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

**The adjudication and
enforcement of rights
after Brexit**

Report of a roundtable held on 3 July 2018
at the University of Edinburgh
(compiled by Laura Bremner)



THE UNIVERSITY of EDINBURGH
Edinburgh Law School



ABOUT BREN

The Brexit and Rights Engagement Network (BREN) comprises a group of early career legal researchers exploring the areas of rights, devolution and Brexit. The network is supported by a British Academy Rising Star Engagement Award and led by Dr Tobias Lock of Edinburgh Law School. It aims to provide younger scholars with an opportunity to share the findings of their research with an external audience of stakeholders. Further roundtables will take place in Belfast and London.

BREN consists of the following members:

Dr Katie Boyle, Associate Professor, University of Stirling

Dr Alan Greene, Senior Lecturer, University of Birmingham

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

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

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

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

Dr Kasey McCall-Smith, Lecturer, University of Edinburgh

Nina Miller, PhD researcher, University of Glasgow

Niall O'Connor, Lecturer, University of Essex

Dr Huw Pritchard, Lecturer, Cardiff University

Dr Anni Poes, Lecturer, University of Glasgow

Dr Kirsteen Shields, Lecturer, University of Edinburgh

Dr Adrienne Yong, Lecturer, City, University of London

Dr Rebecca Zahn, Senior Lecturer, University of Strathclyde

INTRODUCTION

This report records the inaugural meeting and roundtable of the Brexit and Rights Engagement Network (BREN) on Tuesday 3rd July 2018 at Edinburgh Law School. Attendees at the roundtable included network members, fellow academics, representatives of the Scottish Parliament, the Scottish Government, the Scottish Human Rights Commission, the Equality and Human Rights Commission, the legal professions, and NGOs.

Two years after the EU Referendum and only a few days after the European Union (Withdrawal) Act 2018 (the 2018 Act) receiving Royal Assent, the Brexit and Rights Engagement Network met for the first time. The purpose of the roundtable was to ignite debate amongst legal scholars and policy makers, and others working in a rights environment relating to interpretation, adjudication and enforcement of rights in the lead up to, and following “Brexit Day,” (March 29, 2019).¹

By way of introduction, Dr Lock proposed that some rights will probably be lost following the UK’s departure from the EU, but the extent of the changes are still unclear. There is also a lack of clarity or agreement on the nature of the relationship between the UK and the EU, but the European Union (Withdrawal) Act 2018 does go some way to answering some of our enquiries.

It was noted that no changes were made to the Bill, despite the House of Lords’ vote to retain the Charter of Fundamental Rights after Brexit.² A little insight was given to the general flavour of the Act, and negotiations so far. Looking more closely at the legislation, in addition to the specific repeal of the European Communities Act 1972,³ Schedule 1 para 3 of the Act, states 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 (whether or not as an essential part of the decision in the case).” Therefore EU law which was enacted / ruled before exit day will remain part of UK law, and therefore UK citizens still have these rights, however, this rule is a little inane, given that paragraph 3 of the same Schedule states 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”; and “No court or tribunal or other public authority may, on or after exit day—(a)disapply or quash any enactment or other rule of law, or (b)quash any conduct or otherwise decide that it is unlawful, because it is incompatible with any of the general principles of EU law.” Even though this does not apply to any proceedings commenced within three years of exit day,⁴ in the longer term there will be no mechanism for enforcing these retained EU rights.

¹ Financial Times, “Brexit timeline: key dates in UK’s divorce with EU” 22 June 2018.

<https://www.ft.com/content/64e7f218-4ad4-11e7-919a-1e14ce4af89b> Last accessed 6/07/18

² BBC, “EU Withdrawal Bill suffers third Lords defeat on human rights charter <https://www.bbc.co.uk/news/uk-politics-43872520> Last accessed 08/07/18.

³ European Union (Withdrawal) Act 2018, s1.

⁴ See European Union Withdrawal Act, Schedule 8, para 39 (5).

BREN: The adjudication and enforcement of rights after Brexit

Compiled by Laura Bremner

This report is split into two sections, Part A will consider the adjudication of EU rights, but also their enforcement under the 2018 Act and the Withdrawal Agreement, whilst ‘options for the future’ will be broached in Part B.

Most of the contributions to this roundtable have been published as blog posts on the Europa Institute’s Europeanfutures blog. They can be found here: <http://www.europeanfutures.ed.ac.uk/topics/bren>

Furthermore, there are audio recordings of the roundtable available, which can be found here:

Part 1: <https://edin.ac/2NJ7Dbi>

Part 2: <https://edin.ac/2LNzvdO>

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

(1) “Missing parts of the future adjudication of EU Citizens’ rights in the UK”

Dr Adrienne Yong, City, University of London

Focusing specifically on deportation and the right to remain in the current climate within the UK, Yong considered the ‘missing parts’ of future adjudication of rights post-Brexit with the background of existing EU and UK law.

What’s the law?

Firstly, the stark contrast was drawn between European position on deportation, which tends to be protective and only permits expulsion on grounds of public policy or security⁵ compared with the position in the UK, where there is a presumption of automatic deportation if the foreigner is convicted of an offence.⁶ The level of protection increases the longer a resident has been living in a member state. An expulsion decision can only be taken against those who have been living in the Member State for more than 10 years or for minors in the event of “imperative grounds of public policy.”⁷ However these grounds are open to interpretation by the Member State.⁸ The case of *Tsakouridis*⁹ highlights that a Member State cannot expel a resident purely based on a prior conviction. Going even further, the case of *PI*¹⁰, a long-term Italian resident was convicted for sexual assault and rape of a minor within his family and was not deported because the matter was not of interest in terms of public security.

What’s the problem?

The speaker firstly addressed changing attitudes towards EU free movement. She highlighted that societal sentiments were helping to drive an increasingly harsh deportation policy, citing changing attitudes towards free movement since the Maastricht Treaty. She also cited an amplification in xenophobia dominating the Brexit vote, as well as a widespread increase in right-wing populism. She highlights that the number of EU citizens being deported from the UK has sharply increased from 3435 in June 2015, to 5301 to June 2017.¹¹

⁵ Directive 2004/38, Article 28.

⁶ UK Borders Act 2007, s32(1).

⁷ Directive 2004/38, Article 28 (3).

⁸ Directive 2004/38, Article 28 (3).

⁹ C-145/09 *Land of Baden-Württemberg v Panagiotis Tsakouridis* [2010] ECR-I 11979.

¹⁰ C-348/09 *P.I. v Oberbürgermeisterin der Stadt Remscheid* (judg 22 May 2012).

¹¹ How many people are detained or returned? <https://www.gov.uk/government/publications/immigration-statistics-april-to-june-2017/how-many-people-are-detained-or-returned> Accessed 10/07/18.

Secondly, Yong discussed the issue of EU rough sleepers being deported. As set out above, the EU position on the right to remain is that deportation is generally only on serious or imperative grounds of public policy or public security. However, the UK Home Office had taken the decision that homelessness could be shoe-horned into this policy concern and that the presence of homeless EU citizens living in the UK was contrary to public policy. This was challenged in the case of *Gureckis and Others*¹² where it was held that the Home Office policy on ejecting rough sleeping EU residents was contrary to EU law, and furthermore “[a]ccommodation, or the lack thereof, in the host Member State had no connection to freedom of movement rights and requirements, and was not a factor taken into account in the Treaties or Directive.”¹³

Finally, Yong referenced to Theresa May’s interview with the Telegraph in 2012, in which she vowed to create a ‘hostile environment for illegal immigrants’¹⁴ and admitted that this has been further evidenced by the current increase in deportation of EU migrants as well as Windrush scandal. Further, Operation Vaken was discussed – and Yong highlighted that only 11 people left the UK voluntarily. Unsurprisingly, given the government’s stance on immigration and increased number of deportations, the UK was investigated by the EU over their deportation of EU citizens.¹⁵

What’s missing?

There is no real protection from expulsion for EU citizens, and this suggests that there may well be no guarantees for EU citizens in the final Brexit deal. This is because the UK stance and law on immigration is more punitive. She outlined three main issues still to be tackled. Firstly; there is no clear position on protection for *Zambrano* carers,¹⁶ individuals who care for EU citizens, but are not themselves EU citizens, second; the reality that under British law there is little protection from expulsion for EU citizens resident in the UK, and these people would otherwise be protected under EU law, and thirdly; that the Home Office have taken a hard line in their Settled Status guidance,¹⁷ and effectively, no foreign criminals can settle in the UK.

Yong concluded by outlining that it is crucial to ensure adequate protection of citizens’ rights post-Brexit but that much is left unclear until we have a clearer understanding of the relationship between the UK and the EU.

¹² [2017] EWHC 3298 (Admin).

¹³ [2017] EWHC 3298 (Admin), paragraph 98 per Mrs Justice Lang.

¹⁴ Theresa May interview: ‘We’re going to give illegal migrants a really hostile reception’
<https://www.telegraph.co.uk/news/uknews/immigration/9291483/Theresa-May-interview-Were-going-to-give-illegal-migrants-a-really-hostile-reception.html> Accessed 11/07/18.

¹⁵ Brussels investigates UK over deported EU citizens
<https://www.theguardian.com/politics/2017/sep/30/brussels-uk-deported-eu-citizens> Accessed 11/07/18.

¹⁶ C-34/09 *Zambrano* [2011] ECR-I 01177.

¹⁷ Home Office, ‘EU Settlement Scheme: Statement of Intent’ (21 June 2018)
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/718237/EU_Settlement_Scheme_SOI_June_2018.pdf> accessed 1/8/18.

(2) “Brexit Britain’s ECJ problem: Enforcement of rights guarantees in the Withdrawal Agreement”

Dr Davor Jancic, Queen Mary University of London

A key question within the Brexit negotiations is the extent of influence the European Court of Justice (ECJ) will have after the Brexit, both during the potential transition period and afterwards. Will the ECJ have an influence, and if so, how much of an influence will this be?

UK opposition to the ECJ

It appears that the ECJ’s *unpredictable authority* is concerning to the UK in two ways. It is ‘unpredictable’ in the sense that the government cannot be certain regarding how case law will be interpreted or construed by the ECJ. ‘Authority’ means that the court has jurisdiction over issues which can affect UK citizens in a very significant ways. The 2018 EU (Withdrawal) Act attempts to limit the ECJ’s influence on post-Brexit Britain. However, the Union itself seeks to retain the authority of the court through the Withdrawal Agreement. Both of these documents will be considered.

EU insistence on ECJ jurisdiction – the Withdrawal Agreement.

On 26 May 2018, at the FIDE Congress in Lisbon, Michel Barnier, the EU’s Chief Negotiator for the Brexit process, explained why ECJ jurisdiction over the process is key. In Jancic’s words, “the withdrawal agreement is not your usual treaty, and the ECJ is not your usual international court.” The Court insists on retaining its jurisdiction in order to preserve the autonomy of EU law as any rivalling interpretation of EU law could challenge the authority of the ECJ.

The ECJ in the draft Withdrawal Agreement – five considerations

1. *Entrenchment of existing EU law*: Retained European Union law will have same legal effect as it has now within EU and its member states. This preserves the effect of EU law; however, the UK parliament are clearly at pains to change this.
2. *Creeping effect*: There is significant potential for EU law to creep into UK law without any input or scrutiny from the British parliament. For example, if certain categories of retained EU law are amended, then such amended law will have effect without the UK having had an opportunity to critique or comment on its content.
3. *ECJ retains full jurisdiction over the transition period - and beyond*: If the facts of a case occurred before the end of the transition period, opinions may still be sought from the ECJ. Further, in the event of an infringement of EU law by the UK before or during the transition period, the UK might be subjected to financial sanctions after Brexit has taken place.

4. *Due regard for ECJ judgements:* Under the draft withdrawal agreement, British courts would have to interpret EU case law in light of ECJ judgements by giving ‘due regard’ to it. If this is the case, it means that British courts may still use ECJ case law to interpret UK law. Further, during the eight years following the transition period, British judges would still be able to ask the ECJ for assistance by requesting preliminary rulings, especially concerning residence rights.¹⁸
5. *Disputes between EU and UK:* It appears that any dispute could be submitted to the ECJ, and if the decision of the court is not respected, the repercussions could be a financial sanction or even the suspension of the withdrawal agreement. Further, in such a situation, even the suspension of the withdrawal agreement would be decided upon by the court. Finally, during the transition period, if ECJ decisions are not implemented, the EU could suspend the UK’s access to the single market.

The UK response

The current approach in the UK is clearly at odds with the tone and wording of the Withdrawal Agreement drawn up by the Union. One clear example of this is that according to the 2018 EU Withdrawal Act, British courts and tribunals cannot refer cases to the ECJ on or after Brexit day.¹⁹ This rule is at odds with the EU’s Draft Withdrawal Bill, which permits referrals for 8 years after Brexit.²⁰ Further, the 2018 Act does not retain EU directives, as these are already implemented in UK law. At present, the UK shares the 8th place with Germany on the list of highest rates of the non-implementation of directives. The UK also very frequently asks the ECJ for preliminary rulings.

Conclusion

The closer the UK is to the EU, the higher the authority of the ECJ. Even if there is no withdrawal agreement, the ECJ will still affect lawmaking in third countries, which the UK will be after Brexit, in terms of setting regulatory standards. It is evident that much is still uncertain, and that it is necessary to distinguish the UK’s future relationship with the European Union. There is also a lack of symmetry between rights and remedies due to the UK’s retention of EU law and ECJ case law, but refusal to allow access to the ECJ.

¹⁸ European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Article 151

¹⁹ EU (Withdrawal Act) 2018, s6(1)(b)

²⁰ European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Article 151

(3) “Enforceability of employment rights after Brexit”

Dr Rebecca Zahn, University of Strathclyde

Introduction

Zahn began by highlighting that there are various EU derived employment rights, such as annual leave, however the EU has limited competence in the employment sphere. There is no coherent body of employment law which comes from the EU. Legislation has instead created a ‘patchwork of rights’ including individual rights, health and safety, some collective rights and equality. It follows that there are limited UK legislative capabilities in these areas.

In general, EU law tends to favour widening protections for workers. Furthermore, case law from the European Court of Justice in employment cases can be contrasted with the approach taken in tribunals and courts in the UK, where a narrow interpretation of employment rights is taken. It should be noted that ‘Employment’ is a reserved matter under the Scotland Act 1998²¹ so there are significant limits on Scotland’s competency in this area.

Employment law and Brexit

In January 2017, at her Lancaster House speech, Brexit’s impact on employment law was addressed by Theresa May. The Prime Minister promised that the Government would not only “protect the rights of workers’ set out in European legislation, [they would] build on them.”²² This pledge has since been strongly contradicted by ministers, such as Michael Gove, with indications that the Working Time Regulations could be amended or scrapped. However, the overall picture is that May has not guaranteed any of our current EU derived rights, nor their enforceability post-Brexit, to date.

Current enforcement of EU law in UK

EU derived laws take primacy over UK law and limit UK legislative competency. UK courts also must give direct effect to rights which are sufficiently clear. UK courts must interpret domestic law in accordance with EU law. Infringement proceedings can be brought against the UK government for non-compliance with European law. Further, the Court of Justice can be asked to decide on questions of non-compliance with EU law through preliminary references. Finally, Francovich damages may also be available where a member state has failed to implement an EU directive into domestic law and has caused loss to a citizen of that member state.

²¹ Scotland Act 1998, Schedule 5, Part II, Head H.

²² The government’s negotiating objectives for exiting the EU: PM speech.

<https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech> Accessed 24/07/18.

Working Time Regulations 1998

The Working Time Regulations implemented the 1993 Directive in the United Kingdom. Prior to this, no statute covered annual leave, rest breaks etc. and all agreement of this nature were derived from individual employment contracts and collective agreements. The UK refused to implement the Directive initially, and challenged it, then the Court of Justice ruled that it had been properly adopted and so would have to be implemented in the UK. If the UK had not implemented, the Commission could have brought a case against the UK. Individuals have relied on the directive, if their employer is the state or a subdivision of the state, due to the principle of ‘direct effect.’ If the directive had been wrongly implemented, there would also be the possibility of claiming Francovich damages. The ECJ has continued to update the law in this area, for example, with the rulings that annual leave planned when an individual is sick must be given back, on-call time counts as working time, and the right to annual leave as a ‘Day 1’ right, rather than an accrued one. These cases have had an impact on UK working life, however the United Kingdom is, at present, unable to overrule or amend the law arising from these cases due to the supremacy of European Law.

Prospective enforcement of EU law in UK

In the event of ‘hard-Brexit’ where the UK leaves the single market and custom union, the enforcement mechanisms available would be rather different. Under the EU (Withdrawal) Act 2018, UK citizens would no longer have access to the ECJ. The Commission will no longer be able to bring infringement proceedings against the UK where there is no implementation of a directive or the UK does not perform its obligations under a Directive.²³ The option of referring a case to the Court of Justice for a preliminary reference will clearly no longer exist, and this will have significant repercussions for employment law protections in the UK, given the impact that such references have had in terms of widening employment rights protection. For example, the upper cap on compensation in cases involving discrimination had been removed, it is likely that this decision may well be reversed, introducing an upper cap once again.

Furthermore, given that pre-Brexit ECJ case law would have the same status as decisions of the Supreme Court, it could be overturned by the Supreme Court or by an Act of Parliament, which does not provide reassurance in terms of rights protection. Considering also remedies here, Schedule 1 of the 2018 Act removes Francovich damages as a remedy.²⁴

The supremacy of EU law is retained in respect of retained EU law.²⁵ Further, under the EU Withdrawal Act, any EU derived rights which were available prior to Brexit, will be “enforced, allowed and followed accordingly”.²⁶ The mirror image of this is that EU law enacted after Brexit day or if the direct effect of that law had not been established by Brexit day, that law will not have supremacy over UK law. This will

²³ European Union (Withdrawal) Act 2018, s6.

²⁴ European Union (Withdrawal) Act 2018, s6.

²⁵ S5(1) and (2) 2018 Act.

²⁶ S4(1) 2018 Act.

include amendments of retained EU law, and as such, could mean that any amendments to the Written Statements Directive²⁷ would not have effect in UK law.

In the UK, most individuals work for private employers, therefore relying on indirect effect, which may still apply after Brexit. However, retained EU case law is not binding. Although British courts and tribunals may well use ECJ jurisprudence as persuasive authority, equally so, our home-grown judicial interpretation may well be far narrower than the European stance on a given issue.

Conclusion

To conclude, it appears then that enforcement of EU derived rights may be entirely dependent on the national legal system within the UK. Ultimately, this could mean that we closely follow the decisions of the European Court of Justice, or that we take a narrower approach. This will depend on two variables, namely i) judicial interpretation, which could continue with the status quo, or close attention being paid to ECJ case law, or something altogether different, and ii) which party is in government. In short, the 'protective umbrella' of EU enforcement mechanisms has been removed.

Is there any alternative to these sparse enforcement mechanisms? The short answer is no, because there is no equivalent international body which provides the same hard law provisions and enforcement mechanisms. By contrast, the International Labour Organisation and the European Social Charter are rather toothless when compared with the European Union and its accompanying enforcement mechanisms. In terms of the Social Charter, it should be minded that their decisions are not binding, and that the UK has repeatedly been criticised for not implementing the provisions in the Charter. Finally, can the Scottish government do anything different? There is a larger public sector in Scotland, therefore more opportunity for individuals to utilise direct effect but otherwise unlikely.

²⁷ Directive 91/533/EEC.

(4) Discussion

Article 151

Firstly, as proposed under Article 151 of the draft Withdrawal Agreement, British courts may refer cases regarding rights of the residence to the Court of Justice for eight years after Brexit. The first two speakers, Yong and Jancic, were questioned on their views of the eight-year limitation period, in terms of protecting citizens' rights (addressed to Yong) but also in terms of the autonomy of EU law (addressed to Jancic).

Yong perceived the time scale to be arbitrary and stated that she had no idea regarding the thinking behind this. The implementation of EU rights could well become a grey area. Jancic agreed that the limit does appear arbitrary but proffered that the prolonged period of ECJ jurisdiction is for new citizens to acquire settled status. He added that he was not quite sure why this specific length of time had been selected.

The 'level playing field'

Next, the concept of the level playing field regarding employment rights was discussed. Zahn highlighted that this would depend on what the relationship with the EU would look like, for example, if the agreement was that the UK remained in the European Economic Area, it would be likely that the UK would need to retain all existing and also, new European employment laws. Even if the eventual agreement is merely an EU-UK trade deal, it is unlikely that the UK will be allowed to dilute employment rights. However, even if that is the case, the supremacy of EU law will fall away, and domestic courts will be unable to ask for references from the ECJ. Given that the UK using its opt-out as much as possible, for example with the Working Time Regulations, it is unknown whether the EU would spur into action if the UK allowed British workers to work 80-hour weeks.

Lock highlighted that having looked at the Commission's take on the security relationship between the EU and UK, it appeared that if the UK was to have a security relationship with EU, the UK would still have to comply with and stay signed up to the ECHR.²⁸

Later in the discussion, the group moved back to what it really means to have a 'level playing field.' If we consider existing EU trade agreements with EU countries, the more recent ones have a labour clause inserted, which is even weaker than the ones which the US inserts. The majority of agreements include weak protections when considering the status quo, incorporating International Labour Organisation standards such as a 'no child labour.' Conceivably, the EU could well require that labour standards do not fall below the level existing on Brexit day. The UK has been very resistant to labour inspections and imposing

²⁸ EU could cancel Brexit security deal if UK quits European Court of Human Rights, The Telegraph https://www.telegraph.co.uk/politics/2018/06/18/eu-could-cancel-brexit-security-deal-uk-quits-european-court/?WT.mc_id=tmg_share_tw Accessed 21/07/18.

EU employment law, such as the Working Time Directive, which again suggests that the UK will wish to step away from this.

Deportation

The European Parliament's view on the Home Office stance on deportation was also queried. The Parliament generally takes a strong view on citizens' rights and will have a vote on the Withdrawal Agreement. The Parliament have not expressed their distain but appear to disagree with it. The UK High Court has been vocal in its contempt for the Home Office policy. Lock added that the Withdrawal Agreement might well iron this out.

It was suggested that if member states wished for the European Parliament to vote in a particular way in relation to the Withdrawal Agreement vote, then this is what would happen, as the members of parliament are effectively whipped by the member states they represent.

The issue of access to justice in deportation cases was later discussed, and it was suggested that where rough sleepers were being deported, there was little time for the EU citizen to hire a lawyer, or even consider the possibility of an injunction. The Home Office has not produced a time line on the new immigration rules.

UK citizens living in EU member states

Finally, it was considered whether UK citizens living in EU member state are protected. There is a missing article in the draft Withdrawal Agreement which is still to be decided to cover this category of individuals. UK citizens are in a stronger position as they will still be within the EU system, for example if the individual commits a crime. It is unknown whether the Withdrawal Agreement would have direct effect in the other member states. It was assumed that it would take primacy over domestic law. The status of 'returners' will be protected under the new Home Office Settled Status scheme.

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

Dr Lock welcomed the attendees back to the second session. He outlined that some of this discussion might be more speculative, but that it is important to examine regardless. He also noted that it is likely that discussion of a British Bill of Rights, which has been put on the back-burner, will return to the forefront in due course and therefore is ripe for discussion.

(1) “Content of rights review after Brexit: substance or process?”

Mr Darren Harvey, University of Edinburgh

The mere fact that human rights enshrined in legislation or treaties alone is unlikely to be enough to robustly protect such rights. There are different political mechanisms for the protection and upholding of human rights such as parliamentary input into legislation, select committees and ombudsmen. However, it is generally understood and accepted that there is a significant role of national courts in human rights protection, and that having human rights enshrined in the treaties is unlikely to be enough. It follows that the way in which the judiciary interpret rights has consequences for how rights are protected. The substantive content of rights is interpreted by the judiciary and can impact on rights protection. For example, in terms of freedom of thought, conscience and religion. When a wide interpretation of the right is taken, a wide range of beliefs and people are protected, but where judicial interpretation of this right is narrowed down to focus only on the older world religions, quite a lot of people and their beliefs will fall outside the realm of protection. Therefore, the scope of the right has been narrowed. The way which these rights are defined by courts have a direct effect on how they are protected.

Presently, the two main sources of human rights protections which we have in the UK are the European Convention of Human Rights and the European Charter for Fundamental Rights, both of which are interpreted by supranational courts. Those interpretations are either taken into account or are binding on UK courts. For example, does prohibition against torture include deporting people to places where they might be deported? A question which has been interpreted by courts as to substantive content of those rights. Typically, both courts have taken a wide interpretation of these rights, and these judgements have been taken into account in British courts. However, the UK is now leaving the European Union, so the first major consequence of Brexit is that the British parliament have recently taken the decision not to implement the Charter, despite the House of Lords’ objections²⁹ and a division in the House of Commons

²⁹ The Guardian, *More Brexit defeats for No 10 in Lords amid reports of cabinet split*, available at <https://www.theguardian.com/politics/2018/apr/23/theresa-may-suffers-third-brexit-defeat-in-lords>

on the same issue³⁰. It might well be the case that certain rights within the Charter will require to be brought into domestic law. One way in which substantive rights could be lost is by not having them, by virtue of the removal of the Charter, but another consequence of this eschewing of the Charter is that these rights may still exist but could be interpreted in a narrower way than the European Court of Justice has traditionally interpreted. We could incorporate all the rights in the Charter into domestic legislation, but parliament could tell courts how to interpret the rights and narrow them down in future. Through this process, rights may not be translated perfectly, or might reduce their application, or substantive content.

The second point is the wider political climate of the Convention. Many people in politics and Brexit have taken Brexit as an opportunity to bring up the ECHR again and perceive it be worth examining relationship between courts, legislature and executive. Many people are discussing the proposed British Bill of rights, whilst more and more academics are publishing commentary on this topic.

The British Bill of Rights envisioned in Conservative party policy³¹ would boil down to the repeal of the Human Rights Act, breaking the link between UK and Strasbourg and instead, British courts will interpret rights as parliament tells them. The proponents of the Bill want to clarify rights to reflect proper balance between rights and responsibilities. This will ensure that they are applied with the original intentions of the Convention, not how they have been interpreted over the last half of a century. This could be seen to be changing the substantive content of rights. These proponents also want to limit the use of human rights to the most serious cases, criminal law, property law. There will be a threshold below which human rights are not engaged at all.

This is a reassertion of the parliament and executive, what the government seems to feel are creeping judicial power. Harvey referred to the 'Judicial Power Project', a right-wing group who find judicial interpretation and discretion worrying.³² Many of their academics and members give evidence to parliament. They have taken Brexit as an opportunity to revisit the relationship. Some desired changes include the parliament legislating to reverse judgements, derogating from ECHR under Art 15, restricting judicial review and legislating to restore greater ministerial functions. Attitude that current human rights systems needs to be revisited in way where courts are no longer in driving seat, but parliament defines when rights are engaged.

A separate issue on substance is when rights are engaged, they can be counterbalanced against general concerns of the community, such as proportionality. This ability to counterbalance is apparently unacceptable to many, as it allows for too much judicial discretion. Again, the substantive content of the

³⁰ Hansard, *European Union (Withdrawal) Bill 2018 Division 183*, available at [https://hansard.parliament.uk/Commons/2018-06-13/division/1E74572F-9227-40C9-BF4C-589A3F09571C/EuropeanUnion\(Withdrawal\)Bill?outputType=Names](https://hansard.parliament.uk/Commons/2018-06-13/division/1E74572F-9227-40C9-BF4C-589A3F09571C/EuropeanUnion(Withdrawal)Bill?outputType=Names)

³¹ The Conservative Party, *Protecting human rights in the UK: The Conservatives' proposals for changing Britain's human rights law*, https://www.conservatives.com/~media/files/.../human_rights.pdf

³² See here: <http://judicialpowerproject.org.uk/>

BREN: The adjudication and enforcement of rights after Brexit

Compiled by Laura Bremner

right, could then be reduced, if rights are worthy of less protection and are only hauled up when “manifestly unreasonable” only.

To conclude, the substance part of ‘definition’ and ‘adjudication of infringements’ have been focused upon in this presentation and in the speaker’s opinion, such developments over the last few years are somewhat alarming.

(2) “Human rights reform: adjudication and enforcement of economic social and cultural rights?”

Dr Katie Boyle, University of Stirling

Introduction

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

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

Case study: Northern Ireland

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

Economic, social and cultural rights

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

These rights can be enforced through the common law. For example, Lady Hale introduced ‘best interest’ of the child, referring to the International Convention for the Rights of the Child in *ZH Tanzania*³³. In the *UNISON*³⁴ case on tribunal fees, the Court outlined what it is to have a social minimum, in respect of allowing access to justice to employment tribunals through removing tribunal fees once more. Economic, social and cultural rights are also adjudicated upon in the realm of equality law. The Equality Act 2010 has facilitated this. If businesses do not comply with the public-sector equality duty, the court can quash their decision.³⁵ However, it should be minded that this is not a substantive right, merely a procedural one.

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

What could happen in future?

Prior to the EU referendum, we could envisage increased adjudication., such as membership of International Covenant on Economic, Social and Cultural Rights (ICESCR). Giving better access to remedies could also have been guaranteed through a renewed constitutional arrangement, with clearer rules for courts on what expected in terms of what is protected and how to be enforced.

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

Given that we are facing significant changes under Brexit, and also the Bill of Rights, there is much more major constitutional upheaval at play. The slight differences could result in much bigger changes.

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

³³ *ZH (Tanzania) (FC) v Secretary of State for the Home Department* [2011] UKSC 4

³⁴ *UNISON v Lord Chancellor* [2017] UKSC 51

³⁵ Equality Act 2010, s149

Therefore, the devolved jurisdictions are already more progressive than the UK-wide treatment of human rights.

Furthermore, in Northern Ireland, human rights are foundational. This is as a result of the Peace Agreement and international treaty which the UK signed up to. We can also consider the Supreme Court case relating to abortion in Northern Ireland.³⁶ This highlights a disjointed approach to healthcare across the jurisdictions. Human rights are left as 'bargaining tools' in politics. Scotland appears to be committed to protecting human rights and Wales has already taken steps in that regard. However, it appears that the UK, when considered as a whole, is entering a space of regression.

Conclusion

It is important to consider what arrangements might exist in the future and how adjudication might operate. It is necessary to think about the substance of rights and remedies facilitated. If no remedies are available, then there is no enforcement. Secondly, when the EU Continuity Bill goes before the court, there is a clause which seeks to retain the remedy to disapply Acts of the Scottish Parliament which are incompatible with retained EU law, including the Charter. This means that Holyrood are attempting to restrict its own competence in future. Ultimately, what will this mean for people who live in different areas of the UK and have access to different rights depending on where they live.

³⁶ *Trinity Term* [2018] UKSC 27

(3) “Brexit and the interpretation of domestic rights.”

Niall O’Connor, University of Essex

What do we mean by domestic rights?

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

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

Interpretation of domestic rights

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

There are different approaches to interpretation. British courts tend to take a *literal* approach. This means that they base their interpretation on the actual wording of text. Conversely, EU courts take a purposive approach, considering the wording firstly, but also looking at the purpose and objectives of rights, interpreting in accordance with these objectives. This purposive approach is not unsurprising, given that there are 24 official languages of the EU, therefore it can be difficult for a given word to mean the same in all Member States and in all languages. As a rule, EU law is often drafted in very general terms meaning that such terms can be left to Member states to interpret and apply as they see fit. The European Court of Justice confirmed their approach in *van Gend & Loos*³⁷, when interpreting treaties, it is necessary to consider the “spirit, general scheme and the wording” of the treaty. The Court also takes the same approach when interpreting EU legislation.

Working Time Directive

O’Connor moved on to focus on employment law, due to its susceptibility to changes post-Brexit, taking the Working Time Directive as an example. The 4th recital to the Directive reads: The improvement of workers' safety, hygiene and health at work is an objective which should not be subordinated to purely

³⁷ ECLI:EU:C:1963:1.

economic considerations.”³⁸ The ECJ has repeatedly held that the Directive must be applied in accordance with this objective, but also refers to human rights objectives. In *ANGED v FASGA*³⁹, the Court referred to Art 31(2) of the Charter of Fundamental Rights⁴⁰, confirming its worker friendly approach in relation to the Directive.

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

Outside of this, national courts are entirely free to take their own approach to interpretation, and as already highlighted, British courts take a literal approach, and generally only depart from the wording if it is unclear. The judiciary have relied upon contract law tests, applying these in the employment law context, even if such tests are not outlined in legislation. This can sometimes undermine the employee protective purpose of the legislation. When we consider unfair dismissal, courts grant significant leeway to employers in deciding whether a dismissal was reasonable, using the ‘band of reasonable responses’ test.⁴¹ This could be argued to ignore the employee-friendly purpose of the legislation.

Judicial interpretation post-Brexit

The question therefore arises, will UK courts apply a non-purposive approach to EU derived domestic law. The answer is of course – maybe? The EU (Withdrawal) Act sets out that domestic law (which derived originally from the EU) is now domestic law.⁴² Seemingly, British courts may now be free to use literal approach in their application to the Working Time Regulations, for example.

Furthermore, there is no need to apply domestic law, having regard to EU law, nor is there a requirement or ability to refer a question to the Court of Justice – domestic courts become the sole interpreter of rights in the UK.⁴³ However, national courts should interpret retained EU law in accordance with existing ECJ

³⁸ Working Time Directive (2003/88/EC).

³⁹ [2012] IRLR 779.

⁴⁰ “Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.” Charter of Fundamental Rights of the European Union, Article 31(2).

⁴¹ See *Iceland Frozen Foods Ltd v Jones* [1982] ICR 17, per Browne-Wilkinson J at 24F-25A.

⁴² European Union (Withdrawal) Act 2018, s2.

⁴³ European Union (Withdrawal) Act 2018, s6(1).

case law, and this includes the purposive approach. The court can also have regard to future EU law if it wishes to do so.⁴⁴

However, domestic courts can depart from existing ECJ case law if it considers it ‘right to do so.’⁴⁵ Finally, the 2018 Act also removes the Charter as a tool of interpretation.⁴⁶

Conclusion

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

⁴⁴ European Union (Withdrawal) Act 2018, s6(1).

⁴⁵ *Ibid*, s6(5)

⁴⁶ *Ibid*, s6(6).

(4) Discussion

Separation of powers

Firstly, the issue of the separation of powers, namely the judiciary, legislature and executive, was raised. It was suggested that the contempt towards the jurisdiction of the ECJ is perhaps also adding to this concern that the British courts have too much power in terms of their judicial discretion.

It was suggested that if rights are defined more restrictively in legislation, then this shifts more power to the executive. Some people do argue that the judiciary in the UK have too much power. A British Bill of Human Rights could well create this shift, and there was a consensus that such a shift could well be deeply problematic.

Boyle added that she hoped such changes would happen on an informed and evidence-led basis but that such restricting or defining of rights from the executive could have an adverse impact on enjoyment of rights. It was also suggested that the position is different with the Welsh Assembly and Scottish Parliament because they are unicameral, therefore there are more mechanisms to ensure accountability.

General comments on Brexit and the Charter

In general, it was suggested that the executive in the UK appear to be making a big push for power and are using Brexit as a stepping stone. It was highlighted that this is a rather worrying trend. It was suggested that the Labour MPs abstaining from voting on amendments to the Withdrawal Bill was also concerning.⁴⁷ The Withdrawal Act was also cited as the ‘embodiment of a power grab’ by one attendee.

Again, the Charter and its role was considered, however, the discussion moved onto the concern that it may not really make sense in the UK, if we are no longer members of the EU. The Charter and EU law in general is irrelevant if we can remove or alter it, as seen through the supremacy of the EU falling away.

The British Bill of Rights

It was suggested that if a British Bill of Rights was drawn up, with those rights being drafted in quite general terms, this could still allow for judicial interpretation of terms. However, if domestic legislation tells judges exactly what to do, they will have no real discretion and will simply have to apply the rights in the way which the statute tells them to do. For example, if the judiciary are told that the right to private life covers only particular situations, then this would take away a lot of discretion from the judiciary.

It was queried whether there were proposals for the UK to leave the ECHR. Theresa May previously had suggested the UK would no longer be part of the Convention at all, however the position is still vague at

⁴⁷ The Guardian, EU withdrawal bill: Labour rebels abstain or vote with government
<https://www.theguardian.com/politics/2017/sep/12/eu-withdrawal-bill-labour-rebels-abstain-or-vote-with-government> Accessed 24/07/18.

present. The prospect of a British Bill of Rights was considered many years ago by academics, however the proposal was that such a Bill would mean a 'scraping back of rights.'

The parliamentary process involving the Withdrawal Act has been worrying. The constitutional impact of this has been seismic. In order to function as a democracy, the UK may need to create a written constitution. If the two pillars of democracy are removed, you are essentially changing what it is to be a citizen within a state. Courts will be reluctant to engage beyond what the parliament tells them to. The change in the separation of powers might need to be written down.

It was reiterated that security considerations are just too important and given that this is a critical point within the Withdrawal Agreement, could prevent the UK from leaving the ECHR. It was also highlighted that it might be easier to discuss human rights and the ECHR in Scotland, rather than in London, where it is rather difficult to discuss such issues.

Moving back to consider this in the context of Northern Ireland, the Peace Agreement is dependent on retaining the ECHR. This left the question open as to whether it would be necessary to enforce a different human rights regime for England, compared to the other countries within the UK.

It was also reiterated that there is a difference between procedural and substantive duties in the human rights context. There is a tendency for the European Court of Human Rights to remove substantive obligations with procedural obligations, such as with right to life, there is a procedural obligation to protect and if someone is killed, and an investigation is carried out, this discharges the responsibility under the Convention.

Hypothetically, it was considered that the way to reduce rights as a government would be to bring in more procedural obligations, then it makes it harder to claim for breaches of rights. There would also be less opportunity for judicial review. It was also highlighted that it would be difficult to create a written constitution.

Generally, it was also suggested that the changes in opinion regarding the European Union have been bubbling away since the 1980s, considering for example industrial restructuring, and this discontent may have been suspended until the economic crisis.