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BREXIT: THE FUTURE OF HUMAN RIGHTS IN SCOTLAND

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ABSTRACT

The UK's exit from the European Union has magnified the lack of effective human rights protection in the UK. It was coupled with the removal of the Charter of Fundamental Rights of the EU by Westminster's European Union (Withdrawal) Act 2018. The Scottish government attempted to preserve the strength of human rights through an introduction of a Scottish Brexit Bill; however, this was struck down by the Supreme Court in order to uphold provisions of the UK Withdrawal Act. Many are wary that leaving the EU will see a continued decline in human rights protection, with prospective removal of the Human Rights Act 1998, which, in turn, enshrines the European Charter of Human Rights in domestic law. Nevertheless, the Scottish government has committed itself to continue collaboration with human rights organisations to devise a strong, viable system which ensures rights currently protected in Scotland. Further, the courts may be able to strengthen human rights claims in Scotland through a liberal interpretation of the law. This research aims to assess human rights protection in Scotland under domestic law and European Union law currently in force in the UK. More significantly, it seeks to explore the possible implications on human rights as a result of the UK's exit from the EU, and initiatives that the Scottish government and courts can take to maintain and develop human rights protection domestically.

INTRODUCTION

The spotlight event of the decade is the United Kingdom's withdrawal from the European Union, also known as Brexit. Brexit has sparked countless controversies and future concerns. These concerns human right protection, yet this topic has been somewhat overshadowed by the concerns about economic and political impacts. The devolved government in Scotland made efforts to address this overlooked issue in its UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill (*hereafter referred to as the Bill*), where many provisions extended application of human rights under the retained EU legal framework. However, the legality of the Scottish Bill was challenged in the Supreme Court, resulting in annulment of numerous key human right provisions, effectively stripping the Bill of its practical significance. As a result, it is no longer possible for Scottish courts to refer to the European Charter of Fundamental Rights (the Charter) when making judicial decisions. This decision removes the most effective source of law protecting human rights, as will be explored in subsequent sections. Additionally, Scottish Ministers were also denied extensive power to make secondary legislation to rectify deficiencies in law and uphold EU-protected rights.

This article aims to provide a legal perspective on human rights after Brexit, by first giving an overview of the level of human rights protection offered by the current law in the Human Rights Act 1998, the European Communities Act 1972, and the Scotland Act 1998. It is then assessed in light of the outcomes of this Supreme Court case to analyse the implications of Brexit on human rights protection. Finally, this article goes on to present Scottish government's initiatives, and other suggestions for the courts and the government to maintain and develop Scottish human rights protection mechanism in the future.

CURRENT LAW

Fundamental human rights have been recognised as an integral part of EU law since the early years of the creation of the European Union (Reed and Murdoch, 2016), and protection of these rights has advanced with developments in the Court of Justice of the European Union (CJEU) jurisprudence. The CJEU takes a broad interpretation of the meaning, scope and applicability of fundamental rights, which accentuates the prominence of human rights and reaffirms its fundamental status within the EU legal structure. However, human rights under EU law are only relevant within a particular sphere, as examined later in this section. Nevertheless, the level of protection offered by EU law surpasses that of other sources of domestic law in many aspects.

Sources of law

The current human rights protection framework in Scots law (formal term for Scottish law) stems from three main sources: the European Communities Act 1972, the Human Rights Act 1998 (HRA) and the Scotland Act 1998 (*hereafter referred to as the Act*). Other sources include international obligations such as the United Nations' Universal Declaration of Human Rights, major UN human rights treaties, and Council of Europe human rights treaties (Scottish Government on human rights policies, 2019), as shown in Figure 1.

Currently in the UK, the only international commitment brought into domestic law is the European Convention on Human Rights (ECHR). The ECHR is a treaty between treaty between the 47 member states of the Council of Europe and was introduced via the Human Rights Act 1998. However, HRA is not the only mainstream source of human rights law in Scotland.

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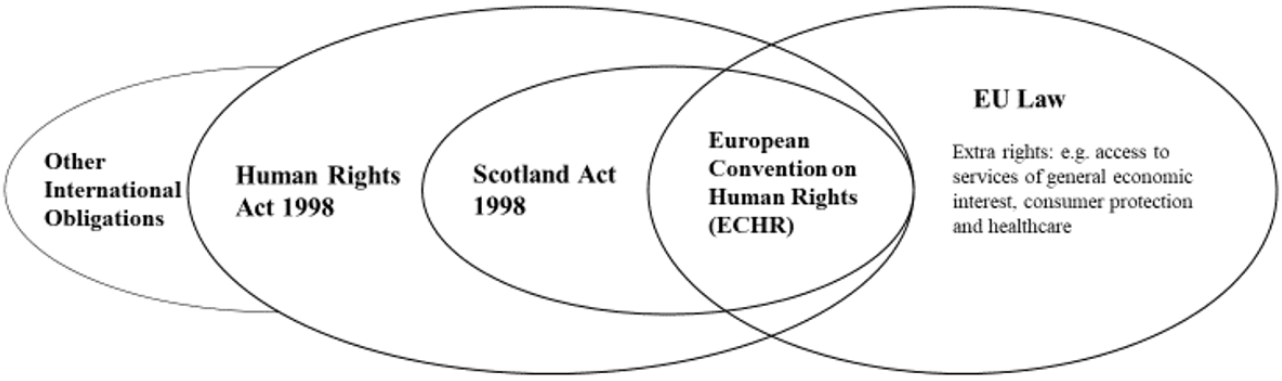

Figure 1: Sources of human rights law in Scotland and the scope of rights.

A key piece of structural legislation is the Scotland Act 1998, which sets out how the protection of human rights is to be realised in Scotland. The Act provides the Scottish Parliament competences to legislate on the subject of human rights. Moreover, it restricts other legislative and executive acts to comply with Scotland's human rights obligations under the Human Rights Act 1998 and EU law if human rights issues are a concern, as illustrated in Figure 1. The Scotland Act also imposes the obligation and competence to observe and implement international human rights treaties, a vital power which the Scottish government can use to improve human rights protection after Brexit, as will be seen in later sections.

Scope of human rights protection

The scope of rights recognised by EU law encompasses a wider scope of rights than those included in the HRA. In this section some of the prominent cases that shaped the existing legislations throughout the years are considered.

The leading case in recognising fundamental rights is *Stauder v City of Ulm*. This landmark case was key in determining the compatibility of EU law with an EU welfare scheme. The court addressed the issue from a human rights perspective and held that the scheme did not prejudice 'the fundamental human rights enshrined in the general principles of community law and protected by the court [CJEU]'. This decision signalled the court's indirect acceptance that fundamental rights formed part of substantive EU law. Decided in 1969, this case laid the foundations for fundamental rights protection just a little over ten years after the creation of the European Economic Community.

The *Stauder* case also confirmed the multiplicity of the sources of fundamental rights in EU law by using the term 'general principles of community law'. These principles derive from the common constitutional traditions of the member states and their international treaties, in particular the ECHR (Mańko, 2017). The introduction of the Charter of Fundamental Rights reaffirmed the relationship between fundamental right protection in EU law and the ECHR (Woods, Watson and Costa, 2017). The Charter ensures that the level of rights protection would not be reduced in national legal orders (Article 53). In dealing with the overlap between the ECHR and the Charter, Article 52(3) informs that when Charter rights correspond with ECHR rights, 'the meaning and scope of those rights shall be the same'. In other words, the system of protection of fundamental rights in EU law is equivalent to that of the ECHR system, and therefore the HRA.

Notably, the EU Charter extends beyond the ECHR to further incorporate socio-economic rights, other international conventions, and rights commonly recognised in its member states (Woods, Watson and Costa, 2018). Thus, the EU Charter covers a broader range of rights than the ECHR and HRA which only protects political and civil rights (Miller, 2012). As seen in Figure 1 these include rights such as access to services of general economic interest, consumer protection and healthcare (Woods, Watson and Costa, 2017).

Limitations on the applicability of human rights in EU law

As previously discussed, the Charter has effect only within the sphere of European law. As seen in Figure 2, where the issue in question is an area governed by EU law, rights under the Charter can only be enforced in two contexts. The first, to govern all acts of European institutions, and the second, to limit actions of member states when they are implementing EU law or seeking to limit rights guaranteed by the EU treaties (Barnard and Peers, 2017). As stated in the *Siragusa* case that, "the concept of 'implementing Union law' […] requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other" (Rossi, 2017). In this case, while the CJEU considered the right to property in Article 17 of the Charter, it ruled that the EU had no competence over the Italian landscape conservation rules, as these rules had no connection with EU competence over environmental issues. This limitation, in turn, shows that the CJEU aims to draw a clear distinction between national and EU areas of competence and further demonstrates deference towards national courts (Pirker, 2014).

Nevertheless, subject to this restriction, the CJEU continued to strengthen the applicability of the Charter to maximise the scope of national actions governed by the Union law (Rossi, 2017). As a result, any state omissions and positive actions are deemed to fall under its scope (Woods, Watson and Costa, 2017). For instance, in the case of Carpenter (2002 C-60/00), the wife of a UK national, who did not have a right to remain in the UK under domestic immigration rules, sought to invoke her right to remain under EU law. However, since the husband merely travelled outside the UK for business and did not move to another EU country, the wife's right to remain in the UK, under EU law could not be invoked. Still, by considering the fundamental right to respect family life, the CJEU was able to interpret the application of EU law broadly to encompass larger legal and administrative areas. As a result, the Carpenters obtained the right to remain, which they would have been denied had they relied solely on UK immigration rules and the HRA (Barnard and Peers, 2017).

While some cases may be within the ambit of EU law implementation and recognised rights are engaged, not all rights are directly enforceable. Some rights listed in the charter are

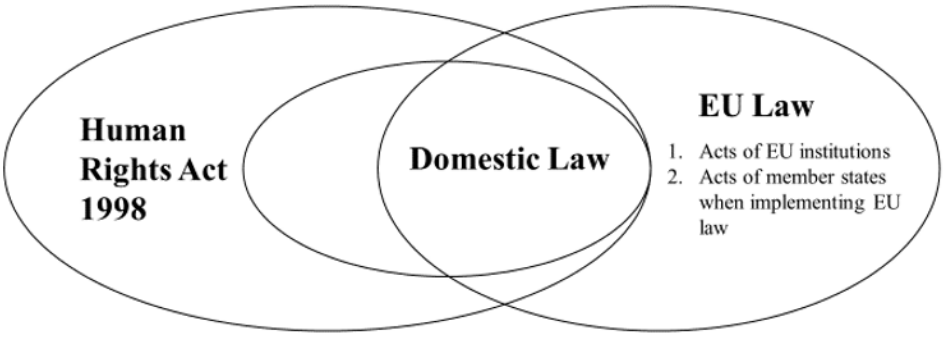

Figure 2: Sphere of applicable rights under EU law and the Human Rights Act 1998.

viewed as mere guiding principles under Article 52(5) and are relevant only in interpretation. In other words, certain rights can only be indirectly enforced through judicial interpretation, with low applicability.

Strength of human rights protection under EU law

The strength of human rights law as set out and developed by the CJEU and the EU can be seen in the level of protection required under EU law.

Adherence to EU fundamental rights and standards is compulsory, as founded in the doctrines of supremacy and direct effect of EU law. The supremacy principle, as reinforced in Internationale Handelsgesellschaft (1970 Case 11/70), has the effect of trumping national law where it compromises EU's standard of rights protection. The principle of direct effect provides an immediate remedy for claimants to assert their rights in national courts, without the need to petition to the CJEU. This means that acts of member states which infringe the Charter will be annulled by national courts (Digital Rights Ireland joined cases C-593/12 and 594/12). In the case of *AB*, the strength of the direct effect doctrine can be seen when compared with the ECHR taking effect under the HRA. This is where the last remedy a court can provide in instances of clear compatibility of national measures with the Convention is a 'declaration of incompatibility' to the European Court of Human Rights, a challenge under EU law would offer an immediate remedy (Woods, Watson and Costa, 2017).

Political mechanism of rights protection – Article 7 TEU

Brexit results in removal of important political mechanisms for ensuring respect for fundamental rights. These political mechanisms remedy the commission's inability to sanction member states violating fundamental rights outwith the scope of EU law. Triggering Article 7 is a two-stage process. Firstly, the European Council can make recommendations to the member state. If the breach of recognised rights and values persist, the Council may adopt sanctions such as the suspension of the member state's voting rights (Barnard and Peers, 2017).

In efforts to make further progress, the European Commission in 2014 established a three-staged pre-Article 7 procedure involving dialogue with the member state, making recommendations demanding a solution to the problems identified, and monitoring implementation of the recommendations. This mechanism has been used in dealing with multiple breaches of EU rights and principles by Poland (Ellis and Scheltens, 2018). These measures are instrumental tools in exerting pressure on member states to respect the rights enshrined in EU constitution and will soon be lost after Brexit.

Despite limitations in the scope of EU law's applications to implementation of EU law or acting within its scope, EU law covers a wider range of rights than the HRA and ECHR. Further, doctrines of supremacy and direct effect outlines the compulsory nature of protection imposed by the EU legal order. On a more holistic level, the early affirmations of fundamental rights and formal incorporation of the Charter giving it 'the same legal value as the Treaties', positions human rights as a vital tradition of EU law. Additionally, as presented in Figure 3, developments in this area has progressed steadily over the years. Therefore, EU law stands as a strong safeguard of rights within the Scottish legal order. Disentangling the Charter foreseeably removes this strong sphere of rights protection.

IMPACT OF BREXIT

Following the issuance of the European Union (Withdrawal) Bill (now the EU Withdrawal Act 2018) by the UK Parliament, the Scottish government and legislature attempted to remedy its destructive effects of removing the EU Charter of Fundamental Rights. This was through the introduction of its own UK Withdrawal from the European Union (Legal Continuity) (Scotland) Bill. The Bill would allow the Scottish executive to continue implementing laws and policy measures according to the EU Charter, and allow the Scottish government and courts to keep up with developments in the CJEU's decisions on fundamental rights cases. Unfortunately, Scotland lost this legislative race as the UK Bill passed, first while the Scottish Bill was referred to the UK Supreme Court for judgement on its legality.

The Withdrawal Act 2018 removes the EU Charter from domestic law completely, but according to section 5(5), the Act also preserves general principles and fundamental rights under EU law. The UK government explanation is that the removal of the EU Charter will not affect existent protections for rights under EU law (UK Government Publications, 2017), as they will be preserved in the form of CJEU case law for UK courts to refer to (Markakis, 2019). However, it seems unrealistic for the court to refer to rights derived from EU case law without using actual terms of the Charter. This difficulty is exacerbated when principles found in retained EU case law are incongruent with actual terms of the Charter. This commonly leads to questions as to whether these retained rights and principles mirror the Charter as the government claims (Markakis, 2019). All of these possible effects affect the level of certainty in rights protection. Nonetheless, there is a degree of flexibility in referencing EU case law and retained principles. The principle

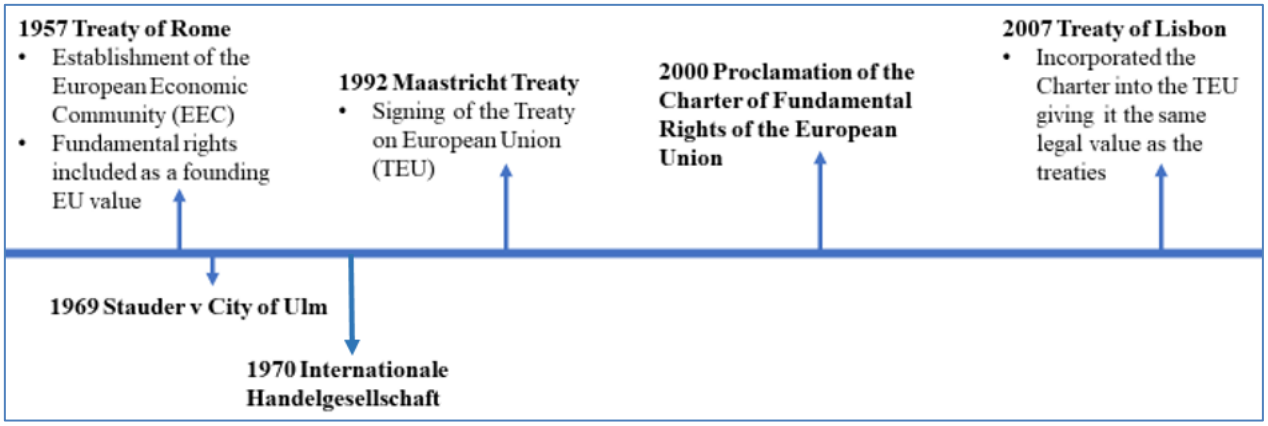

Figure 3: Timeline of development of human rights in the European Union.

of supremacy is preserved with regards to pre-exit law, while any law modified by post-exit legislation will be available to aid interpretation 'if doing so is consistent with the intention of the modification' (s 6(6), EU Withdrawal Act 2018).

Still, the Charter and retained principles are only available as aids to interpretation, while the remedial right of action on failure to comply with general principles of EU law is removed (Schedule 1, paragraph 3, EU Withdrawal Act 2018). This makes declarations of incompatibility under the HRA the best remedy for claimants seeking rights protection, but it does not provide an immediate solution.

This analysis has shown that the UK government has promised that fundamental rights protection will not alter post-exit by virtue of existent protection afforded under the HRA and the common law (UK Government Publications, 2017). However, this promise seems somewhat fanciful considering all the issues presented in this section. Still, the government may be correct, given that fundamental rights claims constitute only a small margin of EU law cases in Scotland (McCorkindale, 2018). Moreover, the Charter has only been binding domestically for eight years, and the number of such cases has only increased incrementally (Markakis, 2019). Yet, the Charter's relatively new status and the steady growth in fundamental rights claims shows potential for developments towards better rights protection. Unless UK courts show a willingness to engage in constructive dialogue with developments in EU rights protection case law, domestic claimants will not be able to benefit from stronger protection.

FUTURE OF HUMAN RIGHTS PROTECTION IN SCOTLAND

Scottish institutions have demonstrated a sustained focus and good level of performance in human rights areas. Additionally, they have shown willingness to continue to participate in human rights developments in a global context, extending beyond the domestic and European framework. While the Scottish Government's proposed Continuity Bill has been unsuccessful, it has promised to carry on pursuing this issue. In a report published by the First Minister's Advisory Group on Human Rights Leadership in 2018, three guiding principles were recommended for Scotland's future journey: (a) non-regression from the rights currently guaranteed by membership of the European Union, (b) keeping pace with future rights developments within the EU, and (c) continuing to demonstrate leadership in human rights. These principles are reflected in the steps taken by Scottish institutions in finding ways forward in the context of post-Brexit uncertainty (First Minister's Advisory Group on Human Rights Leadership, 2018). The following discussion presents Scottish efforts in human rights enhancement with reference to these principles.

Moving on from the Scottish Brexit Bill

Looking at Figure 4, it can be seen that the Scottish Bill was passed through the Scottish Parliament before the Withdrawal Act was passed the UK Parliament. This suggests that had the Scottish Bill not been referred to the Supreme Court, it would

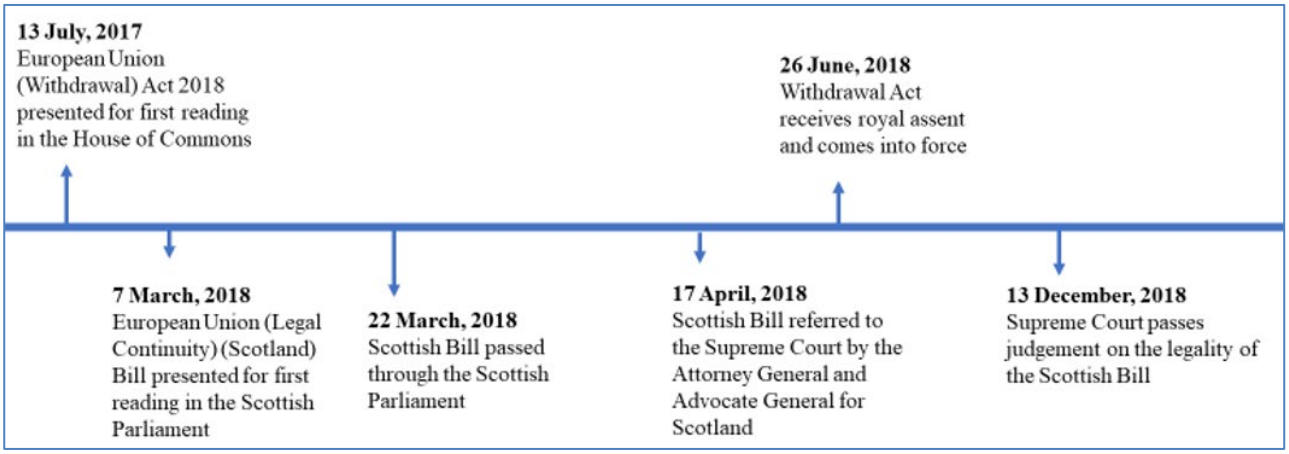

Figure 4: Timeline of development of the European Union (Legal Continuity) (Scotland) Bill

have come into force before the Withdrawal Act. If this this has been the case, many of the Scottish provisions would not have been annulled. The result of this legislative race has sparked some disapproval in Scotland.

Brexit Secretary Mike Russell indicated in a letter to Holyrood's Presiding Officer Ken Macintosh that,

> 'the Scottish Parliament had the power to make different choices, such as the decision to retain the Charter of Fundamental Rights where the UK Government decided not to, but that power was removed by the UK Government's EU (Withdrawal) Act, an Act passed without the consent of the Scottish Parliament [...] That being the case - the Continuity Bill having been in part retrospectively denuded of its force - Scottish Ministers have reluctantly come to the conclusion that we should not at this point move for its reconsideration' (*The Scotsman*, 2019).

Nevertheless, Mr Russell also asserted that Scotland will continue to take legislative and institutional steps in line with the government's commitment to non-regression in standards of human rights protections. It was also stated that Scotland's stance is to respect the commitment to retain the Charter of Fundamental Rights, and new laws will be passed to keep Scotland attuned with EU law. While preserving existent EU law could be said to fulfil the non-regression principle, such protections risk being bypassed by newly introduced measures. Thus, it is important to hold ministers accountable in their exercise of power, especially UK ministers who have been given extensive power to make regulations under the European Union (Withdrawal) Act 2018 (Miller, 2017).

Accepting the second principle on human rights development, the Scottish Government has introduced seven National Outcomes linking to the international framework under its National Performance Framework (Scottish Government Publications, 2019). It integrates the recently adopted UN Sustainable Development Goals (SDGs), along with Scotland's National Action Plan on Human Rights (SNAP), setting out specific and relevant national targets and indicators for the SDGs 2030 Agenda (Miller, 2017).

While it is open for the legislature to enact measures with regard to European legal developments, the courts may also contribute to the second principle of not being left behind in human rights creation. As represented by the straight arrows in Figure 5, the Withdrawal Act provides that after the UK officially leaves the European Union, the courts must follow national law and pre-exit CJEU case law only. Nonetheless, there are two ways for referencing post-exit CJEU jurisprudence and actions of EU entities where relevant (s 6(2), EU Withdrawal Act 2018), also represented in Figure 5 through the dotted lines. As indicated in the section above, rights found in retained EU case law may contradict terms of the Charter. To resolve this issue, the Withdrawal Act directs the higher courts to decide independently of retained EU law where they see fit. This discretionary power allows the higher courts to follow post-exit developments in EU case law and refer to the EU Charter (Markakis, 2017). The lower courts can also consider post-exit CJEU decisions which do not depart from its pre-exit case law. This approach can be taken in the context of the CJEU's 'teleological' approach, where it does not overturn its previous decisions, but only develops and 'distinguishes' them. It may thus be argued that courts can rely on the consistency of CJEU case law to say certain post-exit decisions do not depart from pre-exit case law and thus use these decisions for interpretation (Markakis, 2017). Hence, there is prospective UK-EU dialogue as CJEU jurisprudence develops, and domestic courts may seize this opportunity to strengthen rights protection.

The final principle for Scotland to 'take the lead' in protection and promotion of human rights can be seen in the promises of future legislative steps that were made following recommendations made by the Human Rights Advisory Group. The Government announced accordingly that it would incorporate the principles of the UN Convention on the Rights of the Child (UNCRC) into domestic law (Scottish Government Publications, 2019). The Scottish Government also demonstrated a positive attitude in engaging in implementation of international treaties and in December 2018 published a detailed response to recommendations made by the UN Human Rights Council following the third Universal Periodic Review (UPR) of the UK's human rights record (Scottish Government Publications, 2019). While Scotland has repeatedly asserted its competence in the area of human rights protection, it is doubtful whether the UK Government is willing to give Scotland the power to do so, especially where matters concern subjects originally governed by the EU law.

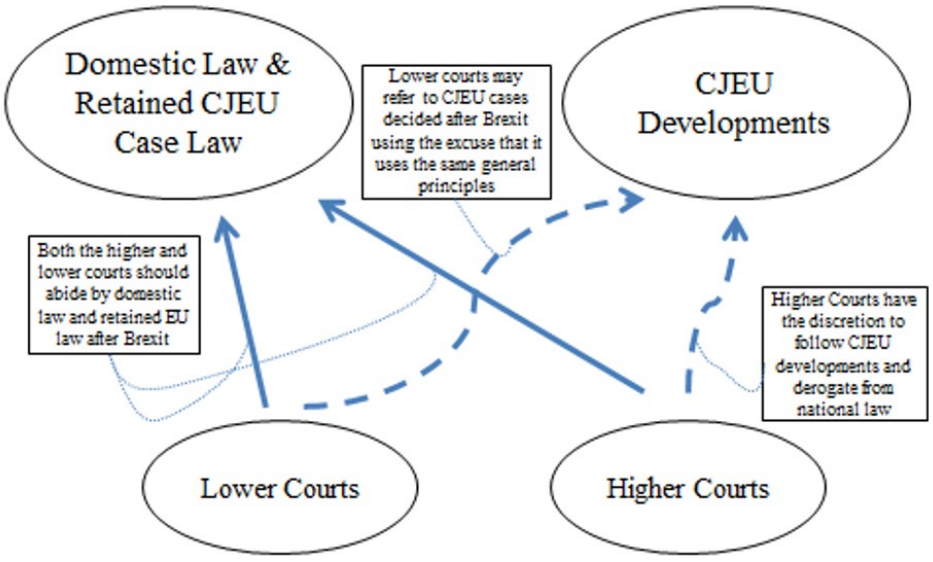

Figure 5: Variable paths for UK courts to follow CJEU developments.

Nevertheless, Scottish legislature's positive attitude is the instrumental driving force asserting Scotland's values and position in conflicts with the UK Government. The executive has taken many progressive actions even before Brexit. For example, it pushed for establishment of independent bodies such as the Scottish Human Rights Commission (SHRC), the First Minister's Advisory Group on Human Rights Leadership, and the Equalities and Human Rights Committee promoting human rights in legislative processes. Through cooperation and evidence-gathering with various independent bodies and civil society, the Scottish Government has responded to recommendations and prioritised actions addressing human rights and impact of withdrawal from the EU (Scottish Government Publications, 2018).

The Scottish Government has also been successful in delivering its promises, as can be seen in the incorporation of the UN Convention on the Rights of the Child in domestic law, as well as implementation of the Convention on the Elimination of all forms of Discrimination Against Women (Scottish Government Publications, 2019). Furthermore, Scotland has demonstrated leadership in shifting its focus to realising human rights protection on a local, day-to-day level (Ferrie, Wallace and Webster, 2018). This localised approach is a new emerging approach in international human rights law (Webster and Flanigan, 2018).

It is also worth noting seven further recommendations made in the Human Rights Advisory Group's report for implementation and realisation of the three guiding principles (First Minister's Advisory Group on Human Rights Leadership, 2018):

a) Introduction of an Act of the Scottish Parliament which provides human rights leadership;
b) A public participatory process developed as a vital part of preparation of the Act and its implementation;
c) capacity-building to enable effective implementation of the Act so as to improve people's lives;
d) A Scottish Government National Mechanism for Monitoring;
e) Reporting and Implementation of Human Rights;
f) Development of human rights-based indicators for Scotland's National Performance Framework (NPF);
g) Creation of a National Task Force to implement the Recommendations, a written constitution including a Bill of Rights for Scotland, in the event that Scotland becomes an independent state.

As was seen previously, some of these recommendations have already been implemented.

CONCLUDING REMARKS

The UK's exit from the European Union has magnified the lack of effective human rights protection in the UK. Now that Scottish provisions with more preparedness to engage with EU principles including the Charter of Fundamental Rights have been struck down, Scotland and the UK must look for alternative options for human rights protection. The Scottish Government may choose to rectify these provisions and present a revised bill for parliamentary reconsideration (Livingstone and Dunne, 2019), but in light of this judgement, it seems unlikely for anything beyond the dimensions of the Withdrawal Act to be implemented. Indeed, Scotland is beginning to revise its current rights protection framework and the Scottish Government has also voiced its commitment to work more closely with different organisations on human rights issues, and consider policy and legislative changes in specific areas (Scottish Human Rights Commission, 2018). The UK government, on the other hand, may have on its agenda a plan to introduce a British Bill of Rights and repeal the HRA, a policy that the Scottish Government has promised to vehemently oppose (Scottish Government Publications, 2019).

In face of the lack of legal certainty about a clear definition of the devolution framework, debilitated competences under a threat of executive power, and a weakened rights protection module within the UK, the task of remedying these challenges might ultimately fall on the devolved Scottish institutions. Luckily, Scotland has shown promising enthusiasm to prevent regression in existent rights commitment to continue to develop human rights protection. Hopefully these actions will guide the people of Scotland in this time of turmoil, and perhaps inspire the UK as a whole to strengthen their efforts in human rights promotion and protection.

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