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Forgetting human rights – the Brexit debate

Adrienne Yong*

Abstract

This article considers the implications of the UK's vote to leave the European Union in relation to the fundamental rights of EU citizens. The possible consequences for individual rights protection are examined in light of UK Prime Minister Theresa May's decision to formally trigger art.50 TEU, the government's paper on 'Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU' and the recently published European Union (Withdrawal) Bill. This article intends to highlight an issue that has seemingly been set aside amidst the chaotic developments related to Brexit – the protection of fundamental human rights. The article's central argument is twofold. Firstly, the article contends that the UK Government currently risks potentially breaching several substantive provisions contained within the European Convention on Human Rights because a satisfactory regime of rights protection for EU citizens living in the UK, or British citizens in other EU Member States, has not yet been clearly established. Secondly, the plan to exclude the EU Charter of Fundamental Rights must be seriously reconsidered. The Charter currently provides the strongest level of protection for certain human rights in Europe, and it is argued that it cannot be so easily sacrificed. The UK, irrespective of Brexit, must be serious about its commitment to the protection of human rights.

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1 Introduction

The result of UK's referendum of 23 June 2016 on the EU in favour of leaving the EU can be reasonably described a surprising one,¹ especially given that there was no precedent for any Member State withdrawing from the EU. Article 50 TEU, the EU's official withdrawal provision, was formally triggered by UK Prime Minister Theresa May, nine months after the referendum.² The UK Parliament approved art.50 TEU being triggered through the European Union (Notification of Withdrawal) Act 2017.³ The year immediately following the referendum has been a tumultuous one, politically. After formally notifying the EU of its intention to withdraw in March 2017, the (then majority Conservative) UK Government published a White Paper entitled 'Legislating for the United Kingdom's withdrawal from the European Union'.⁴ However, following the snap election in June 2017 in which the Conservative government lost its majority, the plans for Brexit are no longer as clear as the original White Paper suggests. There is an offer for the protection of EU citizens living in the UK and British nationals in the EU,⁵ and the European Union (Withdrawal) Bill sets out the plans for incorporating EU law into UK law after Brexit has been published.⁶ This article will examine these developments, but will argue that a particularly significant issue has been cast aside amidst the complicated process of withdrawal – the protection of human rights.

The article contends that undermining the protection of human rights in this context gives rise to two notable points of discussion. Firstly, there are various provisions contained within the European Convention on Human Rights (hereafter the ECHR or the Convention) that would risk being breached

¹ Until today, the UK Government has been criticised for seeming unprepared. See Alex Barker, 'Britain yet to face facts on Brexit, EU's Barnier warns' (July 6, 2017) *Financial Times*, <https://www.ft.com/content/8404d08a-6221-11e7-91a7-502f7ee26895> [accessed 12 August, 2017].

² Article 50 of the Treaty on the European Union; 'Brexit: MPs overwhelmingly back Article 50 bill' (Feb 1, 2017) *BBC News*, <http://www.bbc.co.uk/news/uk-politics-38833883> [accessed 1 Feb 2017]; 'Key points from the Article 50 letter' (March 29, 2017) *BBC News*, <http://www.bbc.co.uk/news/uk-politics-uk-leaves-the-eu-39433403> [accessed March 29, 2017].

³ See *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768.

⁴ Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union* (White Paper, Cm 9976, 2017).

⁵ HM Government, *The United Kingdom's Exit from the European Union: Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU* (White Paper, Cm 9464, 2017).

⁶ European Union (Withdrawal) HC Bill (2017-19) [1].

by an inadequate system of protection guaranteeing EU citizens' residency rights after Brexit. In the first section, the focus will be on art.8 ECHR (the right to private and family life) and art.14 ECHR (the right to non-discrimination), and the role of Protocol 12 (general prohibition on discrimination).⁷ Secondly, the EU (Withdrawal) Bill proclaims "[t]he Charter of Fundamental Rights is not part of domestic law on or after exit day."⁸ However, this article will argue against this, and argue strongly in support of retaining the Charter of Fundamental Rights of the EU (hereafter referred to as 'the Charter'). It seems that the UK Government has refused to acknowledge and give effect to the significant value of the Charter.⁹ Though many of its constituent rights are already guaranteed by the common law, other Acts of the UK Parliament and international standards,¹⁰ the Charter's substantive provisions should be retained to ensure the highest level of rights protection possible. In the second section, the focus will be on data protection, rights to non-discrimination based on sexual orientation, rights to conduct a business and property rights. Based on the findings that both systems of rights protection contribute significantly to the overall regime of individual rights protection enjoyed by EU citizens and UK nationals alike, the article ultimately concludes that for the UK Government to undermine human rights protection under the ECHR and to refuse to incorporate the Charter into national law would be unwise and undesirable.

2 Implications under the ECHR

The relationship between the EU and the ECHR has been complicated from the outset.¹¹ However, as rights enjoyed by British nationals via the ECHR should remain unaffected by Brexit,¹² what is now in need of clarification are questions relating to whether, when, and how the act of leaving the EU will

⁷ Protocol 12 to the European Convention on Human Rights and Fundamental Freedoms on the Prohibition of Discrimination 2000.

⁸ European Union (Withdrawal) Bill cl 5(4).

⁹ The original "Great Repeal Bill" White Paper also suggested the Charter would be scrapped in its entirety. See also Jonathan Cooper, 'We need to keep the EU Charter of Fundamental Rights' (July 19, 2017) *The Times Brief* <https://www.thetimesbrief.co.uk/users/39175-the-brief-team/posts/18639-we-need-to-keep-the-eu-charter-of-fundamental-rights> [accessed July 22, 2017].

¹⁰ Human Rights Act 1998; Equality Act 2010; European Social Charter (Revised) 1996.

¹¹ Opinion 2/94 [1996] ECR I-1759. The Opinion is a prelude, supposedly, to accession to the ECHR in Article 6 TEU.

¹² Great Repeal Bill White Paper, para 2.22.

engage any ECHR rights. The EU has considered the rulings of the European Court of Human Rights as being of “special significance”,¹³ meaning that the Court of Justice of the EU (hereafter the CJEU or the Court) is not bound by the judgments of the European Court of Human Rights, but can and occasionally does draw inspiration from them. Adjudication in the European Court of Human Rights is undertaken through a purely rights-based lens and, as Gaja notes, the ECHR imposes positive obligations on its Member States regarding the protection of rights contained within the ECHR.¹⁴ The European Court of Human Rights has a longer history of developing the protection of human rights in Europe than the CJEU.¹⁵ Because the ECHR will remain binding on the UK after it exits the EU, it is likely that the obligations imposed on the UK by arts 8 and 14 ECHR will become particularly relevant in relation to the status of EU citizens currently residing in the UK. This section outlines how the ECHR will constitute an important source of rights protection for various individuals who may have their rights infringed as a direct consequence of Brexit.

The consequences for certain individuals if the UK does not guarantee their rights post-Brexit in a comprehensive and adequate fashion may be severe. In particular, under the current proposals, family members of EU citizens will have to meet far more stringent standards in order to be allowed a right to remain with the EU citizen.¹⁶ Though recognising that the process of keeping a family together has not been particularly straightforward of late under EU law,¹⁷ to require further process and procedure would be unduly burdensome, not least because of the risk of the EU citizen being separated from any non-EU family members. Furthermore, the lack of information regarding the “cut-off date” for entry to the UK to be subject to the pre-Brexit regime leaves individuals in a highly precarious situation, and risks interfering with their private lives. Finally, the most troubling issue concerning of the

¹³ Opinion 2/94 at [33].

¹⁴ Giorgio Gaja, ‘Accession to the ECHR’ in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law After Lisbon* (OUP: Oxford 2012), 184.

¹⁵ Cf. noting as well that there are very few sanctions available for contracting States who breach ECHR obligations.

¹⁶ Colin Yeo, ‘Analysis: what is the UK proposing for EU citizens in the UK and EU citizens in the EU?’ (June 27, 2017) *Free Movement* <https://www.freemovement.org.uk/analysis-what-is-the-uk-proposing-for-eu-citizens-in-the-uk-and-eu-citizens-in-the-eu/> [accessed June 27, 2017].

¹⁷ Eleanor Spaventa, ‘Family Rights for Circular Migrants and Frontier Workers: *O and B*, and *S and G*’ (2015) 52 CMLR 753.

proposals for EU citizens is the UK's rejection of the jurisdiction of the Court of Justice of the EU.¹⁸

If this proposal becomes reality, then the ECHR and the European Court of Human Rights will play an even more significant role in protecting EU citizens after Brexit.

Article 8 is the most relevant provision of the ECHR that could offer protection to affected individuals after Brexit. There are several pre-requisites for determining whether there has been a breach of art.8 ECHR. The first is to determine whether there is private or family life established. Once this has been done, European Court of Human Rights case law has established that certain actions, such as separating parent and child, will be considered an interference with art.8 ECHR.¹⁹ It is important to recognise this approach of the European Court is in stark contrast to the scope of private and family life before the CJEU. This has become especially obvious in recent cases on citizenship.²⁰ The CJEU has excluded human rights considerations entirely from its judgments of late,²¹ and this approach has been widely criticised.²² For this reason, there is an understanding that there is a narrower interpretation of art.8 ECHR before the CJEU than before the European Court of Human Rights.²³ The argument here, therefore, is that a claim brought before the European Court of Human Rights concerning art.8 ECHR has more chance of being interpreted broadly than if it was brought before the CJEU. Individuals affected by Brexit should rather turn to the Court of Human Rights for protection.

This claim can be supported by way of reference to ECHR case law. The European Court of Human Rights, for instance, has confirmed that the notion of private life as per art.8 ECHR includes the

¹⁸ Citizens' Rights White Paper, para 58.

¹⁹ *Sahin v Germany* (App. No. 30943/96), judgment of 8 July 2003.

²⁰ See for example, *O and B; S and G* (C-456/12 and C-457/12) March 12, 2014; *Dano* (C-333/13) November 11, 2014; *McCarthy and Others* (C-202/13) December 18, 2014; *Alimanovic* (C-67/14), September 15, 2015; *Garcia-Nieto* (C-299/13) February 25, 2016.

²¹ Cases after *Dano* (C-333/13) and *Alimanovic* (C-67/14) are particularly relevant recent examples.

²² See Daniel Thym, 'When Union citizens turn into illegal migrants: the *Dano* Case' [2015] ELR 249; Herwig Verschueren, 'Preventing "Benefit Tourism" in the EU: a Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in *Dano*?' (2015) 52 CMLR 363; Spaventa, 'Family Rights for Circular Migrants and Frontier Workers: *O and B, and S and G*'.

²³ Article 8 ECHR has been decisive in other citizenship case law, but simply not explicit. See *Zhu and Chen* (C-200/02) [2004] ECR I-9925; *Carpenter* (C-60/00) [2001] ECR I-6279 cf. *Zambrano* (C-34/09) [2011] ECR I-1177.

“totality of social ties between settled migrants and the community in which they are living”.²⁴ Establishing a ‘private life’ or ‘family life’ involves a holistic contextual consideration of an individual’s personal circumstances, and applying this wide interpretation broadens the number of situations that fall within the scope of the art.8 ECHR’s protection. The right to a private and family life, however, would still be subject to interference under art.8(2) ECHR.²⁵ Nevertheless, such interferences would undergo a proportionality assessment, and arguably, excessive interference could still be curbed by a thorough proportionality assessment, especially considering the number of potentially affected individuals.²⁶ Because of its wide scope of protection, art.8 ECHR is the most appropriate right to claim protection from for those affected by Brexit.

Another provision contained within the ECHR which may be potentially relevant to individuals post-Brexit is art.14 ECHR, the right to non-discrimination. The scope of art.14 ECHR has been placed under scrutiny due to the way in which it is only ever invoked alongside other rights contained within the Convention.²⁷ Gerards argues that “[t]o provide for a high level of protection against discrimination, the European Court of Human Rights would need to bring the protection offered by Article 14 in line with the sophisticated case law of the CJEU.”²⁸ This reflects the fact that the level of protection for non-discrimination under the EU Treaties and its related legal instruments has been more effective than the provisions in the Convention as applied by the European Court of Human Rights. In the jurisprudence of the CJEU on citizenship, for instance, the principle of non-discrimination has been interpreted as almost being an integral aspect of the rights to citizenship.²⁹ If, therefore, the European Court of Human Rights were to also interpret the right to non-discrimination as a necessary consideration when evaluating any potential breaches of art.8 ECHR, then this would

²⁴ *Üner v Netherlands* (2007) 45 E.H.R.R. 14 at [59].

²⁵ Article 8(2) ECHR states ‘There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

²⁶ UK Parliament, ‘What are the human rights implications of Brexit?’ (Joint Select Committee, September 15, 2016) <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/news-parliament-2015/brexit-human-rights-launch-16-17/> [accessed November 3, 2016], 16.

²⁷ Janneke Gerards, ‘The discrimination grounds of Article 14 of the European Convention on Human Rights’ [2013] *Human Rights Law Review* 99, 100.

²⁸ *ibid* 102.

²⁹ Aaron Baker, ‘Article 14 ECHR: a protector, not a prosecutor’ (2006) 69 *Modern Law Review* 714, 716.

strengthen the argument that the ECHR represents a strong source of protection for individuals affected by the UK's withdrawal.

The ECHR guarantees a free-standing right to non-discrimination. This is protected by Protocol 12. Under that Protocol, instead of non-discrimination being limited to the enjoyment of substantive Convention rights as guaranteed by art.14 ECHR, Protocol 12 embodies a general prohibition on discrimination that is independent and is not restricted in its scope (unlike art.14).³⁰ Protocol 12 has not been ratified by the UK; the Government's position being that its "potential application...is too wide".³¹ With Brexit comes risks of discrimination and human rights violations. Protocol 12, if in force, would have been a reassurance that the process of Brexit would prioritise non-discrimination for all affected. British citizens in Member States that have ratified Protocol 12 will be protected if they are found to be discriminated against for whatever reason after withdrawal. The reluctance demonstrated by the UK Government towards even ratifying the Protocol is indicative of its general hesitant attitude towards European human rights protection. The lack of full commitment in this regard makes it even more crucial to emphasise the consequences of failing to protect such rights in light of withdrawal.

In the absence of a free standing right to non-discrimination guaranteed by Protocol 12, arts 8 and 14 ECHR will become essential safeguards, albeit that there will be circumstances of discrimination where the ECHR cannot provide protection. Some cases have demonstrated that questions regarding an individual's citizenship and nationality can potentially engage both art.8 and art.14 ECHR.³² These cases provide further evidence that the scope of private and family life under art.8 ECHR is a broad concept, certainly broader than when interpreted by the CJEU. The cases also broaden the scope of art.14 ECHR. An individual's private life can be affected by questions concerning the individual's

³⁰ Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms 2000, 1.

³¹ UK Parliament, 'Joint Committee on Human Rights – Seventeenth Report' (Joint Committee on Human Rights, March 23, 2005) <https://publications.parliament.uk/pa/jt200405/jtselect/jtrights/99/9902.htm> [accessed August 15, 2017] at [31].

³² *Genovese v Malta* (App. No.53124/09), judgment of 11 October 2011; *Ponomaryov v Bulgaria* (App. No.5335/05), judgment of 21 June 2011.

access to nationality, as well as their access to education. The most relevant inference that can be drawn related to the Brexit scenario, therefore, is that if there was discrimination in a contracting state's rules on nationality, this could amount to a breach of the ECHR. Should certain elements of the Brexit negotiations come to undermine an individual's enjoyment of British citizenship,³³ they may be challenged via arts 8 and 14 ECHR. At this point, it is important to acknowledge that the ECHR does not explicitly protect citizenship rights under art.8,³⁴ so claimants must be cautious if relying on this. However, what the cases also indicate is a potentially broader scope of art.14 ECHR, which is relevant after withdrawal for affected individuals that are at risk of being discriminated.

This article argues, therefore, that for a satisfactory regime of rights protection for relevant individuals post-Brexit to exist, arts 8 and 14 ECHR must be given full consideration and interpreted to their full potential. The agreement negotiated for citizens post-Brexit must account for the issues raised by ECHR case law regarding family separation and interruptions to private life, on the understanding that a failure to do so could amount to a breach of human rights.³⁵ A potential defence, however, is whether protection deriving from the ECHR is already afforded to individuals in national law, given that UK national law is already expected to be in line with the obligations under the Convention. The objective of the UK's Human Rights Act 1998 was to incorporate the ECHR into domestic law. Therefore, arguably, some level of this protection should already be in place.³⁶ However, to date the UK's rules on immigration that have had to comply with art.8 ECHR through the Human Rights Act 1998 apply only to individuals who themselves fall outside the scope of EU law, namely non-EU nationals. To mitigate any negative effects of withdrawal on EU citizens, there still needs to be a

³³ It is worth noting that *Genovese v Malta* has been applied domestically by the UK Supreme Court in *R (Johnson) v Secretary of State* [2016] UKSC 56.

³⁴ Fabien Marchadier, "L'attribution de la nationalité à l'épreuve de la Convention européenne des droits de l'homme: Réflexions à partir de l'arrêt *Genovese c/ Malte*," (2012) 101 *Revue critique de droit international privé* 61, 68.

³⁵ Furthermore, the scope of the Charter is being limited more and more in cases especially concerning citizenship and welfare benefits these days. See Adrienne Yong, 'Driving a wedge between friends? The Court of Justice of the EU and its citizens in the case of welfare benefits' (2016) 6 *E.H.R.L.R.* 664.

³⁶ Michael Dougan et al, 'Written evidence from Liverpool Law School, University of Liverpool (HRB0033)' (Joint Committee on Human Rights, October 19, 2016) <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2015/human-rights-brexit-16-17/publications/> [accessed November 4, 2016]

clearer indication of the governing regime of rights protection after the withdrawal is complete – especially when there is still so little clarity in the current offer.

The debate surrounding the human rights implications of Brexit has been raised in the context of the withdrawal negotiations, and the argument for protecting human rights in this context has garnered a significant amount of support.³⁷ In November 2016, for instance, the Joint Committee on Human Rights accepted evidence for its inquiry entitled “What are the human rights implications of Brexit?” where it asked specifically for opinions on various issues regarding the right to a private and family life under art.8 ECHR.³⁸ In February 2017, MPs voted to pass the European Union (Notification of Withdrawal) Act 2017 that allowed art.50 TEU to be triggered. The Act, however, did not include any guarantee for EU citizens’ rights. This was despite the House of Lords voting in favour of an amendment to the preceding Bill that included a guarantee for citizens’ rights, which was later rejected when the Bill returned to the House of Commons.

The saga concerning the rights of EU citizens after Brexit continues to this day. The political turmoil that has occurred since the referendum vote in favour of Brexit has added to the uncertainty, particularly regarding the constantly changing face of Brexit itself.³⁹ There is a great divergence in opinion as to what will be retained in terms of EU law after withdrawal, what should be retained after

³⁷ See Keir Starmer, ‘Roosevelt’s Legacy: Human Rights after Brexit’ [2017](2) *European Human Rights Law Review* 103; Michael Dougan et al, ‘Written evidence from Liverpool Law School, University of Liverpool (HRB0033)’; Tobias Lock, ‘Written evidence from Dr Tobias Lock (HRB0015)’ (Joint Committee on Human Rights, October 19, 2016) <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2015/human-rights-brex-16-17/publications/> [accessed November 4, 2016]; ‘Written evidence submitted by the Human Rights Centre, University of Essex (HRB0034)’ (Joint Committee on Human Rights, October 19, 2016) <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2015/human-rights-brex-16-17/publications/> [accessed November 4, 2016]; Nicola Countouris et al, ‘Written evidence from Professor Nicola Countouris, Professor Piet Eeckhout, Professor Jeff King, Dr Virginia Mantouvalou, Dr Ronan McCrea and Professor Colm O’Cinneide1 (HRB0025)’ (Joint Committee on Human Rights, October 19, 2016) <http://www.parliament.uk/business/committees/committees-a-z/joint-select/human-rights-committee/inquiries/parliament-2015/human-rights-brex-16-17/publications/> [accessed October 20, 2016].

³⁸ Joint Committee Report.

³⁹ In particular, the discussions about remaining the Single Market and EU citizens’ rights have dominated headlines of late. See Heather Stewart, ‘Brexit: Labour threatens to defeat Theresa May over ‘great repeal bill’’ (July 13, 2017) *The Guardian* <https://www.theguardian.com/politics/2017/jul/12/labour-tories-great-repeal-bill-brex-16-17/publications/> [accessed July 17, 2017]; Jack Maidment, ‘Key Jeremy Corbyn ally claims UK could remain in single market after Brexit’ (July 16, 2017) *The Telegraph* <http://www.telegraph.co.uk/news/2017/07/16/key-jeremy-corbyn-ally-claims-uk-could-remain-single-market/> [accessed July 17, 2017].

withdrawal and how to do so. Therefore, to further demonstrate that human rights are being undermined in the wake of Brexit, the next section of this article argues in favour of the retention of the Charter of Fundamental Rights in UK law. The UK Government, now without a majority in the House of Commons, has published its White Paper on the regime governing EU citizens' rights after Brexit, and its plans for incorporating certain EU laws into UK law upon exit. Despite Labour and the Liberal Democrats opposing a refusal to incorporate the Charter into UK law, the recently published EU (Withdrawal) Bill still purports to exclude it. There are pressing reasons to reconsider this before the Bill become law.

3 Implications for the Charter of Fundamental Rights

Human rights protection did not form part of the original intentions behind the creation of what is now the European Union. However, despite this, over time the Court of Justice of the EU has found ways to guarantee, and later develop the legal effectiveness of human rights in the EU's legal order. Initially, this was achieved through the Court acknowledging that human rights were a general principle of EU law,⁴⁰ interpreting and applying these rights in various cases.⁴¹ After some time, human rights were enshrined in a codified (and later, binding) document, known as the Charter of Fundamental Rights.⁴² When the Charter was first "solemnly proclaimed",⁴³ it was the first time the EU had a single consolidated catalogue of the full list of its recognised fundamental rights. The intention was that it would help fundamental rights become "more visible to the Union's citizens".⁴⁴ Following the enactment of the Lisbon Treaty in 2009, the Charter was eventually granted legal status in EU law equal to the EU Treaties themselves. The practical effect of this was that human rights

⁴⁰ *Internationale Handelsgesellschaft* (C-11/70) [1970] ECR I-1125.

⁴¹ *Stauder v. Ulm* (C-29/69) [1969] ECR I-0419; *Wachauf* (C-5/88) [1989] ECR I-2609; *ERT* (C-260/89) [1991] ECR I-02925.

⁴² Article 6 TEU.

⁴³ Sarah Sy, 'The Charter of Fundamental Rights' (European Parliament, December 2016) http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_1.1.6.html [accessed April 10, 2017].

⁴⁴ Cologne European Council, 'Conclusions of the Presidency' (European Parliament, June 1999) http://www.europarl.europa.eu/summits/kol1_en.htm [accessed April 10, 2017].

protection under the Charter now “extended beyond the level guaranteed by the Convention.”⁴⁵ The ECHR rights were also entrenched in the Charter, which has helped ensure consistency between the two human rights regimes.

It is relevant at this point to highlight the role of the Council of Europe’s Social Charter of 1961 and its revised version of 1996. This instrument is described as “the regional counterpart” to the ECHR, which enshrined civil and political rights.⁴⁶ The European Social Charter encompasses economic and social rights instead, similar to the Charter of Fundamental Rights. It was therefore a natural source of inspiration during the Charter’s drafting process. The revised European Social Charter is mostly replicated in the Charter of Fundamental Rights. However, the enforcement of the European Social Charter is troubled by an “*à la carte* approach for the definition of the commitments of States parties”⁴⁷ which led to a lack of uniformity across Member States as to human rights protection. It is this weakness of the European Social Charter that has allowed the Charter of Fundamental Rights to become the main source of fundamental rights in Europe. Its failings also highlight the importance of the Charter of Fundamental Rights. The European Social Charter will not provide a satisfactory mechanism of enforcement for human rights protection if the Charter is no longer binding after withdrawal. This is despite it encompassing the same rights as the Charter.

When analysing the practical effects of the Charter and its enforcement, it is important to remember that the CJEU is not a human rights court,⁴⁸ and this has long been the case.⁴⁹ For this reason, some argued that the value of the Charter would be limited, especially in respect of attempts to reconcile

⁴⁵ Juliane Kokott and Christoph Sobotta, ‘The Charter of Fundamental Rights of the European Union after Lisbon’ [2010] EUI Working Papers, Academy of European Law 2010/6, 4.

⁴⁶ DJ Harris, ‘A Fresh Impetus for the European Social Charter’ (1992) 41 ICLQ 659.

⁴⁷ Olivier De Schutter, ‘The European Social Charter in the context of implementation of the EU Charter of Fundamental Rights’ (European Parliament, 2016) p.43.

⁴⁸ See Piet Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’ (2002) 39 *Common Market Law Review* 945; Armin Von Bogdandy and others, ‘Reverse Solange - Protecting the Essence of Fundamental Rights against EU Member States’ (2012) 49 *Common Market Law Review* 489; Philip Alston and Joseph Weiler, ‘An “Ever Closer Union” in Need of a Human Rights Policy: the European Union and Human Rights’ in Philip Alston (ed), *The EU and Human Rights* (OUP: Oxford 1999); Sionaidh Douglas-Scott, ‘The European Union and Human Rights after the Treaty of Lisbon’ (2011) 11 *Human Rights Law Review* 645; *Zambrano*, Opinion of AG Sharpston at [155].

⁴⁹ There is an argument to be made that this will always be the case, and the development and discussion in this article supports the notion that the direction points towards this.

application and enforcement of the Charter with that of the ECHR through the Court of Human Rights.⁵⁰ Since the Charter's proclamation, however, a more constitutionalised fundamental rights rhetoric has spread throughout the EU institutions, culminating in the Charter being granted binding status. Since then, support has increased for the Charter as a source of human rights protection as the European Social Charter faded into the background. As Douglas-Scott points out, the Charter "may set higher standards than in the ECHR" and "legislation to disapply the Charter is surely an extreme measure".⁵¹ The fact that the UK Government do not intend to incorporate the Charter into national law after Brexit is unwelcome, primarily because this would potentially do away with a higher level of rights protection for individuals than is offered by the ECHR and European Social Charter. It would turn back the clock on human rights protection in the UK and add significant work for the UK Government on top of its already heavily complicated procedure of withdrawal. The examples below demonstrate this.

Although the enforcement of ECHR rights via the European Court of Human Rights will still exist after Brexit, one significant concern is the fact that there are fewer stringent obligations outside the framework of EU law to protect the various human rights that are currently recognised in the UK's legal order.⁵² Rights protection and enforcement, as alluded to above, are much stronger under the Charter than the ECHR. Attitudes towards the European Social Charter have also been ambivalent, likely because of its inconsistent enforcement and application across Member States.⁵³ This has diminished its value as a source of human rights protection. In this vein, one of the key problems at

⁵⁰ Koen Lenaerts, 'Fundamental rights in the European Union' (2000) 6 *European Law Review* 575; Koen Lenaerts and Eddy de Smijter, 'The Charter and the Role of the European Courts' (2001) 8 *Maastricht Journal of Comparative and European Law* 90; Sionaidh Douglas-Scott, 'The Charter of Fundamental Rights as a constitutional document' (2004) 1 *European Human Rights Law Review* 37.

⁵¹ Sionaidh Douglas-Scott, "Fundamental Rights not Euroscepticism: Why the UK Should Embrace the EU Charter" in Katja S Ziegler, Elizabeth Wicks and Loveday Hodson (eds) *The UK and European Human Rights: A Strained Relationship?* (Oxford: Hart Publishing, 2015).

⁵² Although see Niamh Nic Shuibhne, "What I Tell You Three Times is True" Lawful Residence and Equal Treatment after *Dano*' (2016) 23 *Maastricht Journal of European and Comparative Law* 908, for a critical review of the value of Directive 2004/38 nowadays cf. the UK has shown contempt for the European Court of Human Rights, and historically been in breach for several years. See *Hirst v UK (No 2)* (2006) 42 E.H.R.R. 4.

⁵³ "The relationship between European Union law and the European Social Charter" (European Committee of Social Rights Working Document, 2014).

present is the jurisdictional issues surrounding questions of EU citizens in the UK.⁵⁴ The regime of human rights protection would be significantly weakened if the UK government does not wish to be bound by the CJEU after Brexit even in the matter of the EU citizens. This is made worse by the Charter losing binding status in the UK as per the plans in the EU (Withdrawal) Bill. Therefore, to assess why this refusal to adopt the Charter as UK law is so concerning, we need only to consider what the Charter has historically achieved for individuals, both EU citizens and UK nationals, and where it specifically offers a higher level of protection of rights compared to the mechanisms from the Council of Europe.

In recent years, certain European Social Charter rights and *sui generis* rights in EU law have found their home in the Charter because they are without equivalent provisions in the ECHR. This disparity between the two regimes has been explicitly recognised by the Court of Justice of the EU in its case law,⁵⁵ and led to various judgments that affirm the protection of these EU-specific rights. The provisions of the Charter provide a legal foundation for such protection especially given its binding nature. In order to highlight the positive impact of the Charter and the high level of protection it affords certain individuals, this section will consider the rights to data protection, rights to protection from discrimination on the grounds of sexual orientation, and the rights to conduct a business and to property as examples of the wider range of rights not protected explicitly by the ECHR. This will highlight that without the Charter, the UK risks undoing a substantial portion of work that has been done to establish a high level of rights protection within its jurisdiction.

One right that has become increasingly relevant in today's technological age is the right to data protection enshrined in art.8 of the Charter. Data protection is a field of law in which it has been recognised that individuals have needed protection for some time.⁵⁶ However, traditionally, data protection as a concept has been expressed narrowly under art.8 ECHR as a manifestation, or subset,

⁵⁴ Yeo, 'Analysis: what is the UK proposing for EU citizens in the UK and EU citizens in the EU?'

⁵⁵ See *Tele2 Sverige* (C-203/15 and C-698/15) December 21, 2016 at [123].

⁵⁶ Lee Bygrave, 'Data Protection Pursuant to the Right to Privacy in Human Rights Treaties' (1998) 6 *International Journal of Law and Information Technology* 247.

of the right to privacy.⁵⁷ Previously considered an “unchartered” right,⁵⁸ the recent judgments in *Google Spain* and *Digital Rights Ireland* saw the Court finally recognising the existence of an independent right to data protection that had to be enforced.⁵⁹ At this point it is worth noting that the UK is not devoid of its own data protection mechanisms, many have been directly transposed from EU law.⁶⁰ However, the Charter’s recognition of data protection as a fundamental right is unique, and offers a more robust level of protection than any domestic legislation. This, of course, would be lost if the Charter was not incorporated to the UK’s domestic legal order after Brexit, a move which could necessitate a return to applying outdated interpretations of the right to privacy in data protection cases. In an age where the law is already struggling to keep pace with technological advances, it would surely be a retrograde step for the UK to effectively erase the right to data protection under the Charter, as to do so would surely be to take considerable steps backwards in an area that has recently enjoyed many positive developments.⁶¹

Secondly, the right to non-discrimination under art.21 of the Charter lists several protected characteristics, including an explicit reference to sexual orientation. This has been heralded by the LGBT community as one of the most explicit forms of protection for their rights, as Cooper notes that “[i]f the CFR [*Charter of Fundamental Rights*] is not to be included in the UK legal arrangements post exiting the EU, gay and lesbian people will be real losers.”⁶² Therefore, in the UK Government’s guarantee that the removal of the Charter will not affect the same substantive domestic rights, it seems to have overlooked the fact that there is not an equivalent right in the

⁵⁷ See *S and Marper v United Kingdom* (2009) 48 E.H.R.R. 50 .

⁵⁸ Gloria Gonzalez Fuster and Raphael Gellert, ‘The fundamental right of data protection in the European Union:

in search of an uncharted right’ (2012) 6 *International Review of Law, Computers & Technology* 73.

⁵⁹ *Google Spain* (C-131/12) May 13, 2014; *Digital Rights Ireland* (C-293/12) April 8, 2014.

⁶⁰ Data Protection Act 1998. In addition, the Regulation 2016/679 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) [2016] OJ L119/1 has been adopted and requires transposition by 25 May 2018. It is likely that Brexit may not have as significant an impact on data protection law as in other areas.

⁶¹ This is not to say that the law is entirely up to date with technology, but it has made some significant gains. See Orla Lynskey, *The Foundations of EU Data Protection Law* (Oxford: OUP 2015).

⁶² Jonathan Cooper, “Why the EU Charter of Fundamental Rights Needs to Remain Part of the UK’s Legal Arrangements Post the UK’s Exiting the European Union: An Introduction” (Doughty Street Chambers, 2017) p.14.

UK protecting individuals from discrimination in respect of their sexual orientation. Cooper also notes the ECHR is weaker than the Charter, especially evident in the context of LGBT asylum case law. This has been notable in the discord between the European Court of Human Rights and the CJEU on the issue of whether having to conceal one's sexual orientation for any amount of time is acceptable.⁶³ In the absence of any specific reference to sexual orientation in the ECHR, the European Court of Human Rights must undertake a more generalised assessment of any potential breaches to rights pertaining to sexual orientation. Furthermore, the margin of appreciation granted to contracting States has been applied broadly in a number of cases where the applicant's sexual orientation is of central importance,⁶⁴ limiting the effectiveness of rights in this regard. The protection offered by the ECHR is simply not as effective as that provided by the Charter.

Article 21 of the Charter, in the context of EU law, is a free standing guarantee of non-discrimination. As already discussed, Protocol 12 ECHR also provides a general right to non-discrimination but Protocol 12 has not been ratified by the UK (or made part of the Human Rights Act). In the absence of Protocol 12, the loss of art.21 CFR is significant. This is not only because of the abovementioned value of the Charter's specific right to protection from discrimination on the basis of sexual orientation, but losing the Charter means that the void created by the UK's decision not to ratify Protocol 12 ECHR will re-emerge. In this regard, the Charter has played a crucial role in protecting equality.⁶⁵ Without the Charter, the right to non-discrimination will be significantly diluted. If the Charter is not to remain part of UK law, the Government can remedy this loss of essential human rights protection by ratifying Protocol 12 ECHR and incorporating it into domestic law.

⁶³ See *X, Y and Z* (C-199/12, C-200/12 and C-201/12) November 7, 2013 cf. *M.E. v Sweden*, (App No.71398/12), judgment of 26 June 2014.

⁶⁴ *Manenc v France* (App No.66686/09), judgment of 21 September 2010; *Mata Estevez v Spain* (App. No.56501/00), judgment of 10 May 2001; *Aldeguer Tomas v Spain* (App No.35214/06), judgment of 14 June 2016.

⁶⁵ Subject to Article 51 of the Charter, which is discussed later.

Finally, art.16 of the Charter expressly protects the right to conduct a business, and art.17 protects the right to property. The inclusion of these economically motivated provisions was the source of some discontent in the Charter's early days, as it seemed that by including these rights the EU did not entirely understand the true nature of fundamental human rights.⁶⁶ Allowing the Charter to include rights linked directly to the protection offered under the four fundamental freedoms of movement risked distracting from the fact that Charter was supposed to codify social and political rights. However, it was soon clarified in the case of *Deutsches Weintor* that this was not the intention of these particular provisions, and that instead there was a need to balance competing rights and interests including social and political rights.⁶⁷ Nonetheless, the inclusion of this category of rights in the Charter is unique to the EU, with no direct equivalent in the ECHR,⁶⁸ and is another example of an area of specific rights that the UK would need to consider as part of its domestic legal regime post-withdrawal. At this point it is worth noting the fact that the Charter is the result of a significant amount of work undertaken to create a clear catalogue of rights the EU considered fundamental, and the UK, were it to seek to reaffirm some of the rights contained within the Charter post-withdrawal, would have to go through this lengthy process again if it were to exclude the Charter from national law. Undertaking such a task would be unnecessarily arduous, and something the UK Government would do well to avoid.

The CJEU has evidently pushed boundaries in its application of the Charter to create a strong level of protection for rights. As a result, the protection of these rights is stronger through the enforcement of the Charter than by other means. This has been achieved through a generous interpretation of the Charter's scope, and on occasion, it has been applied to matters that would otherwise seemingly fall

⁶⁶ Agustín José Menéndez, 'Chartering Europe: Legal status and policy implications of the Charter of Fundamental Rights of the European Union' (2002) 3 *Journal of Common Market Studies* 471, 477 cf. Article 1 Protocol 1 of the ECHR (right to protection of property), so some tangential consideration has been given to this category of rights.

⁶⁷ *Deutsches Weintor* (C-544/10) September 6, 2012 at [47].

⁶⁸ Though this does not necessarily mean that the Court of Human Rights has not dealt with business and human rights, mainly under the guises of Article 1 Protocol 1 of the ECHR. See *Stran Greek Refineries and Stratis Andreadis v Greece* (1994) 19 E.H.R.R. 293; *Centro Europa 7 S.R.L. and Di Stefano v Italy* (App. No.39433/09), judgment of 7 June 2012.

outside its remit. The *Fransson* case confirmed that the interpretation of art.51 of the Charter regarding scope was a broad assessment, and that:

“[I]f such legislation falls within the scope of European Union law, the Court, when requested to give a preliminary ruling, must provide all the guidance as to interpretation needed in order for the national court to determine whether that legislation is compatible with the fundamental rights the observance of which the Court ensures.”⁶⁹

Initially, this implied that the Charter should and could be taken seriously as an instrument that justified bringing human rights protection to the forefront of enforcement. Over the years, however, the Court seems to have narrowed this view, and now “the prospect of an activist ECJ pushing for a broader competence for fundamental rights is rather slim.”⁷⁰ However, the Charter is still clearly of significance despite recent narrowing of scope.

Unfortunately, the damage done to EU human rights protection by the Bill is not limited to the exclusion of the Charter. Schedule 1, paragraph 3(1) of the Bill makes the Charter’s exclusion from domestic law after Brexit even more undesirable. It states ‘[t]here is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law.’⁷¹ Schedule 1, paragraph 4 also states that ‘[t]here is no right in domestic law on or after exit day to damages in accordance with the rule in *Francovich*.’⁷² This schedule is an attempt by the UK Government to further restrict the reach of fundamental rights protection in the EU, for it limits any independent rights of actions for breaches of general principles of EU law like fundamental rights, and removes the ability to sue for such breaches of EU law.⁷³ Prior to the Charter’s existence, bringing a claim for a breach of general principles of EU law were how EU fundamental rights were

⁶⁹ *Fransson* (C-617/10) February 26, 2013 at [19].

⁷⁰ Douglas-Scott in Ziegler, Wicks and Hodson; *Association de médiation sociale* (C-176/12) January 15, 2014.

⁷¹ European Union (Withdrawal) Bill, schedule 1, paragraph 3(1).

⁷² European Union (Withdrawal) Bill, schedule 1, paragraph 4. The Bill refers to the scheme of financial compensation for State liability for breaches of EU law. See *Francovich v Italy* (C-6/90) [1991] ECR I-5043.

⁷³ Josh May, ‘Government accused of ‘chilling’ bid to block compensation claims after Brexit’ (August 11, 2017) *PoliticsHome* <https://www.politicshome.com/news/uk/foreign-affairs/brexit/news/88169/government-accused-chilling-bid-block-compensation-claims> [accessed 5 September, 2017].

previously enforced by the CJEU.⁷⁴ By removing the Charter with its own independent right of action as well as the right of action for breaches of general principles of EU law, it seems that very little enforcement or recourse to EU fundamental rights will be available post-Brexit. This is profoundly concerning and demonstrates a hostility on the part of the UK Government to the importance and value of EU fundamental rights. The process of Brexit will be like a tsunami. There will be unexpected outcomes. It is at these times of upheaval and transition that effective and enforceable human rights are essential. If the Government wants the process of Brexit to have a minimum impact on everyday life in the UK, the Government should be maximising human rights protection. Instead, they are proposing to minimise it. Human rights guarantee protection during periods of transition and they mitigate the impact of change, seeking to ensure change does not become a crisis.

Removing the right to claim breaches of EU fundamental rights as a general principle of EU law and the ability to sue for breaches of EU law will limit rights even further than just removing the Charter will. The Charter has of late become the main source of fundamental rights because of the Lisbon Treaty granting it binding status, but prior to its existence, fundamental rights were enforced as general principles of EU law. The violation of a fundamental principle of EU law constitutes grounds for a cause of action in EU law.⁷⁵ Without the Charter, it would have been expected that EU fundamental rights protection as a general principle could be relied upon, especially as these rights already find expression in many other provisions of EU law. Such rights are also enforced through domestic legislation that derived from relevant EU law. However, in some situations, EU law has been preferred over domestic UK law to best protect fundamental rights, sometimes even setting UK law aside.⁷⁶ Alongside this as a remedy are *Francovich* damages, financial compensation from the State for serious breaches of EU law. However, schedule 1 will now require that any EU fundamental rights are *only* enforced if they can be found in domestic legislation, EU law can no longer set aside

⁷⁴ *Nold* (C-4/73) [1974] ECR I-0491; *Wachauf* (C-5/88) [1989] ECR I-2609; *ERT* (C-260/89) [1991] ECR I-02925.

⁷⁵ Including fundamental rights as recognised in Article 6, Treaty of the European Union (TEU)

⁷⁶ Alison Young, "Oh, What a Tangled Web We Weave... The EU (Withdrawal) Bill 2017-19 and Human Rights post Brexit: Part 2" (OxHRH Blog, August 16, 2017) <<http://ohrh.law.ox.ac.uk/oh-what-a-tangled-web-we-weave-the-eu-withdrawal-bill-2017-19-and-human-rights-post-brexite-part-2>> accessed August 25, 2017.

UK law and there will no longer be recourse to damages for serious breaches of EU law by the State. This will severely limit individual rights protection in an uncertain transitional period where these rights will be at most risk and where remedies for violations of human rights by State will be most needed. Without this and without the Charter, situations where fundamental rights will be available post-Brexit will be few and far between.

If the UK excludes the Charter and the jurisdiction of the CJEU after Brexit, there are likely to be serious consequences affecting the protection of fundamental rights, whether they are human rights protected by the ECHR or otherwise. This bears the greatest risks for EU citizens in the UK and their families. In this regard, it is clear that there are not only legal reasons for why the Charter should be retained post-Brexit, but also strong underlying reasons related to policy. The fact that the UK Government still seeks to exclude the Charter even after the political disquiet expressed in opposition of such a choice indicates how urgent the need is to improve awareness of the risks of failing to adequately address such imminent consequences for fundamental rights protection.

4 Conclusion

It is difficult to predict what the future holds for the EU and the UK. This article has highlighted some human rights implications of Brexit, emphasised that the ECHR is still available as a source from which individuals can claim rights, and has argued that the Charter should not be sacrificed as part of the process of withdrawal. Although there are likely to be teething problems as solutions to these complicated problems are negotiated, for now, the UK Government seems to have failed to meaningfully engage with an issue that is supposedly a top priority – human rights protection. It may be unwise for this to continue. The debate is still ongoing and as negotiations crystallise the future for human rights protection will become clearer. At present, however, it is evident that not only are human rights being set aside, but that they should not be. If these issues are not meaningfully engaged with soon, great difficulties will lie ahead for EU citizens in the UK and British citizens in the EU.