



at  
Global Dialogue

## **Mapping the Great Repeal:**

*European Union Law and the Protection of Human Rights.*

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### **A BACKGROUND PAPER FOR THE THOMAS PAINE INITIATIVE**

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## Summary

*Brexit means Brexit. So that's clear then? No?*

*The limits which membership of the EU placed on the UK – including on the Westminster Parliament - played a major role in the referendum debate. The Prime Minister has now committed her Government to a “Great Repeal Bill” in 2017. This will be designed to “break the link” between EU and UK law. However, the way in which EU law binds the UK and, to what extent it limits the ability of the UK Government to act, has been little explained.*

*The process of Brexit depends upon legal, political and diplomatic steps which are difficult to predict. Hence the implications for the protection of human rights in the UK cannot be predicted with certainty until the nature of the UK's relationship with the EU is determined. However, an understanding of how EU law influences the protection of human rights standards in the UK now may help civil society organisations better inform their own response to both Brexit and any “Great Repeal”.*

*The Members of the European Union are all members of the European Convention on Human Rights and many of the international human rights treaties promulgated by the UN. The protection of human rights - more commonly called ‘fundamental rights’ in EU-speak – is central in the EU Treaties, protected by the General Principles of EU law, by the Charter of Fundamental Rights of the EU and by specific legislative measures, programmes, funding and activities of the institutions of the EU. These institutions include the Court of Justice of the European Union (‘CJEU’), which is responsible for interpreting and applying the law of the EU, and the EU Fundamental Rights Agency, which promotes the protection of fundamental rights in Europe.*

*The General Principles of EU law and the Charter are currently given effect in EU law by the European Communities Act 1972 (‘ECA 1972’). This works to give ‘direct effect’ to EU law in the UK. In practice, this means that in areas in the scope of EU law, individuals can rely on EU standards in the domestic courts to help protect their individual rights.*

*In areas of EU law, EU fundamental rights standards can apply to give some greater protection than offered by the Human Rights Act 1998 and common law. Decisions of the Court of Justice of the EU which provide for greater protection of fundamental rights have a direct effect which can override Acts of Parliament in some circumstances.*

*It is likely that, if Brexit proceeds, the greatest immediate loss to the protection of human rights in the UK would be a) the ability to directly challenge primary legislation which violates human rights within areas of EU competence pursuant to the ECA 1972 and b) the ability to seek a preliminary reference for a decision of the CJEU on the application and scope of the Treaties. [pages 19 – 26]*

*In addition, the UK's direct engagement with the EU Fundamental Rights Agency would also likely end. EU programming (and funding) for the promotion and protection of human rights is widespread and has supported a range of UK civil society organisations and universities in*

*their work on human rights. If access to this work ceases on Brexit, grantees and funders, and Government, may wish to explore other means of engaging UK expertise in pan-European projects for the better protection of individual rights in practice. [pages 27 – 32]*

*While the impact of EU legislation varies widely, a significant proportion of law-making at a European level has focused on measures designed to further the promotion of common standards for the protection of individual rights. The protection of individual rights in domestic legislation in areas as diverse as labour rights to environmental protection sits upon a framework of underlying EU legislation. This ranges from areas of general protection including equality and non-discrimination to specific legal prohibitions, for example, on the export of drugs for use in the administration of the death penalty. [pages 33 – 39]*

*This paper specifically considers the implications for three areas; equality, immigration and asylum and data protection.*

- *The protection against discrimination in domestic law predates the UK's membership of the European Community. However, today the protection for equality and diversity in the General Principles, the Treaty and the Charter means that EU law underpins the domestic architecture for the protection of equality, including in the Equality Act 2010. Over the past four decades, the case law of the European Court of Justice and the Court of Justice of the European Union has helped drive forward the protection of equality by the law. Equality guarantees bind the UK in our wider international human rights obligations, including in Article 14 ECHR as protected by the HRA 1998. However, none of these standards currently offer the same degree of legal protection which a claim grounded in EU law would currently provide to some applicants. [pages 41 – 46]*
- *The Common European Asylum System currently underpins how the UK implements its wider obligations to refugees in domestic law. The 'Dublin Framework' determines when and where a claim for asylum in Europe must be processed. The UK is a beneficiary of this framework and returns a significant number of asylum seekers to other European countries as a result. Some non-EU countries already participate in the Dublin Framework and the Government has expressed an interest in securing participation in this framework – or any successor programme - as part of the Brexit negotiations. This political imperative may create some basis to encourage the UK to commit to the continued protection of existing minimum standards for the protection of refugees. However, some commentators are concerned that, without a commitment to a shared European System, as the migrant crisis worsens, a race to further reduce protection to a lowest common denominator of standards could ensue. [pages 47 – 52]*
- *The protection offered by EU law for personal information is found in both the Charter and in dedicated EU legislation designed to protect personal data. It is generally accepted that within the scope of EU law, the specific protection offered within the EU for data and privacy is a valuable supplement to the protection offered by the European Convention on Human Rights. The UK moves to adopt wide-ranging statutory powers for the bulk handling of personal data in the Investigatory Powers Bill. Yet, challenges to*

*the existing law on surveillance are pending before both the CJEU and the European Court of Human Rights in Strasbourg.*

*The UK is yet bound to implement the new EU Data Protection Framework by May 2018. Data protection, data retention and privacy may prove one of the early tests of the UK's human rights obligations in the context of Brexit. [pages 53 – 56]*

*There are yet too many “unknown unknowns” for a robust analysis of how precisely the work of civil society on the protection of human rights will be affected by the seismic process of removing the UK from the EU and unpicking the legacy of its membership. However early reflection might help identify important areas sensitive to risk and potential areas for influence where the Government might be invested in the longer term protection of existing standards (for example, in the protection of minimum standards in the protection of due process in cross-border police and justice cooperation) [pages 33 – 56, 60].*

*The Great Repeal Bill will only take effect after Brexit occurs. The Bill may be used as ‘smoke and mirrors’ to occupy Parliament while the logistics of Brexit are finalised. However, there will be an important opportunity for civil society to inform the process by which the Government intends any eventual repeal to occur. The Bill may empower Government to use delegated powers to reform key measures designed to protect human rights. Civil society may have an important role to play in highlighting substantive areas of legal protection which would be inappropriate for reform without full Parliamentary scrutiny. [pages 60 – 63]*

*It is impossible to consider the implications of Brexit for the protection of human rights within the UK without acknowledging the Government's intention to reform the existing legal framework for the protection of human rights in the UK and its commitment to repeal the Human Rights Act 1998 ('HRA 1998'). Both the Prime Minister and the new Lord Chancellor have recommitted themselves to the Conservative Party manifesto promise to repeal the HRA 1998. The Prime Minister has indicated that she does not intend – for now – to act on her own personal view that the UK should reconsider its participation in the European Convention on Human Rights.*

*The Brexit process will bring the unsettled nature of the UK's constitutional arrangements into sharp focus. It may create space for civil society to act to better emphasise the importance of rights protection, including for those disenfranchised from mainstream politics and for the protection of the rights of minorities. Reflection on the political implications of the Brexit process may help identify opportunities for public engagement and new ways to highlight the important role which the HRA 1998 plays in our constitutional arrangements.*

*This is not a time for complacency. While the Government's primary attention is on the mechanics of Brexit, the front bench of the Conservative Party remains committed to restricting the protection of human rights in UK law. This trend towards regression is reflected on the global stage in increasing demands for respect for national sovereignty and disrespect for international law standards. The challenging narrative both at home and globally remains focused on fewer rights for fewer people. The work of well-informed and well-supported civil society will be crucial.*





## Part A: INTRODUCTION

### Introduction

1. On 24 June 2016, following a referendum on the UK’s membership, the United Kingdom Government confirmed its intention to withdraw from the European Union (“EU”). There are many diplomatic, political and legal steps to be taken before the UK resiles from its EU membership (“Brexit”). However, the impact of this decoupling on domestic law, including for the protection of human rights, could be significant. The process of reshaping the constitutional and legal framework post-Brexit will take considerable parliamentary time and could have a significant impact on the financial and other resources available to Government.

2. In her first speech to the Conservative Party Autumn Conference, in September 2016, the Prime Minister explained that, as part of the process, the Government would present a “Great Repeal Bill” to Parliament shortly. The intention of that Bill is to ensure:

*“Our laws will be made not in Brussels but in Westminster. The judges interpreting those laws will sit not in Luxembourg but in courts in this country. The authority of EU law in Britain will end.”*

3. The Bill will not take effect until Brexit occurs. However, it will provide a temporary reprieve for existing domestic law based on our participation in the EU:

*“[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.”<sup>1</sup>*

4. On 10 October, David Davis MP, Secretary of State for Exiting the EU, further elaborated:

*“The great repeal Act will convert existing European Union law into domestic law, wherever practical. That will provide for a calm and orderly exit, and give as much certainty as possible to employers, investors, consumers and workers. We have been clear that UK employment law already goes further than European Union law in many areas, and this Government will do nothing to undermine those rights in the workplace. [...] In all, there is more than 40 years of European Union law in UK law to consider, and some of it simply will not work on exit. We must act to ensure there is no black hole in our statute book. It will then be for this House—I repeat, this House—to consider changes to our domestic legislation to reflect the outcome of our negotiation and our exit, subject to international treaties and agreements with other countries and the EU on matters such as trade.”<sup>2</sup>*

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<sup>1</sup> CCHQ, Prime Minister, *Britain after Brexit: A Vision of a Global Britain*, 2 October 2016. See also [HC Deb, 10 Oct 2016, Col 615 et seq](#); [HC Deb, 12 Oct 2016, Col 615 et seq](#).

<sup>2</sup> [HC Deb, 10 Oct 2016, Col 615](#)

5. The Government proposes that Parliament endorse the law as informed by the UK's membership of the EU as a "snapshot" of our commitments upon Brexit, but with the freedom to revisit any legal standards or guarantees after withdrawal from the Union. This approach is designed to give certainty to business and others during the process of withdrawal. However, as expected, it also confirms that there may be a subsequent "pick and mix" approach to reform of domestic law in areas where there is a political incentive for amendment. EU law currently underpins - or runs in parallel to - a range of legal protections for human rights within the UK. It is this relationship which is the focus of this background briefing.<sup>3</sup>
6. This period of change could bring opportunity, but in the current political environment, it seems more likely to lead to a significant risk of regression and a period of instability for civil society organisations working within the UK to secure the protection of human rights across a range of fields.
7. This paper provides a basic introduction to the protection and promotion of human rights by the EU and the impact of EU law and practice on some key domestic guarantees.<sup>4</sup> In short, it looks at some of the core '**aquis**'. It is not comprehensive, but is designed to help inform thinking about how Brexit might affect the protection of human rights in the UK and the work of civil society organisations on human rights issues. Its purpose is to help the Thomas Paine Initiative ("TPI"), its grantees and colleagues begin to think about how they might inform any eventual "*Great Repeal*".

Where a term is in '**bold**' in this paper, it is accompanied by a plain English explanation of its meaning.

These EU law terms are also included in the attached **Glossary** for ease of reference.

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<sup>3</sup> It does not consider the rights of citizenship which are enjoyed by EU citizens by virtue of that status or the legal issues connected with the logistics of Brexit, including, for example, the operation of Article 50, TFEU. These issues are well canvassed in other literature. For example, Prof Mark Elliott, *Constitutional Legislation, Fundamental Rights and Article 50, Public Law for Everyone*, September 2016. The legality of the process of Brexit is, of course, being considered by the High Court at the time of writing (*Miller, Dos Santos & Ors v Secretary of State for Exiting the EU*) and has been considered by the House of Lords Constitution Committee (See *Fourth Report of Session 16-17*).

<sup>4</sup> This paper is weighted principally grounded in legal practice in England and Wales. Where practice is significantly different in the distinct legal jurisdictions in Scotland and Northern Ireland, this is highlighted below.

## *Basic introduction to European Union Law*

8. The impact of EU law on the legislative independence of the Westminster Parliament to legislate played a prominent role in the referendum debate.<sup>5</sup> However, the way in which EU law binds the UK and, to what extent it limits the ability of the UK Government to act, has been little explained.
9. As a **Member State** of the EU, the UK is bound in international law to respect the treaties which underpin the EU.<sup>6</sup> By virtue of the **EU Treaties**, and the **General Principles** of EU law, in any area where the EU has '**competence**', EU law may be invoked directly in national courts and has **primacy over national law**.
10. In practice, this means that when individual countries have decided to work together within the EU towards a shared goal - granting the EU '**competence**' to act - EU law must have primacy in those areas. The goal of setting common standards in key policy areas would be undermined if each Member State were able to pick and choose which EU laws to apply.
11. When members of the EU agree to work together in this way, they determine that EU law will have '**primacy**', in practice, EU law will trump inconsistent national law. The law must be '**directly effective**', which means that it can confer rights on individuals which can be enforced against other individuals and against the state in national courts.<sup>7</sup>
12. There are a number of different types of EU law, which take effect in the UK in different ways:
  - a. **The Treaties:** The primary law of the EU is contained in two treaties – the Treaty on the Functioning of the European Union ("**TFEU**") and the Treaty on European Union ("**TEU**"). Together these treaties are sometimes called '**the Lisbon Treaty**'. They set out the objectives of the EU and the principles to be followed by the Member States in achieving those objectives.
  - b. Secondary EU legislation and other acts are used to obtain these objectives in practice. There are different types of secondary legislation, the most important of which are '**regulations**' and '**directives**'.

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<sup>5</sup> For a considered legal critique of this position, see, for example, Professor Mark Elliot, *Vote leave and take control?*, Public Law for Everyone, 23 June 2016 (originally published in German in the *Frankfurter Allgemeine Zeitung*).

<sup>6</sup> The Vienna Convention on the Law of Treaties (1969) provides expressly that Treaties signed and ratified by States are binding in international law. See, for example, Articles 14 and 26. It may help readers to remember that in the UK, we have a "dualist" system of law. While "monist" systems see international law and national law as part of an integrated whole; dualist countries see both as entirely distinct systems operating on different plains but equally binding on the State. For international law, including the ECHR and the law of the EU to have an impact in domestic law such that an individual might rely upon it against the Government or public agencies, it must be 'incorporated' into domestic law. Thus, the ECHR is 'incorporated' into domestic law by the HRA 1998. Other international law standards, including, for example, the UN Covenant on Economic, Social and Cultural Rights, may not be so incorporated. Although those standards bind the State in international law – and it is presumed that the Government will meet those obligations – the guarantees are not generally enforceable by individuals in domestic courts.

<sup>7</sup> The language in this introductory section draws on JUSTICE, *Law for lawmakers* (2015), a basic introduction to key constitutional principles prepared for MPs, Peers and their staff, prepared by the author of this paper.

- i. **Regulations** automatically bind the UK when they come into force, without the need for new UK legislation. In practice, these rules automatically trump inconsistent domestic law.
  - ii. **Directives** set out binding goals that member states must achieve, but they leave the decision as to how best to achieve that result to each member state. They give countries time to decide how to change the law and some discretion on how the Directive is implemented within domestic law. If they are not implemented within that period, or are badly or only partially implemented, individuals can still rely on their provisions against the state. In cases between individuals, the courts will interpret domestic law in line with the directive as far as it is possible to do so. The state is responsible for any damage caused by its failure to correctly transpose directives into national law.<sup>8</sup>
  - iii. **Other acts of the EU:** Decisions 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. These latter instruments can be used to encourage good practice by Member States, for example.
- c. **The Court of Justice of the European Union:** The Court of Justice of the European Union (“**CJEU**”) comprises judges from each member state. It interprets EU law to make sure it is applied in the same way in all EU countries, and settles legal disputes between national governments and EU institutions.<sup>9</sup> It also considers cases between individuals ‘referred’ to the Court 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 Court is binding on member states. It is applied by domestic judges when they are considering questions involving EU law. In its case law, the Court applies the General Principles of EU law. These are fundamental principles which underpin the law of the Union and which are drawn from the national practices of Member States. The General Principles and the impact they have on the protection of individual rights are considered, below.

*Important examples of current key Regulations and Directives in the protection of fundamental rights include (other examples are considered below in Parts C and D):*

- *The Dublin III Regulation:<sup>10</sup> provides the legal basis for establishing the criteria and mechanism for determining the member state responsible for examining an asylum*

<sup>8</sup> 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.

<sup>9</sup> Fuller information about each of the institutions of the EU can be found online at [http://europa.eu/about-eu/institutions-bodies/index\\_en.htm](http://europa.eu/about-eu/institutions-bodies/index_en.htm). This paper does not cover the law making process within the EU, or the role of the other institutions of the EU, as it focuses *only* on the impact of EU law within the UK.

<sup>10</sup> Regulation (EU) [No 604/2013](#) establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

application lodged in one of the member states by a third country national or a stateless person.

- The EU Employment Equality Directive:<sup>11</sup> also known as the Equality Framework Directive, this prohibits discrimination on the grounds of religion and belief, age, disability and sexual orientation. It covers the fields of employment & occupation, vocational training, membership of employer and employee organisations. The UK was required to implement it by 2000, which it did, first in a series of pieces of secondary legislation and subsequently in the Equality Act 2010.

## How does EU law take effect in the UK?

13. The **European Communities Act 1972** (“ECA 1972”) provides for EU law to have direct effect in domestic law. It also allows Ministers to use secondary legislation to implement changes to EU law which may be needed as a result of EU directives.

14. Section 1 of the ECA 1972 provides that:

*“all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly.”*

15. Section 2 of the ECA 1972 provides the power for Ministers to implement EU law using delegated legislation:

*“Subject to Schedule 2 to this Act, at any time after its passing Her Majesty may by Order in Council, and any designated Minister or department may by order, rules, regulations or scheme, make provision—*

*(a) for the purpose of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented, or of enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or*

*(b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of subsection (1) above;”*

16. In practice, under the ECA, ‘**direct effect**’ means that any UK legislation – including primary legislation – which is incompatible with EU law is ‘disapplied’. This means the law will stay on the statute books, but will stop having any effect in so far as it is inconsistent with the European provisions. This outcome is rare.

17. Individuals can directly enforce positive rights created by directives against the state, but not against other individuals.<sup>12</sup> However, the European Communities Act 1972 requires courts to interpret national law in a way that respects any EU law that applies. This means that in areas with an EU law connection, EU law can play an important role in domestic disputes.

<sup>11</sup> Council Directive [2000/78/EC](#) establishing a general framework for equal treatment in employment and occupation.

<sup>12</sup> Although under the doctrine of ‘**indirect effect**’, in many disputes between individuals courts will interpret national law in a way that conforms with EU law.

18. In each of the devolved parts of the UK, a further limit is placed on the ability of the devolved governments to legislate. No devolved legislation will be lawful unless it complies with EU law. For example, in the Scotland Act 1998, Section 29(2)(d) provides that Acts of the Scottish Parliament which are incompatible with EU law, are outside their legislative competence. That is, they are not lawful and can, on review by domestic courts, be struck down.<sup>13</sup> Similar provisions apply in Northern Ireland.<sup>14</sup>

<b><i>Protecting rights, implementing international standards</i></b> <sup>15</sup>	
<b>European Communities Act 1972</b>	<b>Human Rights Act 1998</b>
ECA 1972 gives effect to EU law in domestic law and empowers	HRA 1998 gives legal effect to 'Convention rights' in domestic law (Convention rights include most of the rights guaranteed by the ECHR).
Ministers to implement EU law by secondary legislation.	Ministers empowered to change the law using secondary legislation when declared unlawful by domestic courts or the European Court of Human Rights.
Judgments of the Court of Justice of the European Union bind the UK in international law and bind domestic courts through the ECA 1972.	Judgments of the European Court of Human Rights bind the UK in international law. They do not affect UK laws directly. UK courts are bound to "take into account" decisions of the European Court of Human Rights.
If primary legislation – acts of Parliament – is inconsistent with EU law it can be disapplied in keeping with the provisions of the ECA 1972.	Primary legislation which is incompatible with Convention rights remains in force. Courts may make a 'declaration of incompatibility' but only Parliament can change the law.
EU law on fundamental rights are binding on UK public authorities only when they are 'acting within the scope of EU law'.	Public authorities must always comply with Convention rights.

### Commentary

19. While a Member State, the Treaties bind the UK in international law and are given effect as part of domestic law by the ECA 1972. However, as the Prime Minister has explained, the ECA 1972 provides only part of the picture. Regulations have immediate

<sup>13</sup> In contrast with *primary legislation* (from Westminster) which remains lawful but which is disapplied by virtue of the application of the ECA 1972.

<sup>14</sup> See Section 6(2)(d), Northern Ireland Act 1998.

<sup>15</sup> For similar comparisons, see HMG, *Review of the Balance of Competences between the United Kingdom and the European Union: Fundamental Rights*, Summer 2014.

and direct effect within domestic law, without any need for specific domestic implementing legislation, as a result of the ECA 1972. Treaty provisions, Regulations and Directives not yet transposed would cease to have effect in UK law on the repeal of the ECA 1972, at the time of Brexit.

20. However, numerous Directives have been given effect in domestic law – transposed into domestic law – either in secondary legislation authorised by the ECA 1972 or in primary legislation from Westminster and Whitehall. Those freestanding measures would not necessarily lapse on the repeal of the ECA 1972.
21. Both Regulations and Directives (and the domestic laws implementing them) have been interpreted by the Court of Justice of the European Union while in force and those interpretations have bound domestic courts in their understanding of the law and, in turn, those interpretations have helped shape the law as applied in the UK. We consider some specific examples below, in Part D. Similarly, EU law is given effect in practice in some areas through decisions of the EU institutions, including its agencies and the Commission, for example. It is unclear whether, in adopting EU legacy litigation as part of domestic law, the Government will also incorporate the interpretations of the law as adopted by the CJEU or domestic courts acting with the guidance of the Court of Justice, or how any responsibilities currently attributed to EU institutions might be distributed in domestic law.
22. It is far from clear whether the Government intends that the “snapshot” taken at the point of Brexit in domestic law is thereafter to be uninfluenced by any new interpretation or guidance on the application of the law offered by the CJEU. A refusal to permit domestic judges an opportunity to consider the comparative analysis of that Court might seem an unduly restrictive and unrealistic approach. However, it remains the Prime Minister’s stated intention that any link between the domestic and the CJEU is broken at the point of Brexit.
23. It may appear irrational to unpick the earlier interpretations of the law adopted by the CJEU. Such a course could be deeply damaging to legal certainty. However, following Brexit, it would be open to the Government to revisit each area of law influenced by the UK’s membership of the EU, with a view to reshaping it as appears appropriate to the Government at that time. This could, in principle, see the UK, through primary or secondary legislation (see below), ensuring that domestic courts take an approach to shared legal standards which is entirely out of step with the interpretation and application of similar measures within the EU. The impracticalities of this approach could serve as a significant disincentive. Parliament can yet legislate in any manner which commands a majority in both Houses. However, the UK would remain bound by its other international obligations on human rights, including in the ECHR as incorporated by the Human Rights Act 1998 (“HRA 1998”), unless and until such time as it enacted reform either to repeal the HRA 1998 or to withdraw from its treaty obligations in the Convention and other instruments.
24. The scope with which the Government will be free to depart from any minimum standards reflected in EU law will depend on the new relationship between the United Kingdom and the EU. For example, if the UK were to join the European Economic Area

("EEA"), then all of the EU legislation relevant to the application of the single market – including those necessary to achieve fairness in the application of the four freedoms (goods and services, people and capital – and a raft of allied obligations, including in respect of competition and social rights). The General Principles of EU law – but not the Charter of Fundamental Rights of the EU - would apply to the interpretation of those standards applicable to membership of the EEA.<sup>16</sup> In respect of any other form of relationship, the Court of Justice of the European Union is likely to remain as the ultimate arbiter of the terms of any agreement and is likely to continue to apply the General Principles of EU law, including in respect of any fundamental rights which may be affected.<sup>17</sup>

It is outside the scope of this paper, and premature, to speculate on the legal form of that relationship.

### *Human rights and the European Union*

25. Respect for the fundamental rights of EU citizens is one of the **General Principles** of EU law. These principles are drawn from the constitutional traditions common to member states, and upheld by the Court. The Treaty on the European Union ('**TEU**') explicitly recognises a role for the EU in upholding human rights.<sup>18</sup> It also provides that fundamental rights as protected by the European Convention on Human Rights are part of EU law.<sup>19</sup> Since 2009, when the Lisbon Treaty came into force, those rights have also been protected by the **Charter of Fundamental Rights of the European Union**.
26. However, beyond the systemic protection of rights as part of the EU legal framework, many individual legislative initiatives of the European Union have, by design or effect, operated to improve rights protection for individuals within the UK and across Europe. These have included Regulations and Directives designed to create an equal playing field in the respect offered to individuals by the law, in order to support the principle of free movement, and other initiatives designed more directly to support the fair treatment of EU citizens as they move from country to country within the Union. Implementing laws in the UK have, on occasion, benefitted from the interpretations offered by the **Court of Justice of the European Union ("CJEU")**.
27. In the following sections, this paper considers each of the ways in which EU law has helped shape the protection of fundamental rights within the UK and reflects on some of the issues which may be at greatest risk during the process of the "Great Repeal".

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<sup>16</sup> E-12/10 *ESA v Iceland* [2011] EFTA Ct. Rep. 117, para.60. Further information on the EEA and the scope of EEA membership can be found [here](#). It appears increasingly unlikely that the UK Government will seek membership of the EEA and will instead attempt to negotiate a 'bespoke' trading relationship with the EU. The scope of these negotiations may determine how much of the EU 'acquis' remains relevant to the protection of individual rights within the UK.

<sup>17</sup> See, for example, Clare McCann, *A Nuts and Bolts Guide to Human Rights in the EU*, *RightsNI*, 21 June 2016. See also Ronan McCrea, *Can a Brexit Deal provide a clean break with the Court of Justice and EU Fundamental Rights Norms?*, UK Constitutional Law Blog, 3 October 2016.

<sup>18</sup> Article 6 TEU.

<sup>19</sup> Art. 6(3)TEU. The EU is looking into ratification of the ECHR. This would make the EU a Contracting Party to that Convention. It would mean that individuals could make complaints against the institution as a whole before the European Court of Human Rights.



## Part B: PROTECTING FUNDAMENTAL RIGHTS IN THE EU

***The Members of the European Union are all members of the European Convention on Human Rights and many of the international human rights treaties promulgated by the UN. The protection of human rights - more commonly called 'fundamental rights' in EU speak – is central in the EU Treaties, protected by the General Principles of EU law, by the Charter of Fundamental Rights of the EU and by specific legislative measures and programmes of the institutions of the EU.***

***While the terms of the UK's relationship with the EU are uncertain, a picture of how EU law protecting fundamental rights will bind the UK is far from clear. The General Principles of EU law and the Charter are currently given effect in EU law by the European Communities Act 1972. In areas of EU law, these can apply to give some greater protection than offered by the Human Rights Act 1998 and the common law. Decisions of the Court of Justice of the EU which provide for greater protection of fundamental rights also have a direct effect which can override Acts of Parliament in some circumstances.***

***It is likely that, if Brexit proceeds, the greatest loss to the protection of human rights in the UK would be a) the ability to directly challenge primary legislation which violates human rights within areas of EU competence pursuant to the ECA 1972 and b) the ability to seek a preliminary reference for a decision of the CJEU on the application and scope of the Treaties.***

***In addition, the UK's direct engagement with the EU Fundamental Rights Agency would also likely end. EU programming (and funding) for the promotion and protection of human rights is widespread and has supported a range of UK civil society organisations and universities in their work on human rights. If access to this work ceases on Brexit, grantees and funders may wish to explore other means of engaging UK expertise in pan-European projects for the better protection of individual rights in practice.***

### The Protection of Fundamental Rights in EU Law

28. All EU Member States are members of both the UN and the Council of Europe. The development of EU law is informed by both the constitutional traditions of its Member States and their shared international commitments to the protection of human rights, whether in the international human rights framework or by virtue of their commitments to the European Convention on Human Rights and the other human rights instruments of the Council of Europe. While the original structures of the European Community did not expressly provide for the protection of individual rights, the case law of the Court of

Justice and the evolution of the law of the Union now place the protection of human rights at its heart.<sup>20</sup>

### *The General Principles of EU Law*

29. The General Principles are part of the primary law of the EU, which both the Member States and the institutions of the EU. 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. The CJEU and domestic courts will apply the General Principles when considering the lawfulness of activities and legislative measures within EU law. They also serve as an aid to the interpretation of legislative measures which give effect to EU law or derogate from it.

30. These General Principles include fundamental rights commonly recognised in the legal traditions of the Member States.<sup>21</sup>

*“Respect for fundamental rights form an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the member states, must be ensured within the framework of the structure and objectives of the Community.”<sup>22</sup>*

31. Some of the fundamental rights recognised in the General Principles of EU Law include procedural guarantees like, for example, the right to a fair hearing and the right to legal certainty. However, the General Principles also recognise rights to dignity and free expression.<sup>23</sup> The principles include respect for the rights contained in the ECHR and they are informed by other rights protected in international human rights law. The CJEU has drawn on the terms of other multilateral conventions, including for example, the European Social Charter and the Conventions of the International Labour Organisation and the ICCPR.<sup>24</sup>

32. The General Principles will apply in any case involving the ‘implementation of EU law’. This is not an easy test to understand and the law is not settled. Broadly, the CJEU and domestic courts will apply the General Principles when the case involves steps taken by the UK to give effect to EU law or to derogate from it.<sup>25</sup>

#### **General Principles in Action: Human Dignity**

*In a series of cases, the Court of Justice of the European Union has confirmed that the General Principles of EU law provide protection for the right to human dignity.*

<sup>20</sup> 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.

<sup>21</sup> *Stauder v City of Ulm* C-29/69 [1969].

<sup>22</sup> *International Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide* [1970] ECR 1125 C-11/70, at [4].

<sup>23</sup> See, for example, Case C-377/98, *Netherlands v. Parliament and Council*, [2001] ECR I-7079, para. 70; and *Connolly*, Case C-274/99 P, [2001] ECR I-1611.

<sup>24</sup> See *Defrenne v Sabena (III)* [1978] ECR 1365 at [28], *Grant v South West Trains* [1998] ECR I – 621 at [44].

<sup>25</sup> *ERT*, C-260/89, [1991] ECR I – 2925, at [42]. Most recently, in *Zambrano*, the UK Advocate General, Eleanor Sharpston proposed a broader test should apply. See C 34/09, [2011], ECR I-1177, [163], [177]. This broader application appears consistent with some case law adopted by the domestic courts, considering the scope of application of the EU Charter, in *Zagorski & Baze v Secretary of State for Business Innovation and Skills*. This case involved the consideration of the ban on the export of drugs used for lethal injection. Although the ban had not been imposed, Lloyd Jones LJ was willing to accept that the field of export restriction was entirely occupied by EU law and thus the decision by the Secretary of State to derogate from the EU standard was an act within the scope of EU law. See [2010] EWHC 3110 (Admin), [70]

This is a concept which underpins many international human rights treaties and also finds express protection in the Charter. In *Omega Spielhallen- und Automatenaufstellungs-GmbH*, the Court upheld a ban on the import from the UK to Germany of paintball equipment, based on a post-war concept of human dignity based in German law. The Court explained:

“[T]he Community legal order undeniably strives to ensure respect for human dignity as a general principle of law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right. Since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services.”<sup>26</sup>

This approach has also seen protection offered to the concept of dignity in the regulation of biotechnology, for example.<sup>27</sup>

## Commentary

33. Like the domestic common law, the protection of human rights through the recognition of General Principles by the CJEU is a valuable but uncertain process.
34. Many of the human rights protections recognised by the CJEU are also rights protected in domestic law either by the HRA 1998 or the ordinary common law.<sup>28</sup> Seeking a preliminary reference to secure an interpretation of the General Principles by the CJEU in individual cases will most likely no longer be possible post-Brexit. The wider interpretation of the law offered by the CJEU in human rights cases involving the General Principles may continue to be relevant as a useful comparator but will not bind domestic courts in their consideration of the law.
35. Any measure of domestic law inconsistent with the General Principles of EU law might currently be disapplied as a result of a determination by the domestic courts and the CJEU, *including* any measure of primary legislation (as a result of the ECA 1972). Nothing in the fundamental rights guaranteed by the common law or the HRA 1998 may affect the application of primary legislation in the UK where the language used is clear and no human rights compatible interpretation is possible.<sup>29</sup>
36. These crucial differences – in areas within the application of EU law – are likely to represent the most significant impact of Brexit on the value which the EU Fundamental

<sup>26</sup> Case C-36/2002

<sup>27</sup> See, for example, the discussion by Aidan O'Neill QC, *Human Dignity and the Human Embryo: The Decision of the CJEU Grand Chamber in Brüstle v Greenpeace eV (C-34/10)*, October 2011, EUtopia.

<sup>28</sup> See Chapter 14, *The UK and the Charter of Fundamental Rights*, Keiron Beal QC, 'Britain Alone!', P Birkenshaw & A Biondi (Eds), 2016, pages 271 – 272. By way of contrast, the concepts of proportionality and subsidiarity are two of the principle General Principles of EU law. In public law challenges within the scope of EU law, the proportionality of a measure or an act of Government might be tested, in keeping with the application of EU public law standards. This proportionality test varies from the test applied pursuant to the HRA 1998 and will differ in its intensity depending on the kind of activity being undertaken and the type of EU law question at issue. The extent to which ordinary common law legality might involve a test of proportionality is as yet, unsettled (see *Keyu & Ors v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, at [131] et seq) . In this regard, *Brexit* may further circumscribe the circumstances when it will be appropriate for the domestic courts to assess the proportionality of public decision making outside of the application of the HRA 1998.

<sup>29</sup> See Sections 3, 4 and 6, HRA 1998. For more detailed commentary on the differences between the Human Rights Act 1998 and the impact of the European Communities Act 1972, see Chapter 14, *The UK and the Charter of Fundamental Rights*, Keiron Beal QC, 'Britain Alone!', P Birkenshaw & A Biondi (Eds), 2016; also HMG, *Review of the Balance of Competences between the United Kingdom and the European Union: Fundamental Rights*, Summer 2014.

Rights framework brings to domestic human rights practice. It is a difference which applies with greater significance to the influence of the Charter of Fundamental Rights of the European Union on the protection of human rights in UK law (see below).

37. How relevant the removal of the influence of the CJEU and the operation of the ECA 1972 might be will, of course, depend on how significantly any future Government seeks to depart from the existing degree of protection offered to individual rights by EU law.
38. The political incentives towards change and the subsequent likelihood of reform involve a degree of crystal ball gazing which is beyond the scope of this paper. Part D explores three individual areas of law – equality, immigration and data protection - and some of the potential sensitivities which civil society organisations contemplating the “Great Repeal” may anticipate.

### *The Treaties*

39. Since 1993, and the Maastricht Treaty, the role of fundamental rights within the legal framework of the EU has been expressly recognised in the Treaties:

*“The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on the 4 November 1950 and as they result from the constitutional traditions common to the Members States, as general principles of Community law.”<sup>30</sup>*

40. 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:

*“1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.*

*The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.*

*The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.*

*2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.*

*3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional*

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<sup>30</sup> Article F, OJ C-191/1 (1992)

*traditions common to the Member States, shall constitute general principles of the Union's law.”*

41. The Charter of Fundamental Rights of the European Union (“**the Charter**” or “**CFREU**”) became a legally binding part of EU law when the Lisbon Treaty came into force in 2009. We consider the Charter in detail in the next section.
42. Respect for human rights is one of the values on which the EU is founded and the EU can take steps to sanction a Member State which fails to respect individual rights. Where there is a determination that there is a ‘clear risk of a serious breach’ of one of the founding values of the EU, the Council (comprised of Ministers or Heads of State from each of the Member States) may agree to make recommendations a Member State. A ‘serious and persistent’ breach may result in the suspension of the rights of a Member State by the EU.<sup>31</sup> These are serious and politically contentious powers which have never been used. However, they illustrate the high regard with which fundamental rights are treated as part of the settlement of the Union.

### Commentary

43. Like the General Principles and the Charter, although these standards may be reflected in similar guarantees offered by the common law and the HRA 1998, Brexit and the “Great Repeal” will remove a) the ability to challenge primary legislation which violates human rights within areas of EU competence pursuant to the ECA 1972 and b) the ability to seek a preliminary reference for a decision of the CJEU on the application and scope of the Treaties.

## *The Charter of Fundamental Rights of the European Union*

### Rights, Freedoms and Principles in the Charter

44. The Charter of Fundamental Rights of the European Union brings together all the fundamental rights protected by EU law in a single document. It was agreed by the Members States in 2000 and has had binding legal effects as part of EU law since the Lisbon Treaty came into force in 2009.
45. The Lisbon Treaty provides that the Union *recognises* the rights, freedoms *and* principles set out in the Charter.<sup>32</sup> It explains that the Charter is not intended to extend the competence of the EU in any way.<sup>33</sup> Explanations which accompany the Charter provide that the Charter was not intended to diverge from the existing case law on the protection of fundamental rights.<sup>34</sup>
46. The Charter contains rights and freedoms under six titles: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice. The rights protected include many rights similar

<sup>31</sup> Article 7, TEU.

<sup>32</sup> 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.

<sup>33</sup> See Article 6(1) TEU, Article 51(2) CFREU.

<sup>34</sup> Explanations Relating to the Chart of Fundmamental Rights (2007/C 303/02) at OJ [2007] C No 303, at page 17.

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 European Convention on Human Rights or the Court of Justice of the European Union. So, for example, while many of the rights in the titles Dignity and Freedoms may look familiar, Title VI (Solidarity) protects a range of social and economic rights including the right to health and the right to social security. Citizenship rights protect a range of rights with no direct equivalent in the ECHR, including, for example, a right to good administration. Some of those rights which are also included in the ECHR have been updated or more broadly expressed in the Charter. So, for example, the right to equality expressly protects against discrimination on the grounds of sexuality (Article 21). While the ECHR does protect against homophobic discrimination, it was not expressly included when the Convention was drafted in 1950.<sup>35</sup> We consider some of these differences, below.

47. Where rights are protected by both the Charter and the Convention, the protection offered by EU law must be *no less* than offered by the case law of the European Court of Human Rights. However, the protection offered by EU law may go further.<sup>36</sup> The rights in the ECHR act as a floor but not a ceiling to the protection offered by the Charter.

### The Application of the Charter in the UK

48. The Charter has effect in the UK by virtue of the ECA 1972. Where the Charter applies, even primary legislation must be disapplied if it is incompatible with the fundamental rights which the Charter protects.

#### The Charter in Action: NS

*In this case the court considered a proposal to deport an Afghan asylum seeker to Greece from the UK. The UK Government considered that under EU Law, Greece was the Member State responsible for considering his claim for asylum. In this case, the domestic court cited Article 4 of the Charter – which prohibits torture and inhuman or degrading treatment – as reason not to send an individual to face systemic failures in asylum decision making which could mean they would face a real risk of inhuman or degrading treatment.<sup>37</sup>*

### When will EU fundamental rights apply?

49. One of the key limitations of the Charter's impact in UK law is whether it should apply at all. The Charter binds the institutions of the EU in everything they do. If the UK, or a UK citizen, wants to challenge the activities of the EU institutions as inconsistent with individual rights, the Charter can be a valuable tool.

50. The Charter is also binding on the UK when "*it acts within the scope of EU law*".<sup>38</sup> This clearly includes any circumstances where the UK (and domestic law) gives effect to, or derogates from, a requirement of EU law. However, this scope has been given a broad

<sup>35</sup> See for example, (1) *Lustig-Prean* (2) *Beckett v United Kingdom* : (1) *Smith* (2) *Grady v United Kingdom* (1999) 29 EHRR 449

<sup>36</sup> Article 53, CFREU

<sup>37</sup> Joined Cases C-411/10 and C-493/10 [2011]

<sup>38</sup> See Article 51(1), CFREU, which provides that its provisions are addressed to Member States only when they are 'implementing EU law'.

interpretation.<sup>39</sup> Fundamental rights will not be protected by the Charter where EU law imposes no obligation on Member States with regard to the matter at hand. In those circumstances, the Charter offers no remedy.<sup>40</sup>

51. Awareness of the Charter in domestic law has been growing, largely as a result of its increased use in domestic litigation and increasing public education by civil society organisations. However, awareness and use of its provisions has historically been relatively low (in 2012, only 10% of respondents in the UK had heard of the Charter).<sup>41</sup> It has recently been called a 'guard dog which did not bark'.<sup>42</sup>

52. In many challenges, the protections offered by EU Charter, the common law and the HRA 1998 are argued together or as alternative means of achieving the same result. Challenges where the Charter have had the greatest impact have been in cases involving tax, immigration and privacy, each areas where the protection offered by the Charter varies (albeit in differing degrees) from that offered by the ECHR (see below).

### *Does the UK have an Opt-out?*

53. There has been much debate about a UK opt-out from the effects of the Charter.<sup>43</sup> Protocol 30 to the Charter is legally binding and applies to the obligations of the UK and Poland under the Charter. It is designed to clarify how the Charter applies. It emphasises that the Charter is not to be interpreted as imposing new obligations on the UK (as provided for in Article 51(2) of the Charter). It expressly provides that the rights protected by Chapter IV (Solidarity) create enforceable rights applicable to the UK except in so far as such rights are protected in UK law. This reflects a view that nothing in that Title is directly enforceable except in so far as it is already guaranteed by national law.<sup>44</sup>

54. The UK Government, Parliament and the Courts in Luxembourg and the UK have all confirmed that the Protocol does not operate as an opt-out (it was never intended to).<sup>45</sup>

### *Why does the Charter matter?*

55. Following the rules in the ECA 1972, the protection which the Charter offers may give a greater individual remedy than the HRA 1998 does. In cases involving inconsistent primary legislation from Westminster, in some cases, the only remedy which the HRA 1998 can offer is a '*declaration of incompatibility*'.<sup>46</sup> This sends the problem back to Parliament for a solution. The offending law will continue to violate individual rights until

<sup>39</sup> See, for example, *Akerberg Fransson* C-617/10 [2013]

<sup>40</sup> *Siragusa v Regione Sicilia* C-206/13 [2014]

<sup>41</sup> European Commission, *Flash Eurobarometer 340: The Charter of Fundamental Rights of the European Union*, (2012). See also *Competences Review: Fundamental Rights*, para 4.23 et seq.

<sup>42</sup> See Chapter 14, *The UK and the Charter of Fundamental Rights*, Keiron Beal QC, 'Britain Alone!', P Birkenshaw & A Biondi (Eds), 2016, pages 279 – 290.

<sup>43</sup> This has included some politicians and judges expressing surprise at the operation of the Charter and its effects. See, for example, *R (AB) v Secretary of State for the Home Department* [2013] EWHC 3453, [10].

<sup>44</sup> See, for example, House of Commons European Scrutiny Committee, *The Application of the EU Charter of Fundamental Rights*, paras 85-86 and 95.

<sup>45</sup> See *NS v Secretary of State for the Home Department* Joined Cases C-411/10 and C-493/10, para 119. See also *Competences Review: Fundamental Rights*, paras 3.5 – 3.9.

<sup>46</sup> Section 4, HRA 1998.

there is action by politicians to change it. If the law were in violation of the *Charter*, it would be ‘disapplied’ and would no longer have an unlawful effect.

56. There are a number of important substantive differences between the rights protected by the Charter and the Convention. Although the rights guaranteed by the Charter must provide no lesser protection than that offered by the European Convention on Human Rights, in some aspects the rights in the Charter are more expansive.<sup>47</sup> The most significant differences include:

- a. *Social and economic rights*: As explained above, the Charter provides some protection for a range of social and economic rights otherwise protected in EU law or in the domestic laws of Member States. The rights to health, environmental protection and social security are all protected in Title IV (Solidarity). Although the enforceability of these rights is circumscribed (see above), their inclusion is a powerful statement about the importance of these rights for the Member States of the European Union. Although these rights are not protected by the mechanisms of the ECHR, most are covered by the UN Covenant on Economic, Social and Cultural Rights (CESCR, which binds the UK in international law, but which is not incorporated in domestic law).
- b. *Equality*: Articles 20 – 21 contain a freestanding equality guarantee and protection against non-discrimination. This is in contrast with Article 14 ECHR which only protects against discrimination in the enjoyment of other rights protected by the Convention (Protocol 12 ECHR contains a similar freestanding equality guarantee but this has not been ratified by the UK). This provision forms part of Title IV and it is not yet clear precisely how much protection it can offer in UK claims. Article 21 expressly protects against discrimination on grounds not incorporated into the Convention when it was drafted in 1950, including sexuality, genetic features and disability. Express provisions are included on the right to equal treatment of women, on the rights of the child and the rights of older persons.<sup>48</sup>
- c. *Access to Justice*: Title VI contains a whole chapter on rights associated with access to justice. While the rights may have some parallel in the protections offered by the right to a fair hearing in Article 6 ECHR, the protection offered by the Charter is more specific and may offer greater protection in some respects. For example, Article 47 of the Charter includes an express right to legal aid “in so far as such aid is necessary to ensure access to justice”. While Article 6 ECHR is only applicable in cases which involve the “determination of civil rights and obligations”, there is no such limit in Article 47 of the Charter. Thus in administrative decision making cases which would not attract the protection of Article 6 ECHR – including in immigration and tax matters – Article 47 of the Charter may impose a right to a fair hearing not otherwise guaranteed.<sup>49</sup>

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<sup>47</sup> Article 52(3), CFREU.

<sup>48</sup> Articles 23, 24 and 25, CFREU.

<sup>49</sup> See for example, *LH Bishop Electric Co v HMRC* [2013] UKFTT 522, 803 – 811 and ZZ C-300/11 at [48] – [59]. Contrast *Maaouia v France* (2001) 33 EHRR 42, at [37] and [38].



- d. *Data Protection and Information Rights*: Reflecting existing protections in EU law beyond the Charter, the text provides an express right to the protection of personal data (Article 8). Although personal information is protected by the right to respect for private life, home and correspondence in Article 8 ECHR, there is not express protection, but one implied by the European Court of Human Rights.<sup>50</sup>
- e. *The Right to Marry*: The protection offered by the right to marry in the Charter is another example of updating to remove historical limitations. The right to marry in the Charter, protected by protected by Article 9 of the Charter, is framed in gender neutral terms. Article 12 ECHR refers only to the right of a man and a woman to be married.

## Commentary

57. While many of the rights protected by the Charter are also protected by the ECHR and the HRA 1998, it is already clear that some rights offer greater protection than is secured by the Convention, including for example, in respect of access to justice.<sup>51</sup> As explained above, in Charter cases, the ECA 1972 currently provides a stronger remedy than that offered by the HRA 1998 when a challenge involves primary legislation from Westminster. Equally, when a matter of interpretation in the Charter is offered by the Court of Justice of the European Union, that interpretation will have direct effect. Any inconsistent practices will be unlawful and any inconsistent law disapplied. By contrast, a decision of the European Court of Human Rights may prompt a different interpretation by domestic courts of the common law. However, if primary legislation is deemed incompatible with the Convention, it will stand until Parliament chooses to reform or repeal it. Although there is an obligation in international law to Act, nothing in domestic law can force Parliament to change the law.<sup>52</sup>

58. Following Brexit, the primary means of protecting these rights will be in the common law and through the ECHR and the HRA 1998. Some other differences do make the Charter a better alternative for some litigation. Claims under the Human Rights Act 1998 only apply when an individual is a 'victim' of a rights violation; Charter claims are pursued by judicial review and subject to a wider test of standing which only requires a 'sufficient interest'.<sup>53</sup> An EU law claim can involve an accusation that the Government has failed to produce primary legislation. This is expressly excluded by the HRA 1998.<sup>54</sup> Finally, the recovery of damages for EU law wrongs follows a different regime. An HRA 1998 claim is tied to the concept of 'just satisfaction' applied by the European Court of Human Rights and damages are relatively rare and their value generally limited.<sup>55</sup>

<sup>50</sup> See for example, *S & Marper v United Kingdom*, App. Nos 30562/04 and 30566/04.

<sup>51</sup> Article 47, CFREU.

<sup>52</sup> Article 46 ECHR. As illustrated by the prisoners' voting case. In *Hirst (No2) v UK*, App No 74025/01, 6 Oct 2005 (GC), Section 3 of the Representation of the People Act 1983 was declared incompatible with the right to participate in free and fair elections as protected by Article 3 of Protocol 1 ECHR. Despite the obligation to give effect to the judgment of the European Court of Human Rights in Article 46 ECHR, that law remains in force more than a decade later.

<sup>53</sup> Challenges in domestic courts on the basis of EU law are often brought by way of judicial review where the test for standing is one of sufficient interest (see Section 31, Supreme Courts Act 1981); by way of contrast claims under the HRA 1998 are confined to individuals who are considered a 'victim' of a violation (see Section 7(1) HRA 1998). See also Chapter 14, *The UK and the Charter of Fundamental Rights*, Keiron Beal QC, 'Britain Alone!', P Birkenshaw & A Biondi (Eds), 2016, pages 287-88

<sup>54</sup> See Section 6(6)(b).

<sup>55</sup> See also Chapter 14, *The UK and the Charter of Fundamental Rights*, Keiron Beal QC, 'Britain Alone!', P Birkenshaw & A Biondi (Eds), 2016, pages 287-88. The author in this piece also anticipates developments in the Charter case law which may

### **The Charter in Action: Benkharbouche**

*Two employees at a foreign embassy 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 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 HRA 1998, and Article 47 of the Charter.*

*The language of the State Immunity Act 1972 was plain. The only remedy open under the HRA was a declaration of incompatibility. However, in so far as the claim related to EU law – race discrimination and working time – the State Immunity Act 1972 was set aside and their claim could proceed. The rest of their case was struck out.<sup>56</sup>*

59. Some rights protected by the Charter but not the Convention or the common law may be protected in the UK's other international obligations. These obligations are not incorporated into domestic law, but may be relevant to the interpretation of the common law or the Convention rights protected by the HRA 1998.<sup>57</sup>
60. In respect of some of these rights, the UN may provide a right of individual petition to an enforcement Committee. The UK has traditionally been reluctant to accept these rights of petition and only concedes to the jurisdiction of the UN Committees in respect of the Committee on the Rights of Persons with Disabilities and the Committee on the Elimination of Discrimination against Women. These petition rights have been little used. If Brexit proceeds, despite political resistance, there may be some benefit in promoting education on existing rights of individual petition and their use and promoting new policy on the right of individual petition and interaction with UN Special Procedures for the protection of individual rights. Beyond these mechanisms, the only redress for rights which fall out with the protection of the common law and the HRA 1998 will be limited.

### **The EU Fundamental Rights Agency**

61. The EU Fundamental Rights Agency (“**EUFRA**”) is a specialised agency of the EU which works to promote respect for fundamental rights within the Union. Established in 2007, it produces reports based on data it collects, to improve knowledge and awareness of fundamental rights issues in the Union.<sup>58</sup>

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create a greater opportunity for reliance on Charter standards as between individuals, and corporations, as the concept of indirect effect is increasingly better understood in Charter caselaw.

<sup>56</sup> *Benkharbouche & Anor v Embassy of the Republic of Sudan* [2015] EWCA Civ 33.

<sup>57</sup> In *Neulinger v Switzerland*, the Strasbourg Court observed that “the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law. Account should be taken . . . of any relevant rules of international law applicable in the relations between the parties’ and in particular the rules concerning the international protection of human rights” (2010) 28 BHRC 706, at [131], referred to by Lady Hale, with whom Lords Brown and Mance agreed, in *ZH (Tanzania) (FC) v Secretary of State for the Home Office* [2011] UKSC 4 at [21]. This approach was also adopted by Lady Hale, with whom Lord Sumption agreed, in *P v Cheshire West and Chester Council* [2014] UKSC 19, at [36].

<sup>58</sup> Council Regulation 168/2007/EC on establishing a EU Agency for Fundamental Rights, 2007, OJ L 245, preamble.

### **Objective of the EU Fundamental Rights Agency**

*Provide the relevant institutions, bodies, offices and agencies of the Community and its Member States when implementing Community Law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights.*<sup>59</sup>

62. The EUFRA is principally a research and advisory body. It does not conduct scrutiny or monitoring of the conduct of the EU institutions or individual Member States. It does not set standards or examine individual complaints. However, the Agency pursues its objectives by publishing research, thematic reports and opinions and by raising awareness of fundamental rights across the Union. It responds to requests for assistance on human rights issues from the EU institutions. It conducts its work in collaboration with civil society, academics and National Human Rights Institutions across Europe and can provide a platform and focal point for research and information sharing at a pan-European level.
63. The EUFRA is based in Vienna, and has 90 staff and a budget of €21m (for 2015). The Agency conducts its work on a five-year multiannual work programme. Its work can include legal and policy analysis on particular human rights issues designed to promote good practice, information and data analysis on the state of rights protection in Europe, and targeted projects looking at discrete human rights situations in individual Member States. A sample of its recent projects illustrates a significant shared interest in respect of human rights issues facing the UK:
- a. *Child poverty and well-being* (ongoing): analysing existing secondary European level data on child poverty and well-being, from a fundamental rights perspective;
  - b. *Migration detention and children* (ongoing): desk research on the approach of Member States to the detention of child migrants;
  - c. *Antisemitism*: overview of the situation of data collection in the European Union on antisemitism;
  - d. *EU-MIDIS II: European Union minorities and discrimination survey*: A survey conducted every five years on the situation of minorities and their experience of discrimination in Member States and across Europe.
64. The EUFRA works with stakeholder individuals and organisations across Europe including in the UK, in a number of ways:
- a. *National Liaison Officers*: National Liaison Officers for each Member State are appointed from national Ministries (the Ministry of Justice in the UK) to act as a point of contact with the EUFRA and to assist with its work.
  - b. *FRANET*: The EUFRA operates a network of research officers across the EU called FRANET. This includes a UK based research organisation contracted to

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<sup>59</sup> Ibid, Article 2.

provide data and research to the Agency as required (in the UK, this is the University of Nottingham Human Rights Law Centre).

- c. *Fundamental Rights Platform*: The EUFRA operates a network of European civil society organisations which work on human rights issues, known as the Fundamental Rights Platform. The Platform can be consulted on issues of importance for the EUFRA and it meets annually to discuss the work of the EUFRA. It has access to an online communication platform, for the exchange of information. The Platform elects an advisory panel to assist the EUFRA Director. With over 300 civil society members across Europe; the Platform can provide a helpful network for the dissemination of learning and good practice.
- d. *Research tendering*: EUFRA research is commissioned on the basis of open tendering, open to organisations and universities across the European Union.

65. In the *Balance of Competences Review* (2014), the Government reported a mixed response to their consultation on the impact of the Agency on the UK's national interests. NGOs reported using the research compiled in the work of the EUFRA in their work, including in litigation and to support submissions to UN bodies. The output of the EUFRA is generally respected as accurate and high-quality. While some raised questions about the value for money the Agency offered, others welcomed the transparency in its processes for tendering. There were conflicting but limited reports on the value of the Fundamental Rights Platform as a means of coordinating civil society input across Europe. Some small organisations thought that the work of EUFRA was not accessible. Concern was raised that there was limited awareness of the work of the EUFRA in the UK and that the EUFRA monitored and measured its impacts inadequately.<sup>60</sup>

66. While some have questioned whether the EUFRA might duplicate the work of the Council of Europe, overlap and conflict has been closely monitored both by the Director of the EUFRA and the organisations of the Council of Europe.<sup>61</sup>

## Commentary

67. While the UK may still benefit from the outputs of the EUFRA, following Brexit UK stakeholders will not be invited to play a formal part in its work. UK research bodies and organisations will no longer be eligible to tender for research projects commissioned by the EUFRA.

68. UK Civil Society organisations and universities may wish to consider how they might maintain informal engagement with the EUFRA as a source of helpful learning, knowledge and information sharing after the UK leaves the Union. This might include exploring whether the UK National Human Rights Institutions or civil society organisations might continue to participate in the Fundamental Rights Platform as observers, for example.

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<sup>60</sup> HMG, *Review of the Balance of Competences between the UK and the EU: Fundamental Rights*, Summer 2014. ('*Competences Review: Fundamental Rights*'), paras 4.52 – 4.78.

<sup>61</sup> *Competences Review: Fundamental Rights*, para 4.72 – 4.76

69. It is likely that engagement with the EUFRA through the processes of the Council of Europe will continue. In areas of shared interest, scope for pan-European cooperation will continue, albeit outside of the EU. In areas of shared interest both the EU and the Council of Europe often work in parallel. Below, for example, we consider some of the work that the EU has done to bring down barriers faced by persons with disabilities. The Council of Europe also promotes enhanced standards within its Member States. The Council is currently consulting on its disability strategy for 2017 – 2023.

## *Programmes for the promotion and protection of EU Fundamental Rights*

### **Thematic Programming**

70. As part of the EU's commitment to the protection of fundamental rights, a number of thematic programmes operate to promote awareness and the protection of the rights of specific groups within the EU. These programmes vary in their scope and impact. An assessment of their effectiveness is outside the scope of this paper. They include, for example:

- a. Gender equality and violence against women: The EU Strategic engagement for gender equality for 2016 – 2019 provides the latest EU strategy on the promotion of equality for women. The document identifies more than 30 concrete actions for Member States and reaffirms commitment to gender mainstreaming. A gender equality perspective must be integrated into all EU policies as well as into EU funding programmes. The priorities for 2016 – 19 are a) Increasing female labour market participation and equal economic independence; b) Reducing the gender pay, earnings and pension gaps and thus fighting poverty among women; c) Promoting equality between women and men in decision-making; d) Combating gender-based violence and protecting and supporting victims; and e) Promoting gender equality and women's rights across the world.
- b. Rights of children: The EU Agenda for the Rights of the Child aims to reinforce the full commitment of the EU - as enshrined in the Treaty of Lisbon and the Charter of Fundamental Rights - to promote, protect and fulfil the rights of the child in all relevant EU policies and actions. This agenda includes 11 concrete actions where the EU can contribute in an effective way to children's well-being and safety.
- c. Trafficking and modern slavery: The EU Directive 2011/36/EU on prevention and combating trafficking in human beings and protecting its victims was adopted in 2011. The current EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016 is based on five key priorities: a) Identifying, protecting and assisting victims of trafficking; b) Stepping up the prevention of trafficking in human beings; c) Increased prosecution of traffickers; d) Enhanced coordination and cooperation among key actors and policy coherence; and e) Increased knowledge of and effective response to emerging concerns related to all forms of trafficking in human beings. As part of this work, the EU has appointed an EU-wide Anti-Trafficking Coordinator responsible for improving coordination and coherence among EU institutions, EU agencies, Member States and international

actors and developing existing and new EU policies to address trafficking in human beings. It also supports a civil society [EU Platform on Anti-Trafficking](#).

71. The EU has generally been supportive of civil society organisations across Europe, recognising the value they may bring to thinking about the protection of individual rights. The Platforms and programmes highlighted in this paper are only a handful of ways in which EU institutions draw on the experience of civil society, including from the United Kingdom. While there is no scope in this paper to consider the impact of this engagement, the implications of Brexit will include the shrinking of these opportunities for European cooperation in policy formation.<sup>62</sup>

## Funding Programmes

72. Historically, UK civil society, charity and not-for-profit organisations working on human rights issues have benefitted from EU funding programmes for their projects designed to improve the better protection of human rights within the EU.

73. The Fundamental Rights and Citizenship Programme distributed a budget of €97.25m over a seven year period.<sup>63</sup> The Rights, Equality and Citizenship Programme (2014 – 2020) replaces the Fundamental Rights and Citizenship programme and a number of other funding streams which targeted specific human rights issues in Europe.<sup>64</sup> It has a slightly smaller budget than the previous programmes combined but has a general objective to further develop a Union where equality and the rights recognised in EU law are promoted, protected and effectively implemented. Priorities for the programme include non-discrimination and the combating of violence against children, young people and women.

74. NCVO analysis shows that UK organisations benefitted from £220m of this and other forms of EU funding in 2012/13.<sup>65</sup>

## Commentary

75. Following Brexit, the UK will no longer contribute to this funding through the EU budget and UK-based organisations will no longer be eligible. While it is unlikely that Brexit will occur before the end of the current programme, in 2020, anecdotally, civil society reports that the impending negotiations may make new applications for funding under the

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<sup>62</sup> For a broader discussion of this engagement, see NCVO Discussion Paper, [The EU Referendum: A Discussion Paper for Charities](#), April 2016, pages 11-12.

<sup>63</sup> The focus of the Fundamental Rights and Citizenship programme was a) the protection of the rights of the child; b) combating racism, xenophobia and anti-Semitism; c) the fight against homophobia; d) active participation in the democratic life of the Union; e) data protection and privacy rights; f) training and networking between legal professions and legal practitioners. Further information about its work and grants can be found [here](#).

<sup>64</sup> Regulation 1381/2013/EU, establishing the Rights, Equality and Citizenship Programme for 2014 – 2020, 17 December 2013. Other EU programmes support the protection of specific rights within the EU. For example, the [Justice](#) Programme for 2014 – 2020 funds programmes which contribute to the further development of a European area of justice based on mutual recognition and mutual trust. It promotes: a) judicial cooperation in civil matters, including civil and commercial matters, insolvencies, family matters and successions, etc; b) judicial cooperation in criminal matter; c) judicial training, including language training on legal terminology, with a view to fostering a common legal and judicial culture; d) effective access to justice in Europe, including rights of victims of crime and procedural rights in criminal proceedings; and e) initiatives in the field of drugs policy (judicial cooperation and crime prevention aspects).

<sup>65</sup> For a broader discussion of this engagement, see NCVO Discussion Paper, [The EU Referendum: A Discussion Paper for Charities](#), April 2016, page 16. Figures taken from the NCVO Almanac 2013, NCVO UK Civil Society Almanac: [data.ncvo.org.uk/a/almanac15/government](http://data.ncvo.org.uk/a/almanac15/government). These figures also include sums of funding from the European Social Investment Fund, which is administered separately from this kind of grant making fund.

programme difficult as project partners in other countries are nervous about the continuing involvement of UK organisations and institutions. Following Brexit, although UK organisations may not benefit from funding, the research and programming supported by the EU through any successor programme may yet inform work within the UK to better protect individual rights through good practice.

76. While the process of securing EU funding and reporting to the EU is notoriously difficult and time-consuming,<sup>66</sup> a significant number of UK organisations have benefitted from this support for work on human rights focused projects.<sup>67</sup> Following Brexit, this will no longer be a source of funding, potentially leaving a gap in support, including for cross-border research projects involving learning from the UK. The NCVO highlights that there has been no reliable analysis of the legacy impacts of EU investment for the UK charity sector or its support for the building of cross-border solidarity for EU civil society organisations: “[I]t is not clear how far they have reached nor how much difference they have made in the longer term, particularly at grassroots level. And if Britain were to leave the EU it is possible that other ways would be found to forge links and create solidarity across national boundaries.”<sup>68</sup>
77. It is unlikely that there will be political support for an increase in the grant making capacity of any of the UK’s National Human Rights Institutions to replicate the contribution historically made by the UK Government to this work via its contribution to the budget of the EUFRA and other EU funding programmes. Trusts, Foundations and other donors may wish to consider whether this funding gap will be sufficiently significant to justify new programmes targeting UK participation in research, including on a cross-border basis where UK experience can play a role in informing global good practice (or vice versa).
78. Thematic EU programmes will remain relevant as a comparator and an important model of committed regional practice on international human rights obligations which the UK shares. However, similar thematic programmes will continue within the Council of Europe and at the United Nations and there may be renewed incentives for funders and civil society to reengage with the commitments of the UK in Strasbourg and Geneva, including through an exploration of means to support and encourage a continued political commitment by the UK Government to those processes.<sup>69</sup>

### *Rights-enhancing EU framework legislation*

79. Outside the scope of the general legal framework for the protection of Fundamental Rights in the EU, allied to the development of the single market, the Union has developed a number regulations and framework directives aimed at ensuring the promulgation of shared minimum standards in the protection of individual rights across the Union. The second Part of this paper considers the protection of specific rights in EU

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<sup>66</sup> *Balance of Competences Review: Fundamental Rights*, para 4.80.

<sup>67</sup> For example, the NCVO reports that for example, that between 2007 and 2011 over 200 UK organisations, including ACT Community Theatre and Battersea Arts Centre, participated in trans-national projects funded by the EU Culture Programme. NCVO Discussion Paper, *The EU Referendum: A Discussion Paper for Charities*, April 2016, page 16

<sup>68</sup> NCVO Discussion Paper, *The EU Referendum: A Discussion Paper for Charities*, April 2016, page 17

<sup>69</sup> It is outside the scope of this paper to compare and contrast the current programmes in the Council of Europe and in the United Nations framework with those operated by the EU for effectiveness or impact. Some similarities in programming are highlighted above.

law and the potential impact of Brexit on a number of specific issues which are of particular interest to TPI.



## Part C: RIGHTS PROTECTING LEGISLATION AND EU LAW

***While the impact of EU legislation varies widely, a significant proportion of law making at a European level has focused on measures designed to further the promotion of common standards for the protection of individual rights. The protection of individual rights in domestic legislation in areas as diverse as labour rights to environmental protection sits upon a framework of underlying EU legislation. Areas of interest for TPI and its grantees are considered in brief in this Section. This ranges from areas of general protection including equality and non-discrimination to specific legal prohibitions, for example, on the export of drugs for use in the administration of the death penalty.***

***It is beyond the scope of this paper to analyse the legacy of our EU membership in every area of law. However, in each area where domestic law sits on an EU legacy, the loss of the ‘floor’ created by the EU underpinning, accompanied by the rights in the General Principles and the Charter will be most felt in the absence of the enhanced remedies associated with the European Communities Act 1972 and the removal of the influence of the Court of Justice of the European Union.***

### The Scope of EU Law: Protecting Individuals, Promoting Rights

80. The Government is reported to be in the process of employing over 200 new staff for the Department for the Exit from the EU (“DeEXEU”).<sup>70</sup> This level of recruitment in a time of general austerity is indicative of the influence of EU law and our membership of the EU on both domestic law and public administration.
81. The general framework for the protection of human rights outlined above is significant and may alter the remedies available for some violations of individual rights within the UK in some circumstances. However, the larger commitment for Government in giving effect to a proposed Great Repeal is in undertaking to review and potentially inform any area of law which is informed by the legacy of our EU membership. Over almost half a century of membership, the influence of EU law has been widespread, if deeper and more influential in some areas than in others.<sup>71</sup>

<sup>70</sup> The Financial Times, *Brexit Ministry to double in size with recruitment drive*, 28 September 2016

<sup>71</sup> The impact of EU law on domestic legal autonomy is exceptionally difficult to measure, although this question has been influential during debate on Brexit. The House of Commons Library has produced figures at the request of some MPs, but has stressed: “there is no totally accurate, rational or useful way of calculating the percentage of national laws based on or influenced by the EU”. In 2010, *How much legislation comes from Europe?* explained: “[i]n the UK data suggest that from 1997 to 2009 6.8% of primary legislation (Statutes) and 14.1% of secondary legislation (Statutory Instruments) had a role in implementing EU obligations, although the degree of involvement varied from passing reference to explicit implementation. Estimates of the proportion of national laws based on EU laws in other EU Member States vary widely, ranging from around 6% to 84%”. See House of Commons Library, Research Paper 10/62, 13 October 2010.

82. This Part provides a broad overview of some of the fields of influence of EU law in the promulgation of specific legal standards for the protection of human rights and, briefly, how they have informed the development of domestic law:

- a. **Equality:** From the earliest establishment of the single market, it was recognised that in order to establish a level playing field for Member States sharing the rights of free movement, shared standards on equal treatment would be essential. Throughout the history of the EU, these commitments have evolved, from employment, to goods and services, and from gender to the treatment of LGBT people. The Equality Act 2010 now sits squarely on top of EU law underpinning. **We consider the impact of Brexit on equality in more detail in Part D.**
  
- b. **Immigration and Asylum:** The treatment of immigration played a significant part in the debate on the referendum, and continues to play an influential role in the approach of the UK to Brexit. As a single market, the coordination of external immigration policies have been crucial in order to preserve access to the market and to support free movement. While the UK is not part of the internal EU border-free Schengen area – continuing to conduct checks on entry to the UK on EU and non-EU citizens alike - it is bound by the measures which harmonise the approach of Member States to the reception and treatment of refugees consistent with the shared commitment of all Member States under the *Geneva Convention on the Status of Refugees* (1951). At a point of crisis globally for migration, how Brexit may affect the treatment of immigrants and refugees may be one of the most pressing questions for civil society organisations in the UK. **We consider the impact of Brexit on immigration and asylum in more detail in Part D.**
  
- c. **Data Protection and Information Rights:** The protection of personal data – and the sharing of data across EU Member States – has been a political priority for the EU for at least three decades. This process has been actively encouraged by successive UK Governments, who have played a role in seeking to set broad EU standards for the retention and use of personal data which are framed to keep pace with shifting technologies and the increasing integration of our lives lived on and offline. The existing UK data protection and data retention framework sits broadly on a framework of EU law which is itself currently in flux. A new [EU Data Protection Regulation](#) will come into force in 2017 and must be implemented by the UK by 2018. This will be accompanied by a new Data Protection Directive, to be implemented by the UK by May 2018.<sup>72</sup> The UK has been consulting on the new legislative framework and the required reform of the Data Protection Act 1998 for several years. The EU Data Retention framework is currently in limbo following a series of decisions of the CJEU, including in *Digital Rights Ireland*, which determined that the EU Data Retention Directive was

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<sup>72</sup> See Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation); Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA

unlawful and incompatible with the EU Charter as it contained insufficient safeguards for the protection of individual privacy. The UK's replacement legislation, passed through Parliament in only 4 days, the Data Retention and Investigatory Powers Act 2014, is currently being challenged before the domestic courts and is the subject of a preliminary reference to the CJEU. **We consider the impact of Brexit on Data Protection and Data Retention in more detail in Part D.**

- d. *Cross-border cooperation on policing, crime and due process:* In July 2013, the UK opted out of all of the EU measures on cross-border cooperation on policing and justice. However, in November 2014, the House of Commons voted to endorse the Government's decision to opt-in to 35 of the key EU measures on cross-border cooperation on policing and justice. These measures bind the UK today. They include, for example, the European Arrest Warrant. The European Arrest Warrant simplifies the extradition of suspects across the EU and is based on a principle of mutual recognition of Member States' legal systems across the EU. It is implemented in domestic law in the Extradition Act 2003.

The UK also participates in the Schengen Information System. This is a large-scale EU database which supports law enforcement cooperation and allows the sharing of real-time information by police forces across Europe. Europol is the EU's law enforcement agency and it assists EU Member States with cross-border investigations in relation to terrorism and cross-border crime. The UK participates in Europol.

Many of the EU mechanisms on policing and justice are supported by the police and security agencies.<sup>73</sup> Although some similar degree of collaboration exists in some Council of Europe instruments, this work is not considered equivalent in its effects or value by those working in investigation and prosecution in the UK. This was evidenced as recently as 2014 when the UK chose, with strong support, to opt in to the main cooperation mechanisms at an EU level. It may be possible to settle some form of participation in these arrangements as part of the negotiations for Brexit (for example, Norway and Iceland have an agreement to participate in the EAW and Europol has a number of strategic cooperation agreements with non-EU states).<sup>74</sup>

If these arrangements are thought to be desirable for the UK to continue their participation, this may provide some limited scope for engagement for civil society to argue for continued safeguards in the minimum protections offered to accused persons by EU law minimum standards to be replicated post Brexit. These minimum standards are largely reflected in domestic criminal procedure

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<sup>73</sup> UK policing agencies have consistently expressed their support for measures designed to support cross-border cooperation, including the European Arrest Warrant. See HMG, *Review of the Balance of Competences: Police and Criminal Justice*, December 2014. The House of Lords EU Committee is currently conducting an inquiry into EU-UK Cooperation in policing and crime and the police and National Crime Agency gave evidence on 12 October 2016 on the implications of Brexit, highlighting important issues for negotiation. See [here](#).

<sup>74</sup> See also House of Commons Library Briefing Paper, *Brexit: Impact across Policy Areas*, ed Vaughne Miller, 26 August 2016, para 11.1.

and in the case law of the Strasbourg Court but linking the continued participation of the UK in cross-border criminal cooperation to the maintenance of robust minimum safeguards for individuals accused of crime could continue a useful extra layer of protection post-Brexit. The participation of UK civil society and UK agencies has informed the development of due process standards within the EU. It is a stated objective of the Government to try to preserve security and intelligence cooperation “as best we can”.<sup>75</sup>

- e. **Trafficking:** The UK initially opted out of the EU Trafficking Directive (see above) arguing that its existing law was already compliant with its minimum standards. It opted in during 2011 and accepted that, for the law to be implemented properly, changes would be needed to domestic practice, not least to clearly criminalise the offence of forced labour.<sup>76</sup> The Directive is now implemented through a range of measures in civil and criminal law, in policy and practice. The main relevant legislation is found in the Modern Slavery Act 2015 and specific legislation in Northern Ireland and Scotland.<sup>77</sup> Although there remain concerns about the UK’s response to trafficking, not least in the limited protection offered to domestic workers and the restrictive application of visas in a trafficking situation, it is generally accepted that the Modern Slavery Act 2015 is a progressive and positive step forward. It contains some steps which are more progressive than the Directive, such as a mechanism for the monitoring and reporting of supply chain activity.<sup>78</sup>

The protection offered by the EU Trafficking Directive sits alongside protection offered by Article 4 of the European Convention on Human Rights and the Council of Europe Trafficking Convention. However, as explained above, the EU underpinning currently has a stronger normative effect on UK law as a result of the principle of direct effect and the operation of the ECA 1972.

Given the political investment, including by the Prime Minister, in the Modern Slavery Act 2015, 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 expressed concerns about the possible implications of Brexit for the effectiveness of the UK response to trafficking and the treatment of victims, emphasising that research 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). They express concern that post-Brexit the UK will not be able to help shape any new response

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<sup>75</sup> HC Deb, 5 Sept 2016, Col 46. Recent evidence from academic and civil society witnesses to the House of Lords EU Committee’s inquiry on UK and EU Cooperation on Policing and Justice provides a more full overview of the implications of Brexit and the negotiations for cross-border cooperation on policing and crime, [here](#).

<sup>76</sup> See analysis prepared by the AIRE Centre, Monitoring Report on the Implementation by the United Kingdom of EU Directive 2011/36 on preventing and combating trafficking in human beings, July 2012, for further information.

<sup>77</sup> See Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015; Human Trafficking and Exploitation (Scotland) Act 2015.

<sup>78</sup> See for example, Schona Jolly, Modern Slavery Act 2015: A step in the right direction, 1 May 2015.

to trafficking across the EU, nor will the UK be bound by any *more* progressive measures which may be adopted in future.<sup>79</sup>

- f. **Labour Rights:** The most easily explained harmonisation in laws across the EU is in the adoption of minimum standards for labour rights across the Union. The standardisation of these rules was designed to provide a level playing field – and equality of treatment for workers - across the single market. Beyond equality, it would be disproportionate to explore the spectrum of labour rights which have their roots in EU law in this paper. A full legal opinion has been obtained by the TUC on the particular rights at risk on Brexit, produced by Michael Ford QC.<sup>80</sup>

As the Chair of the TUC, Frances O’Grady explained, its 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>81</sup>

Aileen McColgan, of Kings College London has recently described the protection for labour rights as one of the areas most significantly at risk as a result of Brexit:

*“[O]ther employment focused, social rights such as those concerned with the regulation of working time and the protection of agency workers, the likelihood is that exist from the EU would result in more or less comprehensive repeal”*.<sup>82</sup>

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.<sup>83</sup>

However, the latest statement from Government on the potential for reform comes from David Davis MP, the DeXEU Minister, who has written:

*“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.”*<sup>84</sup>

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<sup>79</sup> Anti-Slavery International, *Implications of the EU Referendum*, April 2016.

<sup>80</sup> *Legal Opinion for TUC on Brexit and Workers Rights*, Richard Ford QC, April 2016

<sup>81</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>82</sup> See also Chapter 12, *The Implications and Consequences of UK Exit from the EU: Social Policies*, Aileen McColgan, ‘*Britain Alone!*’, P Birkenshaw & A Biondi (Eds), 2016, pages 215

<sup>83</sup> *Ibid*

<sup>84</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

- g. **Other economic and social rights:** Very shortly after the Brexit referendum, the UN Economic, Social and Cultural Rights Committee published a highly critical report on the impacts of austerity on the UK's compliance with its responsibilities under the International Covenant on Economic Social and Cultural Rights.<sup>85</sup>

It is outside the scope of this paper to provide a comprehensive analysis of Brexit on the UK's ability to meet its individual obligations on economic, social and cultural rights. Standards of living will inevitably be affected by changes in the success of the UK economy, but it is far from certain what the long-term economic impact of Brexit will be, nor whether the Government is taking specific measures to preserve economic and social rights from the impact of any changes as a result of Brexit. Rights to health, housing and to education, for example, are underpinned by, or supported in, a variety of EU measures on harmonised standards in Europe. For example, the licensing of medicines across the EU is currently governed by EU law and overseen by the European Medicines Agency, based in London.<sup>86</sup>

However, early commentary identifies the important corollary between the high vote amongst communities particularly hit by socio-economic disadvantage in favour of Brexit as a cause for concern.<sup>87</sup> The impact of Brexit on incomes and benefits for those most exposed to socio-economic risks should be particularly significant for Government and this may provide an important area of research for civil society and for funders.

- h. **Environmental protection:** Both the EU and Member States share competence in the fields of environment and energy. However, the EU has legislated on a wide range of environmental issues including air quality, climate change, water quality and species and habitat protection. These measures form the basis for a broad range of domestic protections for the environment.<sup>88</sup>

The House of Commons Environmental Audit Committee conducted an inquiry on the impact of Brexit on the environment where some stakeholders told the Committee that: "*if the UK were free to set its own environmental standards, it would set them at a less stringent level than has been imposed by the EU*".<sup>89</sup>

The UK would remain bound by a number of international environmental standards which inform the EU legal framework. Depending on the nature of the relationship between the EU and the UK, the UK may find itself yet bound to

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<sup>85</sup> *Concluding Observations on the Sixth Periodic Report of the United Kingdom*, UN Committee on CESCR, 24 June 2016, E/C.12/GBR/CO/6

<sup>86</sup> For more on EU cooperation on public health standards, see House of Commons Library Briefing Paper, *Brexit: Impact across Policy Areas*, ed Vaughne Miller, 26 August 2016, para 15.

<sup>87</sup> Jamie Burton, *Austerity and human rights in an "anti-factual" Brexit*, Just Fair, 6 July 2016.

<sup>88</sup> See also House of Commons Library Briefing Paper, *Brexit: Impact across Policy Areas*, ed Vaughne Miller, 26 August 2016, para 7.1; Chapter 7, *The UK and the World: Environmental Law*, Ionna Hadjiyianni, *Britain Alone!*, P Birkenshaw & A Biondi (Eds), 2016, page 139 et seq.

<sup>89</sup> House of Commons Environmental Audit Committee, *EU and UK Environmental Policy*, 23 March 2016, HC 537

respect many of the minimum standards adopted by the EU in practice.<sup>90</sup> 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>91</sup>

While the European Court of Human Rights has recognised some environmental rights allied to respect for Convention rights protected by, for example, the right to respect for private and family life, home and correspondence, the protection offered by the Convention (and other Council of Europe initiatives) is not comparable to the specific standards imposed by the framework of EU environmental law.<sup>92</sup>

i. **Other rights enhancing legislation:** There are miscellaneous other provisions which reflect the EU commitment to the protection of human rights in their shared policies in a range of fields. For example:

a. **The tools of torture:** The EU Parliament recently voted to extend a 2005 ban on the sale of items associated with the administration of torture to prohibit the transit of such items through the EU.<sup>93</sup> This means that these items can no longer be advertised at major sales or brokered by UK based businesses. This vote followed a major campaign by Amnesty International, which focused on the sale of instruments of torture including, for example, at a regular London Arms Fair.<sup>94</sup> These laws are designed to support the commitment of the Union to a prohibition on torture, reflected in the Charter and guaranteed by the UN Convention against Torture, the International Covenant on Civil and Political Rights and Article 3, ECHR. Will the original ban or its extension survive the Great Repeal?

b. **Death penalty drugs:** The EU prohibits 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, supported by the Member States of the Union.<sup>95</sup> The imposition of this restriction is reported to have caused or contributed to significant shortages of barbiturates and other drugs in US States operating the death penalty.<sup>96</sup> This ban came about

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<sup>90</sup> Chapter 7, *The UK and the World: Environmental Law*, Ionna Hadjiyianni, *Britain Alone!*, P Birkenshaw & A Biondi (Eds), 2016, page 139 et seq.

<sup>91</sup> HC Deb, 12 July 2016, Vol 613, Col 177.

<sup>92</sup> "The important role that the EU plays in environmental law cannot be overstated", See Chapter 7, *The UK and the World: Environmental Law*, Ionna Hadjiyianni, *Britain Alone!*, P Birkenshaw & A Biondi (Eds), 2016, page 139

<sup>93</sup> European Parliament Press Release, *MEPs strengthen torture ban on export goods*, 4 October 2016. See Council Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment.

<sup>94</sup> Amnesty Press Release, *No more torture on your doorstep*, 4 October 2016

<sup>95</sup> Council Regulation (EU) No 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment was adopted on 27 June 2005. It comprises an import and export ban for certain goods listed in Annex II and an export control regime for certain other goods listed in Annex III. In 2011, these lists were amended to include death penalty drugs.

<sup>96</sup> See, for example, The Atlantic, *Can the European drugs ban end the death penalty in America*, 18 Feb 2014. Other commentary has raised concern that the ban is increasing the risk that more inhuman methods of execution are being used. See, for example, The Guardian, *Pfizer's lethal injection drug ban raises fears of alternative execution methods in US*, 14 May 2016.

as a result of work by UK based NGOs, including Amnesty International and Reprieve. Will the ban survive review?<sup>97</sup>

83. Other systemic issues which may be relevant for charities working on human rights issues in the UK include the influence which EU law has on public procurement and on the protection of human rights standards in international trade agreements.<sup>98</sup> Currently EU law underpins all public procurement in the UK. There has historically been criticism from within the charity sector about the complexity of existing procedures for tendering for public contracts. The NCVO has identified this as one area where charities may wish to be engaged in reshaping the law following Brexit.<sup>99</sup>
84. Which laws might eventually be subject to repeal, reform, preservation or event improvement should Brexit proceed is a question which depends on too many factors to predict accurately. These include, of course, the nature of the relationship between the United Kingdom and the EU, the political imperatives of any future Government and its members, the majority enjoyed by Government and any pragmatic considerations which might vitiate against reform or pursuing reform. However, in light of the broad scope of interrelationship between the protection of specific individual rights in domestic law and the law of the EU, an attentive engagement is advisable on the part of any civil society organisation working in a field where Brexit may lead to renewed reforming vigour.

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<sup>97</sup> These examples are limited by the scope of this paper. Further examples are given in the evidence submitted to the inquiry of the Joint Committee on Human Rights looking at how Brexit will affect the protection of fundamental rights in the UK. See, for example, the [evidence submitted by Caoilfhionn Gallagher, Susie Alegre and Katie O'Byrne of Doughty Street Chambers](#) on a number of issues, including the effective protection of the rights of children within the EU and the UK.

<sup>98</sup> Commentary on the UK's engagement in the settlement of international trade agreements outside the EU has been widespread, [some of that commentary](#) has reflected on the relative negotiating power of the EU to include minimum standards for rights in trade agreements; [other commentary](#) has focused on the need to create an impetus for the UK to include a commitment to human rights standards in any new international agreements it concludes in its own right going forward.

<sup>99</sup> NCVO Discussion Paper, [The EU Referendum: A Discussion Paper for Charities](#), April 2016, pages 12-13.



## Part D: EU LAW RIGHTS PROTECTION IN ACTION

### Equality

***The protection against discrimination in domestic law predates the UK's membership of the European Community. However, today the protection for equality and diversity in the General Principles, the Treaty and the Charter means that EU law underpins the domestic architecture for the protection of equality, including in the Equality Act 2010.***

***Over the past four decades, the case law of the European Court of Justice and the Court of Justice of the European Union has helped drive forward the protection of equality by the law. Outside of specific programming within the EU for the promotion of equality, as explained above, post-Brexit, the greatest loss to domestic law will be in the influence of the Court of Justice of the European Union and the enhanced remedies offered to claimants in domestic courts by the operation of the European Communities Act 1972.***

***Equality guarantees bind the UK in our wider international human rights obligations, including in Article 14 ECHR as protected by the HRA 1998. However, none of these standards currently offer the same degree of legal protection which a claim grounded in EU law would currently provide to some applicants.***

85. While the protection of equality and the prevention of discrimination in the UK is now underpinned by EU law, it is clear that UK anti-discrimination law historically developed independently of the UK's membership of the then ECC. Similarly, as the law has reformed and amendments to both the UK and EU legal frameworks have been made, the UK's approach to equality has been generally progressive.<sup>100</sup>

86. The Lisbon Treaty confirmed that equality is one of the core principles on which the Union is established. Beyond the protections for equal treatment offered in the provisions of the Charter, the Treaty itself confirms the foundations for the EU competence to act to promote the protection of equality within the Union. Article 2 of the Treaty, for example, provides:

*"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail"*<sup>101</sup>

<sup>100</sup> See also Chapter 12, *The Implications and Consequences of UK Exit from the EU: Social Policies*, Aileen McColgan, 'Britain Alone!', P Birkenshaw & A Biondi (Eds), 2016, pages 215 – 220.

<sup>101</sup> Other provisions in the Treaty which provide the foundation for the EU Equality Framework include Article 157 TFEU, which provides for equal pay between men and women to be secured within the European Union.

87. This reflects the existing recognition of equality and non-discrimination as a General Principle of EU law.<sup>102</sup>
88. The current EU Equality Framework comprises a series of directives which protect against discrimination on the grounds of gender, race, sexuality, religion, disability and age. These include the Equal Treatment Directive of 1976 to the Equal Treatment Framework Directive 2000, which extended protection to sexuality, religion, disability and age in the workplace.<sup>103</sup> Although discrimination in race and gender is prohibited in employment, goods and services, the other grounds in EU law are limited to employment and occupation.
89. This series of EU measures underpins the operation of the Equality Act 2010 in the UK (and the separate measures which apply in Northern Ireland).<sup>104</sup> Broadly, the Equality Act protects against discrimination on the basis of a range of 'protected characteristics', including gender, race, sexuality, religion, disability and age; offering a range of protections in connection with education, employment and training and access to goods and services. There are some areas where the protection offered by UK law goes further than EU law, including for example, in respect of the freestanding public sector equality duty secured by Section 149, Equality Act 2010. The Equality Act is, of course, supplemented by specific protections for the achievement of equality in respect of particular groups or issues in domestic law. For example, the Marriage (Same-Sex Couples) Act 2013, which provides for equal access to civil marriage for same sex couples.
90. The underpinning of domestic equality law by the EU framework has been important principally as a result of the influence of the domestic courts in interpreting the legislation consistent with the case law of the CJEU (pursuant to the ECA 1972) and the application of the law by the CJEU in specific cases serving to drive the protection of the law forward. The influence which the Court has had has been described as profound: "[i]t is no exaggeration to say that EU law has been the engine that has hauled the development of UK anti-discrimination law along in its wake".<sup>105</sup> A handful of examples from many cases include:
- a. In *Marshall v Southampton and West Health Authority (No 2)*, the then ECJ ruled that a cap on compensation imposed by UK law was inconsistent with the requirement that the sanctions imposed should be 'effective'. This ruling operated to give far greater teeth to the protection offered against sex discrimination in the UK;<sup>106</sup>

<sup>102</sup> See for example, *Mangold v Helm* (2005) C-144/04

<sup>103</sup> The current incarnations of that legislation are Gender Directive; and Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23; Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16;

<sup>104</sup> Sex Discrimination Order 1976, Disability Discrimination Act 1995, Race Relations Order 1997, fair Employment and Treatment Order 1998, Employment Equality (Sexual Orientation) Regulations 2003 and Employment (Age) Regulations 2006.

<sup>105</sup> See Prof Colm O'Cinniede, *Equality Rights in a Post-Brexit United Kingdom*, Bright Blue Blog, 29 July 2016.

<sup>106</sup> C-271/91, [1993] ECR I-04367

- b. More recently, in *P v S & Cornwall*, the European Court held that the prohibition on sex discrimination extended to protect a trans-woman from discrimination associated with gender reassignment; and
- c. In *Coleman v Attridge*, the Court extended significant protection to carers in interpreting the Disability Discrimination Directive to protect against discrimination by association (in this case, the claimant had been forced to resign as a result of her treatment by her employer arising directly from her caring responsibility for her disabled son).<sup>107</sup>

## Commentary

91. It is the role of the CJEU together with the loss of any further pan-European shared impetus to greater protection which will prove the most significant practical loss if Brexit proceeds. However, despite historically relatively progressive attitudes towards equality in the UK, there are concerns amongst equality practitioners that in the current political and economic climate, the removal of the floor of EU binding equality standards will leave the Government free to reduce safeguards against discrimination. Evidence of hostility towards existing equality guarantees has been manifest during the previous two Governments. For example:

- a. The removal of the mechanism for the answering of discrimination questionnaires in April 2014 despite robust opposition;
- b. New limits on the power of Tribunals to make recommendations in response to discrimination claims pursuant to Section 124, Equality Act 2010;
- c. The “Red Tape Challenge” revisited in the Conservative Party Manifesto 2015 (including a commitment to further reduce the red tape which applies to business during this Parliament); and
- d. The introduction of tribunal fees in July 2013 has significantly circumscribed the ability of individuals to enforce their rights under the Equality Act 2010 (sex discrimination claims have fallen by 83%; equal pay claims by 77%, sexual orientation and religion or belief claims by 64% and 60% respectively and race, disability and age claims by 58%, 54% and 43% respectively).<sup>108</sup>

92. While each of these already aggressive restrictions on the effectiveness of domestic law have taken place pre-Brexit, ongoing challenges to the introduction of fees as inconsistent with the requirements in the EU equality framework that remedies must be effective have thus far been unsuccessful; pending consideration by the Supreme Court.<sup>109</sup> Although the protection of the EU minimum standards have so far failed to prevent Government restrictions on the protection of equality, some concerns have been expressed by commentators that Brexit could precipitate new reforms designed to further diminish the value of equality guarantees in domestic law.<sup>110</sup>

<sup>107</sup> *Coleman v Attridge* [2008] C-303/06

<sup>108</sup> See House of Commons Library, *Employment Tribunal Fees*, 22 June 2016. See also Chapter 12, *The Implications and Consequences of UK Exit from the EU: Social Policies*, Aileen McColgan, ‘Britain Alone!’, P Birkenshaw & A Biondi (Eds), 2016, pages 215 – 220.

<sup>109</sup> See for example, *R (Unison) v Lord Chancellor (No 2)* [2015] IRLR 911 (appeal pending to the Supreme Court).

<sup>110</sup> Chapter 12, *The Implications and Consequences of UK Exit from the EU: Social Policies*, Aileen McColgan, ‘Britain Alone!’, P Birkenshaw & A Biondi (Eds), 2016, pages 215 – 220; Prof Colm O’Cinniede, *Equality Rights in a Post-Brexit United Kingdom*, Bright Blue Blog, 29 July 2016.

## *Protecting equality in international law, the Charter & the ECHR*

93. As explained above, the Charter provides a freestanding right to equal treatment before the law which is not replicated in the limited protection of Article 14 ECHR. Protocol 12 ECHR provides such a freestanding guarantee but has not been ratified by the United Kingdom. Equality guarantees of differing types are provided in each of the major UN Covenants and Conventions. Article 26 of the International Covenant on Civil and Political Rights (“ICCPR”) provides plainly:

*“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>111</sup>*

94. However, none of these measures benefit from the direct effect afforded to the Charter by the operation of the ECA 1972 in cases within the scope of EU law.

## *Progressive equality programming and future reform*

95. Beyond the protection of the Charter, the Treaties and the EU Equality Framework (see above), there is a vast array of soft law standards and programmes run by the EU which focus on promoting and supporting a culture of equality and eradicating unlawful discrimination in law, policy and practice across the EU. These programmes are often focused on particularly vulnerable groups in Europe and have worked to highlight the dangers of discrimination for communities otherwise excluded from civil discourse. If Brexit proceeds, while the UK may continue to benefit tangentially from the progress of this work, the UK Government and UK civil society will not play an active role in either informing the choice of programmes, their shape or operation.

96. Some examples of this work include:

- a. *Promotion of equality for Roma people in Europe*: The Roma people are Europe’s largest ethnic minority. Of an estimated 10-12 million in the whole of Europe, some six million live in the EU, most of them EU citizens. Many Roma in the EU are victims of prejudice and social exclusion, despite the fact that EU countries have banned discrimination. The EU requires every member state and institution to work progressively towards the effective integration and elimination of discrimination against Roma peoples. It promotes this objective through a series of soft law standards and targets and through investment in capacity building and research. Since 2012, each EU Member State has had a Roma Strategy and the progression of the fair treatment of Roma people is a priority for the Europe 2020 strategy. This work has included commitment of EU funding to better support national strategies.
- b. *Disability strategies and a barrier free Europe*: The EU “promotes the active inclusion and full participation of disabled people in society, in line with the EU

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<sup>111</sup> Article 3 provides for men and women to enjoy the rights protected by the Convention equally and Article 14 provides for everyone to enjoy the equal protection of courts and tribunals.

*human rights approach to disability issues*". Disability is treated as a "*rights issue and not a matter of discretion*". This approach is also at the core of the UN Convention on the Rights of People with Disabilities (UNCRPD), to which the EU is a signatory. The European Commission's European Disability Strategy 2010-2020, adopted in 2010, builds on the UNCRPD. The Commission convenes a regular High-Level group on the implementation of the UNCRPD and supports the Academic Network of European Disability Experts. The first of eight key priorities for the current strategy is accessibility and the EU is currently in the process of considering a new European Accessibility Act (Directive) (see below).

- c. *Sexual orientation, gender identity and LGBT rights*: In recognition of the specific commitment in the Charter, the Commission has committed to a range of activities for the promotion of LGBT rights during 2016 – 2019.

97. If Brexit proceeds, the UK will not be able to inform the further development of future proposals for reform. If these reforms do proceed, it will be open to civil society and others to persuade the Government of the day that the EU developments represent good practice and should be replicated in UK law. In the current political climate, this is likely to prove a difficult task. However, investment in identifying the benefits of progressive practice and encouraging the adoption of progressive practice through other forms of international cooperation, including by the relevant UN Committees and by the Council of Europe could help ensure that any progress in EU law is disseminated and may indirectly continue to influence practice and policy within the UK.

#### ***The Accessibility Act Directive***

In December 2015, the European Commission published its proposals for a new European Accessibility Act. This new Directive would impose a new duty Europe wide designed to reduce barriers to independent living for persons with disabilities (or functional impairments) (draft Directive 2015/0278). The Commission intends that the Act will benefit both businesses and persons with disabilities:

*"Businesses will benefit from a) common rules on accessibility in the EU leading to costs reduction; b) easier cross-border trading; and c) more market opportunities for their accessible products and services. Disabled and older people will benefit from a) more accessible products and services in the market, b) accessible products and services at more competitive prices; c) fewer barriers when accessing education and the open labour market; and d) more jobs available where accessibility expertise is needed."*

It is uncertain whether the Directive will come into force before Brexit. If it does, the UK may be under an obligation to make changes to the Equality Act 2010 to expand the existing duty to make reasonable adjustments to reflect the broader duty in the Accessibility Act. As many Directives allow time for implementation, if the timetable for Brexit is relatively short, these progressive changes may not bind the United Kingdom.<sup>112</sup> Baroness Tanni-Grey Thomson has already expressed her concern that Brexit could lead to persons with disabilities losing the benefit of these new developments in EU law.<sup>113</sup>

<sup>112</sup> See, for example, Cloisters Briefing, European Accessibility Act, February 2016.

<sup>113</sup> BBC News, Reality Check: What has the EU meant for disability rights?, 22 June 2016

## National Human Rights Institutions

98. There are a number of recognised National Human Rights Institutions (“NHRIs”) in the United Kingdom which are recognised by the UN Paris Principles. These include the Equality and Human Rights Commission for the UK, the Scottish Human Rights Commission (in respect of devolved matters in Scotland) and the Northern Ireland Human Rights Commission and the Equality Commission for Northern Ireland. However, a number of these bodies also satisfy the requirements in EU equality law for a National Equality Body (“NEB”) with responsibility for the effective implementation of EU equality law (they are required for race, gender and disability). The EHRC has a number of regulatory and other functions pursuant to the Equality Act 2010 which ensure that it is capable of fulfilling its role as an NEB. Across Europe, [Equinet](#) – the European Network of Equality Bodies – operates as a forum for the sharing of experience and good practice.
99. If Brexit goes ahead – unless required by the terms of the new relationship between the UK and the EU – it is unlikely that the UK will be *required* to have a body with the same functions as an NEB, although those functions may continue to be desirable. The budget and role of the EHRC was subject to restrictive reform in the last Parliament. The 2015 Autumn Spending review announced that a further 25% cut in the budget of the Commission was expected over the next four years.<sup>114</sup> Civil society organisations may wish to work with the UK NHRIs to help ensure that Brexit does not encourage the further restriction of their work or budgets during the Great Repeal. Grantees and funders may wish to a) encourage the Government to commit to maintaining “A” standard accreditation pursuant to the Paris Principles and b) to recognise where the NHRIs may be able to provide a practical solution to the effective enforcement of individual rights post-Brexit (for example, the EHRC is proactively considering its access to justice functions, in light of the increasingly restricted access to legal advice and representation for discrimination cases).

### Commentary

100. As explained above, one of the primary risks of Brexit removing the floor of binding EU equality law standards is the risk of regression driven by the current political climate of austerity and apparent Government hostility towards enforceable human rights standards.
101. While Brexit will leave a space for civil society to work progressively to emphasise the importance of the international human rights framework for the protection of equal rights, including in the UN Convention on the Rights of the Child and the UN Convention on the Rights of Persons with Disabilities, this work is likely to require significant investment to counter hostility towards enhanced protections and remedies for inequality and discrimination in practice. For example, while civil society organisations could work to highlight the political problems caused by inequality and disadvantage and the failings in existing remedies; it is not likely, for example, that any Government will quickly be persuaded to replace the free-standing equality guarantee in the Charter by ratifying the

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<sup>114</sup> See, for example, the [campaign launched by the Unite and PCS Unions](#) to prevent further budget cuts and to preserve the work of the EHRC, in July 2016.

similar standard in Protocol 12 to the ECHR. No previous Government has chosen to take this step, of course.

102. However, there may be limited political appetite to remove existing guarantees for equality and fair treatment in an environment of increasing tension and hostility against minority groups. In light of the significant increase in reported race crime since the referendum, it would not appear to be politically or socially responsible to consider further watering down the domestic legal framework designed to protect individuals from unjustified discrimination on the grounds of their protected characteristics. The Prime Minister has adopted an egalitarian message as part of her leadership, positioning the Conservative party in an appeal to the working classes and committed herself and her Government to 'one nation' politics. This environment might appear to make an overt regression from existing legal protections for equality standards politically difficult.<sup>115</sup>

## Immigration and Asylum

***While immigration has been and will continue to be a 'hot' topic during the debate on Brexit, the extent to which our laws on immigration will change in respect of EU and non-EU citizens will depend largely on our relationship with the EU and the single market. However, the Common European Asylum System currently underpins how we implement our wider obligations to refugees in international law through our domestic system for asylum. A significant part of this System is the Dublin Framework, which determines when and where a claim for asylum in Europe must be processed. The UK is a beneficiary of this framework and returns a significant number of asylum seekers to other European countries as a result. Some non-EU countries already participate in the Dublin Framework and the Government has expressed an interest in securing participation as part of the Brexit negotiations. However, these countries are generally part of the European Economic Area. This political imperative may create some incentive for the UK to commit to the continued protection of minimum standards for the protection of refugees. Some commentators are concerned that, without a commitment to a shared European System, in the current environment, a race to further reduce protection to a lowest common denominator of standards could ensue.***

103. Although immigration has dominated the debate on Brexit, the extent to which the process will impact upon domestic immigration policy will depend largely on the type of relationship which is settled for the UK's future interaction with the EU.<sup>116</sup>

104. The most significant immigration issue to settle post-Brexit will be the status of EU citizens seeking new entry to the UK, who, it is expected may now to be treated as third

<sup>115</sup> See Prof Colm O'Cinniede, [Equality Rights in a Post-Brexit United Kingdom](#), Bright Blue Blog, 29 July 2016.

<sup>116</sup> Although I have been asked not to engage in this kind of speculation in the context of this paper, a significant number of papers have been written by others in the post-referendum commentary available thus far. These include papers exploring the different kinds of agreements on movement between the UK and the Union and the comparative models for immigration which the UK might follow. A full selection of papers has been compiled by the House of Commons in a Reading List, which organisations with an ongoing interest in immigration and the status of EU citizens following Brexit may find particularly useful. House of Commons Library, [Brexit, Immigration and Asylum: A Reading List](#), August 2016.

state nationals. At present, individuals from the EU enjoy the right to enter and work in the UK by virtue of their EU citizenship. The UK does not however participate in the free movement zone created by the Schengen common space. Instead, the UK continues to control its borders, checking the rights of EU and non-EU citizens alike to enter. The future management of rights of migration will, of course, raise human rights issues. Not least, the treatment of EU citizens who have already settled in the UK in reliance on their existing citizenship rights will continue to enjoy the protection of the ECHR regardless of the outcome of any negotiation between the UK and the EU about their status post-Brexit. While they remain within the jurisdiction of the UK, their treatment will need to comply with the standards imposed by the Convention. Significant questions may arise in connection with the lawful deportation of EU citizens (and their UK citizen children) including in connection with the rights protected by the ECHR and the UK's other international human rights commitments, including the right to respect for private and family life which they enjoy by virtue of Article 8 ECHR and property rights as protected by Article 1, Protocol 1 ECHR. This is an issue which has been raised recently by the Joint Committee on Human Rights in their call for evidence on human rights issues raised by Brexit. While the status of these individuals remains uncertain – and utilised as a 'bargaining chip' by some Ministers – there is a risk that Eurosceptic ire around immigration and the EU may be spread to the Convention as Ministers recognise that the rights of the individuals concerned are not entirely confined to their status as EU citizens, but are enjoyed in connection with the ECHR and by virtue of the HRA 1998. Ministers have most recently stressed their intention that EU citizens already settled in the UK should be accommodated within the settlement, but on the same terms as the benefits to be offered by EU countries to UK citizens currently settled overseas. This may seem a politically more attractive option, in light of the large numbers of UK citizens currently settled in other EU countries including Spain and France.

### *Asylum and Brexit*

105. There are two major issues around the treatment of asylum in EU law and EU legacy legislation which may be important considerations for civil society during Brexit negotiations and any period of Great Repeal: (a) the extent to which the UK might depart from the minimum standards of the Common European Asylum System; and (b) how and whether the UK will continue to be subject to the operation of the Dublin Framework on the distribution of refugees throughout the European space or any process which might replace that framework.

106. It is beyond the scope of this paper to consider the likely success of subsequent future agreements on the handling of migration across Europe, including with Turkey. These agreements *may* bind the UK while we remain a member of the EU. After Brexit, how far the UK will be able to influence the approach of our EU neighbours on asylum and other issues will depend on the nature of the new relationship agreed.



## The Common European Asylum System

107. The UK selectively participates in the Common European Asylum System (“CEAS”). It remains bound by the first of three original Directives on the processing and treatment of asylum seekers, but has opted out of later iterations. This means that the UK is already applying a different set of minimum standards on asylum to most of the rest of Europe. Broadly, domestic legislation in the UK on asylum is based on three EU Directives:

- a. *The Qualification Directive* (2004/83/EC): This Directive is designed to harmonise the criteria by which EU Member States determine who is eligible for protection consistent with the shared international obligations of each of the Member States of the Union. However, it also covers when individuals will be eligible for asylum outside the scope of those wider international obligations, including in the ECHR and the Geneva Convention (1951).

Article 15(c) of the Qualification Directive, for example, provides express protection in cases where there is “*a serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of internal or internal armed conflict*”. This is a risk which would not necessarily be covered by the principle of non-refoulement under the Geneva Convention (1951) nor necessarily protected by virtue of the “real risk” of torture, inhuman or degrading treatment test applied by Article 3 ECHR as both of those tests have generally required evidence that an individual is subject to a specific and measurable individual risk.<sup>117</sup>

If this express provision for humanitarian protection in the Directive falls away, there may be an incentive on the Government to remove this protection from domestic law and a role for civil society to play in explaining why, in the current climate, maintaining this protection for individuals subject to global conflict (including in Syria) is important for the UK’s role as a global leader.

- b. *The Procedures Directive* (2005/85/EC): The Procedures Directive sets minimum standards which govern the process of application, interview and decision making. It provides that free legal assistance should be provided for those who wish to appeal and for the right to an effective remedy before a court or tribunal, for example.<sup>118</sup> Access to the Tribunal for ordinary immigration applications has already been seriously constrained, by removing the right to in-country appeal and introducing draconian levels of fees for applications, hearings and appeals.<sup>119</sup> There may, if the requirements of the EU Directive no longer apply, be a renewed

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<sup>117</sup> See, for example, Stephen Knight, *The unintended consequences of the leftist case for Brexit*, Mansfield Chambers Blog, July 2016. The case law of the CJEU has made clear that the protection offered by Article 15(c) goes beyond the protection offered by Article 3 ECHR, which is thought to be broadly equivalent to Article 15 (b). See *Elgafagi*, Case C-465/07, at [28]. See also Case *C-562/13, Centre public d’action sociale d’Ottignies-Louvain-La-Neuve v Moussa Abdida*, Advocate General Opinion delivered on 4 September 2014. This case law is considered in a [recent analysis of the juridical protection offered by this provision](#) as recast in the 2011 Qualification Directive (its terms are the same) by the European Asylum Support Office.

<sup>118</sup> Articles 19 – 21.

<sup>119</sup> See, for example, Solicitors Journal, *Immigration tribunal fees hike to go ahead despite steep opposition*, 16 September 2016 (fees have increased by up to 500% from October 2016).

incentive for the Government to review access to the Tribunal for asylum seekers as part of the Great Repeal.

- c. *The Reception Conditions Directive* (2003/9/EC): The Reception Conditions Directive establishes minimum standards of living conditions for asylum applicants. It requires that applicants have access to shelter, food, healthcare and employment. The Directive has played an important part in securing a limited right to work for asylum seekers who have been waiting for longer than 12 months to have their claim determined.

In light of the Government's policy on the creation of a 'hostile environment' for migration, if the Directive falls away, regression on the treatment of asylum seekers would not be entirely unexpected. There will, of course, continue to be minimum standards of treatment below which the UK must not fall, by virtue of its obligations under the Geneva Convention (1951) and the Human Rights Act 1998. For example, the HRA 1998 establishes an obligation on the State not to impose destitution on asylum seekers through policies and practices which amount to a positive violation of the standards in Article 3 ECHR.<sup>120</sup>

108. These Directives are designed, of course, to establish harmonised *minimum* standards which apply across the EU. The trend across Europe has been towards less rather than greater enthusiasm for protection of higher standards. Most proposals for further reform both within the UK and at an EU level have been largely regressive and are expected to become more so as pressure to deal with the migrant crisis increases, particularly in States on the Eastern and Southern boundaries of the Union.<sup>121</sup> Although Brexit *could* free the UK to adopt more progressive standards for the reception and processing of asylum claims, the political climate in the UK makes this highly unlikely.

#### ***Brexit and the 'Calais Jungle'***

*Recent focus – with obvious good reason – for UK immigration and asylum practitioners has been on the extent of the UK's obligation to the residents of the 'Calais Jungle' seeking asylum in the UK pursuant to the Dublin Framework. Some who are anxious about the migration effects of Brexit have expressed concern that France will not continue the Le Touquet agreement which permits some degree of UK border control in and around the port of Calais. This agreement operates as a result of a bilateral agreement between the UK and France, not as a result of the UK's membership of the EU.<sup>122</sup>*

*Many unaccompanied children of the Jungle may enjoy rights by virtue of the Dublin framework to reunification with family members already lawfully in the United Kingdom. A number of cases are proceeding through the UK courts on the scope of the UK's obligations to those children currently in France thought to have a valid right to have their asylum claim considered in the UK. These claims hinge not only on the mechanics of the Dublin framework however, but on the compatibility of those measures with the UK's obligations to the relevant children under Article 8 ECHR. If a*

<sup>120</sup> Contrast *R (on the application of EW) v Secretary of State for the Home Department*, [2009] EWHC 2957 and *R (on the application of Limbuela) v Secretary of State for the Home Department* (2005) UKHL 66, (2006) 1 AC 396.

<sup>121</sup> Britte Van Tiem, *Why we need to think about what Brexit means for refugee protection in Britain*, *Open Democracy*, 8 August 2016.

<sup>122</sup> There are conflicting reports from France on how significant Brexit will be for the ongoing arrangements at Calais.

*Dublin-compatible return cannot take place in a manner compatible with the ECHR, it may be unlawful and a departure from the Dublin requirements justified.*<sup>123</sup>

*While the maintenance of the UK's borders remains a priority for the UK as part of the negotiations on Brexit, it is worth remembering that the current Dublin framework does create some albeit very limited protections for those currently seeking asylum in the UK. The requirements of the European Convention on Human Rights may place more rigorous obligations on the United Kingdom which override the general operation of the Dublin framework.*

## The Dublin Framework

109. The Dublin Regulation, now on its third iteration (Dublin III), establishes a common approach to the determination of the European State responsible for the examination of any asylum application.<sup>124</sup> The Dublin framework is complex, but its purpose is generally to ensure that claims are determined by the first EU state in which an application for asylum can be made, subject to important exceptions. The most significant of these is the principle of family reunification. In any case where an asylum seeker has a family member already settled within the UK, there is a presumption that their claim should be considered here. The importance of the operation of this guarantee has been considered recently in the context of the crisis in Calais, where there are said to be several hundred children unaccompanied in the Jungle waiting for the Home Office to process valid UK asylum claims based on the Dublin framework and their right to family reunification.
110. The UK participates in the Dublin framework and is a 'net beneficiary' of its operation because it is frequently used to stop asylum seekers reaching and claiming asylum in the UK have travelled across the rest of Europe. The UK currently returns or refuses significantly more claims based on the Dublin framework than the number of claims which it must accept. In 2014, the UK returned 252 applicants for asylum to other EU states and received only 69 applicants transferred from other States. Since 2003, a former Minister for Immigration has estimated that the UK has transferred around 12,000 applications for asylum to other countries under the Dublin framework.<sup>125</sup>
111. The Dublin framework is being placed under increasing pressure by the migrant crisis as Southern European States face significant numbers of arriving refugees. The European Court of Human Rights has already concluded that reception conditions in Greece may make return pursuant to the Dublin system impossible without violation of Article 3 of the ECHR.<sup>126</sup> Hungary has withdrawn unilaterally from accepting transfers pursuant to the Dublin framework. Negotiations amongst other EU States on reform has been rejected by the UK so far, which has the potential to opt-out of any new reforms to the Dublin mechanism while it remains a member. It is far from clear what the value of any reformed Dublin mechanism would hold for the UK or for the protection of asylum seekers in practice. Some have predicted that the Dublin mechanism is "on its last legs"

<sup>123</sup> *Home Secretary v ZAT and Others* [2016] EWCA Civ 810

<sup>124</sup> [Regulation \(EU\) No 604/2013](#) of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

<sup>125</sup> Andrew McIntyre, *Brexit and Asylum*, Brick Court Brexit Blog, 20 July 2016.

<sup>126</sup> *MSS v Belgium & Greece* (2011) 53 EHRR 2 at 323 – 361.

in any event. However, some commentators have suggested that, post-Brexit, the UK may be given little choice between the reformed mechanism or a less favourable new bilateral agreement.<sup>127</sup>

### The application of the Charter

112. The most significant impact which the Charter has had in the domestic sphere has been in connection with immigration and asylum cases and the right to a fair hearing. The free-standing right to a fair hearing in Article 47 of the Charter allows individuals to challenge the decision making processes on immigration, asylum and deportation in a way which is not possible under the case law of Article 6 ECHR.

#### ***Fair trial rights and the Charter of Fundamental Rights***

*ZZ had his permanent residence status in the UK revoked as the Secretary of State concluded his presence was “not conducive to the public good”.<sup>128</sup> 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 on a preliminary reference.*

*The CJEU stated that the significance of the fundamental right guaranteed by Article 47 of the Charter had to be taken into account and that although Article 52(1) of the Charter allowed limitations on the exercise of Charter rights, these had to respect the essence of the fundamental right and be proportionate such that Article 30(2) of the Directive read in light of Article 47 of the Charter could not have the effect of failing to provide the level of protection guaranteed. So, in any closed proceedings, the person concerned had to be able to ascertain the reasons on which the decision was based.*

113. If the Charter falls away on Brexit, this seam of protection will be lost. However, it is difficult to assess how significant this loss will be on the basis of the limited amount of case law determined thus far. The extra protection offered by the Charter has not deterred the Government in a range of reforms already designed to circumscribe access to fair hearings by those subject to immigration control. 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 ECHR or the Charter. However, challenges to some of these reforms are pending.

### Commentary

114. Concern has been expressed about specific protections provided in EU law but not replicated in the international human rights framework or the ECHR (including, for example, the scope of humanitarian protection as defined in the Qualification Directive).

<sup>127</sup> Andrew McIntyre, *Brexit and Asylum*, Brick Court Brexit Blog, 20 July 2016.

<sup>128</sup> *ZZ v Secretary of State for the Home Department* Case C-300/11

115. As the EU is already moving towards regression, the UK Government will have a clear incentive to avoid the “pull factor” of greater protection than would otherwise be offered on mainland Europe. Immigration and asylum specialists are concerned that without the reinforcing floor of minimum shared EU standards, a regressive race to the bottom might begin. The political incentives to be robust will be heightened in light of the increasing numbers of people seeking asylum in Europe, fleeing conflict in Syria and other parts of the world. Specialists are concerned that the standards set by Europe in a post-Brexit era are likely to become a ceiling rather than a floor for those set by the UK authorities.<sup>129</sup>

116. However, it is likely that the UK will have a political interest in seeking to remain part of the Dublin framework (or its next iteration) as other EEA and non-EU European countries have sought agreements to bring themselves within the Dublin arrangements. This is not likely to be a major priority for the other EU nations and there could be an opportunity to secure through negotiation some agreement of participation based on an agreement to secure minimum standards pegged to the existing CEAS standards. At a minimum, there may be a role for civil society at a European level working to secure the continued application of enhanced humanitarian protection across Europe.<sup>130</sup>

117. The primary implication for migrants and refugees of the Brexit process may be political rather than legal. The environment since the referendum in the United Kingdom has been fairly described as toxic, with a significant increase in racially motivated hate crime and political attacks on migration, including from senior figures in Government. It is in this hostility where the greatest risk to the individual rights of migrants may yet lie.<sup>131</sup>

## Data Protection and Information Rights

***The protection offered by EU law for personal information is found in both the Charter and in dedicated EU legislation designed to protect personal data. It is generally accepted that within the scope of EU law, the specific protection offered within the EU for data and privacy is a valuable supplement to the protection offered by the European Convention on Human Rights. As the EU and its Member States are forced to reconsider their approach to data retention, our digital lives and bulk data, the framework for personal data protection is also being overhauled. The UK moves to adopt wide-ranging statutory powers for the bulk handling of personal data in the Investigatory Powers Bill. Yet, challenges to the existing law on surveillance are pending before both the CJEU and the European Court of Human Rights in Strasbourg.***

<sup>129</sup> See for example, Britte Van Tiem, *Why we need to think about what Brexit means for refugee protection in Britain*, *Open Democracy*, 8 August 2016; Compas Breakfast Briefing, *The UK and CEAS – A leaving matter?*, June 2016.

<sup>130</sup> Lucy Gregg, *What Brexit means for... the refugee crisis*, *Politics.co.uk*, 4 July 2016

<sup>131</sup> New Statesman, *What are the consequences of Brexit for the refugee crisis?*, 29 June 2016.

***The UK is yet bound to implement the new EU Data Protection Framework by May 2018. Data protection, data retention and privacy may prove one of the early tests of the UK's human rights obligations in the context of Brexit.***

118. The CFREU diverges from the ECHR in the language which it adopts in connection with the protection of personal information. While the right to respect for private and family life, home and correspondence protected by Article 8 ECHR does protect the right to enjoy personal information without unjustified interference, the Charter now spells this out in express terms. Article 8 of the Charter provides:

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.*

119. This reflects the protection long offered by the EU Data Protection Directive (Directive 95/46 C), given effect in UK law by the Data Protection Act 1998 and supervised by the Information Commissioner's Office. This combined regime sets standards for all data controllers who handle personal data about individuals. Data controllers must comply with binding data protection principles when processing personal information. The regime is regulated by the Information Commissioner's Office and non-compliance can incur sanctions for those who behave unlawfully. Individuals are data subjects who enjoy individual rights in relation to the handling of personal information, including the right to know what data is held about them by any data controller through the submission of a 'subject-access request'.

120. For several years, the EU has been working to secure agreement on a wholesale rewrite of EU law on data protection, with widespread consultation across Europe and within the UK. In April 2016, the EU adopted a new General Data Protection Regulation (GDPR) and an accompanying Data Protection Directive, which must be given effect in UK law by 2018.<sup>132</sup> Some of the key changes include:

- a. **Enhanced data subjects' rights:** GDPR introduces a 'Right To Be Forgotten' which means that, subject to some exceptions, data subjects will be able to request that their personal data is erased by the data controller and no longer processed. This follows recent case law of the CJEU.

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<sup>132</sup> [Regulation \(EU\) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC \(General Data Protection Regulation\); Directive \(EU\) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA](#)

- b. **Security breaches:** GDPR requires that, as soon as the data controller becomes aware that a personal data breach has occurred, it should without undue delay and, where feasible, not later than 72 hours after having become aware of it, notify the Information Commissioner's Office ("ICO"), unless the controller is able to demonstrate that the breach is unlikely to result in a risk for the rights and freedoms of individuals.
- c. **Consent:** Like the DPA, GDPR will require data controllers to have a legitimate reason for processing personal data. If they rely on the consent of the data subject, they must be able to demonstrate that it was freely given, specific, informed and unambiguous for each purpose for which the data is being processed. Silence, pre-ticked boxes or inactivity will no longer constitute consent.
- d. **Data protection officer:** Most organisations handling personal data, both data controllers and data processors, will require a data protection officer who will have a key role in ensuring compliance with the regulation.

121. The new GDPR will replace the existing 8 principles of data protection with 6 (which are designed to offer greater protection). Article 5 of the GDPR states that personal data must be:

- 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.<sup>133</sup>

122. While many of these principles reflect the requirements of proportionality and legal certainty imposed by the protection of private life in Article 8 ECHR, their specificity and their value in subsequent interpretation by the CJEU may be lost except in so far as the UK is required to abide by EU standards by virtue of its new trading relationship or voluntarily.

## Commentary

123. There has been some degree of domestic criticism of both the existing Data Protection Act 1998 and the new EU Data Protection Framework.<sup>134</sup> However, it is

<sup>133</sup> The ICO has produced a [helpful summary and overview](#) of the impact of the GDPR.

<sup>134</sup> See House of Commons Library Briefing Paper, *Brexit: Impact across Policy Areas*, ed Vaughne Miller, 26 August 2016, para 11.2.

unlikely that there will be any appetite for wholesale repeal of data protection law during the Great Repeal. The European Convention on Human Rights will continue to require that the State refrains from interfering with personal information and correspondence.<sup>135</sup> However, an early test of the UK's concerns may come during the transposition of the new EU Data Protection Directive. If the timetable set out by the Government for Brexit is kept, this law will have to be transposed alongside the negotiations which will see the UK leave the Union (during early 2018).

124. While the provisions of the new Framework could be transposed on a temporary basis - to stay in force while the UK remains bound by its international obligations as a Member State – it is thought unlikely that there will be significant political appetite to revisit the underlying guarantees for personal information longer term. Not least, there is an established history by the EU of requiring its trading partners to illustrate that their domestic arrangements for the protection of personal data are adequate to be considered equivalent to the safeguards in operation within the EU.<sup>136</sup>

### *Data Retention*

125. Allied to the EU law on data protection is the contentious question of lawful data retention. In *Digital Rights Ireland*, the CJEU overturned the EU Data Retention Directive, determining that its provisions were incompatible with the provisions of the Charter and contained insufficient safeguards for the protection of personal privacy and personal data.<sup>137</sup>

126. The EU Data Retention Directive was an instrument much promoted by the United Kingdom.<sup>138</sup> It created a pan-European requirement for telecommunications companies and Communications Service Providers to retain user data for up to two years, subject to criteria specified in the Directive. Following *Digital Rights Ireland*, the domestic Regulations which gave effect to that measure – the Data Retention Regulations – lacked a sound basis in law following the scheme of the ECA 1972.

127. In July 2014, the Government brought forward emergency legislation designed to create a domestic regime for data retention, in the Data Retention and Investigatory Powers Act 2014 (“DRIPA”). DRIPA is subject to a sunset clause and will lapse in December 2016. DRIPA has incorporated many of the problems of the Data Retention Directive identified by the CJEU and is itself subject to litigation in the domestic courts and is currently subject to a preliminary reference to the CJEU in Luxembourg. Despite

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<sup>135</sup> See for example, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, App No 931/13. In this case, the Court upholds the Finnish Data Protection rules against a challenge by a media organisation which sought the right to publish tax data of individuals in bulk.

<sup>136</sup> The issue of data protection proved a difficult aspect of the ongoing negotiation of the Transatlantic Trade and Investment Partnership. Reports had indicated that some US companies had sought to introduce lower standards into the agreement to better reflect the limited privacy guarantees offered to US citizens by US consumer law. In order to reach an agreement, [EU Commission officials](#) indicated that the TTIP agreement will not deal with the issue of data protection at all. However, over summer 2016, over [40 US companies](#) settled an agreement successor to safe harbour which promises to meet similar standards to the EU Data Protection regime in order that they might transfer data on their EU based customers to servers based in the US. It is thought likely that some kind of similar agreement will need to be settled in order to ensure that UK companies are able to trade effectively in the single market. The EU Data Protection Directive – and its replacement in the GDPR - applies to the countries of the EEA.

<sup>137</sup> Joined Cases C-293/12 and C-594/12.

<sup>138</sup> [Directive 2006/24/EC of 15 March 2006](#) on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC



this legal uncertainty, Parliament is currently considering new powers to replace DRIPA, based on the same model, in the Investigatory Powers Bill.<sup>139</sup> That legislation is expected to pass largely unchanged in late 2016.

## Commentary

128. The field of data retention may prove a particularly fertile area of controversy following Brexit. It is unlikely that the UK will leave the Union before a judgment is handed down on the legality of DRIPA. The advice from the Advocate General in that case strongly suggests both that DRIPA is unlawful and inconsistent with the requirements of EU law and that the model adopted in the new Investigatory Powers Bill may face similar difficulties (see below). While the Government may see Brexit as a means by which to avoid constraints on the expansion of bulk powers of surveillance built on expanded powers of data retention, it is unlikely that Brexit will easily resolve this issue. A significant number of other EU states have changed their laws to remove legislation based on the original Data Retention Directive. Others still had refused to implement it from the outset, citing concerns about its compatibility with fundamental rights and their domestic constitutions.

129. The trend within the EU is towards more targeted forms of retention; within the UK towards broader, bulk models of retention, seemingly inconsistent with the underlying guidance from the CJEU. This disparity might initially make Brexit appear an attractive and opportune option for the UK Government. However, discord on an issue as significant as how the State requires private institutions to collect, collate and store information on people within its reach could raise difficulty in securing an agreement on the relationship between the UK and the EU post-Brexit where the UK is seeking to secure access to the EU as a market (and in turn, to the data of EU citizens).

### **Data Retention, surveillance and individual privacy: a case-study**

*Following the revelations of Edward Snowden of the extent to which the UK and US Governments have been capable of monitoring the breadth of our online lives through bulk data retention and surveillance, this issue has been at the forefront of human rights dialogue on the protection of privacy and the preservation of national security.*

*Independent of those revelations, the Court of Justice of the European Union in **Digital Rights Ireland** concluded that the EU Data Retention Directive – which required Member States to provide for telecommunications services to retain individual data for up to two years – was incompatible with the protections offered to personal information by the Charter.*

*In 2016, the Court of Justice of the European Union will give judgment in **Watson & Ors**, a case which challenges the legality of the Data Retention and Investigatory Powers Act 2014 (“DRIPA”) on similar grounds. Although DRIPA adopts a similar model of retention to that in the Data Retention Directive, the Court of Appeal accepted the Government’s argument that the decision in **Digital Rights Ireland** was not conclusive for domestic legislation on data retention. In July 2016, the Advocate General’s decision in the case indicates strongly that there are inadequate safeguards, including through prior judicial oversight, to protect individual privacy in that Act. The*

<sup>139</sup> The progress of the [Investigatory Powers Bill](#) before the UK Parliament and the legality of DRIPA has been dissected by a range of sources. See, for example,

*AG dismisses the Government's case that the determination of Digital Rights Ireland was irrelevant and emphasises that rights in the Charter are not tied to the minimum standards of interpretation adopted by the European Convention on Human Rights particularly where specific rights are afforded greater, specific protection by the Charter.*<sup>140</sup>

*Although the judgment of the Court is awaited, this case illustrates the significance of the role of the CJEU. If the CJEU determines that the domestic legislation may be inconsistent with the Charter and the domestic claim is decided accordingly, the ECA 1972 may operate to ensure that DRIPA must be disapplied. Although DRIPA will lapse in December 2016 in any event, similar powers have been built into the new Investigatory Powers Bill which is expected to pass by the end of 2016.*

*If Brexit proceeds, there may be a narrow window where a Charter-based challenge to the new Investigatory Powers Act 2016 in EU law may be available.*

*However, if Brexit proceeds, the trend in the jurisprudence of the European Court of Human Rights in Strasbourg suggests similar safeguards will be required by virtue of the UK's obligations under the ECHR.<sup>141</sup> Two major challenges to the UK's approach to bulk surveillance are pending before the European Court of Human Rights now, with judgment expected on an expedited timetable.<sup>142</sup>*

130. It remains the Government's position that the ECHR does not prevent the retention of data in the form proscribed by both DRIPA and the Investigatory Powers Bill.<sup>143</sup> However, this analysis has been disputed by many commentators who have highlighted that recent case law from the European Court of Human Rights have confirmed the need for specificity in the application of surveillance powers and the need for independent and objective oversight and authorisation, including by a judicial authority.<sup>144</sup> A significant number of cases involving the United Kingdom and raising the compatibility of existing arrangements for data retention and bulk surveillance are pending before the European Court of Human Rights.<sup>145</sup> It is difficult to speculate about the outcome of those cases, of course. However, it is expected that the European Court of Human Rights will draw upon the analysis of the CJEU in *Digital Rights Ireland* (and subsequent cases) to adopt a similarly robust approach to the legality of these measures. Thus, while the Charter may no longer bind the UK in the longer term, the European Court of Human Rights does not operate in a vacuum. It has long been recognised that in some circumstances, the scope of an individual right and the margin of discretion afforded to individual Contracting Parties to the ECHR is shaped by shared European practice, which the decisions of the CJEU might yet inform.

131. This development of the law in this field is constitutionally significant not only for the UK and Europe but the wider world. The development of bulk surveillance powers based

<sup>140</sup> See C-203/15. See paras 190 – 191, para 79.

<sup>141</sup> See, for example, *Zakharov v Russia* App No 47143/06, 4 December 2015, paras 246,260. The Court in *Zakharov* expressed particular concern about a Russian surveillance law which permitted bulk collection of mobile telephone data. The only safeguard against abuse of this absolute discretion was effective judicial authorisation, capable of conducting a more focused assessment of the proportionality of an individual measure. However, the authorisation process in that case proved inadequate.

<sup>142</sup> *Big Brother Watch and others v UK*, App No 58170/13; See also *10 Human Rights Organisations v UK*, App No 24960/15

<sup>143</sup> See for example, the [Human Rights Memorandum](#) which accompanies the Investigatory Powers Bill.

<sup>144</sup> *Zakharov v Russia* App No 47143/06, 4 December 2015; *Szabó and Vissy v Hungary*, App No 37138/14.

<sup>145</sup> Including *Big Brother Watch and others v UK*, App No 58170/13; See also *10 Human Rights Organisations v UK*, App No 24960/15

upon the capacities of States to engage in bulk data retention has been exposed by the Snowden revelations about the capacities of the NSA and GCHQ in their PRISM and TEMPORA programming. In many countries in the global and economic 'North-West' have reacted to these leaks by further circumscribing the powers of Government agencies to gather information about individual citizens. However, the United Kingdom, through the Investigatory Powers Act 2016 will formalise the legal basis for bulk surveillance through the codification of a model which is at best legally unstable and at worst, inconsistent with the international obligations of the UK both within the EU and as a member of the Council of Europe. This approach has already sparked interest in countries with less scrupulous human rights records than that of the UK. For example, it has been reported that the Chinese Government has already produced draft legislation modelled on the Investigatory Powers Bill to provide a legal platform for its own bulk surveillance programme.

132. The issue of data retention is likely to continue to be a contentious one for the United Kingdom post-Brexit. Civil society organisations have already invested significant energy in responding to the proposals in the Investigatory Powers Bill, but with little gains during the Bill's passage. In light of the global controversy over the development of bulk models of surveillance, engagement by UK civil society organisations in the debate about the proper scope of data retention law, within the EU, at the Council of Europe and at a global level will be valuable. This work is time-consuming, technical and politically contentious, but its impact could be global. This work has already begun, for example, in the work done by Privacy International and other organisations on the *International Principles on the Application of Human Rights to Communications Surveillance*. If the UK continues with a legislative framework for data retention and surveillance which is out of step with standards in the EU and the ECHR, investment by funders and civil society organisations in global dialogue about shared international standards on privacy and data retention will be valuable.

## Part E: INFORMING THE GREAT REPEAL

### Preparing for Brexit

133. There are yet too many “unknown unknowns” for a robust analysis of how precisely the work of civil society on the protection of human rights will be affected by the seismic process of removing the UK from the EU and unpicking the legacy of its membership. Although precise mapping may be premature, there are a few signposts highlighted in this paper which might help:

- a. European Law – through its Treaties, General Principles and the Charter of Fundamental Rights – does currently add an additional layer of protection for human rights in the UK;
- b. That protection overlaps with many of the UK’s other obligations in international law, including the ECHR, but it does offer additional protection in some areas;
- c. By virtue of the ECA 1972, if a right is protected by EU Law, it is granted stronger protection within the domestic legal system than is offered by either the Human Rights Act 1998 or the common law;
- d. In a number of areas, the application of the law by the CJEU has helped ensure a more progressive approach to individual rights within UK law;
- e. If Brexit proceeds, the principal losses for the general system for the protection of human rights in the UK will be a) the loss of the ability to challenge primary legislation inconsistent with human rights standards protected by EU law in the ECA 1972; and b) the loss of the influence of the CJEU;
- f. Brexit will also lead to a loss of specific protection offered in individual areas of law by dedicated EU legislation which may underpin existing standards in domestic law. That EU protection is offered by legislation, soft-law, programmes and grant making, and through the activities of States working through the EU institutions, including the EU Fundamental Rights Agency;
- g. If those standards fall away, there is a political risk that the standard of protection may drop in the UK;
- h. That risk is difficult to define and it will be informed by a) the nature of the new relationship between the UK and the EU and b) the UK’s other binding human rights obligations in international law, including the ECHR;
- i. The risk has been temporarily neutralised by a commitment from the Government to ‘freeze’ the legal legacy of our EU membership at the point of Brexit in a Great Repeal Bill;
- j. The prediction that the Great Repeal Bill will empower Government to review and change the law through secondary legislation may make change more difficult to resist and to challenge should it come;
- k. Whatever the outcome of this process, the logistics of Brexit will divert significant Executive and Parliamentary resources from the ordinary business of Government, creating a separate and distinct challenge which may require scrutiny to ensure that individual rights are not endangered.

134. It may be premature for many in civil society to divert significant resources to dealing with the impacts of Brexit on the protection of fundamental rights this paper has identified some areas of work worth consideration:

- a. *Are there areas of your work where EU law underpinning is particularly influential?* Identifying how a change might affect your priorities or working practices and whether you have the capacity to influence the Brexit negotiations may be important. Informing the negotiations may be difficult, but understanding the political challenges for the Government and the EU in your own area of expertise may help identify areas of potential influence if they do exist (see, for example, the consideration of the Dublin framework and the commitment to cross-border policing, above);
- b. *Are there alternatives to the protection offered by EU law which you can work to improve, enhance or support?* For example, should donors be thinking about gaps in funding which might arise? How will UK civil society continue to participate in EU networks for the protection of human rights? What can be done to ensure the UK's commitment to its wider human rights obligations? What role does UK civil society play in the Council of Europe? What benefits does that work bring to the protection of human rights in the UK?

135. However, the earliest intervention where civil society may be able to make a practical impact will be in framing the Government's attitude to the Great Repeal. If the law is to be frozen in time, precisely how it is frozen and for how long will be in the hands of Parliament and open to engagement and influence.

## Informing the Great Repeal Bill

136. Some commentators have observed the Great Repeal Bill will only take effect after Brexit occurs and might never have any implications for domestic law at all.<sup>146</sup> Some suggest that the Bill may be used as 'smoke and mirrors' to occupy Parliament while the logistics of Brexit are finalised.<sup>147</sup> However, should the Great Repeal Bill ("GRB") proceed as planned, there will be several opportunities for civil society to inform the process by which the Government intends any eventual repeal might occur, during the consideration of the GRB in the 2017-2018 Parliamentary session. Some issues for consideration might include:

- a. ***Shaping the "Great Repeal"***: The label "Great Repeal" overpromises. The proposed Bill appears intended to secure pre-emptive Parliamentary agreement about the repeal of the ECA 1972, to take effect only after Brexit is agreed. In so far as the ECA 1972 only gives effect to EU law which binds the

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<sup>146</sup> Since the Conservative Party Conference in early October 2016, academic and political commentary on the limits of the GRB has been swift. See, for example, Professor Mark Elliott, *On the sidelining of Parliament: The Brexit Secretary's statement to the Commons*, Public Law for Everyone, 10 October 2016; S. Douglas-Scott, *'The 'Great Repeal Bill': Constitutional Chaos and Constitutional Crisis?*, U.K. Const. L. Blog, 10 Oct 2016.

<sup>147</sup> See Professor Mark Elliott, *Theresa May's "Great Repeal Bill": Some preliminary thoughts*, Public Law for Everyone, October 2016.

UK while it is a member of the Union, there is some debate about whether this repeal will have a significant substantive effect. They argue that repeal of the ECA 1972 will have little effect as the EU law commitments which it is designed to implement in domestic law will fall away.

However, the promised Bill may to create the foundation for the wider plan for a further “Great Repeal” following review of legislation with an EU pedigree. It is expected that the Government will – following the model in the ECA 1972 – ask Parliament to create a mechanism for the reform and repeal of EU legacy legislation in secondary legislation. This is important because this kind of model reduces Parliament’s role in legislation significantly.<sup>148</sup> Unlike primary legislation, secondary legislation cannot be amended by Parliament during its passage. These measures are subject to a lesser degree of scrutiny, where a measure is either approved or rejected with limited scope for debate.

- b. ***Great Repeal and the role of Parliament:*** The creation of broad delegated powers for the Executive to change the scope of substantive EU legacy legislation would be inconsistent with the need for effective and robust scrutiny, particularly important in the context of measures designed to protect the human rights of individuals and groups. Civil society organisations may wish to be prepared to highlight pieces of legislation and issues which would be particularly ill-suited to alteration by secondary legislation. This could be a valuable contribution for civil society organisations to make during the settlement of the terms of any GRB, and could illustrate clearly how inappropriate it would be to alter the law designed to protect individual rights without proper scrutiny.
- c. ***Great Repeal and the Union:*** The electorate living in Scotland and Northern Ireland voted overwhelmingly to remain in the EU. The result of the referendum has naturally exacerbated tensions in Scotland around independence. The UK’s only land border with the EU following Brexit will be in Northern Ireland. In light of already complicated constitutional questions over legitimacy, seeking to rewrite law agreed at Westminster (including by MPs from Scotland and Northern Ireland) without full and effective consultation is likely to raise further difficult political questions of propriety.
- d. ***Great Repeal and Human Rights:*** The Government might consider using this model to reform key measures designed to protect human rights, for example, perhaps including Equality Act 2010. Historically, the Joint Committee on Human Rights has consistently expressed concern about the excessive use of delegated powers to legislate in a way which interferes with individual rights, citing the limited opportunity for Parliamentary scrutiny of the legality of the measures before they might take effect.<sup>149</sup>

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<sup>148</sup> See Professor Mark Elliott, *On the sidelining of Parliament: The Brexit Secretary’s statement to the Commons*, Public Law for Everyone, 10 October 2016

<sup>149</sup> See for example, Seventh Report of 2010-11, *Public Bodies Bill*, HL 86/HC 225, para 1.54: “The breadth of delegation proposed in this Bill appears wholly inappropriate. We reiterate our view that parliamentary oversight of matters which engage individual rights and liberties is particularly important, and delegated powers which may impact upon individual rights or

## Delegated legislation and informing change

137. Civil society organisations may wish to consider early whether they can contribute to the work which Parliament will do following the introduction of any GRB. If the Bill is introduced to plan, this could be at any time following May 2017. There are a number of relevant Parliamentary Committees which will have an interest in the propriety of any significant proposals which would allow the Government to change the substance of domestic law. These include the House of Lords Delegated Powers Committee, the House of Lords Committee on the Constitution and the Joint Committee on Human Rights. If reforms are eventually introduced by delegated legislation, they will be considered by both the Joint Committee on Statutory Instruments and the House of Lords Merits Committee.
138. During the passage of any GRB, Parliament may wish to consider whether any model for the approval of delegated legislation designed to alter existing EU-legacy legislation would be appropriate at all, even one based on a specially designed ‘super-affirmative’ procedure (which grants greater opportunity for scrutiny by Parliament than ordinary delegated legislation). Critics of the Human Rights Act 1998 have been disparaging about the function of Section 10 HRA 1998 which permits the Government to change the law using delegated legislation following a judgment of the European Court of Human Rights or a declaration of incompatibility by the domestic courts.<sup>150</sup> This measure is designed to allow Parliament to fast track changes to primary legislation where there is an ongoing violation of human rights clearly established by the courts. It can only be used following one of a number of complex ‘super-affirmative’ procedures which involve scrutiny by the Joint Committee on Human Rights. However, both this mechanism and that provided for in the ECA 1972 is only triggered after the substantive consideration of an issue at length either by the domestic courts or the European Court of Human Rights, in respect of Section 10 HRA 1998, or by the institutions of the European Union (including UK MEPs in the European Parliament). It is far from clear whether the GRB would envisage any prior scrutiny, consultation or engagement before the implementation of Government policy on repeal or reform of EU-legacy legislation by secondary instruments.

## Brexit and the Bill of Rights Debate

139. It is impossible to consider the implications of Brexit for the protection of human rights within the UK without acknowledging the Government’s intention to reform the existing legal framework for the protection of human rights in the UK and its commitment to repeal the Human Rights Act 1998. Both the Prime Minister and the new Lord Chancellor have committed themselves to the Conservative Party commitment to repeal the HRA 1998. The Prime Minister has indicated that she does not intend – for now – to

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*liberties and affect the ability of the UK to meet its international obligations must be justified by the Government and accompanied by adequate safeguards to ensure that infringements do not arise because secondary legislation has been subject to inadequate parliamentary oversight.”* The role of Parliament in the Government’s decision to trigger Article 50 of the Lisbon Treaty is at the heart of the current Brexit litigation. The claimants raise a similar argument, based in concern that a prerogative power cannot be exercised by the Government to deprive individuals of rights already guaranteed by Parliament, including by virtue of the ECA 1972. See *Miller, Dos Santos & Ors v Secretary of State for Exiting the EU*.

<sup>150</sup> See, for example, Michael Pinto-Duchinsky, *Bringing Rights Back Home*, Policy Exchange, 2011, page 10.

act on her own personal view that the UK should reconsider its membership of the European Convention on Human Rights. However, the outcome of the referendum and the process of Brexit has had a number of impacts on the process of the debate about the UK's commitment to human rights protection in UK law:

- a. While the Government is investing political capital in the process of Brexit, reform of the HRA 1998 would involve a second major controversial constitutional change which Parliament may be unwilling to consider without a significant political reason to do so. This may reduce the immediate likelihood that proposals for reform will be forthcoming, unless new circumstances arise to create a new political incentive for the Government to act.<sup>151</sup>
- b. The removal of the additional protection for fundamental rights offered by EU law and the ECA 1972 creates a greater incentive for the protection of the minimum standards and guarantees offered by the HRA 1998 and the UK's commitment to its wider international human rights obligations.
- c. The HRA 1998 has a broader reach than the rights protected by EU law and the ECA 1972. Brexit should highlight how valuable the HRA 1998 can be for individual rights protection and how far it works to protect parliamentary sovereignty and the role of each of the UK institutions of Government in the protection of individual rights.
- d. If Brexit proceeds, then the UK is no longer bound to its membership of the ECHR by its participation in the EU.
- e. While the economic impacts of Brexit are as yet unclear, if the process does impact adversely on the economy, this will create further pressure on the resources available to central Government, public authorities and agencies and could endanger the protection of individual rights in practice.
- f. The hostile political environment which has followed the referendum has created new risks and challenges. Those with more isolationist views have been encouraged by the result of the referendum. There is some overlap between those who support Brexit and attack the protection offered by human rights standards in domestic and international law. Attacks in the media and by politicians, including at the highest level, on the protection of human rights have been widespread. The Prime Minister has most famously attacked the contribution made by 'left-wing human rights lawyers' in challenges to the actions of the UK Armed Forces.<sup>152</sup> Civil society organisations have reprioritised their work to highlight the danger faced by minorities as racist threats have increased. Politically, these challenges highlight the importance of constraints on Government action to protection minorities and the safeguards which are inherent in both the Human Rights Act 1998 and the UK's wider international law obligations. However, it is crucially important to remember that support for Brexit and hostility to human rights protection are not always commensurate. Euroscepticism is not confined to any single part of the political spectrum. Vocal support for the HRA 1998 and the ECHR has been expressed by many important figures in the Conservative Party, including by the current Minister for Brexit,

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<sup>151</sup> Notably, the Government has generally moved away from attacking the HRA 1998 holistically, focusing more recently on specific complaints, including on the application of the Act extraterritorially to the Armed Forces.

<sup>152</sup> See, for example, Evening Standard, *Theresa May attacks 'left-wing human rights lawyers harassing UK troops'*, 5 October 2016



David Davis MP and by others including Dominic Grieve QC MP and Jesse Norman MP, for example. It will be important in this period of heightened tension that civil society organisations remember that neither of these issues are strictly partisan. Effective working on either will be secured most effectively by cross-party engagement.

140. The Brexit process will bring the unsettled nature of the UK's constitutional arrangements into sharp focus. It may create space for civil society to act to better emphasise the importance of rights protection, including for those disenfranchised from mainstream politics and for the protection of the rights of minorities. Reflection on the political implications of the Brexit process may help identify opportunities for public engagement and new ways to highlight the important role played by the HRA 1998 in our constitutional arrangements.

141. This is not a time for complacency. While the Government's primary attention is on the mechanics of Brexit, the front bench of the Conservative Party remains committed to restricting the protection of human rights in UK law. This trend towards regression is reflected on the global stage in increasing demands for respect for national sovereignty and disrespect for international law standards. The challenging narrative both at home and globally remains focused on fewer rights for fewer people. The work of well informed and well-supported civil society will be crucial.

## Glossary

<b>Acquis</b>	The term “acquis” is used to refer to the collective body of EU law, including legislative instruments and case law of the Court of Justice of the EU.
<b>Member State</b>	All States part of the EU are called Member States.
<b>EU Treaties</b>	The Treaties which govern membership of the European Union are usually referred to as the EU Treaties. Currently this includes the Treaty on European Union and the Treaty on the Functioning of the European Union which are collectively also known as the ‘Lisbon Treaty’.
<b>General Principles</b>	Core principles of EU law recognised by the Court of Justice of the European Union (and earlier, the European Court of Justice).
<b>Competence</b>	Where it is recognised that Member States have agreed to work through the EU on an issue, it is said that the EU has ‘competence’ in that area.
<b>Primacy</b>	In areas where the EU has competence, EU law is said to have ‘primacy’ over domestic laws. This means where there is a conflict, EU law must prevail.
<b>Regulations</b>	The primary legislative instrument of the EU. Regulations bind Member States directly and take effect in domestic law by virtue of the European Communities Act 1972.
<b>Directives</b>	The secondary legislative instrument of the EU. Directives set legislative goals, frameworks and standards which must be achieved, but are implemented domestically by States. If States fail to implement Directives effectively, they can be relied on by individuals directly.
<b>CJEU</b>	The <b>Court of Justice of the European Union</b> is the ultimate arbiter of the interpretation and application of EU law. For more information see paragraph 10(c).
<b>Preliminary Reference</b>	National courts can refer questions on the interpretation of EU law to the CJEU, including in cases between individuals where they rely on EU law or domestic law which implements EU standards. This process is called making a ‘preliminary reference’.
<b>ECA 1972</b>	The <b>European Communities Act 1972</b> 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.
<b>Direct Effect</b>	Regulations and Directives which have passed their implementation date have direct effect in domestic law. This means that individuals can rely on them in domestic law against the State, including before domestic courts.
<b>Indirect Effect</b>	EU law cannot generally be used directly against other individuals. However, in so far as it creates obligations in domestic law which may regulate others’ conduct, it is said to have indirect effect and can be relied on in litigation.
<b>CFREU</b>	The <b>Charter of Fundamental Rights of the European Union</b> binds all Member States of the EU. It protects rights and freedoms which reflect the General Principles of the European Union.
<b>EUFRA</b>	The <b>EU Fundamental Rights Agency</b> is an institution of the EU established to support research and education on the promotion and protection of fundamental rights.

## Author

Angela Patrick was called to the bar in 2003 and is a member of Doughty Street Chambers. She is a specialist in public law and public international law, civil liberties and human rights.

She has particular expertise in matters involving the implementation of international human rights standards in domestic law, policy and practice. She brings to her practice an acute understanding of the complex relationship between law, politics and international relations, especially valuable in difficult cases involving national Governments and public authorities under pressure.

From 2011–2016, Angela was Director of Human Rights Policy at JUSTICE, the UK branch of the International Commission of Jurists. There she led on human rights strategy and litigation, focusing principally on national security and counter-terrorism, surveillance and privacy, equality and barriers to access to justice. Her case-load covered the UK's senior courts and the European Court of Human Rights (including in *Smith & Ors v Ministry of Defence*, *Rahmatullah v Secretary of State for Foreign and Commonwealth Affairs*, *Belhaj & Ors v Straw & Ors* and *Tariq v United Kingdom*).

She was previously a legal adviser to the UK Parliament's Joint Committee on Human Rights, advising on a diverse range of issues, from the execution of judgments of the European Court of Human Rights to the application of the Human Rights Act 1998 and the Equality Act 2010 to public bodies and the private sector. She led work on numerous major inquiries, including on the ratification and implementation of the UN Convention on the Rights of Persons with Disabilities, on the then draft UN Guiding Principles on Business and Human Rights, and on the legality of proposed legislation.

Angela holds first class degrees from Durham and Cambridge Universities and has held academic posts at the British Institute of International and Comparative Law and University College London. She regularly acts as an expert trainer, including for the International Bar Association Human Rights Institute and the Council of Europe, and regularly provides training and capacity building support on human rights and public law to lawyers in the UK and overseas.

Angela has published and lectured widely and is a contributing author to Sweet and Maxwell's Human Rights Practice. She sits on the Executive Committee of the Human Rights Lawyers Association and the Legal and Policy Committee of Freedom from Torture. Until 2016 was a Trustee of RightsInfo, where she served on the Advisory Board between 2014 - 2016.