

Human rights, social protections and Brexit – Scotland's voice?



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Scotland Europa Papers

The Scotland Europa Papers are a series of occasional papers which have been published since 1992. The papers have two objectives:

- To make a Scottish contribution to key issues that will affect the development of the European Union
- To promote a wider understanding of European issues in Scotland

To mark our 25th anniversary of networking Scotland in Europe, we are proud to re-introduce the Scotland Europa Papers with an additional objective of sharing and developing ideas for ongoing Scottish engagement with the EU and internationally in the context of Brexit. The series goes hand-in-hand with the Scotland House Discussion Series, which is designed to share views, expertise, and experience from Scotland with our European partners.

The Scotland Europa Papers are intended to provide a forum for interested parties in Scotland and other European countries and regions to promote ideas and perspectives on issues that are of importance to the development of Scotland and the EU. The papers are available on our website to give them wide circulation. We welcome contributions to the series.

Our original papers, which were released periodically for 13 years, sought to make a unique Scottish contribution to European policy debates and in doing so raise understanding of Scottish issues at EU level.

Scotland values its cooperation and ongoing collaboration in European affairs, and continues to be an active and engaged partner. With this in mind, we hope these papers support ongoing engagement through Scotland's expertise and knowledge, and the valuable contribution of our European partners

The views expressed in the Scotland Europa Papers are those of the authors and do not necessarily represent the views of Scotland Europa or its members and partners.

We would be pleased to have your views on any of the ideas raised in the papers or for you to arrange to receive further papers in the series.

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Introduction

This paper was originally written by Professor Alan Miller as a blog for the Scottish Human Rights Journal in September 2017, and is reproduced as the 38th Scotland Europa Paper, with its permission. Professor Miller joined us at Scotland House in September to present a session of the *Scotland House Discussion Series*, on the potential implications of Brexit on human rights law in Scotland.

Historically, Scotland has been recognised as a progressive actor in the field of international human rights law. Its National Human Rights Institution – the Scottish Human Rights Commission – has been awarded ‘A’ status, and regularly engages with bodies within the international human rights system, such as the Human Rights Council and United Nations treaty organisations.

In his talk, Professor Miller was keen to highlight this progressive approach to protection of human rights in Scotland, and provided an overview of the actions being carried out by the First Minister’s Standing Council on Europe to ensure the continued protection of these rights in a post-Brexit landscape.

The discussion centred on three principles, elaborated in the context of the Standing Council, which have been designed to serve as guidance for the Scottish Government, and aim to uphold Scotland’s progressive stance on human rights advocacy post-Brexit. Professor Miller emphasised Scotland’s positive vision of the UN Sustainable Development Goals, and the Scottish Government’s intention to enshrine human rights, for the first time, in the National Performance Framework.

As the UK prepares to enter the seventh round of Brexit negotiations with the EU, questions around repatriation of powers to the Devolved Administrations in the UK, as well as the future roles of the European Court of Justice and the European Convention on Human Rights will bring the issue of human rights protection to the fore. Professor Miller’s reflections offer a unique insight into the expert voices working to ensure that Scotland remains a progressive and forward-thinking champion of human rights.

Edited by Stephanie Abrahams for the Scotland Europa Papers series

About the author

Professor Alan Miller is the former Chair of the Scottish Human Rights Commission¹, a role to which he was unanimously elected and re-elected by the Scottish Parliament.

He currently serves as a Special Envoy for the Global Alliance of National Human Rights Institutions, and is an expert in the UNDP Crisis Response Unit². Prior to this, Professor Miller was Chair of the European Network of National Human Rights Institutions³, and Secretary of the International Coordinating Committee of National Human Rights Institutions (now GANHRI)⁴, both until 2016.

In addition to his work as a Special Envoy, Professor Miller continues to lecture at the University of Strathclyde, and sits on the First Minister of Scotland's Standing Council on Europe⁵.

Professor Miller previously practised as a court lawyer and directed a consultancy specialising in human rights law.

¹ <http://www.scottishhumanrights.com>

² <http://www.undp.org/content/undp/en/home/crisis-response.html>

³ <http://ennhri.org>

⁴ <https://nhri.ohchr.org/EN/Pages/default.aspx>

⁵ <https://beta.gov.scot/groups/standing-council-on-europe>

Human rights, social protections and Brexit – Scotland's voice?

This article was originally published by the Scottish Human Rights Journal, and has been written by Professor Miller in a personal capacity

Brexit negotiations have begun.

The EU (Withdrawal) Bill has been published. It has been subject to wide criticism that it provides an inappropriate amount of discretion to UK Government Ministers, with inadequate parliamentary or public scrutiny, to determine what is to become of those rights previously guaranteed to us all by EU law. These everyday rights are present in such areas as employment, equality, environment and consumer standards.

It has been confirmed by the UK Government that a Legislative Consent Motion of the Scottish Parliament is to be required with respect to the Bill.

Consequently, there is now an opportunity for Scotland's voice to be heard.

What then should be Scotland's voice on human rights, social protections and Brexit?

Through the First Minister's Standing Council on Europe a series of roundtables in Scotland and Brussels has been held on this subject. Participants have included Scottish and European civil society, Scottish Government Ministers and European Commission officials, legal academics and independent experts.

Three guiding principles have been affirmed.

The first principle is non-regression from existing protections guaranteed by EU law. The second principle is of Scotland not being left behind future progressive European developments in rights. The third principle is that Scotland should continue to lead in rights.

What would these principles mean in practice?

The first principle of non-regression would include the Scottish Government and Parliament seeking guarantees of non-regression to be included on the face of the EU (Withdrawal) Bill and a transparent process of adequate scrutiny so as to provide assurance that UK Ministers can be accountable. If such guarantees are not forthcoming then transfer of powers from the UK Parliament to the Scottish

Parliament should be sought in those relevant law-making areas such as employment and equality and others.

The second principle of not being left behind would include the introduction of continuity mechanisms in both Scottish and UK Parliaments to track developments in rights and social protections within the EU (including the application of the EU Charter of Fundamental Rights) so that due consideration could be given to enacting legislation and making policy as appropriate so as not to be left behind.

The third principle of taking a lead would include the continuation of Scotland's journey in human rights and social protections. Acknowledging the backwards step in this journey of losing the constitutional guarantees of EU rights and social protections provided by the Scotland Act 1998, Scotland would need to develop a new framework of constitutional protection of rights. This should be based upon the UN framework of human rights treaties which have been already ratified at the UN by the UK but not yet given a domestic legal status despite repeated recommendations by the UN that the UK do so.

Such a forward step would represent a commitment to the progressive realisation of economic and social rights in such areas as standard of living, health, education, housing, and to giving special attention to the rights of children, women, persons with disabilities and minority ethnic communities and others to ensure that no one is left behind. The principle of human dignity underlying the new proposed Scottish social security system is an example of this direction of travel which would become uniform across public policy and law making in Scotland.

Scotland's journey to date is indeed already acknowledged around Europe and internationally as taking a lead in human rights and social protections. This is particularly due to the steps it is currently taking to integrate the recently adopted UN Sustainable Development Goals (SDGs), along with Scotland's National Action Plan on Human Rights (SNAP), into the renewed National Performance Framework. The development of specific and relevant national targets and indicators for the SDGs 2030 Agenda is precisely what the UN is currently calling on all countries to do. Scotland is in practice doing just this and taking a lead, including through its internationally respected commitments to climate change and to climate justice.

It is universally recognised that it is the implementation of the UN SDGs – ending poverty and reducing inequality within and among all countries – which underpins the solution to so many of the contemporary global challenges such as poverty, conflict, extremist violence, forced migration and climate change through ensuring that no one is left behind.

The reality of our inter-dependent world requires us all to work together to find solutions to our shared problems. A retreat from this multilateral approach into isolationism only makes the problems bigger. This is evidenced by the US withdrawal from the Paris Agreement on climate change and the unified response from the EU and the rest of the world that such a retreat is to give up on the future.

Let us all hope therefore that these three principles do come in fact to guide both Scotland and the UK in the months and years ahead in the Brexit negotiations.

The principles do also go to the heart of the debate on what kind of country we want to build. The landscape will only become clearer at the conclusion of the Brexit negotiations. That will be the time for each of us to make an assessment of just where we are then headed. These principles of non-regression, not being left behind, and taking a lead point towards a forward and outward looking country and a better world. If they do indeed become Scotland's voice then it is certainly a voice for these times.