Jean Monnet Centre of Excellence – Tensions at the Fringes of the EU – regaining the Union's purpose

Article 50 Litigation: UK, Northern Ireland & EU Perspectives

Queen's University Belfast

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The aim of this seminar was to spark a debate on litigation on how to start 'Brexit' and what this means from NI, UK, and EU law perspectives. The panel included four experts in the area from the QUB School of Law: Prof. Chris McCrudden, Dr. Alex Schwartz, Prof. John Morrison and Prof. Dagmar Schiek, and was chaired by Dr. Billy Melo Araujo. The main topics discussed were the recent rulings by the High Courts in Northern Ireland and England and Wales on the question of whether the UK government may notify the European Council of the Member State's intention to withdraw from the EU without a decision by Parliament, relying on the "royal prerogative" in international matters or whether the triggering of Art. 50 requires an Act of Parliament. Since two colleagues from the School of Law are involved in the litigation from Northern Ireland, questions on the position of Northern Ireland (and other devolved nations) were also discussed, alongside the possible involvement of the Court of Justice of the European Union in Brexit disputes, as well as the question of whether the UK would have to leave the European Economic Area (EEA) separately, or whether it might even remain within the Internal Market if it did not.

This event attracted a great deal of interest and was well attended by Queen's staff and postgraduate students, policy makers, lawyers, NGO representatives, researchers, and other members of the public. It sparked a lively debate, which was reported 'live' on twitter.

Prof. Chris McCrudden

Prof. Chris McCrudden is, next to Professor Gordon Anthony, one of the two colleagues from the School of Law at QUB who complete the team of barristers representing a cross-community group of applicants in the NI High Court and the Supreme Court (Agnew and others). In his presentation, he summarized the arguments developed on behalf of the applicants in relation to the four main issues referred for decision by the Supreme Court. These are:

1. Do any provisions in the Northern Ireland Act and the Belfast Agreement have the effect that an Act of Parliament is required before an Article 50 notification can be given?

2. If the answer is "yes", is the consent of the NI Assembly required for Westminster to pass legislation that would affect the Northern Ireland Act?

3. If the answer is "no", is there any provision of the NI Act/Belfast Agreement that operate as a restriction or constraint to the royal prerogative powers?

4. Must Section 75 of the NI Act, imposing an equality duty, be complied with before the royal prerogative is exercised?

In addition to these, there is a constitutional question, namely:

5. Is the consent of the people of Northern Ireland required before triggering article 50 of the TEU?

These are, in addition to Miller's question, five legal questions on restrictions of parliamentary sovereignty which the Supreme Court must take into account, and which will entail political consequences.

In McCrudden's view, there is a big question that encompasses those separate questions – that is, a question about the extent to which the UK Constitution recognises a notion of constitutional pluralism. Since 1972, there are different constitutional norms arising both from EU norms and from devolution, yet those different sources need to be accepted by the norm-giver itself. Thus, the conception before 1972 was that of a unitary state with a centre in London and a dualist understanding of the distinction between national law and international law that recognises the centrality of parliamentary sovereignty. Under this conception, international affairs were left to the Executive, which exercised its powers under the royal prerogative, while any international agreements that entered under that prerogative could only have effects in national law when Parliament enacted incorporating legislation.

However, the normative understanding of EU law must be seen through the ECJ, and there are several implications of this fact. The first one is that UK constitutional requirement is a matter of European Law. The second implication is that EU law is not international law and, therefore, the idea that this is a prerogative in an international context is wrong. From the perspective of EU law, the EU law is a sui generis body of supranational law that has profound constitutional implications both for the national laws of its Member States and for the rules of international law. In addition to this, shared sovereignty among devolved territories also have implications since it requires the UK Parliament to request consent from both the Scottish and the NI parliaments, as this is a constitutional norm.

Dr Alex Schwartz

Dr Schwartz explored the extent to which analogies can be drawn with the Supreme Court of Canada's decision to patriate the Constitution, where the Court held that by, constitutional convention, amendments to the Constitution required a substantial degree of provincial consent.

In his view, the UK government can use its prerogative powers to trigger article 50 and there are plenty of examples of that – i.e., examples of the government eliminating or altering previous rights. Apart from this, there is also a question of whether rights granted by the EU – which are enforceable by virtue of EU membership – are statutory and, if they are not, whether the Executive can use its prerogative powers to alter that.

The UK government's argument relies heavily on the arguments of John Finnis about the status of EU rights. Finnis argues that the Court mistakenly assumes that EU rights are 'statutory rights enacted by Parliament' whereas, in his view, the European Communities Act 1972 simply provides a means for making EU law rights enforceable in English law – in other words, they are not 'statutory rights' as such. Thus, the question is whether legislation has made EU rights 'statutory' in a way which prevents the UK from unilaterally withdrawing without further parliamentary approval. In the view of Dr. Schwartz, even though Finnis is right to an extent, it underestimates the magnitude of the ECA's effects on domestic law and the Crown's prerogative powers.

The other side of the argument relies on the putative constitutional convention by which consent by the devolved assemblies is needed before triggering article 50, as far as this affects the scope of devolved parliaments. That is, the Parliament will not legislate in areas that affect devolved administrations without consent. However, even if the constitutional convention applies to Brexit, this is not a legal barrier.

Dr. Schwartz explored the parallelism with Canadian jurisprudence, particularly in relation to the Patriation Reference to amend its Constitution under the leadership of Prime Minister Trudeau. He concluded that, even if there is a strong parallel, the analogies break down since: 1) Canada is a formal federation and 2) no popular vote was involved in this case. In Canada, the balance was pushed back in favour of the provinces because it is a federation. In the UK, devolution is still quite young and there is no tradition of a federal state. Given this, Dr. Schwartz stated that it is hard to say that the Convention will be the 'winner' in this case, as it does not have the same political force and effect than in the Canadian case.

Prof. John Morison

Prof. John Morison gave his reactions from three different perspectives: 1) As a constitutional lawyer; 2) As a governance theorist; and 3) As a govermentality scholar.

As a constitutional lawyer, Prof Morison expressed his strong reaction against the resurgence of sovereignty ideas. This is, in his view, a bipolar idea of sovereignty of judges and the Parliament, where the judges are viewed as a 'salvation' and where sovereignty is understood in terms of 'popular sovereignty'. Even the most radical judges, he said, are moving away from a simplistic idea of parliamentary sovereignty. The basic question is whether a right given by statute can be taken away by prerogative, and whether the EU is a source of this right or just a gateway through which it comes.

As a governance theorist, Prof Morison stated that all this litigation seems to be a futile exercise, 'a glass bead game' (borrowing from Hesse's novel) to escape from international requirements and norms and where it does not really matter what part wins. The government can pass the required bill to notify the European Council of the UK intention to withdraw from the EU, all it takes is for the PM to trigger Art. 50, independently of litigation. Furthermore, this can be viewed as a way by which Government can rescue us from globalization. According to this perspective, litigation is not the way forward – it is not only adversarial but also decisions about the future relationship between the UK and the EU should not be decided in the national courts.

As a governmentality scholar, Prof Morison raised the question: "What would Foucault say?" He would say, in his view, that there is no such thing as sovereignty, only individual exercises of power acting in the day to day routine of governing, as 'government' has been displaced by 'governance'. Prof Morison agrees with that Foucauldian view; in his own words, "It does not matter who will win the case next week (…) Brexiteers will have to pick which bits of EU law they want". And it is then that we will see plenty of challenges for constitutional lawyers.

Prof. Dagmar Schiek

Prof. Dagmar Schiek explored three questions: 1) Article 50 procedure (What does triggering article 50 of the TEU require?), 2) the question whether national legislation is sufficient to truly convey EU derived rights and 3) the question whether the UK would have to leave the EEA via Article 127 separately or might even remain in the Internal Market as a default option after 'BREXIT'.

From an EU perspective, triggering Art. 50 is a three-stage procedure. First, the Council must be notified. Second, there is a stage of negotiation of the withdrawal agreement. Prof. Schiek highlighted that, during this stage, it is the European Council that defines the negotiation mandate, and that in that process, the future relationship with the UK should be taken into account. After this, the baton goes to the Commission, which negotiates the withdrawal agreement. The result has to be accepted by the Council with a qualified majority, and requires the consent of the European Parliament. The membership of the UK would end once the withdrawal agreement enters into force. In order to ensure that a Member State can actually leave the European Union if they so wish, Art. 50 provides that, two years after the notification, the membership ends even if no withdrawal agreement has been concluded. However, the two year period can be extended with consent of the Council. One question which could trigger a reference to the European Court of Justice is whether the UK can change its mind during this process, and unilaterally revoke its notification under Art. 50. The parties in the Miller litigation agreed that this was not an option, and Prof. Schiek supported this view, referring to a teleological interpretation of Article 50 TFEU: the provision stresses consent throughout, and also provides that rejoining the EU is based on Article 49, not 50. Arguments relying on the Vienna Convention on the Law of Treaties could not refute this. However, the central role of consensus in Article 50 TEU also means that the EU institutions and the UK can agree to reverse the withdrawal process. Accordingly, the process is not irreversible. Such a result would also contradict the Treaties' general tendency to prioritise the progress of EU integration. However, the UK cannot unilaterally withdraw the withdrawal notification, which is also the reason why the notification as such weakens the rights derived from EU law for UK citizens.

Prof. Schiek then turned to an EU law perspective on the question whether the joining of and withdrawing from the EU were truly matters of national law only. She emphasized that the quality of EU rights is such that national law cannot fully replicate its effects. National law can maintain legislation which was based on directives, and even repeat some EU regulations as national law. However, national law cannot grant UK citizens' rights in other Member States (as derived from economic freedoms and citizenship) or in the EU institutions (e.g. voting rights for the EU parliament). Thus, withdrawing from the EU will change the position of UK citizens – whether this can be done without parliamentary consent is, of course, a matter for the UK constitution.

She next turned to the question which is at the basis of deliberations for taking another case to the UK courts: the question of whether the UK remains a member of the EEA, with the consequence that it also remains within the Internal Market even after withdrawing from the EU. If that question would have to be answered in the positive, the withdrawal from the EEA (using Article 127 EEA) would independently affect rights of UK citizens again. Only if that is the case, one could argue that if the notification under Article 50 TEU requires parliamentary consent, so does the initiation of the withdrawal procedure under Article 127 EEA. Prof. Schiek argued that the EEA presupposes the EU or EFTA membership of all its members. This makes it very unlikely that withdrawal from the EEA can be independent from withdrawal from the EU.