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British Institute of
International and
Comparative Law

Brexit: The International Legal Implications | Paper No. 16 – February 2018

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About the Series

Brexit: The International Legal Implications is a series examining the political, economic, social and legal storm that was unleashed by the United Kingdom's June 2016 referendum vote and the government's response to it. After decades of strengthening European integration and independence, the giving of notice under article 50 of the Treaty on European Union forces the UK government and the European Union to address the complex challenge of unravelling the many threads that bind them, and to chart a new course of separation and autonomy. A consequence of European integration is that aspects of UK foreign affairs have become largely the purview of Brussels, but Brexit necessitates a deep understanding of its international law implications on both sides of the English Channel, in order to chart the stormy seas of negotiating and advancing beyond separation. The paper series features international law practitioners and academics from the United Kingdom, Canada, the United States and Europe, explaining the challenges that need to be addressed in the diverse fields of trade, financial services, insolvency, intellectual property, environment and human rights.

The project leaders are Oonagh E. Fitzgerald, director of the International Law Research Program at the Centre for International Governance Innovation (CIGI); and Eva Lein, a professor at the University of Lausanne and senior research fellow at the British Institute of International and Comparative Law (BIICL). The series will be published as a book entitled *Complexity's Embrace: The International Law Implications of Brexit* in spring 2018.

About the Author

Colm O'Conneide is a professor of constitutional and human rights law at University College London (UCL). A graduate of University College Cork, the University of Edinburgh and King's Inns in Dublin, he was called to the Irish Bar in 1997 and went on to work as a legal adviser in the UK House of Lords before joining UCL in 2001. He has published extensively in the field of comparative constitutional, human rights and anti-discrimination law. He has also acted as specialist legal adviser to the Joint Committee on Human Rights and the Women and Equalities Committee of the UK Parliament and advised a range of international organizations, including the United Nations, the International Labour Organization and the European Commission. He was also a member of the European Committee on Social Rights of the Council of Europe from 2006 to 2016 and has been a member of the academic advisory board of Blackstone Chambers in London, England, since 2008.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

Executive Summary

Many commentators have expressed concern that the process of Brexit could have a negative impact on human rights protection in the United Kingdom. In contrast, others have argued that leaving the European Union offers an opportunity for the United Kingdom to develop better standards of rights protection than currently exist in UK or EU law, or at least standards that better reflect popular views in Britain about what qualifies as a human right. To assess the merit of these competing claims, it is necessary to consider whether Brexit creates a real risk that existing human rights standards may be eroded. In answering that question, it is clear that Brexit creates a risk that important EU legal standards that help to protect rights in areas such as personal privacy, workers' rights and non-discrimination will be diluted, amended or even repealed over time. Furthermore, migrants and other vulnerable groups are most at risk from any such erosion of existing standards. This risk may never materialize. However, care needs to be taken that Brexit will not lead to a diluted respect for human rights. Human rights activists, and indeed anyone concerned with the protection of civil liberties and fundamental rights within UK law and policy, will need to be vigilant in the post-Brexit era.

Introduction

The potential impact of Brexit on human rights has attracted plenty of commentary since the Leave vote prevailed in the referendum of June 23, 2016. Much of this commentary has focused on the threats the Brexit process may pose to legal human rights protection in the United Kingdom. Thus, for example, Merris Amos has expressed concern that Brexit and, in particular, its legal implementation via the European Union (Withdrawal) Bill¹ (EU [Withdrawal] Bill) will open up a vacuum in rights protection.² Tobias Lock has argued that, even though the United

Kingdom's exit from the European Union need not automatically result in a dilution of fundamental rights protection, Brexit is nevertheless likely to pose a risk to existing human rights protection.³ Conor Gearty has dramatically suggested that Brexit is becoming Britain's Vietnam, partially in the sense of becoming a policy quagmire that threatens the slow erosion of established human rights and civil liberties.⁴ Colin Harvey and other commentators in Northern Ireland have been vocal in expressing the fear that Brexit will undermine the human rights framework that forms a key element of the Northern Irish peace settlement, laid out in the 1998 Good Friday Agreement.⁵

Nor have these concerns been confined to academic commentary. The Joint Committee on Human Rights (JCHR) of the UK Parliament has expressed concern that the process of Brexit could have a negative impact on human rights across a number of different areas, if careful action is not taken to alleviate its impact.⁶ Similar concerns have been expressed in parliamentary debates on Brexit and, in particular, on the provisions of the EU (Withdrawal) Bill.⁷

In contrast, other commentators have argued that these concerns are radically overstated. For example, a response to the JCHR's report co-authored by a number of prominent law professors and published under the banner of the Judicial Power Project (a project funded by Policy Exchange, a leading centre-right think tank) argued that there is nothing intrinsic to the process of the United Kingdom exiting the European

1 Bill 5, *European Union (Withdrawal) Bill* [HL], 2017–2019 sess (1st reading 13 July 2017) [EU (Withdrawal) Bill].

2 Merris Amos, "Red Herrings and Reductions: Human Rights and the EU (Withdrawal) Bill" (4 October 2017), *UK Constitutional Law Association* (blog), online: <<https://ukconstitutionalaw.org/>>.

3 Tobias Lock, "Human Rights Law in the UK after Brexit" (2017) *Public Law, Brexit Special Extra Issue* 117.

4 Conor Gearty, "A Happy Brexit? We should rather brace ourselves for a dramatic change in our democratic freedom – for the worse" (23 November 2017), *LSE Brexit* (blog), online: <<http://blogs.lse.ac.uk/brexit/2017/11/23/a-happy-brexit-we-should-rather-brace-ourselves-for-a-dramatic-change-in-our-democratic-freedom-for-the-worse/>>.

5 See e.g. Colin Harvey, "Brexit, Northern Ireland and Human Rights" (5 May 2017) *RightsNI* (blog), online: <<http://rightsni.org/2017/05/brexit-northern-ireland-and-human-rights/>>; "Brexit Implications for Human Rights Provisions to be Examined", *Belfast Telegraph* (13 February 2017), online: <www.belfasttelegraph.co.uk/news/republic-of-ireland/brexit-implications-for-human-rights-provisions-to-be-examined-35445599.html>.

6 UK, JCHR, *The Human Rights Implications of Brexit* (5th Report of Session 2016–17, HL Paper 88/HC 695) (London, UK: Parliament, 2016), online: <<https://publications.parliament.uk/pa/ft201617/itselect/itrights/695/695.pdf>>.

7 See e.g. Heather Steward, "'Great repeal bill' human rights clause sets up Brexit clash with Labour", *The Guardian* (13 July 2017), online: <www.theguardian.com/politics/2017/jul/13/great-repeal-bill-human-rights-clause-sets-up-brexit-clash-with-labour>.

Union that necessarily leads to a reduction in the substantive protection of human rights.⁸ The UK government has also argued that the legal adjustments required to give effect to Brexit will not lead to any diminution of the scope of core legal safeguards.⁹ Indeed, some commentators even argue that leaving the European Union offers an opportunity for the United Kingdom to develop superior standards of rights protection than currently exist in British or European law — or, at least, to develop standards that better reflect British values and/or popular views as to the appropriate content of human rights norms.¹⁰

How are we to assess the merits of these competing claims, especially given the highly contested nature of Brexit and the charged political environment that surrounds it? As a first step, it is helpful to identify whether, how and to what extent the Brexit process creates a real risk that existing human rights standards may be eroded. Identifying the extent of any such risk then makes it possible to assess the potential impact of Brexit on rights — bearing in mind that Brexit is playing out against the background of the United Kingdom’s particular political and constitutional culture, and Brexit’s future impact will inevitably be shaped by this culture. In carrying out this assessment, the aim is not to make a polemical argument about the pros and cons of Brexit: instead, the objective of this analysis is to clarify Brexit’s potential impact on human rights in the short- to medium-term future.

The Risks of Brexit

The majority of the commentators expressing concern about the potential impact of Brexit on human rights have focused on how it may undermine existing legal methods of rights protection. Within this general strand of criticism, several different subthemes can be identified.

8 Gunnar Beck et al, “What the JCHR gets Wrong about Fundamental Rights”, *Judicial Power Project* (19 December 2016), online: <<http://judicialpowerproject.org.uk/what-the-jchr-gets-wrong-about-fundamental-rights/>>.

9 See the comments by Lord Keen of Elie, speaking for the government, in the House of Lords debate on “Brexit: Human Rights”: UK, HL, *Parliamentary Debates*, vol 787, col 1524 (12 December 2017).

10 See Beck et al, *supra* note 8.

The Potential Impact of Brexit on Existing EU Legislative Protection for Human Rights

To start with, some commentators have highlighted the important role that EU primary and secondary legislation has come to play in securing certain human rights — which is particularly the case in areas such as discrimination law, workers’ rights, environmental law, data protection and migrant rights.¹¹ In all of these contexts, EU law sets out minimum standards with which all EU member states must comply. Furthermore, the supremacy and direct effect of EU law means that these baseline standards cannot be overridden or diluted by national lawmakers. As a result, the protection these standards provide for human rights is relatively insulated against the vicissitudes of national politics. In addition, the purposive approach adopted by the Court of Justice of the European Union (CJEU) in interpreting EU law, and its willingness to read primary and secondary legislation with reference to the overarching human rights commitments that are supposed to underpin the EU legal order, have ensured that these rights-protective standards often have real teeth.

For example, the set of directives, treaty provisions and general principles that make up EU equality law requires states to prohibit discrimination on the grounds of age, disability, gender, race or ethnicity, religion or belief and sexual orientation in the area of employment and occupation (and, for gender and race, in access to goods and services and other areas of social advantage). By virtue of these legal standards, EU member states are obliged to ensure that their domestic laws provide effective protection against direct and indirect discrimination, harassment and victimization linked to one or more of the four protected grounds of non-discrimination set out in the EU equality directives. The CJEU has also given a purposive interpretation to the relevant EU legal norms in this context.¹² As a consequence, EU equality law provides strong protection against many forms of discrimination. This has had a substantial impact on UK law, which has had to be repeatedly

11 See Lock, *supra* note 3. See also Michael Ford, “Workers’ Rights from Europe: The Impact of Brexit” (10 March 2016), online: <www.tuc.org.uk/sites/default/files/Brexit%20Legal%20Opinion.pdf> (advice prepared for the Trade Union Congress).

12 Colm O’Cinneide, *The Evolution and Impact of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC* (Brussels, Belgium: Migration Policy Group, 2012).

modified and strengthened in response to its requirements.¹³ Furthermore, the supremacy and direct effect of EU law has helped to give discrimination law a quasi-constitutional status in the United Kingdom, embedding it against attempts to dilute its requirements or water down its scope. In so doing, EU equality law provides substantive protection for the right to equality and non-discrimination as protected by article 14 of the European Convention on Human Rights¹⁴ (ECHR) and other human rights treaty provisions: it acts as a backstop to the provisions of the Equality Act 2010¹⁵ and other UK anti-discrimination legislation, ensuring that their provisions, and UK law more generally, give adequate effect to the principle of non-discrimination.¹⁶

The situation is similar when it comes to the other areas mentioned above where EU law protects human rights. The demanding requirements of EU data protection law, as interpreted by the CJEU with reference to the EU Charter of Fundamental Rights¹⁷ (CFR), protects the rights to privacy and freedom of expression. The provisions of instruments such as the Working Time Directive¹⁸ and the Part-Time Workers Directive¹⁹ help to secure core labour rights. EU law in the area of immigration, asylum and migrant rights, while at times problematic from a human rights perspective, also can take effect in a way that strengthens respect for the right to privacy, home and family life. EU environmental law has played a key role in protecting air quality and other essentials to human health and the right to life.²⁰

However, after the United Kingdom exits the European Union, these standards will presumably

no longer enjoy the benefit of supremacy/direct effect. Therefore, even though they will remain part of UK law by virtue of the provisions of the EU (Withdrawal) Act, UK withdrawal from the European Union creates the possibility that they may be diluted, amended or repealed by subsequent UK primary or secondary legislation. Furthermore, the purposive approach generally adopted by the CJEU in interpreting these standards may not be adopted by UK courts in the future as they might consider themselves constitutionally inhibited from following the CJEU's lead in this regard.

As a consequence, Brexit poses a potential threat to all these EU standards — and, by extension, to the specific and embedded forms of legal protection they afford to human rights. The extra layer of security currently provided by the supremacy and direct effect of EU law to many of the legal rules that help to secure equality and labour, environmental and migrants' rights at present will fall away — opening them up to the possibility of being watered down or substantially eroded.²¹

The Potential Impact of Brexit on the Legal Status of the General Principles of EU Law and the CFR

This concern is exacerbated by the likelihood that Brexit will dilute the impact of certain overarching aspects of EU law that serve to ensure the conformity of all aspects of EU law and national implementing measures with human rights — namely, the general principles of EU law and the CFR. Commentators have again focused upon this risk with concern, with some identifying it as perhaps the most significant negative consequence of Brexit for human rights protection.²²

The CJEU has recognized the existence of certain general principles that underpin the EU legal order. All EU law and national implementing measures must respect these general principles — which, since the early 1970s, have been interpreted by the court as requiring adherence to human rights that form part of the common constitutional tradition of EU member states or are recognized

13 Colm O'Connell & Kimberly Liu, "Defining the Limits of Discrimination Law in the UK — Principle and Pragmatism in Tension" (2014) 15:1–2 *Intl J Discrimination & L* 239.

14 *European Convention on Human Rights*, 4 November 1950, ETS 5, 213 UNTS 221 (entered into force 3 September 1953) [ECHR].

15 *Equality Act 2010* (UK), c. 15.

16 See Ford, *supra* note 11.

17 *Charter of the Fundamental Rights of the European Union*, [2000] OJ, C 364/01 [CFR].

18 *Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time*, [2003] OJ, L 299/9.

19 *Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC—Annex: Framework agreement on part-time work*, [1998] OJ, L 14/9.

20 For a general overview, see UK, JCHR, *supra* note 6.

21 See Ford, *supra* note 11.

22 See Amos, *supra* note 2.

in international treaties, such as the ECHR, that have been ratified by all member states.²³

The CFR was intended to specify these human rights obligations with more precision.²⁴ It sets out a wide-ranging list of fundamental rights and principles, extending to cover certain social and citizen rights that human rights instruments such as the ECHR do not cover. Since 2009, it has had the same legal status as the EU treaties, meaning that all EU law and national implementing measures must comply with its requirements.²⁵ As confirmed by the CJEU in the case of *NS*,²⁶ its provisions apply to the United Kingdom notwithstanding the provisions of protocol 30²⁷ to the TEU, which affirm that nothing in the CFR extends the competency of the CJEU to set aside existing UK laws for incompatibility with fundamental rights principles: it appears as if the only legal impact of this protocol, often erroneously described as a UK opt-out from the CFR, may be to limit the application to UK law of certain social rights principles set out in the CFR.²⁸

Taken together, the general principles and the CFR serve as human rights guarantors within the EU legal framework: the provisions of EU law and national implementing measures must be read subject to their requirements and can be set aside by the CJEU and national courts if they are incompatible with the rights they protect. Both the general principles and the CFR have been applied so as to reinforce fundamental rights protection by the CJEU and national courts (including the UK Supreme Court) — with particular impact in areas such as immigration

and asylum, the application of EU sanctions, data protection and discrimination law.²⁹

However, this constitutional layer of rights protection provided by the general principles and CFR is unlikely to be preserved in a post-Brexit United Kingdom. Once the United Kingdom leaves the European Union and the European Communities Act 1972³⁰ is repealed, the doctrine of parliamentary sovereignty will again take full effect: this means that national legislation will be immune from challenge on the basis of incompatibility with the general principles and/or the CFR, restricting the protection they currently afford to rights.

Furthermore, at the time of writing, the text of the EU (Withdrawal) Bill before Parliament provides that the CFR shall not remain part of UK law after Brexit.³¹ This provision of the bill reflects the strongly negative views of many Conservative Party members of Parliament about the CFR and its wide-ranging set of human rights guarantees. It is not uncontroversial: the exclusion of the CFR from the carry-over provisions of the bill has been criticized by both the parliamentary opposition and the Equality and Human Rights Commission,³² and the UK government has been forced to make the somewhat dubious argument that the provisions of the CFR add little or nothing to existing human rights protection.³³ However, absent from a significant shift in government policy, it is likely that the CFR will be uprooted from UK law on Brexit — taking with it the wide-ranging rights protection it currently offers within the scope of application of EU law.

This would leave the general principles of EU law still in play. While the general principles will not override parliamentary legislation post-Brexit, the UK courts will still be required to take them into account in interpreting those elements of EU law

23 *Nold v Commission*, C-4/73, [1974] ECR 491 at especially para 13. See generally Takis Tridimas, *The General Principles of EU Law*, 2nd ed (Oxford, UK: Oxford University Press, 2007).

24 As Young notes, “It can also be difficult to separate out Charter rights and general principles — the Charter and general principles are influenced by each other...developing in a coterminous manner.” See Alison Young, “Oh, What a Tangled Web We Weave... The EU (Withdrawal) Bill 2017–19 and Human Rights post Brexit: Part 1” (15 August 2017) *Oxford Human Rights* (blog), online: <<http://ohrh.law.ox.ac.uk/oh-what-a-tangled-web-we-weave-the-eu-withdrawal-bill-2017-19-and-human-rights-post-brexit-part-1>>.

25 *Treaty on European Union (Consolidated Version)*, 7 February 1992, [2002] OJ, C 325/5, art 6 (entered into force 1 November 1993) [TEU].

26 *NS v Secretary of State for the Home Department*, Case C-411/10, [2012] 2 CMLR 9.

27 *Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom*, 9 May 2008, [2008] OJ, C 115/313.

28 *Ibid* at para 2.

29 See e.g. *Kücükdevici*, C-555/07, [2010] I-00365, [2010] 2 CMLR 33; *Benkharbouche v Embassy of Sudan*, [2017] UKSC 62; *Walker v Innospec Ltd*, [2017] UKSC 47; *Google v Vidal-Hall*, [2015] EWCA Civ 311.

30 *European Communities Act 1972* (UK), c 68.

31 See *EU (Withdrawal) Bill*, *supra* note 1, cl 5(4).

32 Joe Watts, “UK government watchdog pushes for new British ‘right to equality’ to stop Brexit leading to more discrimination”, *The Independent* (15 October 2017), online: <www.independent.co.uk/news/uk/politics/brexit-discrimination-laws-right-to-equality-uk-equalities-watchdog-eu-a7999461.html>.

33 UK Department for Exiting the European Union, “The Repeal Bill — Factsheet 6: EU Charter of Fundamental Rights” (13 July 2017), online: <www.gov.uk/government/uploads/system/uploads/attachment_data/file/642866/Factsheets_-_Charter_of_Fundamental_Rights.pdf>.

that will remain embedded in UK law. However, at the time of writing, the EU (Withdrawal) Bill provides that, from exit day onward, there will be no “right of action in domestic law...based on a failure to comply with any of the general principles of EU law.”³⁴ This would prevent claims alleging a breach of the general principles being litigated in UK courts post-Brexit and limit the role of the general principles to being an interpretative aid. This particular government proposal risks destabilizing established EU law and, thus, generating legal uncertainty, so it may not survive the parliamentary debate on the withdrawal bill. However, as Alison Young has pointed out, the general principles lack specificity — meaning that, in the absence of the CFR, their usefulness as a source of rights protection post-Brexit may be limited.³⁵

The EU (Withdrawal) Bill – Statutory Amendment by Executive Fiat?

Other concerns arise in relation to the legal mechanisms that the EU (Withdrawal) Bill provides for the UK government to amend or repeal the provisions of EU law that will continue to form part of UK law post-Brexit. The bill gives ministers wide-ranging powers to amend both transposed EU law and associated UK law via secondary legislation.³⁶ This means that ministers will have the power to amend or even repeal any aspect of EU law that protects human rights, along with any linked UK legislation, where necessary to give effect to the Brexit transition process. The use of such ministerial powers is open to scrutiny and veto by Parliament — but, in reality, Parliament’s capacity to exercise a meaningful rights protective role in this context is limited by the exigencies of time, a lack of expert knowledge and government control over the business of the House of Commons.

Many commentators have identified the scope of these ministerial powers as a real threat to the enjoyment of human rights post-Brexit, given that these powers make it possible for existing legal guarantees to be diluted, amended or repealed by the exercise of potentially unaccountable executive

power.³⁷ At the time of writing, amendments have been tabled to the withdrawal bill to limit the extent to which these powers can be used to alter existing EU/UK law that impacts upon equality and human rights, and to impose greater parliamentary controls on their use more generally.³⁸ It remains to be seen what political compromises will be reached in this regard. However, it would appear inevitable that EU law, in general, once converted into UK law post-Brexit, will be open to being extensively amended by fast-track executive action — which, therefore, poses, by extension, a risk to the legal protection EU law currently provides for various fundamental rights.

Assessing the Brexit Risk to Human Rights

It is, therefore, possible to identify specific risks that Brexit poses to the protection of human rights. However, if a meaningful overview of Brexit’s potential impact on human rights is to be devised, it is not enough merely to point to the existence of such risks. Brexit may make certain existing forms of rights protection vulnerable, but that does not necessarily mean that the protections are likely to be swept away: risks can be real, without ever coming to fruition. To make a full risk assessment about the impact of Brexit on human rights, some analysis is needed of the probability of existing rights protection being diluted — along with some critical engagement with the question of whether the current (EU) status quo should be regarded as a baseline worth retaining when it comes to human rights.

Starting with the probability of the above-mentioned risks coming to fruition, there are certain factors in play that suggest that Brexit is unlikely to result in a bonfire of rights-protective EU legislative instruments — at least, in the short

34 See *EU (Withdrawal) Bill*, *supra* note 1, Schedule 1, cl 3(1); see also (*ibid*) Schedule 1, cl 3(2) (“no court may disapply, quash, or decide that action is unlawful because it is incompatible with general principles of EU law”).

35 Young, *supra* note 24.

36 See *EU (Withdrawal) Bill*, *supra* note 1, cl 9.

37 See e.g. Mark Elliott, “The EU (Withdrawal) Bill: Initial Thoughts” (14 July 2017) *Public Law For Everyone* (blog), online: <<https://publiclawforeveryone.com/2017/07/14/the-eu-withdrawal-bill-initial-thoughts/>>; UK, House of Lords Constitution Committee, *EU (Withdrawal) Bill: Interim Report* (3rd Report of Session 2017-18, HL Paper 19) (London, UK: Parliament, 2017).

38 See ECHR, “EU (Withdrawal) Bill: Second Reading, House of Commons, 7 September 2017”, online: <www.equalityhumanrights.com/sites/default/files/briefing-eu-withdrawal-bill-second-reading.pdf>.

to medium term. To start with, high levels of political disquiet have been expressed about the possibility of existing EU standards being diluted in fields such as equality law, labour rights and environmental protection. This has affected the political debate surrounding Brexit. For example, when she became prime minister in the wake of the referendum, Theresa May promised that there would be no dilution of existing workers' rights guaranteed through EU law.³⁹ Other government ministers have made similar remarks in respect of equality law and environmental protection.⁴⁰

The controversy that has surrounded the devolution dimension of Brexit — and, in particular, the issue of its impact on Northern Ireland — also makes it likely that both the current and future governments may feel the need to tread carefully when tinkering with EU baseline standards that help to secure human rights in politically sensitive areas such as equality law and environmental protection. There is also the possibility that the final withdrawal, transition and trade agreements to be negotiated with the European Union will require the United Kingdom to maintain regulatory alignment in various areas currently governed by EU law — with the trio of equality law, labour rights and environmental protection again being potential candidates for inclusion in this category.⁴¹ In addition, there are areas where market forces will in all likelihood require the United Kingdom to continue to adhere to EU standards that are related to the enjoyment of human rights — such as data protection, where UK bulk holders of personal data that is sourced from a number of different EU states may need to maintain compliance with the EU data protection framework.

Having said that, there are also political factors in play which make it likely that there will be some

departure from existing EU standards that currently help secure human rights. At present, both the Conservative and Labour parties are committed to changing EU free movement rules as they apply to the United Kingdom — meaning that migrant rights are likely to be diluted in the wake of the United Kingdom's exit from the European Union. Furthermore, various political factions within the broad pro-Leave coalition have supported the idea of the United Kingdom embracing a low-regulation economic model.⁴² If implemented now or in the future, such an adjustment could entail substantial departures from the current EU regulatory framework in areas such as labour rights and environmental protection. In any case, it is likely that UK governments in the future will use the regulatory manoeuvre room left to them by the post-Brexit EU/UK trade agreement(s) to make adjustments to British law that will entail a departure from the existing (EU) status quo — which again could impact on the protection that status quo currently affords to human rights.

Therefore, while the risk of a radical dismantling of existing EU legislation that has a rights-protective function can be overstated, it is likely that Brexit will result in some adjustment of the status quo. In other words, Brexit will open existing EU rights-protecting standards to review, revision and potential repeal — and this is likely to result in changes to these standards, which are likely to be implemented through the potentially problematic secondary legislation mechanisms set out in the EU (Withdrawal) Bill. Thus, commentators who point to the risk of Brexit impacting upon human rights protection, and express fear that such changes will not be always subject to sustained parliamentary scrutiny, have a point.

Nonetheless, change is not inherently bad, even when it relates to the enjoyment of human rights. The EU standards under discussion in this paper, which have conferred a degree of effective protection upon certain human rights in areas such as discrimination law, labour rights and migrant rights, are not the only way of securing such rights. Alternative modes of regulation might hypothetically confer equivalent or even superior levels of protection on such rights —

39 Theresa May, "Theresa May's Brexit speech in full", *The Telegraph* (17 January 2017), online: <www.telegraph.co.uk/news/2017/01/17/theresa-mays-brexit-speech-full/>.

40 Note that the UK government has confirmed that it only intends to make minor technical amendments to the Equality Act 2010 via the enabling powers conferred by the EU (Withdrawal) Bill: see UK, "Equality Legislation and EU Exit" (12 December 2017), online: <www.gov.uk/government/uploads/system/uploads/attachment_data/file/665442/171206_Equalities_SI_summary_FINAL_.pdf>.

41 See e.g. UK, "Joint Report on Progress during Phase 1 of Negotiations under Article 50 TEU on the United Kingdom's Orderly Withdrawal from the European Union" (8 December 2017) at para 53 (on rights protection in Northern Ireland: "The UK commits to ensuring that no diminution of rights is caused by [Brexit], including in the area of protection against forms of discrimination enshrined in EU law").

42 This is sometimes referred to as the Singapore model in Brexit debates. See e.g. Patrick Collinson, "Billionaire Brexit Supporter says UK Should Emulate Singapore", *The Guardian* (12 May 2016), online: <www.theguardian.com/politics/2016/may/12/billionaire-brexit-supporter-says-uk-should-emulate-singapore>.

or might protect rights in a way that resonates better with other values, such as democratic self-governance.⁴³ It is problematic to regard existing EU law that protects human rights — such as the CFR, or the equality directives — as sacred text: such instruments may be well-established features of the current European landscape of human rights protection, but that does not mean that replacing them with new legal frameworks need inevitably be a bad thing.

This is why some commentators downplay the risks Brexit poses to human rights, choosing instead to argue that the United Kingdom's exit from the European Union represents a positive opportunity to open up debate about how rights are protected through law and to rethink existing (EU) methods of protection.⁴⁴ However, there are problems with this perspective. When viewed in isolation, Brexit might seem a plausible opportunity to rethink existing modes of rights protection in the United Kingdom, free from the dead hand of EU orthodoxy. However, the potential consequences of Brexit for human rights cannot be assessed in isolation, detached from the background political and constitutional context. If this context is considered, then additional causes for concern about Brexit's impact on human rights enter the picture.

To start with, if EU standards in areas such as migrant rights or non-discrimination are to be replaced over time by UK regulation, this replacement process will inevitably play out against the divisive backdrop of acrimonious political debates about immigration, equality rights, devolution and the United Kingdom's continuing relationship with Europe. This creates a risk that new legal standards will be framed with an eye on achieving short-term political gains or to appease special interests or particular segments of the electorate, rather than with a fuller perspective centred around the assumption that human rights need to be given presumptive priority in law making.

Furthermore, this replacement process is likely to be channelled through law-making mechanisms

that are often lacking in transparency and democratic accountability. For example, the executive has historically played a dominant role in framing UK immigration rules — and ministers and civil servants have regularly been accused of exercising too much authority over the shaping and application of British law in this regard, which is characterized by a high degree of complexity and non-transparent decision making.⁴⁵ Now, the Brexit process will give even greater powers to the executive in this regard, in particular, due to the wide powers conferred on ministers by the provisions of the EU (Withdrawal) Bill. As a result, there are grounds for being concerned about how UK migration rules will be framed in the future — when ministers will, post-Brexit, be freed from the constraints of EU migration rules and the protective, rights-influenced jurisprudence of the CJEU.⁴⁶

Furthermore, if the CFR is excluded from UK law post-Brexit, and the status of the general principles of EU law is watered down as discussed above, then the range of human rights that are directly enforceable within UK law will be considerably limited.⁴⁷ The Human Rights Act 1998⁴⁸ (HRA) will continue to apply after the United Kingdom's exit from the European Union. However, the fundamental rights protected by the HRA are much more limited in scope than those protected by the CFR or the general principles of EU law.⁴⁹ The HRA protects the core civil and political rights set out in the ECHR. However, the CFR's scope, in particular, is much greater, extending as it does to cover a wide range of dignitarian, social, equality and citizenship rights, in addition to the civil and political rights set out in the ECHR.⁵⁰ At present, the substance of many of these rights is not always clear, as the case law of the CJEU interpreting

43 For criticism of the CFR on the basis that it is incompatible with democratic values, see Richard Ekins, "The Charter of Fundamental Rights gives judges too much power, and is bad for accountable government", *Judicial Power Project* (22 July 2017), online: <<https://judicialpowerproject.org.uk/richard-ekins-the-charter-of-fundamental-rights-gives-judges-too-much-power-and-is-bad-for-accountable-government/>>.

44 See e.g. Beck et al, *supra* note 8.

45 See UK, House of Lords Constitutional Committee, *Immigration Bill* (7th Report of Session 2015-16, HL Paper 75) (London, UK: Parliament, 2016) at, in particular, paras 18–19.

46 See Joint Council for the Welfare of Immigrants (JCWI), "JCWI Response to the Exiting the European Union Inquiry on the UK's negotiating objectives for withdrawal from the EU" (20 March 2017), online: <www.jcwi.org.uk/sites/jcwi/files/2017-03/2017_03_20%20JCWI%20Response%20to%20the%20Exiting%20the%20European%20Union%20Inquiry.pdf>.

47 Amos, *supra* note 2.

48 *Human Rights Act 1998* (UK), c 42.

49 Amos, *supra* note 2.

50 See especially CFR, *supra* note 17, Title I (Dignity), Title III (Equality), Title IV (Solidarity) and Title V (Citizens' Rights).

the CFR's provisions is still in embryonic form.⁵¹ The extent to which respect for these rights is legally required as part of the general principles of EU law is also uncertain. Nevertheless, the requirements of the CFR, taken together with the general principles of EU law, considerably extend the range of individual rights claims that are directly enforceable before UK courts.⁵² However, this will presumably change with Brexit. If the CFR is excluded from UK law post-Brexit, and the status of the general principles is diluted, then only the more limited range of rights protected by the HRA will be directly enforceable within UK law.⁵³

Indeed, a Brexit-related shadow even hangs over this limited floor of protection afforded by the HRA. It transplants rights protected by the ECHR into UK law — and, therefore, attracts political controversy, in particular, among many Brexit supporters, because the HRA is viewed as representing another instance of European supranational governance.⁵⁴ It may be the case that Brexit will divert attention and energy from the constant debates about the status and legitimacy of the HRA/ECHR, at least, in the short term. However, all forms of human rights law are likely to remain politically controversial — which means that any modification of existing EU rights-protective standards is likely to be carried out in a climate of intense rights skepticism, which is likely to extend even to the relatively narrow range of civil and political rights protected by the HRA.⁵⁵

Some commentators have suggested that English common law could fill some of the gaps in rights protection left by the exclusion of the CFR and/or other post-Brexit dilution of European rights

standards.⁵⁶ The UK courts have been willing to recognize the existence of certain common law rights, such as freedom of speech and the entitlement to a fair trial: public authorities cannot act in a manner that limits the enjoyment of these rights unless they are expressly or by necessary implication authorized to do so by parliamentary legislation.⁵⁷ These rights are widely regarded as constituting home-grown human rights standards, whose lineage can be traced back to the Magna Carta. In recent years, the UK Supreme Court has shown a willingness to develop the case law relating to these common law rights — perhaps reflecting the current political hostility directed toward transnational European standards in this field.⁵⁸ This expanding case law shows that these common law rights have some teeth. They will also remain unaffected by Brexit and, thereby, will continue to provide a degree of rights protection even if European standards are amended, diluted or repealed. However, the scope of these rights — like that of the HRA — is limited to a narrow range of civil and political rights.⁵⁹ Furthermore, the rights' content is uncertain and controversy persists as to whether judges should play an active role in developing such rights standards in the absence of clear parliamentary authorization to do so.⁶⁰ As a consequence, it is unlikely that common law rights can plug the gaps that Brexit may potentially generate in UK law relating to rights protection.

Given this background context, there are substantial reasons to be concerned about how the Brexit process will impact on human rights. There is the possibility that well-established human rights standards will be reviewed, revised and possibly even repealed — and this replacement process is likely to unfold in a political climate unfavourable to human rights concerns. This provides a reason to be concerned about Brexit's impact on rights, especially given the limited scope of the HRA and common law rights. This concern may prove unfounded: future UK adjustments to existing EU standards in this

51 See generally Steve Peers et al, *The EU Charter of Fundamental Rights: A Commentary* (Oxford, UK: CH Beck/Hart Publishing/Nomos, 2014).

52 See e.g. *Benkharbouche v Embassy of Sudan*, [2017] UKSC 62. The rights claim at issue in this case — the right to non-discrimination in the context of employment as protected by article 21 of the CFR — was enforceable in UK law as the provisions of the CFR were applicable (in other words, the issue concerned national measures coming within the scope of EU law). In contrast, the right to non-discrimination as protected by article 14 of the ECHR was not applicable in this context, as article 14 does not usually extend to cover employment issues. See generally Colm O'Connell, "The Principle of Equality and Non-discrimination within the Framework of the EU Charter and Its Potential Application to Social and Solidarity Rights" in Giuseppe Palmisano, ed, *Making the Charter of Fundamental Rights a Living Instrument* (Leiden, Switzerland: Brill, 2015) 199.

53 Amos, *supra* note 2.

54 Merris Amos, "Transplanting Human Rights Norms: The Case of the United Kingdom's Human Rights Act" (2013) 35:2 *Hum Rts Q* 386.

55 Lock, *supra* note 3.

56 See e.g. Mark Elliott, "Beyond the European Convention: Human Rights and the Common Law" (2015) 68:1 *Current Leg Probs* 85.

57 See e.g. *R v Home Secretary, Ex parte Simms*, [2000] 2 AC 115; *Osborn v The Parole Board*, [2013] UKSC 61; *Kennedy v Charity Commissioners*, [2014] UKSC 20.

58 See Elliott, *supra* note 57. See also Roger Masterman & Se-shauna Wheatle, "A Common Law Resurgence in Rights. Protection?" [2015] *Eur HRL Rev* 56.

59 *Moohan v Lord Advocate*, [2014] UKHL 67.

60 Richard Clayton, "The Empire Strikes Back" [2015] *Public Law* 3.

field may not turn out to be very damaging. However, as things stand at present, some sense of foreboding about the future is justified.

Qualifying the Brexit Risk to Human Rights – A Tentative Conclusion

As Lock has argued, Brexit is rights neutral when considered on its own terms.⁶¹ However, Brexit makes it possible for certain EU rights-protective standards to be diluted, amended or repealed over time. Furthermore, the outcome of this process may be less than optimal when viewed from a human rights perspective, especially when it comes to the treatment of migrants and certain other vulnerable groups. Therefore, this risk assessment leads to the conclusion that Brexit poses a potential danger to rights. This danger may never materialize. However, the rights-negative background context against which Brexit is unfolding, and the limits of the non-EU forms of legal rights protection that currently exist in UK law, cannot be ignored. As a result, care needs to be taken that the United Kingdom's departure from the European Union will not lead to a diluted respect for human rights. Human rights activists, and indeed anyone concerned with the protection of civil liberties and fundamental rights within UK law and policy, will need to be vigilant in the post-Brexit era.

⁶¹ *Ibid.*

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