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## **Criminal Justice Cooperation Between the UK and Ireland After Brexit: Special Edition**

**Gemma Davies, Associate Professor, Northumbria University**

This special edition of the Journal of Criminal Law emanates from an Arts Humanities Research Council project which funded the UK-Irish Criminal Justice Cooperation Network.<sup>1</sup> The network is a collaboration between Northumbria University, Queen's University Belfast and the Association for Criminal Justice Research and Development in Ireland (ACJRD). The aim was to understand the challenges that the UK and Ireland might face, post-Brexit, in relation to criminal justice cooperation, and assist in meeting those challenges where possible. The network held three workshops in 2019 and events in 2020 were moved online due to the Covid-19 pandemic.<sup>2</sup> A planned conference has been postponed until 2021. Throughout the duration of the network over 70 stakeholders participated in events from a broad range of criminal justice institutions, including police, prosecutors and border control, across Great Britain, Northern Ireland and the Republic of Ireland, along with policy makers and academics. The four papers in this special edition all draw on insights shared by participants of the network events and the authors would like to express their gratitude to those that have generously given of their time over the last two years.

Academic research has highlighted that the political motivations and institutional infrastructure framing the Brexit negotiations presented a risk to continued efficient cross-border criminal justice cooperation.<sup>3</sup> Written evidence to the House of Commons Justice Committee in 2017, submitted by Northumbria academics, highlighted, inter alia, that the loss of EU criminal justice cooperation, combined with the risks that Brexit presented for the Irish border, created a specific problem for the island of Ireland and the maintenance of the Common Travel Area.<sup>4</sup> A workshop held in Ireland in June 2017 further highlighted that criminal justice practitioners in Ireland and Northern Ireland felt that their voices and experiences weren't being heard at the political level and a space was needed where practitioners could meet to share understanding and work collaboratively to address the problems that Brexit could present. Davies and Jackson presented a paper at the ACJRD annual conference in September 2017 which concluded that there was 'no coherent strategy to ensure... effective criminal justice cooperation between the UK and Ireland will be maintained post-Brexit'.<sup>5</sup> From these events the UK-Irish Criminal Justice Cooperation Network was born. Practitioner and academic involvement in the network was essential to ensuring the co-creation of knowledge which reflected the legal, political and social nuances unique to the island of Ireland and assisted in understanding the barriers (both jurisdictional and professional) to enhanced cooperation moving forward. The network has

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<sup>1</sup> AH/S002197/1

<sup>2</sup> All were held under Chatham House rules.

<sup>3</sup> Gemma Davies and Adam Jackson, 'Evaluating the European Criminal Record Information System (ECRIS) for the Exchange of Criminal Records Information between Member States: Establishing the Need for Post "Brexit" Sharing of Criminal Records Information' [2017] 21 International Journal of Evidence and Proof 330; Tim Wilson, 'The Impact of Brexit on the future of UK forensic science and technology', (2019) 302 Forensic Science International 109870

<sup>4</sup> Northumbria University Centre for Evidence and Criminal Justice Studies (NCECJS) – Written evidence (FRS0038), Wilson, T., Stockdale, M., Jackson, A., Carr, S., Davies, G., Piasecki, E. 14 Sep 2018. See also House of Commons Justice Committee: implications of Brexit for justice published 22 March 2017 (HC750)

<sup>5</sup> Gemma Davies and Adam Jackson 'UK-Irish Criminal Justice Cooperation: Finding Solutions to a Multi-faceted Problem' in ACJRD 20th Annual Conference 'The Brexit Impact on Criminal Justice Cooperation in Ireland' (2017) available at <<https://www.acjrd.ie/contents/375>> accessed 03 November 2020

sought to ensure that these nuances were captured and informed political discussions of the criminal justice implications for cross-border cooperation after Brexit.<sup>6</sup> More importantly though the network worked to strengthen dialogue and collaboration between all criminal justice organisations, hopefully permanently. Although the eventual outcome of the Brexit negotiations is still, at the time of writing<sup>7</sup>, not known, the papers in this special edition all add to our understanding of the close relationship between British and Irish criminal justice agencies and explore ways of ensuring this relationship is protected and even enhanced in the coming years, regardless of the eventual relationship between the UK and the EU. The subject of trade and the operation of the Northern Irish Protocol has inevitably received the greatest attention over the last four years. This special issue is dedicated to throwing light on a less understood but still vitally important aspect of Brexit. It is hoped that at least some of the recommendations in the articles will find their way to political reality.

The first article, by Gemma Davies is entitled 'Facilitating cross-border criminal justice cooperation between the UK and Ireland after Brexit: 'Keeping the lights on' to ensure the safety of the Common Travel Area'. The article highlights the combined risks that Brexit presents for Northern Ireland in the form of increased criminality at a time when the loss of EU police cooperation mechanisms may result in a reduction of operational capacity and the removal of the legal architecture underpinning informal cooperation. Part 1 seeks to highlight the historical context of UK-Irish cooperation in policing matters. Part 2 explores the risk that post Brexit the Irish border may become a focus for criminal activity. The risks relating to increased immigration crime, smuggling of commodities and potential rise in terrorist activities are explored. Part 3 considers how the risks of increased criminal threats are exacerbated by the loss of EU criminal justice cooperation mechanisms and how this will affect UK-Irish cooperation specifically. Consideration is particularly given to the loss of information sharing systems. Part 4 considers how loss of EU level cooperation mechanisms could be mitigated. The viability of bilateral agreements between the UK and Ireland is considered alongside ways which police cooperation can be formalised to compensate for the potential loss of EU criminal justice information sharing systems. Nordic police cooperation is considered as a potential blueprint for the UK and Ireland.

The second article, by Paul Arnell and Gemma Davies is entitled 'Extradition Between the UK and Ireland after Brexit – Understanding the past and present to prepare for the future'. The article maps the long, close and difficult history between Ireland the UK and the unique practices as regards the transfer of accused and convicted persons from one to the other. Indeed, there has been a special and close relationship between the two in that regard; albeit one not without difficulties. In recent times EU Justice and Home Affairs measures and the Good Friday Agreement 1998 have supplemented and strengthened the relationship. These include, since January 2004, the European Arrest Warrant (EAW). The EAW has been particularly important in streamlining the extradition process between the Ireland and the UK. This phase of history and cooperation is coming to an end. The UK's membership of the EU has now ceased, and a transition period during which the UK remains part of the EAW will end on 31st December 2020. The extradition relationship between the two is therefore facing a considerable challenge. There are several options open to Ireland, the UK and the EU as a replacement. Time, political will and the interests of third states, however, may well stand in the way of the conclusion of an agreement that optimally serves the interests of all parties and criminal justice. This paper considers the origins of extradition between the UK and Ireland and the alternative methods of extradition open to the UK and Ireland after Brexit. Consideration is given to the likely operation of a

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<sup>6</sup> For example informing through written and oral evidence the Northern Ireland Affairs Committee, Cross-border co-operation on policing, security and criminal justice after Brexit inquiry.

<sup>7</sup> 03 November 2020

Norway-Iceland style agreement and whether such an agreement will be in place by the end of the transition and, if it was, whether its terms are likely to be sufficient for the needs of Ireland and the UK. The possibility of a bilateral arrangement on extradition between Ireland and the UK is also explored. Underlying the discussion is the critical point that the future extradition relationship must retain its 'special' characteristics, and therefore maintain the trust and good will that has developed over the years and given rise to an effective extradition relationship between the two countries. In other words, the lessons of history must be remembered.

The third article is by Tim J Wilson and is entitled 'Prisoner Transfer within the Irish-UK Common Travel Area (CTA) after Brexit: human rights between politics and penal reform'. The UK Government proposed in February 2020 that sentenced prisoner transfers with EU member states should continue after Brexit, but using a more 'effective' process than the existing Council of Europe convention. The article analyses, with a particular focus on the Irish-UK CTA, the significance of continued UK human rights compliance for the achievement of this objective and the interrelationship of this issue with extradition/surrender (including the surrender of fugitive prisoners). It is concluded that Brexit has most probably raised the level of formal and institutional human rights compliance (including legal aid/assistance and the direct enforcement of prisoners' rights in domestic courts) required from the UK for criminal justice cooperation with EU member states. Entering into such undertakings would not assist criminal impunity or the evasion of lawfully imposed penalties. Such undertakings, however, cannot help to resolve many problems inherent in prisoner transfer within the EU. The creation of a truly effective and rehabilitative transfer system would require (a) constructive UK Government participation in inter-governmental (including the UK devolved governments)/EU arrangements capable of incrementally resolving or effectively mitigating criminal justice cooperation problems and (b) acceptance at Westminster that this aspect of post-Brexit readjustment is likely to be intermittent and of long-duration.

The fourth article by Liz Heffernan is titled 'Irish Criminal Trials and European Legal Culture: A Backdrop to Brexit' and explores themes relating to legal culture in European criminal justice post-Brexit by focusing on aspects of the common law trial process in the Irish courts. The incorporation of EU law and the ECHR within the domestic legal order has necessitated the nurturing of a constructive co-existence with the country's longer standing constitutional and common law traditions. Ireland and the United Kingdom have collaborated closely as common law Member States and the departure of the UK from the EU will affect Ireland's position in EU criminal justice in many and varied ways. Using the examples of victim participation in criminal trials and pre-trial access of suspects to legal assistance, the paper seeks to illuminate trends of consonance and dissonance in Ireland's relationship with European law. Drawing on the shared commitment to the protection of fundamental rights in the EU and the ECHR, the discussion reflects on some of the longer term implications of Brexit for the common law presence in European criminal legal culture.

All four papers have an important common element. Although occasioned by Brexit, they look beyond this particular event, or as some of us see it, a longer-term readjustment process. They capture important aspects of and ambitions for cross-jurisdictional and inter-governmental political cooperation that reflect intricate nuances in relationships across the border in Ireland and how institutions in that island interact (or need to interact) with both Great Britain and the European Union. It is my hope that this will not be the final publication reflecting collaborative work created through the UK-Irish Criminal Justice Cooperation Network. Certainly, there is huge need for pragmatic problem solving as well as scope for more traditional academic research on network topics. Much more than can be presented within a single special issue.