

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.civilsocietybrexit.scot

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

This briefing is written for civil society organisations working in Scotland. For more information, contact civilsocietybrexitscot@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.civilsocietybrexit.scot

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 There is a separate political debate about whether it should be repealed and replaced with a British Bill of Rights, but this is independent of Brexit.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 any transition period is up. If the UK leaves with a deal, Brexit will be followed by a transition period lasting at least until 31 December 2020, possibly longer up until 31 December 2022. During the transition period, EU law including the Charter will continue to be binding on the UK.
- The Charter itself will not be carried over into UK law by the European Union (Withdrawal) Act 2018. 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) Act 2018 provides that human rights protected as part of the unwritten general principles of EU law will remain relevant. 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) Act, they will however have different effects compared with the Charter. The Act 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 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) Act. 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 – they will be subject to amendment and repeal at the discretion of the UK Parliament. For a two-year period after Brexit, they can even be amended or repealed by the UK Government due to the so-called Henry VIII powers contained in the EU (Withdrawal) Act.
- 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 when (and indeed whether) Brexit will happen. The original Brexit date has now been pushed back twice; first to 11 April and then to 31 October 2019. Brexit may, however, occur at an earlier date in two cases:
 - 1) in the unlikely event that the UK does not hold elections to the European Parliament on 23 May, the UK will leave without a deal on 1 June 2019;
 - 2) if the withdrawal agreement is ratified by the UK and the EU before 31 October, the UK might leave at the end of an earlier month, e.g. 30 September. Brexit might, however, be delayed further if the EU and the UK agree another extension. And indeed, Brexit may still be cancelled altogether if the UK decides to revoke the Article 50 notification. It is unlikely that this would happen without another

referendum taking place beforehand.

- We do not yet know whether the House of Commons will approve the withdrawal agreement. Such approval is a pre-requisite for ratification under the EU (Withdrawal) Act 2018. If the withdrawal agreement is not approved, there is a high likelihood that the UK will leave the EU without a deal on 31 October 2019.
- If the withdrawal agreement enters into force, the UK will leave the EU on the date specified in it (e.g. 31 October 2019). Brexit will be immediately followed by a so-called transition period during which the UK will need to continue to conform with all EU rights including the EU Charter of Fundamental Rights. The period is meant to bridge the time between Brexit and the new relationship between the EU and the UK coming into force. The transition period will last until 31 December 2020, but can be extended for up to two years, i.e. until 31 December 2022 at the most. It is still unclear, however, whether the dates for the transition period might be changed again given the overall delay in Brexit.
- We do not yet know the contents of the European Union (Withdrawal Agreement) Bill, which will give domestic force to the withdrawal agreement.
- We do not yet know what developments in rights terms will happen at the Scottish level. The First Minister appointed an advisory group on human rights leadership in early 2018. The group's report¹ recommends the adoption of a new Act of the Scottish Parliament containing the human rights of people in Scotland. The group recommends in particular the incorporation of social, economic, cultural and environmental rights into Scots law following a public participatory process. The First Minister endorsed the report's direction and announced the establishment of a task force implementing the recommendations.
- We know that the Supreme Court declared the Scottish Continuity Bill to have been (largely) outwith the competence of the Scottish Parliament. We do not yet know, however, which parts of the Scottish Continuity Bill that the Scottish Parliament could lawfully adopt will be

1. See <https://humanrightsleadership.scot/>

reintroduced into the legislative process. The Scottish Government promised in particular that it would bring back the provision on keeping pace with EU law though no bill has yet been tabled.

- 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) Act 2018.
- 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 incentivised the First Minister to establish an advisory group on human

rights leadership. The group recommended that there should be a new Act of the Scottish Parliament outlining the human rights of people in Scotland. As noted above the First Minister endorsed the report's direction and announced the establishment of a task force implementing the recommendations.

What happens now in the Brexit process?

- On 14 November 2018 the UK and the EU agreed a withdrawal agreement, which remains, however, unratified. The agreement would have seen the UK leave the EU as planned on 29 March 2019. The UK Government has so far been unable to ratify the agreement and it is not clear whether it will enter into force at all. The withdrawal agreement is accompanied by a political declaration.
- For the UK Government to be allowed to ratify the withdrawal agreement, the European Union (Withdrawal) Act 2018 requires that the withdrawal agreement (plus the political declaration) is approved by the House of Commons and that the legislation implementing it – the European Union (Withdrawal Agreement) Bill – is passed. So far, the House of Commons has rejected the withdrawal agreement on three different occasions.
- The EU also has not yet ratified the withdrawal agreement. At EU level, ratification requires the approval of the European Parliament and a qualified majority in the Council.
- For this reason, the UK was unable to leave the EU as planned on 29 March 2019. The Brexit negotiating period was therefore extended until 31 October 2019. If the UK and the EU manage to ratify the withdrawal agreement before then, the UK might leave at an earlier date. If, however, the UK fails to hold European Parliament elections on 23 May, the UK will leave on 1 June without a deal.
- There remain three options for the UK at this stage: 1) leave with a deal, which requires ratification of the withdrawal agreement; 2) leave without a deal, which would happen automatically on 31 October 2019; 3) revoke the Article 50 notification, which – as the European Court of Justice has confirmed –

the UK can do unilaterally at any point in time before Brexit.

- Once the withdrawal agreement has been ratified, the EU and the UK will start negotiating their future relationship. The political declaration negotiated alongside the withdrawal agreement contains a rough sketch. It currently envisages an association agreement between the EU and the UK. This would mean that there would be a free trade agreement between the EU and the UK. The UK would agree to comply with EU rules in certain areas of trade. In addition, there would be a security partnership that would allow for cooperation in both internal and external security. However, the political declaration is not binding and was kept deliberately vague so that another future relationship – be it closer or looser – is still a possible outcome.

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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 civilsocietybrexitscot@gmail.com

There is also information available online at www.civilsocietybrexit.scot