Report

Brexit: The Immediate Legal Consequences

By Richard Gordon QC and Rowena Moffatt

THE CONSTITUTION SOCIETY

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First published in Great Britain in 2016 by
The Constitution Society
Top Floor, 61 Petty France
London SW1H 9EU
www.consoc.org.uk
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ISBN: 978-0-9928904-9-0

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Introduction

This paper is divided into two parts. Part 1 considers the main legal and constitutional consequences of a vote to leave the European Union ('EU'). The emphasis here is on the immediate challenges that will have to be addressed although some wider constitutional effects on the UK are also outlined. Part 2 focuses on the specific area of citizenship rights following a hypothetical Brexit; this being a major area that the negotiations to end this country's membership of the EU would have to take into account.

Both Parts are thematically related in that they seek to explain particular effects of Brexit that can, even in the short term, neither be avoided nor deferred.[1] They can also be subjected to close legal analysis. Other questions such as, for example, the economic or migratory effects of a vote for Brexit are more political, open-ended and therefore less susceptible to clear analysis (whether economic or legal). Moreover, it is arguable that an understanding of some of the legal issues posed by Brexit is related to the attainment of other objectives. For example, the process of negotiation under Article 50 of the Treaty on the European Union ('TEU') contains (assuming that this provision is invoked) a number of unresolved legal issues that could affect

1 Thus the paper does not examine campaign issues that do not present early challenges after a hypothetical vote for Brexit. An example of this is the enforceability or otherwise of the Prime Minister's pre-referendum agreements.

the political assessment of how best to move forward after a vote to leave the EU.[2]

It is emphasised that the authors of this paper are neutral on the referendum question, as recommended by the Electoral Commission *'Should the United Kingdom remain a member of the European Union or leave the European Union?'* The analysis presented is essentially legal. Political calculations may, sometimes, be made on the footing of legal analysis and legal analysis may at least inform how votes are cast in the forthcoming referendum. But this paper offers no suggestions or recommendations as to whether or how such calculations should be made or how such votes should be cast.

2 Each of the legal issues examined in Part 1 has the potential to inform political calculations. Whether it will or should do so is outside the scope of this paper.

Executive Summary

1. Three areas are addressed in Part 1. They are: (i) the operation of Article 50 TEU; (ii) the complexities involved in unravelling EU law from domestic law following Brexit; and (iii) wider challenges to the Union arising in respect of the different interests of the devolved governments and legislatures.

2. In practice the forthcoming referendum outcome will bind the government. In theory it is advisory but in reality its result will be decisive for what happens next.

3. Having regard to the referendum question recommended by the Electoral Commission and the binding nature of that result, there would be no alternative but to engage in the Article 50 TEU negotiating process in the event of Brexit.

4. The scope of Article 50 TEU is not certain. There is, on any view, an asymmetry in the negotiating process with the UK not being entitled to participate in the decision-making process of the remaining 27 Member States. The requirement for all Member States to ratify 'mixed agreements' and the potential for one Member State to block an extension of time for negotiating beyond 2 years from notice of intention to withdraw makes it a stringent process.

5. However, there is no obvious means of avoiding the stringency of Article 50. Even if revocation of a notice of

intention to withdraw from the EU could be implied into Article 50 (and this is by no means certain) in constitutional terms the result of the referendum would not be compatible with such revocation.

6. The end of the time period in Article 50 brings the EU Treaties to an end. However, the process of unravelling EU law from domestic law following Brexit would be a complicated process. Repeal of the European Communities Act 1972 in itself would be insufficient to surmount the legal difficulties. An earlier attempt at repeal in the form of a Private Member's Bill failed to grapple with the complexity of the different bases on which EU law is incorporated into domestic law.

7. In particular, it seems unlikely that all EU law would be sought to be repealed. Much of it would be retained. In that event constitutional difficulties might arise. It would be questionable whether a single Henry VIII clause allowing primary and secondary legislation to be amended or repealed by statutory instrument would be constitutionally acceptable given the wide areas that EU law cuts across and the limited Parliamentary scrutiny that subordinate legislation allows.

8. There would also, following Brexit, be some difficulty in identifying the continuing status of EU law. Questions would be likely to arise and have to be legislated for or else decided by the courts as to the precedent value of European court case law and its status in areas where a particular area of EU law was sought to be preserved in a domestic context.

9. Linked issues of law arise in respect of the devolved governments and legislatures. The devolution Acts are phrased differently but each of them appear to contain EU law that has been devolved. That being so, the Sewel Convention (depending on the scope of its application) may be engaged. That Convention has been included in clause 2 of the Scotland Bill which amends s. 28 of the Scotland Act. The Sewel Convention requires the consent of the devolved legislature as a pre-condition of Westminster legislating on devolved matters.

10. Moreover, inclusion of the Sewel Convention in a statute raises, at least in theory, questions of justiciability of that Convention in the courts.

11. Wider legal issues may arise following Brexit and they could include (though not be limited to): (i) a claim that Brexit ought to be attended by constitutional safeguards in respect of a devolved legislature and government whose population had voted to remain in the EU; (ii) legal issues of disentanglement of EU law from the Belfast Agreement; (iii) issues around the possible creation of EU borders across the island of Ireland and/or about the constitutional position of the Republic of Ireland. Other issues, not referred to in this paper, could also arise in relation to areas linked to the EU such as Crown Dependencies and British Overseas Territories.

12. The theme of Part 1 is that questions of law are likely to inform politics after Brexit and vice versa.

13. Three questions related to the rights of EU citizenship are considered in Part 2. They are: (i) the content and nature

of EU citizenship rights; (ii) the impact of Brexit on those rights; and (iii) whether, in the event of Brexit, individuals could enforce the rights before national courts.

14. EU citizenship is a status that is parasitic on national citizenship but it confers rights different from and additional to those that derive from national citizenship. The right to free movement within the territory of the EU is the most significant in practice.

15. The EU citizenship right to free movement is incorporated into UK law by the European Communities Act 1972 and is transposed by domestic secondary legislation. The EU citizenship rights in the EU treaties have also been held to be directly effective. EU free movement rights do not adhere to the logic of domestic immigration law and EU citizen migrants are in a far stronger position vis-à-vis their host states than migrants from non-EU states. However, EU citizens are not assimilated to British citizens and remain subject to immigration control whilst territorially present in the United Kingdom.

16. The EU citizenship of British nationals would have no independent existence following Brexit but the same may not automatically be said of their EU citizenship rights. The legal position of the body of persons that are currently termed EU citizens who seek to rely on EU citizenship rights following Brexit will depend on: (i) the nature of the legal situation that replaces EU membership; and (ii) whether the individual in question is a British citizen in the EU or an EU citizen in the UK.

17. Whilst both the terms of Article 50 TEU and political expediency anticipate that some form of successor agreement to EU membership will be reached following Brexit, this is not guaranteed and, in any event, in the light of the extensive application of EU law in the UK legal order and the difficulties of disentangling the two envisaged in Part 1, no future agreement could be entirely comprehensive.

18. In the absence of an agreement, domestic immigration law would apply to EU citizens in the UK and British citizens in the EU. In the EU, this would mean the application of a combination of partially harmonised EU standards and the individual immigration laws of each of the remaining 27 member states. In the UK, this would mean domestic immigration law: a combination of legislation and executive discretion and policy. In both cases, at least in theory, Brexit could leave individuals without immigration status and, as such, liable to the coercive apparatus of immigration control including detention and expulsion.

19. In terms of remedies that may be available to individuals adversely affected by Brexit, there are two central distinctions to be drawn, namely those between: (i) EU citizens in the UK and UK citizens in the EU; and (ii) rights that have been 'vested' and those that have not. Insofar as rights are 'vested', there are likely to be legal remedies as a matter (at least) of the administrative law principles of non-retrospectivity, legal certainty and fairness as well as under human rights law. In respect of EU citizens in the UK, conceptually, it is difficult to argue that EU general principles and fundamental rights could continue to apply following Brexit since both the norms incorporating them domestically as well as any international obligations under the EU Treaties

would cease to exist. As such, the source of these principles would be domestic administrative law and/or the European Convention on Human Rights. However, UK citizens in the EU may still be able to rely on the EU general principles and EU fundamental rights insofar as their legal situation falls within the scope of EU third country immigration law. The extent of these legal principles in application to EU citizenship rights on Brexit would, however, require future litigation.

PART 1
A Vote for Brexit – Legal and Constitutional Challenges

Article 50 TEU

If the forthcoming referendum were to result in a vote to leave the EU a prior question of law arises which is whether or not the referendum result is legally binding on the government. As it happens, the European Union Referendum Act 2015 contains no provision as to its effect in law. This means that as a matter of constitutional theory the referendum verdict has no consequential legal effect. It is, like many other referendums, devoid of consequential legal effect. Its result is advisory rather than mandatory. So, the government could, in strict law, choose to ignore it.

This is to be contrasted with at least some statutes where the legal effect of a referendum has been stipulated in advance. Thus, for example, the legislation for the electoral system referendum in 2011 required the minister responsible to enact the result.[3] Nonetheless, given the constitutional significance of the issue at stake it is inconceivable that the government could choose not to be bound by the result any more than it could have done with respect to the Scottish independence referendum in 2014 or, indeed, with respect to the referendum on membership of

3 See Parliamentary Voting System and Constituencies Act 2011 s. 8.

the common market in 1975 neither of which were triggered by statutes that purported to bind the government in law.[4]

This paper proceeds, therefore, on the assumption that the result of the referendum would, if it resulted in a vote for Brexit, mandate a decision on the part of the government to leave the EU. Once that decision has been made the terms of Article 50 TEU becomes relevant.

Article 50 TEU provides as follows:

> '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

4 It is not impossible that public statements as to the effect of the referendum might lead to claims being brought in the courts for alleged breach of public law legitimate expectation if the referendum result were not followed (see: *R v. Department of Education and Employment, ex p. Begbie* [1999] EWCA Civ 2100). However, there would be formidable, if not insurmountable, problems in persuading a court to hear such claims in view of Article IX of the Bill of Rights (see, for example: *R (Wheeler) v. Prime Minister and Home Secretary* [2014] EWHC 3185 (Admin)).

> concerned, unanimously decides to extend this period. 4. For the purposes of paragraphs 2 and 3, the member of the European Council or of the Council representing the withdrawing Member State shall not participate in the discussions of the European Council or Council or in decisions concerning it. A qualified majority shall be defined in accordance with Article 238(3)(b) of the Treaty on the Functioning of the European Union. 5. If a State which has withdrawn from the Union asks to rejoin, its request shall be subject to the procedure referred to in Article 49.'

Several points of importance emerge from a careful reading of this provision.

First, although a decision to withdraw from the EU may be made in accordance with the constitutional requirements of the Member State concerned (Article 50.1) there is a requirement on the Member State wishing to withdraw to notify the European Council of its intention to withdraw (Article 50.2).

Secondly, receipt of the mandatory notice of intention to withdraw triggers an obligation on the Union to negotiate and conclude an agreement with the departing Member State setting out the arrangements for its withdrawal taking account of the framework for that Member State's future relationship with the EU (Article 50.2).

Thirdly, the negotiations that ensue must be undertaken by reference to the procedure set out in Article 218(3) of the Treaty on the Functioning of the European Union ('TFEU')[5] and be concluded on behalf of the Union by the Council acting by a

5 Article 218 TFEU provides, materially, that the Commission must submit recommendations to the Council which shall adopt a decision authorising the opening of negotiations and, depending on the subject of the agreement envisaged, nominating the Union negotiator or the head of the Union's negotiating team.

qualified majority[6] after obtaining the consent of the European Parliament (Article 50.2).

Fourthly, there is a time limit for the departing Member State for EU law to apply in its territory. This is expressed to be: (i) the date of entry into force of the withdrawal agreement, or (ii) two years from the notification of intention to withdraw if no withdrawal agreement has entered into force by that time or (iii) any later period provided that such extended period has been unanimously approved by the European Council[7] in agreement with the departing Member State (Article 50.3).

Fifthly, the departing Member State may not participate in the discussions of the European Council or in decisions concerning it (Article 50.4).

Finally, if a State which has withdrawn asks to rejoin the EU its request is subject to the procedure under Article 49 TEU for applications for membership of the EU (Article 50.5).

The structure of Article 50 suggests that a Member State may not seek to negotiate terms of withdrawal from the EU outside the ambit of Article 50. This is because Article 50 contains a comprehensive and self-contained scheme of withdrawal which places specific obligations on both the withdrawing Member State and the remaining (currently 27) Member States. Once a decision has been taken to withdraw from the EU the Member State concerned is required to take action under Article 50 (service of a notice of intention to withdraw) and corresponding obligations are then placed upon the other Member States by reference to a mandated and ostensibly stringent procedure.

6 As defined in Article 238(3)(b) TFEU.

7 The European Council comprises the heads of state or government of the Member States along with the Council's own president and the president of the Commission.

The stringency of the procedure mandated by Article 50 is apparent from the fact that the negotiations contain an essential asymmetry. The departing Member State may take no part in the decision-making process engaged in by the remaining Member States. Moreover, a single Member State may prevent time being extended for negotiations for withdrawal arrangements beyond the 2 year period. Given that the negotiations involved in a UK withdrawal from the EU are likely to be complicated and may well, therefore, be lengthy this creates a potentially serious disadvantage.[8]

Although majority voting could enable other Member States to carve out withdrawal arrangements within the 2 year period that cannot be blocked by a single Member State it is possible that at least some of these agreements would need the consent of all Member States because they constitute 'mixed agreements'. A mixed agreement in EU law is one the content of which extends beyond EU trade policy and which accordingly requires the consent of the EU institutions and the consent of all the Member States.

Once Article 50 is engaged it is far from clear that its effects can be avoided. In particular, there is no express provision within it for revoking a notice of intention to leave. Article 50 was

8 The only way in practice of avoiding Article 50 following a referendum vote for Brexit would appear to be not to serve an intention of notice to withdraw from the EU. Collateral negotiations might then be undertaken without the time (and other) constraints imposed by Article 50. The constitutional obstacle to this would be that such a course of action had not been authorised by the result of the referendum. The question recommended by the Electoral Commission ostensibly compels a decision to serve notice of intention of withdrawal under Article 50. The only mode of withdrawal, consistent with a vote for Brexit, would be simply to withdraw and to disclaim adherence to the Treaty provisions at all. This would certainly avoid Article 50 but at the price, it may be thought, of leaving so many crucial issues unresolved that it would be wholly impracticable.

inserted by the Treaty of Lisbon and its provisions have not been required to be tested.[9] It is possible that if the CJEU were invited to rule on the matter it would imply a right to revoke a notice of withdrawal prior to the time at which the Treaties cease to apply under Article 50.3. In that respect it should be noted that a Member State is only expressed to be subject to the procedure for re-application under Article 49 once it *'has withdrawn from the Union.'* Prior to that time the Member State concerned remains a Member State and so cannot invoke Article 49. It may, therefore, be that the CJEU would rule that Article 50 does not operate to compel a Member State to leave the EU merely because it has served a notice of intention to do so.[10]

But there is a counter-argument. As a matter of policy to allow a Member State to bypass the comprehensive regime for negotiating withdrawal by simply revoking notices of an intention to withdraw and thereby extending the potentially tight time limits in Article 50.3 might be held by the CJEU to subvert the purpose of Article 50 which is to lay down a clear and tightly constrained scheme for withdrawal.

However these arguments might otherwise be resolved by the CJEU, it must, in any case, be questionable in constitutional terms whether a referendum outcome mandating withdrawal could sanction revocation of a notice of an intention to withdraw that had been served. It is true that there is precedent for a second referendum on the same subject as reflected in the two Lisbon

9 Earlier withdrawals of Greenland and Algeria took place by Treaty amendment.

10 In his recent evidence to the House of Lords Select Committee on the European Union (8th March 2016) on their inquiry into '*The EU Exit Process*' Professor Derrick Wyatt QC advances precisely this reasoning in his answer to the Commitee's Q3. At the time of writing the transcript of the hearing was unrevised. The counter-argument was not, however, referred to by either Professor Derrick Wyatt or Sir David Edward KCMG, QC, PC, FRSE both of whom gave their oral evidence together.

referendums in Ireland in 2008 and 2009 on ratification of the Treaty of Lisbon which resulted in the electorate deciding to ratify on the second occasion when it had refused to do so on the first. But the difference between that precedent and a vote for Brexit is that the latter is a mandate for the positive act of withdrawal which would be inconsistent with revocation of a notice of intention to withdraw under Article 50.

Uncoupling domestic law from EU law

As explained earlier, the time constraints introduced by Article 50 focus (although they are necessarily also related to the time for completing negotiations with the remaining Member States) on the time at which EU law ceases to apply to a Member State. By Article 50.3 the Treaties after expiry of the time periods there set out *'shall cease to apply to the State in question.'*

It should be borne in mind that the fact that the Treaties have ceased to apply is most unlikely to have the result that all EU law is simply removed by the repeal of the European Communities Act 1972 ('ECA'), the statute that gives domestic effect to EU law in the UK.[11]

One of the most urgent challenges following a vote to leave the EU would be how to uncouple those parts of EU law that the government wishes to see removed from those parts that it wishes to retain ('the objective'). There are really two linked questions:

1. What statutory mechanism can or should be adopted to ensure the objective?

11 The analysis here focuses on the ECA. However, it should be borne in mind that drafting issues could arise in relation to certain provisions of the European Union Act 2011 most notably s. 18 which deals with the status of directly applicable and directly effective EU law (the so-called 'sovereignty clause' in s. 18).

2. How will the courts interpret the EU law that remains after Brexit?

In order to understand questions surrounding the uncoupling of domestic from EU law it is necessary to examine the different ways in which EU law has come into national law.

In very broad outline[12] EU law has operated directly in the United Kingdom in one of two ways; either through the EU doctrine of direct effect or through the EU doctrine of direct applicability. Both doctrines have enabled EU law to operate directly in the UK without the need for implementing legislation. Both take effect via the ECA s. 2(1).

ECA s. 2(1) provides thus:

> 'All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable EU right" and similar expressions shall be read as referring to one to which this sub-section applies.'

Put shortly, s. 2(1) means that provisions of EU law that are directly applicable or have direct effect, such as EU Regulations,

12 A detailed exposition of EU law and its relationship to domestic law is beyond the scope of this paper. The outline here is merely a vague outline and omits consideration of many important aspects even of the doctrines covered. Thus, for example, the doctrine of direct effect includes horizontal direct effect and vertical direct effect. All these are complexities that would need to be factored into a consideration of which elements of EU law were sought to be retained following Brexit and which to be repealed.

certain articles of the EU Treaties as defined[13] and (in the case of direct effect) certain directives that have not yet been transposed into national law are automatically *'without further enactment'* incorporated and binding in national law without the need for a further Act of Parliament.

ECA s. 2(4) further provides that:

> 'any enactment passed or to be passed […] shall be construed and have effect subject to the foregoing provisions of this section'

ECA s. 3(1) provides:

> 'For the purpose of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any EU instrument, shall be treated as a question of law (and, if not referred to the European Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court).'

Sections 2(4) and 3(1) thus give effect to the doctrine of the supremacy of EU law, as interpreted by the CJEU, over national law;[14] and where EU law is in doubt, requires UK courts to refer the question to the CJEU. As a consequence of the rule of construction in s. 2(4) all primary legislation enacted by Parliament after the entry into force of the ECA on 1 January 1973 is to be construed by the courts and take effect subject to

13 It should be noted that an EU Treaty as defined in ECA s. 1(2) extends to some international treaties. Thus, for example, the UN Convention on the Rights of Persons with Disabilities is to be regarded as an EU Treaty within the meaning of s. 1(2): see the European Communities (Definition of Treaties) (United Nations Convention on the Rights of Persons with Disabilities) Order 2009, Article 2.

14 Section 3(1) does so expressly and s. 2(4) does not by necessary implication because the expression *'the foregoing provisions of this section'* includes s. 2(1).

the requirements of EU law. This obliges the courts to disapply legislation which is inconsistent with EU law.

In addition, EU law may be required to be transposed into domestic law. This may be achieved through primary or secondary legislation. As to the latter, ECA s. 2(2) encompasses measures of EU law, most notably directives, that are neither directly applicable nor have direct effect and/or that are required for other reasons to be transposed into domestic law.[15] This provision makes it possible to give effect in national law to such measures by secondary, or delegated, legislation, such as (most notably) statutory instruments. Materially, such secondary legislation can amend an Act of Parliament (s. 2(4)) since the delegated legislative power includes the power to make such provision as might be made by Act of Parliament.[16]

Given these different 'routes' by which EU law becomes incorporated into domestic law there will, to say the least, be some complexity in devising legislative drafting that is adequate to enable proper scrutiny to be given to the myriad amendments and repeals that will be needed to retain the objective (i.e. to retain those parts of EU law that the government wishes to retain).

Ignoring for the moment the additional legislative drafting issues surrounding EU law in the devolved legislatures including the possible scope and application of the Sewel Convention (for which see below) it is apparent that simple repeal of the ECA, without more, would not achieve the objective. That is because a repeal of the ECA alone would have the following consequences:

15 The most obvious reason is that a provision of a directive with direct effect is still required to be transposed into domestic law.

16 This provision is a Henry VIII clause and, as explained below, has potential constitutional implications when it comes to amending or repealing EU legislation.

1. All directly applicable and directly effective provisions of EU law would automatically cease to apply once ECA s. 2(1) was repealed[17]; as outlined above their sole source of authority in domestic law derives from s. 2(1).[18]

2. Similarly, but for different reasons, all secondary legislation implementing EU law via ECA s. 2(2) would automatically cease to apply once ECA s. 2(2) was repealed; as outlined above their sole source of authority in domestic law derives from s. 2(2).

3. By contrast, primary legislation transposing EU law into domestic law would remain unaffected by the simple repeal of the ECA.

How will the objective be best secured having regard to the different entry points of EU law into national law?

In the case of primary legislation transposing EU law there would seem to be few problems in terms of a legislative solution. The implementing primary legislation can be left on the statute book and amended or repealed piecemeal. In that fashion there can be proper Parliamentary scrutiny of how EU law is amended or repealed after Brexit.

17 Importantly, however, repeal of the ECA prior to expiry of the time period stipulated in Article 50 TEU would not affect directly applicable and directly effective EU law as a matter of international obligation; that would cease once that time period had expired.

18 See also the Supreme Court's judgments in *Assange* [2012] UKSC 22, [2012] 2 AC 417 and *HS2* [2014] UKSC 3, [2014] 1 WLR 324. In *Assange,* the Supreme Court held that EU law that falls outwith the terms of the ECA are treated as matters of international, rather than EU, law in the UK legal order (at [201]–[218]).

More difficulty arises with directly applicable and directly effective EU law that has found its way into national law through ECA s. 2(1) and with the large amount of secondary legislation that has been introduced under s. 2(2). The problems are related albeit not identical.

In a private members' Bill:[19] the European Communities Act 1972 (Repeal) Bill that was introduced in 2013 but failed to complete its passage through Parliament, the solution attempted was as follows.

Clause 1 of the Bill provided that:

> 1. The European Communities Act 1972 is repealed.
>
> 2. Secondary legislation made under that Act shall continue in force unless it is subsequently amended or repealed, and any such amendments or repeals may be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

Clause 2 of the Bill provided that:

> 1. The Secretary of State may by order made by statutory instrument repeal any Act which is rendered obsolete by virtue of the repeal in section 1.
>
> 2. No order may be made under subsection (1) unless a draft of the order has been laid before and approved by a resolution of each House of Parliament.

This 'solution' ('generalised model') is problematic for a number of reasons. **First**, directly applicable and directly effective EU law is not addressed at all. **Secondly**, all the 'heavy lifting' of EU law post Brexit is proposed to be achieved by a Henry VIII clause

19 The Bill was introduced by Mr. Douglas Carswell MP.

thereby enabling both primary and secondary legislation relating to EU law to be amended or repealed by secondary legislation. The first of these reasons raises the spectre of unintended consequences; the second raises the constitutional issues engaged in using Henry VIII clauses to make potentially significant legislative changes.

Both directly applicable and directly effective EU law derive from the EU institutions and are not shaped by domestic legislation.[20] Yet it would not necessarily be desirable to abrogate all such law after a Brexit vote. To take but one example; much of our domestic competition law is statutorily expressed to be based on EU law. Section 60(1) of the Competition Act 1998 provides, materially, that:

> 'The purpose of this section is to ensure that so far as is possible … questions arising under this Part in relation to competition within the United Kingdom are dealt with in a manner which is consistent with the treatment of corresponding questions arising in Community law in relation to competition within the Community.'

Much of that EU law, in turn, consists of a series of EU regulations and directives. The EU regulations are directly applicable (see above) and at least some EU competition law is directly effective. Of course there is also much EU competition law that has also been implemented through secondary legislation.

Competition law thus affords an example of all the elements of the sources of EU law in UK law that would need to be addressed if there were a vote to leave the EU and that would in no way be resolved by a repeal of the ECA.

20 As explained above, they find their way into domestic law via ECA s. 2(1) *'without further enactment.'*

It would be for consideration whether primary legislation other than the ECA (including the Competition Act 1998) should be repealed or amended after Brexit. Given the very close connection since the enactment of the 1998 Act with EU competition principles it may be that the government would wish to retain that connection. If s. 60 remained on the statute book it would then be necessary to decide whether to amend it to include only some directly applicable or directly effective EU provisions or whether all directly applicable and directly effective EU law would be retained. Similar considerations would have to inform secondary legislation giving effect to EU competition law.

The core point is that in many discrete areas of domestic law such as competition law EU law is integral to the operation of that law. Further, some of our laws as, for example, employment law in the areas of equality and discrimination are now engrained into our culture and business practices. Careful and evaluative legislative judgments would necessarily have to be made following Brexit as to which parts of EU law to retain and which to jettison.

A legislative model that simply repealed the ECA would not be adequate for this purpose for the reasons identified earlier. Nor (even if there were no constitutional objections) would a generalised legislative model such as that adopted in the abortive European Communities Act 1972 (Repeal) Bill necessarily work either. Certainly, such a generalised model would need to accommodate (or at least address) directly applicable and directly effective EU law but the latter, in particular, is problematic because the concept of 'direct effect' is a construct of the CJEU as opposed to being a function of the Treaties. Careful consideration would, therefore, need to be given to how to retain (if it were desired to retain) those parts of EU law that had become part of our domestic law by virtue of decisions of the CJEU or by reference to principles laid down by the CJEU.

There are also wider constitutional issues arising in relation to a generalised model following Brexit. Legislation that relies on secondary legislation to repeal or amend primary legislation is known as a Henry VIII clause. In the case of a repeal of the ECA secondary legislation would, in a generalised model, be sought to be used to amend or repeal both primary legislation and the enormous amount of EU law that has been introduced by ECA s. 2(1) and s. 2(2).

It is true that the ECA itself employed a Henry VIII clause in ECA s. 2(1) but it is at least arguable on the constitutional level that this was unsurprising as Parliament had assented to the wholesale incorporation of a supranational legal regime into domestic law at the time of accession to the European Community.

The difference between deploying a Henry VIII clause on accession and the position post Brexit is that judgments as to which parts of EU law to retain and which to remove would not in substance be scrutinised by Parliament. EU law has created a plethora of rights and obligations not only between Member States but also for nationals of those States some of which are considered in Part 2 of this paper.

The subject-matter of those obligations thus affects extremely significant areas of domestic law. The constitutional objections to use of such a generalised model to alter EU law through a Henry VIII regime may be thought to be potentially more significant than that identified by the House of Lords Constitution Committee's Report on the Legislative and Regulatory Reform Bill as first introduced:[21]

21 See House of Lords Constitution Committee 6th Report 2010–2011 *Public Bodies Bill*, HL 51).

> **'The point of principle**
>
> '6. The Government has not made out the case as to why the vast range and number of statutory bodies affected by this Bill should be abolished, merged or modified by force only of ministerial order, rather than by ordinary legislative amendment and debate in Parliament. As we have said, and as is axiomatic, the ordinary constitutional position in the United Kingdom is that primary legislation is amended or repealed only by Parliament. Further, it is a fundamental principle of the constitution that parliamentary scrutiny of legislation is allowed to be effective. While we acknowledge that exceptions are permitted – as in the case of fast-track legislation, for example – we have also sought to ensure that such exceptions are used only where the need for them is clearly set out and justified. As we have said, the use of Henry VIII powers, while accepted in certain, limited circumstances, remains a departure from constitutional principle. Departures from constitutional principle should be contemplated only where a full and clear explanation and justification is provided.
>
> '13. The Public Bodies Bill [HL] strikes at the very heart of our constitutional system, being a type of 'framework' or 'enabling' legislation that drains the lifeblood of legislative amendment and debate across a very broad range of public arrangements. In particular, it hits directly at the role of the House of Lords as a revising chamber.'

The complexities attending the selection of a legislative model that works after Brexit brings with it the linked problem of how, if some EU law is to be retained, the courts will – in the absence of clear legislation to the contrary – decide to interpret and apply it. There are a number of uncertainties (largely stemming from the doctrine of the supremacy of EU law) which may themselves inform the way in which the post-Brexit legislative model should be selected. They include the following.

First, the doctrine of supremacy of EU law itself would be questionable. As a matter of EU law, that system of law takes precedence over any contrary domestic law.[22] But if the ECA were repealed that statutory doctrine would lapse unless statutorily revived or otherwise implied by the courts. So, too, the duty of a domestic court of last resort to refer questions of EU law (unless clear) to the CJEU would lapse.[23]

Secondly, the status of judgments of the CJEU would probably be different. If the ECA were repealed then ECA s. 3(1) would go and with it the current binding status of CJEU judgments. Unless legislation specified the status to be accorded to CJEU judgments the domestic courts would have to decide how far to take them into account when determining questions of EU law.

Thirdly, within EU law there is a hierarchy accorded to the different types of EU legislation. Treaty provisions, for example, have a higher status than directives. Whether or not the same hierarchy would necessarily apply post Brexit would be a matter of legislative choice or for our domestic courts to decide.

Fourthly, in the absence of clear legislation it might be open to the UK courts to determine that the common law had been altered during our membership of the EU. The court might, for example, rule that EU-type equality was now firmly entrenched

22 See, for example, *Costa v. ENEL* Case 6/64.

23 This would probably encompass principles of interpretation of EU law which have the doctrine of EU supremacy at their root: see *Marleasing SA v. La Comercial Internacional de Alimentacion SA* Case C-106/89. Even where EU law survived *eo nomine* in a domestic statute post Brexit the appropriate principles of interpretation would be a matter solely for domestic law: see *Assange* [2012] UKSC 22, [2012] 2 AC 417 at [201]–[218].

in the common law.[24] The common law might also be developed through the general principles of EU law which are said to include principles common to the laws of the Member States.

These types of question, and perhaps others, are not entirely dissimilar from questions that would arise if the government were to repeal the Human Rights Act 1998. In particular, the status of European court judgments whether in Strasbourg (for fundamental rights) or Luxembourg (for EU law) and the response of domestic courts to detachment from a European legal regime that has become part of our legal culture have never before had to be faced by Parliament or by the courts.[25]

It is emphasised that these questions, though they may involve the courts, also engage the legislative model adopted after Brexit because legislation may, depending on how it is drafted, reduce the scope for judicial activism or, conversely, expand it.

Wider issues relating to the Union

The extensive devolution that has taken place over the last two decades poses further challenges to an effective Brexit. The challenges here are both legal and political and it is not easy to disentangle one from the other.

24 Traces of equality as a common law principle have existed in a few common law decisions: see *Kruse v. Johnson* [1898] 2 QB 91. But the status and extent of the principle remain uncertain. Brexit might lead to a strengthening of common law equality by reference to EU jurisprudence. This is by no means the same thing as treating EU case-law as binding.

25 It should be noted that although they are to some extent interlinked, the UK could withdraw from the EU but remain a member of the Council of Europe and, therefore, a party to the European Convention on Human Rights. EU law and ECHR fundamental rights law are governed by two separate legal regimes. ECHR fundamental rights law is governed by the Human Rights Act 1998 which statutorily incorporates many though not all of the Convention into domestic law.

At least to some extent, each of the devolution statutes incorporates the European Convention on Human Rights and EU law directly into the powers and duties of the devolved legislatures. Thus, as far as EU law is concerned, s. 29(2)(d) of the Scotland Act 1998 stipulates that Acts of the Scottish Parliament that are incompatible with EU law are outside the legislative competence of the Scottish Parliament. In similar vein, s. 108(6) of the Government of Wales Act 2006 provides that any act of the Welsh Assembly that is incompatible with EU law, falls outside its competence. Section 24 of the Northern Ireland Act 1998 prohibits any legislation that is contrary to EU law.

Several issues arise with respect to the fact of such direct incorporation. The first is that of identifying the legal source of devolved EU powers and what drafting changes would be necessary to implement a vote to leave the EU. Resolution of that question depends upon an analysis of both the ECA and the devolution statutes. The second issue is that on the assumption that at least some EU law has been devolved to the respective legislatures to what extent (if any) is the Westminster Parliament constrained legally and/or constitutionally from legislating to remove that EU law. This requires an analysis of the scope and application of the Sewel Convention. The third issue is whether or not the courts might ever be called upon to decide that issue in respect at least of Scotland. The fourth issue is what impact the legal issues surrounding Brexit might have on the stability of the Union especially if one or more of the other constituent parts of the United Kingdom were, notwithstanding an overall Brexit outcome, to vote to remain in the EU.

These questions will be addressed briefly in turn.

Question 1: Identifying the source of devolved EU law

Identifying exactly what has been devolved requires close analysis of the devolution statutes. The analysis here focuses on the Scotland Act 1998 but a similar analysis would be necessary for each of the other devolution Acts because they do not contain identical provisions.[26] Matters which are not devolved are reserved and within the exclusive competence of the Westminster Parliament. However, even matters which are devolved may still be legislated on by the Westminster Parliament albeit (see further below) normally only with the consent of the devolved legislature through the operation of the Sewel Convention (see further below).

It is clear that most of the ECA has not been devolved. Schedule 4 paragraphs 1(1) and 1(2)(c) of the Scotland Act provide that an Act of the Scottish Parliament cannot modify or create power by secondary legislation in respect of a number of specific provisions in the ECA. Notably, however, ECA s. 2(2) is not included and the exercise of power thereunder has, therefore, been devolved under s. 53 of the Scotland Act.

There are other parts of the Scotland Act that are also potentially relevant. **First**, paragraph 15 of schedule 8 amends the ECA (including ECA s. 2(2)) to extend the references there to *'any statutory power or duty'* to include *'a power or duty conferred by an Act of the Scottish Parliament or an instrument made under such an Act.'*

26 The formula is different in each of the devolution statutes. In the Scotland Act all matters that are reserved are listed and all else falls within the legislative competence of the Scottish Parliament. By contrast, in the Government of Wales Act 1998 devolved matters are specifically listed. In Northern Ireland under the Northern Ireland Act 1998 the position is different again with separate lists of 'excepted' and 'reserved' matters with all else constituting a devolved matter.

Secondly, therefore, the Scottish Parliament is required to have regard to the objects of the EU when exercising its powers. This follows from the last part of ECA s. 2(2) which reads materially as follows:

> 'and in the exercise of any statutory power or duty, including any power to give directions or to legislate by means of orders, rules, regulations or other subordinate instrument, the person entrusted with the power or duty may have regard to the objects of the EU…'

Thirdly, By virtue of s. 126(9) of that Act the term 'EU law' is very widely defined and is derived directly from the Treaties. It is not expressed to be subject in any way to the ECA. Given the terms of s. 29(2)(d) it follows that a repeal of the ECA would, at least prior to Article 50 TEU taking effect (when the Treaties would cease to apply) not necessarily operate to constrain the legislative competence of the Scottish Parliament. This is because at least up to the point at which the Treaties ceased to apply the Scottish Parliament could not legislate in a manner that was incompatible with EU law as defined by s. 126(9) of the Scotland Act even if the ECA were to be repealed. The Scottish Parliament would also be empowered to have regard to the objects of the EU.

Moreover, even at the point at which, under the Treaty, the Treaties ceased to apply such effect would, arguably, only apply on the level of public international law. As a matter of domestic law an un-amended Scotland Act would continue to constrain the legislative competence of the Scottish Parliament.[27]

In terms of drafting it seems clear that mere repeal of the ECA would not automatically end the application of EU law as defined in the Scotland Act to the powers and duties of

27 Subject, always, to how the domestic courts interpreted the phrase 'EU law' after the Treaties ceased to apply directly.

the Scottish Parliament. The Scotland Act 1998 itself would require amendment.

Question 2: Scope and application of the Sewel Convention

However drafting issues are by no means as constitutionally significant as the potential application of the Sewel Convention. The Sewel Convention finds its origin in Lord Sewel's (the then Scotland Office Minister's) statement in the House of Lords during the second reading debate of the Scotland Bill in 1998. He said:

> '[A]s happened in Northern Ireland earlier in the century, we would expect a convention to be established that Westminster would not normally legislate with regard to devolved matters in Scotland without the consent of the Scottish parliament.'[28]

This formulation has been adopted with regard to all the devolved legislatures in successive Memorandums of Agreement (see most recently October 2013 *'Devolution – Memorandum of Understanding and Supplementary Agreements'* presented to Parliament and to the Scottish Parliament, the Northern Ireland Assembly and laid before the National Assembly for Wales). The documents are not intended to be legally binding but, nonetheless, constitute *'a statement of political intent.'*[29]

Paragraph 14 of the latest Memorandum states the now well established Sewel Convention in respect of Scotland, Wales and Northern Ireland, stipulating that:

> '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

28 HL Debates, volume no. 592, part no. 191, 21 July 1998, column 791.

29 See paragraph 2 of the October 2013 Memorandum.

> 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 approach from the UK Government.'

At the same time, paragraph 21 of the Memorandum makes it clear that (materially) *'[t]he devolved administrations are responsible for observing and implementing… European Union obligations which concern devolved matters.'*

Clause 2 of the Scotland Bill currently[30] provides for a new s. 28(8) to be inserted into the Scotland Act 1998. Section 28(7) presently provides that s. 28 – which confers legislative authority on the Scottish Parliament – *'does not affect the power of the Parliament of the United Kingdom to make laws for Scotland'*. But the new s. 28(8) would say: *'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.'*

The constitutional scope of the Sewel Convention is not free from doubt. If it does apply, then as a matter of constitutional expectation a legislative consent motion would now ordinarily be required giving consent by the devolved legislature to a Westminster Bill containing provisions with regard to devolved matters before such legislation could be enacted.[31]

However, whether or not the Sewel Convention is engaged as a matter of principle depends upon whether the Convention is

30 As of 1 March 2016.

31 See Chris McCorkindale *'Echo Chamber : the 2015 General Election at Holyrood – a word on Sewel'* UK Constitutional Law Association May 13, 2015. See also Standing Order 9B of the Standing Orders of the Scottish Parliament.

to be read as encompassing only legislation from Westminster in devolved policy areas or whether it extends to legislation from Westminster seeking to vary the legislative competence of the Scottish Parliament or the executive competence of the Scottish Ministers.[32]

It may be argued that the Convention was not intended to preclude Westminster from legislating on foundational matters such as amending the powers of the Scottish Parliament. Nonetheless, purely as a matter of legal interpretation of the words used in clause 2 of the Scotland Bill the words *'with regard to devolved matters'* (echoing the earlier formulations in the Memoranda and in Lord Sewel's original statement to the House) are extremely broad. Similar words were used in s. 29(2)(b) of the Scotland Act 1998 in constraining the power of the Scottish Parliament to legislate where legislation *'relates to reserved matters'*. The breadth of that provision has consistently been interpreted by the government as being very wide and, in particular, precluding Scotland from legislating so as to authorise even an advisory referendum on Scottish independence.[33]

On an expansive understanding of the Sewel Convention that embraced legislation from Westminster designed to amend the powers of the Scottish Parliament (or other devolved legislature) it seems inevitable that at least in terms of constitutional principle the Sewel Convention would apply to a proposed repeal of the ECA and (as far as Scotland is concerned) the Scotland Act 1998.

32 MCorkindale *op cit.*

33 Nonetheless, Scotland has not accepted the government's interpretation of s. 30. The issue was left unresolved in the Edinburgh Agreement by which the coalition government authorised the holding of a referendum on Scottish independence. For a stimulating rehearsal of the arguments see Adam Tomkins: *'The Scottish Parliament and the Independence Referendum'* Constitutional Law Group Blog January 12 2012 responding to Nick Barber's *'The Virtues of Advisory Referendums'* March 22 2012.

Question 3: Justiciability of the Sewel Convention in the courts

Even potential engagement of the Sewel Convention raises political issues. These are addressed briefly as part of Question 4 below. Yet there is a prior legal question as to whether a determination that the Sewel Convention either does or does not apply is one of law rather than politics and therefore one to be determined by the courts.

It has, in the past, been trite law that the scope and application of a Parliamentary convention is not justiciable in the courts.[34] However, the unusual feature of the Sewel Convention is that it is currently intended to be codified in the Scotland Act when enacted. It may, therefore, be contended that this feature gives it statutory force and, hence, renders it justiciable in the courts.

There are two formidable objections to such a contention although the point might yet fall to be argued in the courts. The first is that Article IX of the Bill of Rights Act operates to prevent proceedings in Parliament from being questioned in the courts. The application of a Parliamentary convention does not, in constitutional terms, constrain Parliament from legislating and an argument for an interpretation of the current clause 2 that viewed it as a constraint of that kind would have to overcome the fact that the Parliamentary draftsman was unlikely to have envisaged such a constraint since that would invite the court to adjudicate on proceedings in Parliament.

The second objection is that the proposed new s. 28(8) does not appear to alter the effect of s. 28(7) but, rather, simply to accord declarative recognition to the Sewel Convention. This objection influenced the Political and Constitutional Reform Committee of

34 See *Madzimbamuto v. Lardner-Burke* PC [1969] 1 AC 645, 722A-723A, D–E.

the House of Commons in its Report *'Constitutional Implications of the Government's draft Scotland clauses'*.[35]

Question 4: Wider impacts of Brexit on the Union

The subject of the overall impact of Brexit on the Union is one more appropriate for political than legal consideration. Nonetheless, the legal issues identified in this paper cannot, entirely, be divorced from political calculations that may be made in the light of the legal uncertainty that might follow a vote to leave the EU.

Many areas could become the subject of legal debate following Brexit. The law would almost certainly have politics as the underlying trigger for disputation but certainly law (and especially constitutional law) could operate as the leitmotif for that debate. Scotland, in particular, given its recent referendum and the terms of the new Scotland Bill might have the most to say about the post-Brexit legal position. But there are issues that could surface in each of the devolved jurisdictions.

Legal argument could take place by reference to:

1. Different conceptions of sovereignty in Scotland and Wales (stemming from a strengthened national consciousness following devolution) underpinning demands for some form of constitutional safeguards against the devolved nations being taken out of the EU against their will.

2. The consequences of Brexit on Northern Ireland and the Republic of Ireland in terms of cessation of EU membership.

The concept of Parliamentary sovereignty emanating from Westminster is itself imprecise and susceptible to different shades

35 Ninth Report printed 16 March 2015 at paragraph 54.

of meaning. In the sense adumbrated by the eminent Victorian jurist A.V. Dicey it means simply that Parliament has *'the right to make or unmake any law whatever.'*[36] In that sense (which is still the generally accepted meaning) by entering the common market the United Kingdom did not surrender its sovereignty. It merely made a set of laws (most notably the ECA) which it may repeal or amend at any time.

The Prime Minister has recently distinguished between power and sovereignty suggesting that the latter without the former is illusory.[37] Yet to critics of our remaining in the EU it is that very distinction that leads them to argue that sovereignty has in a meaningful sense been lost by surrendering it to unelected officials in Brussels.[38]

These arguments are incapable of legal resolution because they depend upon conflicting ideas of power and economics. The important point, however, is that a different idea of sovereignty to that of Parliamentary sovereignty permeates at least some of the devolved jurisdictions.

In Scotland some have argued that Parliamentary sovereignty in the sense of sovereignty attaching to the Westminster Parliament is, as far as Scotland is concerned, an historical fiction because when the Bill of Rights was enacted in 1689 Scotland had its own Parliament and the 1707 Act of Union (enacted some 18 years later) did not in any way transfer to Westminster the sovereignty of the Scottish Parliament.

That argument has gained some traction since devolution by being deployed more as providing historical support for an

36 A.V. Dicey 'Introduction to the Study of the Law of the Constitution' (6th ed 1902, Macmillan) at pp. 37–38.

37 Interview on the Andrew Marr programme on 21 February 2016.

38 See *'The Demise of the Free State'* David G. Green (Civitas, 2014).

assertion of national sovereignty founded on principle. Thus, in 2014 the draft Constitution for an independent Scotland stated the *'fundamental principle'* that *'the people are sovereign … resonates throughout Scotland's history and will be the foundation stone for Scotland as an independent country* [our underlining].[39]

A similar emphasis can be discerned in Wales where the devolved government there has, emboldened no doubt by a strengthening of national consciousness after two decades of expanding devolution made a joint statement with the Scottish First Minister that: *'[a]ny decision to leave the EU, taken against the wishes of the people of Wales or Scotland, would be unacceptable and steps must be taken to ensure that this does not happen.'*[40]

The issues of law raised earlier in this paper may feed into each other. Thus, if Scotland and/or Wales were to vote to remain in the EU but the UK as a whole voted to leave then the uncertain scope, effect and enforceability of the Sewel Convention (involving as it would constraints on the legislative powers of Westminster) could, with the different conceptions of sovereignty beginning to crystallise in Scotland and Wales make it a complex and difficult task to give effect to Brexit without the consent of the devolved governments. That in turn might lead to drafting issues as to how best to give effect to a majority vote to leave the EU when distinct parts of the UK wished to remain.

In Scotland's case there is a further possible dimension of law which is the relationship between the 2014 Scottish independence referendum and the outcome of the EU referendum. There was

39 See Nicola Sturgeon's Foreword to The Scottish Independence Bill: A Constitution on an Interim Constitution for Scotland, (The Scottish Government, Edinburgh, 2014).

40 Joint Statement of the First Minister of Scotland Ms Nicola Sturgeon (SNP) and the First Minister of Wales Mr. Carwyn Jones (Labour) 3 June 2015.

much argument during the build-up to the 2014 referendum about whether Scottish independence would prejudice its continued membership of the EU. At the time the UK government contended that if Scotland were to become independent it would have to invoke Article 49 of the Treaty (addressing new applications for membership of the EU) as opposed to being able to seek a Treaty amendment under Article 48 to address if it became independent.

That discussion is now past history but it reflects the possibility that a perceived benefit of voting against independence in 2014 may have been the risk of losing certain membership of the EU through a vote for independence. A Brexit outcome may be thought by some to invalidate that reasoning and constitute a change of circumstances supporting claims for a new independence referendum. This is, indeed, what Nicola Sturgeon has claimed.[41]

This, in turn, raises the spectre (not resolved in the Edinburgh Agreement that set the framework for the 2014 independence referendum) of Scotland claiming that it has power under the Scotland Act 1998 to authorise a new advisory referendum on independence following a vote for Brexit. There are legal arguments that might be used to support the proposition that it does not need the consent of the UK Parliament to do so and they turn on the proper interpretation of s. 29(2)(b) of the Scotland Act 1998; specifically on the constraint that the Scottish Parliament does not possess legislative competence to legislate where legislation *'relates to reserved matters'*. The question at issue would be whether the phraseology is sufficiently broad to preclude the Scottish parliament legislating for an advisory referendum (the outcome

41 See Ms Sturgeon's speech in Brussels to the European Policy Centre 2 June 2015.

of which would probably have decisive political consequences) or whether it does not imply such a prohibition.

Section 29 of the Scotland Act is something of a double-edged weapon. On the one hand (as explained earlier) it may afford an expansive interpretation to be given the scope of the Sewel Convention (which Scotland would contend for). But if that interpretation is correct it would appear to suggest, by parity of reasoning, an equally wide constraint on the powers of the Scottish Parliament to legislate for an advisory referendum (which Scotland would not contend for).

As far as Northern Ireland is concerned, that country has had a dramatic history over the last century and its continued political stability cannot, sensibly, be isolated from that of the Republic of Ireland. Both would need to be addressed in terms of legal analysis following Brexit.

A detailed analysis of the complex legal issues that might arise following Brexit is beyond the scope of this paper but the following subject-headings would be obviously material:

1. The Belfast Agreement contains numerous EU provisions. It has been observed that:[42]

> *'… the status of the UK and Ireland is woven into the fabric of the Agreement: it provides for the establishment of a Northern Ireland Executive and Northern Ireland Assembly, as well as enshrining "North-South" and "East-West" co-operation. In addition, it has effected constitutional changes and established cross-border bodies. Both the Northern Ireland Assembly and the Executive have been pro-actively working to develop*

42 See *'The Art of Falling Apart – Constitutional conundrums surrounding a potential Brexit'* Allan F. Tatham (Centro Studi Sul Federalismo CSF-SSSUP Working Paper Series 3/2015.)

> *"European engagement" and the Northern Ireland Assembly has increasingly sought to engage with European issues. It is quite apparent that a Brexit could easily lead to an unravelling of the Belfast Agreement and undo much of what has been achieved in the last two decades in UK-Irish relations, undermining the institutions established in order to provide for the foundations of the dynamic relationship between all parties concerned.'*

2. The relationship between Northern Ireland and the Republic of Ireland and, indeed, that between the UK and the Republic might engage other legal issues on Brexit. The special constitutional position of the Republic with the UK would need to be reassessed if there were a vote to leave the EU especially as it could lead to the creation of an external EU border across the whole of Ireland.

Conclusion on Part 1

The theme of Part 1 of this paper has been a broad outline of the immediate constitutional issues of law that might arise after a vote to leave the EU. They demonstrate the scope for a fusion between law and politics following Brexit. Sometimes the raising of legal issues, as opposed to their definitive resolution, can have considerable political impact. Moreover, by no means all the possible questions of law have been identified and, for example, separate questions might arise with respect to Crown dependencies and British Overseas Territories.

What is also clear is that the process of negotiating exit terms is likely to generate detailed substantive questions of law, many of which will need to have been anticipated well in advance of the Article 50 process. Part 2 now focuses on one especially important area – the rights of EU citizenship.

PART 2
A Vote for Brexit – EU Citizenship Rights

EU citizenship rights

As foreshadowed earlier, the focus of Part 2 is on rights of EU citizenship and the discussion contemplates the UK electing to withdraw from the EU following the referendum. Therefore, unless otherwise stated, "EU citizens" referred to below are not taken to include British citizens. It is also important to distinguish at the outset between the rights described below as "citizenship" rights, which attach specifically by virtue of holding EU citizenship and other rights derived from EU law applicable to anyone in the territory of the EU such as, for example, rights under employment law derived from the EU. The EU has competence in a broad range of sectors and EU law, therefore, provides for rights beyond those of EU citizens. Subject to the problems of disentangling EU and UK law discussed in Part 1, these rights would also cease to exist insofar as contrary provision was not made in domestic law.

The principal rights of EU citizens

EU citizenship is a status that derives from and is parasitic on national citizenship. Article 20(1) TFEU (ex 17 EC), which establishes EU citizenship, acknowledges this in two ways: first, by expressly defining EU citizenship by reference to national

citizenship ("[e]very person holding the nationality of a Member State shall be a citizen of the Union") and secondly, by recording that "[c]itizenship of the Union shall be additional to and not replace national citizenship." That said, EU citizenship does, however, confer rights that are different from and additional to those held as a matter of national citizenship. These rights are provided for in the EU Treaties and EU secondary legislation.[43] The most significant of these are listed in Article 20(2) and include: i) the right to move and reside freely within the territory of the Member States (Article 21 TFEU, ex 18 EC); ii) the right to non-discrimination in respect of the right to vote and stand as candidate in elections to the EU Parliament and local elections (Article 22 TFEU, ex 19 EC); iii) the right to enjoy diplomatic and consular protection in a Third Country from another Member State (where the individual's Member State of nationality is not represented) (Article 23 TFEU, ex 20 EC); and iv) linguistic rights which may be invoked against the EU institutions (the right to petition EU institutions in any of the Treaty languages and receive a reply in the same language) (Article 24 TFEU, ex 21 EC).[44]

43 Article 20(2) TFEU.

44 Article 20(2): "Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (a) the right to move and reside freely within the territory of the Member States; (b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State; (c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State; (d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language. These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder."

Importantly, EU fundamental rights contained in the Charter of Fundamental Rights of the EU are not rights conferred by virtue of holding EU citizenship. Article 51(1) of the Charter delimits its scope of application and provides that it applies to the institutions, bodies, offices and agencies of the Union and to Member States 'only when they are implementing Union law.'[45] The effect of Article 51(1) is that the Charter's jurisdiction is not defined by the nationality or citizenship of the individual wishing to rely on it but rather by whether his or her legal situation falls within the remit of EU competence.[46] Therefore, holding EU citizenship does not, in and of itself permit an individual to invoke the Charter rights.

Of the illustrative list of EU citizenship rights provided in Article 20(2) TFEU, the right to free movement (Article 21) is the most significant in practice. The right has several components: Article 21 applies by virtue of the holder possessing EU citizenship alone, whereas EU citizens who are conducting economic activity across Member State boundaries (to work as an employee or self employed person in another Member State, or to provide temporary services in another Member State, or to make financial transactions across Member State boundaries) may rely on the commercial free movement provisions of the TFEU in Title IV.[47] Both the citizenship right in Article 21 and the commercial free movement

45 This has been interpreted by the CJEU to mean within the 'scope' of EU law: Case C-617/10 *Fransson* [2013] ECR nyr.

46 This is a complicated question that falls outwith the scope of this paper. For a detailed consideration of the scope of EU law and the Charter see Richard Gordon QC and Rowena Moffatt, *EU Law in Judicial Review,* 2nd edn, chapters 6 and 12.

47 Free movement of workers (Article 45 TFEU, ex 39 EC), freedom of establishment (Article 49 TFEU, ex 43 EC), free movement of services (Article 56 TFEU, ex 49 EC), free movement of capital and payments (Article 63 TFEU, ex 56 EC).

rights in the TFEU have been given specific effect in EU secondary legislation and the case law of the CJEU. The central instrument of secondary legislation regulating the conditions upon which EU citizens may move and reside in other Member States is Directive 2004/38/EC[48] (the Citizens' Directive). The CJEU has interpreted both the Citizens' Directive and Treaty rights to develop free movement rights. In particular, it has relied upon the principle of non-discrimination on grounds of nationality in Article 18 TFEU (ex 12 EC) to confer rights to, for example, various welfare benefits and protection against expulsion not expressly conferred by EU primary or secondary legislation.[49]

As noted earlier, what are referred to in this paper as "EU citizenship rights" are to be distinguished from rights that derive from EU law but are not specifically related to the EU citizenship of the holder. These other rights deriving from EU law apply to anyone within the scope of EU law[50] (third country nationals as well as EU citizens and EU citizens who have not moved outside of their country of origin). Amongst the most significant of these rights are those relating to, for example, non-discrimination on

48 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ 2004 L518/77.

49 See, e.g., Case C-184/99 *Grzelczyk [2001] ECR I-6193 (*general social assistance payments may be available for migrant students where they are to host state national students), Case C-140/12 *Pensionsversicherungsanstalt v Brey* [2014] 1 CMLR 37 (recourse to public funds must not 'automatically' result in revocation of a right of residence and subsequent removal). Although the more recent trajectory of the case law is more restrictive: see Case C-333/13 *Dano* [2015] ECR nyr (Member States may refuse claims of social assistance to EU citizens who have no intention to work) and Case C-67/14 *Alimanovic* [2015] ECR nyr (German restriction of social assistance to an upper limit of 6 months following the cessation of employment was found to be compatible with EU law).

50 See n 46 above.

grounds of race, gender, sexual orientation, age and disability in the employment context.[51] These are not EU citizenship rights but rights that accrue by virtue of EU legislative competence in a particular sector.

EU citizenship rights in the UK

As analysed in Part 1, the EU citizenship rights (and all other rights created by EU law) must be expressly incorporated into UK law in order to have domestic effect. The EU free movement rights in the TFEU have been found to be directly effective before UK courts. This means that individuals may rely on the EU Treaty rights directly before domestic courts to enforce their EU rights in the absence of a domestic implementing measure providing the substance of the right.[52] The majority of the EU citizenship rights are, however, given effect in domestic legislation, primarily, through the Immigration (European Economic Area) Regulations 2006 ("the EEA Regulations").[53] The EEA Regulations purport to implement the requirements of the Citizens' Directive as well as other EU citizenship rights recognized in the jurisprudence of the CJEU.[54]

The free movement rights held by EU citizens as implemented into UK law by the EEA Regulations do not adhere to the logic of national immigration control. Since the development of the modern idea of the state, immigration control has been associated with wide-ranging executive power and discretion

51 See further, e.g. Ellis and Watson, *EU Anti-Discrimination Law,* second edn, 2012.

52 See, e.g., in the case of Article 21 TFEU, Case C-34/09 *Ruiz Zambrano* [2011] ECR I-1177.

53 SI 1003/2006.

54 The extent to which they do this is, in some instances, questionable. See, e.g., the interpretation of the judgment of the CJEU in Case C-456/12 *O & B* in reg 9 of the EEA Regulations.

over the entry and residence of migrants (that is, individuals who do not have the nationality of the country in which they are territorially present or seek to enter). This position relies as its premise on an absence of the right on the part of migrants to enter and remain in states other than that of their nationality.[55] As such, in domestic immigration law, the right to enter and remain is constituted by the immigration documentation (generally a visa or vignette in the holder's passport) granting leave to enter or remain for a specified period. However, significantly, EU free movement law is different in that any immigration documentation that may be obtained is merely declaratory of the rights to enter and reside in a Member State other than an EU citizen's state of nationality.[56] The rights of entry and residence are constituted by the EU Treaties and secondary legislation and engaged by the holder of EU citizenship moving to another Member State and undertaking one or more of the activities prescribed by the Treaties (including residence as a self-sufficient person). What this means in practice is that EU citizen migrants are in a far stronger position vis-à-vis their host states than are nationals from so-called 'third' countries. In the

55 The classical, absolutist notion of the principle is expressed by the eighteenth century political philosopher and diplomat Emmerich de Vattel: '[o]ne of the rights possessed by the supreme power in every state is the right to refuse to permit an alien to enter that state, to annex what conditions it pleases to the permission to enter it, and to expel or deport from the state, at pleasure, even a friendly alien, especially if it is considered that his presence in the state opposed to its peace, order, and good governance, or to its social or material interests.' Emmerich de Vattel, Law of Nations, book 1, s. 231; book 2, s. 125, cited in John Finnis,'Nationality, Alienage and Constitutional Principle ' [2007] LQR 417, p. 420. See also expressions to this effect in the courts, eg, *Musgrove v Chun Teeong Toy* [1891] AC 272.

56 The purpose of the residence documentation is simply evidential confirmation of EU citizens' status; it is not a source of their rights: see Case 157/79 *R v Pieck* [1981] QB 571.

UK, EU citizens do not require leave to enter and/or remain.[57] They are not, however, assimilated to British citizens and remain subject to immigration control.[58] This means that EU citizens differ from British citizens in (at least) three important ways: first, EU citizens (who are not British citizens) may be expelled and/or excluded from the territory of the UK; secondly, EU citizens (who are not British citizens) may not vote in national general elections (including the EU referendum itself); and thirdly, some EU citizens (who are not British citizens) may be excluded from some benefits available to those with a right of abode in the UK.[59]

EU citizenship rights and Brexit

Given that EU citizenship is dependent on a person holding the nationality of an EU Member State, if a person is no longer the national of a Member State (because the state of his or her nationality is no longer a member of the EU), that individual is no longer an EU citizen. The EU citizenship status created by the EU Treaties has no independent existence following a State's withdrawal from the EU. It is important, however, to separate EU citizenship as a status from the rights enjoyed as a matter of EU citizenship. Whilst the status would inevitably be extinguished by the UK's withdrawal from the EU, the same may not be said automatically of the rights derived from EU citizenship. What will happen to the EU citizenship rights in the event of the UK withdrawing from the Union depends on two variables: first, the

57 Immigration Act 1988, s. 7(1).

58 In UK law, the right of citizens to be free from immigration control is called the right of abode, from which, as the Immigration Act 1971 makes clear, non-British EU citizens are excluded: Immigration Act 1971, s. 2.

59 The exclusion of some EU citizens from benefits in the UK operates on the basis of a "habitual residence" test, this is automatically satisfied by those with a right of abode but this is not the case in respect of EU citizens.

nature of the legal situation that replaces EU membership (and in particular whether there is an agreement, and if so, its terms); and secondly, whether the citizenship rights in question are held by an UK citizen in the EU or an EU citizen in the UK. These scenarios are considered below.

Scenario 1: successor agreement

Part 1 contains a detailed analysis of Article 50 of the TEU which, as noted earlier, provides a comprehensive and self-contained scheme of withdrawal. What can be said at this stage is that the requirement that negotiations take place and the stipulation that in the absence of an agreement setting a date for withdrawal, a two-year period (which may be extended if unanimously agreed) must elapse from the initial notification of the intention to leave, anticipates that some form of agreement would be reached. Indeed, in political terms the nature of the political consequences of UK withdrawal for both British and EU citizens make the prospect that no successor agreement would be reached highly unlikely. What would happen to existing rights would, of course, depend on the precise form and contents of any future agreement.[60] Whilst this is impossible to predict with any certainty, there is more clarity as regards what any future agreement would be unlikely to resemble. For example, it is very likely that if the UK withdraws from the EU, it will also withdraw from the EEA Agreement (all EU Member States are signatories to the EEA Agreement as well as Norway, Iceland and Liechtenstein). As recognized in the UK legislation implementing the EU Citizens' Directive (the EEA Regulations), the EEA Agreement replicates the free movement

60 Noteworthy in this context is Article 2 of the Protocol attached to the Greenland Treaty which clarified that there would be a transitional period during which Greenlanders, non-national residents and businesses with acquired rights under EU law would retain these rights: Leaving the EU House of Commons Research Paper 13/42 1 July 2013.

provisions of the EU and extends it to the three non-EU states mentioned earlier. Given that remaining in the EEA would retain the status quo in terms of the free movement rights of EU (and EEA) citizens in the UK,[61] if the UK elects to withdraw from the EU (for, inter alia, migration reasons) it is unlikely that it will seek to remain a party to the EEA Agreement; remaining in the EEA but not the EU would subject the UK to the same free movement rules as in the EU but deny any role in decision-making.

As such, a new, negotiated bilateral agreement between the EU and the UK would be a more attractive option in respect of UK interests.[62] The terms of any such agreement are, obviously, as yet unknown, however, given that the UK is highly likely to want to continue to benefit from the EU internal market, it is likely that a bilateral UK-EU agreement would permit some form of free movement, albeit less extensive than under the EU free movement rules and the EEA Agreement. The limitation of this option from the UK's perspective is that it is extremely likely that the EU would require the same rules to apply to all of its Member States (and not, therefore, permit the less well off states to be subject to less favourable free movement rules). As such, the UK may seek to agree separate individual treaties with each EU Member State with which it wished to have some form of enhanced relationship. Beyond the inefficiencies associated with negotiating 27 individual treaties, it is also important to note that since the majority of EU Member States are bound by the EU immigration acquis the UK's possibilities of negotiating favourable terms for British citizens

61 The EEA Agreement (Article 112) contains a derogation insofar as there are "serious economic, societal or environmental difficulties of a sectorial or regional nature" which are "liable to persist". However, any such safeguard measures must be "restricted with regard to their scope and duration to what is strictly necessary in order to remedy the situation."

62 Switzerland and Greenland have a series of sector specific bilateral agreements with the EU.

would be limited since they would, following Brexit, become third country nationals and so be subject to the general EU rules for non-EU nationals (see further below).

Scenario 2: no agreement

As unlikely as the "no agreement" scenario may be, it should be recalled – as discussed in Part 1 – that whilst Article 50 TEU requires an attempt at agreement to be made (provided that the withdrawing Member State serves notice of intention to withdraw), it does not compel agreement itself. As such, Article 50 TEU leaves open the possibility that no agreement will be reached and in any event, as recognised in relation to the complexities of unravelling domestic law from EU law in Part 1, no transitional arrangement could hope to be entirely comprehensive. The question of what would happen to EU citizenship rights in the absence of an agreement is, therefore, a relevant one. As before, the answer differs depending on whether the focus is on British citizens in the EU or EU citizens in the UK. The following section examines the "default" position in terms of the immigration laws of the UK and the EU for current EU citizens (including British citizens) who would become, on the event of a UK withdrawal, "third country nationals".

Since the EU has partially harmonised immigration laws,[63] the laws applicable to British citizens in the EU would be a mixture of common EU standards and the residual domestic immigration laws of each of the Member States. The immigration laws applicable

63 Article 77 TFEU provides that the Union is competent to adopt rules relating to the absence of internal border controls, the management of external borders and short stay visa policy; Article 79 TFEU provides that the EU may adopt rules relating to the conditions of entry and residence, the definition of the rights of third country nationals residing legally, illegal immigration and unauthorised residence, and combating human trafficking.

to non-EU Member State nationals ("third country nationals") would apply to British citizens by default since the UK would become a "third country" for the purposes of EU immigration law. The harmonised EU immigration norms provide common standards for border and visa controls,[64] legal migration routes into the EU,[65] and processes applicable to irregular migrants.[66] In terms of visas and border controls, it would mean increased scrutiny of British nationals at EU borders and permit the EU to impose visa requirements, including for short-term trips and holidays. British nationals who sought to reside for longer periods in the EU would be subject to the EU rules on managed migration including quotas and EU-preference rules on labour migration. Highly skilled British professionals would be required to apply for a Blue Card (the EU's work and residence permit for skilled non-EU nationals), or fall within the framework

64 Schengen borders Code regulation 265/2006/EC (and associated implementation secondary legislation); Regulation 539/2001/EC listing the third countries whose nationals must be in possession of visas and those whose nationals are exempt from that requirement; and Regulation 810/2009/EC establishing an EU code on visas (and associated implementation directives).

65 Directive 2004/114/EC on the conditions of admission of Third Country National pupils for the purposes of studies, pupil exchange, unremunerated training, or voluntary service; Directive 2005/71/EC specific procedure for admitting Third Country Nationals for the purposes of scientific research; Directive 2009/50/EC "Blue Card" (highly skilled migrants); Directive 2011/98/EU 'Single permit' and common set of rights for workers; Directive 2014/36/EU Seasonal workers; Directive 2014/66/EU Intra-company transfers; Directive 2003/86/EC on the right to family reunification; and Directive 2003/109/EC concerning the status of Third Country Nationals who are long term residents.

66 Directive 2001/51/EC (Carriers sanctions); Directive 2004/82/EC (obligation to communicate advance passenger data); Council Directive 2002/90/EC defining facilitation of authorized entry, transit and residence; Directive 2009/52 Sanctions against employers of illegally staying Third Country Nationals; Directive 2004/81/EC residence permit issued to Third Country Nationals who are victims of trafficking in human beings; and Directive 2011/36/EC on preventing and combating trafficking in human beings

for intra-corporate transfers. These are clearly more restrictive than current free movement rights enjoyed under Article 45 TFEU. Since there are no unified rules on low skilled workers and the self-employed, the applicable rules would depend on the domestic immigration law of each Member State.[67] British students wishing to study in the EU would not be granted equal treatment with EU nationals in relation to tuition fees and the right to undertake part-time work.

British citizens who had been resident in an EU Member State for more than five years would be able to apply for the EU status of long-term residency for third country nationals: a status similar to, but less advantageous than, permanent residency but with stricter eligibility requirements.[68] Insofar as British nationals legally resident in the EU would seek to bring their British (or other third country national) family members into the EU, there are also EU-wide rules regulating family reunion. These are stricter than the family reunion regime applicable to EU citizens under the Citizens' Directive.[69] In terms of the rules applying to irregular migration, the EU Returns Directive contains provisions for the detention,[70] expulsion and exclusion

67 There are common rules that apply to seasonal workers, but their residence is subject to time limits. See n 65.

68 Such as, for example, language tests.

69 Including, for example, possible waiting periods and integration (language) requirements. See Directive 2003/86/EC on the right to family reunification. British citizens who were family members of 'static' EU citizens (i.e. individuals who have not exercised their Treaty rights by moving to another EU Member State) would have the domestic immigration law of the Member State of their spouse's nationality applied to them. Only British family members of free moving EU citizens (i.e. individuals who have exercised their Treaty rights by moving to another EU Member State) may rely on the more generous family reunion rights under the Citizens' Directive.

70 It provides for immigration detention for up to 6 months, or 18 months in the event of complications with the removal process: Directive 2008/115/EC.

of migrants irregularly present in the EU. In theory at least it would also apply to all British nationals present in the EU upon the UK's withdrawal in the event of a non-negotiated Brexit.

Likewise, in the absence of a negotiated settlement, EU citizens residing in or seeking to enter the UK would become subject to domestic UK immigration law.[71] As noted earlier, the requirements of domestic UK immigration law are far less favourable than EU free movement rules. Domestic immigration rules include a Points Based System for economic migration (including workers and students)[72] and financial requirements for family reunion.[73] The UK system also has a system of entry clearance for nationals of states requiring visas to enter the UK, leave to enter and enforced removals and detention for those present in the UK without leave.[74] As in the case of UK nationals in the EU in the event of a non-negotiated withdrawal by the UK, in theory at least EU nationals in the UK would not have leave to remain and so would become liable to the coercive machinery of immigration control.[75]

71 Analogous in this context is the status of Citizens of the United Kingdom and Commonwealth in the UK following independence of former British colonies from which they originated.

72 Immigration Rules Part 6A: https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-6a-the-points-based-system (accessed on 8 March 2016).

73 Appendix FM to the Immigration Rules: <https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-fm-family-members> (accessed on 8 March 2016).

74 See, e.g., Immigration Act 1971, s. 3 and Immigration and Asylum Act 1999, s. 10.

75 As noted earlier, given these consequences, it is very unlikely that the UK would withdraw from the EU without express provision having been made for EU citizens already in the UK (and UK citizens in the EU). It is also likely that legal challenges would be brought: see below.

Remedies

From the above it is clear that the application of the third country national EU and UK immigration regimes to British citizens in the EU and EU citizens in the UK, respectively, will lead to adverse consequences for both groups – including not only the application of unfavourable criteria but also, in theory, liability to detention and expulsion from the territory. As recognised earlier, it is for this very reason that a non-negotiated UK exit is so unlikely. However, in the event that British and EU citizens did become subject to the third country regime,[76] it may be the case that those who are already present and who have acquired rights prior to withdrawal are able to avail themselves of remedies before national courts.[77] There is, therefore, a distinction in terms of the availability of potential remedies between rights that have been 'vested' in EU citizens and other non-vested EU rights. Generally, EU citizenship rights would be classed as 'non-vested' when an individual has not exercised them prior to Brexit. Further, as before, the remedial options would depend on whether the enforcement of EU citizenship rights was sought by British citizens in the EU or EU citizens in the UK. The remedies available as a matter of national administrative law would depend on the individual provisions of each EU Member State's domestic public

76 As before, this question will depend on whether or not there is an agreement. If an agreement were reached, remedies would turn on the terms of the agreement and how it is incorporated into UK law. If incorporated, EU citizens present on the territory of the UK would be able to rely on the terms of the agreement before domestic courts. Given the number of contingencies, it is not possible to elaborate further on rights that may be enforced through any future negotiated settlement that may be reached.

77 Due to the nature of the arguments, it is necessary to distinguish between those already present exercising EU citizenship rights and those who are currently EU citizens (including British nationals) who have not yet exercised their rights.

law – only the UK's position is considered below.[78] However, in addition, a number of international remedies may be invoked including: those under the European Convention on Human Rights, to which all EU Member States adhere;[79] human rights and general principles under EU law; and those deriving from public international law. These are considered in turn, below.

English administrative law

EU nationals who sought to enforce their pre-existing EU citizenship rights may well have a remedy as a matter of UK[80] public law. In particular, two strands of case law are of relevance: the first, relating to vested rights and the second relating to fairness and, in particular, the doctrine of substantive legitimate expectation. The question of vested rights has been explored in the context of the Immigration Rules in the case of *Odelola v. Secretary of State for the Home Department*.[81] Ms Odelola was a Nigerian medical doctor who had trained and practised in Nigeria as a consultant surgeon. She came to the UK in 2005 as a visitor for a two-month clinical attachment with the intention of applying for further leave to remain as a postgraduate doctor. When she made her application the Immigration Rules then in force permitted applications from persons whose medical degree had been acquired overseas. However, whilst Ms Odelola's application was pending the Rules changed confining

78 The authors do not have expertise in the domestic public law systems in the other 27 EU Member States.

79 See, e.g., Article 6(3) TEU.

80 The focus here is on the administrative law of England and Wales. Whilst there are separate judicial systems in Scotland and Northern Ireland, migration appeals and judicial review are broadly available on the same basis as in England and Wales. Immigration statues apply throughout the four parts of the UK.

81 [2009] UKHL 25, [2009] 1 WLR 1230.

eligibility for leave to remain as a postgraduate doctor to those with medical qualifications from UK institutions. There were no transitional provisions exempting those with pending applications from the changes and Ms Odelola's application was, therefore, refused on the basis of the amendment to the Rules since she had a Nigerian qualification. She appealed, unsuccessfully, to the Asylum and Immigration Tribunal, the Court of Appeal and finally the House of Lords, which upheld the Secretary of State's decision. The House of Lords found that the Secretary of State was not bound to apply the Immigration Rules applicable at the date on which Ms Odelola had made her application. In coming to this conclusion it considered the application of the presumption against retrospectivity, both at common law[82] and under the Interpretation Act 1978.[83] It held that in both cases the presumption operates only insofar as rights have been vested, that is, they have come into existence at the time of application. Insofar as rights are vested, under the common law and statutory presumptions they will not be construed as taken away except by express statutory language.[84] In the case of the Immigration Rules, the House of Lords held that there are no vested rights at the time that an application is made due to the nature of the Rules as statements of administrative policy indicating how, at any particular time, the secretary of state will exercise his or her discretionary control over migration.[85] In relation to applications made under the

82 See further *Wilson v. First County Trust (No 2)* [2003] UKHL 40, [2004] 1 AC 816 for discussion of the principle at common law.

83 Interpretation Act 1978, s 16(1)(c) : "where an Act repeals an entitlement, the repeal does not, unless the contrary intention appears…(c) affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment…" Section 23 applies the 1978 Act to "subordinate legislation."

84 *Odelola,* n 81, at [5].

85 See n 54 above.

Immigration Rules, therefore, substantive rights do not "vest" until a decision is made. The House of Lords held further that in the absence of a vested right, the common law principle of fairness remains applicable, but they found the unfairness in Ms Odelola's case to be slight: given that there was no vested right or legitimate expectation in play, the loss amounted to no more than a "disappointment."[86]

As such, the *Odelola* case shows that the secretary of state may – in the absence of representations to the contrary or transitional provisions – apply the Immigration Rules retrospectively. Insofar as representations giving rise to a legitimate expectation are made, however, the secretary of state is likely to be more circumscribed in retrospective application of the Rules. This is clear from the two legal challenges brought by HMSP Forum (a claimant representative organisation) in relation to the secretary of state's attempts to amend the Highly Skilled Migrant Programme with retrospective effect.[87] In 2002 the United Kingdom had introduced the Highly Skilled Migrant Programme, which provided a route by which highly skilled migrant workers could enter and remain in the UK indefinitely. The Secretary of State provided guidance stating that any future revisions would not affect migrants already on the scheme. However, in 2006 it was revised, with the effect that certain requirements under the scheme were made stricter, and the changes were applied retrospectively to those already participating. HMSP Forum sought judicial review of the decision of the defendant Secretary of State to withdraw from the commitment in the earlier guidance that future changes would not be applied retrospectively. The Administrative Court held that there was a substantive, legitimate expectation on the part of

86 *Odelola,* n 81, at [59]. Fair dealing may, however, require the secretary of state to refund the application fee (at [2] and [40]).

87 HMSP Forum [2008] EWHC 664 (Admin) and [2009] EWHC 711 (Admin).

all those on the programme that they would enjoy the benefits of the programme as they were at the time they joined it.

These cases may be of relevance to EU citizens already exercising EU free movement rights in the UK. In relation to the presumption against retrospectivity, importantly, as discussed earlier, there is a central distinction between free movement law and domestic UK immigration law. The EU rights flow from the EU legislation and are constituted (and, therefore, "vested") in the absence of and prior to an application being made.[88] Unlike Ms Odelola (who had to apply under domestic immigration law), therefore, EU citizens would be in a far stronger position to invoke the presumption against retrospectivity in the event that a UK withdrawal from the EU altered or removed their existing free movement rights enjoyed in the UK.[89] As for the application of the English public law principles of substantive legitimate expectation to EU citizenship rights, in the absence of an express representation that those exercising EU rights in the UK would not be affected by future changes to the law (including withdrawal from the EU) it may be difficult to argue the application of a substantive legitimate expectation *per se*. However, as a matter of good administration and fair treatment, arguments could be made that actions undertaken by EU citizens in the UK in the expectation of following a particular route to residence in the UK should not be undermined by future legislative change. As is clear from the reasoning in the *Odelola* and *HMSP Forum* cases, it is fairness that underlies both the presumption against restrospectivity and legitimate expectation. As such, it is considered likely that the common law would be astute to protect the pre-existing interests of EU citizens in the UK on the event of a UK withdrawal.

88 This is analogous to the case of entitlements in the social security context discussed in *Odelola* (n 81), per Lord Brown at [36]–[37].

89 As noted above, however, that the presumptions can be overridden by express statutory language to the contrary.

European Convention on Human Rights

In addition to domestic administrative law, there are also potential remedies available to those EU citizens (and former EU citizens) adversely affected by a UK withdrawal from the EU under the European Convention on Human Rights, in particular, Article 8 ECHR (private life/family life)[90] and Article 1 of Protocol 1 (peaceful enjoyment of "possessions").[91] The family life limb of Article 8 may be relevant insofar as there is family life of the type protected by Article 8 between a person with former EU citizenship rights and persons who are citizens of the State in which residence is sought or who have leave to remain under domestic immigration law. Given that the EU citizen will often be able to prove prior lawful residence under EU law either as permanent residents or with a view to obtaining permanent residency, depending on the specific facts of each case, it is very likely that *some* EU citizens who might find themselves without a right to reside after a UK withdrawal would be able to rely successfully on Article 8 before domestic courts. Similar reasoning would apply to applications for leave to remain on the basis of Article 8 ECHR in respect of private life built up

90 "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

91 "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

during a period of residence under the EU free movement rules. Each case would turn on its own particular facts (clearly, long residence and strong family connections would have the best prospects of success) but it may be thought that at least some people no longer able to benefit from EU free movement law would succeed under Article 8.

In terms of Article 1 of Protocol 1 to the ECHR, insofar as a UK withdrawal affects economic interests (such as employment, self-employment as well as the free movement of goods and capital), arguments may be advanced that this constitutes a disproportionate interference with property or "possessions."[92] The threshold for the engagement of Article 1 of Protocol 1 has been construed broadly and challenges would be likely to turn on proportionality. Insofar as any challenge were brought against any piece of primary legislation affecting EU citizens rights in the UK, the assessment of proportionality would include consideration of: (i) whether the objective of a measure is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.[93] The doctrine of the margin of appreciation would also be relevant: courts will defer to decisions of the legislature on matters of policy on the basis that the courts lack the democratic legitimacy and institutional expertise to decide the issues. This applies all the more where the measure

92 Arguments based on Article 1 of Protocol 1 could be invoked in relation to a broad range of commercial interests adversely affected by Brexit and many of these situations will be regulated by contract. Contractual remedies are outside the scope of this paper but Article 1 of Protocol 1 may also have application where contracts are terminated as a result of Brexit.

93 *Bank Mellat* v. *HM Treasury* [2014] AC 700.

in question has been subject to Parliamentary debate.[94] As with Article 8, the proportionality assessment would be case specific and outcomes would depend on the specific situations of individual EU/UK citizens.

Public International law

Further, it has been suggested that principles of public international law may also have relevance to EU citizens (and former EU citizens) seeking to enforce their pre-existing free movement rights. There are two questions regulating the application of public international law to a Brexit situation: first, what are the UK's international obligations and, as such, does international law offer any remedies?; and secondly, whether and how could international law be invoked before domestic courts? As to the initial question, public international law contains principles of vested or acquired rights in two contexts. First, the doctrine arises as a matter of treaty interpretation: unless the treaty stipulates or the parties agree otherwise, withdrawing from an international agreement releases the parties from any future obligations to each other, but does not affect any rights or obligations or legal

94 See e.g. *R (MA) v SSWP* [2014] PTSR 584 [§57] citing see *Bank Mellat v HM Treasury (No 2) (Liberty intervening) [2013] 3 WLR 179*, [44]. It should also be noted that under the scheme of the Human Rights Act 1998, courts may not strike down primary legislation but are limited to making declarations of incompatibility: s. 4 HRA 1998.

situation of the parties acquired under it before withdrawal.[95] The doctrine of acquired rights is also relevant in a situation of state succession, that is, a change of sovereignty in a state.[96] The doctrine provides that in the event of a change of sovereignty, there is a presumption that legal interests acquired under existing law do not cease and continue after succession as enforceable against the new sovereign. The high water mark of the doctrine derives from judgments of the Permanent Court of International Justice between the first and second world wars in relation to the creation of an independent Poland from the former German, Russian and Austrian empires. Poland sought to evict German national settlers from its territory. The Court held that private rights (in this case the ownership of property) "acquired under existing law do not cease on a change of sovereignty."[97]

There are, therefore, clear principles of international law regulating rights acquired by parties to treaties and prior to a change in sovereign control, but how these principles might be construed to apply to a Brexit situation is less obvious. As a matter of treaty interpretation, as is clear from the terms of Article 70 of the Vienna Convention, the rule applies only so far as there is

95 Vienna Convention on the law of treaties, Article 70 '1. Unless the treaty otherwise provides or the parties otherwise agree, the termination of a treaty under its provisions or in accordance with the present Convention: *(a)* Releases the parties from any obligation further to perform the treaty; *(b)* Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.
2. If a State denounces or withdraws from a multilateral treaty, paragraph 1 applies in the relations between that State and each of the other parties to the treaty from the date when such denunciation or withdrawal takes effect.'

96 See further, O'Connell, *State Succession,* ch 10; *Oppenheim's International Law,* pp 215 ff.

97 Whilst there is some doubt as to whether the same would be accepted today, it is generally accepted that a presumption of the continuance of rights exists, Malcolm Shaw, *International Law,* 7th edn, 2014 p 725.

no treaty provision or agreement to the contrary. Any successor agreement could, therefore, make different provision for acquired rights. Furthermore, the terms of Article 70 also make clear that it is aimed at regulating the rights and obligations of the *parties*, that is, the 28 (current) EU Member States, rather than private individuals who are nationals of those Member States. As regards the doctrine of state succession, as seen in the example above, the paradigm to which the doctrine applies is a change of sovereignty in a state through, for example, independence (in the case of Poland, above) or annexation. The doctrine operates so as to permit continuity in terms of the enforcement of private rights and interests. As such, this paradigm cannot readily be applied to a situation in which a member state withdraws from the EU: the EU is not a state and it is difficult to argue the existence of a change in sovereignty since, as the Supreme Court made clear in the *HS2* case,[98] the ultimate locus of sovereignty remains with the Member States. However, whilst the *sui generis* nature of the EU Treaties means that there is no straightforward application of either doctrine of acquired rights to the situation in which a Member State withdraws from the EU, as with domestic public law, the principles underlying the doctrines of non-retrospectivity and concerns of fairness in protecting existing interests are clearly of relevance to the Brexit situation.

As regards the second question set out above – the application of these principles of international law in UK courts – insofar as the principles are considered to be international customary law (as the Vienna Convention principles generally are), they may be applicable in UK common law. Further, to the extent that the principles were invoked in relation to the interpretation of a particular provision, to the extent that there was ambiguity, they could be used as interpretative aids.

98 See n 18 above.

EU general principles of legal certainty and non-retroactivity

The final potential remedial avenue considered is that provided by EU law itself. There is clearly a threshold question in issue as following a UK withdrawal from the EU, it cannot readily be said that EU law would continue to apply at all. In conceptual terms, it would be difficult to argue that following Brexit (including repeal of the ECA) EU citizenship rights could continue to apply in UK law *as a matter of EU law*: EU law would no longer be part of domestic law following the repeal of implementing statutes and it would cease to constitute an international obligation on the UK following withdrawal from the EU Treaties. As such, in respect of EU citizens in the UK, following UK withdrawal, any prior EU rights would need to be enforced through successor legislation or via common law, human rights law or public international law. As explained above, it may be the case that certain EU rights may remain enforceable in the UK following Brexit and repeal of the ECA but this legal situation would arise as a matter of *domestic law*.[99] However, the case of British citizens in the EU is different and there may be cases in which British citizens in the EU would continue to fall within the scope of EU law following a UK withdrawal. This is because, as discussed earlier, immigration law is partially harmonised at EU level and as such British citizens – as third country nationals in the EU – may fall within the ambit of EU law with the effect that they would be able to invoke EU general principles of law and the Charter of Fundamental Rights of the EU in respect of their rights. EU law operates its own principles of non-retroactivity and legitimate

99 Including, where relevant, Strasbourg human rights law and incorporated public international law. See further the *Assange* judgment discussed earlier.

expectation under the general principles[100] and the Charter also protects family and private life and property interests.[101] Arguably, similar arguments to those advanced under domestic public law and the Human Rights Act could, therefore, be made under EU law – if the threshold question of its scope is resolved favourably to claimants.

Conclusion on Part 2

Whilst, therefore, the EU citizenship of British nationals would be lost on the UK's withdrawal from the EU, the rights of EU citizens may continue in certain circumstances. It is highly unlikely given the nature of the rights and the numbers involved that the UK would withdraw from the EU without some form of successor treaty or treaties regulating the free movement rights between the EU and the UK. However, in the absence of such agreement(s) or an entirely comprehensive agreement, it is likely that at least some of those who had acquired EU citizenship rights prior to Brexit could seek to enforce them before national courts. The question of remedies in the absence of an agreement remains relevant since there is no guarantee that any agreement reached would have terms that are favourable to all affected groups and it is, furthermore, unlikely that any agreement could claim to be entirely comprehensive. Any remedies, however, would relate to the enforcement of existing rights; individuals who had not already sought to use their free movement rights would derive little assistance from the courts.

100 See further Richard Gordon QC and Rowena Moffatt, *EU Law in Judicial Review,* 2nd edn, chapters 8, 9 and 12. The general principle of non-retroactivity is linked to legal certainty since if laws could operate with retroactive effect those subject to them could not plan their activities in any meaningful way.

101 Charter of Fundamental Rights of the European Union, Articles 7 and 17.

Report

Brexit: The Immediate Legal Consequences

By Richard Gordon QC and Rowena Moffatt

The outcome of the referendum on 23 June 2016 will, in practice, bind the government on the question of whether or not the United Kingdom will remain in the EU. This paper does not engage in the issues about 'remain' or 'leave' about which it is neutral. But if there is a vote for Brexit the legal implications of such an outcome will suddenly occupy centre-stage. Thus far, they have hardly been addressed. Here, the authors explore the two pressing and immediate legal consequences of Brexit. Part 1 examines the constitutional consequences of a vote to leave the EU and Part 2 focuses on the consequences of such a vote for EU citizenship rights. The thesis presented is that identifying the immediate legal effects of Brexit can neither be avoided nor deferred and that, once identified, they need to be planned for well in advance of any exit from the EU. Constitutionally, these legal challenges encompass the uncertainties surrounding the operation of Article 50 TEU regulating the exit of member states, the complexities of uncoupling EU law from domestic law, and the implications of Brexit for devolution including the engagement and justiciability of the Sewel Convention. There are also likely to be substantive legal effects on EU citizenship rights that are vested and that may become the subject of legal proceedings either in the UK or elsewhere in the EU.

This pamphlet presents the views of the authors and not those of The Constitution Society, which publishes it as a contribution to debate on this important subject.

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