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*Quel avenir pour les droits de l'homme au Royaume-Uni après le Brexit ?*

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## Introduction

- <sup>1</sup> As early as October 2020, Downing Street's spokesman stated that "*The UK remains committed to the ECHR - we have been clear on that time and time again, including in Parliament*". He insisted on the fact that "[W]e agree that cooperation with the EU should be based on our shared values of respect for fundamental rights and for the rule of law." <sup>1</sup>One month later, a declaration from the Ministry of Justice was published on the official website of the UK Government, affirming this commitment:

Her Majesty's Government is committed to upholding the UK's stature on human rights; the UK contribution to human rights law is immense and founded in the common law tradition. We will continue to champion human rights both at home and abroad.<sup>2</sup>

- <sup>2</sup> On the one hand, these statements aim at strengthening the reputation of the UK as a champion of human rights in the field of justice and criminal law. Such a status is deeply embedded in British statute law and British parliamentary history, most notably through several vital Acts of Parliament such as the 1215 *Magna Carta*,<sup>3</sup> the 1679 *Habeas Corpus Act*,<sup>4</sup> or the 1689 *English Bill of Rights*.<sup>5</sup> On the other hand, the second quotation is taken from the first paragraph written to introduce a long-awaited review into the 1998 *Human Rights Act's* operation. This possible reform has triggered much concern about a potential limitation of individuals' right to bring human rights claims before domestic courts.
- <sup>3</sup> The paper seeks to contribute to the assessment of the consequences of Brexit, i.e. the decision made by the UK to leave the European Union (the EU), on the protection of human rights in the UK. During Brexit negotiations, a particular bone of contention arose about the UK's continued adherence to the European Court of Human Rights (the

ECtHR), more specifically in the field of criminal matters. Thus, it seems increasingly critical to understand how Brexit will affect British human rights: will the UK uphold its commitment to Europe's human rights regime post-Brexit? After a brief assessment of the UK legal framework that protected human rights before Brexit, this paper will underline the possible evolutions brought by Brexit in human rights protection. Contemporary sources of concern, such as current derogations from the European Convention on Human Rights and Fundamental Freedoms (the ECHR)<sup>6</sup> and the ongoing debate on the review of the *Human Rights Act*, will then be considered. These may question the future extent of the UK's commitment to the ECtHR as they have left many observers worried about the detrimental effects of Brexit in the field of human rights.

## The UK legal framework that protected human rights before Brexit

- 4 Before the UK's decision to leave the EU,<sup>7</sup> fundamental human rights were mainly protected through a dual legal framework composed of, on the one hand, the European Convention on Human Rights and Fundamental Freedoms, on the other hand, the Charter of Fundamental Human Rights of the European Union (CFR).<sup>8</sup> These two legal texts should not be confused with each other.

### The legal protection granted through the ECHR

- 5 The ECHR is an international treaty vital to ensuring the rights of people in Europe. It was drafted in 1949-1950 by the Council of Europe,<sup>9</sup> instituted in post-war Europe "*as a means of establishing and enforcing essential human rights*"<sup>10</sup> and fundamental freedoms. The Council of Europe is not part of the European Union; it is a separate international organisation, created in 1949 by the Treaty of London and based in Strasbourg. The Council of Europe was separate from the European Coal and Steel Community founded in 1951 that would later become the EU, and has always maintained its own distinct membership and agenda. It is composed of 47 Member States, all signatories to the ECHR. The continent's leading human rights organization is not concerned with economic matters, but with the protection of civil rights and freedoms: it promotes human rights, democracy, and the rule of law. What is remarkable is the fact that the UK was at the forefront of the Convention's creation, referred to as "*one of the architects of the human rights agenda that grew out of the devastation of Second World War*".<sup>11</sup> Indeed, as one of the initial signatories to the ECHR, the UK became the first European country to formally commit itself by ratifying the Convention in Parliament in March 1951.
- 6 The Convention, which came into force on 3 September 1953, was made in relation to members of the Council of Europe which committed to upholding fundamental rights such as the prohibition of torture, the right to life and liberty, the right to a fair trial and freedom of expression and assembly to name a few. The Convention became enforceable by the ECtHR charged with ensuring the observance of the engagements<sup>12</sup> undertaken by the signatories to the Convention. The creation of the ECtHR was the continuation of the post-war desire for mutual cooperation and bonds, and to ensure that the protection of these rights and liberties was constant.
- 7 Another significant step took place in 1998 with the passage of the *Human Rights Act* (the HRA), deemed to be one of the most important pieces of legislation for the

preservation of human rights in the UK. As a matter of fact, it incorporated the ECHR provisions into British domestic law, thus giving effect to the rights secured in the Convention and enabling individuals in the UK to take their case to a British court rather than to the ECtHR to uphold their rights. When the Labour Government gained office in 1997, it immediately set about the process of incorporation that led to the drafting and adoption of the HRA: the rights secured in the ECHR were actually incorporated into UK law by being listed in Schedule 1 to the HRA.

## The protection provided through the CFR

- 8 The CFR was established in 2000, and came into force in December 2009 along with the Treaty of Lisbon. The Charter mirrored all the rights set out in the ECHR. For example, Chapter 6 of the CFR is on justice and its articles 47 and 48 respectively protect the right to a fair trial and the presumption of innocence and right of defence (both rights provided for in Article 6 of the ECHR). The CFR, which has the same value as a European Treaty, was created to provide clear and consistent rights<sup>13</sup> that must be respected by the EU, all EU institutions and the Member States when implementing EU law. In 1952, the Court of Justice of the European Union (the CJEU, now ECJ) was established to ensure that the law is uniformly observed in the interpretation and application of the Treaties, and that the Member States comply with obligations under the Treaties. This Court, as the judicial authority of the EU, is entitled to interpret EU law at the request of national courts and tribunals.
- 9 In short, the CFR can be invoked in national courts: it incorporates some provisions of the Council of Europe's ECHR but it is entirely separate from this Convention. The CFR contains more rights than the ECHR does. For example, the CFR right to a fair hearing secured in Article 47 was interpreted as applying to deportations hearings, which is not the case for the corresponding ECHR right to a fair trial enshrined in Article 6.<sup>14</sup> Moreover, unlike the Convention rights, the CFR rights were not incorporated into UK law.

Fundamental rights	Articles of the ECHR	Articles of the CFR
the right to life	Article 2	Article 2
freedom from torture	Article 3	Article 4
freedom from slavery	Article 4	Article 5
the right to liberty	Article 5	Article 6
the right to a fair trial	Article 6	Article 47
the right not to be punished for something that wasn't against the law at the time	Article 7	Article 49
the right to respect for family and private life	Article 8	Article 7
freedom of thought, conscience and religion	Article 9	Article 10

freedom of expression	Article 10	Article 11
freedom of assembly	Article 11	Article 12
the right to marry and start a family	Article 12	Article 9
the right not to be discriminated against in respect of these rights	Article 14	Article 21
the right to protection of property	Protocol Article 1	1, Article 17
the right to education	Protocol Article 2	1, Article 12
the right to participate in free elections	Protocol Article 3	1,
the abolition of the death penalty	Protocol 13	Article 2
protection of personal data		Article 8
the right to asylum		Article 18
right of collective bargaining and action		Article 28

## The possible changes and evolutions brought by Brexit in human rights protection

### A continued commitment to the ECHR

- 10 The UK's departure from the EU under the *EU (Withdrawal) Act 2018* (the 2018 EUWA) put an end to this partial dual legal framework in human rights protection. Indeed, the UK's commitment to the fundamental human rights protection provided by the ECHR has not been directly affected by Brexit since the country is still bound by the Convention. In other words, the UK's decision to leave the EU does not mean that the UK has renounced its obligations under the Convention.
- 11 The UK's continued adherence to the ECHR, particularly in the field of law enforcement and judicial cooperation in criminal matters, was one of the central questions raised during Brexit negotiations. This issue was a particular bone of contention during the transition period. The inclusion of human rights within the future relationship between the UK and the EU was already present in the non-binding Political Declaration that accompanied the *UK-EU Withdrawal Agreement 2018*: "*The future relationship should incorporate the United Kingdom's continued commitment to respect the framework of the European Convention on Human Rights.*"<sup>15</sup>
- 12 As it turned out, the *EU-UK Trade and Cooperation Agreement*<sup>16</sup> contains a number of provisions "*locking-in*" the UK's continued commitment to the ECHR, thus opening a new chapter between the UK and the EU. Article 524 of the Agreement provides that

the continued cooperation between the UK and the EU depends on the UK and the EU committing to respect the ECHR as well as “giving effect to the rights and freedoms in that Convention domestically”.<sup>17</sup>

1. The Parties shall continue to uphold the shared values and principles of democracy, the rule of law, and respect for human rights, which underpin their domestic and international policies. In that regard, the Parties reaffirm their respect for the Universal Declaration of Human Rights and the international human rights treaties to which they are parties.
  2. The Parties shall promote such shared values and principles in international forums. The Parties shall cooperate in promoting those values and principles, including with or in third countries.<sup>18</sup>
- 13 Thus, Article 524 is much more specific and narrows down Article 763 which commits the parties in general terms to respecting human rights as a shared value under the section entitled “Basis for Cooperation”.

### A new definition of UK domestic law

- 14 If the UK remains bound to obey the ECHR’s fundamental rights regardless of Brexit, the CFR is no longer a binding text. Indeed, the UK is now outside the EU: as of exit day, the CFR is explicitly no longer part of UK domestic law under Section 5(4) EUWA. Nevertheless, some parts of EU law have been carried over into UK law even after the end of the Brexit transition period on 31 December 2020. Under Section 7(1) of the 2018 EUWA,
- Anything which—
- (a) was, immediately before exit day, primary legislation of a particular kind, subordinate legislation of a particular kind or another enactment of a particular kind, and
  - (b) continues to be domestic law on and after exit day by virtue of section 2, continues to be domestic law as an enactment of the same kind.
- 15 This body of EU law that applied before Brexit and that has been cut and pasted into the UK’s domestic legal system has been called “retained EU law”. Graeme Cowie in his Briefing Paper entitled *The status of “retained EU law”*,<sup>19</sup> notices that this new body of UK domestic law falls into three sub-categories: EU-derived domestic legislation, direct EU legislation, and preserved rights and obligations that had effect because of the *European Communities Act*.
- 16 The 2018 EUWA has transposed these three categories into domestic law through its sections 2 to 4. Section 2 deals with EU-derived domestic legislation;<sup>20</sup> the law adopted by Parliament to give effect to or implement EU law in the UK, has kept its previous status in UK law as primary or secondary legislation such as Acts of Parliament like the *Equality Act 2010* or the *Data Protection Act 2018*, but also regulations, for instance the UK’s Working Time Regulations (1998)<sup>21</sup> or Scotland’s Right to Interpretation and Translation in Criminal Proceedings (Scotland) Regulations 2014.<sup>22</sup> Section 3 deals with direct EU legislation, i.e. EU legislation which was directly applicable in the UK without implementing legislation such as the EU’s General Data Protection Regulation<sup>23</sup> which secures the fundamental right to erasure, more commonly known as the “right to be forgotten”. Last, but not least, Section 4 deals with otherwise retained EU law, in other words other rights and principles in EU law that had direct effect in the UK before Brexit. One could quote the vital principle of “respect for fundamental rights” enshrined in Article 67<sup>24</sup> of the Treaty on the Functioning of the EU (TFU) as well as the

right not to be discriminated against on grounds of nationality provided for in Article 19:

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

## Implications of the decision not to keep the CFR in UK law

17 The decision not to incorporate the CFR into domestic law has several implications. Firstly, it entails that the substances of the fundamental rights secured in the Charter will no longer have effect except if provided otherwise by the parts of EU law that have been retained.<sup>25</sup> This, then, leads to an inapplicability of the parts of EU law that have not been integrated into UK law before domestic courts since the UK is now beyond the remit of EU law or the European Court of Justice (ECJ).<sup>26</sup> Indeed, it is now no longer possible for a person living in the UK to rely on the CFR to challenge a law in violation of fundamental rights or to request a preliminary ruling from the ECJ on the issue at stake:

If this legislation is deemed incompatible with fundamental rights by a person living in the UK, they cannot rely on the Charter to challenge it and a UK Court will not be able to request a preliminary ruling from the CJEU on that question.<sup>27</sup>

18 Since the Charter no longer applies at a national level, British nationals are not able any longer to bring legal action against domestic legislation that is allegedly in breach of a CFR fundamental right.

19 Such a situation has led some legal scholars to describe the UK's withdrawal from the EU as “an important step towards a disentanglement of human rights in the UK's constitutional order [...] a form of disentanglement of UK law from its EU influences”.<sup>28</sup> Post-Brexit, the CFR rights and principles no longer prevail over other instruments of retained EU law, “unless and to the extent that those rights and principles can be shown to exist independently of the Charter”.<sup>29</sup> Others, such as human rights activist and campaigner Debora Singer, have voiced their fear that the loss of the Charter will be felt in the years to come.<sup>30</sup> She analysed the situation of human rights protection in a post-Brexit UK and underlined the possible decrease in the level of protection for these fundamental rights. According to her, withdrawing from the CFR has left the UK with a weakened human rights framework entailed by a loss of substantial EU fundamental rights. As a matter of fact, the CFR secures broader substantive rights protections because of a wider scope than that of the ECHR or the HRA.<sup>31</sup> This assessment is shared by Tobias Lock:

Where the Charter applies it provides for further-reaching substantive protection of fundamental rights than the HRA. Additional rights include a guarantee of human dignity; a right to physical and mental integrity; an express prohibition of human trafficking; an express right to conscientious objection; an express right to data protection; freedom of the arts and sciences; a right to marry that is not restricted to different sex-couples; freedom to choose and occupation; freedom to conduct a business; a right to asylum and against refoulement; strong anti-discrimination provisions; rights of the child; and the social protections contained in its Title V.<sup>32</sup>



- 20 As a consequence, letting the UK without any obligation under the future application of the CFR constitutes a loss, not only of one set of important human rights protections,<sup>33</sup> but also of remedies against human rights infringements.
- 21 Consequently, as a way to counterbalance what appears to be a UK weakened or imbalanced human rights framework, pressure was exercised on the UK by other Member States during Brexit negotiations for a continued cooperation with the EU based on common and shared values for fundamental rights and the rule of law.<sup>34</sup> Indeed, as the UK is no longer bound by any EU membership obligation, it appeared necessary to find a form of substitute for the obligation of mutual trust and cooperation inherent in EU membership. Thus, the obligation of continued adherence to the ECHR<sup>35</sup> that constitutes a part of the EU's regime of fundamental rights protection<sup>36</sup> works as an external replacement for this guarantee. It seems that access to the EU Single Market came at a price for the UK, namely the obligation to give continued effect to the ECHR under its domestic law. Thus, complying with the current European regulatory framework of human rights protection provided for by the ECHR has been deemed necessary by EU negotiators to keep a form of residual indirect influence of EU fundamental rights standards set out in the CFR.
- 22 However, the current situation of the UK regarding human rights development is a growing source of concern from several perspectives. One may wonder whether the UK will uphold its commitment to Europe's human rights' Post-Brexit regime.

## Current sources of concern

### Derogations from the ECHR

- 23 One first source of concern comes from the current limits on the enforceability of ECtHR decisions: "*Even if recourse to the ECHR results in a judgment finding a violation of ECHR rights, it is not in and of itself enforceable in the UK legal order*".<sup>37</sup> The best illustration of that situation is to be found in the 2005 case *Hirst v United Kingdom*,<sup>38</sup> a lengthy confrontation that opposed the ECtHR and the Council of Europe to the UK over convicted prisoners serving a custodial sentence being deprived of the right to vote. The UK was found to have violated Article 3 of the First Protocol of the Convention but did not immediately comply with the ECtHR judgment.<sup>39</sup>
- 24 Furthermore, the ECHR contains a list of absolute and inalienable rights,<sup>40</sup> as well as contingent ones that may be subject to derogation and potential limitations. Under Article 11(2) of the HRA, signatory states are able to opt out of the latter in particular circumstances. The minister responsible for the passage of a Bill through Parliament is required, under Section 19 of the Act, to declare that although the Bill may be incompatible with ECHR, it is still the government's wish to proceed with it. The UK government considered derogating from the ECHR with the *Overseas Operation Act* that received Royal Assent on 29 April 2021. The initial provisions of the Act introduced a presumption against prosecution for veterans after five years to exclude war crimes, crimes against humanity, genocide and torture from the scope of application of the Act. Eventually, the final version of the Act amended this presumption and put an end to the government's attempts to "opt out" of parts of the ECHR in order to protect British troops serving overseas from legal action.

25 There is also much concern over the current *Police Crime Sentencing and Courts Bill*,<sup>41</sup> criticized sometimes as an illustration of the anti-ECHR and anti-HR government's agenda in action. The Bill aims at introducing a new statutory offence of "intentionally or recklessly causing public nuisance". If the Act is adopted without any changes, some protests would be criminalized under Section 59 if they create "disorder" and "serious disruption" and severe limitations would be placed on the "noise levels" and location at which demonstrations could be held. Civil rights activists have expressed their strong disagreement<sup>42</sup> over a piece of legislation that would breach Articles 10 and 11 of the ECHR.<sup>43</sup> Indeed, non-violent demonstrations that are normally protected by the ECHR could be criminalized. Moreover, the Bill provides for a reversal of the burden of proof: protesters accused of having committed the offence of public nuisance would be required to prove that they had a reasonable excuse for committing such an offence. Such a reversal of the burden of proof is contrary to the principle of presumption of innocence of the accused until proven guilty, as enshrined in Article 48 of the CFR and Article 6 of the ECHR. This latest example constitutes a possible illustration of how the UK will derogate from the legal framework of human rights protection as it already did in the past.<sup>44</sup>

### Loss of "the EU's own bill of rights"<sup>45</sup>

26 As already mentioned, the CFR, also called "the EU's own bill of rights", provides broader substantive rights protection than the Convention. Thus, once the UK is no longer bound by the CFR's contents, the scope of human rights protection will be reduced. As a matter of fact, the CFR is more up to date than the Convention as it includes rights related to data protection, workers' rights, environmental rights, and trafficking. It extends some Convention rights such as the right to a fair trial;<sup>46</sup> it includes general principles such as the right to dignity and equality (which the Convention does not). Therefore, post-Brexit human rights protection will be reduced in the field of equality and non-discrimination for instance.

27 Moreover, if new rights are created or developed under the CFR after Brexit, those rights will not be enforced automatically at a national level because of the UK's departure from the EU. For example, the aforementioned "right to be forgotten" already mentioned was derived from existing rights to private life and personal data:<sup>47</sup> it emerged from the application of the Charter that has led to the development of new rights. If the UK had not been part of the EU at the time of this case and the development of EU case law about this right, there would have been no automatic enforcement of this new right developed under the CFR. However, Brexiteers do not go along with this logic: they argue that Brexit will not impact human rights protections in the UK because the Charter does not create new rights but codifies and reaffirms already existing rights and principles in EU law that will continue to apply as "retained EU law". They even go so far as to claim that, in theory, Brexit constitutes an opportunity to set up stronger human rights by lifting limitations imposed by the ECJ, such as the one established in the *Melloni* case.<sup>48</sup> In 2013, European judges ruled that Member States are only allowed to apply higher human rights standards if and only if the "*primacy, unity and effectiveness of EU law are not thereby compromised.*"<sup>49</sup> Hence, the possibility to introduce a right to trial by jury in a British Bill of Rights and the possibility for example to rely on this right to resist extradition on the basis of the

European Arrest Warrant will be possible after Brexit inasmuch as the principle of primacy of EU law will no longer apply in the UK.

## A debate over a new approach to human rights: a review of the *Human Rights Act*?

- 28 Over the years, criticism of the HRA has come from across the British political spectrum.<sup>50</sup> For example, the Act has been denounced for being a threat to public safety<sup>51</sup> by “*preventing convicted foreign nationals from being deported*”.<sup>52</sup> So, its replacement became a key idea in the Conservative Party’s manifestos. In 2010, it was stated that the HRA would be replaced with a UK Bill of Rights.<sup>53</sup> In 2015, the same Conservative Party pledged to “*scrap the HRA and curtail the role of the European Court of Human Rights*”.<sup>54</sup> Two years later, the Conservative Party qualified its previous commitment by stating that it would not replace or repeal the HRA while the process of Brexit was under way: the UK would “*remain signatories to the ECHR for the duration of the next Parliament*” but the Government would consider “*our human rights legal framework*” once the UK had left the EU.<sup>55</sup> This statement was taken up in the 2019 Conservative Manifesto that included a promise of a review of the legislation. It proposed to “*update the HRA and administrative law to ensure that there is a proper balance between the rights of individuals, our vital national security and effective government.*”<sup>56</sup>
- 29 Therefore, following the commitment stated in the 2019 Conservative Party Manifesto, the British government announced a review of the HRA in December 2020. It set up the Independent Human Rights Act Review (IHRAR) panel, led by Sir Peter Gross, empowered to conduct a review into the domestic HRA framework. However, any issue relating to potential changes to the substantive rights of the ECHR or to the operation of the ECtHR have not been included within the scope of this review.<sup>57</sup> The report of the IHRAR, expected by the end of October 2021, is still pending. In the meanwhile, there are concerns over any possible reform of the HRA that could prevent individuals from bringing human rights claims and enforcing their rights directly before domestic courts.

## Conclusion

- 30 Some provisions of the *EU-UK Trade and Cooperation Agreement* have been introduced as safeguards regarding human rights protection. Article 524 provides that:
1. The cooperation provided for in this Part is based on the Parties' and Member States' long-standing respect for democracy, the rule of law and the protection of fundamental rights and freedoms of individuals, including as set out in the Universal Declaration of Human Rights and in the European Convention on Human Rights, and on the importance of giving effect to the rights and freedoms in that Convention domestically.
  2. Nothing in this Part modifies the obligation to respect fundamental rights and legal principles as reflected, in particular, in the European Convention on Human Rights and, in the case of the Union and its Member States, in the Charter of Fundamental Rights of the European Union.
- 31 Such a provision precludes any ambitious reworking of the HRA as envisaged in the Conservative Proposals. It is reinforced by Article 526 that provides that cooperation on law enforcement will stop if the UK withdraws from the ECHR. Nevertheless, what

remains unclear is what exactly will happen if the UK falls short of its commitments to protect rights and does not comply with the ECHR or any ECtHR ruling.

- 32 One of the key issues ahead is not so much about what parts of EU law have been retained, but how Parliament will be able to modify these parts after Brexit.

Indeed, the fundamental difference between EU law and retained EU law is that the latter will, in its entirety, be modifiable or revocable by Parliament. In many cases, the UK Government (and in other cases, devolved authorities) will also be able to change retained EU law through secondary legislation.<sup>58</sup>

- 33 UK's post-Brexit domestic law can no longer be set aside by directly effective EU law since it takes precedence over the latter. Parliament is now empowered to amend retained EU law in ways that could be inconsistent with the intentions of the original legal texts. While keeping control over its own legislation and getting its sovereignty back, the UK appears able to alter and replace fundamental human rights. The future of human rights in the UK seems rather bleak now: there is no denying the existence of a somewhat worrying risk to modify human rights protection. Let us hope that the UK will live up to its reputation as a champion of human rights.

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## NOTES

1. *The Guardian*, 7 October 2020 <http://www.theguardian.com/science/shortcuts/2014/oct/05/galaxys-guardians-make-the-case-upgrade-pluto-back-to-planet-size> consulted 04 October 2021.
2. Website of the UK Government, <https://www.gov.uk/guidance/independent-human-rights-act-review> consulted 04 October 2021.
3. The *Magna Carta* constitutes the first step in giving English subjects the right to a jury by one own's peers.
4. The *Habeas Corpus Act* is well-known as another significant step towards the right to a fair trial by protecting and extending the right of the detained individual to have the legality of his/her detention reviewed before a judge.
5. This Act included the protection from cruel and unusual punishment, more than three hundred years before the *Human Rights Act* and its ban on torture.
6. Text of the ECHR available at [https://echr.coe.int/Documents/Convention\\_ENG.pdf](https://echr.coe.int/Documents/Convention_ENG.pdf) consulted on 4 October 2021.
7. The UK voted to leave the EU by 52% to 48% on 23 June, 2016.
8. Text of the CFR available at [https://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](https://www.europarl.europa.eu/charter/pdf/text_en.pdf) consulted on 8 November 2021.
9. See the website of the Council of Europe: <https://www.coe.int/en/web/portal/home> consulted on 8 November 2021.
10. Slapper & Kelly, *The English Legal System* (London, Routledge, 2016), p. 49.
11. BBC News, 29 September 2000, "Human Rights: The European Convention", [http://news.bbc.co.uk/2/hi/uk\\_news/948143.stm](http://news.bbc.co.uk/2/hi/uk_news/948143.stm) consulted on 8 November 2021.
12. See Article 19 of the ECHR: "To ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a

European Court of Human Rights, hereinafter referred to as “the Court”. It shall function on a permanent basis.”

13. For more information about the fundamental rights enshrined in the CFR, see [https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights\\_en](https://ec.europa.eu/info/aid-development-cooperation-fundamental-rights/your-rights-eu/eu-charter-fundamental-rights_en) consulted on 8 November 2021.

14. See *ZZ v Secretary of State for the Home Department*, Case C-300/11, 4 June 2013 (Grand Chamber).

15. The revised EU-UK “Political Declaration” setting out the framework for the future relationship between the EU and the UK, 17 October 2019, Part I, § 7.

16. The final version of the Act entered into force on 1 January 2021. Then, it was approved by the European Parliament on 27 April 2021, meaning that the Act came into full force on 1 May 2021.

17. Article 524, Part Three “LAW ENFORCEMENT AND JUDICIAL COOPERATION IN CRIMINAL MATTERS”.

18. Article 763, Democracy, rule of law and human rights.

19. Graeme Cowie, *The status of “retained EU law”*, Briefing Paper Number 08375, House of Commons Library, <https://researchbriefings.files.parliament.uk/documents/CBP-8375/CBP-8375.pdf> consulted on 4 October 2021.

20. EU-derived domestic legislation includes statutory instruments that implement EU directives. However, EU directives have not been included within retained EU law because they are not directly applicable and their implementation is a matter left to the discretion of each Member State.

21. The Working Time Regulations (1998) implemented the European Working Time Directive into UK law.

22. The Right to Interpretation and Translation in Criminal Proceedings (Scotland) Regulations 2014 implemented the 2010 European Directive on the Right to Interpretation and Translation in Criminal Proceedings.

23. For the text of the Regulation (EU) 2016/679 (General Data Protection Regulation), see <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016R0679> consulted on 11 November 2021.

24. “1. The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.”

25. Graeme Cowie, p. 37.

26. The Charter will only be used as a means of interpreting retained direct EU law.

27. Tobias Lock, “Human Rights Law in the UK after Brexit”, Public Law, 2017, p. 128. Lock is a Senior Lecturer in EU Law and co-director of the Europa Institute at the University of Edinburgh.

28. *Ibid*, p. 117.

29. Graeme Cowie, p. 37.

30. Deborah Singer, ““The loss of the Charter will be felt in the years to come”- Our human rights protections after Brexit”, René Cassin website <https://www.renecassin.org/the-loss-of-the-charter-will-be-felt-in-the-years-to-come-our-human-rights-protections-after-brexit/> consulted on 4 October 2021.

31. For instance, Article 47 of the CFR has a wider scope of application than Article 6 of the ECHR: on the one hand, administrative proceedings such as tax and immigration; on the other hand, cases of civil rights and criminal cases.

32. Lock, p. 122

33. “Despite Brexit, the EU Charter is likely to continue to exert some influence over the level of human rights protection in the UK. However, this influence will be confined to some areas only and will only be indirect”, *ibid.*, p. 132.

34. The fundamental interrelation between the two concepts of “the rule of law” and “human rights” had already been highlighted way before Brexit by Lord Bingham of Cornhill in a speech delivered in November 2006 at the University of Cambridge: “the rule of law must require the legal protection of such human rights as are recognised in that society.” Quoted in Slapper & Kelly, p. 36.

35. See *infra*, p. 3.

36. See Article 6(3) of the Treaty of the EU: “Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.”, <https://www.legislation.gov.uk/eut/teu/article/6> consulted on 12 November 2021.

37. Lock, p. 126.

38. *Hirst v United Kingdom* (N°2) ECHR 2005-IX.

39. More than a decade after the 2005 ECtHR ruling, the UK presented proposals, including the principle of granting prisoners on Temporary Licence the right to vote, in November 2017. These proposals were accepted as “acceptable compromise” in December 2017 by the Council of Europe, and implemented in July 2018 in the UK.

40. Articles 2, 3, 4, 7 and 14.

41. <https://bills.parliament.uk/bills/2839>. At the time of the writing of this Paper, the Bill was at its committee stage, a line-by-line examination of the Bill, in the House of Lords.

42. For an analysis of the Bill, see Ishika Grag, “UK’s ‘Police, Crime, Sentencing and Courts Bill’: Analyzing the Future of Protests”, JURIST, <https://www.jurist.org/commentary/2021/08/ishika-garg-uk-police-crime-sentencing-bill/> consulted on 4 October 2021.

43. Article 10 provides for freedom of expression. Article 11 provides for freedom of assembly.

44. As already done in the past in cases such as *Brown v Stott* (Prosecutor Fiscal, Dunfermline) [2003] 1 AC 681. In *Brown*, the Court ruled that the obligation imposed on the registered keeper of a vehicle to identify herself as the driver was not a breach of the right to a fair trial even if such self-identification was to be used as evidence against her in a subsequent criminal trial.

45. M. E. Butt, Kubert J., Schultz C. A., “Fundamental social rights in Europe – Part V: The European Parliament's position in the past”, [https://www.europarl.europa.eu/workingpapers/soci/104/part5\\_en.htm](https://www.europarl.europa.eu/workingpapers/soci/104/part5_en.htm) consulted on 13 November 2021.

46. Under Article 47 of the CFR, “[E]veryone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.”

47. See *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, 2014, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0131> consulted on 13 November 2021.

48. *Melloni v. Ministerio Fiscal*, C-399/11 [2013], <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:62011CJ0399> consulted on 13 November 2021.

49. *Ibid.*, § 60.

50. See Alexander Horne et Lucinda Maer, “From the Human Rights Act to a Bill of Rights?: key issues for the 2010 Parliament”, House of Commons Library Research, 2010, [https://www.parliament.uk/globalassets/documents/commons/lib/research/key\\_issues/key-issues-from-the-human-rights-act-to-a-bill-of-rights.pdf](https://www.parliament.uk/globalassets/documents/commons/lib/research/key_issues/key-issues-from-the-human-rights-act-to-a-bill-of-rights.pdf) consulted on 17 February 2022.

51. Amos Merris, “Problems with the Human Rights Act 1998 and How to Remedy Them: Is a Bill of Rights the Answer?”, *The Modern Law Review*, vol. 72, No. 6 (Nov., 2009), pp. 883-908, 883.

52. David Cameron, speech at the Centre for Policy Studies, 26 June 2006 as reported in W. Woodward, “Cameron promises UK bill of rights to replace Human Rights Act”, *The Guardian*, 26 June 2006.



53. *Invitation to Join the Government of Britain: The Conservative Party Manifesto 2010*, p. 79, <https://conservativehome.blogs.com/files/conservative-manifesto-2010.pdf> consulted on 4 October 2021.
54. *The Conservative Party, Strong Leadership, a clear economic plan, a brighter, more secure future: The Conservative Party Manifesto 2015*, p. 58 <http://ucrel.lancs.ac.uk/wmatrix/ukmanifestos2015/localpdf/Conservatives.pdf> consulted on 4 October 2021.
55. *Forward, Together Our Plan for a Stronger Britain and a Prosperous Future: The Conservative and Unionist Party Manifesto 2017*, p. 37, <https://general-election-2010.co.uk/2017-general-election-manifestos/conservative-manifesto-2017.pdf> consulted on 4 October 2021.
56. *Get Brexit Done Unleash Britain's Potential: The Conservative Party Manifesto 2019*, p. 48, <http://www.cpa.org.uk/cpa/docs/Election2019/ConservativeManifesto2019.pdf> consulted on 4 October 2021.
57. For more information about the HRA review, see <https://www.gov.uk/guidance/independent-human-rights-act-review> consulted on 4 October 2021.
58. Graeme Cowie, p. 17.
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## ABSTRACTS

This paper aims at contributing to the assessment of the consequences of Brexit on the protection of human rights in the UK. Has Brexit affected British human rights and will the UK uphold its commitment to Europe's human rights regime post-Brexit? After a brief presentation of the legal framework that protected UK human rights before Brexit, we will highlight the possible evolutions brought by Brexit in human rights protection. Lastly, we will focus on current sources of concern about the detrimental effects of Brexit in the field of human rights.

Cet article entend contribuer au processus d'évaluation des conséquences du Brexit sur la protection des droits de l'homme au Royaume-Uni. Le Brexit a-t-il affecté les droits de l'homme britanniques ? Le Royaume-Uni va-t-il continuer de respecter ses engagements relatifs à la Convention européenne des droits de l'homme après le Brexit ? Après avoir brièvement présenté le cadre juridique qui protégeait les droits de l'homme au Royaume-Uni avant le Brexit, nous soulignerons les possibles évolutions apportées par le Brexit en matière de protection des droits de l'homme. Enfin, nous nous intéresserons aux sources actuelles d'inquiétude quant aux effets néfastes du Brexit dans le domaine des droits de l'homme.

## INDEX

**Mots-clés:** Brexit, Charte européenne des droits fondamentaux, Convention européenne des droits de l'homme

**Keywords:** Brexit, European Charter of Fundamental Rights, European Convention on Human Rights

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