

HR 03

Ymchwiliad i hawliau dynol yng Nghymru

Inquiry into Human Rights in Wales

Ymateb gan: Dr Tobias Lock

Response from: Dr Tobias Lock

Inquiry into human rights in Wales

Evidence to the Equality, Local Government and Communities Committee of the Welsh Assembly
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1. This submission is confined to an assessment of certain **legal questions** within the author's area of expertise.

The impact of the UK's withdrawal from the European Union on human rights protection in Wales

Introductory remarks

2. Much of the following will depend on the future relations between the UK and the EU and the intensity of cooperation between them. In the absence of concrete proposals from the Government regarding these future relations, it is necessary to make a number of assumptions in order to frame the following remarks.
3. First, it is assumed that the UK will cease to be bound by the EU Treaties and consequently by the EU Charter of Fundamental Rights.
4. Second, it is assumed that the future relationship between the UK and the EU will not include express treaty obligations concerning fundamental rights protection. While this is, of course, theoretically possible, it is unlikely given that the closest known relationships between the EU and third countries (the law of the European Economic Area and the law governing the relations between the EU and Switzerland) do not make the Charter binding.
5. Third, it is assumed international treaties on which these future relations will be based will not be directly effective in the UK legal order and will not take primacy over domestic UK law (including statute) in case of conflict.
6. Fourth, it is assumed that recourse to the European Court of Justice (CJEU) will no longer be available. This means that UK courts will no longer be able to request preliminary rulings from that court on the interpretation of points of EU law; nor will they be bound by its future case law.
7. Fifth, the Great Repeal Bill – announced by the UK Government – may temporarily retain many, if not all, EU rights. Nonetheless, these will no longer be underpinned by treaty obligations. Depending on the exact terms of the Great Repeal Bill, they may become subject to executive repeal, e.g. through a Henry VIII clause. If this resulted in an empowerment of the executive to decree a reduction in individual rights, this would be problematic and should be avoided.

Impact of Brexit on human rights protection: general remarks

8. Brexit will lead to a weakening of the legal human rights framework in the UK. It will remove numerous legal obstacles and make a wide-ranging reduction in human rights standards possible. This is chiefly because the current human rights framework is to a large degree underpinned by EU Treaty obligations. This will be demonstrated in what follows.
9. The **main sources of EU human rights** are the EU Charter of Fundamental Rights, the EU Treaties (in particular Article 157 TFEU on equal pay), and the so-called general principles of EU law. These **primary law sources** are directly applicable and therefore judicially cognisable in the law of the UK thanks to s. 2 (1) of the European Communities Act 1972. If there is a conflict between them and

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domestic law, including statute, EU law prevails. It results in domestic law being disapplied as far as it conflicts with EU law (more details to follow).

10. In addition, there are a number of **EU equality directives**, in particular: the Race Equality Directive (outlawing racial discrimination)¹, the Framework Directive (outlawing discrimination on the basis of religion or belief, disability, age or sexual orientation as regards employment and occupation),² the Equal Treatment Directive (on equal treatment of men and women in matters of employment and occupation),³ and a Directive extending the principle of equal treatment between men and women in the access to and supply of goods and services.⁴ These Directives are not in and of themselves applicable in the law of the UK, but they have been transposed into domestic law by the Equality Act 2010.
11. The UK will leave the EU once a withdrawal agreement negotiated on the basis of Article 50 TEU has entered into force. Failing that, the UK will leave two years after Article 50 TEU has been invoked unless the two-year negotiating period is extended.
12. As a non-Member State, the UK will no longer be bound to comply with the Treaties, including the Charter and the general principles of EU law. It will therefore no longer be obliged to make them applicable within the UK's domestic legal order so that the European Communities Act 1972 can be repealed. If this happens, the Charter and other Treaty-based rights will no longer be available to individuals in the UK given that the legislative 'hook' for invoking these rights in domestic judicial proceedings will have disappeared.
13. Furthermore, the UK will **no longer be obliged to comply with the equal treatment directives**. Given that these directives have been transposed by Act of Parliament, however, they will not be immediately affected by Brexit. Yet Parliament will no longer be under any constraints from EU law if it wishes to modify or repeal the Equality Act 2010. In addition, domestic courts will no longer need to follow the CJEU's lead in the interpretation of equality law, so that over time the standards in the UK and in the EU may come to diverge. There are numerous examples for the advancement of equality law by the Court of Justice. The following two can illustrate this. In *P v S and Cornwall County Council* the Court of Justice held that discrimination arising from gender reassignment (which was the ground for the claimant's dismissal) constituted 'sex discrimination'.⁵ And in *Coleman v Attridge Law* the Court of Justice held that discrimination of a mother because of her son's disability constituted disability discrimination 'by association' and was unlawful under the Framework Directive.⁶
14. The **removal of the Charter** from the UK legal order will further weaken the human rights framework in a number of ways. It should be noted that the scope of the Charter is limited. According to Article 51 (1) CFR it applies to Member States only 'when they are implementing Union law.' The CJEU has interpreted this to mean that they are only bound to comply with Charter rights when they are acting in the scope of EU law.⁷ This is the case either when a Member State is acting in pursuance of an EU law obligation, e.g. transposing a Directive into national law or applying a

¹ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22

² Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

³ Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L204/23.

⁴ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L373/37.

⁵ Case C-13/94 *P v S and Cornwall County Council* ECLI:EU:C:1996:170.

⁶ Case C-303/06 *S. Coleman v Attridge Law and Steve Law* ECLI:EU:C:2008:415.

⁷ Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* ECLI:EU:C:2013:105, para 19.

Regulation⁸, or when a Member State is derogating from one of the fundamental freedoms of the EU.⁹ Where this is not the case, the Charter does not apply.¹⁰

15. First, it will lead to a **reduction in substantive rights** available to persons living in the UK. The Charter includes numerous rights not protected by the Human Rights Act 1998 (HRA). These include a guarantee of human dignity; a right to physical and mental integrity; a prohibition on human trafficking; the right to conscientious objection; a right to marry that is not restricted to different-sex couples; a right to asylum; and the social protections contained in Title IV of the Charter.¹¹ In so far as the Charter mirrors the rights protected by the HRA, the loss of the Charter is likely to lead to tangible losses of rights in three areas: data protection law; the right to a fair trial – which is broader under the Charter than under the HRA in that it includes administrative proceedings; and migration law.
16. Second, it will lead to a **loss of EU law remedies**. The disappearance of the Charter from the UK legal order will end the possibility of reviewing Westminster primary legislation as to its compliance with Charter rights where the legislation was enacted within the scope of EU law. The case of *Benkharbouche and Janah* is instructive for the Charter's procedural strength.¹² This Court of Appeal decision dealt with the question whether the right to a fair trial – guaranteed in Article 6 ECHR and in Article 47 CFR – can be invoked in order to restrict the scope of the State Immunity Act 1978. The two claimants respectively worked as a cook and a member of the domestic staff of two foreign embassies in London. They brought claims of unfair dismissal, failure to pay the minimum wage, breaches of the Working Time Regulations 1998, racial discrimination and harassment, and arrears of pay. The State Immunity Act confers general immunity from jurisdiction on other states, i.e. in strict application of the Act neither claim could be successful as the respondents were immune from jurisdiction.
17. The Court of Appeal considered whether this general immunity from jurisdiction was a) compatible with Article 6 of the ECHR as guaranteed by the HRA; and b) with Article 47 of the Charter of Fundamental Rights. Both provisions are nearly identically worded and guarantee the right to fair proceedings, implicit in which is a right of access to a court. The Court of Appeal recognised that these rights can be limited and that immunity from jurisdiction – as required by international law – can be such a limit. However, it came to the conclusion that the limitations on these rights went too far and were disproportionate.
18. The judgment revealed stark differences in the consequences of claims based on the HRA and claims based on the Charter. Unfair dismissal, failure to pay the minimum wage, and arrears of pay are based solely on domestic (English) law, whereas the claims based on the Working Time Regulations and racial discrimination and harassment are based on domestic law implementing EU directives. Hence those parts of the claims came within the scope of EU law and Charter rights could be invoked in their regard.

⁸ See e.g. Joined Cases C-411/10 and C-493/10 *N.S. v Secretary of State for the Home Department* ECLI:EU:C:2011:865.

⁹ Case C-390/12 *Pfleger* ECLI:EU:C:2014:281, paras 35-37.

¹⁰ As for instance in Case C-206/13 *Cruciano Siragusa v Regione Sicilia - Soprintendenza Beni Culturali e Ambientali di Palermo* ECLI:EU:C:2014:126 or Case C-265/13 *Torrallbo Marcos v Korota* ECLI:EU:C:2014:187; on this case law in more detail see e.g. Filippo Fontanelli, 'Implementation of EU law through domestic measures after Fransson: the Court of Justice buys time and 'non-preclusion' troubles loom large' (2014) 39 *European Law Review* 782.

¹¹ A further right contained in the CFR and not guaranteed by the HRA is the right not to be punished twice, see Article 50 CFR, even though the rule against double jeopardy exists at common law and is also protected by statute (see Criminal Justice Act 2003; Double Jeopardy (Scotland) Act 2011).

¹² *Benkharbouche and Janah* [2015] EWCA Civ 33; the same effects could be observed in *Google v Vidal-Hall and others* [2015] EWCA Civ 311.

19. As far as the claims based on English law were concerned, the Court of Appeal made a declaration of incompatibility under the HRA. This means that the claimants still lost their case as far as these claims are concerned, but there is a prospect that Parliament will amend the State Immunity Act and make it human rights compatible for future cases. By contrast, as far as the claims based on EU law were concerned, the Court of Appeal ‘disapplied’ the State Immunity Act, i.e. it did not consider the two respondents immune from jurisdiction, so that a remedy can be granted to them. This is because EU law – in sharp contrast to the law of the ECHR, which the HRA incorporates – has primacy over conflicting national law.
20. *Beankharbouche and Janah* demonstrates that the remedies available under EU law – disapplication of the Act of Parliament concerned resulting in the claimant succeeding in her claim – are stronger than under the HRA, where in the absence of a possibility to ‘read down’ the Act, the best a claimant can hope for is a declaration of incompatibility, which nonetheless results in the claimant losing their case. Furthermore, one should mention that the Charter opens up the possibility of suing for damages under EU state liability rules.¹³ However, this option is likely to remain more theoretical than practical given the high hurdles a claimant must overcome. Not only must he convince a court that there has been a breach of his Charter rights by a Member State authority acting within the scope of EU law and that this has caused him to suffer damage. He must also convince the court that this breach of EU law was ‘sufficiently serious’¹⁴, which in practice is very difficult to do.¹⁵
21. Third, Brexit will make it **impossible for persons living in the UK and for the UK itself to effectively challenge EU legislation which infringes human rights**. Despite Brexit, some EU legislation may continue to be binding on the UK and within the domestic legal order because a future UK-EU relationship may make this necessary. For instance, EEA membership is founded on the principle of homogeneity, which means that EU legislation is routinely transformed into EEA law by annexing it to the EEA Agreement.¹⁶ Yet there is no way of challenging it in the Court of Justice for persons living in EEA countries. The same would be true if e.g. the UK were to continue to take part in the European Arrest Warrant.

The impact of the UK Government’s proposal to repeal the Human Rights Act 1998 and replace it with a UK Bill of Rights

22. As far as human rights reform *within the UK* is concerned, it should be noted that this is not unconnected from Brexit in that Brexit will **remove certain practical and legal obstacles** to human rights reform. As long as the Charter – which incorporates all rights in the HRA – is binding, albeit in a limited way, there is not much point in reducing the rights contained in the HRA as this would only be effective in some cases – those not arising within the scope of EU law – but not in others. Furthermore, Brexit will remove the legal obligation arising from EU law to be signed up to the European Convention on Human Rights.¹⁷ According to media reports, withdrawal from the

¹³ EU state liability law was introduced in Joined Cases C-6/90 and C-9/90 *Francovich and Bonifaci v Italy* ECLI:EU:C:1991:428 and refined in Joined Cases C-46/93 and 48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* ECLI:EU:C:1996:79.

¹⁴ This requirement was introduced in *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* (n 13).

¹⁵ See e.g. Tobias Lock, 'Is Private Enforcement of EU Law through State Liability a Myth? : An Assessment 20 Years after Francovich' (2012) 49 *Common Market Law Review* 1675.

¹⁶ See Article 102 EEA Agreement.

¹⁷ On that obligation see e.g. Kanstantsin Dzehtsiarou and Tobias Lock (eds.), *The Legal Implications of a Repeal of the Human Rights Act 1998 and Withdrawal from the European Convention on Human Rights* (2015) available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605487.

Convention may be included in the next Conservative manifesto and might therefore become a key policy objective after the 2020 General Election.

23. A repeal of the HRA and a replacement with a British Bill of Rights (BBR) could result in a reduction of human rights protection in the UK in general and in Wales in particular. Much would depend on whether a BBR will guarantee **fewer substantive rights or make it easier for these rights to be restricted**. In the absence of any concrete proposals by the UK government, this is difficult to predict.
24. Another important question is whether the **remedies** for a violation of these rights will remain the same. As explained at para 20 of this submission, Acts of Parliament are immune from judicial review in so far as courts do not have the power to declare them invalid. Courts can, however, interpret them in a way that is compatible with the human rights guaranteed by the HRA or, if that is not possible, make a declaration of incompatibility.
25. A repeal of the HRA and its replacement with a BBR raises a number of **devolution questions**.
26. Where **Acts of the Assembly** are concerned, these must be compliant with Convention rights according to s. 94(6)(c) of the Government of Wales Act 2006. If they violate Convention rights, they are invalid. This means that if a BBR leads to a reduction in rights protections, this has an immediate impact on the judicial protections that people in Wales enjoy against Acts of the Assembly. This is because according to s. 158 of the Government of Wales Act 2006, Convention rights have the same meaning as in the HRA. It is assumed that if the HRA is replaced with a BBR, these sections of the Government of Wales Act will have to be amended to stipulate that compliance with human rights means compliance with the BBR. The same goes for the **powers of the Welsh Ministers** under s. 81 of that Act.
27. This point demonstrates further that a repeal of the HRA and replacement with a BBR would most probably result in an **alteration of the powers of the Welsh Assembly and of the Welsh Ministers**. A strong argument can therefore be made that such an alteration to the powers of the Welsh Ministers would require their **consent** as per para 49 of Devolution Guidance Note 9.
28. Equally, the **consent of the Welsh Assembly** may have to be obtained. Changes to the powers of the Welsh Assembly by way of an order under s. 109 of the Government of Wales Act or by Act of Parliament. In the former case, s. 109 (4) (b) says that the Assembly must agree to the change. In the latter case, para 13 of Devolution Guidance Note 17 suggests that the consent of the Assembly must be sought.
29. It should be noted that a similar argument has been made regarding a requirement for consent by the Scottish Parliament (and by extension the same can be said for the Northern Irish Assembly).¹⁸

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¹⁸ See Kanstantsin Dzehtsiarou and Tobias Lock (eds.), *The Legal Implications of a Repeal of the Human Rights Act 1998 and Withdrawal from the European Convention on Human Rights* (2015), page 12, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2605487