

## Written evidence from, Dr Katie Boyle, Senior Lecturer in Law (HBR0042)

### Key questions addressed:

- What rights do we derive from EU law?
- What are the human rights implications of Brexit?
- What about the European Convention of Human Rights?
- What are the devolved implications?

### Key recommendations:

- According to principles of deliberative democracy, significant constitutional change – especially in relation to the nature of human rights and citizenship ought to be preceded by a lengthy deliberative process that is fair, participative, democratic and informed.
- Changes to human rights, whether through withdrawal from the EU legal structure or through a renewed relationship/ withdrawal with the European Convention of Human Rights, therefore ought to be predicated by informed, inclusive, participative, evidence led deliberation.
- Citizens should be involved in this deliberation. They should be informed of the potential implications of EU withdrawal and the impact this has on their enjoyment of both citizenship rights and fundamental human rights. They should also be informed of the potential mechanisms/ future options to replace any changes to the existing structures.
- It is not yet possible to conclude or determine the full implications of UK withdrawal from the EU on human rights. Human rights law is in a constant state of flux at the different jurisdictional levels and we risk entering a legal and structural deficit if departure from the EU is not also met with appropriate structural and legal safeguards that ensure full compliance with human rights.
- Control of processes relating to human rights change should not be elite driven. It should not fall to the Executive to control change without the scrutiny of such change exercised by Parliament and the Judiciary where appropriate.
- Space must also be created in order to facilitate deliberative dialogue, through the operation of a forum such as a Constitutional Convention. The implications for human rights requires a national dialogue – across regions and across sectors. This dialogue should be genuinely deliberative and inclusive and should be informed by research led evidence.
- The devolved regions and the particular circumstances of Scotland, Northern Ireland and Wales require careful consideration in relation to the operation of devolution, human rights and compliance with international obligations.
- The devolved status of particular areas of EU law mean that responsibility for filling the gap left by EU law may well be interpreted in different ways across the UK – such as the interpretation of equality law in a devolved Northern Ireland.
- Further fragmentation of the legal and constitutional structures in the UK risk undermining UK unity. The different human rights trajectories of the UK indicate a non-unified approach would be exacerbated without careful forward planning for the extensive array of EU derived rights and the legal competence to change domestic obligations at the devolved/ national level with varying approaches across the regions.

### Response to the Call

1. This response to the call for evidence addresses a number of areas that impact human rights on the event of the UK leaving the European Union following the EU referendum on 23 June 2016.
2. The evidence presented here forms part of a research project supported by the Economic and Social Research Council, 'Human Rights in Transition: Impact for the UK in a Changing Europe.' This project

formed part of the [ESRC UK in a Changing Europe Programme](#), the authoritative source of independent and impartial expert led evidence in relation to the EU referendum. The views expressed here are those of the author alone. During the course of the research project a number of papers were published addressing the potential implications of Brexit on human rights.<sup>[1]</sup> The contribution of these papers was made in the broader context of constitutional change at the national and devolved level and in the context of the European Convention of Human Rights and the proposal to withdraw from the ECHR and repeal the Human Rights Act 1998 in addition to the EU referendum and potential Brexit. As explained in the various publications, the EU and ECHR, together with the constitutional framework for human rights at the national and devolved level forms a ‘super-complex’ structure. Each process should therefore not be viewed in isolation when accounting for changes in the way human rights are protected in the UK.

3. The following sections apply in the context of the UK leaving the European Union following notification of UK departure in accordance with Article 50 of the TFEU. Until such time as the UK departs from the European Union, EU law of course continues to apply. This means that all the rights and obligations derived from EU law remain in force until withdrawal. The evidence demonstrates that EU human rights law is in a state of constant flux, and so, as the jurisprudence of the court develops between now and withdrawal the way that human rights are protected in the UK may continue to develop and change. It is therefore important to note that we may anticipate change and the implications of the UK departing from the EU, however, we cannot fully account for the full impact when in some cases the extent to which rights apply may change between now and then. For example, the rights/ principles associated with Title IV Solidarity under the EU Charter of Fundamental Rights have formed part of oscillating jurisprudence over the past number of years with labour rights in particular subject to competing interpretations. The research highlights that the departure from EU law may adversely impact on the application of socio-economic rights at the domestic level with EU law providing for a number of rights in areas of social policy and employment – areas that the European Convention does not cover. The extent to which the EU will provide protection under this area is still very much ‘[unchartered territory](#)’ and so the implications cannot be fully accounted for at this stage.

### What rights do we derive from EU law?

4. Human rights are derived from a number of sources in EU law. The system of protecting rights or extending protection to different groups of rights is as broad as the EU’s areas of competence. Leanne Cochrane and I have previously set out the various sources of rights derived from EU law, including EU citizenship rights, rights derived from general principles of EU law, Charter based rights and rights derived from Directives engaging with rights based concepts.<sup>[2]</sup>
5. In our evidence paper we highlighted the following sources of EU law and summarised the implications of a potential Brexit on human rights in particular for UK citizens:

#### “General principles of EU law

##### *i. General Principles of EU law*

*The CJEU [Court of Justice of the European Union] has recognised fundamental rights as ‘general principles of EU law’ long before implementation of Article 6 TEU which now enshrines the principle ([Stauder, Case 29-69](#), [Internationale Handelsgesellschaft, Case 11-70](#)). Fundamental rights in this context constitute the rights guaranteed by the [European Convention on Human rights](#) (an instrument of the [Council of Europe](#)) and rights derived from the “constitutional traditions common to the Member States”. The legal significance of fundamental rights that are general principles is that the CJEU will not uphold incompatible measures ([Nold, Case 4-73](#)). As a result, such rights can be relied upon in the context of legal disputes between private parties ([Mangold, Case C-144/04](#) concerning non-discrimination on the grounds of age).*

##### *ii. Charter of Fundamental Rights*

*The [Lisbon](#) treaty which came into force in 2009 made the most constitutionally significant alteration to the EU human rights framework by placing the CFR [Charter of Fundamental Rights] on the same legal footing as the treaties (Article 6 TEU). This means that the CFR constitutes EU primary legislation and has binding legal effect. The CFR is unique as a European human rights instrument for its comprehensive reflection of the indivisibility of rights including explicit provision for civil, political, economic, social and cultural rights. On closer inspection however, the CFR makes a distinction between*

'rights' and 'principles' both of which have a different legal effect (Article 52(5) CFR). Before a principle can be enforced, it appears that it must first be given specific expression in either EU or national law ([Association de Médiation Sociale \(AMS\), Case C-172/12](#)). One notable complexity of the CFR is [its lack of clarity on whether some provisions constitute rights or principles](#) – making the enforceability of some EU human rights provisions unclear.

This lack of clarity has its roots in the fact that the EU may only pass law in an area of its competence (TFEU, Title I). Article 51 CFR makes clear that the CFR does not extend EU law. Instead it was intended to consolidate and codify the obligations that already existed on EU Member States. The UK, through Protocol 30, attempted to limit the application of an expansive Charter (the CJEU has determined that Protocol 30 does not carry the legal effect of opting the UK out of its obligations ([N.S., Case C-411/10](#))). What remains unclear is to what extent the section of the CFR dealing with social rights (Title IV 'Solidarity') reflects 'rights' or 'principles' (e.g. AMS case on Article 27 which guarantees workers the right to information and consultation). The UK's obligations, and EU rights, in this respect remains mostly uncharted territory.

Nevertheless, it has been suggested that the CFR still serves as a catalyst for an increased focus on fundamental rights ([Kosta](#)) which could ensure to them a stronger protection ([Safjan and Miklaszewicz](#)). Indeed, what constitutes the scope of EU law thereby allowing the CFR to be engaged has been given a broad meaning ([Åkerberg Fransson, Case C-617/10](#)).

On the basis of [DEB, Case C-279/09](#), where the CJEU determined that legal persons also had a right to an effective remedy, [de Vries](#) argues that the CJEU may be "generating its own meaning" for rights. This comes as no surprise given that the Charter was drafted without giving a fully substantive account of what was intended – particularly in relation to the rights v principles distinction.

Similar to [Mangold](#), the CJEU determined that the equivalent CFR provision on non-discrimination (Article 21 CFR) could be applied in disputes between private individuals ([Kücükdeveci, Case C-555/07](#), recognised by the UK domestic courts in [Benkharbouche \[2015\] EWCA Civ 33](#)). However, not all provisions of the CFR have been elevated to this level (see AMS case above), while [other fundamental rights could not by their very nature have a horizontal effect, even on a narrower reading](#). The precise nature of the relationship between the CFR with the rights recognised as general principles has not yet been worked out. In [Yoshikazu Iida, Case C-40/11](#), the CJEU was asked this very question but did not provide an answer. Some have argued that the CFR could "contribute significantly to the discovery of general principles" ([Lenaerts and Gutiérrez-Fons](#)).

### iii. Citizen's rights

The CJEU has a developing case law which recognises human rights as crucial to the enjoyment of EU citizenship rights. Citizens of the UK are also EU citizens by virtue of the UK's membership of the EU ([Article 20\(1\) of the Lisbon Treaty](#)). Rights derived from EU citizenship, which each UK citizen enjoys, include (amongst many others) rights relating to [equal pay for equal work](#) between men and women, the right to adequate rest and limited working hours (the [Working Time Directive](#)), [the right to move and reside within different member states](#), [the right to vote and stand for election within the EU political framework](#) and the [right to work in other member states](#) – and in some circumstances to seek [social assistance](#) in other member states.

Citizenship rights are reciprocal rights, meaning rights enjoyed by UK citizens outside of the UK are also granted to non-UK citizens from other EU member states to enjoy within the territory of the UK.

EU citizenship rights associated with free movement are not absolute, however, for the moment EU membership means that UK citizens can move, reside and work across the different Member States. It is unclear at present to what extent an alternative arrangement might be negotiated should the UK vote to leave the EU. As highlighted [here](#), a Brexit vote would trigger the [Article 50](#) procedure for a negotiated exit and the rights derived from citizenship for the [2 million UK citizens living in other EU countries would no doubt form part of the negotiations](#).

### iv. Directives which engage rights concepts

*Even before the CFR gained binding force, EU secondary legislation in the form of directives, already embodied many of the rights contained within the CFR. Although not always explicit, directives help develop the content of fundamental rights, such as the [Data Protection Directive](#), the [Gender 'recast' Directive](#), the [Racial Equality Directive](#), and the [Trafficking in Human Beings Directive](#). Directives do not strictly speaking have horizontal direct effect ([Marshall I](#), Case C-152/84 and the AMS case), and while treaties will prevail over secondary legislation (such as in a conflict between a fundamental freedom and a directive), where the directive is giving expression to a fundamental right which is already a general principle of EU law, the law can become more complex. That is, the underpinning fundamental right that is a general principle will be taken into account by the Court ([Küçükdeveci](#) and [Mangold](#) cases).*

## What are the human rights implications of Brexit?

6. At the moment the extent of the potential human rights implications of Brexit remains largely unclear. We do not yet know what transitional arrangements will be made for each of the different categories EU sourced human rights law. The Secretary of State for Exiting the European Union David Davis announced that the European Communities Act 1972 would be repealed and dismissed ["any suggestion that the Government intends to use Brexit to roll back workers' rights"](#).
7. Legal commentary following the announcement has highlighted the danger of the Brexit repeal processes being largely excluded from the domain of Parliament through the operation of secondary legislation under the ['Great Repeal Bill'](#) announced by Theresa May in her speech to the Conservative Party Conference. Whilst the Prime Minister states that labour rights would not be subject to change without full scrutiny and parliamentary debate others, such as Mark Elliot, have highlighted that there is a ["strong likelihood ... that the process will be carried on largely by executive means, through the insertion into the Great Repeal Bill of wide-ranging powers enabling Ministers, rather than Parliament, to repeal or amend domesticated EU legislation."](#)
8. In the area of human rights, an elite executive driven process falls short of the requirement to hold a truly inclusive, participative and deliberative process in the post-referendum landscape. When the subject of constitutional change relates so fundamentally to existing human rights structures there ought to be added emphasis in ensuring legitimacy in the process of change. This is of particular significance when we consider the far reaching implications for human rights which are both expressly and implicitly provided for across the full array of EU competencies to different degrees.
9. An elite driven process removes constitutional safeguards in so far as the executive may derogate from rights protection (through the repeal of EU law expressly or implicitly protecting human rights) without being held accountable to parliament. This, as highlighted by Sionaidh Douglas-Scot, approach to ["repeal EU law is particularly repugnant, given that EU law has created vast networks of rights and obligations, whose subject matter – eg social policy, discrimination law, or fundamental rights – covers many matters central to individual liberty, and their repeal or amendment, even by means of primary legislation, would be highly controversial."](#)
10. A key conclusion emerging from the research highlights that the human rights implications of Brexit could see the creation of a significant [human rights legal deficit](#). Without appropriate constitutional safeguards to ensure the continuation of rights (such as Parliamentary scrutiny on all rights based issues) there is a real risk that many rights derived from EU law will simply go unchecked – a lack of legal structure, the loss of EU remedies, and the executive driven process means the UK faces significant difficulties in ensuring legitimate and democratic processes are in place.
11. Facilitating a process which ensures full parliamentary scrutiny on all human rights based issues may prove difficult given the vast and extensive scope of EU law. A legal presumption in favour of the continuation of existing standards could enable a judicial led review of human rights standards on a 'rights-affirmative' basis. Alternatively a more holistic approach to the future of human rights in the context of various ongoing processes could be encapsulated in a deliberative democracy mechanism such as a Citizen Forum or Constitutional Convention. Any such process should be evidence led and must ensure genuinely inclusive participation and informed deliberation.

## What about the European Convention of Human Rights?

12. The UK also derives human rights from a separate European legal framework – the Council of Europe which contains the [European Convention of Human Rights](#) (ECHR). The ECHR applies in the UK under the [Human Rights Act 1998](#) and under each of the devolved statutes. At the moment there is the potential that the UK could exit the EU and repeal the Human Rights Act 1998 [\(as promised by the UK](#)

[Government](#) and confirmed as [a post-referendum objective](#) by the Justice Secretary Liz Truss). The ECHR, the Human Rights Act 1998 and the devolved human rights frameworks do not exactly mirror the rights protected by EU law – although there is a degree of overlap and the various systems are intertwined. The EU offers more extensive protection to some categories of rights, in particular the potential to better protect social and economic rights. The remedies available under EU law are also more robust than those available under the domestic incorporation of the ECHR.

13. The ECHR framework as applicable in the UK may also be subject to significant change with the proposals to repeal the Human Rights Act 1998 still on the horizon. A potential exit from both systems places further risk on entering a legal deficit in relation to human rights protections. Even without changes to the HRA, the ECHR does not fully account for the vast array of protection available under EU law and is not qualified to act as a suitable 'safety-net' on EU withdrawal.
14. The research indicates that it is of particular importance to provide a forum through which to facilitate deliberation on how best to proceed with constitutional change in a democratically legitimate way.
15. This paper proposes a more robust constitutional mechanism, such as an inclusive, participative and deliberative Constitutional Convention process. Such an approach may afford an opportunity to address potential change by allowing an evidence led approach and opening up the opportunity to citizens to participate in the formation and creation of the system that replaces those structures which will be lost.

### What are the devolved implications?

16. A key theme emerging from the research undertaken during the Human Rights in Transition project was the extent to which the devolved regions are overlooked in the context of the implications of Brexit and the constitutional status of rights under the devolved legal structures.
17. There are some further complications at the devolved level that also require consideration. As explained [here](#), the devolved constitutional statutes (the [Scotland Act 1998](#), the [Northern Ireland Act 1998](#) and the [Government of Wales Act 2006](#)) each afford the ECHR and EU law constitutional status – meaning the ECHR and EU law are binding on the parliaments, governments, judiciary and public bodies. The types of remedies available for non-compliance are robust meaning non-compatible legislation can be declared unlawful and no longer apply (see [here](#)).
18. EU law forms part of the constitutional framework of the devolved regions. Repeal of the European Communities Act 1972 would not be sufficient to remove the duty to comply with EU law in the devolved regions. For example, in Scotland, the Scotland Act 1998 incorporates constitutional safeguards in the protection of ECHR rights and compliance with EU law (including EU human rights law), granting such rights constitutional status within the devolved settlement. Section 29(d) of the Scotland Act limits the competence of the Scottish Parliament in so far as any Act passed that is incompatible with Convention rights or EU law is not law (the Courts can declare said Acts void with immediate effect). Section 101 of the Scotland Act compels the reading of Acts of the Scottish Parliament to be read as narrowly as is required to be within devolved competence and any act by the Scottish Ministers is deemed *ultra vires* if it is in breach of Convention rights (section 57). Similar provisions constitute the devolved settlements in Northern Ireland[3] and Wales[4].
19. In Scotland, the First Minister, Nicola Sturgeon has already indicated that the [Scottish Parliament would refuse to consent to any change to the devolved application of the ECHR](#) already protected in the Scotland Act 1998 and has warned that leaving the EU would ['almost certainly' lead to a second Scottish independence referendum](#).
20. Whilst not within the power to block UK legislation the Scottish Parliament could refuse to pass legislative consent motions granting authority to change the devolved status of the EU at the devolved level. Meaning a tier of EU *aquis* could continue to apply beyond the UK national repeal mechanisms at a devolved level. Similar devolved parliamentary blocks may be explored by Northern Ireland and Wales – particularly in relation to contentious issues such as border control and the peace process – or ensuring areas in receipt of EU funding are protected. Whilst the UK parliament retains supreme authority over the devolved legislatures, forcing through legislative change without consent causes significant political difficulties (and lack of democratic legitimacy) again potentially undermining the unity of an already fragmented UK.
21. The appetite for change to human rights structures at the devolved level tends also to differ substantially to that at the national level with a trajectory towards better protection evident in each of the devolved jurisdictions.
22. There is momentum behind an extended version of socio-economic rights protection in Scotland. There was a clear commitment to this effect by [Nicola Sturgeon at an event in December hosted by the](#)

[Scottish Human Rights Commission](#) and there is a new power devolved to Scotland which will allow the Scottish Parliament to [enforce a socio-economic equality duty](#) in devolved matters.

23. In Northern Ireland, change to the human rights structure becomes even more problematic as the ECHR plays a foundational role in the peace process. To remove the ECHR framework would be in [direct breach of a legally binding international agreement that the UK entered into with Ireland](#). In relation to the operation of EU law, the competence of the Northern Ireland Assembly partially extends into the area of Equality law. Without the continuation of EU based equality norms the NIA would be in a position to reformulate non-discrimination provisions which might lead to an even more nuanced interpretation of different norms being applied across the UK (the Equality Act 2010 does not extend to Northern Ireland and there is no consolidated version of equality law in Northern Ireland – EU law provides the common framework). Pressure to amend non-discrimination provisions on the grounds of religion or on the grounds of sexuality may come under increasing pressure should cases such as the [Lees v Ashers Baking Co Ltd](#) lead to equality law reform.
24. There is also a risk of undermining an already existing Northern Ireland Bill of Rights process emanating from the peace agreement [which is yet to be concluded](#) because of a lack of political consensus. The [Northern Ireland Bill of Rights proposals](#) also contain many more rights than are currently protected under the ECHR or EU system (including better protection of economic, social and cultural rights).
25. In Wales, the Welsh Assembly forged ahead with [legislation](#) which actually increases the protection of human rights by incorporating a duty to have due regard to the [UN Convention on the Rights of the Child](#).
26. Each of the devolved regions are very much on different human rights trajectories with a move towards stronger enforcement. Changes to the way human rights operate may risk further fragmenting an already fragmented UK and could potentially leave those living in England with less access to rights or remedies compared to other parts of the UK should the devolved legislatures use their legislative competence to further increase rights protection and compliance with international obligations.
27. The human rights implications of Brexit could therefore differ significantly across the UK with the retention and derogation from rights applying in different ways in different jurisdictions.

## Conclusion

28. The human rights implications of Brexit remains an area that requires substantial attention and expertise. The extent and scope of EU law means that it is difficult to predict just how significant Brexit will be in relation to existing rights structures in the UK. It is not yet possible to anticipate the full consequence of Brexit on human rights. The UK does not have a written constitution and much of its existing human rights law is derived from the two separate yet intertwined European regional human rights systems (EU/ Council of Europe). At the moment – the UK faces a potential withdrawal from both. These processes, and the implications at both the national and devolved level require to be viewed holistically. Examination in isolation risks underestimating the full impact of a potential human rights legal deficit. Changes to the nature and status of rights in the UK requires a more formal process of consideration and deliberation that involves and includes citizens in the formation of the rights structures that might exist post-Brexit.

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[1] Katie Boyle and Leanne Cochrane: Brexit and a British Bill of Rights: Four Scenarios for Human Rights, ESRC UK in Changing Europe Explainer available at <http://ukandeu.ac.uk/explainers/brexit-and-a-british-bill-of-rights-four-scenarios-for-human-rights/>; Katie Boyle, "What are the human rights consequences if we change our relationship with Europe" ESRC UK in a Changing Europe Explainer, available at <http://ukandeu.ac.uk/explainers/what-are-the-consequences-for-human-rights-if-we-change-our-relationship-with-the-eu/>; Katie Boyle and Leanne Cochrane, "Rights Derived from EU Law: Informing the Referendum Process", UK Constitutional Law Blog, available at <https://ukconstitutionallaw.org/2016/04/13/katie-boyle-and-leanne-cochrane-rights-derived-from-eu-law-informing-the-referendum-process/>; Katie Boyle, The legitimacy of the EU

referendum requires that citizens are informed of the implications of their decision, available at <http://www.democraticaudit.com/?p=21263>

[2] Katie Boyle and Leanne Cochrane, "Rights Derived from EU Law: Informing the Referendum Process", UK Constitutional Law Blog, available at <https://ukconstitutionallaw.org/2016/04/13/katie-boyle-and-leanne-cochrane-rights-derived-from-eu-law-informing-the-referendum-process/>

[3] See Northern Ireland Act 1998, s.6(1)(c) (legislative competence); s.24(1)(c) (Ministerial competence); s.83 (interpretation of Acts of the Assembly)

[4] See Government of Wales Act s.81(1) (Ministerial competence); s.94(6)(c) (legislative competence); s.154 (interpretation of Acts of the Assembly)