

# The Only Certainty is Uncertainty: Risk to Rights in the Brexit Process

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## ABSTRACT

This chapter exposes the uncertain future of rights in the UK following the Brexit process, adopting a taxonomy of risk that the Brexit process will pose to the framework of rights protection. It provides an overview of the envisioned Brexit process as it impacts rights and concomitant remedies for their infringement, and links this to the core question of whether there is an inherent ‘injustice’ in uncertainty. It outlines those rights which will be lost; those which are critically at risk; those which are vulnerable; and considers whether there are alternative means of protecting rights. It concludes on the argument of the injustice in the ‘knowable’ consequence of uncertainty and risk to rights which will arise as a direct consequence of the planned legal process by which the UK will withdraw from the EU.

**Keywords:** human rights; consumer rights; workers rights; equality; EU Charter;

## 1. IN BREXIT, THE ONLY CERTAINTY IS RISK AND LOSS

### A. *UK Withdrawal from the European Union*

In June 2016, the UK electorate in referendum to withdraw from the European Union. Having triggered the Article 50 notification process in March 2017, the UK is set to withdraw from the European Union at 11pm on 29 March 2019 if there is no agreement with the EU or following a transition period ending 31 December 2020 if the draft Withdrawal Agreement is concluded. For the law, and particularly for rights, much will depend on an agreement, *if* there is an agreement, with the EU.<sup>1</sup> For example, conditions for a future relationship with the EU *could* be predicated on adherence to rights principles.<sup>2</sup> As of February 2019 (and only one month before the March 2019 deadline), there is little hope for optimism of an agreement being reached between the UK and the EU, and there is less certainty regarding the future without one. Without a legally binding EU-UK Withdrawal Agreement, this chapter is based on what scope there is for certainty. It draws primarily from the European Union (Withdrawal) Act 2018 [EUWA], as its framework outlining the process of legal separation has since proved the model for the Brexit process ahead.

### B. *A Framework for the Legal Separation in the Brexit Process*

The European Union (Withdrawal) Act 2018 will repeal the European Communities Act 1972 on ‘exit day’,<sup>3</sup> but, to avoid legal uncertainty where the authority for a broad scope of EU-derived domestic legislation no

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<sup>1</sup> The Draft Withdrawal Agreement was finalised in November 2018. At the point of writing, there is significant uncertainty as to whether the Prime Minister will have sufficient support for the Agreement in Parliament to be passed on a second vote.

<sup>2</sup> Rob Merrick, ‘Theresa May bows to EU by keeping UK in human rights convention after Brexit, enraging Tory right’ *The Independent* 12 July 2018.

<sup>3</sup> Section 1 European Union (Withdrawal) Act 2018. This is defined in the Act as 11:00pm on 29 March 2019.

longer has legal effect, will also incorporate the *acquis* of EU law into UK law.<sup>4</sup> This will include direct EU legislation which has effect before and on exit day.<sup>5</sup> However, it will *not* include the EU Charter of Fundamental Rights,<sup>6</sup> though this ‘does not affect the retention in domestic law ... of any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles).’<sup>7</sup> General Principles of EU law, including human rights, are retained in domestic law (only if recognised by CJEU pre-exit case law) but given no right of action, nor is any court or tribunal permitted to disapply any rule of law or quash any conduct where they conflict with incorporated general principles of the EU.<sup>8</sup> The EUWA removes the principle of supremacy from any law passed after exit day but continues to apply it where relevant to the ‘interpretation, disapplication or quashing’ of any law made before exit.<sup>9</sup> In the interpretation of retained EU-derived law, the courts are not bound to decisions of the Court of Justice of the European Union [CJEU] made after exit. Domestic courts may, however, ‘have regard’ to the decisions of the CJEU or any other EU body in ‘so far as it is relevant’.<sup>10</sup>

Controversially, Ministers may by secondary legislation may any change to retained law which the Minister considers fit ‘to prevent, remedy or mitigate ... any failure of retained EU law to operate effectively, or ... any other deficiency in retained EU law’ arising from withdrawal.<sup>11</sup> These changes are a matter of the subjective discretion of the Minister,<sup>12</sup> and can be made to any law of any status, including acts of Parliament. The limitations on the use of this unprecedented degree of delegated power are limited: Ministers may not impose or increase taxes, create a criminal offence, or law with retrospective application. They also may not amend, repeal or revoke the Human Rights Act 1998 (HRA 1998) or any legislation under it or amend the Northern Ireland Act 1998. A sunset clause of two years is included in this section – though, controversially this may be amended by the Minister, and addition discussion of extension of this clause in the event of no-deal is under discussion.<sup>13</sup> Limited oversight is envisioned under the bill, and even less is possible given the sheer scale and scope of changes to be made.<sup>14</sup> Delegating unprecedented scope of legislative power to the executive, the Act has been widely subject to criticism, particularly concerning the impact on individual rights protection, where Ministers may make changes based on policy-preference rather than necessity for legal certainty.<sup>15</sup> This model of removal and the delegation of wide Ministerial legislative powers to replace, has been followed by subsequent Brexit legislation.<sup>16</sup> A large number of statutory instruments introduced in preparation for Brexit have already

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<sup>4</sup> Section 2 EUWA.

<sup>5</sup> Section 3 EUWA.

<sup>6</sup> Section 5(4) EUWA.

<sup>7</sup> Section 5(5) EUWA.

<sup>8</sup> Schedule 1(2) EUWA.

<sup>9</sup> Section 5(1)-(2) EUWA.

<sup>10</sup> Section 6(2) EUWA.

<sup>11</sup> Section 9(1) EUWA.

<sup>12</sup> See J Grogan, ‘The Lords have just raised the bar on the defence of rights and the rule of law in the Brexit process’ LSE Brexit Blog 27 April 2018: <http://blogs.lse.ac.uk/brexit/2018/04/27/the-lords-have-just-raised-the-bar-on-the-defence-of-rights-and-the-rule-of-law-in-the-brexit-process/>.

<sup>13</sup> Department for Exiting the European Union, ‘White Paper on Legislating for the Withdrawal Agreement between the United Kingdom and the European Union’ (24 July 2018) para 71-71.

<sup>14</sup> Conservative estimates are that between 800 and 1,000 changes will be needed: Department for Exiting the European Union, *The Repeal Bill: White Paper* (30 March 2017) para 3.19.

<sup>15</sup> For constitutional concerns related to the background to the Act, see Bingham Centre for the Rule of Law, ‘Briefing Paper: Parliament and the Rule of Law in the Context of Brexit’ (29 September 2016); House of Lords Select Committee on the Constitution, ‘The ‘Great Repeal Bill’ and delegated powers’ 9th Report of Session 2016-17 (7 March 2017) HL Paper 123; House of Lords Delegated Powers and Regulatory Reform Committee published its *European Union (Withdrawal) Bill: 3rd Report of Session 2017-19 (TSO, 2017)*, HL Paper 22, 28 September 2017; and M Elliott and S Tierney, ‘The ‘Great Repeal Bill’ and Delegated Powers’, UK Const L Blog (7th Mar 2017) <<https://ukconstitutionallaw.org/>>.

<sup>16</sup> See the Immigration and Social Security Co-ordination (EU Withdrawal) Bill as introduced.

raised serious concerns as to their design and impact, in addition to raising serious concerns for the lack of capacity for oversight due to the large volume of instruments.<sup>17</sup>

Critically, without a codified constitution or robust rights protections, the cumulative effect of the EUWA creates unprecedented risk to the future of rights protection. This is compounded by the design of the bill, which has provided the model for subsequent Brexit legislation: removal of large swathes of law derived from the EU, paired with the delegation of vast legislative powers to the executive to fill consequent gaps in the law.<sup>18</sup> The flagship Brexit legislation designed to deliver the legal separation of the UK from the EU, but also guarantee a degree of legal certainty through the Brexit Process. In effect, however, it compromises both to achieve neither.

### *C. A Taxonomy of Risk and consequent uncertainty posed to Rights by Brexit*

It is possible to estimate the risk posed by the Brexit process, delineated by the degree of risk posed by the process of legal separation and reform.<sup>19</sup> The following four categories emerge:

#### **(1) Rights Lost**

This category includes those rights which are predicated on UK membership of the EU, and which cannot be replicated or restored in the UK;

#### **(2) Rights Critically at Risk**

This category includes rights which are capable of replication or restoration in the UK, but which are either predicated on agreement with the EU, or are otherwise critically at risk by political will or deficient legislative and executive action;

#### **(3) Rights Vulnerable to Repeal**

This category of rights may owe their origin to the EU but can or do exist independent of its legal framework, but which nevertheless are vulnerable to reform or removal without underlying obligations to be protected under EU law;

#### **(4) Rights at Low Risk of Removal**

This final category of rights does not owe their origin or continued recognition to EU law but are precursory, or recognised at common law or are otherwise at low risk.

This taxonomy rejects arguments based on ‘cross-matching’ whereby one right sourced in one instrument is considered to be the same or equivalent to one sourced in another instrument. The approach of this chapter is instead holistic: viewing substantive rights protection as a matrix of interrelated rules, obligations, and remedies which are supported by a wider multi-level institutional framework. By establishing the risk created by the *process* of withdrawal, it identifies the structural and procedural weaknesses in the system which exacerbate risk of the diminishing of rights – rather than the lack of recognition of a right *per se*.

## **2. WHAT IS (INEVITABLY) LOST IN THE BREXIT PROCESS**

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<sup>17</sup> Ruth Fox, ‘Can the government get all its Brexit Statutory Instruments through Parliament by exit day on 29 March?’ (Hansard Society, 12 February 2019) <<https://www.hansardsociety.org.uk/blog/can-the-government-get-all-its-brexit-statutory-instruments-through>>.

<sup>18</sup> See eg Immigration and Social Security Co-ordination (EU Withdrawal) Bill as introduced.

<sup>19</sup> This categorisation is explored in depth in J Grogan, ‘Rights and Remedies at Risk: Implications of the Brexit Process on the future of Rights in the UK’ [2020] PL [*forthcoming*].

### A. *Loss of EU Citizenship*

An inevitable consequence of withdrawal from the European Union is the loss of EU citizenship<sup>20</sup> for British nationals with no other claim on EU-27 citizenship.<sup>21</sup> UK nationals will also lose a host of EU citizens' rights which cannot be replicated as they depend on EU membership. These include rights to participate in the democracy of the EU, with the right to vote and stand in European Parliament elections (Article 39 EUCFR); and the right to vote and stand in municipal elections in Member States where the EU citizen is a resident (Article 40 EUCFR). Justiciable rights to good governance, including the right to good administration by Union institutions (Article 41 EUCFR); the right of access to documents (Article 42 EUCFR) and to the European Ombudsman (Article 43 EUCFR), and the right to petition the European Parliament (Article 44 EUCFR, Article 227 TFEU), will be lost. Beyond the loss of such rights which go to the core of good governance, is a further and, to some, greater loss. As the Conservative government has made ending the freedom of movement of people as one of the prime motivations for EU withdrawal,<sup>22</sup> free movement, or the bundle of rights which entitled EU citizens and their families to move and reside freely within the European Union subject to conditions laid down in the Treaties,<sup>23</sup> will end. All UK citizens who do not otherwise have claim on EU citizenship or have EU family, will lose the free movement rights in the other EU Member States. Similarly, any EU citizen without any other claim (for example, through pre-Brexit residency), will lose their rights to enter, work and reside in the UK following withdrawal. There are no near equivalent examples of such an extensive and overnight loss of rights to a wide group of people. While prohibitions or limitations of rights to travel based on criminal or national security concerns can be identified, it is impossible to draw the same arguments here. However, such limitations are founded on arguments of justice, to prevent or punish actions done to others – none of which can be applicable here. Where justice is driven by perspective, for those who face such a loss – an act of democracy can never justify the injustice.<sup>24</sup>

Some attempts have been made to extend the rights of EU citizenship to UK citizens following withdrawal, including a challenge before the CJEU on the question of acquired rights.<sup>25</sup> The European Parliament's Chief Brexit Negotiator, Guy Verhofstadt, proposed 'associate EU citizenship' on a voluntary basis to UK citizens,<sup>26</sup> but this has been given little chance of success.<sup>27</sup> The irony of the promise of *Grzelczyk*, that 'Union citizenship is destined to be the fundamental status of nationals of the Member States',<sup>28</sup> is that it is still limited to nationals of *Member States*. The un-mourned loss of these rights by those leading the Brexit process represents a rejection of cosmopolitan citizenship, participating in a democracy and governance larger than the state which defines its citizenship.

### A. *Loss of Right of Effective Remedy – and the Most Effective Remedy*

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<sup>20</sup> Article 20-25 TFEU.

<sup>21</sup> I distinguish here between the total loss of EU citizenship by UK nationals by virtue of UK withdrawal, and the potential of acquired rights by EU-27 citizens and UK citizens who have exercised their rights to reside in the UK and EU-27 respectively, and who are the subjects of the Withdrawal Agreement.

<sup>22</sup> HM Government 'The Future Relationship Between the United Kingdom and the European Union' CM 9593 (July 2018).

<sup>23</sup> Article 45 TFEU.

<sup>24</sup> J Grogan, 'Three Fast and Three Slow Lessons for UK Democracy in 2019' (*Democratic Audit*, 8 January 2019) <<http://www.democraticaudit.com/2019/01/08/three-fast-lessons-and-three-slow-lessons-for-uk-democracy-in-2019/>>.

<sup>25</sup> See Tony Barber, 'Can Britons keep their EU citizenship after Brexit?' *Financial Times* 6 June 2018; Steve Peers, 'What's Next What's next for acquired rights of EU27 and UK citizens? Anticipating the draft Brexit withdrawal agreement' EU Analysis Blog 6 February 2018 available at '<http://eulawanalysis.blogspot.com/2018/02/whats-next-for-acquired-rights-of-eu27.html>'.

<sup>26</sup> Harry Cooper, 'MEPs: Brexit an 'opportunity' for the EU' Politico 12 September 2016; Available at <https://www.politico.eu/article/brexit-opportunity-for-european-union-meps-report/>

<sup>27</sup> See 'Can Britons keep their EU citizenship after Brexit?' *The Economist* 12 April 2017; and Jennifer Rankin, 'EU citizenship deal for British nationals has no chance, say experts' *The Guardian* 12 December 2016.

<sup>28</sup> Case C-184/99 *Grzelczyk v Centre public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR I-6193, [31].

The EU legal system has long recognised the principle of effectiveness,<sup>29</sup> or the procedural requirement that domestic rules must not be ‘liable to render practically impossible or excessively difficult’ the exercise of rights which have been conferred by EU law.<sup>30</sup> If there is a conflict between national norms and EU law, the doctrine of supremacy applies, and the national law is disapplied.<sup>31</sup> Since 2009, the EU Charter of Fundamental Rights has the same status and legal value as the EU Treaties upon which the entire EU legal system is based. The EU Charter applies to Member States where they are acting within the scope of EU law.<sup>32</sup> Thus, if a provision of national law (of any value) which fall within the scope of EU law infringes a fundamental right under the EU Charter, the measure must be disapplied by national courts under the principle of the supremacy of EU law.

Currently, Article 47 EUCFR provides the right to an effective remedy and has strengthened access to justice rights. It is not limited to the determination of a person’s civil rights and obligations, or criminal charges as Article 6 ECHR is.<sup>33</sup> Critically, the HRA 1998 does not incorporate Article 13 ECHR, which requires an effective remedy before a national authority. While access to justice has been a principle of the common law, it has not provided equivalent protection, and has only served in case law as a principle of interpretation preventing the ‘disproportionate erosions of access to justice’.<sup>34</sup> Where there is a conflict between domestic law and EU law (thus Article 47 EUCFR) domestic law was disapplied, whereas the remedy for an unavoidable violation of the ECHR, resulted in a declaration of incompatibility to Parliament. The loss of this right arguably leads to a loss in the level of protection, as that afforded by the ECHR is weaker.<sup>35</sup>

### 3. CRITICALLY AT RISK AND CRITICAL UNCERTAINTY

#### A. *Rights of EU Citizens in the UK*

EU citizens in the UK face critical uncertainty as to their future during and after the Brexit process. Campaign groups are advocating for the ring-fencing of rights for EU citizens living in the UK, and UK citizens who have exercised their rights to live in the EU-27, *even* in the event of no agreement between the EU and UK.<sup>36</sup> To avoid a situation whereby nearly 3.6 million individuals could gain illegal status overnight, the UK government has created Immigration Rules to implement a registration scheme giving ‘settled status’ to EU citizens who have been resident for five years, and ‘pre-settled status’ to those who have not. However, the rights of carers, family members, and vulnerable groups (including children in care, and the elderly) have not been sufficiently clarified, and latent threats of exposure to the ‘hostile environment’ remain – particularly where this system

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<sup>29</sup> See F Synder, ‘The Effectiveness of European Community law’ [1993] MLR 56; and M Accetto and S Zlepting, ‘The Principle of Effectiveness: Rethinking its role in Community Law’ [2005] Euro Pub L 375.

<sup>30</sup> Case C-268/06 *Impact v Minister for Agriculture and Food* [2008] ECR I-2483, para 46.

<sup>31</sup> In *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs: Secretary of State for Foreign and Commonwealth Affairs and Libya v Janah* [2017] UKSC 62, the Court of Appeal held that the embassies of Sudan and Libya could not rely on the State Immunity Act 1978 to bar employment rights claims under the EU Working Time Directive, as it would violate Article 47 CFR which in turn required the disapplication of the Act. The Court also found a violation under Article 6 ECHR and issued a declaration of incompatibility. See A Young, ‘*Benkharbouche* and the Future of Disapplication’ (UK Constitutional Law Blog 24 October 2017).

<sup>32</sup> Article 51 EU Charter of Fundamental Rights.

<sup>33</sup> For example, immigration proceedings: *ZZ (France) v Secretary of State for the Home Department* [2014] EWCA Civ 7, [2014] QB 820. See Nik de Boer, ‘Secret evidence and due process rights under EU law’ (2014) 51 CML Rev 1235, 1256–1261.

<sup>34</sup> Sandra Fredman, Alison Young, and Meghan Campbell, ‘The Continuing Impact of Brexit on Equality Rights’ (Oxford Human Rights Hub and The UK in a Changing Europe, 2018) <<https://ukandeu.ac.uk/research-papers/the-continuing-impact-of-brexit-on-equality-the-findings/>>.

<sup>35</sup> See the distinction in level of protection of the ECHR and EUCFR in eg *BAT Industries and others v HMRC* [2017] UKFTT 558 (TC); *AZ v Secretary of State for Home Department* [2017] EWCA Civ 35; and *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62.

<sup>36</sup> For example, the3million ([www.the3million.org](http://www.the3million.org)) and British in Europe ([www.britishineurope.org](http://www.britishineurope.org)). See House of Commons Exiting the EU Committee, ‘The progress of the UK’s negotiations on EU withdrawal: the rights of UK and EU citizens’ 8<sup>th</sup> Report of 2017-2019, 18 July 2018, HC 1439.

depends on citizens successfully applying for status in advance of a deadline (after which they will lose that entitlement).<sup>37</sup> The conclusion that the EUWA imports EU citizens' rights into UK law has been undermined by the Immigration and Social Security Co-ordination (EU Withdrawal) Bill as introduced, which contains no explicit protection or mention of EU citizens currently resident, but only repeals any immigration regulations which previously protected them. Without even quasi-entrenchment of these rights through the Withdrawal Agreement with the European Union, (which is otherwise constitutionally challenging under the domestic law)<sup>38</sup>, the rights and future of EU citizens in the UK remains at risk as they are vulnerable to changes in immigration policy.<sup>39</sup> Living under such an extreme state of uncertainty as to the future, has been arguably an injustice, as concerns have been compounded by the introduction of a system which provides fewer rights than currently enjoyed, and a status which could be changed through statutory instrument.

### *B. Uncertainty Created by Loss of EU Charter of Fundamental Rights*

The EU Charter of Fundamental Rights codifies fundamental rights, including first-generation rights of life<sup>40</sup> liberty,<sup>41</sup> and the prohibition on torture<sup>42</sup> and the death penalty,<sup>43</sup> as well as socio-economic rights and third-generation rights such as the protection of personal data.<sup>44</sup> The primary justification offered for the removal of the Charter is that it is not a source of rights, but rather it only 'reaffirmed the existing legally binding fundamental rights, in a new and binding document'.<sup>45</sup> It has been asserted that the excision of the EU Charter will not undermine 'substantive rights' which otherwise have existed and exist elsewhere in EU law, and thus will be converted into UK law.<sup>46</sup> The EUWA references these as 'underlying rights' which will be relevant to the interpretation by the UK Courts, even when interpreting references to the Charter in converted case law. A point weakened by the lack of conclusive identification of 'directly effective' Treaty provisions, or guidance by the EUWA as to the identification of these rights.

The confusion of what constitutes an 'underlying right' when the codified account has been removed creates significant legal certainty and undermines codified rights which do not exist at common law or in other rights instruments.<sup>47</sup> Where the contention that the Brexit process will not undermine substantive rights protection was repeatedly challenged, notably by the House of Lords EU Committee,<sup>48</sup> the Department for Exiting the EU produced the *Right by Right Analysis* to respond to concerns for the weakening of rights protection as a result of UK withdrawal from the EU, arguing an equivalence of rights found elsewhere.<sup>49</sup> DEXEU argued that 18 Charter rights 'correspond, entirely or largely, to articles' of the ECHR and are 'as a result, protected both internationally and, through the Human Rights Act 1998 and devolution statutes'. However, this obfuscates the

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<sup>37</sup> Thomas Colson, 'Eu citizens could be the next victims of Theresa May's 'Hostile' Immigration policy' (*Business Insider* 24 April 2018) <<http://uk.businessinsider.com/eu-citizens-theresa-may-hostile-environment-immigration-brexit-2018-4?r=US&IR=T>>.

<sup>38</sup> P Daly, K Hughes and K Armstrong, 'Brexit and EU Nationals: Options for Implementation in UK Law' CEPS/CPL Working Paper Nov 2017 1-14.

<sup>39</sup> Steve Peers, 'What's next for acquired rights of EU27 and UK citizens?' (*EU Legal Analysis Blog* 6 February 2018) <<http://eulawanalysis.blogspot.com/2018/02/whats-next-for-acquired-rights-of-eu27.html>>.

<sup>40</sup> Article 2 EUCFR.

<sup>41</sup> Article 6 EUCFR.

<sup>42</sup> Article 4 EUCFR.

<sup>43</sup> Article 2 EUCFR.

<sup>44</sup> Article 8 EUCFR.

<sup>45</sup> DExEU, 'Charter of Fundamental Rights of the EU: Right by Right Analysis' (5/12/2017)

<sup>46</sup> *ibid.*

<sup>47</sup> See Merris Amos 'Red Herrings and Reductions: Human Rights and the EU (Withdrawal) Bill' (UK Constitutional Law Association 4 October 2017) <<https://ukconstitutionallaw.org/2017/10/04/merris-amos-red-herrings-and-reductions-human-rights-and-the-eu-withdrawal-bill/>>.

<sup>48</sup> Select Committee on the Constitution of the House of Lords: 'The 'Great Repeal Bill' and Delegated Powers' 9<sup>th</sup> Report of Session 2016-2017 HL Paper 123.

<sup>49</sup> DExEU, 'Charter of Fundamental Rights of the EU: Right by Right Analysis' (5/12/2017).

multiplicity of sources of rights reflected in the Charter, and the irony is that the rationale for codification in the Charter was exactly to provide a single, clear source of rights. DEXEU forwarded the argument that where Charter rights, where not found in common law or ECHR, could be covered by international treaties, overlooking the fact that international treaties (other than the EU Treaties) may not confer enforceable rights upon individuals where they have not been incorporated into domestic law.

The Charter will continue to have relevance to retained EU law, *particularly* where retained EU law, or pre-Brexit UK and CJEU case law, contains explicit reference to Charter rights. Such continuing relevance of the Charter to the understanding and interpretation of retained law is recognised by the EUWA, Section 5(5) which states that the removal of the Charter ‘does not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles)’. However, explicitly excluding the Charter in the interpretation of retained law, and in litigation concerning former Charter rights, will cause significant confusion and uncertainty in practice as Courts and litigants must rely on the ambiguous authority of ‘underlying’ rights to be found in a multiplicity of sources. This confusion will be compounded by distinctions arising from interpretive obligations owed to retained law (no rights of action will be given), and new law introduced to replace it either through primary legislation or through delegated powers under the EUWA, the latter of which will not be subject to interpretation based on ‘underlying rights’.<sup>50</sup> The only certainty in this, is that where the EU Charter is lost, rights recognised within it which are *not* either easily identifiable or recognised elsewhere in EU or UK case law, the ECHR or the common law are critically at risk.

#### 4. VULNERABLE TO REPEAL

##### A. *Weakening the Foundation of Equality Law*

In the absence of codified constitution, provisions of primary EU law, the EU Charter of Fundamental Rights and directly effective rights within the EU Treaties, have held quasi-constitutional status and capable of disapplying national norms of any status including Acts of Parliament. As underlined in the introduction to this book, the EU has provided a strong framework for non-discrimination beyond national boundaries.<sup>51</sup> Even in the absence of implementing legislation, directly effective rights including non-discrimination on grounds of nationality,<sup>52</sup> equal treatment,<sup>53</sup> and equal pay<sup>54</sup> could be enforced in domestic courts.<sup>55</sup> While the Equality Act 2010 is not dependent on the ECA (and in many cases the legislation has gone beyond the strict requirements of EU law), equality law is indebted to the EU. For example, in *Walker*<sup>56</sup> the Supreme Court held that the Equality Act 2010 is incompatible with EU law and must be disapplied, and that Mr Walker’s husband is entitled on his death to a spouse’s pension, provided they remain married. Women’s groups have commented on the benefit brought by EU membership to the position of women’s rights, with particular regard to sex discrimination, maternity,<sup>57</sup> parenthood,<sup>58</sup> and the right to equal pay for equal work: for example, the

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<sup>50</sup> See Amos (n 43).

<sup>51</sup> Floris De Witte, *Justice in the EU: The Emergence of Transnational Solidarity* (OUP 2016).

<sup>52</sup> Article 18 TFEU.

<sup>53</sup> Article 19 TFEU, which prohibits discrimination to sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation beyond employment to good, services, housing, education and social protection: all currently implemented through the Equality Act 2010. See Nicole Busby, ‘Equality law, Brexit and devolution’ *Emp L B 4*.

<sup>54</sup> Article 157 TFEU.

<sup>55</sup> For analysis, see Colm O’Cinneide, *The Evolution and Impact of the Case-Law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC* (Brussels, Belgium: Migration Policy Group, 2012).

<sup>56</sup> *Walker v Innospec and others* [2017] UKSC 47.

<sup>57</sup> See eg Pregnant Workers Directive (92/85/EEC).

<sup>58</sup> Parental Leave Directive (2010/18/EU).

Commission's infringement action against the UK on the matter of legislating for unequal pay.<sup>59</sup> This body of rights will not be lost or removed with Brexit, but is nevertheless vulnerable as their continued existence is subject to the political will to protect them, as there may be no further EU obligation to recognise them. While the HRA is immune from amendment by Henry VIII powers under the EUWA, no such immunity is given to the Equality Act 2010.<sup>60</sup> Ministers could, through secondary legislation, modify or remove exceptions given under the Equality Act 2010<sup>61</sup> and justifications for discrimination<sup>62</sup> could be extended.<sup>63</sup> Even where there is no express intention to reduce or weaken equality law, without the external obligation of EU law, Equality law is made 'vulnerable to change and neglect.'<sup>64</sup>

## B. Consumer and Workers' Rights

As consumers and workers are at the core of the functioning of the Single Market, associated regulation inevitably came within the scope of EU law.<sup>65</sup> While there is still a question of the UK's future relationship with the Single Market, consumer and workers' rights do not necessarily depend on it to exist. Consumer and workers' rights were driven by the exigencies of the Internal Market, and extended by the EU beyond the bare minimum of safety standards. For example, a host of directives implemented in the UK have extended the protection of workers,<sup>66</sup> to those working on part-time, temporary and fixed term contracts.<sup>67</sup> The Consumer Rights Act 2015 can trace its origin to EU legal obligations. The Prime Minister has spoken of the continued guarantee of workers' rights,<sup>68</sup> and the governments outline of its intended future relationship with the EU has stated the UK and the EU 'commit to the non-regression of labour standards'.<sup>69</sup> However, concerns remain that in the absence of external obligations, consumer and labour rights would continue post-Brexit until it became politically expedient for them not to, for example, as a condition of any future trade deal.<sup>70</sup>

International agreements do not enjoy the same level of parliamentary scrutiny over negotiation and ratification than there is or EU legislation.<sup>71</sup> Concerns have been voiced that in the (re)negotiation of trade deals with over 65 countries, the UK government may aim to balance a weaker negotiating position (a smaller market, and time and resource pressure) with a reduction in labour standards (including maternity, parental leave, equal pay, working-time and agency worker rights) in order to improve competitiveness in the international market.<sup>72</sup> Without sufficient domestic protection, for example in the requirement of a clause protecting labour rights in trade agreements, these rights are at increased vulnerability through the Brexit process.

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<sup>59</sup> See Case C-61/81 *Commission of the European Communities v United Kingdom* [1982] ICR 578.

<sup>60</sup> Fredman et al (n 30).

<sup>61</sup> Sections 191-197 Equality Act 2010.

<sup>62</sup> Sections 13(2), 15, 19(2)(d).

<sup>63</sup> Nicole Busby, 'Equality law, Brexit and devolution' *Emp L B 4*.

<sup>64</sup> *ibid*.

<sup>65</sup> See Iris Benohr, *EU Consumer Law and Human Rights* (2013 OUP) ch 2; and A Bogg, C Costello, ACL Davies, J Prassl, *The Autonomy of Labour Law* (2015 Hart Publishing) ch 9.

<sup>66</sup> EU Directive 2000/78/EC (the Framework Directive) requires member states to prohibit discrimination, including on grounds of sexual orientation, in the field of employment.

<sup>67</sup> Part-time Workers Directive (97/81/EC); Fixed-Term Workers Directive (99/70/EC); Temporary Agency Workers Directive (208/104/EC)

<sup>68</sup> Joint Committee on Human Rights, 6.

<sup>69</sup> HM Government 'The Future Relationship Between the United Kingdom and the European Union' CM 9593 (July 2018) at 123.

<sup>70</sup> See eg James Harrison, 'Workers' rights are now a basic element of trade deals. What stance will Britain take?' LSE Brexit Blog (27 June 2017); and Adam Bienkov, 'Theresa May's new Brexit chief called to turn 'back the clock' on workers' rights' *Business Insider* (16 July 2018).

<sup>71</sup> Fredman et al (n 30).

<sup>72</sup> Women's Budget Group and Fawcett Society Report, 'Exploring the Economic Impact of Brexit on Women' March 2018 Report, <<https://www.edf.org.uk/womens-budget-group-and-fawcett-society-report-exploring-the-economic-impact-of-brexit-on-women/>>.



### C. The Uncertain Future of 'New Rights'

The Charter is a source of rights, and (importantly) a source of additional rights which do not exist in the European Convention on Human Rights or in the common law. These rights include data protection, and the recognition of the right to be forgotten in *Google Spain*.<sup>73</sup> These 'new' rights are vulnerable where there is a regressive attitude towards them, or where they are considered far lesser concerns to, for example, national security and immigration policy. For example, the Data Protection Act 2018, ostensibly implementing the EU's General Data Protection Regulation, removes the rights of person subject to immigration procedures to have access to the data held about them.<sup>74</sup> By doing so, the DPA makes individuals unable to correct or delete any incorrect or unlawfully obtained information about them, creating Kafkaesque situation whereby individuals could be condemned in both innocence and ignorance. It is likely that the future of data protection in particular will rest with a future agreement with the EU.<sup>75</sup> Compliance with a standard of 'essential equivalence' with EU data protection could be a condition for participation in the single market, and (critically) any lowering of the standards of data protection could undermine access to cross-border transfers.<sup>76</sup> However, this protection may not extend to other 'new' rights which are not necessary for a transactions with the Single Market, and protections for UK citizens or non-EU citizens interacting with state bodies may not fall within the scope of protection.

## 5. FINDING CERTAINTY IN ALTERNATIVE AVENUES

One category of rights the least vulnerable to change are those which include personal rights which can claim a long legacy, firmly rooted in the British constitution and that are recognised at, and rooted in, the common law. These rights include personal security, personal liberty and private property, and can trace their origin within the development of the common law.<sup>77</sup> These rights, where recognised, are least vulnerable by the Brexit process, as even the ECHR has come under threat following declarations by the government of intention to repeal the Human Rights Act 1998 and withdraw from the ECHR.<sup>78</sup> There is an essential uncertainty in common law constitutional rights, as 'the jurisprudential approach lacks coherence'.<sup>79</sup> This leads to the question of *which* rights and whether ECHR rights are replicated in the common law, and further whether the established ECHR case law will be reincorporated or re-interpreted into the system. Where rights are not recognised, replicated (or replicable), we may see a return to alternative fields of law to replace 'Euro-rights'. For example, consumer protection is regulated by the Consumer Rights Act 2015 among other primary acts which are in turn based on EU directives:<sup>80</sup> were these to be repealed, recourse for consumers might then return to principles of tort and

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<sup>73</sup> C-131/12 *Google Spain SL v Agencia Espanola de Proteccion de Datos* (AEPD) [2014] ECR 317; [2014] QB 1022.

<sup>74</sup> Schedule 2, Part 1 Data Protection Act 2018.

<sup>75</sup> Outline of the political declaration setting out the framework for the future relationship between the European Union and the United Kingdom, as agreed at negotiators' level on 14 November 2018, sets out the reaffirmation of the UK's commitment to the ECHR as a basis for cooperation. See <[https://ec.europa.eu/commission/publications/outline-political-declaration-setting-out-framework-future-relationship-between-european-union-and-united-kingdom-great-britain-and-northern-ireland-agreed-negotiators-level-14-november-2018\\_en](https://ec.europa.eu/commission/publications/outline-political-declaration-setting-out-framework-future-relationship-between-european-union-and-united-kingdom-great-britain-and-northern-ireland-agreed-negotiators-level-14-november-2018_en)>

<sup>76</sup> See A Dickson, 'UK ministers warned of 'significant legal costs' if no Brexit deal on data' *Politico* (16 October 2018).

<sup>77</sup> Writing in 1765, Blackstone identified the genesis of these liberties further to the foundations of the legal system and the Magna Carta, Blackstone Commentaries 1:120-41. See also AV Dicey, Introduction to the Study of the Law of the Constitution (8<sup>th</sup> edn, Macmillan 1915).

<sup>78</sup> Conservative Party, 'Protecting Human Rights in the UK: The Conservatives' Proposals for Changing Britain's Human Rights Laws' (Conservative Party, 2014). See S Greer and R Slowe, 'The Conservatives' proposals for a British Bill of Rights: mired in muddle, misconception and misrepresentation?' (2015) EHRLR 372.

<sup>79</sup> Christina Lienen, 'Common Law constitutional rights: public law at a crossroads?' [2018] PL 649, 649.

<sup>80</sup> See eg the Equality Act 2010 which implements the EU directives: 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; 2000/78/EC establishing a general framework for equal treatment in employment and occupation; 2006/54/EC on the implementation of the principle of equal opportunities and

contract law.<sup>81</sup> Finding such alternate avenues of redress and remedy is challenging: compounded by cost and capacity, and also the willingness of the courts to engage with rights in an political environment which increasingly rejects them.

## **6. CONCLUSION: THE INJUSTICE OF UNCERTAINTY**

The Brexit process will inevitably, and negatively, impact the framework of rights protection in the UK. The removal of the Charter and the commitment to effective protection of fundamental rights will create such an extreme environment of uncertainty as to be unjust. UK citizens, in loss of their EU citizenship, will lose with it a host of EU rights. EU citizens will lose those rights to free movement within the EU, and those EU citizens and their families who are resident in the UK will face an uncertain future ahead without guarantees of protection of their current level of rights and protection. The foundations of a host of important fields of protection – equality, workers, consumers and personal data rights – will be weakened by the loss of EU obligations. There is no argument of that such loss and uncertainty is ‘unavoidable’, all of these consequences are known and knowable. In the planned creation of legislation and political action which creates such extreme degrees of legal uncertainty and personal insecurity, compounded in the certain loss of rights and weakening of protection – there is no other conclusion than such action is unjust. Such uncertainty is injustice.

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equal treatment of men and women in matters of employment and occupation (recast); and 2004/113/EC implementing the principle of equal treatment between men and women in the access to and supply of goods and services.

<sup>81</sup> S Fredman, A Bogg, A Young and M Campbell, ‘The Human Rights Implications of Brexit’ Oxford Human Rights Hub.