

LIBERTY

PROTECTING CIVIL LIBERTIES  
PROMOTING HUMAN RIGHTS

**Liberty's submission to the Joint  
Committee on Human Rights inquiry into  
the Human Rights Implications of the EU  
(Withdrawal) Bill**

**November 2017**

## About Liberty

Liberty (The National Council for Civil Liberties) is one of the UK's leading civil liberties and human rights organisations. Liberty works to promote human rights and protect civil liberties through a combination of test case litigation, lobbying, campaigning and research.

## Liberty Policy

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, Inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at

<http://www.liberty-human-rights.org.uk/policy/>

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1. In its current form, the EU (Withdrawal) Bill ('the Repeal Bill') will not retain the Charter of Fundamental Rights of the European Union ('the Charter') and will remove the ability for legal claims to be brought based upon the general principles of EU law. This will have serious consequences for the promotion and protection of human rights after withdrawal from the EU. This approach runs counter to the purpose of the Bill – to facilitate the wholesale transfer of EU law onto the domestic statute book – and contradicts Government assurances that “the same rules will apply on the day before exit as on the day after”.<sup>1</sup>

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

2. Clause 5(4) of the Repeal Bill makes clear the Charter will not be retained as part of domestic law after exit day. The Government has stated that its reason for not wanting to retain the Charter is that it contains rights that are replicated elsewhere, for example, in the European Convention on Human Rights. However, this is not *necessarily* true. Although the rights contained in the Charter were drawn from a variety of sources, they have been interpreted to provide for protections that either are not, or have not yet been held to be, covered by other legal instruments.

3. For example, the Charter, not the Convention, has proven a powerful tool in protecting individual rights in light of the challenges wrought by rapid technological change. In *Google Spain*,<sup>2</sup> Article 8 (on the protection of personal data) served as the basis for the ‘right to be forgotten’. Furthermore, the Secretary of State for Exiting the European Union, David Davis, relied upon Article 8 in his successful challenge of state powers to record the metadata of communications under the Data Protection and Investigatory Powers Act 2014. In Davis’s case, the Court noted the Charter “clearly goes further, is more specific, and has no counterpart” in other privacy laws.<sup>3</sup>

4. The Charter is also notable for its inclusion of remedies that do not have domestic equivalents. It must be remembered that the fundamental rights protected by the Charter are directly enforceable by individuals and can be used by courts to set aside incompatible domestic legislation (in areas within the scope of EU law). This stands in contrast to

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<sup>1</sup> Department for Exiting the European Union, ‘Repeal Bill Overview’ (August 2017) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/627983/General\\_Fact\\_sheet.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/627983/General_Fact_sheet.pdf)> accessed 17 November 2017.

<sup>2</sup> Case C-131/12 *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* [2014].

<sup>3</sup> *David Davis and Others v Secretary of State for the Home Department* [2015] EWHC 2092 (Admin) [80].

statutory rights protections, such as under the Equality Act 2010, which are not directly enforceable. Moreover, domestic legislation that is found to be incompatible with the European Convention on Human Rights (ECHR) cannot be set aside, rather only a weaker 'declaration of incompatibility' can be made.

5. Charter rights without domestic equivalents include:

- Article 3 (guarantees on bioethics); provides a right to physical and mental integrity, prohibiting eugenic practices, the use of the body and its parts for financial gain and the reproductive cloning of human beings. This right is separate and distinct from the prohibition of torture, inhumane and degrading treatment provided for under the ECHR.
- Article 14 (right to education); provides a right to vocational and continuing training. Unlike its analogue under the ECHR, Article 14 is framed as a positive right rather than as a right not to be denied an education (see Article 3, Protocol 1 of the ECHR).
- Article 25 (rights of the elderly); recognises the right of the elderly to lead a life of dignity and independence and to participate in social and cultural life. This right is unique and has no equivalent under the ECHR or any justiciable international treaty or convention to which the UK is a party.
- Article 47 (right to a fair remedy and to a fair trial); has been applied to require EU Member States to provide legal aid in cases where not doing so would make it impossible to ensure an effective remedy was available. In comparison to its analogue under the ECHR (Article 6), Article 47 is not limited to the determination of a criminal charge or civil rights.
- Article 10 (freedom of thought, conscience and religion); includes a right to conscientious objection that is not recognised in domestic law.

6. Although many of these rights are yet to be adjudicated, it does not stand to reason that they should be cast aside due to our vote to leave the EU. Moreover, even if it were difficult to explain the added value of the Charter, which it is not, its alleged overlap with rights protected in other instruments is not a valid reason for it to be excluded from retention under the Repeal Bill. The purpose of the Repeal Bill is to facilitate the wholesale transfer of EU law onto the domestic statute book, not to allow the selective repeal of laws or regulations that, for whatever reason, are deemed to be undesirable. The time for making such policy decisions is after withdrawal, in separate primary legislation, subject to full,

informed, public debate. This is what respect for our internationally renowned framework for protecting human rights demands.

7. Retaining the Charter would be straightforward, requiring only minor amendment to the Repeal Bill i.e. clarifying its retention as it applied whilst the UK was a member of the EU, when acting within the scope of (retained) EU law. This approach would protect important rights without extending the Charter's field of application.<sup>4</sup> After withdrawal from the EU, decisions of the Court of Justice of the European Union (CJEU) would not have supremacy over those of our own courts. Once incorporated, Charter rights would be interpreted and enforced by domestic courts and tribunals.<sup>5</sup>

8. This is a better proposal than the Bill's approach, not only for human rights but also for legal certainty and clarity; objectives the Government has prioritised during the process of incorporating EU law. In its current form, the Bill suggests references to the Charter in pre-Brexit case law should be read as though they are references to "corresponding fundamental rights or principles" retained in domestic law.<sup>6</sup> However, this approach will lead to serious uncertainty and confusion. For example, from which sources should corresponding rights and principles be drawn? Could incorporated international law sources serve as adequate substitutes or did the drafters of the Bill envisage a straight swap between Charter and Convention rights (as incorporated through the Human Rights Act 1998)? The Bill leaves these questions unanswered, leaving it to the courts (and litigants) to decide, creating exactly the sort of legal uncertainty the Bill is supposed to avoid.

9. With regard to the latter question, taking the example of David Davis's case, Article 8 of the Charter has been developed in a far more expansive way by the CJEU than its analogue under the Convention (the difference is such that the former is said to provide a so-called 'digital right to privacy'). The two are not equivalents and it would be foolish to assume that retained EU law could be disentangled from the Charter without issue (one commentator has suggested this would be akin 'separating an egg from an omelette').<sup>7</sup>

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<sup>4</sup> A 'retained' Charter would also require minor amendment to remove rights that would not make sense when the UK has withdrawn from the EU, for example, the right to stand and vote in European Parliament elections. This type of amendment is precisely what the delegated powers provided for under Clause 7 of the Repeal Bill are supposed to be used for.

<sup>5</sup> Under Clause 6(2) of the Repeal Bill, domestic courts and tribunals would be free to consider CJEU jurisprudence on the Charter when making a determination concerning retained EU law.

<sup>6</sup> Clause 5(5).

<sup>7</sup> Steve Peers, 'The White Paper on the Great Repeal Bill: Invasion of the Parliamentary Control Snatchers' (*EU Law Analysis*, 31 March 2017) <<http://eulawanalysis.blogspot.co.uk/2017/03/the-white-paper-on-great-repeal-bill.html>> accessed 17 November 2017.

10. The example of David Davis's case also reveals how Clause 5(5) of the Bill, which the Committee's questions to the Government suggest is of great interest to the Committee, cannot be considered an adequate substitute for the retention of the Charter. There cannot be a like-for-like swap between the Charter and the Convention. Courts have already noted one divergence, on data privacy, leaving the possibility of many others yet to be adjudicated. Furthermore, no domestic law provides for the same remedy the Charter currently provides individuals whose rights have been violated by domestic legislation that falls within the scope of EU law.

### ***The General Principles of EU Law***

11. The 'general principles of EU law' are open-ended rules, drawn from a variety of sources that can be applied by judges when considering EU law.

12. The Charter draws heavily on the general principles, however, they do not find complete expression in any one particular document (rights arising from both are complementary and should not be viewed as replicating each other). General principles include:

- The principle of equality
- Legal certainty and the protection of legitimate expectations
- The principle of effective remedies in national courts
- Transparency and rights to documents

13. The Repeal Bill retains the general principles for interpretative purposes but removes the ability for claims to be brought where domestic legislation is incompatible.<sup>8</sup> Furthermore, the ability for courts and tribunals to strike down conflicting law based upon the general principles will also be removed.<sup>9</sup>

14. The approach of the Bill to the general principles robs them of their practical value. From a human rights perspective, the ability to strike down legislation based upon a set of basic principles has proven incredibly valuable (examples of which are explored below). Fundamental rights are only worth the paper they are written on if they are enforceable; something the Bill removes for the general principles.

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<sup>8</sup> Clause 3(1), Schedule 1.

<sup>9</sup> Clause 3(2), Schedule 1.

15. There has also been discussion about the origins of the general principles and suggestions they sit uncomfortably in our domestic legal system. However, rather than sitting apart from developments in the common law, there has been notable cross-pollination.<sup>10</sup> Put another way, the general principles are not 'European' constructs to be scrubbed from our legal system once we leave the EU; they are safeguards that find expression in all mature democracies based upon the rule of law. The method by which they were introduced into our legal system, via membership of the EU, should not be used as an excuse to change the way in which they operate.

16. Moreover, in light of the Bill's twin aims of proving for legal certainty and continuity, preventing individuals from bringing claims based upon their infringement is contradictory; such a right of action has been part of the legal status quo in the UK for decades, not ensuring its availability in the future would be a significant change.

16. The benefit of the general principles to those whose rights have been infringed and their acceptance by the judiciary as part of our domestic human rights framework is illustrated by two recent high profile cases decided in the Supreme Court:

- In *Walker v Innospec*,<sup>11</sup> the general principle of non-discrimination was used to find that an exemption in the Equalities Act was illegal as it allowed for pensions to be provided on a less favourable basis to same sex couples versus opposite sex couples.
- In *Unison v Lord Chancellor*,<sup>12</sup> the legality of employment tribunal fees was considered with reference to the general principles. The general principles of effectiveness and of effective judicial protection were cited in support of the argument that tribunal fees imposed a disproportionate limit on the right to justice.

17. The retention of the general principles, in a way that would ensure they are still actionable after withdrawal, could be achieved with minor amendment to the Bill. However, as some general principles relate specifically to the actions of EU institutions (for example, that on subsidiarity), this should be done in a way that avoids causing incoherence in our

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<sup>10</sup> Indeed, in the context of the development of a common law principle of proportionality, in the recent Supreme Court case of *Pham v SSHD* (2015), the equivalent general principle of EU law was considered at length.

<sup>11</sup> *Walker (Appellant) v Innospec Limited and others (Respondents)* [2017] UKSC 17.

<sup>12</sup> *R (on the application of UNISON) (appellant) v Lord Chancellor (Respondent)* [2017] UKSC 51.

legal system after withdrawal.<sup>13</sup> Separating these Union-focussed general principles from those that are more generic could be accomplished by including a description in the Bill of those that should not be kept. A way of doing this would be to add a line to Clause 3(1) of Schedule 1 of the Bill so that it reads:

There 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... *that relate either to the functioning of the EU, its institutions, or relations between Member States...*

This would retain a right of action for all general principles apart from those that should not, for practical reasons, be made available to a non-EU member.

### **Conclusion**

18. In conclusion, in its current form, the Repeal Bill presents a significant danger to the promotion and protection of human rights. As briefly explore above, its failure to retain the Charter of Fundamental Rights of the European Union and the actionability of the general principles of EU law will result in a serious reduction in human rights protections after withdrawal. The Government must address the concerns raised in this submission and outline how, if it intends to proceed with the Repeal Bill un-amended, it will ensure Brexit does not lead to us leaving the EU with fewer rights than we had when we were members.

**George Wilson**

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<sup>13</sup> Surprisingly, in its current form, the Bill appears to retain general principles like subsidiarity and solidarity for interpretative purposes.