of the referendum result, supporting the UK's exit from the EU ('Brexit') is far from clear. The government has not yet pursued the second pledge with the same vigour, but it remains a central plank of the platform for government. This research paper provides an overview of a number of key legal questions raised by the Conservative government's plans, emphasising the complexity involved; a complexity which tends to be elided in current government policy formation. The paper is intentionally succinct and does not claim to be exhaustive.

Detailed policy and academic discussions have of course already taken place, and continue to take place, concerning the legal and political complexities and uncertainties surrounding Brexit, since the results of the referendum vote were announced on 24 June 2016. However, despite this, discussion has often failed to capture the full extent of this complexity. In addition, the plan for a British Bill of Rights (BBR) has been eclipsed by Brexit. Yet, as this report reveals, the two developments are closely linked and the BBR presents an added dimension to the extraordinarily complex constitutional entanglement presented by Brexit, as well as raising fundamental questions beyond the Brexit context.

The paper is the product of a one-day workshop held at Edinburgh Law School on 27 October 2016 attended by Ed Bates, Christine Bell, Christopher McCrudden, Kanstantsin Dzehtsiarou, Fiona de Londras, Sir David Edward, Anne Smith, Murray Hunt, Cormac Mac Amhlaigh, Dimitrios Kagiros, John Corey, Kavita Chetty, Maire McCormack, and the editors. The text of this paper was produced by the editors from the contributors' oral

¹ *The Conservative Party Manifesto 2015*, available at: <https://s3-eu-west-1.amazonaws.com/manifesto2015/ConservativeManifesto2015.pdf>.

² *Ibid.* See in particular the section 'Real change in our relationship with the European Union' 72 et seq.

³ *Ibid.* 60.

presentations and discussion, and the editors take full responsibility for the accuracy of this report. Where necessary, the editors have added notes or additional information to the text to enhance clarity or detail, or to note key developments that have taken place since the workshop was held.

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General introduction

On 27 October 2016 Edinburgh Law School, the Bingham Centre for the Rule of Law, the Global Justice Academy, the Human Rights Centre, and the Edinburgh Europa Institute came together at Edinburgh Law School to discuss, under the Chatham House rule, two interconnected developments of profound significance for the constitutional order of the United Kingdom: Brexit and a British Bill of Rights. Although the discussion ranged widely, human rights protection, and the prospect of regression in existing rights protection, was the primary focus.

The workshop provided a useful forum for academics, civil society actors, politicians and other governance actors to offer and exchange their perspectives on the nature of these developments, and the possible implications of each development for the United Kingdom across a range of dimensions: the devolution settlements, the peace settlement in Northern Ireland based on the Good Friday Agreement, parliamentary supremacy, the UK's relationship with the European Union, and the UK's international obligations beyond the EU's legal order.

Overall, the workshop presented a form of mapping exercise, with successive presentations and round-table discussion incrementally building a picture of the ways in which Brexit and a British Bill of Rights relate to, and are shaped by, the expansive and multi-level constitutional terrain across the sub-state, UK, EU, and international levels.

With twelve speakers in one day, as well as open 'Q & A' sessions, it is not possible to fully reflect the detail of the discussions. This summary of the proceedings groups conveys the key points arising from the discussions, grouped around four key themes:

- Concrete reduction in rights protection;
- Consent;
- Constitutional complexity; and
- Community.

Part I

Concrete Reduction in Rights Protection

Introduction

Although public discussion concerning Brexit has largely focused on the economic and international relations dimensions, a central additional concern is the impact of the UK's exit from the EU on human rights protection within the UK.

1. Loss of rights contained in EU law

Brexit clearly presents an overall reduction in the formal protection for human rights within the UK. Departure from the European Union (EU) means that the EU Charter of Fundamental Rights would disappear from the UK legal order, as there is currently no relationship in existence between the EU and a third country that would continue its applicability.

The Charter is more limited in the scope of its application to the UK than the European Convention on Human Rights (ECHR), but is substantively broader. The Charter only applies where a public authority in the UK 'is implementing' EU law. By contrast, the ECHR applies directly in the UK via the Human Rights Act 1998 (HRA) to all acts of public authorities. Removal of the Charter means removal of a variety of rights therein that are not protected by other texts in force in the UK, such as an express right to data protection, specific rights of the child, and social rights, as well as the more expansive protection of rights which have a counterpart in the European Convention on Human Rights (ECHR).

In terms of enforcement, the Charter, as a creature of EU law, requires UK Acts (implementing EU law) that are incompatible with its text to be disapplied by national courts. This follows from the primacy of EU law.⁴ By contrast, under the HRA, national courts are empowered to make solely a declaration of incompatibility where rights protection under UK law departs from the protection afforded by the ECHR.

⁴ Established early on in Case 6/64 *Costa v ENEL* ECLI:EU:C:1964:66.

Other losses in the Brexit context are the possibility to challenge EU measures from within the UK under the EU Charter, and the extraterritorial applicability of the Charter. Loss of the Charter, through Brexit, also means loss of a ‘back up’ in the event that a British Bill of Rights (BBR) might seek to provide narrower rights protection; namely, that such a retrograde move would be only partially successful insofar as the Charter would be likely to gain prominence and more preliminary references concerning Charter rights could be made to the European Court of Justice (ECJ).

It was also observed that under the Great Repeal Bill Ministers are likely to be endowed with rather robust powers to amend legislation, and that it would be important to scrutinise the detail of both the primary legislation and secondary legislation enacted, which both intentionally and unintentionally may water down human rights protection.

More broadly, it was observed that the removal of the Charter from the UK legal system represents a weakening of the human rights protection framework as a whole – a certain ‘disentrenchment’ of human rights, reversing the decades-long trend toward incremental expansion in the right protection afforded to individuals across the UK.

2. Potential mitigation of Brexit-related rights reduction

As against this, participants discussed the possibility that some elements of the remaining rights framework might temper these losses. These include:

- Rights protections afforded by the common law (i.e. protections in judicial decisions, rather than statutory law);
- Interpretation of the UK’s anti-discrimination laws remaining linked to ECJ judgments;
- The fact that lawyers and judges will not simply ‘unlearn’ EU law overnight; and
- The UK’s continuing obligations under other, non-EU, international human rights treaties (e.g. the European Convention on Human Rights, the UN Convention on the Rights of the Child).

However, it was recognised that many of these protections would be weak. The first possibility in particular relates to ‘common law constitutionalism’ – an approach to law, gaining ground in recent years, which tends to support a reinvigoration of the common law as a primary pillar of constitutional government and a constitutional politics grounded in fundamental common law principles (including protection of rights under the common law), and which tends to accord a more central place to the courts. However, it was noted by one participant that common law constitutionalism, as it currently stands, does not provide rights protection equivalent to the rights that would be ‘lost’ through Brexit. It was also observed that common law constitutionalism has been a particular disappointment in Northern Ireland for decades, especially as far as rights protection is concerned.⁵

As regards other rights treaties, the modalities for their enforcement are different and generally weaker than enforcement of EU law. There is no equivalent of the primacy and direct application of EU law in national orders, and the resources and powers of oversight bodies of many international treaties are not comparable to those of the ECJ (e.g. the Committee on the Rights of the Child (CRC), a body of 18 Independent experts that monitors domestic implementation of the Convention on the Rights of the Child, receives periodic reports and issues general comments, but the UK has not ratified an optional protocol to permit individual complaints to the CRC).

3. Fresh impetus to a Bill of Rights for Northern Ireland: A silver lining?

It was observed that a ‘silver lining’ of Brexit in Northern Ireland may be the fresh impetus to the adoption of a Bill of Rights for Northern Ireland. Such a Bill of Rights, separate from a British Bill of Rights, is ‘unfinished business’ from the Good Friday Agreement of 1998.⁶ 18 years on such a Bill of Rights has not come into being, despite a formal recommendation for the adoption of such a text by the NIHRC in 2008,⁷ and a recognition by the Commission on

⁵ See, for instance, T Cunningham, ‘Absent friends: common law constitutionalism and the Northern Ireland Bill of Rights debate’ (2010) 61 *Northern Ireland Legal Quarterly* 123.

⁶ The text of the Good Friday Agreement is available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/136652/agreement.pdf.

⁷ Northern Ireland Human Rights Commission, *A Bill of Rights for Northern Ireland: Advice to the Secretary of State for Northern Ireland* 10 December 2008. Text available at:

a British Bill of Rights in its 2012 report that such a text should not interfere with the separate discussion of a Bill of Rights for Northern Ireland.⁸

The failure to enact such a text is largely due to a lack of political consensus. The major parties in the government of Northern Ireland have diametrically opposed positions: Sinn Féin supports the enactment of a specific Bill of Rights for Northern Ireland while the Democratic Unionist Party (DUP) would prefer Northern Ireland to come within a British Bill of Rights. It was noted that the lack of political consensus to date does not augur well for an effective response to threats to the existing rights framework posed by Brexit, but that round-tables have been viewed as one way of addressing the lack of political consensus. A round-table was held in Belfast in 2014 at which a wide diversity of views was aired, and funding has been sought for further round-tables.

A Bill of Rights for Northern Ireland

Paragraph 4, under the heading 'Rights, Safeguards and Equality of Opportunity' in the Good Friday Agreement, tasked the Northern Ireland Human Rights Commission (NIHRC) with consulting and advising the UK government 'on the scope for defining, in Westminster legislation,

rights supplementary to those in the European Convention on Human Rights, to reflect the particular circumstances of Northern Ireland, drawing as appropriate on international instruments and experience. These additional rights to reflect the principles of mutual respect for the identity and ethos of both communities and parity of esteem, and - taken together with the ECHR - to constitute a Bill of Rights for Northern Ireland. Among the issues for consideration by the Commission will be:

<http://www.nihrc.org/uploads/publications/bill-of-rights-for-northern-ireland-advice-to-secretary-state-2008.pdf>.

⁸ Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* Vol.1 December 2012 paragraph 75 and Conclusion 12.4. Text available at:

<http://webarchive.nationalarchives.gov.uk/20130128112038/http://www.justice.gov.uk/downloads/about/cbr/uk-bill-rights-vol-1.pdf>.

- the formulation of a general obligation on government and public bodies fully to respect, on the basis of equality of treatment, the identity and ethos of both communities in Northern Ireland; and
- a clear formulation of the rights not to be discriminated against and to equality of opportunity in both the public and private sectors.

4. The ‘forgotten’ all-Ireland charter of rights

It was noted at the Workshop that the Good Friday Agreement also envisages discussion of a form of All-Ireland ‘charter’ of rights. However, this aspect of the Agreement has been largely ignored since 1998 and represents further ‘unfinished business’ from the Agreement.

An all-Ireland Charter of Rights

Paragraph 10, under the heading ‘Rights, Safeguards and Equality of Opportunity’ in the Good Friday Agreement, states:

It is envisaged that there would be a joint committee of representatives of the two Human Rights Commissions, North and South, as a forum for consideration of human rights issues in the island of Ireland. The joint committee will consider, among other matters, the possibility of establishing a charter, open to signature by all democratic political parties, reflecting and endorsing agreed measures for the protection of the fundamental rights of everyone living in the island of Ireland.

5. The potential and pitfalls of a British Bill of Rights

Regarding a separate British Bill of Rights (BBR), a key point of discussion was whether moving towards such a Bill of Rights represents a step toward a more mature constitutionalism in the UK, or whether the process would be ‘captured’ by political interests eager to achieve a narrowing of rights protection.

That question had been central to the adoption of different positions by members of the Bill of Rights Commission, which reported in 2012. The majority of the Commission were of the view that a strong argument existed in favour of adopting a UK Bill of Rights, primarily on the basis that it would enhance public 'ownership' of human rights protection and could provide a stronger bulwark against abuse of State power than the Human Rights Act. A minority of the Commission's members, Philippe Sands and Helena Kennedy QC, had voiced the concern that a British Bill of Rights could set a path towards withdrawal of the UK from the ECHR system of rights protection and a diminution in rights protection across the UK.⁹

At the Edinburgh workshop on 27 October, some participants pointed to the possibility that a British Bill of Rights could mitigate or resolve the reduction in rights protection occasioned by Brexit. 'Lost' EU Charter rights, for instance, could be included in a BBR. More widely, one participant emphasised that we should not fear the discussion of a BBR but embrace it, in a similar manner to other states, such as Norway, that have recently adopted a bill of rights into their constitutional system.¹⁰ In this connection, it was noted that a draft BBR has already been produced by Martin Howe QC, one of the members of the Commission on a British Bill of Rights.¹¹

Other participants voiced the strong concern that, given the likely drafters of a BBR within the prevailing political climate, a BBR would inevitably bring in a reduction in rights protection (and it was recognised, in this connection, that all human rights commissions in the UK are firmly opposed to any such regression in rights protection).

⁹ For a summary of the majority and minority positions within the Commission, see Commission on a Bill of Rights, *A UK Bill of Rights? The Choice Before Us* (n8) Ch.12 175-178.

¹⁰ As part of the bicentennial anniversary of the Constitution of Norway in May 2014, and drawing on the ECHR and other major international human rights treaties, a catalogue of civil, political, economic, social, and cultural rights, as well as rights of the child, were added to the Constitution in a new 'Part E'. See e.g. A Bårdsen, Judge of the Supreme Court of Norway, 'Interpreting the Norwegian Bill of Rights' Annual Seminar on Comparative Constitutionalism 21-22 November 2016 Faculty of Law, University of Oslo <https://www.domstol.no/globalassets/upload/hret/artikler-og-foredrag/interpreting-the-bill-of-rights-21112016.pdf>.

¹¹ This draft BBR has not been published. For further details, see O Bowcott, 'Lawyer urges release of Tories' proposals for British bill of rights' *The Guardian* 11 May 2015 <https://www.theguardian.com/law/2015/may/11/tory-british-bill-of-rights-martin-howe-human-rights-act>.

A number of participants also voiced doubt regarding the potential to develop the kind of mature, deliberative constitutional systems built up in other European states (e.g. Germany) in the UK around a BBR. One key obstacle to such a development is that, unlike the single constitutional identity in states such as Germany (notwithstanding the federal nature of that state), the UK now has multiple constitutional identities; particularly the separate constitutional identities that have developed in Scotland and Northern Ireland since the devolution settlements and the Good Friday Agreement in 1998.

Part II

Consent

Introduction

Regarding Brexit, the process of withdrawal from the EU is governed by Article 50 of the Treaty on European Union (TEU) and can be presented as five separate stages:

- UK decision to withdraw in accordance with the UK's constitutional requirements;
- Notifying the European Council of the UK's intention to withdraw;
- Negotiation between the UK and the EU on the terms of the withdrawal;
- If the negotiation is successful, exit takes place;
- If the negotiation is not successful the UK will automatically leave the EU without a negotiated deal after two years (unless an extension is unanimously agreed by the 27 remaining Member States).

Consent was a central issue discussed at the workshop, which affects the withdrawal process across five inter-related dimensions: (i) the involvement of the UK Parliament in the Brexit negotiations; (ii) the consent of the Northern Ireland Assembly to Brexit; (iii) the consent of the Scottish Parliament; (iv) the need for unanimous agreement by all EU Member States should the UK wish to reverse the triggering of Article 50; and (v) the possible need to obtain the consent of the Republic of Ireland to Brexit as a fundamental alteration of the Good Friday Agreement.

Spanning domestic law, EU law, and international law, as well as politics, all five dimensions speak to the same central message: the UK government does not have a free hand in its approach to Brexit negotiations, and will have to engage with a variety of internal and external actors in the Brexit process in order to ensure that the process complies with the UK's existing legal and constitutional obligations, and more widely, to ensure that fundamental questions regarding the legitimacy of the process are adequately addressed.

1. Existing litigation concerning consent

The first two consent issues listed above, concerning the UK Parliament and the Northern Ireland Assembly, are the subject of two different litigation processes in London and Belfast.

Both cases concern the initial stage of the process of withdrawing from the EU, set out in Article 50 TEU.

Article 50 TEU: Key provisions

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.
2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union. That agreement shall be negotiated in accordance with Article 218(3) of the Treaty on the Functioning of the European Union. It shall be concluded on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.
3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

1.1 The London litigation: R (Miller) v Secretary of State for Exiting the European Union

The litigation in London concerns whether the exercise of the Royal Prerogative by the UK government to trigger the process of leaving the EU under Article 50 of the Treaty on European Union (TEU) is acceptable under UK constitutional law, or whether there is a requirement that Parliament must be involved on the basis that the Prerogative has been displaced by the European Communities Act 1972.

Update: The High Court judgment of 3 November 2016

The workshop took place before the High Court judgment of 3 November 2016 in *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin). In this judgment, the High Court held that the triggering of Article 50 TEU does require the approval of Parliament. The UK government has appealed the decision to the UK Supreme Court, with a hearing date of 5-8 December 2016.

1.2 The Belfast litigation

The Belfast litigation goes significantly beyond the London litigation. Its starting point is similar, in that it argues that the Royal Prerogative has been displaced by the Northern Ireland Act 1998, read in conjunction with the Good Friday Agreement of 1998. It is argued that the UK government must seek and obtain a legislative consent motion (LCM) from the Northern Ireland Assembly (as established, the litigants argue, by convention). In the alternative, it is argued that any exercise of the Royal Prerogative is constrained by various provisions of Northern Ireland legislation and public law, including the Northern Ireland Act.

In the Belfast litigation, the arguments are both legal and political. The main legal argument is that if the UK government has the power to exercise the Royal Prerogative in the context of Brexit, this has the potential to affect the legislative capacity of the Northern Ireland Assembly under the Northern Ireland Act. It is argued that the consent principle is the central principle in the Good Friday Agreement: reflected legally through the legislative consent motion (LCM) required to permit the UK Parliament to enact legislation on a devolved issue over which the Northern Ireland Assembly has regular legislative authority. The Belfast litigation therefore concerns whether the courts are in a position to declare the existence of a convention for the use of an LCM, and whether such convention should be implemented (it is therefore a declaratory order, not a mandatory order).

As regards rights protection, the Belfast litigation argues that Brexit would affect the central commitment in the Good Friday Agreement (GFA) to ensuring rights protection in Northern Ireland equivalent to the ECHR. This is because this equivalence is achieved in Northern Ireland through overlapping protection provided by both the Human Rights Act 1998 and through EU law itself. The overall political argument relates to the considerable concern in Northern Ireland that the GFA, which underpins the enduringly fragile peace settlement, will be weakened by Brexit and may be subjected to such strains that it will fall apart, with obvious implications (especially for human rights) if the conflict is renewed.

One concrete example is the issue of equality legislation, which is a clear 'flash point' for discord between the main parties in the consociational government: Brexit would mean that more responsibility for equality legislation, where the EU is currently a dominant actor, would be transferred to the Northern Ireland Assembly, thereby increasing the likelihood of friction between the main governing parties and threatening the peace settlement itself.

Update: The High Court of Northern Ireland judgment of 28 October 2016

One set of litigants in Belfast received an adverse ruling from the High Court of Justice in Northern Ireland on 28 October, one day after the workshop. In *Re McCord's Application* [2016] NIQB 85 the High Court rejected the applicants' arguments for a reading of the Good Friday Agreement holding that any change to the constitutional arrangements for the government of Northern Ireland and, in particular, UK withdrawal from the EU, can only be effected with the consent of the people of Northern Ireland.

The text of the judgment is available at: <http://bit.ly/2fN1ZXF>.

2. Consent of the Scottish Parliament

Third, the question of issuance of an LCM was also discussed in the context of the Scottish Parliament, under the Scotland Act 2016 (which places the Sewel convention concerning consent on a statutory footing). Two possible scenarios were noted:

- (i) Westminster would proceed without seeking an LCM; or
- (ii) Westminster, having sought and failed to obtain an LCM, would nevertheless proceed with triggering Article 50, possibly triggering a constitutional crisis (which might be defined as contestation that the constitution itself cannot resolve.) It was also noted that a similar provision is found in the Wales Act.

The Sewel convention

The Sewel convention first appeared as an aspect of the Scotland Act 1998, which established the devolution settlement for Scotland. The Memorandum of Understanding (the main intergovernmental agreement) set out the convention as follows in para.14:

The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will proceed in accordance with the convention that the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking such agreement as may be required for this purpose on an approach from the UK Government.

The Scotland Act 2016 has amended section 28 of the Scotland Act 1998 by adding the following statement: “But 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.”

3. The EU law dimension to consent

The fourth point regarding consent, which has been raised in the Belfast litigation, is that the triggering and operation of Article 50 TEU in all its stages is a matter of EU law. It is a treaty-based provision that the UK is authorised to initialise, but governed by EU law. To date, the assumption in both the London and Belfast litigation has been that the triggering of Article 50 cannot be reversed, save through the unanimous agreement of all EU Member States. If it were to be case that Article 50 cannot be rescinded, this implies that much of the implications of triggering Article 50 (e.g. a 'hard Brexit') would be out of the hands of the UK Parliament, not in terms of domestic law, but as matter of EU law. This would be a question for the ECJ and is not being ruled out right now.

4. Consent of the Republic of Ireland under the Good Friday Agreement

A fifth, and much more tentative, potential consent issue concerning Brexit arises in the context of the relationship between the UK and the Republic of Ireland under the Good Friday Agreement, which is an international treaty registered with the United Nations (by the government of the Republic of Ireland).

4.1 *Consent of the government and people of the Republic of Ireland*

In the Republic of Ireland some have raised the possibility that Brexit may be so fundamental to the Good Friday Agreement that it requires renegotiation of the Agreement; essentially requiring the UK government to consult the government of Ireland before pulling out of the EU.¹² Under the Irish Supreme Court's *Crotty* judgment,¹³ a popular referendum could possibly also be needed on the basis that Brexit would alter the EU treaties (although this is far from clear).

¹² See e.g. 'Explainer: Why are politicians talking about a 'border poll' now?' *The Journal* 20 July 2016 <http://www.thejournal.ie/border-poll-2-2885034-Jul2016/>.

¹³ *Crotty v An Taoiseach* [1987] IESC 4. The full text is available at: <http://www.supremecourt.ie/SupremeCourt/sclibrary3.nsf/pagecurrent/9FA0AA8E8D261FC48025765C0042F6B3?opendocument&l=en>.

The Supreme Court of Ireland's *Crotty* judgment

In its landmark 1987 judgment in *Crotty v An Taoiseach*, concerning ratification of the Single European Act, the Supreme Court laid down a general principle that a constitutional amendment is necessary whenever the government wishes to ratify any EU treaty which would go beyond the “essential scope or objectives” of the existing EU treaties. A popular referendum is required for any amendment of the Constitution.

4.2 *The Good Friday Agreement and EU law*

The Good Friday Agreement may also bring EU law into play in a manner that has not yet been fully considered: Given that the UK will remain a member of the EU until exit is achieved, a question would arise – which could come before the ECJ – regarding the obligations on the UK to uphold an agreement with another Member State which affects EU law. This point was not pursued in detail at the Workshop.

Part III

Constitutional Complexity

Introduction

As the above discussion suggests, complexity transpired as the *leitmotif* of the workshop. The existing legal and institutional framework for the protection of human rights in the UK is a multi-layered system that cuts across both devolved and reserved competences in the context of devolution, and which is based on, and affected by, international treaties which the United Kingdom has ratified, particularly the ECHR and the EU Charter of Fundamental Rights, and the Good Friday Agreement.

More broadly, discussion of both Brexit and the issue of a British Bill of Rights reveal the sheer complexity of the British legal order after decades of incremental changes and constitutional fudges. Evidently, all European legal orders have become more complex due to the increasing influence of Europe-wide constitutional structures, but the UK legal order is exceptionally complex.

1. Constitutional ignorance

Despite this complexity – or perhaps because of it – it was repeatedly recognised, or implied, that a form of ‘constitutional illiteracy, naïveté, or arrogance’ is a key factor driving current policy developments in the political arena, which present constitutional questions in excessively simple form, and which tend to present simple solutions to perceived institutional problems.

To date, the UK government’s approach to Brexit in particular appears to have elided the constitutional complexity involved; to seek to cut through the multiple Gordian knots rather than attempt to untangle them. Similarly, scrapping of the Human Rights Act and introduction of a BBR has been presented as a rather simple process. For instance, the Conservative Party Manifesto of 2015 states:

This will break the formal link between British courts and the European Court of Human Rights, and make our own Supreme Court the ultimate arbiter of human rights matters in the UK.¹⁴

2. Misconceptions underlying plans to ‘free’ the UK from the European Court of Human Rights through a BBR

A number of general observations were made at the Workshop concerning the fundamental misconceptions underlying the Conservative government’s stance toward repeal of the Human Rights Act (HRA) and its replacement by a British Bill of Rights (BBR). Even if the HRA is repealed the UK would still remain under an obligation to comply with the judgments of the European Court of Human Rights judgments in cases where the UK is a respondent party. A future BBR would not remove this international obligation. In fact, it might lead to an increase in the number of successful applications to the Strasbourg Court, diminish the possibility for meaningful dialogue between the Strasbourg Court and the British courts, and thereby amplify rather than lessen the impact of Strasbourg case-law.

It was noted that the idea that a BBR would provide a ‘shield’ against future interventions by the Strasbourg Court is mistaken. The idea appears to be based on the observation that in other states with a domestic bill of rights, such as Germany, Italy, and Russia, the courts have set down a doctrine maintaining that domestic constitutional law is superior to the ECHR as a matter of domestic law. However, as a matter of international law, such doctrines do not alter the international legal obligations of these states in any way. Under Article 26 of the Vienna Convention on the Law of Treaties a party to a treaty cannot use national law to justify its failure to perform a treaty, and this rule applies to the ECHR as an international treaty.

Ultimately, there are just two ways to avoid any legal obligations arising from judgments of the Strasbourg Court:

- a) amending the ECHR (which appears politically implausible); or
- b) leaving the jurisdiction of the Strasbourg Court by denouncing the ECHR.

¹⁴ *The Conservative Party Manifesto 2015* (n1) 60.

3. Additional government proposals

Two specific policy proposals discussed at the Workshop further evince this ‘constitutional illiteracy’ and misconceptions concerning the nature of the UK’s human rights obligations under international treaties:

- a) reductions in the protection against extradition and deportation; and
- b) restriction of the extraterritorial application of UK human rights law.

3.1 Government proposals regarding extradition and deportation

Regarding the extradition of criminals, or more broadly the deportation of foreign nationals who have committed crimes in the UK, it was emphasised that we have no clear understanding of how a British Bill of Rights (BBR) would be drafted in this area: the main information here is restricted to pronouncements in the Conservative Party Manifesto and previous documents produced by the Conservative Party setting out concerns regarding the Human Rights Act.

These documents do not contain legal analysis, and do not acknowledge that it would be very hard to depart from the existing rights framework in any significant way while remaining compliant with the ECHR. For instance, the stated Conservative policy that any foreign national who takes the life of another cannot rely on the right to private and family life under Article 8 ECHR to challenge deportation amounts to a blanket ban. Given that blanket bans are viewed with considerable suspicion by the European Court of Human Rights, such a provision could bring a BBR into conflict with the Court in Strasbourg.

3.2 Government proposals to restrict extraterritorial application of ECHR to military activities

Regarding restriction of the extraterritorial application of UK human rights law to military activities, the Prime Minister in her speech at the Conservative Party Conference in

Birmingham on 5 October 2016, stated the view that soldiers should not be under shadow of the ECHR in carrying out their duties:

[W]e will never again – in any future conflict – let those activist, left-wing human rights lawyers harangue and harass the bravest of the brave – the men and women of Britain’s Armed Forces.¹⁵

This crystallised into a two-part proposal: that the British Bill of Rights would be deemed not to have extraterritorial application, and that the UK would derogate from the ECHR in every case of military activity abroad. While this would affect the ability of UK military members to claim breaches of human rights while active outside the State, the focus in the discussion was on the ability of civilians to challenge breaches of the ECHR by the UK military services acting outside of the UK.

The central message arising from the Workshop was that it would not be possible to simply remove human rights from the equation. Even if the HRA were repealed and a cast-iron clause could be provided in a BBR expressly restricting application of the BBR to the State territory, there would be two key possible pathways to human rights re-entering the equation:

- first, through judicial creativity interpreting any relevant statutory provisions; and
- second, in the common case where the UK is acting multilaterally under a UN Security Council Resolution, the stock phrase that states carry out military action “in accordance with international obligations” could create a pathway to rights protection arguments, including the ECHR as a (now unincorporated) treaty.

It was emphasised, in this connection, that even with the repeal of the HRA the UK would remain subject to the ECHR. A derogation of the nature proposed would still have to comply with the rules concerning derogation, with the fact that there are various non-derogable

¹⁵ ‘Theresa May’s keynote speech at Tory conference in full’ *The Independent* 5 October 2016 <http://www.independent.co.uk/news/uk/politics/theresa-may-speech-tory-conference-2016-in-full-transcript-a7346171.html>.

rights in the ECHR, and with the fact that even rights that can be derogated from can only be limited to the extent “strictly required” by the exigencies of the situation.

The likely outcome thus would simply be that individuals might make applications for relief to the Strasbourg Court, either following unsuccessful domestic litigation or, depending on the ‘non-extraterritoriality clause’, directly to Strasbourg as there might not be any reasonable prospect of success in domestic remedies. Were such an application to be made, the Court’s jurisprudence on the extraterritorial application of the Convention suggests that the UK would probably be found to be liable under the ECHR as a matter of international law. In other words, this purported solution would not in fact address the problem as it is framed in current Conservative Party policy.

Should this play out as predicted, the whole scenario would likely exacerbate the sovereigntist tensions regarding parliamentary sovereignty, and put Westminster on a further collision course with the Strasbourg Court. In such a situation, the only possible outcomes would be:

- a) amendment of the British Bill of Rights to allow it to have extraterritorial effect;
- b) refusal by the UK to comply with the Court’s judgments (under a domestic ‘rule of law’ argument); or
- c) withdrawal from the ECHR system itself by denouncing the Convention.

4. Implications of Brexit and these specific government proposals

Should the above be the case, we would not only have a ‘Great Repeal Bill’ in the Brexit context, but a ‘Great Retreat’ from international human rights protection, with a shift from the Brighton Declaration agenda focused on a form of UK dialogue with the Strasbourg Court to an agenda focused on freeing the UK from the Court.

Brexit, in this way, not only opens the door to withdrawal from the EU, but from the wider system of rights supervision centred on the ECHR.¹⁶ For some participants, this reflects the

¹⁶ See media reports from December 2016 that the Conservative Party will include ECHR withdrawal in its next election manifesto, <http://www.telegraph.co.uk/news/2016/12/28/theresa-may-fight-2020-election-plans-take-britain-european/>.

overall position of a government that is not only engaged in political calculations as to whether submission to external European human rights supervision is ‘worth it’ on balance, but a government that does not wish to deal with constraints of any nature on its power, which is provoking a real ‘rule of law’ crisis.

In this connection, it was noted that UK withdrawal from the ECHR system would be likely to lead to withdrawal from the Council of Europe, which would significantly undermine the UK’s reputation as a state that cares about human rights protection. The UK would be only the second country in Europe which is not a member of the Council of Europe; the other being Belarus with its very problematic human rights record. Withdrawal of the UK would also be the first time a long-established Western democracy has left a major international human rights regime.¹⁷ Such a move would place the UK in the company of Greece under military rule in December 1969, when it left the ECHR system and Council of Europe, or more recently, Venezuela under Hugo Chávez, which denounced the American Convention on Human Rights in 2012 in order to leave the jurisdiction of the Inter-American Court of Human Rights.

5. Other significant questions raised at the Workshop

Other questions raised at the workshop, which further underscore the constitutional complexity surrounding Brexit and a BBR included:

- How will the government’s Brexit proposals address the reality of acquired (EU) rights? (this could arise in, for instance, the significant damage caused by Brexit to commercial interests).
- Does the Westminster Parliament have the organisational capacity to effectively oversee the Brexit process? (it was noted, for instance, that it has a much smaller cohort of legal advisors than government).

¹⁷ Of course it should be noted that withdrawal from the ECHR would not relieve the UK of its obligations resulting from other human rights treaties, such as the International Covenant on Civil and Political Rights or the United Nations Convention Against Torture.

- Would a British Bill of Rights necessarily be accompanied by repeal of the HRA? (the Republic of Ireland, which has both a constitutional bill of rights and a Human Rights Act, suggests that the two are not necessarily incompatible).
- How can we attempt to address the real problem of a 'democratic deficit' in the context of rights supervision, without resorting to simplistic solutions?
- If the people are to be viewed as key constitutional actors, how do we address significant problems concerning knowledge of, and widespread misperceptions of, human rights and the constitution more broadly?
- How do human rights defenders address, in particular, the sense of alienation felt by individuals toward human rights, and the problem that 'human rights' itself has become a problematic, even toxic, term?

Part IV

Community

Introduction

Finally, if consent relates to the need for Brexit negotiations in particular to incorporate the interests of Northern Ireland, and the other nations of the UK, 'community' as a term is used here to denote the wider implications of Brexit and a British Bill of Rights for the European community beyond the boundaries of the UK.

1. Brexit and the wider context of EU Member States

As regards Brexit, participants noted the broader European context that this is the first time Article 50 TEU will be (or might be) triggered. In the event that legal issues concerning Brexit comes before the ECJ for judgment, that Court will not address such issues solely insofar as they relate to the UK.

Rather, with the rise of populism and calls for 'exit' in states such as France and the Netherlands, the ECJ will likely take a contextual approach that addresses these risks. In other words, should issues of EU law come before the ECJ in the context of the Brexit process, the Court will not decide the issue solely on the basis of how EU law relates to the UK's legal and political order.

2. The wider implications of withdrawal from the ECHR on the UK's neighbours

As regards a British Bill of Rights, it was recognised at the workshop that although Brexit is very unlikely to lead to a collapse of the EU, there is a real risk that UK withdrawal from ECHR system could lead to the collapse of that system, by triggering a rush for the exit by other states, such as Russia and Azerbaijan, whose governments may welcome the excuse to remove the strongest tier of European supervision impeding policy formation and implementation.¹⁸ There is some evidence that existing UK backlash against the Court has

¹⁸ Currently all 47 member states of the Council of Europe are subject to the European Court of Human Rights: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco, Montenegro, Netherlands,

already encouraged these countries to take a more hostile attitude towards the European Court of Human Rights.¹⁹

Therefore, even in the positive scenario that a BBR provides rights protection equivalent to the ECHR, or even more extensive protection, if this is accompanied by UK withdrawal from the ECHR system it may have significant consequences for rights protection in other states (notwithstanding the fact that many states do not fully comply with Strasbourg Court judgments).

Participants noted that the purpose of the ECHR system is to provide a collective defence of rights, and that the current tendency to view the value of adherence to the ECHR in cold, transactional terms does not reflect its original purpose.

3. Conclusion

A number of preliminary conclusions could be drawn from the Workshop: the clear risk of a regression in rights reduction in the context of Brexit and a BBR; significant questions surrounding the search for a more democratically legitimate approach to rights protection; and the real wider threats posed by current developments: to the fragile peace in Northern Ireland; and to the rights protection (albeit limited) provided by the ECHR system in other European states.

The most fundamental conclusion from the workshop is that the current governmental approach to Brexit and a British Bill of Rights does not adequately appreciate, or address, the extraordinary complexity of human rights protection in the UK, which enmeshes protections across the international, EU, State, devolved, and bilateral planes. Until, and unless, policy formation begins to fully grapple with this complexity, serious rule of law and legitimacy questions will hang over the solutions presented by the Conservative government to the current constitutional entanglement.

Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, "The former Yugoslav Republic of Macedonia", Turkey, Ukraine, and United Kingdom..

¹⁹ P Leach and A Donald, 'Russia Defies Strasbourg: Is Contagion Spreading?' *EJIL Talk* 19 December 2015. Available at <http://www.ejiltalk.org/author/leachdonald/>.

Addendum 1

The Supreme Court's Decision in *Miller*

On 24 January 2017 – after the drafting of this report – the Supreme Court handed down its decision in the joined appeal against the judgments of the English and Welsh High Court in *Miller* and of the Northern Irish High Court in *McCord*.²⁰ It upheld the judgment of the High Court by requiring that Parliament passes an Act authorising the Government to notify the UK’s intention to withdraw from the European Union under Article 50 TEU. It dismissed the appeal against the Northern Irish judgment – as well as similar arguments advanced by the Scottish Government before the Supreme Court – that the consent of the devolved legislatures was necessary as well.

As far as the operation of the Sewel Convention was concerned, the Supreme Court drew a dividing line between political conventions and questions of law. While it recognised that the former can play a fundamental role in the operation of the constitution, the fact remains that they are not law and their compliance with them cannot be the subject of judicial review. Judges are mere observers of conventions, but neither their parents nor their guardians. The fact that the Sewel Convention had been placed on statutory footing did not change this finding since – according to the Supreme Court – it was the purpose of its legislative recognition to entrench it as a convention only. The Supreme Court dismissed a further Northern Ireland-specific argument that the consent of the people of Northern Ireland was required to take Northern Ireland out of the EU based on Article 1 of the Northern Ireland Act 1998, which says that Northern Ireland shall not cease to be a part of the UK without the consent of the people.

The Supreme Court’s judgment brought to the fore some of the constitutional complexities highlighted in this paper. Importantly, it did not resolve the issues of consent identified. Instead these questions were left unresolved – and perhaps even unresolvable – with the Supreme Court holding that neither it nor any other court was competent to decide on the operation of the Sewel Convention. This confines the question of consent to the sphere of politics without anybody of making an authoritative decision in this regard.

The editors

3 February 2017

²⁰ *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant)* [2017] UKSC 5.

Addendum 2

UK Withdrawal from the ECHR

It is worth noting that, since the workshop was held in October 2016, reports emerged in December 2016 that the UK Prime Minister, Theresa May, plans to make withdrawal from the European Convention on Human Rights (ECHR) a central campaign pledge for the General Election of 2020.²¹ The Prime Minister had previously dropped calls for such withdrawal as part of her campaign for leadership of the Conservative Party in Summer 2016, but had been a vocal opponent of the Convention for some time. For instance, in April 2016, when she was still Home Secretary, she stated:

The [Convention] can bind the hands of parliament, adds nothing to our prosperity, makes us less secure by preventing the deportation of dangerous foreign nationals, and does nothing to change the attitudes of governments like Russia's when it comes to human rights.²²

The editors

3 February 2017

²¹ See W Worley, 'Theresa May 'will campaign to leave the European Convention on Human Rights in 2020 election'' *The Independent* 30 December 2016 www.independent.co.uk/news/uk/politics/theresa-may-campaign-leave-european-convention-on-human-rights-2020-general-election-brexit-a7499951.html.

²² Home Secretary's speech on the UK, EU and our place in the world (Archived), 25 April 2016 <https://www.gov.uk/government/speeches/home-secretarys-speech-on-the-uk-eu-and-our-place-in-the-world>.