



**THEY'RE YOUR  
RIGHTS  
FIGHT FOR THEM**

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# Executive Summary

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MPs and peers face a huge task in ensuring that the mandate to 'take back control' is not manipulated into an instruction for one of the most significant rights regressions and power grabs in modern British political history.

In this report, we looked at the wider political and legal domain of human rights within the process of Brexit and we have found that:

The EU took action on tools of torture and trafficking and clarified the status of rights that affect people's lives in key areas such as data protection, environmental protection, access to justice and working conditions, amongst others;

There is a category of rights in EU law that are capable of being replicated in UK domestic law, but there are many that are not and will be lost on Brexit;

Brexit is likely to mean challenging infringement of rights will be more difficult for UK citizens;

In order to be practicable in the short term, UK laws are likely to still be influenced by EU laws and the decisions of the CJEU;

The Miller judgment was clear that the executive does not have power to amend or repeal fundamental rights of UK citizens;

The EU's commitment to human rights includes the arena of trade agreements which should also guide its impending negotiations with the UK.

## RIGHTS GUARANTEE

**We call on Parliamentarians to ensure that all UK legislation, including the *acquis* of EU laws capturing human rights, is not amendable or repealable by secondary legislation nor without recourse to a vote by the general public.**

When we appealed to people to fund this wide-reaching work, we did so on the basis that we would focus on rights under EU law. It is increasingly apparent that the current UK Prime Minister is dedicated to withdrawal from the European Convention on Human Rights at some point in the future. Therefore, we are now extending our fight for rights and taking it to the member states and institutions of the EU as well.

## FREEDOM TRADE ZONE

**We call on the EU not to agree to any free trade deal with the UK without express provision that the UK remains a signatory to the European Convention on Human Rights and that there will be equivalence with EU law on human rights standards.**

# *Introduction*

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From Magna Carta to the English Bill of Rights through to the Universal Declaration of Human Rights and latterly, the Human Rights Act, British political history is thread through with successive generations' battle to secure their rights.

By taking power away from monarchs and embedding them in Parliament, and by agreeing with other countries how state powers should be limited, there has been substantial progress made over the course of hundreds of years in securing peace and prosperity for citizens who do not have recourse to title and privilege.

After the atrocities of the Second World War, politicians such as Winston Churchill and lawyers such as David Maxwell-Fyfe helped establish major rules-based orders on the European continent. The European Convention on Human Rights challenged nation states to conform to a higher standard of conduct, both towards their citizenry and to each other through an agreed set of laws and levers of accountability.

The EEC was created in 1957 under the Treaty of Rome to remove barriers to trade and provide financial and regulatory incentives on a macroeconomic level through the initiative of the Single Market. After the fall of the Berlin Wall, central European countries joined the project, which led to the Treaty of Lisbon.

For the first time since the Second World War, this progression is being proactively challenged by state and populist responses to the pressures of globalisation.

The fair movement of capital, services, people, goods and latterly, in data and environmental protection have the potential to create sustainable prosperity and peace.

Populists are blaming rules-based orders and are pushing through radical changes quickly that could exacerbate problems, not solve them. To date, the British government's response to the vague mandate provided by the UK electorate in 2016 at the EU Referendum has been to seek as much power as possible from the EU for the executive branch of government and to do so without clear deference to citizens' rights. This is an unprecedented power grab.

The Supreme Court's judgment in the case of Miller was a timely reminder that when it comes to the rights of citizens, it is the Crown in Parliament that is sovereign, not the executive.

Taking back control means that rights of the people must continue to progress, not regress. It should mean Parliament deciding carefully how to improve people's lives, not allow the government to trade in torture tools or allow polluted air that kills thousands of adults and children every year.

In this report, we have set out initial insights into the rights that people have accumulated as a result of EU law.

In the first section, 'Peace and Prosperity' we look at the role of the EU in combining trade freedoms with rights obligations and how this should be replicated in a future EU-UK agreement.

## ***Introduction (cont.)***

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In the second section we provide an overview of UK citizens' rights heritage as it has derived from different sources of human rights law.

In section three, 'Strasbourg' we briefly set out the context of the twentieth century human rights movement and the context of the ECHR.

Section four, titled 'Brussels' addresses what EU laws are and how EU membership has progressed rights.

In the fifth section 'Westminster' we consider the growing role of the UK Parliament in the post-Brexit constitutional settlement and in protecting rights.

The sixth part of the report then looks into specific areas of rights that have benefitted from the *acquis* of EU law.

Finally, there is analysis of the present political situation and the dangers of extending UK executive power further.

Given the broad and technical nature of this work we have not been able to tackle the complex issues that affect EU nationals who live in the UK or of UK nationals living in the EU. We are aware that there is a large amount of work to be done by groups and individuals who have specialised knowledge and expertise in the issues raised and who will be looking more into these problems.

# *Peace and Prosperity*

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Human rights and freedoms are important factors in global trade.

In Western Europe, the post-second world war settlement on individual and collective civil and political rights provided the bedrock for state accountability. The European continent moved from conflict to a trade system that respected rights remarkably quickly and successfully. The defeat of Hitler was followed by initiatives such as the creation of the Council of Europe, and the progression of the European Coal and Steel Community, to the EEC, and finally the EU.

One of the key drivers of global economic growth has been increasing the stability of individual nation states. A stability that is based on, amongst other things, a society's rejection of conflict, installing the rule of law, and an established taxation system. Entwined with all of these notions is the ability of citizens to hold governments accountable regularly and especially when they act arbitrarily.

Stability and accountability in the UK rely not just on elections and getting people out of office every five years but keeping the government compliant with the rule of law. Elections on their own do not afford citizens, as some suggest, enough scrutiny of government, Parliament and the wider state during the complex and difficult actions that need to be undertaken in the years in between votes.

Human rights exist not only to protect citizens from the state but to hold public bodies, or arms of the state, accountable for their actions everyday. Rights prevent the state doing what it wants when it wants, which is good for business and society. The HRA and ECHR provide human rights laws that are interwoven with the UK's standing as a country that is not afraid to be held up to scrutiny, be it in the domestic courts or in Strasbourg.

The ECHR exists to hold states up to internationally recognised higher standards of conduct. Legally enforceable individual freedoms provide business with a societal stability that promotes profit and growth.

## **FREE TRADE AND FREEDOMS**

There are over 400 regional trade agreements around the world with varying degrees of tariff barriers and harmonisation of trade rules. The European Union is the biggest exporter, importer and consumer market bloc in the world<sup>1</sup> with 500 million consumers. It has the largest single market of harmonised rules and regulations and the largest economic bloc in terms of GDP per head.

Global free trade is however presently under renewed strain given the damaging consequences of Brexit on the EU and the policy statements of the new US president. President Trump has advocated<sup>2</sup> scrapping the North Atlantic Free Trade Agreement, amongst other measures, to mitigate the supposed effect of globalisation on American jobs.

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<sup>1</sup> EU Position in World Trade <http://ec.europa.eu/trade/policy/eu-position-in-world-trade/>

<sup>2</sup> Katie Allen. (2016). "Trump's Economic Policies: Protectionism, Low Taxes and Coal Mines". Guardian. Available at: [goo.gl/IFxIKr](https://goo.gl/IFxIKr)

## *Peace and Prosperity (cont.)*

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The retreat from established trade represents a knee-jerk, blame-first reaction to complex problems. It also contrasts greatly to a potentially more progressive solution, which is to increasingly link free trade and freedoms. This can be achieved through incorporating human rights protections to form mutually beneficial conditions on preferential trade agreements.

For example, the Canadian-Colombian Free Trade Agreement signed in 2008 aided Colombian import of goods such as Canadian wheat, paper, machinery, and pulses and its export of coal, coffee, bananas, and fuel oil to Canada<sup>3</sup>. That agreement also contains specific provisions around labour at Chapter 16<sup>4</sup> where the Parties affirmed their obligations as members of the International Labour Organization (ILO) and made commitments on working conditions. Chapter 17 also recognised the importance of balancing trade and environmental obligations.

The EU has been rightly recognised as having achieved a positive effect on the human rights of states that have wished to join it. Countries from central and eastern Europe such as Poland, Romania and Bulgaria were all required to increase their human rights framework in order to become members of the EU. By combining trade and rights and creating a conditionality of respect for human rights, with specific deference to the ECHR within the economic bloc, the EU has been a rare example of progressing rights through incentives and without finger wagging at the level of international forums. Although there is a high degree of complexity in assessing human rights progression, statistical studies of the relationship between trade agreements, like the EU, and human rights behaviour confirm:

*“Repressive states violate human rights less when they are parties to even one trade agreement that incorporates human rights standards than when they are party to none. Those that are party to at least one such agreement are more likely to improve their human rights behaviour over time than to stay at the same level”<sup>5</sup>*

## **AGREEING ON RIGHTS**

It is for the broad policy principles and reasons set out, that the EU has included human rights clauses in its trade agreements with other countries for decades. The Treaty of Lisbon was established to advance agreed values, principles and objectives and compliance with international law across the European continent. Human rights have been described as the “silver thread”<sup>6</sup> to actualise this intention as part of the EU's external action.

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3 (2011). “Canada-Colombia Trade Deal Takes Effect”. CBCNews. Available at: <http://www.cbc.ca/news/business/canada-colombia-trade-deal-takes-effect-1.1094902>

4 Government of Canada website. “Canada-Colombia Free Trade Agreement”. Available at: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/colombia-colombie/chapter16-chapitre16.aspx?lang=eng>

5 Emilie M. Hafner-Burton. (2012). “Trade and Development Agreements for Human Rights?”. ECDPM. Available at: <http://ecdpm.org/great-insights/trade-and-human-rights/trade-development-agreements-human-rights/>

6 Clair Gammage, ‘Social Norms and Labour Standards in EU FTAs: A Legal Perspective’ (GIFTA Workshop, London, United Kingdom, 30 June – 1 July 2015)

***Peace and Prosperity (cont.)***

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The importance of the EU's external human rights obligations is set out in the Treaty of Lisbon in Article 21(1) and (2):

***“The Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law”***<sup>7</sup>

***“The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to...  
(b) consolidate and support democracy, the rule of law, human rights and the principles of international law;”***<sup>8</sup>

These excerpts from the founding document of the EU show the extent to which rights considerations should be at the forefront of the EU's external relations. This has manifested itself, amongst other ways, in the form of human rights clauses within international trade agreements. The UK's Joint Committee on Human Rights recently characterised such clauses as:

***“Referring to basic human rights and democracy standards, and ... a mechanism for applying ‘appropriate measures’ (such as sanctions) if the other party violates an ‘essential elements’ clause...”***<sup>9</sup>

The Committee further warned that the UK should not dilute these standards in its further agreements with other states as it could give rise to a rights imbalance between the UK and the EU after Brexit. It is right that the UK's future free trade should be an opportunity to raise human rights standards globally, not diminish them.

The process of a member state leaving the EU under the process of Article 50 has never been undertaken before. However, if the EU is to apply the logic set out in the Treaty of Lisbon, if a member state wishes to leave the European Union and establish a new relationship, there is no reason why it should not be given any less substantial criteria than those states who are seeking membership.

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<sup>7</sup> Access to European Union law website <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>

<sup>8</sup> Access to European Union law website <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT>

<sup>9</sup> UK Parliament website <https://www.publications.parliament.uk/pa/jt201617/jtselect/jtrights/695/69502.htm>

## *Peace and Prosperity (cont.)*

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After the fall of the Berlin Wall, the EU set out the Copenhagen criteria to establish what countries wishing to join the EU needed to have:

- 1** stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- 2** a functioning market economy and the capacity to cope with competition and market forces in the EU;
- 3** the ability to take on and implement effectively the obligations of membership, including adherence to the aims of political, economic and monetary union.<sup>10</sup>

The HRA, domesticating the ECHR, is arguably one of the few stable instruments guaranteeing democracy, the rule of law, human rights and the protection of minorities to UK citizens. Withdrawal from the ECHR and the jurisdiction of the Strasbourg court would set the UK outside of the established principles of the EU.

Moreover, all EEA countries who are outside of the EU: Iceland, Liechtenstein and Norway as well as Switzerland, are signatories to the ECHR<sup>11</sup>. Albania, Bosnia-Herzegovina, Macedonia, Montenegro and Serbia, who have all applied to join the EU<sup>12</sup>, are all signatories of the ECHR. The EU itself is in the process of acceding, as an international body, to the jurisdiction of the ECHR.

It is imperative that the EU27 must not dilute its standards when negotiating a trade agreement with the UK. In fact, the UK being a signatory to the ECHR, should be a prerequisite to any free trade deal. The EU must not diverge from the principle that the power to trade freely with it is inextricably linked to the responsibility to treat citizens fairly under internationally recognised laws.

The European project's successful combination of market/trade rights with human rights to date precludes a prospective UK divergence on the handling of data, or environmental protection, or on exporting tools used for torture and capital punishment.

**It is antithetical to the values of the EU to negotiate a free trade agreement with a member state, exiting the Union, without guarantees secured on compliance with the ECHR.**

**It is right that no free trade treaty with the UK should therefore take place without express provision that the UK remains a signatory to the European Convention on Human Rights and that there will be equivalence with EU law on human rights standards.**

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<sup>10</sup> Access to European Union law website [http://eur-lex.europa.eu/summary/glossary/accession\\_criteria\\_copenhagen.html](http://eur-lex.europa.eu/summary/glossary/accession_criteria_copenhagen.html)

<sup>11</sup> Council of Europe website [https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p\\_auth=goWKQxt3](https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=goWKQxt3)

<sup>12</sup> (2014). "EU Enlargement: The Next 7". BBC. Available at: <http://www.bbc.com/news/world-europe-11283616>

# *Your Rights Heritage*

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Human rights are often best identified and understood via the sources from which they derive. People in the UK generally draw their rights from four main sources of law<sup>13</sup>:

**1 Westminster** - UK Parliament and common law<sup>14</sup>

**2 Brussels** - The EU

**3 Strasbourg** - The ECHR

**4 Global** - international law

There is a great degree of overlap between these four sources as many human rights exist in principle (and sometimes in practice) across them all. What matters in turning a principle or ideal into an actual right is the extent to which people can rely on them and how they are protected by interpretation of the law.

In the UK's legal system, people have limited access and remedies from human rights in international law. This is because unlike some other countries, the UK does not believe all of the principles it signs up to on the global stage should generate a direct cause of action for citizens in UK courts<sup>15</sup>.

This has meant that the human rights that people rely on everyday, knowingly or unknowingly, have mainly come from laws and judgments that are a mix of Brussels, Westminster and Strasbourg.

Westminster human rights develop through laws passed by Parliament and the interpretation of those laws in courts. Brussels human rights similarly emerge from laws passed by the EU Parliament that are subsequently interpreted and implemented by individual member states or the EU itself. The CJEU decides where there is any dispute about what an EU law human right means and where it applies.

Strasbourg human rights are slightly different from both Westminster and Brussels in that the ECtHR has no law-making function. Strasbourg is only a court and a council, which exists to consider whether countries are actually abiding by the rules on human rights that they agreed to.

Brexit is an attempt to remove one of these sources of human rights (what has been termed 'Brussels') without a detailed democratic mandate in how to do so. In the following sections we look at the types of laws under Brussels that are relevant to human rights. We then look at how the EU has made conscious choices to advance human rights issues, in and of its own and its member states' accord. We then look at how human rights have become deeply entwined with the creaking constitutional settlement in Westminster. Before those arenas, it is important to understand the context of modern day human rights and the Second World War.

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<sup>13</sup> See Table 1 at Appendix A for more details

<sup>14</sup> UK Supreme Court website <https://www.supremecourt.uk/docs/speech-160818-01.pdf>

<sup>15</sup> UK Parliament website <https://www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/633/63304.htm>

# Strasbourg

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Over 60 million people were killed during the Second World War, which was estimated to be around 3% of the world population. In the aftermath of the fall of violent nationalism and genocidal mania, Britain stood up first to sign up to a new order of rules to curb state power.

The European Convention on Human Rights was ratified by the UK in March 1951. It followed a proposal by Winston Churchill to create a Council of Europe which was “guarded by freedom and sustained by law.”<sup>16</sup> The idea of using the rule of law to prevent state abuse on an international scale had been gaining momentum at a time when states, acting in self-interest, could no longer be trusted to sustain the peace. This notion has chilling parallels with the present state of geopolitics.

A key architect of the Convention was another Conservative MP and lawyer, David Maxwell-Fyfe, who had been deputy British prosecutor at the Nuremberg trials of Nazi war criminals and who was also involved in the drafting of the Universal Declaration of Human Rights. Maxwell-Fyfe was adamant that rights should not just exist in the political domain, but that they needed to be legally-enforceable:

***“We cannot let the matter rest at a declaration of moral principles and pious aspirations, excellent though the latter may be. There must be a binding convention, and we have given you a practical and workable method of bringing this about”<sup>17</sup>***

The battle to move rights from vague commitments by politicians and governments to a legally certain contract between the state and citizen on an international scale, was a legacy of the post-War era that deserves greater reverence.

It is also worth noting that at this time, the perceived benefit of pooling sovereignty for the sake of cross-border peace was overwhelming. This consensus eventually manifested itself in the individual right of petition directly to the court in Strasbourg. Since this time, UK citizens and many others across the European continent have had the ability to challenge laws that infringe on their rights.

These rights involve notions such as the prohibition of torture and slavery and the right to life, liberty and security. They echo the cry of a generation who wished to reclaim their humanity from the horrors of conflict and structure it in a way that was meaningful and sustainable.

We do not know how many civil conflicts and international wars have been avoided as a result of the ECHR which in principle, though not perfect, ensures that countries should abide by a set of rules.

Strasbourg case law has driven human rights in both the Brussels and Westminster sources of laws, in ways that are outside of the parameters of this report. It bears repeating though that Strasbourg-derived human rights form the bedrock of laws in the UK rights domain.

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<sup>16</sup> Winston Churchill. (1948.) “The Council of Europe.” The Churchill Society. Available at: <http://www.churchill-society-london.org.uk/WSCHague.html>

<sup>17</sup> Michael Torrance. (2011). “Maxwell Fyfe and the Origins of the ECHR”. The Journal. Available at: <http://www.journalonline.co.uk/Magazine/56-g/1010095.aspx>

# Brussels

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There are a number of different types of EU law, some of which pertain to human rights, which take effect in the UK in different ways:

**A)** Primary law of the EU is contained in treaties under 'the Lisbon Treaty'<sup>18</sup> which set out the objectives of the EU and the principles to be followed by the Member States in achieving those objectives.

**B)** Secondary EU laws are used to attain these objectives in practice. A range of these currently provides for the protection of individual rights:

(i) EU regulations automatically bind the UK when they come into force, without the need for new UK legislation. These rules automatically trump inconsistent law.

(ii) EU directives set binding outcomes that Member States must achieve, but they leave the decision as to how best to achieve that result to each Member State. If they are not implemented, or are badly or only partially implemented, individuals can challenge the Member State. In cases between individuals, the courts must interpret domestic law in line with the directive. The state is responsible for any damage caused by its failure to correctly transpose directives into national law<sup>19</sup>.

(iii) Decisions of EU institutions are binding only on those to whom they are addressed, including Member States and individuals (including companies). Recommendations and opinions are non-binding acts of the EU institutions. However, these instruments can be used to encourage good practice by Member States.

**C)** Decisions of the Court of Justice of the European Union ("CJEU") (formerly the European Court of Justice ("ECJ")) provide a final, binding interpretation of EU law and settle legal disputes between national governments and EU institutions.<sup>14</sup> The CJEU also considers cases between individuals 'referred' from national courts ("preliminary references"), to help determine the scope of any EU law issue which is unclear or uncertain. The case law of the CJEU is binding on Member States. It is applied by UK judges when they are considering questions involving EU law. In its case law, the CJEU applies the General Principles of EU law.

While the original structures of the European Community did not expressly provide for the protection of individual rights, the case law of the CJEU and the evolution of EU law now place the protection of human rights at its heart<sup>20</sup>. Protection for human rights is now expressly enshrined in both the Treaties underpinning the Union and in the General Principles of law safeguarded and applied by the CJEU<sup>21</sup>. These General Principles include fundamental rights commonly recognised in the legal traditions of the Member States<sup>22</sup>.

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18 (i) the Treaty on the Functioning of the European Union ("TFEU"); (ii) the TEU (Treaty on European Union)

19 See *Francovich* (Case C-6/90) [1991] ECR I-5357 and *Brasserie du Pêcheur and R (Factortame) v Secretary of State for Transport (No 3)* (Joined Cases C-46 and 48/93) [1996] ECR I-1029

20 See Chapter 14, *The UK and the Charter of Fundamental Rights*, Keiron Beal QC, 'Britain Alone!', P Birkenshaw & A Biondi (Eds), 2016, pages 261-262

21 The General Principles bind both the Member States and the institutions of the EU when acting within the scope of EU law. They are derived from the national legal traditions of the Member States and recognised by both the Treaties and the case law of the CJEU.

22 *Stauder v City of Ulm* Case C-29/69 [1969]

**Brussels (cont.)**

The Charter of Fundamental Rights of the European Union ("the Charter") became a legally binding part of EU law when the Lisbon Treaty came into force in 2009<sup>23</sup>. It brings together all the fundamental rights protected by EU law in a single document. The Lisbon Treaty explains that the Charter is not intended to extend the competence of the EU in any way<sup>24</sup>.

The Charter contains rights and freedoms under six titles:

- 1.** Dignity
- 2.** Freedoms
- 3.** Equality
- 4.** Solidarity<sup>25</sup>
- 5.** Citizens' Rights
- 6.** Justice

Charter rights<sup>26</sup> protected include many rights similar to those in the European Convention on Human Rights, but also other rights protected by virtue of EU citizenship or recognised in the case law of the CJEU. Where rights are protected by both Brussels and Strasbourg, the protection offered by EU law must be no less than that offered by the case law of the ECtHR. However, the protection offered by EU law may go further<sup>27</sup>. The rights in the ECHR act as a floor but not a ceiling to the protection offered by the Charter<sup>28</sup>.

The supremacy of EU laws have meant that legal protection of human rights standards are greater than under the HRA 1998. This is because Westminster laws that are inconsistent with the HRA 1998 are unaffected by its operation and remain in force with full effect. Courts can make a declaration of incompatibility indicating inconsistency, but the law can then only subsequently be changed by Parliament.

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23 Article 6 of the TEU now explains that the protection of fundamental rights within EU law is confirmed in the Charter of Fundamental Rights of the EU and in the General Principles of EU law, as informed by both the ECHR and the legal traditions of individual Member States.

24 The 'principles' protected by the Charter may not have the same legal effect as rights. The Charter provides that they will be implemented in law by Member States and EU institutions and the principles are only 'judicially cognisable' – or relevant to the judges – when they are relied on when interpreting laws passed by Europe or its Member States which give effect to the underlying principles of the Charter. The Court has relied on principles in the Charter when interpreting EU law generally. These concepts are not entirely simple, nor completely settled in EU law. See Article 52

25 Within these titles, Solidarity provides some protection for a range of social and economic rights, including the rights to health (Article 35) and social security (Article 34). Their enforceability is limited by Protocol 30 and they are not as well protected by other sources of law. They are not protected by the ECHR except in so far as connected with other civil and political rights in the Convention. The ICESCR, the European Social Charter and other treaties including economic and social rights, although they might protect a broader range of rights, are not incorporated domestically, so that they afford limited individual protection or remedies in domestic law.

26 The enforceability of the economic and social rights protected by the Charter is limited, both by the Charter and by Protocol 30. This was done in order not to extend rights too far across member states who have differing interpretations of laws. However, EU law does contain more detailed legislation, regulations and harmonised standards underpinning or supporting economic and social rights. These would include important areas such as welfare benefits and free movement, pensions, health policy and medicines regulation, and higher education. People may have underappreciated the impact of Brussels bureaucracy on their quality of life, given how these specific measures bind the UK. It is beyond the scope of this paper to analyse all of these areas in detail.

27 Article 53, the Charter

28 The UK Government, Parliament and the Courts in Luxembourg and the UK have all confirmed that Protocol 30 does not operate as an opt-out (it was never intended to). See *NS v Secretary of State for the Home Department* Joined Cases C-411/10 and C-493/10, para 119

**Brussels (cont.)**

UK law inconsistent with EU law is disapplied and no longer has legal effect by virtue of the power of the ECA 1972. This has made Brussels a powerful forum in which to hold states to account for their commitments to human rights, as well as under Strasbourg and HRA 1998 rights.

In practice however, there have been few cases testing the full extent of this power.

One interesting test case of the Charter and its effect on UK law is the recent judgment in *Benkharbouche & Anor v Embassy of the Republic of Sudan*<sup>29</sup>.

The case concerned two employees at a foreign embassy who wanted to sue their employers in the Employment Tribunal, alleging unfair treatment, race discrimination and breaches of the rules on working time. Their case was initially barred by the application of the State Immunity Act 1972 and they complained that this was incompatible with the right to a fair hearing under both Article 6 of the ECHR (via the HRA 1998), and Article 47 of the Charter.

The Embassy's reliance on language of the State Immunity Act 1972 was plain and only engaged a remedy under the HRA such as a declaration of incompatibility. However, in so far as the employment claim related to EU law – within the realms of race discrimination and working time – the State Immunity Act 1972 was set aside and the claimants cases proceeded. The rest of their case based on the HRA was struck out. The case showed that where a particular issue is within the 'scope' or 'competence' of EU law, the Charter applies. The judgment is considered a good example of the primacy of fundamental rights of individuals trumping laws that states use to immunise themselves from human rights standards.

**EU HUMAN RIGHTS IN ACTION**

Aside from underpinning the Union with a body of law with express commitments to people, the EU has also led the way in delivering human rights on an international scale. Initiatives such as those around the victims of human trafficking and on the ban on tools of torture have pooled the sovereignty of states to create positive change.

The Victims of Human Trafficking Directive<sup>30</sup> was designed to prevent and combat the trafficking of human beings globally within the power of EU Member States. This law is an example of giving direct effect of a human right under the Charter (Article 5(3))<sup>31</sup> by placing an obligation on Member States to punish the following acts:

*“The recruitment, transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation”*

<sup>29</sup> [2015] EWCA Civ 33. This decision is currently subject to appeal before the Supreme Court

<sup>30</sup> Directive 2011/36/EU

<sup>31</sup> Trafficking of human beings is prohibited

**Brussels (cont.)**

Placing such acts clearly under criminal law would presumably seem uncontroversial but the UK perversely initially opted out of the Directive, insisting that domestic law was already human rights-compliant. However, it was eventually accepted that for anti-trafficking to be implemented properly, changes would be needed to UK law such as to clearly criminalise the offence of forced labour.

As a result of the EU initiative, the UK has adopted much lauded provisions under the Modern Slavery Act 2015; the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 and the Human Trafficking and Exploitation (Scotland) Act 2015. Brussels legal and political effect can therefore be said to have combined to protect many vulnerable lives in the future. Prime Minister Theresa May, then the Home Secretary, pushed the Modern Slavery Act 2015 through Parliament, so there appears to be little risk that there will be any immediate regression from existing legal standards or commitment to programming post-Brexit.

However, Anti-Slavery International has voiced concerns<sup>32</sup> about the possible implications of Brexit for the effectiveness of the UK response to trafficking without EU obligation. Research into the treatment of victims shows that victims from outside the EU are far less likely to be recognised as victims of trafficking (20% of claims compared to 80% of claims originating from within the EU). The Anti Trafficking and Labour Exploitation Unit has also expressed concern<sup>33</sup> regarding diminution of rights of non-UK EEA nationals who are victims of trafficking.

The EU Parliament has also banned<sup>34</sup> the sale of items associated with the administration of torture following a major campaign by Amnesty International, who highlighted the sale of instruments at events such as the London Arms Fair<sup>35</sup>. The Council Regulation realised the commitment in Article 4 of the Charter to prohibit torture by making express restrictions on trade concerning the goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment. This included a bar on transit through EU countries.

This Regulation also prohibited the export of drugs for use in the administration of the death penalty, reflecting commitments in both the Charter and the ECHR on the death penalty. Unlike the ECHR, EU law has actually gone further by expressly legislating practical steps to prevent torture from happening. There is no other economic bloc in the world that has taken such a stance.

If Brexit proceeds and these Regulations fall away, whether these standards remain as a binding part of the domestic law would remain within the power of the Westminster Parliament. There is a danger that the legally binding consensus of EU membership will be lost to political whims for short-term benefit.

32 Anti-Slavery International, "Implications of the EU Referendum", April 2016.

33 ATLEU, Implications of Brexit for victims of modern slavery, Briefing Paper for Human Trafficking Foundation, 28 September 2016, page 2.

34 European Parliament website. Regulation (EC) No 1236/2005 - <http://www.europarl.europa.eu/news/en/news-room/20160930IPR44536/meps-strengthen-eu-export-ban-on-%E2%80%9Ctorture-goods%E2%80%9D>

35 Tom Davies. (2016). "No More Torture On Your Doorstep." Amnesty International. Available at: <https://www.amnesty.org.uk/blogs/campaigns/no-more-torture-your-doorstep>

## ***Brussels (cont.)***

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The current President of the United States, Donald Trump has been reported recently saying he wants to "fight fire with fire" when it comes to stopping terrorism, suggesting that he could be open to bringing back torture because he "absolutely" believes it works."<sup>36</sup>

Torture is a heightened illustration of the potential crossroads that the UK faces on its future on human rights after Brexit. On one side there is the largest economic bloc in the world that is so committed to the prohibition of torture and capital punishment it has taken the unprecedented step to ban trade of any items associated with it. On the other, is the spectre of the resurgence of the use of torture and pro-capital punishment American administration that is seemingly resistant to the constraints of its domestic constitutional and international legal obligations.

Brexit under the current plans is a far cry from 'Taking Back Control.' Brexit seems to mean swapping the prohibition of torture from the high bar of the international legal order of EU law and placing it in the hands of the political whim of the Westminster executive.

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<sup>36</sup> Dan Merica. (2017). "Trump on Waterboarding: 'We have to fight fire with fire'" CNN. Available at: <http://edition.cnn.com/2017/01/25/politics/donald-trump-waterboarding-torture/index.html>

# Westminster

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The British Constitution is a notoriously malleable and complex beast. The flexibility of the structures of the UK, including the protection of human rights, are to be tested substantially and repeatedly by Brexit over the coming years. What we know now for sure is that rights cannot be removed without the express authorisation by Parliament. However, the ability of the Parliamentary process to reassert itself in the maelstrom of confusion over the constitution, individual rights, direct democracy and sovereignty, remains to be seen.

R (Miller) -v- Secretary of State for Exiting the European Union<sup>37</sup>

The judgment of the UK Supreme Court on Tuesday, 24 January 2017 was the most comprehensive exposition on the relationship between the EU and the UK's unwritten constitution that has been delivered to date. The Court was mainly concerned with the nature of the UK's "constitutional arrangement" as prescribed for the trigger of an Article 50 TFEU notification for a member state to leave the EU.

The Court outlined that as a matter of UK constitutional law an Act of Parliament was required, rather than the use of the executive's Royal Prerogative power, was required to initiate Article 50 notification. The reason why the government could not rely on its historic power to conduct foreign affairs was that the UK's membership of the EU, and EU law, was entwined with the domestic rights of UK citizens. Only Parliament, as a direct representative of the people, is mandated to confer or withdraw rights.

There was no explicit reference to 'human rights' in the judgment, however fundamental rights under EU law that were relevant to the Justices' decision-making. They were summarised in three broad categories:

- (i) ***“Rights capable of replication in the law of the United Kingdom***  
***The first category of rights is those which are in principle capable of replication in domestic law such as the rights of workers under the Working Time Directive.”***

These rights could exist even if the UK had no obligation under EU law to maintain them in domestic law. Now, the Supreme Court decided, it is for Parliament to choose how to do so. The government has proposed a Great Repeal Bill, according to which EU law rights would be re-enacted as ordinary rights in primary legislation.

- (ii) ***“Rights enjoyed in other Members States of the EU***  
***The second category of rights is those enjoyed by British citizens and companies in relation to their activities in other Member States, as provided for by EU law.”***

These rights would include those exercised, for example, by the large population of British citizens residing in Spain who rely on EU rights of free movement of persons, capital and the freedom of establishment. These rights prohibit the UK authorities from placing impediments in the way of the exercise of these rights on EU citizens as well as vice versa on UK citizens residing in EU member states.

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<sup>37</sup> Courts and Tribunals Judiciary website. [2016] EWHC 2768 (Admin) - <https://www.judiciary.gov.uk/judgments/r-miller-v-secretary-of-state-for-exiting-the-european-union/>

- (iii) ***“Rights that could not be replicated in UK law***  
***The third category of rights is those which have an effect in the domestic law of the United Kingdom and which would be lost upon withdrawal from the European Union and which could not be replicated in domestic legislation.”***

The Supreme Court used the characterisation of the rights of belonging to “the EU club” such as standing for election to the European Parliament and the right to vote in such elections. The right of litigants to seek redress from the CJEU is another example as well as the ability to persuade the EU Commission to take regulatory action in relation to matters such as violations of EU environmental protection and grant a remedy in relation to it.

As far as human rights are concerned, the findings of the High Court on the importance of category (i) rights on UK citizens were cemented in *Miller*. The ECA 1972, the principal source of the effect of these rights, is not legally subjectable to executive whim under prerogative powers.

In more simplistic terms, the Court considered that the rights of citizens at risk from Brexit and the provision of the CJEU to interpret those rights are so important that it requires the full Parliamentary process to authorise their removal or transfer into domestic law.

It is worth considering that the *Miller* case was only necessary because of a deficiency in the detail of the EU Referendum Act 2015. The two clause *Withdrawal from the European Union (Article 50) Bill*<sup>38</sup> could and should have been incorporated in that 2015 Act. The effect of a disaggregated vote to leave in an advisory referendum in the UK's constituent countries, on the devolution settlement, should also have been set out in that Act.

The Referendum result has posed many unanswered questions that Parliament should have foreseen. Politicians across the party political divide<sup>39</sup> in both chambers of the House should consider the Supreme Court's intervention in *Miller*, a declaration of Parliament's mounting importance to people's rights.

Given the initial motivation for this report and the interest of the members of the public who backed it, there will be a focus on what have been described by the Supreme Court as category (i) rights only. That should not detract from the importance of the loss of category (ii) and (iii) rights during Brexit, issues which will attract further attention, and potentially legal challenge.

<sup>38</sup> UK Parliament website. <http://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0104/170104.pdf>

<sup>39</sup> With the exception of the SNP who were the only part in the House of Commons to vote against the EU Referendum Bill: <http://www.publications.parliament.uk/pa/cm201516/cmhansrd/cm150907/debtext/150907-0002.htm#15090715000001>

**Westminster (cont.)****BREXIT BRITAIN'S NEW ORDER**

If Brexit is to include a clean break from the EU and its law, as the Prime Minister has stated, it stands to reason that the Treaties and any associated obligations or powers of censure will no longer apply to the UK. Structurally, a break with the EU and repeal of the ECA 1972 would result in two key losses to human rights, ending:

- a) the ability to directly challenge primary legislation which violates human rights within areas of EU competence; and
- b) the possibility that decisions of the CJEU may clarify the application and scope of EU laws protecting rights.

At present the UK Supreme Court plays a primary role in the implementation and application of EU law at the domestic level. The CJEU acts only when national courts refer a question of EU law to it for a binding preliminary ruling. The Charter is presently used by the UK Supreme Court to:

- a) interpret EU law, and the national measures implementing EU law, in cases where the meaning of a provision is unclear. This requires UK courts to interpret domestic regulations so far as is possible to achieve the result required by EU law<sup>40</sup>;
- b) enforce EU law by invalidating national legislation and decisions of national public authorities which conflict with EU law<sup>41</sup>.

The UK Supreme Court has tried to clarify the complex relationship between domestic courts in our unwritten constitution and the heavily codified EU law under the CJEU. Often mindful of the politically controversial nature of what 'legally binding' means, Supreme Court Justices have chosen their words carefully. Lord Neuberger has said:

*"A ... consequence of not having a constitution is that one way of fighting off some EU decisions, or decisions of the Strasbourg court, which is available to many other European judges is not open to us. The point may be graphically illustrated by the decision last week of the German Constitutional Court, the Bundesverfassungsgericht, which was considering the legality of an essential aspect of the European Central Bank's scheme for supporting the Euro, the so-called outright monetary transactions programme.*

*While the German Constitutional Court has played for time by referring to the ECJ the question whether the programme infringes EU law, it has left open the possibility that it, the German Court, may decide that the programme infringes German law, which would, according to some commentators, throw the future of the Euro into doubt. More centrally for present purposes, the fact that Germany has a Constitution enables a German court to say that German law sometimes trumps EU law. This is an option which is much more rarely, if at all, open to a UK court as we have no constitution to invoke."<sup>42</sup>*

40 See Article 4(3) TEU; Marleasing SA v La Comercial Internacional de Alimentacion SA Case C-106/89 (1990).

41 See, for example, R (Factortame Ltd) v Secretary of State for Transport (No 2) [1991] 1 AC 603

42 Lord Neuberger, Cambridge Freshfields Annual Law Lecture 2014, "The British and Europe", 12 February 2014.

## ***Westminster (cont.)***

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Lord Neuberger's statement could be extrapolated to include that the inability of the UK's uncodified constitution to resist the supremacy of EU law fed populist fears of foreign judges. For now though, how Brexit affects the relationship between the CJEU and the Supreme Court and other domestic courts in the UK will depend largely on the model or trade agreement adopted. We submit that once the UK's arrangement with the EU27 is decided, the issue of domestic constitutional reform may need returning to<sup>43</sup>.

If EU legacy rights are to remain part of domestic law under the Great Repeal Bill, the case law of the CJEU in continuing to interpret EU legacy standards may remain significant as a source of comparative legal experience. However, this would not bind UK courts unless it were specifically expressed in the new negotiated framework with the EU27.

On the presumption that there will be some degree of equivalence sought between the newly captured EU laws under domestic legislation and existing EU law; the jurisprudence of the CJEU may remain persuasive authorities in court decisions post-Brexit. However, as noted by the Supreme Court, the UK would have "no obligation to make, and individuals would not be able to seek, a reference to the CJEU to obtain an interpretation of the rights by that Court."

The Miller judgment shows that losing the jurisdiction of the CJEU, even if all EU laws came under UK law, will affect human rights in Brexit Britain.

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43 Niamh Ni Mhaoileoin. (2016). "Gordon Brown: Divided UK needs a new constitutional settlement". Left Foot Forward. Available at: <https://leftfootforward.org/2016/11/gordon-brown-divided-uk-needs-a-new-constitutional-settlement/>

# Your Rights

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EU law engages how people experience their human rights in more ways than the scope of this report. However, having mapped<sup>44</sup> the broader context of how human rights laws got to the present point, the following section looks into certain EU rights, namely those that are replicable in UK law, that have developed outside of domestic and ECHR protection. In particular, we focus on data protection, labour rights, environmental protection and access to justice.

By shining a light on the complex legal and political questions which will arise on Brexit, it is intended that Parliament should assess each and every one of these issues forensically. The foreseeable implementation of any Great Repeal Bill, designed to unpick the influence of EU law on the protection of individual rights, must be exercised with more care than the vague scrutiny of the constitutional effects of the EU Referendum Act 2015.

## DATA PROTECTION

The development of online rights to privacy under the Charter has been a key check on how we balance the extraction, storage, transfer and deletion of data in a fair and just way. Recent state failures in this arena, including the conduct of GCHQ which unlawfully escaped the attention of Parliament, the people and the courts, highlight why a society that has just begun its love affair with smartphones and the internet of things needs protection.

Article 8 of the Charter states:

1. *Everyone has the right to the protection of personal data concerning him or her.*
2. *Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.*
3. *Compliance with these rules shall be subject to control by an independent authority.*

The Snowden revelations revealed that UK and US intelligence agencies were using surveillance powers without appropriate scrutiny and in contravention of the rights of citizens to their privacy. More generally, data has been a driver of globalised business operations. The majority of people in the UK now use hand-held devices which are increasingly capable of processing highly personal information through advances in: hardware, storing information efficiently through cloud servers, and accessing vast amounts of data quickly and remotely through 4G and imminent 5G mobile networks.

Article 8 is the clearest articulation of the principle of online protection and is supplemented by a body of laws including and perhaps most importantly the General Data Protection Regulation ('GDPR') and Data Protection Directive. These laws are being constantly updated and interpreted by the CJEU in an effort to keep up with technological changes and human behaviour that takes advantage and manipulates communication advances.

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<sup>44</sup> See Table 2 in Appendix B for a snapshot comparative overview

EU law provides a level of safeguards on online privacy and sets some of the world's highest standards on how personal data about individuals should be handled. The new GDPR, which will be enforced by 2018, will contain six key principles to secure personal data<sup>45</sup>.

These principles must be replicated in domestic law as long as the UK is in the EU and must be enforced by all relevant data-handlers, from hospitals, to social media companies, to local government, to individual people.

Alongside this body of law, the decisions of the CJEU have also sought to provide definitive answers to complex and emerging situations concerning data. Article 8 of the Charter has become the go-to human rights beacon for data protection, in contrast to less precisely defined rights under the Convention and the HRA, which only exist under the broader rights to respect for private and family life.

Aside from the GDPR, the UK was also a chief proponent of the EU Data Retention Directive. However, in another example of the government's desire to have their cake and eat it, it has recently been found to have been breaking the law in its retention of people's data.

On 21 December 2016, the CJEU concluded in the joined cases of *Tele Sverige & Watson*<sup>46</sup> which also originally included the Secretary of State for the Department of Exiting the EU, David Davis, that the principle of confidentiality of electronic communications had been interpreted in a manner inconsistent with the protection for individual privacy and personal information provided by the Charter (Articles 7, 8, 11 and 52(1)).

The CJEU found that where national laws provide for data retention, any retention must be strictly necessary for the purposes of investigating serious crime and linked to the investigation of serious crime. The robust judgment made clear that the purposes for which data retention might be authorised must be linked to the "exhaustive" list of authorisations in the Directive, which are limited to national security, defence, public security and the investigation, detection and prosecution of criminal offences.

It remains to be seen how the UK will react to the judgment, especially given the state of the law under the Investigatory Powers Act 2016. There are numerous further legal challenges pending. Unquestionably though, the CJEU's role in data regulation has extended the rights established in the Strasbourg Court under the Convention, which has not to date, set such a demarcated guidance for the handling of data and the impact of state surveillance.

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45 a) Processed fairly, lawfully and in a transparent manner in relation to the data subject.  
b) Collected for specified, explicit and legitimate purposes and not further processed for other purposes incompatible with those purposes.  
c) Adequate, relevant and limited to what is necessary in relation to the purposes for which data is processed.  
d) Accurate and, where necessary, kept up to date.  
e) Kept in a form that permits identification of data subjects for no longer than is necessary for the purposes for which the personal data is processed.  
f) Processed in a way that ensures appropriate security of the personal data including protection against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures.

46 *Joined Cases C-203/15 and C-698/15*.

## *Your Rights (cont.)*

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The proliferation and advancements of communication technology means that how these data issues develop over the coming years will present new challenges to law-makers, consumers and businesses that we probably can not foresee. The scale and pace of developments in sectors that handle data mean that it has always been in the UK's interest to pool resources on proper workable standards with other European countries.

For example, the new GDPR, which must be given effect in the UK by 2018, will include a 'right to be forgotten' meaning that, subject to certain exceptions, individuals will be able to request their personal data is erased by the data controller and no longer processed. It will also require data controllers to have a legitimate reason and the consent of the user - which must be freely given, specific, informed and unambiguous - for each purpose for which they require that data to be processed.

Looking at the value of Article 8 shows us that the CJEU takes data protection very seriously, and that EU law has been used by the court to interpret rights, that may exist in some form under the Convention, but much more specifically. This stands in stark contrast to how the UK government has frequently breached its own laws<sup>47</sup>, and international laws on how it treats its citizens' data.

The clarity and international consensus afforded by EU law around data protection would be severely undermined by a Hard Brexit in ways that we realise and in many ways that we do not. Data can no longer be parked in the realm of unintelligible abstract tech. Data usage is expected to increase in areas such as healthcare, banking, cars, elections, warfare, crime and an endless list of economic and social domains.

The ability of data to transcend national borders, as much as and even more so than services, people, goods and capital has always been best-served by pooling of sovereignty that EU membership has afforded. It is unclear how the government will protect UK citizens, outside of a framework of EU data protection laws and the digital single market, from foreign and domestic data-handlers who are a divergent and an ever increasing list of public bodies, businesses, individuals, and multinational corporations, who may abuse or mistakenly damage information they acquire.

The EU should be rightly concerned about the UK's approach to data given the recent developments in the Russian and US administrations and the impending dangers of cyber warfare. The EU27 should rightly insist that any trade agreement must include complete compliance with EU law and prohibit any loosening of standards.

***Your Rights (cont.)*****LABOUR RIGHTS**

A significant number of employment-related rights derive directly from EU law. Among these are measures which prevent discrimination against part-time and temporary workers, protection for agency workers; paid holiday and working time; protection for employees when their roles are transferred from one employer to another (TUPE protection) and parental leave rights. The standardisation of these rules across the EU was designed to provide a level playing field and equality of treatment for workers across the single market.

Article 31 - The right to fair working conditions<sup>48</sup>

1. *Every worker has the right to working conditions which respect his or her health, safety and dignity.*
2. *Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave.*

A full legal opinion was obtained by the Trades Union Congress ("TUC") on the particular rights at risk on Brexit, produced by Michael Ford QC<sup>49</sup>. The opinion repays reading in full, but makes the following key points:

- a)** EU labour rights (e.g. on discrimination in employment, pregnant and parenting workers, part-time workers, working time, information and consultation, health and safety, and data processing) are currently the subject of very strong guarantees, much stronger than other rights flowing from international treaties signed by the UK.
- b)** In the event of Brexit, a future Government would have legal freedom of action in relation to those areas of working life currently protected by EU social rights. The duties set out in other international treaties the UK has ratified place a much weaker restraint on a Government committed to deregulation in the employment sphere. The common law provides almost no effective protection of workers' rights.
- c)** EU-guaranteed rights especially vulnerable to repeal in the name of deregulation, austerity or reducing burdens on business include provisions on collective consultation; many working time rights (especially the level of pay in respect of annual leave); some of the EU-derived health and safety regulations; substantial parts of TUPE; legislation protecting agency workers and other 'atypical' workers; and those elements of discrimination law imposing what are seen as large financial awards on employers, such as equal pay awards for long-standing discrimination in pay arrangements.
- d)** Post-Brexit the mechanisms for enforcing EU-derived rights would greatly diminish. Workers will not be able to enforce EU rights directly; the duty to interpret national law in accordance with EU law will weaken; and a future Government could reverse legal rulings it did not like. Brexit would free a Government from the requirement to ensure that sanctions for breach of EU-derived rights are effective, allowing it to introduce caps on compensation or other measures to limit the enforcement of rights.

<sup>48</sup> See also the right to information (Article 27) and the right to collective bargaining (Article 28), protection from unfair dismissal (Article 30)

<sup>49</sup> Michael Ford QC, Legal Opinion for TUC on Brexit and Workers Rights, April 2016

***Your Rights (cont.)***

The Chair of the TUC, Frances O'Grady explained, TUC's view is that:

*“Brexit would mean working people are haunted by years of uncertainty, as rights like paid holiday, parental leave and equal treatment for part-timers and contract workers could be stripped away over time. The EU guarantees these rights, but generations of trade unionists fought for them. If we lose them because of Brexit, it could take generations to get them back again.”<sup>50</sup>*

However, David Davis in his economic strategy document for Brexit in July 2016<sup>51</sup> has stated:

*“All the empirical studies show that it is not employment regulation that stultifies economic growth ... Britain has relatively flexible workforce, and so long as the employment law environment stays reasonably stable it should not be a problem for business... The great British industrial working classes voted overwhelmingly for Brexit. I am not all attracted by the idea of rewarding them by cutting their rights.”*

Outside of EU law, workers' rights will be far more exposed to the political whim of the executive. For example, there is now the prospect that in the year 2021, the new Secretary of State for the Department of Business, Energy and Industrial Strategy, Philip Davies MP has a bill passed through Parliament by a simple majority, repealing maternity leave. There would be no right or supremacy of EU law to prevent this.

The role of trade unions raising awareness that the standards working people in the UK are subject to has never been more important. It is imperative that any free trade deal between the UK and the EU must ensure equivalence between the rights of workers in both unions to place a high platform for citizens' standards of living.

## **ENVIRONMENTAL PROTECTION**

Binding the concept of economic development to the requirement of environmental sustainability is an internationally accepted norm in the twenty-first century. It is one that only exists in UK law because of the EU Charter, notwithstanding the high levels of concern detected in public opinion<sup>52</sup>. Without Article 37, there is a risk of a loss of accountability on government actions that harm the environment and in turn, harm people themselves.

Article 37 of the Charter sets out:

*“A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.”*

<sup>50</sup> TUC Press Release, “Brexit could risk ‘legal and commercial chaos’ and would cause years of uncertainty for employers and workers, says leading QC”, 6 April 2016

<sup>51</sup> David Davis MP, Trade deals. Tax cuts. And taking time before triggering Article 50. A Brexit economic strategy for Britain, Conservative Home, 14 July 2016

<sup>52</sup> Fiona Harvey. (2015). “British belief in climate change on the rise, research finds” Guardian. Available at: <https://www.theguardian.com/environment/2015/jan/29/british-belief-in-climate-change-at-highest-level-in-past-decade-survey>

***Your Rights (cont.)***

The framework of UK laws protecting the environment is extremely broad and spans fracking, waste management, animal welfare, flooding and many other issues. The EU has acted as a catalyst for shaping the UK's environmental policy by combining the benefits of single market membership with a multilateral approach to environmental problems. Since the 1970s, it is widely accepted<sup>53</sup> that the fields of environment and energy have been an area where pooling sovereignty has reaped reward.

EU legislation has benefited UK citizens in underappreciated ways such as the incorporation of public participation rights under the Access to Justice in Environmental Matters (Aarhus Convention). This has increased NGO's direct impact when advocating for people's health and quality of life including laws on air quality, climate change, water quality and protecting habitats and species.

The most topical example is Directive 2008/50/EC<sup>54</sup> which contains standards on ambient air quality and cleaner air for Europe, including nitrogen dioxide levels<sup>55</sup>. Official figures estimate that there were over 31,000 premature deaths in 2010 in the UK due to air pollution<sup>56</sup>. Children and older people are particularly affected in this needless and avoidable loss of life.

One of the most successful legal challenges to air quality problems in London is based on EU law. In *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs*<sup>57</sup> the government claimed that failed promises to limit nitrogen dioxide levels by 2015 would not be met until 2030 despite the fact the need to limit these emissions had been in legislation since 1999. The Supreme Court, having obtained clarification from the CJEU, ruled that this air quality plan was not good enough, in breach of obligations under the EU Directive and that a new plan should be submitted to the European Commission.

The case continued into 2016 when the High Court ruled again that the government's new plan, ordered as a result of the Supreme Court judgment, was still woefully inadequate for the following reasons:<sup>58</sup>

***(i) that the proper construction of Article 23 means that the Secretary of State must aim to achieve compliance by the soonest date possible, that she must choose a route to that objective which reduces exposure as quickly as possible, and that she must take steps which mean meeting the value limits is not just possible, but likely.***

53 <http://www.publications.parliament.uk/pa/cm201516/cmselect/cmenvaud/537/537.pdf>

54 This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to promote the integration into the policies of the Union of a high level of environmental protection and the improvement of the quality of the environment in accordance with the principle of sustainable development as laid down in Article 37 of the Charter of Fundamental Rights of the European Union.

55 Directive 2008/50/EC of 21 May 2008 on ambient air quality and cleaner air for Europe.

56 See European Environmental Bureau, Air Pollution, United Kingdom, at [http://www.eeb.org/EEB/assets/File/final\\_uk\\_en.png](http://www.eeb.org/EEB/assets/File/final_uk_en.png)

57 [2015] PTSR 909

58 Courts and Tribunals Judiciary website. <https://www.judiciary.gov.uk/wp-content/uploads/2016/11/clientearth-v-ssenviron-food-rural-affairs-judgment-021116.pdf>

***Your Rights (cont.)***

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EU law has provided the basis to challenge the government on why it is seemingly so unwilling to submit a proper plan to reduce air pollution that kills thousands. What is even more concerning is that without recourse to the CJEU and EU law, UK citizens may find that their ability to redress government failure is weakened<sup>59</sup>.

Depending on the future relationship between the EU and the UK, the UK may find itself yet bound to respect many of the minimum standards adopted by the EU in practice. In July 2016, the then Secretary of State for Energy and Climate Change (Amber Rudd MP), stressed the Government's commitment to the environment would not change post-Brexit<sup>60</sup>. However, as shown by the ClientEarth case above, what the government promises and what it delivers, needs persistent scrutiny for compliance with the law.

Article 37 is a right couched in the realities of environmental degradation that humanity presently faces. There is a danger that without specific legal mechanisms, protection of the environment will remain all talk and not enough action. Brexit could mean the UK is no longer legally bound by EU standards which will make it harder to protect the rights of the public affected by environmental issues.

**ACCESS TO JUSTICE**

This right to an effective remedy and to a fair trial allows individuals to challenge decision-making processes in connection with administrative decisions, such as in the areas of immigration, asylum and deportation or taxation, in ways which are not possible under the Convention or the common law.

Article 47 of the Charter states:

1. Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
2. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
3. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

Article 47 has given EU citizens the right to challenge such inconsistent laws in the UK domestic arena against the basic principle of being able to be heard. The ability of individuals to seek recourse from the CJEU has opened up the possibility that domestic laws that are unfair, can be ruled as incompatible with human rights principles of the EU and therefore be disapplied.

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<sup>59</sup> Caroline Lucas MP. (2017). "Exiting the EU, not the environment". Available at: <https://www.carolinelucas.com/sites/carolinelucas.com/files/Safe%20Guarding%20Environment%20after%20Brexit.pdf>

<sup>60</sup> HC Deb, 12 July 2016, Vol 613, Col 177

## ***Your Rights (cont.)***

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ZZ v Secretary of the State for the Home Department, Case C-300/11

The applicant in the case, ZZ had his permanent status in the UK revoked as the Secretary of State concluded his presence was not "conducive to the public good". This decision was reviewed in the Special Immigration Appeals Commission following a 'closed material procedure' where ZZ and his legal team were excluded but a Special Advocate who was security vetted was allowed to attend.

ZZ argued that this process was unfair and that he was entitled to at least "a gist" of the reasons for the decision of the Secretary of State to allow him to give instructions to the Special Advocate. The domestic courts rejected this analysis and concluded that the fair hearing rights in Article 6 ECHR did not apply to a decision on immigration status.

The question of how Article 47 of the Charter affected the rights of ZZ was sent to the CJEU who ruled that Article 47 of the Charter had to be taken into account and in any closed proceedings, the person concerned had to be able to ascertain the reasons on which the decision was based.

Article 47 has not been as influential on balancing domestic laws against international standards as Article 8 of the Charter (on data protection). There has been little deterrent effect on the government's range of reforms designed to circumscribe access to fair hearings, particularly those subject to immigration control.

UK laws around immigration have been taking a sinister turn for some time, largely down to unachievable pledges made on reducing levels of migration in manifestos by political parties. For example, the introduction of new wider presumptions that appeals outside HRA 1998 claims will be heard out-of-country and the introduction of prohibitive new fees for access to the Immigration and Asylum Chamber of the First Tier Tribunal and appeals to the Upper Tribunal have not thus far been deterred by either the applications of the Convention or the Charter. However, challenges to some of these reforms are pending and the application of Article 47 will continue to be relevant in that context.

If the protections under Article 47 are not explicitly replicated in UK law, and basic rights are not as defensible for minority groups such as migrants, damage will continue to be done to the UK's reputation globally as one of the arbiters of equality and fairness before the law.

## *Your Rights (cont.)*

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### **OTHER RIGHTS**

The Charter also contains a number of rights and principles that bind the EU institutions in everything that they do. These rights draw on the established law of member states or in EU law, and reflect the development of case law of the ECHR or the CJEU.

These are however, not laws that have extended human rights under EU law significantly. This is because Article 52 (1) of the Charter states that these rights are proportionate and can be limited in scope where necessary. What these rights do achieve is a clear sense of the framework of human rights protections if you are an EU citizen and include:

Freedom of the arts and sciences - Article 13

*“The arts and scientific research shall be free of constraint. Academic freedom shall be respected”<sup>61</sup>*

Right to conduct a business - Article 16

*“The freedom to conduct a business in accordance with Community law and national laws and practices is recognised”<sup>62</sup>*

The present presumption is that all rights in the treaties will be brought into domestic law and will be 'unpicked' thereafter. There would be a great benefit to public engagement of human rights if whatever form they end up in, they were to be codified in a more coherent format as they are under the Charter. This would allow UK citizens to have a clear sense of their rights be they from Westminster, Strasbourg or Brussels, as EU citizens do.

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<sup>61</sup> this provision, whilst not expressly stated in the ECHR is drawn principally from the protection offered by Article 10 of the ECHR. It is subject to the same limits as Article 10(2) and there is very little case law on the scope of this right.

<sup>62</sup> this provision draws from the general principles of EU law that are protected by the right to property in Article 1 and Protocol 1 to the ECHR but is limited by the boundaries of EU law and national legal practices. A recent report by the Fundamental Rights Agency from 2015 does explain how the right might be used to help drive forward EU economic policy and development in the future - <http://fra.europa.eu/en/publication/2015/freedom-conduct-business-exploring-dimensions-fundamental-right>

# The Regression of Rights

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There is limited information on the plans or workability of the present government's handling of Brexit and its impact on human rights. Prime Minister Theresa May stated at the Conservative Party Autumn Conference in October 2016 that:

*"[W]e will convert the 'acquis' – that is, the body of existing EU law – into British law. When the Great Repeal Bill is given Royal Assent, Parliament will be free –subject to international agreements and treaties with other countries and the EU on matters such as trade – to amend, repeal and improve any law it chooses. But by converting the acquis into British law, we will give businesses and workers maximum certainty as we leave the European Union. The same rules and laws will apply to them after Brexit as they did before. Any changes in the law will have to be subject to full scrutiny and proper Parliamentary debate."*

The government white paper on the UK's exit and from and partnership with the EU, published in February 2017<sup>63</sup>, included the Prime Minister's twelve point plan<sup>64</sup>.

Somewhat unsurprisingly there was no explicit commitment on the standards and protections of human rights under present laws be they domestic or EU. This is in keeping with the Prime Minister's public and historic myopia on the international human rights framework, including and repeatedly, the ECHR.

Before the referendum Mrs May was a sole voice on the Remain campaign calling for withdrawal from the ECHR but continuing membership of the EU. A stance that was legally questionable but was seen at the time as an equivocating pitch for the future leadership of the Conservative party leadership:

*"The ECHR can bind the hands of parliament, adds nothing to our prosperity, makes us less secure by preventing the deportation of dangerous foreign nationals – and does nothing to change the attitudes of governments like Russia's when it comes to human rights. So regardless of the EU referendum, my view is this: if we want to reform human rights laws in this country, it isn't the EU we should leave but the ECHR and the jurisdiction of its court."*<sup>65</sup>

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63 UK Government website. [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/589191/The\\_United\\_Kingdoms\\_exit\\_from\\_and\\_partnership\\_with\\_the\\_EU\\_Web.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf)

64 "1. Providing certainty and clarity;  
2. Taking control of our own laws;  
3. Strengthening the Union;  
4. Protecting our strong historic ties with Ireland and maintaining the Common Travel Area;  
5. Controlling immigration;  
6 The United Kingdom's exit from and new partnership with the European Union  
6. Securing rights for EU nationals in the UK and UK nationals in the EU;  
7. Protecting workers' rights;  
8. Ensuring free trade with European markets;  
9. Securing new trade agreements with other countries;  
10. Ensuring the United Kingdom remains the best place for science and innovation;  
11. Cooperating in the fight against crime and terrorism; and  
12. Delivering a smooth, orderly exit from the EU."

65 Anushka Asthana. (2016). "UK must leave European convention on human rights, says Theresa May" Guardian. Available at: <https://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum>

## *The Regression of Rights (cont.)*

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On a broader policy level, the government's focus on human rights reform has shifted from amending the Human Rights Act 1998 and installing the proposed British Bill of Rights which was a Conservative party manifesto pledge from the General Election in 2015. Sir Oliver Heald QC, confirmed in Parliament<sup>66</sup> that the government is:

*“Committed to reforming our domestic human rights framework, and we will return to our proposals once we know the arrangements for our exit from the European Union.”*

We now know that the withdrawal of the UK from an international treaty that affects fundamental rights requires a Parliamentary process and can not be carried out by executive power. What is becoming clearer is that the present administration is actually considering withdrawal of the ECHR altogether<sup>67</sup>. Although Theresa May has confirmed that is not the plan for this Parliament, there is every possibility that it could be a manifesto pledge for the next one. This move would impact even more severely on the rights of UK citizens, as it is anticipated to occur once the UK is outside of the protection of EU law.

In this report we have only considered the ways in which people's rights in EU law outside of the ECHR could be affected by Brexit. The effect of withdrawal from the ECHR itself would be incredible. The ECHR has been the basis of an international consensus on the limits of state power since the Second World War. Withdrawal would be a radical and seismic change to the UK as a country and for human rights globally. It would concentrate even more power in politicians and the government than they have had for decades.

Mrs May's statements indicate she is seemingly determined to trample on the agreement that Churchill envisioned, rightly, would preserve the peace on the continent of Europe where conflict had prevailed for centuries.

Mrs May heralds a rights regression at the same time as she reaches out to national leaders such as Trump, Erdogan and Xi Jinping. Administrations that have shown paltry concern for the human rights of their people and others, and have pursued illiberal policies relentlessly.

She does so at the same time as she turns her back on a Europe that is troubled but still exists to promote free trade, democracy and expanding the rights and the quality of life of its citizens.

She does so despite the fact nobody voted for a regression of rights.

## **HENRY VIII & THE ACQUIS**

In order for the government to do its work it has delegated powers in order to amend or repeal laws quickly without the full scrutiny of all parties and politicians in the Parliamentary process. This circumnavigation was originally designed by Henry VIII under the 1539 Statute of Proclamations and has thus been titled the 'Henry VIII clause'. These clauses have had varying

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66 UK Parliament website. <https://hansard.parliament.uk/Commons/2017-01-24/debates/0093E5AB-78F3-4BA9-A4F2-7395D3EF8A84/HumanRightsAct1998#contribution-FF13CECF-FF29-47D9-BDE4-693650E13241>

67 Christopher Hope. (2016). "Theresa May to fight 2020 election on plans to take Britain out of European Convention on Human Rights after Brexit is completed" Telegraph. Available at: <http://www.telegraph.co.uk/news/2016/12/28/theresa-may-fight-2020-election-plans-take-britain-european/>

***The Regression of Rights (cont.)***

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uses and application in the last five hundred years of Parliament often as a necessity of the functioning of the civil service.

The wide scope of the power has attracted criticism by many over the years. The former Lord Chief Justice, Lord Judge commented that the powers should be "consigned to the dustbin of history."<sup>68</sup> In important legislation, these ministerial powers of the executive have also needed to be expressly curtailed by simple amendments, such as section 8 to the Legislative and Regulatory Reform Act 2006<sup>69</sup>, which prohibits the power to amend or repeal the HRA 1998.

What is now most concerning is the potential for these powers to be used by the executive to curtail rights presently contained under EU law and forming part of the Acquis which will become part of UK law after Brexit.

The Miller judgment required an Act of Parliament, and not the Prerogative Power, to trigger Article 50. However it did not prohibit amending the Acquis, as it pertains to human rights, via secondary legislation. The nightmare scenario for UK citizens is that a Prime Minister who does not respect human rights can amend or repeal these rights brought into UK law using Henry VIII powers without an elected mandate nor by full recourse to the Parliamentary process and scrutiny.<sup>70</sup>

**We submit that any proposed legislation, be it the Withdrawal from the EU Bill, the proposed Great Repeal Bill or any other bill, that affect human rights in EU law, be subject to Constitutional lock. They should include an express provision requiring primary legislation to change human rights laws under the Acquis.**

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68 The Rt. Hon Lord Judge. (2016). "Ceding power to the executive: The Resurrection of Henry VIII". King's College London. Available at: <https://www.kcl.ac.uk/law/newsevents/newsrecords/2015-16/Ceding-Power-to-the-Executive---Lord-Judge---130416.pdf>

69 UK Legislation website. [http://www.legislation.gov.uk/ukpga/2006/51/pdfs/ukpga\\_20060051\\_en.pdf](http://www.legislation.gov.uk/ukpga/2006/51/pdfs/ukpga_20060051_en.pdf)

70 This position was recently highlighted by Professor Alison Young in her submission to the House of Lords Constitution Committee on Wednesday, 1 February 2017 (video at 11.54.52) <http://parliamentlive.tv/event/index/75194d6a-b303-436b-8bd8-e4b1dec58b3f>

# Conclusion

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In this report we have given an overview of some of the many of issues that the process of Brexit will engage. Populist calls for the abandonment of our country's long standing commitment to the rule of law are particularly dangerous. It is our contention that the current simplistic regression of free trade and freedoms as a solution to the complex challenges posed by globalisation is misguided.

We have begun setting out broadly how the EU has been a force for progressing human rights through requiring states to adopt a condition of trade and rights compliance. We have demonstrated, by reference to the principles of the foundations of the EU and in practice how it treats member states who want to join, why it is right that the UK should be required to remain in the ECHR in any new UK-EU27 free trade agreement.

We have explained the body of human rights law deriving from Brussels and explored how they have progressed in action and in law, thanks to EU membership and the jurisprudence of the CJEU. This includes the banning of the use of torture tools and providing proper laws for victims of human trafficking. We have outlined the potential deleterious impact on equality, data protection, environmental protection, access to justice and working conditions by a poorly scrutinised Brexit.

Finally, we have come back to champion Parliament's role as the sovereign embodiment of people's political will to hold the government to account with relentless scrutiny of its actions and decisions. This should entail the category of rights in EU law that are capable of being replicated in UK domestic law, are only changed through the full primary legislative process after a clear democratic mandate. This scrutiny should also ensure that UK laws concerning human rights achieve equivalence with international standards, including the influence of CJEU decisions. Parliament will have to secure the means that challenging infringement of human rights is less not more difficult after Brexit.

They're your rights. The fight for them started hundreds of years ago. History has taught us that through concerted unrelenting effort and perseverance, people can achieve a fairer society that is not hostage to the trappings of privilege and the abuse of power.

## **THIS IS HOW WE PREVENT A RIGHTS REGRESSION NOW:**

### **RIGHTS GUARANTEE**

We call on Parliamentarians to ensure that all UK legislation, including the acquis of EU laws capturing human rights, is not amendable or repealable by secondary legislation nor without recourse to a vote by the general public.

### **FREEDOM TRADE ZONE**

We call on the EU not to agree to any free trade deal with the UK without express provision that the UK remains a signatory to the European Convention on Human Rights and that there will be equivalence with EU law on human rights standards.



# Appendix A

The following appendices provide a broad summary snapshot of human rights protections in EU law, ECHR, international and domestic law, as things presently stand, in respect of the specific areas examined in this report.

## TABLE 1: HOW DOES THE LAW PROTECT INDIVIDUAL RIGHTS IN THE UK?

This table explains, in general terms, the mechanisms for protecting rights under EU law as compared to under the ECHR, international and domestic law.

### EU LAW

#### HOW THE LAW PROTECTS RIGHTS

- General principles of EU law applied by judges at the CJEU protect fundamental rights.
- The Charter for the Protection of Fundamental Rights binds both EU institutions and Member States when they act within the scope of EU law.
- Some specific rights are given additional protection by specific EU legislation such as in the Treaties and in Regulations or Directives.
- Extra rights protection is also offered in some cases by specific legislation designed to provide more practical protection for individual rights, including in respect of the environment, labour rights, data protection and other areas.
- **The protection offered by the Charter must be at least as great as that offered by the ECHR, but may afford additional protection.**
- **The European Communities Act 1972 binds UK courts to apply the general principles of EU law and the Charter in the UK.**
- **Individuals can rely on EU law rights in cases against the UK Government, public agencies and against other individuals in some cases.**
- **Primary legislation, which is incompatible with rights protected by EU law, is disapplied by the UK courts.**

### ECHR

#### HOW THE LAW PROTECTS RIGHTS

- The ECHR binds the UK in international law. Many of its provisions are also reflected in the Charter.
- The ECHR principally protects civil and political rights, like the right to life and the right to freedom of expression, not social and economic rights, like the right to health or education.
- Some of its provisions are also reflected in international law instruments, like the International Covenant on Civil and Political Rights ("ICCPR").
- Individuals have a right of individual petition against the UK to the European Court of Human Rights ("ECtHR").
- The ECtHR gives definitive interpretations of the Convention and may award compensation to individual victims of human rights violations.
- Article 46 ECHR requires the UK to give effect to judgments against it at the ECtHR.
- The Committee of Ministers – a political body made up of representatives from the Governments of each of the ECHR Contracting Parties – oversees whether individual states respect the ECHR and the decisions of the ECtHR. Their ultimate sanction is to vote to remove a State from the Council of Europe.
- The rights protected by the ECHR are given effect in domestic law in the UK by the Human Rights Act 1998. That Act requires domestic judges to "take into account" the decisions of the ECtHR.
- **The ECHR does not have direct effect in UK law. Its provisions bind the UK in international law and are only given effect in the UK by the Human Rights Act 1998 (see below)**

## INTERNATIONAL LAW

### HOW THE LAW PROTECTS RIGHTS

- International treaties and customary law operate to protect international human rights standards.
- Rules of customary international law arise from the recognised practice of states. Examples of rules which protect human rights include the recognised prohibition on torture as a rule of customary international law.
- The UK is bound by customary international law but also by a series of human rights treaties which the UK has ratified. These treaties include protections for both civil and political and economic and social rights. They also afford guarantees to a range of groups recognised as in need of particular rights protection:
  - ICCPR;
  - International Covenant on Economic, Social and Cultural Rights (“**ICESCR**”);
  - UN Convention on the Elimination of Racial Discrimination (“**CERD**”);
  - UN Convention on the Elimination of All Forms of Discrimination against Women (“**CEDAW**”);
  - UN Convention on the Rights of the Child (“**UNCRC**”);
  - UN Convention against Torture (“**UNCAT**”);
  - UN Convention on the Rights of Persons with Disabilities (“**UNCRPD**”).
- Other international law obligations entered into by the UK also provide protection for individual rights, including in respect of the environment or labour rights. For example the International Labour Organisation has its own Covenants, a number of which bind the UK in international law.
- These international law instruments are enforced in a variety of ways. They are not generally a part of UK domestic law. Some parts of international law may be relevant to the interpretation of UK law, for example the Children Act 2004 provides that that Act will give effect to the protection offered by the UNCRC to the best interests of the child. In other cases, international law may be relevant to the interpretation of the common law, Convention rights or other statutes.
- Each of the treaties provides a mechanism for individuals to bring a complaint under the treaty to an international body or committee tasked with hearing those “communications” from individuals. The UK has only accepted this right of individual petition in respect of the UNCRPD and CEDAW. These bodies do not have the power to award compensation.
- International monitoring bodies review UK compliance with these treaties on a regular, or periodic, basis, usually around every 4 years. The outcome of these reviews are publicly available.
- **The UK takes a ‘dualist’ approach to the incorporation of international law in domestic law. While international law standards may be relevant to the interpretation of some domestic laws and the application of the ECHR or the Charter, international human rights standards are not generally enforceable by individuals in the domestic courts. The requirements of international law cannot affect the application of otherwise sound domestic legislation, except through the political process, debate and amendment by Parliament.**

*Appendix A (cont.)***DOMESTIC  
LAW****HOW THE LAW PROTECTS RIGHTS**

- The Human Rights Act 1998 ("**HRA 1998**") gives effect in domestic law to most of the human rights protected by the ECHR, except Article 1 and Article 13 (which govern the scope and application of the Convention and the right to an effective remedy).
- Section 2, HRA 1998 requires rights to be interpreted in a way which "takes into account" the case law of the ECtHR.
- Section 3, HRA 1998 requires domestic courts to read all other legislation "in so far as possible" in a way that protects those rights.
- Section 4, HRA 1998 provides that where such an interpretation isn't possible, courts can make a "declaration of incompatibility". If Westminster Parliament legislation is incompatible, it remains in force.
- Section 10, HRA 1998 allows Parliament to consider "fast track" legislation – Remedial Orders – to change the law when a violation of Convention rights is identified by UK courts or the ECtHR.
- The devolution settlement assumes that the devolved Governments will each respect the HRA 1998. Any act of any of the devolved Governments which is incompatible with Convention rights may be struck down by domestic courts.
- Some specific provisions of domestic legislation are designed expressly to better protect individual rights in domestic law. For example, the Equality Act 2010 protects persons sharing certain protected characteristics from discrimination and the Children Act 2004 makes express provision for the protection of the best interests of the child. Like the HRA 1998, these measures can be repealed or amended by any successful simple majority vote in both Houses of Parliament.
- General principles of fundamental rights are also protected by the common law, including, for example, free expression and equality. These fundamental rights are recognised in, and defined by, the case law of the domestic courts. Domestic courts require Parliamentary language to be "crystal clear" if it interferes with such fundamental rights. The common law can only develop in a way which is consistent with these rights.
- **Unlike EU law following the ECA 1972, there is nothing in the HRA 1998 or the common law which can displace another clearly and expressly incompatible piece of primary legislation.**

# Appendix B

## TABLE 2: COMPARISON OF RIGHTS PROTECTIONS IN SPECIFIC AREAS

This table sets out a summary of rights protections under each source of law in each of the areas examined. Where a source of law is in the colour GREEN it indicates it has the strongest rights protection in relative terms.

### (i) Economic and social rights

#### EU LAW

- *Charter, Title IV (Solidarity) protects economic and social rights, including:*
  - *Article 33: Legal, economic and social protection for the family;*
  - *Article 34: Right to social security;*
  - *Article 35: Right to health.*
- *Protocol 30 has the effect of circumscribing how these rights can be enforced in the UK. The provisions of Title IV will only be justiciable in so far as they are already reflected in domestic law.*
- *EU law contains detailed legislation, regulations and harmonised standards underpinning or supporting economic and social rights, including welfare benefits and free movement, pensions, health policy and medicines regulation, and higher education.*

#### ECHR

- Economic and social rights are not protected by the ECHR, except in connection with other (civil and political) rights in the Convention.
- *Article 1 of Protocol 1 to the ECHR ("A1P1") has developed to the point that social security interests are afforded protection as 'possessions': *Stec & Ors v United Kingdom*, App Nos 65731/01 and 65900/01.*

#### INTERNATIONAL LAW

- Both the *ICESCR* and the *European Social Charter* protect economic and social rights.
- Both these instruments bind the UK in international law, but neither is incorporated into domestic law.
- International 'soft law' mechanisms also have a normative effect on economic and social rights. For example, the supervisory committee of the *ICESCR* has recently published a highly critical report on the impacts of austerity and benefit cuts on the UK's compliance with its responsibilities under the *ICESCR*.

#### DOMESTIC LAW

- The UK has not generally incorporated international economic and social rights at the domestic level.
- The HRA 1998 incorporates the civil and political rights set out in the ECHR. A series of domestic cases have examined the interaction between social security, human rights and equality law, treating social security as a 'possession' under A1P1: *R (SG and others) v SSWP and CPAG* [2015] 1 WLR 1449; *R (MA & Ors) v Secretary of State for Work and Pensions* [2016] 1 WLR 4550.
- *Within the scope of EU law, the effect of the ECA 1972 is that the provisions of EU law will apply, including Articles 33 - 35, Charter.*
- Current domestic legislation relating to housing, community care, healthcare and employment reflects some aspects of economic and social rights. Public law duties under these laws may be the subject of judicial review.

**Appendix B (cont.)****(ii) Data protection****EU LAW**

- *Charter, Article 8* provides express protection for personal information and data. This sits alongside Article 7, which provides protection for personal privacy, including respect for private and family life.
- *Directive 95/46 C ("the Data Protection Directive")* provides for a specific framework of standards for data protection to be implemented across the EU.
- *The General Data Protection Regulation* will replace the Data Protection Directive and must be given effect in UK law by May 2018. This supplements the existing data protection framework with new provisions on the right to be forgotten and notifications of security breaches. It will update EU law on data processing to incorporate 6 principles of data protection, including that all data is only processed fairly, lawfully and in a transparent manner.
- This protection is supplemented by specific protection in respect of data retention, including in *Directive 2002/08 on the Privacy of Electronic Communications*.
- The case law of the CJEU has concluded that a blanket rule on the retention of data must be expressly limited to purposes "strictly necessary for the purposes of investigating serious crime". It must also be accompanied by safeguards, including oversight and authorization by an independent body. See *Tele-Sverige v Watson, C203/15, C698/15*

**ECHR**

- *ECHR, Article 8* protects the right to private and family life. The ECtHR has held that this includes the right to personal information, although not expressly protected in the terms of the ECHR (see, for example, *S & Marper v UK*, App Nos. 30562/04 and 30566/04).
- The case law of the ECtHR has never set bright line guidance for the handling of surveillance, but it will test any specific act or legislative provision against the standards required in the Convention for the protection of respect for private and family life. However, in recent case law, the Court has placed great weight upon the need for specificity and proportionality in the aims served by surveillance laws and on the need for independent oversight and authorization (See *Zakharov v Russia* App No 47143/06)

**INTERNATIONAL LAW**

- *ICCPR, Article 17* provides that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honour and reputation."
- In 2013, the General Assembly adopted Resolution 68/167, which expressed deep concern at the negative impact that surveillance and interception of communications may have on human rights. The General Assembly affirmed that the rights held by people offline must also be protected online, and it called upon all States to respect and protect the right to privacy in digital communication. The General Assembly called on all States to review their procedures, practices and legislation related to communications surveillance, interception and collection of personal data and emphasized the need for States to ensure the full and effective implementation of their obligations under international human rights law. This resolution recalls the obligations in ICCPR Article 17, but is not binding.

**DOMESTIC LAW**

- The *HRA 1998* incorporates the standards of Article 8 ECHR into domestic law.
- **Within the scope of EU law, the ECA 1972 means that the provisions of EU law will apply, including Articles 7 - 8, Charter.**
- The *Data Protection Act 1998* implements the provisions of the Data Protection Directive and work is underway to consider reform to meet the standards of the General Data Protection Regulation
- The *Investigatory Powers Act 2016* provides for broad powers and duties in respect of data retention in the UK. This replaces provisions which were scrutinized by the CJEU in *See Tele-Sverige v Watson, C203/15, C698/15* and found lacking. It is likely that the replacement measures are also open to challenge as inconsistent with the provisions of EU law while the UK remains a member of the Union.

**Appendix B (cont.)****(iii) Access to justice****EU LAW**

- *General principles of EU law* protecting access to justice include for example, the right to be heard (see *Transocean Marine Paint, C-17/74*).
- *Charter, Article 47* protects the rights to a fair hearing and an effective remedy. This applies to all decision-making processes within the scope of EU law. It also incorporates express protection for access to legal aid in some cases.
- *Charter, Articles 48-50* provide express protections for criminal due process, including in respect of double jeopardy, the right to proportionality and the presumption of innocence.

**ECHR**

- *ECHR, Article 6* provides for the right to a fair hearing before an independent tribunal and for a series of specific protections for due process in criminal cases.
- In civil justice, Article 6 is only applicable in cases which involve the “*determination of civil rights and obligations*”. This means Article 6 is not applicable to a range of administrative decisions, including immigration decisions (*Maaouia v France* (2001) 33 EHRR 42). There is no such limit in Article 47 of the Charter (ZZ C-300/11 at [48]-[59]).
- The right to legal aid is recognised by Article 6 only in so far as is necessary to ensure access to justice (*Airey v Ireland* (1979) 2 EHRR 305).

**INTERNATIONAL LAW**

- The *ICCPR, Article 14* provides for the protection of the right of equal treatment before the law. It is recognised that this provision is designed to protect the right to a fair hearing before an independent tribunal. Article 14 also provides specific protection to a range of due process rights.
- Many of the other international human rights treaties provide specific protections for fair hearing rights in respect of the protections they offer to individuals. For example, the UNCRPD provides in Article 13, for persons with disabilities to have equal access to justice.

**DOMESTIC LAW**

- The *HRA 1998* incorporates the standards of Article 6 ECHR into domestic law.
- **Within the scope of EU law, the *ECA 1972* means that the provisions of EU law will apply, including Article 47-50, Charter.**
- The common law recognises access to justice and access to the courts as a fundamental right protected by the common law. In some cases, this right has empowered challenges to administrative restrictions on access to the courts short of primary legislation (see, for example, *Regina v Secretary of State Home Department, ex parte Leech (No 2)* [1993] 3 WLR 1125).
- Ordinary public law also protects the right to be heard in some matters of administrative decision-making (see, *Cooper v Wandsworth Board of Works*, (1863) 14 CB (NS) 180).

**Appendix B (cont.)****(iv) Equality****EU LAW**

- *General Principle of EU law of equal treatment and non-discrimination: Ruckdeschel v Hauptzollamt* [1977] ECR 1753.
- *TEU, Article 2*: protects values common to Member States “in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.
- *Charter, Articles 20-25*: Freestanding equality guarantee.
  - Article 20 protects equality before the law;
  - Article 21 protects against discrimination on grounds of sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation;
  - Article 23 protects equal treatment of women;
  - Article 24 protects rights of the child;
  - Article 25 protects rights of older persons.
- *EU Equality Framework: Employment Equality Framework Directive 2000/78/EC* (prohibits discrimination on grounds of sexuality, religion, disability and age in the workplace); *Race Equality Directive 2000/43/EC*; *Equal Treatment Directive 2006/54/EC* (both prohibit discrimination in employment and goods and services).

**ECHR**

- *ECHR, Article 14* protects against discrimination in the enjoyment of rights protected by the ECHR. The protection is parasitic on other ECHR rights, not a freestanding protection.
- *ECHR, Protocol 12* contains a general freestanding equality guarantee that no one shall be discriminated against on any ground by any public authority. The Protocol has not been ratified by the UK.

**INTERNATIONAL LAW**

- *ICCPR, Article 3* provides for men and women to enjoy the rights protected by the ICCPR equally.
- *ICCPR, Article 26* provides equality before the law for all persons and equal protection of the law without any discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- *ICESCR, Article 7(a)(i)* provides for fair wages and equal remuneration for equal work, particularly between women and men.
- *ICESCR, Article 7(c)* protects equal opportunity for everyone to be promoted in their employment to an appropriate higher level according to seniority and competence only.

**DOMESTIC LAW**

- *The HRA 1998*: Individual public authorities must comply with Article 14 in all their public functions (s 6, HRA 1998). Individuals can bring domestic law claims based on a failure to respect the rights protected by Article 14. (See above).
- **Within the scope of EU law, the ECA 1972 means that the provisions of EU law will apply, including Article 20 – 25, Charter.**
- The common law recognises a general but relatively undeveloped right to equal protection by the law: *Matadeen v Pointu* [1999] 1 AC 98, [8].
- ***Equality Act 2010 (UK)* (and separate legislation in Northern Ireland) protect against discrimination on the basis of a range of protected characteristics, including gender, race, sexuality, religion, disability and age; in connection with education, employment and training and access to goods and services.**
- ***Equality Act 2010, s 149*: The freestanding public sector equality duty (“PSED”) requires public authorities to have due regard to the need to eliminate discrimination and advance equality of opportunity. The PSED goes further than EU law.**

**Appendix B (cont.)****(v) Environmental rights****EU LAW**

- *Charter, Title IV* protects the right to environmental protection. Article 37, Charter provides: "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development."
- A long list of *Environmental Directives* impose obligations on members states in areas such as pollution, water policy, conservation of species and natural habitats, urban waste, floods, landfill and marine strategy.
- These Directives work to support the practical enjoyment of the rights protected under EU law.

**ECHR**

- The ECtHR has recognised some environmental rights allied to respect for ECHR rights, e.g. Article 8 see *Fadeyeva v Russia*, App No 55723/00 concerning the violation of private and family rights from caustic energy activities.
- However the protection offered by the ECHR is not comparable to the detailed standards imposed by the framework of EU environmental law.

**INTERNATIONAL LAW**

- There is currently no settled direct individual right in international law to a clean, healthy, or satisfactory environment, despite its inclusion in some instruments *African Charter on Human and Peoples' Rights, Article 24; San Salvador Protocol (Additional Protocol to the American Convention on Human Rights, Article 11)*.
- A body of international law is evolving, these include treaties and other instruments designed to work towards an international response to particular threats. For example, including the *Convention on Nuclear Safety (1994)* or the *Basel Convention on Hazardous Wastes (1989)*.
- Poverty and health implications of poor environmental conditions and lack of access to energy may raise issues under *ICESCR*, amongst other treaties, and are firmly on the international policy agenda.
- For the first time, the Paris Agreement of 2015 linked States' human rights and climate change obligations

**DOMESTIC LAW**

- **The UK has implemented EU Directives in numerous pieces of domestic legislation.**
- **Successful legal challenges in the UK about the air quality in London are generally based on EU law: *R (ClientEarth) v Secretary of State for the Environment, Food and Rural Affairs* [2015] PTSR 909.**
- While the Government has indicated continued commitment to the environment post-Brexit, the UK will no longer be bound by EU standards and legal challenges will be more difficult.

**Appendix B (cont.)****(vi) Labour rights**

There are a variety of labour laws protected by the **Charter and by specific provisions of EU law**, including on working time and maternity rights, on the rights of part-time workers and on transfers of employment rights. These are given effect in UK law as a result of UK membership of the Union. However, there is no direct equivalent of these protections provided for in the ECHR or necessarily in other international law standards which bind the UK. **In this section, we illustrate only one example, where there are comparable but distinct protections in the EU, the ECHR and international law; for the right to strike, as protected by the right to freedom of association. Other rights such as the Working Time Directive, are only protected by the provision of EU law in the domestic legal framework.**

**EU LAW**

- *Charter, Article 28 provides for an express right to collective bargaining: "Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action."*
- *However, the CJEU, while acknowledging the fundamental status of the right to strike, has failed in practice to afford it a similar level of protection consistent with a right derived from the freedom of association, as advocated by the ILO and endorsed by the ECtHR (see columns right). Most notably, where these rights have conflicted with the right to freedom of movement across the market, freedom of movement has prevailed (see *Viking Line C-438/05* and *Laval C-341/05*).*

**ECHR**

- *ECHR, Article 11 also recognises that the right to freedom of association protects the right of employees to participate in collective bargaining, subject to a margin of appreciation enjoyed by individual Contracting Parties to regulate strike action in domestic law. However, the ECtHR has found that a complete bar on strikes would violate Article 11 (*Enerji Yapi-Yol Sen v. Turkey* (App No. 68959/01). In *National Union of Rail, Maritime and Transport Workers v. The United Kingdom* App No. 31045/10), the ECtHR explained that "if a legislative restriction strikes at the core of trade union activity, a lesser margin of appreciation is to be recognised to the national legislature and more is required to justify the proportionality of the resultant interference, in the general interest, with the exercise of trade union freedom."*
- *The European Social Charter (1961) Articles 5 and 6 provide protection for the right to strike.*

**INTERNATIONAL LAW**

- *ICCPR, Article 22 provides "Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests".*
- *ICESCR Article 7 guarantees the right to just and favourable conditions of work, and Article 7(a)(ii) in particular guarantees the right of workers to "a decent living for themselves and their families." Article 8 (1) (d) guarantees "the right to strike, provided that it is exercised in conformity with the laws of the particular country". (The Committee on the ICESCR has criticised UK domestic law on the right to strike as inconsistent with international standards).*
- *The right to strike is not expressly recognized in any international labour convention. However, ILO Conventions 87 and 98 provide specific guarantees which the ILO considers protect a right to strike.*
- *The ILO Committee of Experts and the Committee for Freedom of Association, have emphasised in their pronouncements that the right to strike must be understood to constitute a central element of the right of association protected by both these Conventions.*

## *Appendix B (cont.)*

### **(vi) Labour rights (cont.)**

#### **DOMESTIC LAW**

- The *HRA 1998* gives effect to ECHR, Article 11 in domestic law.
- **The *ECA 1972* gives effect to the protections offered by EU law and the Charter, including Article 28. Article 28 arises in Title IV (Solidarity), so will engage the UK position in Protocol 30 to the Charter. It is protected through the provisions of domestic law.**
- Strikes are governed in domestic law by the *Trade Union and Labour Relations (Consolidation) Act 1992*, as amended. This makes provision for lawful strikes to occur following the conduct of ballots on industrial action, subject to legal limitations. The most recent amendments to the law have been made by the *Trade Union Act 2016*. This existing legal framework has been criticised by domestic trade unions, academics and international institutions.
- The Government considers that it complies with its international obligations. The latest legislation proved controversial. It limits the circumstances when certain public services can strike and raises the conditions for a successful strike ballot.

# Glossary

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**Acquis**

Used to refer to the body of EU law, including legislative instruments and case law of the Court of Justice of the EU.

**Brexit**

Colloquialism for the process of the UK withdrawing itself from membership of the EU.

**Charter**

The Charter of Fundamental Rights of the European Union which binds all member states of the EU and protects the rights and freedoms which reflect the General Principles of the EU.

**CJEU**

The Court of Justice of the European Union is the ultimate arbiter of the interpretation and application of EU law.

**ECA 1972**

The European Communities Act 1972 which provides that EU law has direct effect in the UK. It allows ministers to use secondary legislation to implement changes to domestic law where necessary to further implement EU law, including Directives.

**ECHR**

The European Convention of Human Rights, signed in 1950 and containing 47 members, more than the EU.

**ECtHR**

The European Court of Human Rights which decides cases brought against a signatory to the European Convention on Human Rights and is based in Strasbourg.

**EU27**

The 27 remaining member countries of the EU minus the UK.

**HRA 1998**

The Human Rights Act 1998

**Member State**

A country that is a current member of the European Union.

**The Lisbon Treaty**

Incorporates the Treaty on the Functioning of the European Union ("TFEU"); and the TEU (Treaty on European Union)