Written Evidence from Professor Thomas Glyn Watkin*

1. I am grateful to the Equality, Local Government and Communities Committee for the invitation to appear before it and give evidence in relation to this inquiry. The opinions expressed in this paper are entirely my own and do not represent the views of any body or institution with which I am or have been associated. I should stress that my knowledge and experience of the law relating to human rights is by and large limited to the connection between such issues and the legislative competence of the Assembly and the Welsh Ministers. That connection was the focus of the briefing paper, *Human Rights from the Perspective of Devolution in Wales*,[1] which I wrote for the British Academy at its invitation last year. I understand that the Committee is already aware of that paper and the views expressed in it, although I should emphasize that it was commissioned and written prior to the Brexit referendum last June.

Introductory Remarks

2. In his prizewinning book, *The Rule of Law*, the late Lord Bingham of Cornhill argued that 'affording adequate protection of fundamental human rights' should be regarded as a feature of the rule of law in a free democratic society. He thought that the rights and freedoms set out in the European Convention on Human Rights and to which direct effect had been given within the UK by the Human Rights Act 1998 deserved to be regarded as fundamental in the sense of being guarantees which 'no one living in a free democratic society such as the UK should be required to forego'.[2]

3. Few would dissent from that final statement, but there remains considerable room for debate about the best means to ensure its achievement. The basic choices lie between political and legal safeguarding of such rights, and with regard to the latter between internal safeguards within a nation state as opposed to external supra-national checks.

4. The United Kingdom would traditionally regard itself as having safeguarded such fundamental rights through internal, political means. The representative nature of the House of Commons within Parliament, coupled with the oversight afforded by the unelected House of Lords as a revising chamber, both safeguard fundamental rights as part of the regular work of scrutinizing legislative proposals and supervising the conduct of government. Questions such as whether the courts might ever intervene by refusing to apply a duly enacted piece of Parliamentary legislation because it was repugnant to reason, fundamental rights or the rule of law have been for the classroom rather than the courtroom.

5. Few modern democracies, however, have been prepared to place such trust in political checks alone. Countries with written constitutions rely ultimately on the law rather than political processes to ensure that fundamental rights are respected, setting limits to the legislative powers of even the national parliaments and allowing recourse to the courts by citizens if those limits are breached, with judicial power to annul offending enactments. As such approaches are inconsistent with the notion of parliamentary

sovereignty, they have proved unattractive within the UK – at least as far as the Westminster Parliament is concerned. The devolved legislatures, on the other hand, have statutory limitations imposed upon their competence by the UK Parliament which render their enactments susceptible to challenge, review and annulment before the courts.

6. Unsurprisingly, events in Europe in the first half of the twentieth century raised doubts concerning the efficacy of internal checks alone as a means of protecting fundamental rights from the abuse of legislative and executive power. Declarations, such as the European Convention on Human Rights (ECHR), and supra-national judicial bodies, such as the European Court of Human Rights (ECtHR), were designed to ensure state compliance with fundamental freedoms. Such supra-national obligations and determination procedures are, of course, inimical to notions of untrammelled national sovereignty.

7. The tension between the UK's traditional perspective of parliamentary sovereignty and the supra-national perspective of the ECHR is manifest in the manner in which the Human Rights Act 1998 operates. Although the incorporation of Convention rights into the domestic law of the UK meant that UK citizens no longer had to revert to the ECtHR for adjudication of their rights, the 1998 Act did not confer on UK courts the power to annul UK parliamentary legislation which was incompatible with the Convention rights. Instead, the courts were empowered to make declarations of incompatibility, following which it was for Parliament to determine whether or not the incompatible legislation should be repealed or amended to bring the rogue provisions into compliance. Declarations of incompatibility have usually, but not always, been followed by legislative correction.

8. The position of the devolved legislatures is different in this regard. If a citizen complains before the courts that a legislative provision made by a devolved legislature or a devolved government is incompatible with Convention rights, then, if the incompatibility is found to exist, the legislative provision will be annulled totally or at least tailored to the extent necessary to restore compliance. Indeed, bills passed by the devolved legislatures can, after having been passed, be referred to the UK Supreme Court by the law officers on the grounds of incompatibility so as to prevent them becoming law. This was one of the grounds of challenge in the reference of the Recovery of Costs of Asbestos-Related Diseases (Wales) Bill at the end of the fourth Assembly.[3] The devolved legislatures in this regard are more akin to legislatures working under a written constitution than they are to the UK Parliament.

9. There is one further twist in this tale. As England has no devolved legislature, the 'English Votes for English Laws' procedures in the House of Commons operate to prevent England-only laws being passed by the UK Parliament against the wishes of a majority of English MPs in the lower house. As such England-only legislation, when passed, is a UK Act of Parliament, it is not subject to judicial annulment following challenge for incompatibility, but only to being declared incompatible. Although 'EVEL' is often presented as a corrective counterbalance to a democratic deficit suffered by England as a consequence of devolution to other parts of the UK, the solution adopted re-inforces the view that the sovereign UK Parliament remains in truth the English Parliament to which representatives of the other nations are admitted. Such a perception goes along with a view of the UK as the union of three

other nations with England rather than as the union of four nations to form a united state. These competing perspectives are relevant to the question of how functions currently vested in the institutions of the EU are to be distributed nationally within the UK in the wake of Brexit.

The Impact of the UK's withdrawal from the EU on human rights protection in Wales

10. While withdrawal from the EU would mean that Welsh legislation would no longer have to be compatible with EU law, withdrawal of itself would make no difference to the requirement that Welsh legislation had to be compatible with the Convention rights incorporated into domestic law by the Human Rights Act 1998. The Convention rights however are concerned with rights of the fundamental kind identified by Lord Bingham as being the kind that no one living in a free democratic society should be required to forego. Lord Bingham himself commented that there was 'no universal consensus on the rights and freedoms which are fundamental, even among civilized nations'.[4] In other words, some rights not included within the Convention might be regarded as being fundamental or at least as deserving protection.

11. Many such rights are currently enjoyed by UK citizens as a consequence of their being protected by EU law. These would include, for example, rights concerning employment, parental leave and consumer protection. Questions therefore arise as to whether, and, if so, how, such rights will be 'afforded adequate protection' in the aftermath of the UK's exit from the EU.

12. Currently, within Wales, such rights are protected by the requirement that laws enacted by the Assembly or made by the Welsh Ministers have to be compatible with EU law, and – even at UK level – the European Communities Act 1972 requires that EU law be accorded primacy over UK domestic law thus ensuring compatibility. The UK government has indicated that a 'Great Repeal Bill' will be announced in the Queen's Speech this year which will propose the repeal of EU law provisions within the UK and their re-enactment in the form of provisions of UK domestic law.

13. The question therefore arises as to whether thereafter Welsh legislation will be required to be compatible with this new body of domestic law in order to be valid, and, if so, how will that new body of law subsequently be developed. While part of EU law, those provisions would fall to be interpreted by the Court of Justice of the European Union (CJEU), and could only be amended by the appropriate institutions of the EU. The UK could not amend that law without the consent of at least a weighted majority of the other member states and, on occasion, the unanimous consent of all of them. The question arises as to by whom and by what procedure the replacement body of law can be amended following Brexit. Will it be entirely under the control of the UK Parliament as a reserved matter, or will the consent of the other nations of the UK be required? Given that such changes will affect the legislative competence of the devolved nations, legislative consent motions should be required, but on this issue the question of whether such a requirement should be a mere convention or should be capable of judicial enforcement arises afresh.

14. Nor is it simply an issue of consent to proposed UK provisions. Will it be open to the devolved nations to provide greater levels of protection or different mechanisms for protection within their respective territories? One thinks of the incorporation of the rights of children and young persons into the body of Welsh law, or of the proposals to safeguard the rights of workers to take industrial action within sections of the public sector in Wales. Will such variations be permissible regarding matters which are not reserved? If such competence is devolved, will that devolution be symmetrical or will there be differing competences among the devolved nations, and will the answer to that question regarding Wales be affected by its not being a distinct legal jurisdiction?

15. In giving effect to EU legislation at present, member states are required to respect Convention rights as part of the general principles of EU law. This gives rise to the question of whether such an approach will also inform the content of the domestic law made after the Great Repeal has taken place. As long as the Convention rights remain incorporated within UK domestic law, one would expect the provisions of erstwhile EU law to remain subject to the protection mechanisms provided by the 1998 Act, although no primacy would attach to them as they may at present enjoy in those areas by virtue of being part of EU law. An interesting question is how far the other EU nations may attempt to insist that the UK observe Convention rights in areas currently governed by EU law as part of the treaty obligations to be entered into by the UK to govern its future relations with the EU, and how such obligations will be enforced as regards devolved law-making.

The Impact of the UK Government's proposal to repeal the Human Rights Act 1998 and replace it with a UK Bill of Rights

16. This is the issue which was discussed regarding Wales in my briefing paper written for the British Academy last year. As I am aware that the Committee has access to that paper, I will not repeat its contents in any detail here. I shall confine myself to emphasizing some issues of particular relevance and importance here.

17. First, repeal of the Human Rights Act 1998 would not of itself terminate the UK's adherence to the ECHR. Such adherence would remain a treaty obligation. Accordingly, although citizens would not be able to challenge legislation before the UK's domestic courts for incompatibility, they would nevertheless be able to seek redress before the ECtHR, and the Secretary of State would still have the power to intervene to prevent an Assembly bill from receiving Royal Assent where he or she had reasonable grounds to believe that its provisions were incompatible with the UK's treaty obligations relating to the Convention.

18. Secondly, with regard to the enforceability of fundamental rights before courts in the UK, everything would depend on the exact terms of the UK Bill of Rights. One suspects that compatibility with the UK Bill of Rights would become an essential ingredient of legislative competence for the devolved legislatures. Once more, however, the question will arise of whether the courts will be empowered to do anything more than issue declarations of incompatibility with regard to the legislation of the UK Parliament. Very important in this regard will be how a UK Bill of Rights is to be enforced in relation to England-only legislation made by the UK Parliament. Will such legislation continue to be treated as enactment by the sovereign parliament

or will it be treated as a form of devolved legislation. In truth, as suggested above, the manner in which this question is answered is very revealing about the status of England within the UK and how the relationship of the UK to that nation corresponds or differs to the UK's relationship with its other national components.

19. The same issue remains pertinent with regard to the manner in which the courts will review questions of compatibility when dealing with the various legislatures. In the *Asbestos-Diseases Case*, the majority of the Supreme Court were clear that, in considering whether a fair balance had been achieved between the policy goal being pursued by the legislation and the interference proposed to a fundamental right in order to achieve that goal, the court would not question or review the quality of the decision-making in the UK Parliament – as that would be contrary to article 9 of the 1689 Bill of Rights – but would be prepared to do so when reviewing legislation made by devolved legislatures. The minority judgment of the Supreme Court found this distinction to be illogical. To this must once more be added the inconsistency between the treatment of England-only legislation made by the UK Parliament under EVEL and nation-specific legislation made by the devolved legislatures. The passing of a new UK Bill of Rights would afford the opportunity to redress this imbalance, but it is questionable whether the opportunity will be welcomed let alone taken. It is in essence an opportunity to make a clear choice between defending human rights by political or legal means, rather than, as at present, imposing legal mechanisms for their defence on the devolved nations while relying on political checks at UK – and therefore England – level under cover of respecting and defending the sovereignty of parliament.

20. The content of a UK Bill of Rights will undoubtedly be a reserved matter as against the devolved legislatures, at least with regard to the minimum content or level of protection of those rights. The question, however, may remain open as to whether a devolved legislature might supplement or add to the list of protected rights within its territory or afford increased levels of protection. A precedent for such an approach can be found in the treatment of Equal Opportunities as a reserved matter in the Wales Act 2017. Despite Equal Opportunities being reserved, an exception allows the National Assembly to enact provisions which supplement or are otherwise additional to provision made by the Equality Act 2010 or to require the taking of action which is not prohibited by the 2010 Act. This would however lead to different levels of protection in the different nations of the UK, and once more the question needs to be asked whether, in considering the propriety of such variations, the continued single legal jurisdiction of England and Wales might militate against Wales enjoying the same legislative latitude as the other devolved nations.

Public perceptions about human rights in Wales, in particular how understandable and relevant they are to Welsh people

21. I cannot provide anything other than anecdotal evidence concerning how the public in Wales perceive human rights. While inevitably such perceptions are undoubtedly coloured by political opinion, my own experience is that popular understanding of human rights protection, including its importance and its relevance, is frequently confused, a confusion which results in my view from the confusing manner in which the UK has chosen to promote human rights.

22. One common source of confusion is to link adherence to the ECHR with membership of the EU, and to confuse the work of the CJEU with that of the ECtHR. There is a degree of inevitability about this confusion, but it would be wrong not to recognize that it results, at least in part, from the ambivalent attitude to supra-national, European institutions which has plagued British politics for over half a century. As long as a 'them and us' approach to European institutions prevails, with supra-national, European dimensions being regarded as 'other', such confusions will continue. It may be that this particular confusion will be redressed on realisation that Brexit does not of itself affect the UK's adherence to the ECHR, nor the UK's acceptance of the jurisdiction and jurisprudence of the ECtHR.

23. If the UK were to replace the mechanisms of the Human Rights Act 1998 with a UK Bill of Rights, it is possible that the outcome would assist in making the legal and constitutional mechanisms for the protection of human rights in the UK more accessible to its citizens. I doubt however whether that will be the case if differences continue between the treatment of England in this regard and the treatment of the other nations. The UK Parliament has successfully enacted provisions in the European Communities Act 1972 which have allowed the courts to accord primacy to EU law over later parliamentary enactments as well as the legislation of the devolved nations. It should not be impossible for it enact a similar scheme to permit the courts to accord primacy to a UK Bill of Rights over other UK parliamentary legislation, even if that were only to be a rebuttable presumption in respect of the UK Parliament, that is a presumption which could in specific cases be rebutted by express provision to the contrary or by necessary implication. Such a move would be no more a denial of parliamentary sovereignty than the existing provisions of the European Communities Act, the proposed repeal of which establishes beyond doubt that its enactment has not diminished Parliament's sovereign law-making powers.

24. Such a development would mark a clear choice by the UK of its preference for legal rather than political checks upon legislative power, rather than the mix which obtains at present. At the very least I would argue that England-only legislation in the UK Parliament should be subjected to such a regime, and that as an irrebuttable presumption, so as to ensure equal treatment for those subject to the law in all of the nations of the UK. To again quote the words of Lord Bingham on the contemporary meaning of the rule of law: 'The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation'.[5] I would argue strongly that such differences with regard to the protection of human rights should be objective differences regarding the individuals entitled to them, not differences with regard to the legislatures which enact the means for their protection. It is simply neither right nor just that an England-only law which allegedly contravenes a protected right cannot be challenged by those affected by it in the same manner as a law made in Wales, Scotland or Northern Ireland.

25. Nor is the injustice confined to the treatment of individuals. If the UK Parliament chooses political means to protect and redress human rights violations for the laws it makes, leaving it ultimately to the democratically elected representatives of the people to determine whether particular interferences are justifiable, it is not clear why the same method of protection should not be regarded as effective with regard to the legislative choices of the devolved legislatures in matters within their competence. If the people's elected representatives at Westminster can be trusted to make the

appropriate choices on such issues, why cannot the same people's choice of representatives be trusted in Cardiff Bay, Holyrood and Stormont? A consistent and articulated principle underlying the UK's approach to human rights protection would, in my view, go far to increase public understanding of the system, and appreciation of its significance.

I hope these views will be of some assistance to the Committee in its deliberations.

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* Professor Thomas Glyn Watkin, since retiring, has been an honorary professor at both Bangor and Cardiff Law Schools. Prior to retirement, he was First Welsh Legislative Counsel to the Welsh Assembly Government (2007–10), Professor of Law and Head of Bangor Law School (2004–2007) and Professor of Law at Cardiff Law School (2001–2004), having previously been successively Lecturer, Senior Lecturer and Reader in Law at Cardiff (1975–2001) and Legal Assistant to the Governing Body of the Church in Wales (1981–1998). He is a Fellow of the Learned Society of Wales, and an ordinary academic bencher of the Middle Temple.

Notes

[1] http://www.britac.ac.uk/news/british-academy-publishes-human-rights-briefings-devolution-wales-and-uk%E2%80%99s-international.
[2] Tom Bingham, *The Rule of Law* (London: Penguin Books, 2010), p. 66.
[3] [2015] UKSC 3.
[4] Bingham, *The Rule of Law*, p. 68.
[5] Bingham, *The Rule of Law*, p. 55.