

The Civil Society Brexit Project: *Information* BREXIT AND HUMAN RIGHTS

About the Civil Society Brexit Project

The Civil Society Brexit Project is a collaboration between the **Scottish Universities Legal Network on Europe (SULNE)** and the **Human Rights Consortium Scotland**, funded by the **Legal Education Foundation**. We give information, insight and independent advice to make sure that organisations in Scotland are able to influence Brexit as much as possible. The Project will also help organisations to prepare for Brexit consequences for themselves or their beneficiaries.

www.hrcscotland.org/brexit

Who is this Civil Society Brexit Project: *Information* for?

This briefing is written for civil society organisations working in Scotland. For more information, contact hrcscotland@gmail.com

What areas of rights does this Brexit Information briefing cover?

This briefing covers human rights in the broad sense:

- Civil and political rights
- Equality rights
- Social rights
- Procedural rights

It focuses on the EU Charter of Fundamental Rights and the mechanisms for its enforcement. Details on other legal rights can be found in other briefings at www.hrcscotland.org/brexit

Which legal rights that particularly affect human rights protection in Scotland currently come from EU law, policy or regulations?

The rights outlined above are currently protected in Scotland through different legal sources:

- The Human Rights Act (HRA) is the main law protecting civil and political rights in the UK. It will not be directly affected by Brexit because it is

based on the European Convention on Human Rights, which has nothing to do with the EU. There is a separate political debate about whether it should be repealed and replaced with a British Bill of Rights, but this is independent of Brexit.

- The **EU Charter of Fundamental Rights** is the central human rights instrument in EU law. It sets out the full range of civil, political, economic and social rights of EU citizens and everybody resident in the EU. It includes all the rights protected by the HRA, but has a much broader scope: it contains fifty different Articles, each covering at least one – and many several – rights and freedoms. Its stated aim is to ‘strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.’ The Charter does this by setting out relevant principles under the following headings:

- I. Dignity
- II. Freedoms
- III. Equality
- IV. Solidarity
- V. Citizens’ rights
- VI. Justice

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Whilst the Charter incorporates all of the rights set out in the European Convention on Human Rights, its scope is also broader and its contents update those rights in line with changing social and economic circumstances. For example, in contrast to the European Convention, the Charter contains an express prohibition on human trafficking and an express right to data protection. Under the Convention, they both only exist in case law. Furthermore, the Charter includes some additional protections, for example in the broad area of social rights – e.g. a right to take collective action or a right to fair and just working conditions – and, more specifically, in relation to non-discrimination.

- However, the **Charter applies only ‘to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.’** This means it applies only where a Scottish or UK public authority is either applying EU law (e.g. handing out farming subsidies) or deviating from it (e.g. expelling an EU citizen for crimes committed in the UK).
- Equality rights (anti-discrimination law) and employment rights are additionally protected in various EU Directives, which have been brought into UK law by Acts of Parliament (e.g. the Equality Act) and secondary legislation (e.g. the Working Time Regulations).

Which legal rights that particularly affect human rights protection in Scotland are currently reserved to the UK Parliament and which parts are devolved to the Scottish Parliament?

Human rights as such are not a reserved power. Schedule 4 of the Scotland Act protects the Human Rights Act from being changed by an Act of the Scottish Parliament. But this does not mean that Scotland could not adopt its own human rights bill

so long as it is compliant with the Human Rights Act (or a British Bill of Rights). Hence if Scotland intended to protect certain rights better than the overall UK regime, it could do so within the powers of the devolution settlement.

There are limits where equality and employment rights are concerned, however, because equal opportunities and employment relations are a reserved matter.

What do we *know* will happen to these legal rights when the UK leaves the EU?

- The Charter of Fundamental Rights will no longer be binding on the UK after Brexit and after the transition period is up. A transition is likely to be negotiated in 2018 and likely to last for about two years from the date of Brexit of 29 March 2019.
- The Charter itself will probably not be carried over into UK law by the European Union (Withdrawal) Bill.¹ This means that it – in contrast to other EU rights – will not form part of the category of ‘retained EU law’ and will no longer apply in the UK after Brexit.
- However, the EU (Withdrawal) Bill provides that human rights protected as part of the unwritten general principles of EU law will remain relevant.² The unwritten general principles of EU law were the only basis for fundamental rights protection in the EU before the Charter came into force (as part of the Lisbon Treaty). They contain – broadly speaking – the same rights as the Charter, even though this is not entirely clear.

Despite these rights being retained by the EU (Withdrawal) Bill, they will however have different effects compared with the Charter. The Bill makes it clear that these rights will no longer give a **right of action** before a court. This means that individuals will no longer be able to challenge either a piece of (retained) EU law or a measure implementing EU law on the basis that they

1. The House of Commons voted down an amendment to this effect. It is unclear whether the House of Lords will change this.

2. See clause 5 (4) and (5) of the European Union (Withdrawal) Bill as amended in Committee (21 December 2017), available at: <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0147/18147.pdf>.

infringe EU fundamental rights. The only role for EU fundamental rights that remains is that they can be used to help interpret EU law. Of course, the option of challenging a measure on the basis of the Human Rights Act remains, but the effects of the Human Rights Act are weaker: in particular, it cannot be used to disapply an Act of Parliament, which EU law – including retained EU law under the EU (Withdrawal) Bill – can.

- Human rights protected by EU secondary law – EU Directives in particular – will remain part of UK law by virtue of the EU (Withdrawal) Bill. These rights will, however, be more vulnerable than they are now. While they cannot currently be removed without the UK violating its obligations under EU law, after Brexit – and a probable transition period of two years – they will be subject to amendment and repeal at the discretion of the UK Parliament – and for a two-year period after Brexit even by the UK Government due to the so-called Henry VIII powers contained in the EU (Withdrawal) Bill.
- The Human Rights Act will not be directly affected by Brexit. Brexit might however, make leaving the European Convention on Human Rights on which the Human Rights Act is based, easier politically as the EU and the other Member States will no longer expect the UK as a fellow Member State to be signed up to it.

What do we not *know* yet?

- We do not yet know what exactly will happen during a transition period between the official date of Brexit and the entry into force of the new relationship between the UK and the EU. But it is likely that the UK will need to continue to conform with all EU rights – including the Charter – during that period.
- We do not yet know whether the EU (Withdrawal) Bill as it stands at the moment will pass the House of Lords unamended. We also do not yet know whether the devolved legislatures – in particular the Scottish Parliament – will give it their legislative consent; and if they do, we do not know whether this consent will be given under the condition that the Scottish Parliament's powers are increased,

possibly even with regard to rights.

- We do not yet know what developments in rights terms will happen at the Scottish level. The First Minister recently appointed an advisory group on human rights leadership, which is due to report back to her by the end of 2018. It is possible that that group's work will lead to policy changes and/or legislation in Scotland.
- We do not yet know whether the Scottish Continuity Bill – a Scottish version of the EU (Withdrawal) Bill will enter into force. If it does, it will retain the Charter as far as some Scots law connected with EU law is concerned.
- We do not yet know how far the UK Government is intent on using its Henry VIII powers under the EU (Withdrawal) Bill to amend or repeal 'retained EU law' protecting human rights.
- We also do not yet know how the courts will interpret the constraints regarding the justiciability of EU fundamental rights contained in the EU (Withdrawal) Bill.
- We do not know how the rights in the Charter of Fundamental Rights will be developed by the EU Court of Justice in the future, i.e. the rights protections there might have been if the UK had remained in the EU.

What are the main concerns around human rights protection after Brexit?

- One main concern is regression compared with the protections that exist today. That concern is perhaps most acute in the field of social and employment rights and is discussed in more detail in the briefings dealing with these topics.
- Another concern is that the UK might not follow rights developments at the EU level: this relates to both legislative developments and developments in the case law of the European Court of Justice. While the EU is no human rights organisation, there are areas in which the Court of Justice's case law has been ground-breaking. Data protection law and anti-discrimination law deserve particular mention in this regard.

What about in Scotland – are there particular concerns or opportunities affecting these rights because of devolution?

- While there is nothing in the devolution settlement to prevent the Scottish Parliament from legislating on human rights – e.g. by passing a Scottish Bill of Rights – the effects of its legislative efforts will always be limited to Scottish acts. This means that where Westminster legislative or executive action is concerned, Scottish human rights legislation would have to give way.
- Nonetheless, the constitutional upheaval that Brexit brings might provide an opportunity for Scotland to promote and enact progressive human rights law.

- Internally, the EU (Withdrawal) Bill has received its third reading in the House of Commons and is currently being debated in the House of Lords. If there are no amendments voted through in the House of Lords, it can probably receive its Royal Assent before the summer. If there are, this may be delayed.

Dr Tobias Lock
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What happens now in the Brexit process?

- On 15 December 2017, the European Council agreed that the Brexit negotiations should move to phase 2. This means that key issues have been settled in principle: in particular, most issues on citizens' rights and the financial settlement.
- Phase 2 will first be dedicated to agreeing a transitional period where the UK will leave the EU but remain bound by EU law and entitled to (most) rights under EU law. Second, phase 2 will probably result in a basic agreement on what the future relations between the EU and the UK will be.
- In terms of rights it will remain to be seen whether the EU will ask the UK to remain committed to protecting current standards, in particular in the field of employment rights, and to remain signed up to the ECHR.



WHERE CAN I GET MORE INFORMATION?

If there is any aspect of the briefing or a particular issue around Brexit where you would like more detailed advice or information, we are happy to help! Please get in touch with us at hrcscotland@gmail.com

There is also information available online at www.hrcscotland.org/brexit