REPORT ON HUMAN RIGHTS IMPLICATIONS OF UK WITHDRAWAL FROM THE EU

AN INDEPENDENT LEGAL OPINION
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TABLE OF CONTENTS

EXECUTIVE SUMMARY

This Report examines the significance of withdrawal of the UK from the Union (colloquially, **"Brexit"**) for the EU-UK relationship and for individual and fundamental rights in European Union Law (**"EU law"**). It seeks to assist MEPs in incorporating human rights arguments into negotiating strategy. The core content and findings in each Part of this Report are as follows.

Part 1 – Introduction sets out the context and scope of the Report.

- The precise ramifications of Brexit for fundamental rights protection remain unknown, but it appears clear that Brexit, on the current proposals of the UK Government, will weaken the protection of fundamental rights across the UK for both UK citizens and EU citizens.
- The protection of human rights forms a constitutional core of the EU law. Currently, the Charter of Fundamental Rights of the European Union (**"the Charter"**) is key to the protection of fundamental rights in the UK. The UK Government's current intention, via the European Union (Withdrawal) Bill (**"the Withdrawal Bill"**), is not to incorporate the Charter in UK law post-Brexit.
- Examination of the Joint Report from the negotiators on behalf of the EU and the UK Government, published on 8 December 2017 (**"the Joint Report"**), and the European Commission's draft Legal Text, published on 28 February 2018, suggests that there is no shared understanding between the parties on the agreement reached on critical issues, particularly concerning the future relationship between the UK and the EU and the position of Northern Ireland and its citizens.
- Despite a long history of declared respect for the rule of law and human rights, the ongoing threats to the human rights framework in the UK, including the protections in the Human Rights Act 1998 (**"HRA"**) and the Good Friday Agreement 1998 (**"GFA"**), mean that the constitutional protection afforded to human rights by UK law remains far from stable, enduring and inalienable, particularly for the people of Northern Ireland.

Part 2 – Protection of Individual Rights in the EU outlines the protection of individual and fundamental rights in the EU, and considers the implications of the EU commitment to human rights for the future of the EU-UK relationship.

- Respect for fundamental rights is now recognised as a foundational element of the constitutional framework of the EU and as part of the general principles of EU law, which are binding on Member States and protected by the Court of Justice of the European Union (**"CJEU"**).
- The Charter contains 50 rights in six chapters covering a range of civil, political, social, economic and 'third generation' rights. Articles 20-24 of the Treaty on the Functioning of the European Union (**"TFEU"**) set out the rights of EU citizens to free movement, to vote and stand as a candidate in EU elections, to diplomatic and consular protection in third states, and to petition, apply to and

address EU bodies in any Treaty language. EU law also provides specific rights relating to trade and professional activities within the EU.

- Where rights are protected by both the Charter and the European Convention on Human Rights (**"ECHR"**), the protection offered by EU law must be *no less* than offered by the case law of the European Court of Human Rights, but the protection offered by EU law may, and does, go further.
- Differences between the Charter and the ECHR include the range of citizenship rights, the breadth of social and economic rights, the freestanding protection of equality, and stronger protection for access to justice, data and the right to marry.
- Fundamental rights guarantees impact upon the external relationships of the Union. The EU's commitment to fundamental rights is likely to remain central to the Brexit negotiations across a range of areas. Even in the most arms-length of cooperation agreements, including those concluded by the US and by Canada, it remains within the power of the CJEU to rule out measures incompatible with Charter rights. MEPs may wish to consider how the commitment of the EU to fundamental rights should inform negotiations and affect the future EU-UK relationship.

Part 3 – Individual Rights, EU Law and the UK considers the UK's current domestic constitutional standards on the protection of human rights and civil liberties and summarises the UK Government's proposals in the Withdrawal Bill.

- A brief summary is given of the operation of the ECHR and HRA in the context of devolution.
- The Charter has effect in the UK by virtue of the European Communities Act 1972 (**"ECA"**). The Charter binds the UK when it acts within the scope of EU law. The Charter often provides deeper and more effective protection than the HRA, particularly given the differences in enforcement and remedies. Despite some claims, Protocol 30 to the Charter does not operate as an 'opt-out' from the UK's obligations under EU law.
- The Withdrawal Bill repeals the ECA, converts directly-applicable EU law into UK law ("retained EU law"), and allows the modification of that law by ministers making secondary legislation (known as 'Henry VIII clauses'). The Bill grants ministers broad powers to implement the future Withdrawal Agreement and to make provision regarding EU competences which have previously been devolved. Corresponding powers for devolved authorities are restricted, and must be shared with UK ministers. Crucially, the Bill proposes to remove the Charter from UK law after Brexit. It also removes the jurisdiction of the CJEU, but allows courts to have regard to its jurisprudence in the future. The Bill retains general principles but removes their effectiveness as a right of action.
- This Report disputes the UK Government's claim that the terms of the Withdrawal Bill will not result in a loss of rights. There are a number of specific concerns about diminution of rights following from the proposals, including the erasure of novel rights, the weakening of procedural

mechanisms, the breadth of Henry VIII powers, the removal of remedies, and the surrounding context of threats to the broader human rights framework in the UK.

- This Part further considers some case study examples on the impact of withdrawal for the protection of individual rights in the UK, in the areas of data protection, trafficking and equality.

Part 4 – Key Issues for Negotiations focuses on key issues for human rights in the EU-UK negotiations.

- As a result of Brexit, legal protection for human rights in the UK is shrinking. The most significant loss for UK citizens and residents in the UK will be the suspension of the application of the Charter and the UK's departure from the jurisdiction of the CJEU. UK citizens resident in the EU and within the UK are also expected to lose their wider citizenship rights, with the exception of citizens of Northern Ireland who also hold Irish citizenship. These factors raise serious concerns about the future protection of fundamental rights in the UK and should inform the ongoing negotiations.
- Northern Ireland is a special case when it comes to Brexit and individual rights. The people of Northern Ireland enjoy the same rights afforded by the HRA and the Charter, but hold additional rights guaranteed in international law by the GFA. While it is agreed that all the people of Northern Ireland will retain the right to hold Irish (and therefore EU) citizenship even after Brexit, if they so choose, it is not clear how continued practical protection can be achieved for their rights beyond citizenship currently protected by EU law. Post-Brexit, there is a risk that Irish nationals living in Northern Ireland will be disenfranchised from their rights to democratic participation in the EU.
- Differential protection of human rights as between citizens of Ireland and the UK, and / or between citizens of Northern Ireland and the remainder of the UK, is likely to stir up enmities. The sustainability of a two-tier approach to rights protection must inform both the continuing negotiations towards withdrawal and the shape of a future relationship between the UK and the EU.
- The issue of the land border between Ireland and Northern Ireland has so far proved impossible for negotiators to surmount. In its draft Legal Text, the Commission has set out its stall in relation to the 'back-stop' plan for Northern Ireland: full regulatory alignment in the sense of membership of the internal market and customs union. While this has prompted negative reactions from the Prime Minister and politicians, it is now for the UK Government to put forward an alternative plan.
- The extent to which EU law on fundamental rights influences the relationship between the EU-UK relationship in the future will depend upon the nature of that relationship, the wish-list produced by the UK for future cooperation and the relative bargaining strength of the EU27. There is a clear precedent within Europe for human rights and cooperation to go hand in hand in the relationships of the EU. Beyond the EU, the indirect impact of EU law binding on the institutions means the Charter will remain crucial to any third country relationship. Human rights issues, including the

Charter, human rights conditionality, the ECHR and the protection of the GFA, must inform negotiations on the Withdrawal Agreement and the terms of any subsequent agreement.

Part 5 summarises brief conclusions and recommendations for the consideration of the European Parliament and MEPs.

1. INTRODUCTION

A. Overview of Context

1.1. Wholesale withdrawal from the European Union (**"EU"**) is an unprecedented step for an EU Member State, and the terms of the United Kingdom's (**"UK's"**) withdrawal from the EU (commonly referred to as 'Brexit') are as yet to be determined. This means that the precise ramifications of Brexit for the protection of fundamental rights, for both UK citizens and EU citizens resident there, are unknown, but it is clear that it gives rise to complex and unparalleled challenges, legal and political. Brexit also raises the significance of rights protection to the future functioning of the EU, its members and citizens in determining its future relationship with the UK. In the process of withdrawing its membership, the UK will unknit itself from the legacy of EU membership built over the last half century, including in respect of the deepening commitment to human rights and the protection of the individual found in the Treaties, the general principles of the EU and the Charter of Fundamental Rights of the European Union (**"the Charter"**).[1]

1.2. Clarity on the treatment of citizens' rights – the individual rights arising from the Treaties as a result of membership of the EU – has been an issue which has repeatedly reared its head since shortly after the referendum in June 2016, and it has featured in statements made and policy documents produced by the Irish and British Governments and various EU bodies. Within months of the referendum, for example, Guy Verhoftstadt was quoted as having indicated that *"associate EU citizenship"* for UK nationals, on a fast-track basis, would be on the table during negotiations between the UK and the remaining 27 Member States (**"the EU27"**).[2] The centrality of this issue to the EU's institutions is not surprising, given the terms of the Lisbon Treaty and the need to ensure that for any withdrawal agreement to be concluded by the European Council, and consented to by the European Parliament, the agreement must protect fundamental rights in line with the EU Treaties, including the Charter (Articles 50(3) and 218(11), Lisbon Treaty). Citizens' rights post-Brexit has also been a topic of particular interest to commentators from within the UK and across the wider Union.

1.3. Regrettably, however, legal certainty on this (amongst other issues) has not been a hallmark of the Article 50 negotiations thus far. There were initial indications that the lack of certainty on

[1] See Parts 2-4 below.
[2] "Brexit: UK associate citizenship to be fast-tracked", *BBC News* (9 December 2016), http://www.bbc.com/news/world-europe-38264203.

this topic may have been a deliberate tactical manouevre, with reports of Westminster Government Ministers considering this to be a significant bargaining chip. For example, in October 2016 the UK's Secretary of State for International Trade, Liam Fox MP, was reported to have described EU nationals in the UK as one of the "*main cards*" in the negotiations.[3] The UK's Parliamentary Joint Committee on Human Rights (**"JCHR"**) was highly critical of such language and tactics shortly thereafter, issuing a report in December 2016 which urged the UK Government not to use fundamental rights as bargaining chips in Brexit negotiations, and calling for early resolution of this issue.[4]

1.4. However, it was not until a year later that, finally, some agreement on this issue appeared to have been reached. The Joint Report from the negotiators on behalf of the EU and the UK Government on the conclusion of Phase 1 of the negotiations, dated 8 December 2017 (**"the Joint Report"**), stated in strong terms that, *"it is of paramount importance to both Parties to give as much certainty as possible to UK citizens living in the EU and EU citizens living in the UK about their future rights"* and so a *"specific set of arrangements"* had been reached in this regard.[5] The Joint Report did indicate that agreement appears to have been reached in respect of some reciprocal rights for UK citizens in the EU and EU citizens in the UK, at least in respect of those resident at the time of UK withdrawal from the Union.[6] It appears that these provisions provide the basis for the draft Legal Text prepared by the EU Commission and published on 28 February 2018 (**"draft Legal Text"**).[7] This text provides the Commission's proposed baseline for the next stage of the negotiations, but it has not yet been agreed by the EU27. Uncertainty remains, including for example on whether the rights agreed will extend during the transitional period, or be limited to those already resident in the UK on 29 March 2019.[8] More significantly, there appears to be

[3] *The Guardian*, "Liam Fox: EU nationals in UK one of 'main cards' in Brexit negotiations" (4 October 2016), https://www.theguardian.com/politics/2016/oct/04/liam-fox-refuses-to-guarantee-right-of-eu-citizens-to-remain-in-uk.

[4] Joint Committee on Human Rights, Fifth Report of Session 2016-17, *The Human Rights Implications of Brexit*, HL 88, HC 695, Summary (19 December 2016), https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/695/69502.htm.

[5] Joint Report approved and annexed to the European Council Guidelines (8 December 2017), [33], available at https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf.

[6] Joint Report, [6]-[41].

[7] TF50 (2018) 33, European Commission Draft Withdrawal Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (28 February 2018). https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement.pdf

[8] The Joint Report refers to reciprocal rights ending on the "*specified date*" that date being the "*time of the UK's withdrawal*" (at [8]). However, the revisions made to the EU Negotiating Directives published by the European Council appear to clarify that the EU understanding of this specified date will be at the end of any agreed transition period. See, European Council, Annex to the Council Decision supplementing the Council Decision of 22 May 2017, authorising the opening of the negotiations with the United Kingdom of Great Britain and Northern Ireland for an agreement setting out the arrangements for its withdrawal from the European Union, XT 21004/18 ADD 1 REV 2 (29 January 2018), [9], available at http://www.consilium.europa.eu/media/32504/xt21004-ad01re02en18.pdf. The draft Legal Text proceeds on the basis that such rights will continue to be accrued until

no shared understanding between the parties on the extent of agreement reached in the Joint Report. Reaction from the UK Government to the publication of the draft Legal Text was vocal and critical, most particularly on the treatment of Northern Ireland and the jurisdiction of the CJEU. It was reported that the UK Prime Minister had "*protested*" to the Irish Prime Minister that the draft Legal Text was an "*attempt to unpick the December deal*".[9] The Northern Ireland Minister, Karen Bradley was quick to reassert the UK's commitment to the December deal (and specifically, to no hard border for Ireland).[10] Yet, on the same day, the UK Prime Minister told the House of Commons: "*the draft legal text that the Commission has published would, if implemented, undermine the UK common market and threaten the constitutional integrity of the UK by creating a customs and regulatory border down the Irish sea, and no UK Prime Minister could ever agree to it. I will be making it crystal clear to President Juncker and others that we will never do so.*"[11] The only thing that appears clear is that the position of Northern Ireland, and its citizens, plays a crucial role in the continuing negotiations and in the future EU-UK relationship.

1.5. Critically, the Joint Report contained two particularly important paragraphs in relation to the protection of fundamental rights in Northern Ireland[12], acknowledging that the 1998 Good Friday Agreement (**"GFA"** or **"Belfast Agreement"**) "*recognises the birth right of all the people of Northern Ireland to choose to be Irish or British or both and be accepted as such*" and that "*the people of Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens, including where they reside in Northern Ireland*". It expressly stated that "*both Parties therefore agree that the Withdrawal Agreement should respect and be without prejudice to the rights, opportunities and identity that come with European Union citizenship for such people*". An important guarantee was given: "*The United Kingdom commits to ensuring that no diminution of rights is caused by its departure from the European Union*".

1.6. Although aspects of the December 2017 Joint Report were undoubtedly positive, the treatment of the fundamental rights enjoyed by EU citizens, the protection of human rights standards within the UK following withdrawal from the EU, and the wider human rights implications of Brexit have generated significantly greater heat than light. From the franchise to free movement,

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the end of the transition period, see, Part 2 (Citizen's Rights), for example, Article 8; and Article 9 on personal scope.

[9] The Times, "Don't break up Britain, May warns EU leaders" (28 February 2018), https://www.thetimes.co.uk/article/don-t-break-up-britain-may-warns-eu-leaders-c7vs6v05x.

[10] Reuters, "Britain stands resolutely behind border agreement - Northern Ireland minister" (28 February 2018), https://uk.reuters.com/article/uk-britain-eu-ireland-bradley/britain-stands-resolutely-behind-border-agreement-northern-ireland-minister-idUKKCN1GC1DV.

[11] HC Deb, 28 Feb 2018, col 823.

[12] Ibid., [52] and [53].

individual rights lie at the heart of the EU's legal framework. From equal treatment for women and the LGBT community to the protection afforded to the right of access to justice; from data protection and privacy to the rights of trafficked persons, the protection of human rights (more commonly termed "**fundamental rights**" in EU law) forms a constitutional core of the law of the Union. These rights are not expressly addressed in the Joint Report.[13] Real concern has arisen following the publication of the draft Legal Text, that the position in the Joint Report as respects the future relationship between the EU and the UK, and the rights of individuals within it is as yet not shared by both the UK Government, the EU Commission and the EU27.

1.7. As noted above, the UK Parliament's JCHR stressed in December 2016 that "*[f]undamental rights should not be used as a bargaining chip*".[14] More than a year on, it remained "*particularly concerned with the human rights implications of excluding the Charter of Fundamental Rights*" from UK law following Brexit.[15]

1.8. The UK Government's position is as yet unclear, beyond an intention not to be bound by the Charter. This much is apparent from a number of policy documents and statements and from Clause 5(4) of the EU (Withdrawal) Bill, currently before the UK's Houses of Parliament, which provides that the Charter will not form part of the law of the UK following withdrawal. How this sits with the seeming guarantee in the Joint Report that there will be no diminution of rights for those in Northern Ireland is entirely unclear (an issue to which we return below).

1.9. Although the Charter is to form no part of UK law post-Brexit, the general principles of EU law will, however, be deposited into the domestic legal framework (we return to the Withdrawal Bill in Part 3 of this Report). In November 2017, Suella Fernandes MP – now a Minister in the Department for Exiting the European Union – wrote:

> "*Britain should be proud that we're a founder member of the European Convention of Human Rights … The EU Charter of Fundamental Rights, on the other hand, is much*

[13] A leaked version of part of the draft Withdrawal Agreement prepared by the European Commission, available on 8 February 2018, for example, makes no express reference to the Charter of Fundamental Rights of the EU, alongside the general principles of Union law and the Treaties (although it is arguable that the reference to the Treaties and their treatment of the Charter may be sufficient). See EU Law Analysis, Steve Peers, "The Running Commentary Begins: Annotation of the proposed Withdrawal Agreement" (8 February 2018), http://eulawanalysis.blogspot.co.uk/2018/02/the-running-commentary-begins.html.

[14] Joint Committee on Human Rights, Fifth Report of Session 2016-17, *The Human Rights Implications of Brexit*, HL 88, HC 695, Summary, (19 December 2016), https://publications.parliament.uk/pa/jt201617/jtselect/jtrights/695/69502.htm. The Committee concluded that, at that stage, "*The Government seemed unacceptably reluctant to discuss the issue of human rights after Brexit. The Minister of State responsible for human rights was either unwilling or unable to tell us what the Government saw as the most significant human rights issues that would arise when the UK exits the EU*": at [21].

[15] Joint Committee on Human Rights, *First Report of Session 2017-19, Legislative Scrutiny: EU (Withdrawal) Bill: Right by Right Analysis,* HL 70, HC 774, [2] (26 January 2018), https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/774/77403.htm#_idTextAnchor000.

flabbier, covering everything from biomedicine and eugenics to personal data and collective bargaining. … So, it seems odd to put the EU Charter into UK law when we've opposed it for years, and when we've got the tried and tested European Convention to fall back on anyway. One of the main reasons for leaving the EU was to take back control of our own laws, so we don't have to do what Brussels tells us if we think it's wrong. And the Charter is wrong for Britain; both Labour and Conservative prime ministers have said so. So, let's not chicken out of one of our first opportunities to use the newly won freedom that Brexit will give us. Let's use it for good instead."[16]

1.10. In January 2018, Lord Callanan, another Minister for Exiting the European Union, confirmed: "*Our intention has always been that, in itself, not incorporating the [C]harter should not result in a significant loss of substantive rights.*" He explained that the UK Government's view was that it would be inappropriate for the Charter to become part of domestic law.[17] This discussion takes place against a complex period of evolution in the UK's constitutional arrangements, including for the protection of human rights and through devolution of power across Wales, Scotland and Northern Ireland. In Northern Ireland, the post-conflict position is especially significant, and the rights of the citizens of Northern Ireland are given particular protection by the GFA. Despite the UK Government's stated commitment to upholding the GFA in all its parts, it is as yet far from clear how the rights of Irish citizens resident in Northern Ireland might be enforced following the UK's withdrawal from the Union.[18] Worryingly, politicians from across the political spectrum have begun to cast doubt on the GFA, its significance and sustainability.[19] Labour MP Kate Hoey, for example, described the GFA as *"unsustainable,"* in comments which were promptly condemned by her colleague, the shadow Northern Ireland Secretary, Owen Smith MP, and described by Tánaiste Simon Coveney TD as *"not only irresponsible, but reckless."*[20] Boris Johnson MP, the Foreign Secretary went so far as to suggest that the reinstatement of a hard border in Northern Ireland might form part of any future settlement.[21] This seems entirely at odds with the UK's international obligations under the GFA; the terms of the Joint Report and the UK's stated negotiating position.

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[16] Suella Fernandes MP and John Penrose MP, "Sucking up flabby Euro-rights law is not the point of Brexit independence", *The Telegraph* (18 November 2017), http://www.telegraph.co.uk/news/2017/11/18/sucking-flabby-euro-rights-law-not-point-brexit-independence/.

[17] HL Deb, 31 Jan 2018, col 1694.

[18] See comment, including, for example, in Anthony M. Collins, *EU Law in Ireland Post-Brexit*, Seventh Annual Brian Lenihan Memorial Address (3 February 2018); Irish Times, "Noel Whelan: EU rights of Irish citizens in North a Brexit dilemma" (8 February 2018), https://www.irishtimes.com/opinion/noel-whelan-eu-rights-of-irish-citizens-in-north-a-brexit-dilemma-1.3385131.

[19] The Guardian, "The Good Friday Agreement is under Attack: Can we really risk ditching it?", (23 February 2018), https://www.theguardian.com/commentisfree/2018/feb/23/good-friday-agreement-irish-brexit-northern-ireland.

[20] The Guardian, "Ireland condemns Kate Hoey's 'reckless' Good Friday Agreement remarks" (20 February 2018), https://www.theguardian.com/politics/2018/feb/20/ireland-kate-hoey-good-friday-agreement-remarks.

[21] The Telegraph, "Boris Johnson raises the prospect of a hard border in Ireland in leaked letter to Prime Minister" (28 February 2018), https://www.telegraph.co.uk/politics/2018/02/27/boris-johnson-raises-prospect-hard-border-ireland-leaked-letter/.

1.11. How a two-tier system of rights guarantees – differently applied in Britain and in Northern Ireland – might affect the current asymmetric system of devolution within the United Kingdom is unexplored. A majority of citizens in Scotland voted against leaving the EU and the Scotland Act 1998 (as amended) is predicated on the UK's continuing membership of the EU. The Scottish Government has been resolute in its resistance to the diminution of rights for Scottish voters following Brexit and highly critical of the proposals in the EU (Withdrawal) Bill which appear to repatriate powers from Scotland and the other devolved administrations to Westminster.[22]

1.12. Prior to the referendum, the Prime Minister Theresa May, then Home Secretary, reiterated her personal opposition not to membership of the EU, but to the continued application of the European Convention on Human Rights ("**ECHR**") to the UK. In April 2016, she urged voters to remain within the Union, but withdraw from the ECHR.[23] The Conservative election manifesto in 2017 reiterated the Government's intention to repeal the Human Rights Act 1998 (**"HRA"**) and committed to membership of the ECHR only for the duration of this Parliament (likely to be until 2022[24]):

> *"We will not bring the European Union's Charter of Fundamental Rights into UK law. We will not repeal or replace the Human Rights Act while the process of Brexit is underway but we will consider our human rights legal framework when the process of leaving the EU concludes. We will remain signatories to the European Convention on Human Rights for the duration of the next parliament."*[25]

1.13. Whatever the result of the Article 50 negotiations, despite a long history of declared respect for the rule of law and human rights, the constitutional protection afforded to human rights by UK law remains far from stable, enduring and inalienable, not least in Northern Ireland. The likely constitutional picture following 29 March 2019 remains uncertain, and both politically and legally malleable.[26]

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[22] See, for example, the Ministerial Statement to the Scottish Parliament made indicating that no legislative consent motion would be proposed on the EU (Withdrawal) Bill, SP OR, 12 Sept 2018, Col 12: "*certain choices in the bill, such as ending the effect of the European charter of fundamental rights, will make the process even more damaging than it needs to be"* (Michael Russell, Minister for UK Negotiations on Scotland's Place in Europe), http://www.parliament.scot/parliamentarybusiness/report.aspx?r=11069&mode=pdf.

[23] BBC News Online, "Theresa May: UK should quit European Convention on Human Rights" (26 April 2016), http://www.bbc.co.uk/news/uk-politics-eu-referendum-36128318.

[24] However, see the analysis by Lady Hale, "The United Kingdom Constitution on the move", Canadian Institute for Advanced Legal Studies' Cambridge Lectures (2017), 5-6, available at https://www.supremecourt.uk/docs/speech-170707.pdf.

[25] Conservative and Unionist Party, *Forward Together, Conservative and Unionist Party Manifesto 2017* (18 May 2017), 37, https://www.conservatives.com/manifesto. Since, it has been reiterated by the UK Government that there will be no such repeal, at least until after the issue of withdrawal from the Union has been settled.

[26] For further background on the constitutional debate on repeal of the Human Rights Act 1998, see KRW Law and Doughty Street Chambers, *Report on the Potential Effects of Repeal of the Human Rights Act 1998 by the British Government: An Independent Study commissioned by The European United Left/ Nordic Green Left (GUE*

B. The Scope of the Report

1.14. In this Report, we focus on the significance of individual and fundamental rights in European Union Law (**"EU law"**) for the Brexit negotiations and the future EU-UK relationship.

1.15. The Report is not a substitute for full consideration of the position of Northern Ireland in the ongoing negotiations, and the separate question of designated special status.[27] Nor does it replicate a comprehensive consideration of the political challenges facing the protection of human rights within the UK.

1.16. Without clarity on the goals of the UK Government, including for the EU-UK relationship, this Report cannot provide definitive answers on the protection of fundamental rights following Brexit. Instead, it is designed to inform and support discussion of the options open to the European Parliament and MEPs in incorporating human rights arguments into negotiating strategy for the Withdrawal Agreement and the future EU-UK relationship.

1.17. The Report draws some brief conclusions and makes recommendations on issues for the consideration of the EU Parliament and MEPs, including on the protection of the rights of individual EU citizens and others, and for the promotion and non-retrogression of human rights standards in the UK.

/ *NGL) Group of the European Parliament* (15 February 2016), available at https://www.doughtystreet.co.uk/documents/uploaded-documents/HRA_NI_FINAL_15_02_16.pdf.

[27] For further on the position of Northern Ireland and its status, see Caoilfhionn Gallagher QC and Katie O'Byrne, *Report on How Designated Special Status for Northern Ireland within the EU can be Delivered, An Independent Legal Opinion Commissioned by the GUE/NGL Group of the European Parliament* (16 October 2017), available at http://www.guengl.eu/uploads/publicationsdocuments/NI_Special_status_report_161017_FINAL_crops.pdf.

2. PROTECTION OF INDIVIDUAL RIGHTS IN THE EU

2.1. All EU citizens enjoy individual rights both by virtue of that citizenship and in the fundamental rights guaranteed by EU law. This has a variety of implications for the EU in its relationship with third states, including in respect of its settlement of international agreements for trade and other forms of cooperation.

A. The Treaties and Individual Rights

2.2. Articles 20-24 Treaty on the Functioning of the European Union (**"TFEU"**) set out the main rights of EU citizens:

a. the right to move and reside freely within the territory of the Member States;

b. the right to vote and the right to stand as a candidate in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

c. the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State; and

d. the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language.[28]

2.3. EU law also provides specific rights relating to trade and professional activities within the EU. The single market means that goods can be sold or purchased anywhere in the Union without import duties; workers have the right to seek employment anywhere in the Union; [29] businesspeople cannot be discriminated against in their professional activities;[30] and members of the professions have the right to set up a practice and to work in any Member State.[31] Citizens have the right to be treated by the administrative or judicial authorities of a country of the Union in the same way as the nationals of that country.[32]

[28] Art 20 TFEU.
[29] Art 45 TFEU.
[30] Art 37 TFEU.
[31] Art 54 TFEU.
[32] Art 18 TFEU.

B. The Protection of Fundamental Rights in the EU

(1) The Emergence of Fundamental Rights

2.4. The protection of fundamental rights was not expressly included in the founding Treaties of the European Communities, although they contained a number of articles that could have a direct bearing on individuals' rights: for example, in the EEC Treaty, the rules on the general prohibition on discrimination on grounds of nationality (Article 7), on freedom of movement for workers (Article 48), on the freedom to provide services (Article 52), on improved working conditions and an improved standard of living for workers (Article 117), on equal pay for men and women (Article 119) and on the protection of persons and protection of rights (Article 220).[33]

2.5. Protecting fundamental rights is now recognised as a 'foundational' element of the European Union and an essential component of the development of the supranational European Area of Freedom, Security and Justice.[34] Article F of the Treaty on European Union (**"TEU"**) in 2000, provided that the EU is obliged to:

> "*respect fundamental rights, as guaranteed by the European Convention on Human Rights and as they result from the constitutional traditions common to the Member States as general principles of Community law."*

2.6. Article 2, TEU, as revised following the Lisbon Treaty in 2009, now provides that the EU is founded, in part, on the value and respect for human rights. Article 3(1) provides that the Unions aims include the promotion of its values. Article 6 – echoing the language of Article F – explains that the protection of fundamental rights within EU law is confirmed in the Charter of Fundamental Rights of the EU *and* in the general principles of EU law, as informed by both the ECHR and the legal traditions of individual Member States.[35]

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[33] For a detailed analysis of this topic, see Francesca Ferraro and Jesús Carmona, *Fundamental Rights in the European Union: The role of the Charter after the Lisbon Treaty*, European Parliamentary Research Service, March 2015 (PE 554.168), http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/554168/EPRS_IDA(2015)554168_EN.pdf.

[34] See, for example, Violeta Moreno-Lax and Cathryn Costello, "The Extraterroitorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model", in Steve Peers et al (Eds), *The Charter of Fundamental Rights: A Commentary*, (Hart Publishing, 2014), 1660. Together these articles "*illustrate the foundational and pervasive character of human rights in EU law*". See also Velluti, S, "The Promotion and Integration of Human Rights in EU External Trade Relations", (2016) 32 (83) *Utrecht Journal of International and European Law* 41.

[35] This provision also provides for the EU to accede to the ECHR. The progress to ratification is complex and outwith the scope of this paper.

2.7. Respect for human rights is one of the core values on which the EU stands. The EU can take steps to sanction a Member State which fails to respect individual rights. Where there is a determination that there is a "*clear risk of a serious breach*" of one of the founding values of the EU, the Council may agree to make recommendations to a Member State. A "*serious and persistent*" breach may result in the suspension of the rights of a Member State by the EU.[36] These powers – never used to date – illustrate the regard with which fundamental rights are treated as part of the constitutional framework of the Union.

(2) The General Principles

2.8. Even before their entrenchment in the Treaties, the Court of Justice of the European Union (**"CJEU"**)[37] took steps to protect fundamental rights as general principles of Community law.[38] In 1969, the *Stauder* case first recognised fundamental rights as part of the "*general principles of Community law*".[39] That fundamental rights form a part of that core jurisprudence is now settled:

> *"Respect for fundamental rights form an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the member states, must be ensured within the framework of the structure and objectives of the Community."*[40]

2.9. The general principles bind both the Member States and the institutions of the EU when acting within the scope of EU law. The CJEU and domestic courts apply these principles when considering the lawfulness of activities and legislative measures within EU law. They serve as an aid to the interpretation of legislative measures which give effect to EU law or derogate from it. Actions which offend against the general principles of EU law will be unlawful and may be struck down. Offending measures of domestic law may be struck down or disapplied.

2.10. These general principles include fundamental rights familiar to the legal traditions of the Member States.[41] They include procedural guarantees like the right to a fair hearing and the right to legal

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[36] Article 7, TEU.
[37] "CJEU" is the acronym currently used and so it is used in this Report, although "ECJ" (European Court of Justice) was commonly used at this time.
[38] Albeit that there was uncertainty regarding the extent to which there were then sufficient guarantees for fundamental rights at Community level, by way of contrast with domestic constitutions in the Member States. The German Constitutional Court, the *Bundesverfassungsgericht*, required convincing on this issue: see *Solange*, Judgment of 29 May 1974, Case 2 BvL 52/71 and cf *Solange II*, Judgment of 22 October 1986 (Case 2 BvR 197/83).
[39] Case 29/69, *Stauder* [1969] ECR 419.
[40] *International Handelsgesellschaft v Einfuhr- und Vorratsstelle Getreide* Case C-11/70, [1970] ECR 1125, [4].
[41] *Stauder v City of Ulm* Case C-29/69 [1969].

certainty. The general principles also include rights to dignity and to free expression.[42] The principles include respect for the rights contained in the ECHR, but they are informed by other rights protected in international human rights law. The CJEU has drawn on the terms of other multilateral conventions, including for example, the European Social Charter, the Conventions of the International Labour Organisation, and the ICCPR.[43]

C. The Charter of Fundamental Rights

2.11. The Charter of Fundamental Rights of the European Union (**"the Charter"**) became a legally binding part of EU law when the Lisbon Treaty came into force in 2009.

2.12. The Charter is often described as a strand-tying document, which stems from the fact that the rights of individuals within the EU *"were established at different times, in different ways and in different forms"* and so it was necessary to bring together all the fundamental rights protected by EU law in a single document.[44] These rights are derived from a variety of international and European sources, such as the ECHR, the Treaties and the case-law of the CJEU. However, the characterisation of the Charter thus, as a tidying or strand-tying exercise only, tends to underplay its importance.

2.13. The Charter contains rights and freedoms under six Chapters: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice. The rights protected include many similar to those in the ECHR, like the right to liberty or the right to free expression, but they are in many cases more developed in the Charter. It also contains other rights protected by virtue of EU citizenship or recognised in the case-law of the CJEU.[45]

2.14. The Charter contains 50 rights in its six Chapters, three times more than are in the ECHR. It contains economic and social rights as well as civil and political rights, and it contains what are often described as 'third generation' fundamental rights, such as guarantees concerning bioethics and transparent administration.

2.15. Some illustrative differences between the Charter and the ECHR include:

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[42] See, for example, Case C-377/98, *Netherlands v. Parliament and Council*, [2001] ECR I-7079, [70]; and *Connolly*, Case C-274/99 P, [2001] ECR I-1611.
[43] See *Defrenne v Sabena (III)* [1978] ECR 1365 at [28], *Grant v South West Trains* [1998] ECR I – 621, [44].
[44] European Commission, "Why the EU Charter of Fundamental Rights Exists", http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm.
[45] See also Angela Patrick, *Mapping the Great Repeal*, Thomas Paine Initiative (October 2016), https://rightsinfo.org/app/uploads/2016/12/Mapping-the-Great-Repeal-Thomas-Paine-Initiative-November-2016-For-RightsInfo.pdf, Part B.

a. *Citizenship rights*: There are a range of rights and principles protected by the Charter which are entirely unknown to the ECHR. These include express protection offered to EU citizenship rights outlined above, in Title V, including the right to vote in European Parliament elections (Article 39); the right to vote and stand in local elections on the same basis as a national in the state where you are resident (Article 40); the right to good administration (Article 41); the right to access EU documents (Article 41); the right of free movement and residence (Article 45); and the right to diplomatic and consular assistance (Article 46).

b. *Social and economic rights*: The Charter provides some protection for a range of social and economic rights otherwise protected in EU law or in the domestic laws of Member States. The rights to health, environmental protection and social security are all protected in Title IV (Solidarity). These protections are not found in the law of the ECHR or the domestic constitutional law of the UK.[46] The enforceability of these Charter rights is circumscribed in some cases, including in the UK specifically, by Protocol 30 (considered in Part 3). Some but not all of these measures have direct effect and are justiciable. Others are termed principles, reliant on the further action of Member States and the EU.[47]

c. *Equality:* Articles 20-21 contain a freestanding equality guarantee and protection against non-discrimination (contrast with Article 14 ECHR, which only protects against discrimination in the enjoyment of other rights protected by the Convention (Protocol 12 ECHR contains a similar freestanding equality guarantee, but this has not been ratified by the UK)). Article 21 expressly protects against discrimination on grounds not incorporated into the Convention when it was drafted in 1950, including sexuality, genetic features and disability. Express provisions are included on the right to equal treatment of women, on the rights of the child and the rights of older persons.[48]

[46] Although these rights are not protected by the mechanisms of the ECHR, most are covered by the International Covenant on Economic, Social and Cultural Rights and the Council of Europe's European Social Charter, both of which bind the UK in international law, but neither of which is incorporated in domestic law). Although the UK has signed and ratified the European Social Charter (1961), it has not accepted the 1996 revision, nor has it ratified the mechanism for individual complaints.

[47] Chapter IV is considered a variety of rights, principles and objectives. For example, Article 34 on social security and assistance is considered a mere objective. Article 28 on collective bargaining is a guiding principle left to national legislation. On the other hand, provisions on access to placement services in Article 29 and the right to fair and just working conditions have been considered justiciable in commentary. Case law has not so far provided a definitive answer. See, for example, See also S. Velluti, "The Promotion and Integration of Human Rights in EU External Trade Relations", (2016) 32 (83) *Utrecht Journal of International and European Law* 41, fns 35-40.

[48] Articles 23, 24 and 25, Charter.

d. *Access to Justice*: Title VI contains rights associated with access to justice. While the rights may parallel the protections offered by the right to a fair hearing in Article 6 ECHR, the protection offered by the Charter is more specific and may offer greater protection. For example, Article 47 of the Charter includes an express right to legal aid "*in so far as such aid is necessary to ensure access to justice*".[49] Article 6 ECHR is only applicable in cases which involve the "*determination of civil rights and obligations*"; there is no limit in Article 47. Thus in administrative decision making cases which would not attract the protection of Article 6 ECHR – including in immigration and tax matters – Article 47 of the Charter may impose a right to a fair hearing which is not otherwise guaranteed.[50]

e. *Data Protection and Information Rights:* Reflecting existing protections in EU law, the Charter provides for an express right to the protection of personal data (Article 8). Although personal information is protected by the right to respect for private life, home and correspondence in Article 8 ECHR, it contains no express provision for data, but one implied by the European Court of Human Rights (**"ECtHR"**).[51]

f. *The Right to Marry:* The protection offered by the right to marry in the Charter is another example of updating to remove historical limitations. The right to marry, as protected by Article 9 of the Charter, is framed in gender-neutral terms. Article 12 ECHR refers only to the right of "*men and women*" to be married.[52]

2.16. The Charter distinguishes between "*rights*" and "*principles*". Rights are to be "*respected*" and principles "*observed*".[53] Some Articles of the Charter contain both rights and principles and the distinction between the two has not been comprehensively addressed in the case law of the CJEU.[54] Any part of the Charter which is capable of having direct effect according to the ordinary

[49] Legal aid may be required by the ECHR in a limited number of circumstances where a fair hearing would be impossible without it. See for example, *Airey v Ireland*, 32 Eur Ct HR Ser A (1979); [1979] 2 EHRR 305.
[50] See for example, *LH Bishop Electric Co v HMRC* [2013] UKFTT 522, 803-811 and *ZZ v Secretary of State for the Home Department* Case C-300/11 at [48]-[59]. Contrast *Maaouia v France* (2001) 33 EHRR 42, at [37] and [38].
[51] See for example, *S & Marper v United Kingdom*, App. Nos 30562/04 and 30566/04.
[52] For interpretation of Article 12 ECHR in view of Article 9 of the Charter, see *Schalk and Kopf v Austria* (App. No. 30141/04), 24 June 2010.
[53] See Articles 51 – 52, Explanations to the Charter of Fundamental Rights of the EU, Explanation to Article 52, http://eurlex.europa.eu/legalcontent/EN/TXT/HTML/?uri=CELEX:32007X1214(01)&from=EN.
[54] See, for example, C-176/12 *Association de mediation sociale v Union locale des sydicats*.

rules of EU law[55] is considered justiciable and can be relied on and enforced by individuals before national courts and in references to the CJEU.

2.17. Where rights are protected by both the Charter and the Convention, the protection offered by EU law must be *no less* than offered by the case law of the ECtHR. However, the protection offered by EU law may go further,[56] and does in some areas.[57] The rights in the ECHR act as a 'floor' but not a 'ceiling' to the protection offered by the Charter.

2.18. We return to the impact of the Charter for UK residents and for EU citizens in the UK below, in Part 3.

D. Protection of human rights in EU legislation and programming

2.19. Outside its general legal framework for the protection of fundamental rights, EU law includes a number of regulations and framework directives aimed at ensuring the promulgation of shared minimum standards in the protection of human rights across the Union. It is outside the scope of this paper to present a comprehensive picture,[58] but this section provides an overview.

2.20. This ranges from broad framework legislation on minimum standards in equality and immigration for example, to specific measures designed to target individual human rights challenges. The EU Equality Framework, for example, comprises a familiar series of directives which protect against discrimination on the grounds of gender, race, sexuality, religion, disability and age. These include the Equal Treatment Directive of 1976 to the Equal Treatment Framework Directive 2000, which extended protection to sexuality, religion, disability and age in the workplace.[59] In an example of more targeted measures, the EU prohibits the export of drugs for

[55] Applying the well-known test in *Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] CMLR 105, broadly that the measures be generally applicable and sufficiently precise to be relied upon without further implementing measures.
[56] Article 53, Charter.
[57] For example, Articles 20-21 TFEU contain a freestanding equality guarantee and protection against non-discrimination (contrast with Article 14 ECHR which only protects against discrimination in the enjoyment of other rights protected by the Convention (Protocol 12 to the ECHR contains a similar freestanding equality guarantee, but this has not been ratified by the UK)).
[58] Further examples are provided in Angela Patrick, *Mapping the Great Repeal*, Thomas Paine Initiative (October 2016), https://rightsinfo.org/app/uploads/2016/12/Mapping-the-Great-Repeal-Thomas-Paine-Initiative-November-2016-For-RightsInfo.pdf, Parts C and D.
[59] The current incarnations of that legislation are the Gender Directive; and 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; 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; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

use in the administration of the death penalty, reflecting commitments in both the Charter and the ECHR on the death penalty, supported by the Member States of the Union.[60] These legislative standards form part of the body of EU law which bind the Union and Member States and which will inform the conclusion and progress of any future EU-UK relationship. Their scope and effect remain subject to the supervision of the CJEU as the final arbiter of the interpretation of EU law.

2.21. Scrutiny of any disparity between the protection and promotion of fundamental rights in the UK and in the EU following Brexit must stretch beyond the guarantees in the legal framework offered by the general principles and the Charter. Immediately following withdrawal, the UK Government intends to align the legislative framework in the UK with that of the EU**;** incorporating a substantial proportion of the *acquis* (the body of EU law) into domestic law.[61] Thereafter, the extent of alignment and any continued participation in EU programmes for the protection of fundamental rights will depend upon the nature of the EU-UK relationship.

2.22. We consider the current proposals in UK law for the implementation of "*retained EU law*" in the EU (Withdrawal) Bill; and specific proposals for the adoption of measures to secure alignment between EU and UK law, including for the purposes of the protection of fundamental rights, in Part 3.

E. Human rights in the external relationships of the EU

2.23. Fundamental rights guarantees in the EU impact upon the external relationships of the Union in a range of direct and indirect ways. These include (a) the extent to which the Treaties and the Charter bind the EU and Members States in their external relationships; (b) the interpretation and application of EU law relevant to those relationships; and (c) in the settlement and application of the bilateral and multilateral Treaties and agreements which govern the relationships between the EU and third states.

[60] Council Regulation (EU) No 1236/2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment was adopted on 27 June 2005. It comprises an import and export ban for certain goods listed in Annex II and an export control regime for certain other goods listed in Annex III. In 2011, these lists were amended to include death penalty drugs.

[61] The Government has determined that it should incorporate a significant proportion of the *acquis* of the Union, in the EU (Withdrawal) Bill, which we deal with below in Part 3. See, for example, CCHQ, Prime Minister, "Britain after Brexit: A Vision of a Global Britain" (2 October 2016). See also HC Deb, 10 Oct 2016, col 615 et seq.

(1) The Treaties, the General Principles and the Charter

2.24. The Treaties govern the external relationships of the EU. Articles 216 and 217 of the TFEU, for example, provide one basis for the EU to enter into international agreements in its own right, including Association Agreements, Free Trade Agreements, Partnership and Cooperation Agreements and Economic Partnership Agreements. Article 21, TEU sets broad general principles on the conduct of the external relationships of the UK, including democracy, the rule of law, universal human rights and fundamental freedoms, respect for human dignity, principles of equality and solidarity, respect for the principles of the United Nations Charter and international law.[62]

2.25. The provisions of the Treaties and the protection offered by the Charter and the general principles for fundamental rights apply to all the activities of the institutions of the EU, including in the settlement of international agreements for which it is responsible. The CJEU has confirmed that agreements with third countries and international organizations are "*binding upon the institutions of the EU and on its Member States, and would therefore form an integral part of EU law*."[63] The conclusion of such agreements – and in the case of Brexit, any Withdrawal Agreement or any subsequent agreement on the EU-UK relationship – is within the jurisdiction of the CJEU to check whether the EU has acted within its competence. The CJEU has the power to declare any agreement unlawful, and to prevent or annul any decision of the Council to ratify it, should it be found to violate the basic constitutional standards of the EU legal order, including compliance with fundamental rights.[64]

2.26. This is a significant responsibility on the EU institutions, which should be considered seriously during the negotiation of the Withdrawal Agreement and any subsequent agreement on the EU-UK relationship. There may, of course, be restrictions in respect of any challenge brought to the conclusion of such an agreement, including standing limitations on the ability of individuals

[62] Some forms of agreement, including trade agreements, involve commitments of a mixed competency. These must be agreed and ratified by the Union and by all individual Member States. This can be a lengthy process (see, for example, the recent EU-Ukraine Association Agreement, signed in 2014, but only recently ratified by the Netherlands). It is beyond the scope of this paper to consider the likely political and diplomatic barriers to the conclusion and ratification of a future agreement on the EU-UK relationship.
[63] Opinion 2/13, (18 December 2013), [180].
[64] See C-402/05 *Kadi and Al Barakaat International Foundation v Council and Commission* (2008) on the relationship between international law and the requirements of the then Community constitutional framework: "*the Community is based on the rule of law, inasmuch as neither its member states nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of act of the institutions*" (at [281]).

to bring a challenge.[65] However, agreements with the EU require caution to ensure that individual and fundamental rights, such as are as guaranteed by the EU legal framework, are respected. It is reasonable to assume that the politically fraught circumstances of the Brexit process and the unprecedented nature of the withdrawal make such a challenge all the more likely.[66]

(2) The effects of EU law

2.27. EU law binds both the EU and Member States in their conduct, including in so far as that might impact on the interests of third state actors. The CJEU remains the ultimate arbiter of the interpretation of that law. The human rights standards in EU law are likely to impact indirectly on the UK's interests in its relationship with the EU, however it is configured. For the avoidance of doubt, the draft Legal Text specifies that Union Law inclues both the Treaties and the Charter, together with the general principles.[67] We provide here a small number of key examples, which are illustrative of the wider ramifications: concerning data protection and data sharing and policing, crime and security cooperation.

2.28. **Data protection and data sharing:** EU law on data protection – as now reflected in the General Data Protection Regulation (**"GDPR"**) – prevents the transfer of data outside of the Union except under strict conditions.[68] Any data-sharing with the EU and the UK, once it becomes a third state, will require an assessment by the European Commission that the UK's laws on data protection are adequate, or equivalent to the measures in the EU regime. The CJEU has recently rejected agreements between the EU and the US and Canada where data protection standards did not satisfy the requirements of EU law, including Articles 7 and 8 of the Charter.[69] The continued

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[65] See, for example, C-104/16, *Council v. Front Polisario*, (21 December 2016), http://curia.europa.eu/juris/document/document.jsf?text=&docid=186489&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=397652. In this case, the General Court found that a liberation movement could successfully challenge the conclusion of an EU trading agreement in respect of a disputed area of the Sahara. The CJEU – in an appeal involving the intervention of several Member States – subsequently overturned the decision of the General Court for reasons of standing.

[66] See, for example, Ronan McCrea, "Can a Brexit Deal Provide a Clean Break with the Court of Justice and EU Fundamental Rights Norms?" (13 October 2016), https://ukconstitutionallaw.org/2016/10/03/ronan-mccrea-can-a-brexit-deal-provide-a-clean-break-with-the-court-of-justice-and-eu-fundamental-rights-norms/.

[67] Draft Legal Text, Article 2(a).

[68] Article 45, GDPR. Except in circumstances where data transfers comply with alternate additional safeguards imposed by Article 46 GDPR.

[69] C-362/14 *Schrems v Data Protection Commissioner* (EU-US Privacy Shield) (6 October 2015); Opinion 1/15 (EU-Canada PNR Agreement) (26 July 2017). For a fuller exploration of the impact of these potential impact of an equivalence assessment, see Gabe Maldoff & Omer Tene, "'Essential Equivalence' and European Adequacy after *Schrems*: The Canadian Example", *Wisconsin International Law Journal* (forthcoming) (10 January 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2896825; Lorna Woods, "Transferring personal data outside the EU: Clarification from the ECJ?" (26 July 2017), http://eulawanalysis.blogspot.co.uk/2017/08/transferring-personal-data-outside-eu.html.

application of these standards – or an equivalent – is likely to be a core consideration during negotiations. We consider the UK's planned approach to data protection in a short case study in Part 3 of this Report.

2.29. **Policing, criminal justice and security cooperation:** In February 2018, it was reported that the Prime Minister was ready to make a "*big offer*" to the EU, designed to "*grease the wheels*" on trade, as the UK would seek continue participating in policing, criminal justice and security cooperation, including through the operation of Europol and the European Arrest Warrant (**"EAW"**).[70] The Government set "*cooperating in the fight against crime and terrorism*" as one of its 12 guiding principles for the negotiations.[71] The value of continued criminal justice cooperation for both the UK and the EU is clear, but the extent to which a 'pick and choose' approach will be open to the UK as a third state remains to be seen.[72] Participation in cooperation on policing, criminal justice and security is on the basis of mutual recognition and the alignment of certain minimum standards across the Union. Alignment of criminal justice and due process standards between the UK and the EU at the time of withdrawal may be easily established. Any future move to derogate from those standards in the ECHR – and as reflected in the Charter – would create significant barriers to cooperation on policing, criminal justice and security.

2.30. This raises a number of issues, including:

a. Firstly, the new Police and Criminal Justice Data Protection Directive will operate like the GDPR (above) to require the UK to show adequacy to a standard which satisfies the European Commission, or that alternate appropriate safeguarding measures are in place, or that a number of tightly defined specific circumstances exist; before criminal justice data can be shared.[73] While privacy standards might appear easy to establish from the outset, the disparity in approach to data retention is likely to create significant tension (see Part 3, *Data Protection*).[74]

[70] *The Sunday Times*, "PM pledges to keep EU security links" (11 February 2018).
[71] HM Government, *The United Kingdom's exit from, and new partnership with, the European Union*, Cm 9417 (February 2017).
[72] See Rosemary Davidson, "Brexit and Criminal Justice: the future of the UK's cooperation relationship with the EU", [2017] Crim L.R. 379, 379-80.
[73] Policing and Criminal Justice Data Directive, Articles 26-28.
[74] See Rosemary Davidson, "Brexit and Criminal Justice: the future of the UK's cooperation relationship with the EU", [2017] Crim L.R. 379, 384.

b. Secondly, the Government has indicated that security cooperation arrangements might be governed by bespoke adjudication arrangements outside the jurisdiction of the CJEU.[75] In an area likely to straddle both national security and the liberty of the individual, it is far from clear that the EU would be willing to abandon the oversight of the CJEU. Indeed, the UK Parliament's House of Lords European Union Committee has expressed scepticism on this issue, noting that where the Government's aims in respect of control were in conflict with its aims on security cooperation, "*the safety of the people of the UK should be the overriding consideration in attempting to resolve that tension*."[76]

c. There is no precedent for third-state cooperation on the scale envisaged by the UK Government. No non-Schengen state has, for example, been granted access to the Second Generation Schengen Information System (**"SIS II"**), a database of real time alerts on individuals and objects of interest. The SIS II system is one of three top priorities set by the National Crime Agency for the negotiations and has been described as an "*absolute game-changer for the UK*".[77] Yet, without certainty on the privacy and data protection standards applied within the UK, and the constitutional protection for human rights sitting behind them, progress, particularly beyond the oversight of the CJEU, appears unlikely.

d. It is reported that the UK hopes to continue to participate in the European Arrest Warrant system.[78] The Supreme Court of Ireland recently referred a question on extradition and the EAW to the CJEU. Considering an appeal against enforcement of return to the UK, the appellant had raised uncertainty in respect of his treatment following Brexit: if the UK were to withdraw from the EU, could the Irish Supreme Court be certain that the rights protected by the EAW would be met?[79] The operation of the EAW sits on mutual recognition of due process in the criminal justice systems of the Union and guarantees for the rights of the suspects facing extradition and trial.[80] Any agreement on extradition or participation in the EAW must grapple with the standard of protection in the UK for suspects' rights and to

[75] C-203/15 and C-698/15, *Tele2 Sverige AB v Post-och telestyrelsen* and *Secretary of State for the Home Department v Watson and Others* (21 December 2016).
[76] House of Lords European Union Committee, Seventh Report of 2016-17, *Brexit: Future UK-EU Security and Police Cooperation*, HL 77, (16 December 2016), [39], https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/77/77.pdf.
[77] House of Lords European Union Committee, Seventh Report of 2016-17, *Brexit: Future UK-EU Security and Police Cooperation*, HL 77, (16 December 2016), [89], Q11, https://publications.parliament.uk/pa/ld201617/ldselect/ldeucom/77/77.pdf.
[78] The Sunday Times, "PM pledges to keep EU security links" (11 February 2018).
[79] See *Minister for Justice v O'Connor* [2018] IESC 3 (1 February 2018), [5.17]-[5.25], http://www.supremecourt.ie/Judgments.nsf/1b0757edc371032e802572ea0061450e/e1e1f8b6b0a3d6cc8025822700406ee8?OpenDocument.
[80] Council Framework Decision 2002/584/JHA, (13 June 2002) OJ L 190.

what extent those guarantees are equivalent to those offered by EU law, including in the Charter.

2.31. Beyond these issues lies a panoply of matters where future cooperation may hinge on respect for fundamental rights consistent with the requirements of EU law. Those commitments must be considered in recognition of both the constitutional and legal standards which bind the EU and the current constitutional uncertainty in the UK's settlement at home.

(3) Treaties, third-country relationships and conditionality

2.32. While the terms of the future EU-UK relationship remain to be determined, the commitment to fundamental rights in the EU will inform both the process of negotiation and the implementation of any future agreement in a number of ways.[81]

2.33. **Regulatory Alignment:** The process of settling any free trade agreement or association agreement, or other settlement, will necessarily involve careful negotiations over the degree to which regulatory alignment of standards in the UK with those within the EU is required.[82] This will involve both political choices for the UK and the EU and technical questions across a range of fields, including food safety and medicines, environmental protection, energy, transport, telecommunications, data protection and consumer standards. Many of those discussions will be informed by the commitment by the EU to the protection of fundamental rights. The European Council Guidelines on the principles for the future relationship between the EU and the UK make clear that any future relationship should involve a balance of rights and obligations and should respect the regulatory and supervisory regime of the EU, including the role of the CJEU.[83] Many association agreements in Europe are based on substantial or partial alignment of regulatory and other standards (see, for example, the EU-Ukraine Association Agreement and the Norway model - both considered below). The European Commission has indicated that, in light of a range of red lines identified by the UK, there are limited existing models open for the future EU-UK relationship; these are found in third country free trade agreements, including those settled by Japan and Canada, or in no deal.[84] Even in broad fair trade agreements, such as the Comprehensive Economic and Trade Agreement (**"CETA"**) between Canada and the EU, certain

[81] The picture is shifting, but the UK Government has stated that it does not want Britain to be bound by full membership of the current EU Customs Union, as this prevents it from negotiating its own trade deals, but that it does want tariff free trade with Europe.
[82] TF50 (2018) 32, Internal EU27 preparatory discussions on the framework for the future relationship: "Regulatory Issues", p6-9, https://ec.europa.eu/commission/sites/beta-political/files/slides_regulatory_issues.pdf.
[83] Ibid, p4.
[84] Ibid, p5.

minimum standards are likely to be required by the EU before access to the single market, or any other such preferential trade arrangement, is agreed. The degree to which alignment will be required will depend on the extent of cooperation and beneficial treatment sought by the UK.

2.34. A disparity in the degree of protection offered to fundamental human rights might operate as a substantive barrier to free trade just as it may restrict the ability of the Union to act. For example, the Charter protection offered to the environment will inform negotiation on the commitment of the UK to environmental standards, just as Articles 7 and 8 of the Charter and the GDPR will inform discussion on any form of cooperation or trade which will require the cross-border exchange of data.

2.35. These discussions will take place in the understanding that the UK has previously committed to avoid regulatory divergence in Northern Ireland. If no agreement is reached, the Joint Report provides for full alignment as default, in order to ensure a "*frictionless land border*" between the North and South consistent with the GFA.[85] Following the Government's reaction to the publication of the draft Legal Text, it is clear that this issue remains live, significant and contentious. We return to this issue in Part 4 of this Report, below.

2.36. **"Human Rights Clauses" and Conditionality:** A number of the EU's third party trade, cooperation and association agreements have historically incorporated an element of human-rights-based conditionality. These 'human rights clauses' require the parties to meet standards specified in an 'essential elements' provision, violation of which will create cause for sanctions or the termination of the agreement. From trade agreements to arrangements for wider bilateral cooperation, since the 1990s, it has been regular EU practice to include a human rights or a sustainability clause in the treaty or allied agreements. These provide that respect for human rights, democracy and the rule of law constitute the basis for the agreement or that shared standards must be respected by all parties.

2.37. These commitments can represent an 'essential element' on which the reciprocal obligations of the parties are premised. Violations of scale will amount to a material breach with the ultimate consequence that an agreement may fail. Enforcement mechanisms for these agreements are specific to the individual arrangement agreed, generally distinct from the jurisdiction of the CJEU, and sanctions are reserved only for the most extreme and flagrant violations of human rights. While the potential for the EU to secure and enforce conditions in any agreement may

[85] Joint Report, [49]. See, for example, Brookings Institute, Douglas A. Rediker, "Brexit Options Explained" (5 December 2017), https://www.brookings.edu/blog/order-from-chaos/2018/01/05/the-brexit-options-explained/.

depend on economic leverage, the practice of linking benefit (including access to the single market or tariff-free trade) to a commitment on human rights is embedded in the historical negotiating practices of the EU.[86]

2.38. This approach is likely to be most effective in respect of countries where the EU has substantial economic leverage.[87] There is no precedent for such any such agreement extending to standards matching the Charter. Yet, there is no precedent for the negotiation of an agreement with a former Member State; let alone one which incorporates conditionality. The UK's long history of declared commitment to the rule of law and to the adoption and implementation of international human rights standards might be seen by some to render such an essential elements clause an unnecessary addition. However, in light of the UK Government's recent political and diplomatic retrenchment from the ECHR and the insecure position of the domestic human rights settlement, for many, including EU citizens resident in the UK, citizens of Northern Ireland and the EU27, it might provide an essential, bottom line, or 'belt and braces' provision with which compliance might be considered simple to achieve but important to secure.

2.39. The UK – in contrast to many other Member States of the EU – has no entrenched constitutional Bill of Rights. Government Ministers are actively seeking to distance UK standards from those in the Charter and a national commitment to the ECHR remains subject to question. EU negotiators and MEPs may wish to consider whether the terms of any future agreement should include a baseline commitment to human rights which seeks to preserve the shared values currently applied within the UK, across the EU and the wider Council of Europe.

F. Examples of Third-Country Agreements

2.40. We consider the treatment of human rights and sustainability in some existing EU treaties, below.

[86] In 2009, the EU Council revisited its previous policy of pursuing human rights conditionality as default in all of its trade and association agreements. Since then such clauses have been called political clauses and have been included in cooperation agreements, securing human rights commitments in pure sectoral or trade agreements by reference to conditionality in other agreements on cooperation or linking to commitments in standards agreed in secondary agreements. See EU Council, *Reflection Paper on Political Clauses in Agreements with Third Countries*, Doc 7008/09 (27 February 2009), discussed in DG External Policies, European Parliament, The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements, (13 February 2014).

[87] Modern treaties which involve increasing cooperation and association are more likely to incorporate conditionality (for example, the 1995 customs agreement between Turkey and the EU contains no essential elements clause).

a. **The European Economic Area (Norway, Iceland and Liechtenstein):** The Agreement on the European Economic Area (**"EEA"**), which entered into force on 1 January 1994, brings together the EU Member States and the three EEA European Free Trade States "**EFTA**" States – Iceland, Liechtenstein and Norway – in a single internal market (without a customs union). The EEA Agreement guarantees equal rights and obligations within the internal market for individuals and businesses in the EEA. The four freedoms apply in each of the Member States, including in the participating EFTA States. The degree of regulatory alignment is significant. The Charter does not bind the EFTA States. Monitoring in the EEA is governed by a Surveillance Authority (which role broadly equates to that of the European Commission) and the EFTA Court. The EFTA Court is required to follow all CJEU decisions handed down prior to the date of the EEA Agreement (2 May 1992). It is required also to pay "due account" to all subsequent relevant CJEU jurisprudence.[88] The preamble to the Agreement emphasises its contribution to a Europe based on peace, democracy and human rights. Although there is no direct reference to the ECHR in the EEA agreement, the EFTA court has long held that the agreement must be "*interpreted in the light of fundamental rights*".[89] The ECHR and the jurisprudence of the ECtHR are considered important sources which determine the content of rights in EEA law.[90] Those norms reflect a "*common standard and a common denominator for the protection of fundamental rights on a European level*". Fundamental rights are considered general and unwritten principles of EEA law.[91] The EFTA Court has referred to decisions of the CJEU on fundamental rights which derive from the Charter, but its status in EEA law is unsettled.[92] The principle of homogeneity on which the constitution of the EEA rests, and the requirement in the EEA to have due regard for the CJEU, suggest that significant divergence is unlikely.[93] The UK Government's current red lines are inconsistent with entry into the EEA, or the adoption of any similar model for its relationship with the EU.

b. **Turkey:** The original 1963 EU-Turkey Agreement (**"the Ankara Agreement"**) does not include any specific clause on human rights or other essential elements; nor does the final

[88] Agreement between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice OJ L 344, 31.1.1994, Articles 3(1) – 3(2).
[89] Case E-2/03, *Asgeirsson*, [2003] EFTA Ct. Rep 18, [23].
[90] Ibid, [28], Case E-20/13 *Fred Olson*, [2014] EFTA Ct Rep 400, [224].
[91] Case E-2/03, *Asgeirsson*, [2003] EFTA Ct. Rep 18, [185].
[92] See, for example, C E-10/14, *Enes Devici* [2014] EFTA Ct Rep 1364, [63]. Norway has resisted the formal recognition of the Charter as part of EEA law.
[93] Robert Spano, *The EFTA Court and Fundamental Rights*, (2017) ECL Review, 475, at 482. Judge Spano is a judge of the ECtHR and was writing extra-judicially on this topic. He has previously served as an ad hoc judge on the EFTA Court for Iceland.

decision concluding the terms of the Customs Agreement between Turkey and the EU.[94] The relationship between the EU and Turkey is a complex one. Turkey has been unsuccessfully seeking closer cooperation; since 2005, as a formal candidate for accession with the associated commitments to work towards alignment with EU law, including on human rights standards. This process has stalled, often linked to concerns for the rule of law and the protection of human rights expressed in the progress reports of the European Commission. In July 2017, in anticipation of worrying changes to the Constitution to expand the powers of President Erdogan, the European Parliament called for the suspension of Turkish accession negotiations.[95] The UK Government's current position is to rule out any customs union with the EU.[96]

c. **Ukraine, Georgia and Moldova:** Each of the association agreements concluded with Ukraine (in 2014) and with Georgia and Moldova (in 2013) contain an essential elements clause which commits the parties to compliance with the ECHR and other regional standards. Article 2 of the EU-Ukrainian Association Agreement provides:

> *"Respect for democratic principles, human rights and fundamental freedoms, as defined in particular in the Helsinki Final Act of 1975 of the Conference on Security and Cooperation in Europe and the Charter of Paris for a New Europe of 1990, and other relevant human rights instruments, among them the UN Universal Declaration of Human Rights and the [ECHR], and respect for the principle of the rule of law shall form the basis of the domestic and external policies of the Parties and constitute essential elements of this Agreement.*"[97] (The 2013 Georgia and Moldova Association Agreement is in similar terms).

Enforcement is by form of binding international arbitration. This model has been cited by the UK Government as a potential model for future determination of disputes between the EU and the UK.[98] Yet, this agreement also recognises the supremacy of the CJEU, at least

[94] Agreement establishing an Association between the European Economic Community and Turkey (1963); Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union (96/1492/EC).

[95] European Parliament, "Turkey: MEPs raise the alarm on EU accession talks" (6 July 2017), http://www.europarl.europa.eu/news/en/press-room/20170629IPR78637/turkey-meps-raise-the-alarm-on-eu-accession-talks. It was reported at or around the same time, that Turkey continued to lobby the Commission to open further Chapters, including in respect of justice and human rights, to allow for further negotiation and progress towards accession. See Voa News, Dorian Jones, "Turkish-EU Talks Rekindle Membership, Human Rights Hopes" (12 June 2017).

[96] The Guardian, "No 10 rules out customs union with EU amid confusion over government policy", (5 February 2018), https://www.theguardian.com/politics/2018/feb/04/cabinet-united-brexit-trade-strategy-amber-rudd-theresa-may-customs-union.

[97] OJ L 161/3, Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, (29 May 2014).

[98] Department for Exiting the European Union, *Enforcement and dispute resolution – a future partnership paper* (23 August 2017), [20].

in the interpretation of EU law. Article 322(2) of the EU-Ukraine Association Agreement provides that: "*where a dispute raises a question of interpretation of a provision of EU law … the arbitration panel shall not decide the question but request the Court of Justice of the European Union to give a ruling on the question*" (such determination to be binding on the panel). Agreement on any alternative approach would require the EU to adapt its long held position on the supremacy of EU law in external Treaties.[99] While the agreements with Ukraine, Georgia and Moldova are concluded in very different political circumstances, where each State is actively seeking a closer relationship with the Union, these treaties provide a helpful illustration of how the EU has approached recent agreements with European partners already committed to the ECHR and other regional agreements.

d. **Canada:** The CETA is one of a new generation of EU free trade agreements with third states beyond Europe. It does not contain an overarching essential elements clause but it does contain conditionality in its trade and sustainable development chapters. In chapters 22-24, the parties commit to the respect for labour and environmental standards, understandably not by reference to EU or Council of Europe standards, but in shared international commitments, including to the ILO Conventions. Disputes under these chapters can be referred to a Panel of Experts for examination by a monitoring Committee on Trade and Development, who can make recommendations for resolution. Similar mechanisms can be found in other agreements reached with third-party states and regional groups beyond Europe, including in the 2010 EU-Korea FTA, the 2012 EU-Central America Agreement and the 2013 EU-Singapore FTA.[100]

2.41. It is impossible to assess which of these models is most likely to suit the UK's aspirations for the future EU-UK relationship or if any element of them might inform a tailored or bespoke model for the EU-UK relationship. There is precedent in the conclusion of free trade agreements and association agreements by the EU for the establishment of conditionality and commitments based upon shared human rights obligations. Within Europe, there is precedent for those commitments to include a statement of loyalty to the minimum standards in the ECHR. The viability of any of these models – and the likelihood they would be accepted during negotiation – will depend on the extent of cooperation sought by the parties. The Joint Report indicated that, at least in Northern Ireland (see below), if a tailored agreement is not possible, the default would be "*full*

[99] UK Trade Policy Observatory, Erika Szyszczak, "A UK Brexit Transition: To the Ukrainian Model?" (11 November 2017), http://blogs.sussex.ac.uk/uktpo/files/2017/11/Briefing-Paper-11.pdf.
[100] See, for further consideration, S. Velluti, "The Promotion and Integration of Human Rights in EU External Trade Relations", (2016) 32 (83) *Utrecht Journal of International and European Law* 41.

regulatory alignment". The UK Government response to the draft Legal Text prepared on the basis of that Report has provoked significant disagreement from politicians, particularly within the Conservative Party. However, despite vocal and trenchant political statements made, including at Cabinet level, the level of cooperation the UK Government seeks appears to go beyond a bare preferential trade agreement, with active cooperation on matters of policing, crime and national security a priority.

2.42. While 'no deal' might yet be a realistic prospect for the EU-UK future relationship, MEPs may wish to consider how any EU commitment to fundamental rights might impact upon its relationship with the UK in such a scenario. The answer is not a simple one, and it depends largely on the distance in the EU-UK relationship. However, for the reasons explained above, in any circumstances where the UK wishes to work with the EU and its Member States, the fundamental rights standards which bind them and the CJEU's interpretation of that law will be difficult to avoid.

3. INDIVIDUAL RIGHTS, EU LAW AND THE UK

A. The constitutional context

3.1. A clear understanding of the constitutional context of Brexit is necessary to grasp the impact of withdrawal from the EU on the protection of individual and fundamental rights in the UK. This Part of our Report considers both the operation of the ECHR through the provisions of the HRA and the impact of EU law on fundamental rights in the UK. Finally, it considers the function of both the ECHR and EU law in the protection of individual rights in the context of devolution and given the particular position of Northern Ireland.

(1) The ECHR and the HRA

3.2. The ECHR and HRA, while not the central focus of this report, form an important part of its context. The differences between the Charter and the ECHR are particularly significant for the purposes of informing the likely divergence between minimum standards in the EU and the UK following Brexit. This section gives a brief summary of the operation and application of the ECHR and HRA, to that end.[101]

3.3. The UK ratified the ECHR in 1951, but did not incorporate the Convention into domestic law until the passage of the HRA in 1998 (see below). In 1966, it accepted the right of individual petition, meaning that individuals in Britain and Northern Ireland had the possibility of obtaining redress in Strasbourg where there was a violation of Convention rights and no adequate remedy was provided by domestic courts. (Ireland was one of the original countries to sign up to the Convention in 1950, but the Convention was not brought into domestic law until 2003, following the terms of the GFA (further discussed below)).

3.4. The judgments of the ECtHR bind states under international law pursuant to Article 46(1) of the ECHR, which requires states "*to abide by the final judgment of the Court in any case to which they are parties*". The Committee of Ministers – a political body made up of representatives from

[101] For fuller analysis regarding the ECHR, HRA and Brexit, see the report commissioned by the GUE / NGL Group on these issues in 2016: KRW Law and Doughty Street Chambers, *Report on the Potential Effects of Repeal of the Human Rights Act 1998 by the British Government: An Independent Study commissioned by The European United Left/ Nordic Green Left (GUE / NGL) Group of the European Parliament* (15 February 2016), available at https://www.doughtystreet.co.uk/documents/uploaded-documents/HRA_NI_FINAL_15_02_16.pdf, especially Ch 3.

the Governments of each of the ECHR Contracting Parties – oversees whether individual states respect the ECHR and the decisions of the ECtHR.

3.5. The ECHR does not have direct effect in UK law. Instead, the HRA incorporates into domestic law most of the human rights protected by the ECHR, except Article 1 and Article 13 (which govern the scope and application of the Convention and the right to an effective remedy).

3.6. Section 2 of the HRA requires domestic judges to "*take into account*" the decisions of the ECtHR. Section 3 of the HRA requires domestic courts to read all other legislation "*[s]o far as it is possible*" in a way that protects those rights. Section 4 provides that where such an interpretation is not possible, courts can make a "*declaration of incompatibility*". If Westminster legislation is incompatible, it remains in force. A declaration of incompatibility does not result in the invalidity of the measure.

3.7. Section 6 of the HRA binds all public authorities, including the courts, to act compatibly with ECHR rights in exercising their functions. Public authorities must put procedures in place in order to ensure that they do not breach their duty under s 6. In practice, these provisions and the others in the HRA mean that the judiciary and courts have their own primary statutory duty to give effect to the ECHR and are tasked with reading legislation passed before 1998 in a manner which is compliant with case law from the ECtHR on ECHR rights. In this way, the HRA plays a fundamental role in fostering accountability and a human rights culture in public authorities. By contrast, the Charter applies only whenever public bodies make decisions within the realm of EU law.

3.8. Some specific provisions of domestic legislation are designed expressly to better protect individual rights in domestic law, and to be compatible with both the ECHR and with the Charter. For example, the Equality Act 2010 protects persons sharing certain protected characteristics from discrimination and the Children Act 2004 makes express provision for the protection of the best interests of the child. Like the HRA, these measures are not entrenched and can be repealed at any time by Parliament, consistent with the principle of parliamentary sovereignty which lies at the heart of the constitutional settlement of the UK.

3.9. General principles of fundamental rights are also protected by the common law, including, for example, free expression and equality.[102] These fundamental rights are recognised in and defined

[102] See, for example, *R (Simms) v Secretary of State for the Home Department* [2000] AC 115.

by the case law of the domestic courts. Domestic courts require Parliamentary language to be "*crystal clear*" if it interferes with such fundamental rights.[103] The common law can only develop in a way which is consistent with these rights. However, unlike in EU law, there is nothing in the HRA or the common law which can displace another clearly and expressly incompatible piece of primary legislation.

(2) Devolution

3.10. The enactment of the HRA must be understood in the context of wider reform, including devolution, and the move to guarantee human rights, while upholding the tradition of parliamentary sovereignty peculiar to the British constitutional order.[104] The HRA was enacted in the context of negotiation and debate over greater devolution of powers to Scotland, Wales and Northern Ireland. Both the ECHR and EU law bind the devolved legislatures.[105] The devolution settlement assumes that the devolved Governments will each respect the HRA and act within the bounds of EU law. The HRA was passed at Westminster in the same month as the Northern Ireland Act 1998, which implemented significant parts of the Good Friday Agreement. Section 21 of the HRA sets out that legislation from the Northern Ireland Parliament or Assembly or from the Scottish Parliament is to be considered as subordinate legislation for the purposes of the Act. The UK Supreme Court remains the final Court to hear matters from Northern Ireland and Scotland on human rights violations.

3.11. The complexities of the devolution settlements are compounded by concerns about the UK Government's previously stated plans to scrap the HRA, a key part of the supporting framework of the GFA.[106] The GFA requires the UK to "*complete incorporation into Northern Ireland law of the European Convention on Human Rights (ECHR), with direct access to the courts, and remedies for breach of the Convention, including power for the courts to overrule Assembly legislation on grounds of inconsistency*".[107] The repeal of the HRA and its replacement with a

[103] *R (Evans) v Attorney General* [2015] 1 AC 1787. .
[104] Jeffrey Goldsworthy, *The Sovereignty of Parliament* (1999).
[105] Section 29(2)(d) of the Act provides that Parliament cannot act incompatibly with the Convention. Section 57(2) of the Act provides that the Executive is bound not to act incompatibly with EU law and the Convention. Like the Scottish Parliament, EU law and the Convention bind the Assembly under ss 106 and 107 of the Government of Wales Act 1998. Under s 6(1) and (2)(b) of the Northern Ireland Act 1998 Assembly acts are subordinate legislation for the purposes of the HRA and so can be invalidated by any court or tribunal if found to be incompatible with Convention rights.
[106] Confirmed at HC Deb, 6 September 2016, col 614.
[107] GFA, 'Rights, Safeguards and Equality of Opportunity', [2].

lesser or different form of rights protection in a British Bill of Rights would be likely to breach that provision of the GFA.[108]

3.12. However, the UK Government in its Repeal White Paper and the Conservative Party Manifesto 2017 (highlighted above) has confirmed that the UK will remain a party to the ECHR only for the lifetime of this Parliament. Lady Hale has recently pointed out that this wording, *"seems to be keeping open the option of withdrawal*".[109] Human rights in the UK continue to be under threat beyond Brexit.

(3) EU law and fundamental rights in the UK

(i) Direct effect and supremacy of EU law

3.13. As a Member State of the EU, the UK is bound in international law to respect the Treaties which underpin the EU.[110] By virtue of the EU Treaties, and the general principles of EU law, in any area where the EU has 'competence' (including but not limited to the protection of fundamental rights), EU law may be invoked directly in national courts and must have primacy over national law.

3.14. The Charter has effect in the UK by virtue of the European Communities Act 1972 (**"ECA"**). The ECA binds UK courts to apply the general principles of EU law and the Charter in the UK and provides for EU legislation and the case law of the CJEU to have 'direct effect' in the domestic law of the UK. Section 2(1) of the ECA provides that:

> *"All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly".*

3.15. This means that when an EU regulation enters into force, it automatically becomes part of the law of the UK without the need for further incorporation. This is in contrast with the usual steps required for the incorporation of international law into domestic law in a dualist country, which

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[108] See KRW Law and Doughty Street Chambers, *Report on the Potential Effects of Repeal of the Human Rights Act 1998 by the British Government: An Independent Study commissioned by The European United Left/ Nordic Green Left (GUE / NGL) Group of the European Parliament* (15 February 2016), available at https://www.doughtystreet.co.uk/documents/uploaded-documents/HRA_NI_FINAL_15_02_16.pdf.

[109] "The United Kingdom Constitution on the move", Canadian Institute for Advanced Legal Studies' Cambridge Lectures (2017).

[110] Vienna Convention on the Law of Treaties (1969), Arts 14 and 26.

apply to the ECHR. Section 2(2) of the ECA gave Ministers the power to implement other EU legislation through secondary legislation.

(ii) Application and operation of the Charter

3.16. Like any other Member State, the Charter binds the UK when "*it acts within the scope of EU law*".[111] This includes any circumstances where UK domestic law gives effect to, or derogates from, a requirement of EU law. Individuals cannot rely on the Charter except where the UK is acting within the scope of EU law. In this respect, its scope of application is significantly narrower than the ECHR rights protected by the HRA.[112]

3.17. Individuals can directly rely upon positive rights created by EU law against the state, but not against other individuals. However, the ECA requires courts to interpret national law in a way that respects any applicable EU law which binds the UK.[113] This indirect effect means that individuals frequently rely on EU law in cases between private individuals in UK courts.

3.18. An example of the Charter in action is the case of *NS v Secretary of State for the Home Department*. [114] In this case the court considered a proposal to deport an Afghan asylum seeker to Greece from the UK. The UK Government considered that under EU Law, Greece was the Member State responsible for considering his claim for asylum. In this case, the domestic court cited Article 4 of the Charter – which prohibits torture and inhuman or degrading treatment – as reason not to send an individual to face systemic failures in asylum decision making which could mean they would face a real risk of inhuman or degrading treatment.

(iii) The Charter, the ECHR and the HRA

3.19. In many cases, the protections offered by the Charter, the common law and the HRA are argued together or as alternative means of achieving the same result. Challenges where the Charter has had the greatest impact have been in cases involving tax, immigration and privacy, each areas where the protection offered by the Charter varies, in different ways, from that under the ECHR.

[111] See Art 51(1), Charter, which provides that its provisions are addressed to Member States only when they are "*implementing EU law*".
[112] *Siragusa v Regione Sicilia* C-206/13 [2014].
[113] See *Miller* (fn 1), [40]; *Marleasing SA v La Comercial Internacional de Alimentacion SA* (1990) Case C-106/89.
[114] Joined Cases C-411/10 and C-493/10.

3.20. When the Charter applies, it often provides deeper and more effective protection than the HRA. In cases involving inconsistent primary legislation from Westminster, in some cases, the only remedy which the HRA can offer is a 'declaration of incompatibility'. It is for Parliament to act on a declaration of incompatibility to remove any offending violation in the law. The offending law will continue to violate individual rights until there is political and legislative action by the legislature to change it. By contrast, currently, where a domestic law violates the Charter, it will be 'disapplied' and will no longer have effect, furnishing any claimant with an immediate remedy.

(iv) The effect of Protocol 30 to the Charter

3.21. There has been much debate about a UK 'opt-out' from the effects of the Charter.[115] Protocol 30 to the Charter[116] is legally binding and applies to the obligations of the UK and Poland under the Charter. It emphasises that the Charter is not to be interpreted as imposing new obligations on the UK. It expressly provides that the rights protected by Chapter IV of the Charter (Solidarity) create no enforceable rights applicable to the UK except in so far as such rights are protected in UK law.[117]

3.22. Protocol 30 does not, as some have argued, deprive the Charter of any legal effect. The UK Government, Parliament and the Courts in Luxembourg and the UK have all confirmed that the Protocol does not operate as an opt-out (and it was never intended to).[118] In the case of *NS v Secretary of State for the Home Department*, the CJEU stated that Protocol 30 "*explains Article 51 of the Charter with regard to the scope thereof and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions*."[119]

3.23. In the Summer 2014 Review of the Balance of Competences between the United Kingdom and the European Union Fundamental Rights, completed by the UK Government, it was said:

> "*It is helpful to clarify from the outset that the Protocol is not, and never has been, an opt out for the UK from the application of the Charter. The Charter applies to the UK;*

[115] This has included some politicians and judges expressing surprise at the operation of the Charter and its effects. See, for example, *R (AB) v Secretary of State for the Home Department* [2013] EWHC 3453, [10].
[116] OJ 2010 C 83, 313.
[117] See, for example, House of Commons European Scrutiny Committee, '*The Application of the EU Charter of Fundamental Rights',* [85]-[86] and [95].
[118] See *NS v Secretary of State for the Home Department* Joined Cases C-411/10 and C-493/10, [119]. See also Competences Review: Fundamental Rights, [3.5]-[3.9].
[119] *NS*, [120].

a fact acknowledged by respondents and commentators as well as by the House of Lords European Union Committee and the House of Commons European Scrutiny Committee."[120]

3.24. Protocol 30 does not change the binding nature of the Charter for the purposes of UK law.

B. Mechanics of the European Union (Withdrawal) Bill

(1) Background and purpose

3.25. The European Union (Withdrawal) Bill 2017-19 (**"Withdrawal Bill"**) was read the first time in the Commons on 13 July 2017, and passed its Third Reading on 17 January 2018, by 324 votes to 295. It has completed First and Second Readings in the House of Lords, and Committee Stage is scheduled to begin on 21 February 2018. The Bill is expected to become law before Autumn 2018.[121]

3.26. The Government has described the purpose of the Withdrawal Bill as threefold.[122] First, it is said that it will repeal the ECA and bring to an end the supremacy of EU law in the UK. Second, its purpose is to convert directly-applicable EU law (as it stands on exit day) into UK law, creating a new category of domestic law known as "*retained EU law*". Third, it is said that it will provide for retained EU law to be modified post Brexit by ministers making secondary legislation under statutory instruments (known as 'Henry VIII clauses'). The Bill will also grant Ministers broad powers to ensure the UK complies with its international obligations post-Brexit and to implement the Withdrawal Agreement and to make provision regarding EU competences which have previously been devolved.

(2) Key provisions of the Bill

3.27. **Repeal:** Clause 1 of the Bill achieves the first of the Government's stated aims by repealing the ECA.[123]

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[120] Review of the Balance of Competences between the United Kingdom and the European Union Fundamental Rights (Summer 2014), [3.6].

[121] See https://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html.

[122] The Repeal Bill: White Paper, *Legislating for the United Kingdom's Withdrawal from the European Union*, 30 March 2017 (ISBN 9781474140065, Cm 9446) (**"The Repeal Bill: White Paper"**), https://www.gov.uk/government/publications/the-repeal-bill-white-paper, [1.24].

[123] In addition to the repeal of the European Communities Act 1972, the Bill also proposes to repeal the following Acts: European Parliamentary Elections Act 2002; European Parliament (Representation) Act 2003; European Union (Amendment) Act 2008; European Union Act 2011; European Union (Approval of Treaty Amendment Decision) Act 2012; European Union (Approvals) Act 2013; European Union (Approvals) Act 2014; European

3.28. **Retention of EU law:** The conversion of EU law to domestic law is intended to maintain legal continuity upon exit, so that the same laws apply on the day after the UK leaves the EU as the day before.[124] The Government has stated that this will "*provide[] fairness to individuals, whose rights and obligations will not be subject to sudden change*" overnight.[125] Clauses 2-4 of the Bill give effect to EU-derived domestic legislation (cl 2), direct EU legislation (cl 3) and "*[a]ny rights, powers, liabilities, obligations, restrictions, remedies and procedures which … are recognised and available in domestic law by virtue of section 2(1)*" of the ECA (cl 4(1)(a)). (It is accepted that this last wrap up clause will generally capture Treaty provisions and other measures which the CJEU has recognised to have direct effect.) Once EU laws have been 'retained' in domestic law, Parliament will be free to repeal, amend or replace those laws.[126]

3.29. **Supremacy of EU law:** Clause 5(1) provides that the principle of the supremacy of EU law will not apply to any enactment or rule of law passed or made on or after exit day. However, the principle will continue to apply in respect of to the "*interpretation, disapplication or quashing*" of any enactment or rule of law passed or made *before* exit day (cl 5(2)). The House of Commons Library has explained that in effect, this means that the courts will have to decide, on a case by case basis, whether pre-exit legislation should be subject to supremacy.[127] The House of Lords Select Committee on the Constitution has expressed the initial view that "*clause 5 is insufficiently clear in setting out the aspects of retained EU law to which the supremacy principle will continue to apply and how it will continue to apply*", and that this "*risks creating confusion as to the effects of the already highly complex legal regime prescribed by the Bill*".[128]

3.30. Clause 5(3) addresses the status of any post-exit EU amendment to a retained EU law. The supremacy of EU law may also apply to "*a modification made on or after exit day of any enactment or rule of law passed or made before exit day if the application of the principle is consistent with the intention of the modification*". Again, courts will have to assess whether applying the principle of supremacy to a provision of retained EU law which has been amended is consistent with Parliament's intentions. This is not straightforward. The former President of the Supreme Court,

Union (Finance) Act 2015; European Union (Approvals) Act 2015; ss 82 and 88(5)(c) of the Serious Crime Act 2015.

[124] The Repeal Bill: White Paper, 5.

[125] Ibid, [1.24].

[126] Explanatory Notes, 8. For further explanation see e.g. John Stanton and Craig Prescott, *Public Law* (OUP, 2018), 182.

[127] House of Commons Library Briefing Paper, *The European Union (Withdrawal) Bill: Supremacy and the Court of Justice*, Number 08133 (8 November 2017), 6.

[128] House of Lords Select Committee on the Constitution, *European Union (Withdrawal) Bill: interim report* (3rd report of session 2017-19, HL Paper 19), [33]-[34].

Lord Neuberger, said in evidence to the House of Lords Select Committee on the Constitution that this exercise "*could lead to difficulties*" and "*arguments about what you are entitled to look at to see what the intention was*".[129]

3.31. **The Charter:** The Bill makes clear that the Charter will cease to be a part of UK law after Brexit. Clause 5(4) states that "*the (Charter of Fundamental Rights) is not part of domestic law on or after exit day*". The Explanatory Notes to the Bill seek to minimise the significance of this reform, claiming that *"the Charter did not create new rights but rather codified rights and principles which already existed in EU law. By converting the EU* acquis *into UK law, those underlying rights and principles will also be converted into UK law.*"[130] Clause 5(5) goes on to state that "*Subsection (4) does not affect the retention in domestic law on or after exit day … of any fundamental rights or principles which exist irrespective of the Charter*". Thus Clause 5 would end the direct effect of the Charter in the UK; but seeks to incorporate the general principles of EU law recognised by the CJEU before its withdrawal into domestic law. The ramifications of these provisions are further discussed below.

3.32. **The jurisdiction of the CJEU:** Clause 6 provides that UK courts and tribunals are no longer bound by CJEU decisions taken after exit day, and cannot refer any matter to the CJEU.[131] A court or tribunal need not have regard to anything done on or after exit day by the CJEU, but may do so if it considers it appropriate to do so.[132] Relevant decisions of the CJEU decided before exit day will be "*retained case law*". Any question "*as to the validity, meaning or effect of any retained EU law*" is to be decided "*in accordance with any retained case law and any retained general principles of EU law*" and having regard to the limits immediately before exit day of EU competences.[133] However, the Supreme Court and Scotland's High Court of Justiciary are not bound by any retained EU case law and may depart from it, in accordance with any retained case law and any retained general principles of EU law.[134]

3.33. Lord Neuberger and the current President of the Supreme Court, Lady Hale, have each expressed concern that the Bill is insufficiently clear about how retained EU law should be interpreted by domestic courts post exit. Lord Neuberger stated that the judiciary "*would hope and expect Parliament to spell out how the judges would approach that sort of issue after Brexit, and to spell*

[129] Select Committee on the Constitution, Uncorrected oral evidence: European Union (Withdrawal) Bill (1 November 2017).
[130] Explanatory Notes, 27.
[131] Clause 6(1).
[132] Clause 6(2).
[133] Clause 6(3).
[134] Clauses 6(4)-(5).

it out in a statute".[135] Lady Hale has said: "*We hope that the European Union Withdrawal Act will tell us what we should be doing*",[136] and later: "*We don't want to have to decide what weight we have to give to Luxembourg judgments — it is preferable for Parliament to tell us*."[137]

3.34. **The 'correcting' power:**[138] The Bill allows ministers to make secondary legislation to amend or remove laws, in some circumstances, without a vote in Parliament. Clause 7 makes provision for ministers to correct "*deficiencies*" in retained EU law (including references to EU institutions that the UK is no longer a member of, EU treaties that are no longer relevant, and redundancies). Under clause 7(7), the power is subject to few limitations, including that it cannot be used by ministers to "*amend, repeal or revoke the Human Rights Act 1998*". This power expires two years after exit day. Exit day may be defined as a different day for different purposes.

3.35. The Hansard Society is only one of a range of commentators to express concern about the scope and ambiguity of these powers:

> "*What is considered a 'deficiency', a 'redundant' provision or of 'no practical application' is therefore open to wide interpretation. In short, it may be whatever the minister wishes it to mean. And ministers in different departments may interpret the terms differently, potentially introducing inconsistency into the post-exit statute book for which there will be no immediate parliamentary remedy*."[139]

3.36. **Compliance with international law:** Clause 8 gives ministers of the Crown the power to make secondary legislation to enable continued compliance with the UK's international obligations by preventing or remedying any breaches that might otherwise arise as a result of withdrawal. This power expires two years after exit day.

3.37. **Implementing the withdrawal agreement:** Clause 9 confers on ministers the ability to "*make any provision that could be made by an Act of Parliament (including modifying this Act)*", "*if the Minister considers that such provision should be in force on or before exit day*". This power expires on the day the UK leaves the EU.

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[135] Clive Coleman, "UK judges need clarity after Brexit - Lord Neuberger", BBC (8 August 2017), http://www.bbc.co.uk/news/uk-40855526.

[136] Owen Bowcott, "UK's new supreme court chief calls for clarity on ECJ after Brexit", *The Guardian* (5 October 2017), https://www.theguardian.com/law/2017/oct/05/uks-new-supreme-court-chief-calls-for-clarity-on-ecj-after-brexit.

[137] Frances Gibb, "Baroness Hale: Women bring different experiences to judging", *The Times* (30 November 2017), https://www.thetimes.co.uk/article/baroness-hale-women-bring-different-experiences-to-judging-h2n8s5zkd.

[138] See House of Commons Library Briefing Paper, *The European Union (Withdrawal) Bill: clause 7 "the correcting power"*, Number 8171 (6 December 2017).

[139] The Hansard Society, "The European Union (Withdrawal) Bill – initial reflections on the Bill's delegated powers and delegated legislation" (18 July 2017), https://www.hansardsociety.org.uk/blog/the-european-union-withdrawal-bill-initial-reflections-on-the-bill-s.

3.38. The broad 'Henry VIII powers' in clauses 7, 8 and 9,[140] as well as in Schedule 1 to the Bill, have been the subject of particular criticism given the very broad powers they grant to ministers to amend or repeal any law, which could be used to avoid Parliamentary votes, even at a crucial stage in negotiations. Rachel Sylvester has pointed out the irony in the Bill's use of Henry VIII clauses ostensibly to reclaim the UK's sovereignty over its own laws: "*Far from giving control back to the people, this is a massive power-grab by the executive*." [141] Dominic Grieve MP, the Conservative backbencher (and former Attorney General) who has tabled several major amendments to the Bill, has stated in Parliament:

> "*The whole Bill is about an accretion of power to a Government who do not really know how they are going to have to use that power and are fearful that something will come up that will require them to act swiftly, and who therefore think that they have to maximise the tools at their disposal. … [I]t was this sort of thing that made me describe the Bill as a monstrosity on Second Reading. It is so contrary to the normal way in which one would expect to legislate for Parliament both to grant the powers that a Government need, including, where necessary, powers of secondary legislation, and at the same time to make sure that these cannot run out of control. On the plain face of the Bill, this is really one of the immense Henry VIII powers. The Government have decided to resolve this issue by taking a very big sledgehammer to the normal structures*."[142]

3.39. **Corresponding powers for devolved authorities:** Clause 10 confers on devolved authorities corresponding powers to those conferred by clauses 7 to 9, in Schedule 2. Devolved authorities can exercise the power to deal with deficiencies arising from withdrawal, the power to comply with international obligations and the power to implement the withdrawal agreement. Schedule 2 requires devolved authorities to act in consultation with UK Ministers; an earlier incarnation requiring consent of UK Ministers was amended at report stage.[143]

3.40. This may at first glance appear to broaden the powers of the devolved authorities. However, the powers are tightly restricted, and must be shared with UK Ministers. Post-Brexit, powers currently exercised by the EU in relation to common policy frameworks in the devolved administrations would return to the UK. Clause 11 amends the devolution statutes to introduce a new limitation: an Act of a devolved legislature "*cannot modify, or confer power by subordinate legislation to modify, retained EU law*". Schedule 13 prevents devolved administrations from making changes

[140] See cls 7(5), 8(2) and 9(2), all of which provide: "*Regulations under this section may make any provision that could be made by an Act of Parliament*".
[141] Rachel Sylvester, "EU repeal bill is a power-grab by ministers", *The Times* (5 September 2017).
[142] Dominic Grieve MP, HC Deb, 20 December 2017, col 1082.
[143] See House of Lords, Select Committee on the Constitution, 9th Report of Session 2017-19, *European Union (Withdrawal) Bill* (January 2018), [236]-[240].

that are "*inconsistent*" with those made by the UK government.[144] This limits the power of the devolved governments by making it impossible for them to choose to retain a piece of EU law that has been modified by the UK government. Concerns have been raised that the requirement of consultation only goes one way; there is no mirror requirement for consultation by UK Ministers with the devolved authorities prior to the exercise of powers in respect of otherwise devolved matters.[145] The First Ministers of Scotland and Wales, Nicola Sturgeon and Carwyn Jones, issued a joint statement calling the Bill a "*naked power grab*" and threatening to withhold Legislative Consent Motions unless the bill was redrafted.[146]

3.41. **General principles and remedies:** The Bill retains the general principles of EU law – as they have been recognised by the CJEU – before exit day.[147] However, the Bill also makes provision to restrict their relevance as the basis for a cause of action; essentially limiting their usefulness to interpretative purposes. Paragraph 3 of Schedule 1 provides that "*there is no right of action in domestic law post-exit based on failure to comply with EU general principles*". Courts cannot disapply domestic laws post-exit on the basis that they are incompatible with EU general principles. Further, domestic courts will not be able to rule that "*a particular act was unlawful or quash any action taken on the basis that it was not compatible with the general principles*". The Bill also removes the ability of individuals to seek damages arising for any failure to effectively implement retained EU law ('*Francovich* damages').[148]

3.42. This effectively removes the right to a remedy arising from general principles in EU law as it stands. The Government does not express any intention to ensure that Charter principles are incorporated within domestic law. Courts will, however, be required under to interpret retained EU law in accordance with retained general principles.[149] Some of the difficult issues arising from this approach are discussed below.

(3) Impact on fundamental rights

3.43. The Government has continually sought to downplay the erasure of the Charter from UK law under cl 5(4) of the Withdrawal Bill, arguing that this will not result in a loss of rights:

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[144] Sched 13(2).
[145] House of Lords, Select Committee on the Constitution, 9th Report of Session 2017-19, *European Union (Withdrawal) Bill* (January 2018), [237]-[238].
[146] Joint statement from First Ministers of Wales and Scotland in reaction to the EU (Withdrawal) Bill (13 July 2017), available at http://gov.wales/newsroom/firstminister/2017/170713-joint-statement-from-first-ministers-of-wales-and-scotland/?lang=en.
[147] See cl 5(5), above.
[148] Sched 1(4).
[149] Clause 6(3).

> "*The Government's intention is that, in itself, not incorporating the Charter into domestic law should not affect the substantive rights that individuals already benefit from in the UK, as the Charter was never the source of those rights.*"[150]

3.44. The Government's White Paper asserted that the loss of the Charter would not adversely affect the "*substantive rights that individuals already benefit from in the UK*", as "*many of these underlying rights exist elsewhere in the body of EU law which we will be converting into UK law*" and "*others already exist in UK law, or in international agreements to which the UK is a party*".[151]

3.45. The Government has repeatedly relied on the existing multi-layered protection of human rights in the UK to justify its position:

> "*The Charter of Fundamental Rights is only one element of the UK's human rights architecture. Many of the rights protected in the Charter are also found in other international instruments, notably the European Convention on Human Rights (ECHR), but also UN and other international treaties too.*"[152]

3.46. The Government has further stated:

> "*The Bill makes no changes to the UK's obligations under the ECHR, nor under the Human Rights Act 1998 that gives effect to the ECHR. This Government has been clear that it has no plans to withdraw from the ECHR. Individuals will still be able to bring a claim under the Human Rights Act 1998 as they can now.*"[153]

3.47. In December 2017, the Government published its 'Charter of Fundamental Rights of the EU: Right by Right Analysis',[154] which sets out how the Government intends that each fundamental right that is currently protected by EU law will be protected after exit from the EU. A full critique of this paper is outwith the scope of this report. However, in addition to the points made below, the overall superficiality of analysis in the paper in respect of most individual rights is profoundly

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[150] Department for Exiting the European Union, *The Withdrawal Bill – Factsheet 6: Charter of Fundamental rights*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/678333/Factsheet_6_-_Charter_of_fundamental_rights.pdf.

[151] The Repeal Bill: White Paper, [2.25].

[152] The Repeal Bill: White Paper, [2.22].

[153] Department for Exiting the European Union, *The Withdrawal Bill – Factsheet 6: Charter of Fundamental rights*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/678333/Factsheet_6_-_Charter_of_fundamental_rights.pdf.

[154] *Charter of Fundamental Rights of the EU Right by Right Analysis* (5 December 2017), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/664891/05122017_Charter_Analysis_FINAL_VERSION.pdf.

concerning.[155] Its heavy reliance on the HRA, ECHR and common law rights, many of which the Conservative leadership has previously promised to diminish or repeal, is also telling.

3.48. While it is accepted that many of the rights contained in the Charter (though not the principles recognised in the Charter) are protected within domestic UK law – in the common law; in specific statutes including the HRA; or as part of the corpus of domesticated EU law – there are several key concerns in relation to the protection of rights within the UK post-Brexit:

a. First, as to substantive protection of rights, the Charter contains a number of novel rights which have no counterpart in the ECHR or the HRA. In addition to the examples discussed elsewhere in this report, these include media plurality (Article 11 of the Charter), freedom of the arts and sciences (Article 13), freedom to choose an occupation and engage in work (Article 15), freedom to conduct a business (Article 16) and environmental protection, including the requirement that improvement of the environment be integrated into policies (Article 37). The Right by Right Analysis gives no assurance as to protection of these rights that cannot be overturned either by Parliament or by ministers acting without a Parliamentary vote, including by using the powers in the Withdrawal Bill.

b. Second, although many of the rights contained in the Charter will continue to be protected, UK law is not as comprehensive or detailed in scope and the protection will be piecemeal. For example, children's rights are protected in Article 24 of the Charter, a comprehensive provision. Whilst there is some domestic protection in UK law (through the common law, the HRA and other statutes), it is significantly weaker. As explained above, the Charter also provides more extensive rights protection than the ECHR / HRA in many respects – for example, it contains an express right to the protection of personal data; there is an express right to dignity; and its fair trial and discrimination provisions are broader in reach and more detailed than those in the ECHR. These substantive differences have made a real difference for individuals seeking to challenge violations. For example, in cases involving a right to a fair hearing, Article 6 ECHR provides no relief in many immigration or tax cases where a civil right or obligation may not be engaged. Instead, Article 47 of the Charter has been used to secure due process in these important areas of public decision making.

[155] See e.g. Jonathan Cooper, "The Impact of the EU Charter on Fundamental Rights", University of Kent (7 December 2017), https://www.doughtystreet.co.uk/documents/uploaded-documents/Intro_to_EU_Charter_Kent_7_Dec_2017_(2).pdf.

c. Third, the Charter contains more robust procedural mechanisms to protect rights than are available in UK law. Charter rights cannot be repealed, and domestic law contrary to Charter rights must be disapplied (as explained above). By contrast, the HRA allows only for a declaration of incompatibility where primary legislation is incompatible with ECHR rights, and the Withdrawal Bill permits repeal of retained EU law by secondary legislation. The snapshot incorporation of rights respecting EU law might be removed in many cases without a vote by Parliamentarians and in all cases without any opportunity for amendment. Remedies for individuals are diminished: individuals will no longer be able to bring legal claims to strike down domestic legislation or administrative action as being contrary to Charter rights.

d. Fourth, in asserting that there will be no loss of rights protection, the Government relies heavily on protections under the HRA and ECHR, without acknowledging that the HRA is also under threat. The carefully worded preservation in the Government's Factsheet ("*This Government has been clear that it has no plans to withdraw from the ECHR*" (emphasis added) [156]) seeks to distract attention from its more general policy of rights regression including repeal of the HRA.

e. Fifth, the Government's intention to ensure that Charter protection is not weakened seemingly refers only to Charter rights and not to general principles. The Government does not propose to incorporate the Charter rights or principles into domestic law, but refers to the general principles of EU law and fundamental rights otherwise recognised in EU law. Whereas these principles are now directly enforceable under EU law, the effect of Clause 6(3) and Schedule 1, paragraph 3 of the Bill is to remove the right to a remedy unless a claimant has another cause of action which arises, limiting the value of the general principles incorporated to an interpretative one. There will be no freestanding right of action post-Brexit based on a failure to comply with any of general principles of EU law. The principles will only have such limited legal effect where they have been recognised by the CJEU before exit day. Since the Charter came into force in 2009, it is almost impossible to disentangle what is a freestanding general principle from those which are rights or principles grounded in the Charter.[157] This creates a significant problem of legal certainty. Finally, as retained EU law, it will be open to Ministers to amend such general

[156] Department for Exiting the European Union, *The Withdrawal Bill – Factsheet 6: Charter of Fundamental rights*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/678333/Factsheet_6_-_Charter_of_fundamental_rights.pdf.

[157] C-203/15 and C-698/15, *Tele2 Sverige AB v Post-och telestyrelsen* and *Secretary of State for the Home Department v Watson and Others* (21 December 2016).

principles such as are considered 'defective' or which otherwise fall within the broad powers in Clause 7 of the Bill.

3.49. Independent legal advice commissioned by the Equality and Human Rights Commission of England and Wales reinforces the argument that the UK Government's assurances are fallible.[158] The Commission's view is that the Government's proposed approach is likely to create confusion and is a recipe for costly and time-consuming litigation as the courts seek to establish how far the rights in the Charter continue to apply after Brexit.

3.50. In January 2018, a group of more than 20 organisations and human rights legal experts signed an open letter on the importance of the Charter ahead of the Withdrawal Bill returning to Parliament:[159]

> "*Losing [the Charter] creates a human rights hole because the Charter provides some rights and judicial remedies that have no clear equivalents in UK law. Furthermore, by keeping the wide and complex body of EU law while throwing away the Charter which is the code to unlock it, the Government risks creating confusion, jamming itself in a mountain of legal cases. Rights without remedies are just symbols. We need legal guarantees in the Bill about the kind of society we want to be after Brexit. For the Government to honour its promise of preserving existing rights it must retain the protections in the Charter*."

3.51. For the reasons outlined above, the operation of the European Union (Withdrawal) Bill creates significant concern about the continuing respect within the UK for the human rights laws and fundamental rights protected within the EU. The absence of the Charter from UK law after exit day will lead to a diminution in the substantive protection of fundamental rights within the UK and the capacity of individuals in the UK to pursue redress for the violation of their rights. We further consider the shrinking protection of rights in Part 4.

C. Other legislative proposals

3.52. Alongside the Withdrawal Bill, the Queen's Speech of 21 June 2017 announced other specific legislative proposals to deal with particular issues in UK domestic law deriving from its EU law legacy. The Government intends to introduce seven other Brexit-related Bills, concerning customs, trade, immigration, fisheries, agriculture, nuclear safeguards and international

[158] Jason Coppel QC, *European Union (Withdrawal) Bill - E.U. Charter of Fundamental Rights: Opinion* (5 January 2018), https://www.equalityhumanrights.com/sites/default/files/eu-withdrawal-bill-legal-advice-jason-coppel-qc.pdf, [42]-[43].
[159] See open letter (14 January 2018), https://www.equalityhumanrights.com/en/our-work/news/eu-withdrawal-bill-will-not-protect-uk-rights-open-letter.

sanctions.[160] The Queen's Speech also announced a Data Protection Bill to give effect to the GDPR, aimed at ensuring that after Brexit the UK maintains adequate standards to enable data sharing with EU Member States and countries around the world (regarding the Data Protection Bill, see further below).

3.53. This step appears to reflect the UK Government's recognition that these areas, all particularly affected by Brexit, require more intensive regulation than the simple transposition of EU law effected by the Withdrawal Bill. As Mark Elliott points out, substantial elements of new domestic legislation in these fields will be sensitive to the terms of the Withdrawal Agreement (whatever they are) and the transitional relationship with the EU. He goes on to argue that the Bills are likely to function, "*at least to some extent, as enabling legislation that confers powers upon the Government to enact secondary legislation in the light of prevailing conditions as Brexit Day nears*".[161]

3.54. In other words, as Mark D'Arcy has explained, the Bills "*have to provide sweeping powers and extensive legislative tools for ministers, so that they can set up a system that has yet to be negotiated*".[162] Accordingly, scrutiny of the powers conferred on ministers in those bills will be particularly important both for constitutional scholars and for those participating in the EU-UK negotiations. The suspension of ordinary legislative checks and balances gives rise to an increased risk of erosion of basic human rights protections.

3.55. The Trade Bill, which had its First Reading in the Commons on 7 November 2017, is a case in point. This provides the platform on which the Government will settle the future trading relationships of the UK post-Brexit. Clause 2 provides that a Minister "*may by regulations make such provision as the authority considers appropriate for the purpose of implementing an international trade agreement to which the United Kingdom is a signatory*",[163] including by "*modifying primary legislation that is retained EU law*".[164]

3.56. Liberty, one of the UK's foremost human rights NGOs, has been exceptionally critical of the broad powers granted in the Trade Bill and its relationship with the Withdrawal Bill.[165] The organisation

[160] https://www.gov.uk/government/speeches/queens-speech-2017.
[161] https://publiclawforeveryone.com/2017/06/21/the-2017-queens-speech-and-the-no-longer-great-repeal-bill/.
[162] http://www.bbc.co.uk/news/uk-politics-42528692.
[163] Clause 2(1).
[164] Clause 2(6)(a).
[165] Liberty, "Second Reading Briefing on the EU (Withdrawal) Bill", https://www.liberty-human-rights.org.uk/sites/default/files/Liberty%20-%20Trade%20Bill%20briefing%20for%20Second%20Reading.pdf; see also http://www.independent.co.uk/news/uk/politics/brexit-human-rights-equalities-laws-legislation-government-liberty-theresa-may-latest-a8146691.html.

is concerned that the Bill grants ministers further broad discretion to amend primary legislation. For example, this "*could include the Equality Act 2010 (which implements four important EU law non-discrimination Directives), the Modern Slavery Act 2015 (which implements the EU Anti-Trafficking Directive)*" and other rights protections. At the very least, "*it is vitally important that safeguards are introduced to ensure that human rights and equality laws passed by Parliament cannot be amended by Ministers whose foremost agenda is to conclude trade agreements*". [166] The same concern is likely to apply across the board.

D. Specific concerns on particular rights

3.57. This section sets out a number of short case-study examples of rights currently protected by the Charter, and by the wider legislative framework for the protection of human rights in the EU, to illustrate the potential impact of Brexit on the protections offered to UK citizens and EU citizens living in the UK, and the relevance of this for the future of the EU-UK negotiations.

(1) Data Protection

3.58. Article 8 of the Charter provides express protection for the right of all persons to enjoy privacy in the handling of their personal data. This right goes further than Article 8 ECHR which provides general protection for the right to private and family life, home and correspondence (reflected in Article 7 of the Charter). Article 8 of the Charter is far more specific and directed, reflecting the protection long offered by the EU Data Protection Directive (Directive 95/46 C), given effect in UK law by the Data Protection Act 1998. In April 2016, the EU adopted a new General Data Protection Regulation (**"GDPR"**) and an accompanying Policing and Criminal Justice Data Protection Directive, to afford enhanced protection to data privacy.[167] The UK Parliament is now considering a Data Protection Bill to give effect to these provisions in UK law by May 2018.

3.59. The UK has identified data sharing with the EU has a key priority for its future relationships, including for the purposes of criminal justice cooperation and national security.[168] Any such data sharing between the EU and a third state will require an assessment by the European Commission

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[166] Ibid, https://www.liberty-human-rights.org.uk/sites/default/files/Liberty%20-%20Trade%20Bill%20briefing%20for%20Second%20Reading.pdf.

[167] General Data Protection Regulation ('GDPR') (Regulation (EU) 2016/679); Directive 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, detection or prosecution of criminal offences or the execution of criminal penalties [2016] OJ L119/89 ("the Police and Criminal Justice Data Protection Directive").

[168] See Rosemary Davidson, "Brexit and Criminal Justice: the future of the UK's cooperation relationship with the EU", [2017] Crim L.R. 379.

that the UK's laws on data protection are adequate, or equivalent to the measures in the EU regime, as outlined above, and provided for in Articles 45 – 47 of the GDPR. In the Data Protection Bill, the Government's intention is that UK laws will be remain aligned to the GDPR on exit day.[169] However, even if the new Data Protection Act 2018 were to mirror the requirements of the GDPR, these measures can be altered at any time by any subsequent Act of Parliament. Should the Withdrawal Bill pass in its current form, it would arguably be open to Ministers to alter its provisions as retained EU law pursuant to the proposed powers in Clause 7.[170]

3.60. In light of the significance of equivalence for the purposes of third party agreements with the EU, it might be politically unrealistic for the UK to countenance major changes to data protection law following exit day. However, the UK Government continues to object to the CJEU's interpretation of Article 7 and 8, in so far as it would constrain domestic data retention, acquisition and processing, including in the provision of bulk and thematic powers of surveillance in the Investigatory Powers Act 2016. In *Watson*, the CJEU concluded that the predecessor of that Act – modeled on similar provision - was incompatible with Articles 7 and 8 of the Charter.[171] The Government has since heavily criticised the reasoning of the Court, refused substantial reform and requested further clarity in a fresh reference.[172] Litigation on this issue continues in the UK and Luxembourg.[173] Continuing tension on the permissibility of data retention is a human rights issue of significant concern and it could undermine any assessment of adequacy by the European Commission. This in turn is likely to inform the likely extent of cooperation between the EU and the UK on a range of possible matters, from participation in SIS II (above) to the exchange of Passenger Name Records.

[169] The Explanatory Notes to the Bill explain: "*While the UK remains a member of the EU, all the rights and obligations of EU membership remain in force. When the UK leaves the EU, the GDPR will be incorporated into the UK's domestic law under the European Union (Withdrawal) Bill, currently before Parliament."* Bill 153, Explanatory Notes, [6] (18 January 2018), https://publications.parliament.uk/pa/bills/cbill/2017-2019/0153/en/153en01.htm.

[170] Clause 7 of that Bill, as explained above, provides potentially very broad powers to Ministers to alter provisions of primary legislation designed to give effect to EU law, including where the law makes provision for reciprocal arrangements which Ministers no longer consider appropriate. It appears that minimum standards guaranteed across the Union for the purposes of the fair operation of the single Market, including in respects of data protection, might be considered to fall within that broad definition.

[171] C-203/15 and C-698/15, *Tele2 Sverige AB v Post-och telestyrelsen* and *Secretary of State for the Home Department v Watson and Others* (21 December 2016).

[172] See, for example, Home Office,'*Investigatory Powers Act 2016: Consultation on the Government's proposed response to the ruling of the Court of Justice of the European Union on 21 December 2016 regarding the retention of communications data'* (November 2017), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/663668/November_2017_IPA_Consultation_-_consultation_document.pdf.

[173] See the further reference to the CJEU made in *Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others*, IPT/15/110/CH , (8 September 2017).

3.61. No matter the terms of the future relationship between the EU and the UK – by reason of this discrepancy in approach – the competence of any potential data transfer between the EU and the UK is likely to be considered by the CJEU in due course.

(2) Trafficking

3.62. Article 5 of the Charter provides that no one shall be held in slavery or servitude; no one shall be required to perform forced or compulsory labour; trafficking in human beings is prohibited. EU Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims sets out provisions on criminalisation of acts related to trafficking, establishment of jurisdiction, protection, assistance and support for victims, special protection for child victims, non-punishment for petty crimes, establishment of a National Rapporteur in each Member State, and coordination of EU strategy. The EU Strategy towards the Eradication of Trafficking in Human Beings includes best practices, standards and procedures for combating and preventing trafficking in human beings.

3.63. The UK initially opted out on the basis that its existing law was compliant with the minimum standards in the Directive. It opted in during 2011 and accepted that, for the law to be implemented properly, changes would be needed to domestic practice, not least to clearly criminalise the offence of forced labour.[174] The Directive is now implemented through a range of measures in civil and criminal law, in policy and practice. The main relevant legislation is found in the Modern Slavery Act 2015 and specific legislation in Northern Ireland and Scotland.[175] Although there remain concerns about the UK's response to trafficking, not least in the limited protection offered to domestic workers and the restrictive application of visas in a trafficking situation, it is generally accepted that the Modern Slavery Act 2015 is a progressive and positive step forward. It contains some steps which are more progressive than the Directive, such as a mechanism for the monitoring and reporting of supply chain activity.[176]

3.64. The protection offered by the EU Trafficking Directive sits alongside protection offered by Article 4 ECHR and the Council of Europe Trafficking Convention.[177] Article 4 ECHR prohibits the

[174] See analysis prepared by the AIRE Centre, Monitoring Report on the Implementation by the United Kingdom of EU Directive 2011/36 on preventing and combating trafficking in human beings (July 2012) for further information.
[175] See Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015; Human Trafficking and Exploitation (Scotland) Act 2015.
[176] See for example, Schona Jolly, "Modern Slavery Act 2015—the first steps in the right direction" (1 May 2015), http://www.halsburyslawexchange.co.uk/modern-slavery-act-2015-the-first-steps-in-the-right-direction/.
[177] CETS No. 197, Council of Europe Convention on Action against Trafficking in Human Beings, Warsaw, (16 May 2005), https://rm.coe.int/168008371d.

holding of any person in slavery or servitude and prohibits forced or compulsory labour, although there has been very limited case law from the ECtHR and so the precise contours of this provision remain largely unexplored. The Council of Europe Convention provides a series of rights for victims of trafficking, including the right to be identified as a victim, to be protected and assisted, to be given a recovery and reflection period, to be granted a renewable residence permit, and to receive compensation.

3.65. The EU underpinning of the Modern Slavery Act 2015 currently has a stronger normative effect on UK law as a combined result of the supremacy of EU law, principle of direct effect and the operation of the ECA 1972. Domestic challenges based on the Charter and the Directive are the only means in domestic law to challenge directly any violation of individual rights arising as a result of primary legislation. Following Brexit, this will drop away. Any rights-based challenge will hinge on Article 4 ECHR. If a legislative provision is not capable of a Convention compatible reading, the only remedy would be a declaration of incompatibility. The law would remain in place and would await a political solution.

3.66. Given the political investment made, including by the Prime Minister, in the Modern Slavery Act 2015, there appears to be little real risk of immediate regression from existing legal standards or commitment arising from the Modern Slavery Act 2015 post-Brexit. However, should the political climate – or personalities – shift; the powers in Clause 7 of the Withdrawal Bill could arguably be used to amend such provision in the Act which derives from the Directive. The Modern Slavery Act 2015, although it goes further than the requirements of the Directive in some respects, will be retained EU law by virtue of Clause 2 of the Withdrawal Bill.

3.67. Anti-Slavery International has expressed concerns about the possible implications of Brexit for the effectiveness of the UK response to trafficking and the treatment of victims, emphasising that research shows that victims from outside the EU are far less likely to be recognised as victims of trafficking (20% of claims compared to 80% of claims originating from within the EU). They have expressed concern that post-Brexit the UK will not be able to help shape any new response to trafficking across the EU, nor will the UK be bound by any *more* progressive measures which may be adopted in future. [178] This proactive engagement of the UK in moving forward the protection of human rights through cooperation on anti-trafficking work within the Union will be lost, subject to the terms of any future EU-UK agreement.

[178] Anti-Slavery International, *Implications of the EU Referendum* (April 2016).

(3) Equality

3.68. Equal treatment and non-discrimination is a general principle of EU law.[179] In addition, as noted above, Articles 20 and 21 of the Charter contain a freestanding equality guarantee: Article 20 protects equality before the law, while Article 21 prohibits discrimination "*on any ground*" including "*sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation*". Article 23 protects equal treatment of women; Article 24 protects the rights of the child, and Article 25 protects the rights of older persons. Also as noted above, the EU Equality Framework contains the Employment Equality Framework Directive 2000/78/EC, which prohibits discrimination on grounds of sexuality, religion, disability and age in the workplace, as well as the Gender Directive, the Race Equality Directive 2000/43/EC and the Equal Treatment Directive 2006/54/EC, prohibiting discrimination in employment and goods and services.

3.69. That the right of equality is a core fundamental right in the legal framework of the EU is recognised in the consideration of the rights of the citizens of Northern Ireland, both in the Joint Report and the draft Legal Text. Both single out the protection of equality; there shall be no diminution of rights and that shall include *"in the area of protection against discrimination as enshrined provisions of Union law"*.[180] An important part of the context to this phraseology is the recognition throughout the GFA of the significance of equality and non-discrimination. As Professor Christopher McCrudden has put it, achievement of *"equality between the two main communities in Northern Ireland"* was *"one of the central elements of the Agreement"*.[181] The constitutional issues outlined at the outset of the GFA state that, in Northern Ireland, *" the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities."* In Strand Three, equality underpins much of the content of the section entitled, 'Rights, Safeguards and Equality of Opportunity,' and the particular importance of *"the right to equal opportunity in all social and economic activity, regardless of class, creed, disability, gender or ethnicity" in the context of "the recent history of communal conflict"* is emphasised.

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[179] *Ruckdeschel v Hauptzollamt* [1977] ECR 1753.
[180] Draft Legal Text, Article 1(1); see also Joint Report, [53].
[181] Christopher McCrudden, *Equality and the Good Friday Agreement: Fifteen Years On* (29 March 2013), UK Constitutional Law Association, https://ukconstitutionallaw.org/2013/03/29/christopher-mccrudden-equality-and-the-good-friday-agreement-fifteen-years-on/.

3.70. Article 14 of the ECHR protects against discrimination in the enjoyment of rights protected by the ECHR, but the protection is parasitic on other ECHR rights, rather than freestanding. ECHR, Protocol 12 contains a general freestanding equality guarantee that no-one shall be discriminated against on any ground by any public authority, but the Protocol has not been ratified by the UK. Individual public authorities must comply with Article 14 in all their public functions.[182] Individuals can bring domestic law claims based on a failure to respect the rights protected by Article 14. However, it does not apply to the employment context in the same way as EU law. EU law on equality is not only more far-reaching and more detailed, but more robustly enforceable, than protections under the ECHR.

3.71. Equality rights have been translated into the UK's domestic law. The Equality Act 2010 (and the Sex Discrimination Order 1976, Disability Discrimination Act 1995, Race Relations Order 1997, fair Employment and Treatment Order 1998, Employment Equality (Sexual Orientation) Regulations 2003 and Employment (Age) Regulations 2006 in Northern Ireland) protect against discrimination on the basis of a range of protected characteristics, including gender, race, sexuality, religion, disability and age in connection with education, employment and training and access to goods and services. Further protections including for part-time and agency workers are contained in regulations, rather than primary legislation.[183]

3.72. Post-Brexit, it will be open to Parliament to make laws in relation to equality which weaken protections. The Equality Act, as an ordinary piece of domestic legislation, could be amended or repealed by simple act of Parliament or even, if the Withdrawal Bill is passed in its current form, without the usual Parliamentary safeguards and scrutiny pursuant to the Henry VIII powers. The distinct legislative framework for equality in Northern Ireland – including the Fair Employment & Treatment Order (NI) Order 1998 – will be similarly vulnerable to amendment using the powers in the Withdrawal Bill to the extent that its provisions are considered retained EU law (and not measures necessitated by the GFA).[184] Protections currently contained only in regulations could be amended by executive action; this is a particular area of concern, as groups such as part-time

[182] HRA, s. 6.

[183] E.g. Agency Workers Regulations 2010, in effect implementing the Temporary Agency Work Directive 2008/104/EC; Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, implementing the Part-time Work Directive (97/81/EC).

[184] The equality framework in Northern Ireland sits on a series of regulations, many of which largely mirror the protection in the Equality Act 2010 (see, for example, the Sex Discrimination (NI) Order 1976 (as amended) and the Race Relations (NI) Order 1997 (as amended). However, other provisions are limited to Northern Ireland, including in the Fair Employment & Treatment Order (NI) Order designed to ensure equality between the communities there; these do not arguably have a root in EU law.

and agency workers may be particularly vulnerable and not in a position to make their voices heard.

3.73. Liberty has expressed concern about the rise in hate crime and racial discrimination immediately following Brexit, and has pressed for the protection of a new constitutional right to equality in legislation to prevent a watering down of equality protections;[185] the Equality and Human Rights Commission and others have suggested a preamble to the Withdrawal Bill, non-retrogression clause or enshrining equality protections in free trade agreements.[186] While debates continue about incorporation of the Charter within the Withdrawal Bill (discussed in Part 4 of this Report, below), MPs have tabled amendments to the Bill to secure special protection for the Equality Act.[187] Whether such amendments will succeed is yet to be seen.

[185] See Liberty, Submissions to the Joint Committee on Human Rights' Brexit Inquiry (October 2016), https://www.liberty-human-rights.org.uk/sites/default/files/Liberty%20Submissions%20to%20JCHR%20Brexit%20Inquiry%20%28Oct%202016%29.pdf;

[186] See Equality and Human Rights Commission, "European Union (Withdrawal) Bill House of Commons Report stage" (16 January 2018), https://www.equalityhumanrights.com/sites/default/files/briefing-eu-withdrawal-bill-commons-report-stage-16-january-2018.pdf; Sandra Fredman et al, *The Impact of Brexit on Equality Law*, Oxford Human Rights Hub, http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2017/11/The-Impact-of-Brexit-on-Equality-Rights.pdf.

[187] See Notices of Amendments: 15 November 2017, https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/amend/euwithdrawal_rm_cwh_1115.57-63.html; Institute for Government, "EU Withdrawal Bill: Amendments and Debates" (21 February 2018), https://www.instituteforgovernment.org.uk/explainers/eu-withdrawal-bill-amendments-and-debates.

4. KEY ISSUES FOR NEGOTIATIONS

4.1. In this section, we highlight some key issues arising for the continuing negotiations of the impact of Brexit on individual and human rights and from the commitment of the wider Union to the foundational principles of fundamental rights, including as expressed in the general principles, in the ECHR and the Charter.

A. Shrinking rights protection in the UK

4.2. The process of Brexit will involve a fundamental shift in the UK's constitutional arrangements for the protection of human rights (see Part 3, above).

4.3. Subject to the treatment of the Northern Ireland, considered below, for most individuals living in the UK, including UK citizens and EU citizens, this is likely to involve a significant regression in respect of the protection of individual and fundamental human rights. This section considers how the enjoyment of individual citizens' rights and fundamental rights might be affected for UK citizens, EU citizens living in the UK and UK citizens living in the EU.

(1) Citizens' Rights: Reciprocal Rights

4.4. The Joint Report indicated there was agreement in principle that EU citizens living in the UK and UK citizens living in the EU at the time of the withdrawal of the UK from the Union, will continue to enjoy residence rights by virtue of the Withdrawal Agreement. The UK Government committed to bring forward domestic legislation to give effect to the Withdrawal Agreement in domestic law.[188] As explained above, it is as yet unclear whether that date will be 29 March 2019 or at the end of the agreed transitional period. The rights afforded to those individuals will be specified in the Withdrawal Agreement; the draft Legal Text produced by the Commission

[188] Joint Report, [6]-[41]. It is as yet far from clear whether the source of this commitment will be in the international law obligation created in the Withdrawal Agreement, or reliant upon the passage by Parliament of consistent domestic legislation. The language in the Joint Report is conflicting and appears somewhat contradictory. If derived from the Agreement and given effect in domestic law, this model would follow the ECA 1972, but would again see a form of agreement with the EU taking effect within the UK, with the CJEU acting as ultimate arbiter of the rights it bestows. The language in the Joint Report supposes a degree of prohibition on implied repeal of this legislation and the rights which it protects, which may not necessarily be constitutionally appropriate, albeit that such repeal would be politically unlikely. See Professor Mark Elliott, "The Brexit agreement and citizens' rights: Can Parliament deliver what the Government has promised?" (11 December 2017), https://publiclawforeveryone.com/2017/12/11/the-brexit-agreement-and-citizens-rights-can-parliament-deliver-what-the-government-has-promised/.

reflects the Joint Report's provision on citizens' reciprocal rights, but it has not proved without controversy.[189]

4.5. The Joint Report specified that such reciprocal rights would not extend to the full benefits of citizenship for UK citizens living in the EU, but both groups' rights would include:

a. A right to be treated without discrimination on grounds of nationality, as between nationals and those covered by the Agreement;[190]
b. Some categories of family member will be permitted to join a resident for the purposes of reunification during the lifetime of that eligible resident on the same conditions as if Union law applied; it is agreed that entry will be facilitated for partners in a durable relationship, provided the relationship was durable and eligible at the date of withdrawal and on the date of application;[191]
c. Other family reunification will be governed by national law;[192]
d. The Withdrawal Agreement will govern administration; eligible persons may be required to be issued with a residence document. Applications must be free of charge or comparable to the charges levied on nationals for similar documents. The Application process must be open for up to two years after withdrawal;[193]
e. Individuals who enjoy permanent residence issued under EU law, will have that residence converted free of charge;[194]
f. Healthcare reimbursement, including under the EHIC scheme will continue to apply to those residents;[195]
g. Social security provision will continue to apply broadly as under EU law.[196] A mechanism will be agreed jointly on how to address any future changes;[197]
h. Equal treatment will apply within the limits of Articles 18, 45, and 49 TFEU, Article 24, Directive 2004/38/EC and Regulation (EU) No 492/2011, including rights of workers, self-

[189] Draft Legal Text, Part 2, Citizens' Rights.
[190] Joint Report, [11].
[191] Joint Report, [12]-[13].
[192] Joint Report, [14]. On family reunification, the UK Government published a position paper on the same day as the draft Legal Text. This appears to accept that individuals moving to the UK during the transition period will be able to secure a 5-year residents visa, and will be able to accrue permanent residence, toghether with rights to family reunification. Department for Exiting the EU, "EU citizens arriving in the UK during the implementation period", (28 February 2018) https://www.gov.uk/government/publications/eu-citizens-arriving-in-the-uk-during-the-implementation-period.
[193] Joint Report, [17] – [19].
[194] Joint Report, [23].
[195] Joint Report, [29].
[196] Joint Report, [28].
[197] Joint Report, [30].

employed, students and economically inactive citizens with respect to social security, social assistance, health care, employment, self-employment and setting up and managing an undertaking, education and training, social and tax advantages;[198]

i. Decisions on the recognition of qualifications – broadly – if made prior to withdrawal, will stand. Decisions on recognition of qualifications thereafter will be subject to any future agreement;[199] and
j. Rights of permanent residence will echo existing provision in EU law.[200]

4.6. Broadly, then, if these terms form part of the final Withdrawal Agreement:

a. EU citizens resident in the UK will retain their citizenship rights by virtue of their national state's membership of the Union.
b. They will continue to enjoy residence rights and some benefits specified in the Withdrawal Agreement provided they are resident in the UK at the date of withdrawal (that date is to be confirmed).
c. UK residents resident in the EU on the date of withdrawal will enjoy reciprocal rights of residence as outlined in the Withdrawal Agreement.

The rights agreed will go some way to providing reassurance to residents in the UK and the EU about the extent to which their current rights will continue. If confirmed, agreement appears to have been reached about continuation of residence and employment rights, health and social security. It is important that, for those individuals settled, family reunification rights appear to continue on a basis similar to that which would be afforded within the EU. There are, of course, no guarantees given for future migrants and their families after the applicable period of the Withdrawal Agreement expires. At this point, movement into the EU, including Ireland, would be governed by the terms of any future agreement on the relationship between the EU and the UK, including in respect of any special arrangement for citizens of Northern Ireland, consistent with the GFA.

4.7. The Joint Report provided that the enforcement of these rights will be governed by the Withdrawal Agreement. The terms of the Withdrawal Agreement will become part of both UK and EU law, to increase certainty for those eligible for reciprocal rights of residence. These provisions provide for individuals to rely directly on the terms of the Withdrawal Agreement and

[198] Joint Report, [31].
[199] Joint Report, [32].
[200] Joint Report, [20]-[22].

will provide for incompatible domestic law to be set aside or disapplied.[201] The Withdrawal Agreement will provide that the CJEU is the ultimate arbiter of the interpretation of EU law and rights deriving from it. It will provide for UK courts and tribunals to have due regard to CJEU case law following withdrawal; domestic law will provide for a procedure to allow a reference on a question of interpretation to be made by the domestic courts for up to 8 years following withdrawal. A regular judicial dialogue between the UK and the EU will ensure consistency. The Commission will perform a monitoring role within the Union. In the UK, an independent national authority will be appointed (the role of that body and its treatment of individual complaints is to be settled during the next phase of negotiations). It appears that this model is reflected in the draft Legal Text available at the time of writing, but it is far from clear that the UK is content with its terms, or if they have been agreed by the EU27.[202]

4.8. UK citizens resident in the EU and within the UK are expected to lose their wider citizenship rights, except as negotiated independently as part of the UK's future relationship with the EU, with the exception of citizens of Northern Ireland who also hold Irish citizenship (see below).[203] UK citizens who are resident in an EU country would lose their rights to free movement and their rights to vote in European Parliament elections; with no such broad provision planned in the Withdrawal Agreement envisaged by the Joint Report or the draft Legal Text.[204] The Commission has suggested that they may continue to enjoy limited movement throughout the Union, guaranteed by the Schengen Agreement, for temporary stays and could move to another EU state, subject to the eligibility provisions of the Long Term Residents Directive (following the attainment of permanent residence after 5 years). However, this position is far from clear, and not yet agreed.[205]

4.9. A recent reference to the CJEU has called the limitations on the wider citizenship rights of this group, and of all UK citizens, into question. In February 2018, a group of UK citizens resident

[201] The language in the Joint Report supposes a degree of prohibition on implied repeal of this legislation and the rights which it protects, which may not necessarily be constitutionally appropriate, albeit that such repeal would be politically unlikely. See Professor Mark Elliott, "The Brexit agreement and citizens' rights: Can Parliament deliver what the Government has promised?" (11 December 2017), https://publiclawforeveryone.com/2017/12/11/the-brexit-agreement-and-citizens-rights-can-parliament-deliver-what-the-government-has-promised/.
[202] Draft Legal Text, Part 6.
[203] Joint Report, [42]-[56].
[204] See also, draft Legal Text, Article 32.
[205] Council Directive 2003/109/EC (25 November 2003). This provides that long-term residents (i.e. having resided lawfully as non-EU nationals for five years) in a first Member State have the right to reside in a second Member State on three main grounds: exercise of an economic activity; studies or vocational training or other purposes. Other provisions on mobility for long term residents as apply now will be open to those UK citizens resident within the UK. The EU has provided a helpful Q & A to provide guidance on the proposed rights arising from the proposals in the Joint Report: https://ec.europa.eu/unitedkingdom/services/your-rights/Brexit_en.

in the Netherlands successfully secured a reference to the CJEU on the question of the proposed removal of their citizenship rights.[206] They argue that because the language of Article 20, TEU says that EU citizenship "*shall be additional to national citizenship and not replace it*", this means that the EU citizens who are already EU citizens cannot be deprived *en masse* of EU citizenship because the state of which they are a national leaves the EU. The full text of Article 20 provides that "*Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.*" This language, also reflected in Article 9, suggests that citizenship logically follows only from being a national of a Member State. The Court has asked whether the removal of citizenship rights on withdrawal from the Union is automatic and, if not, should conditions or restrictions be placed on the maintenance of rights and freedoms. It is now for the CJEU to determine whether, on withdrawal from the Union, it is within its jurisdiction to consider the proportionality of the removal of citizenship rights allied to that determination of any state that it wishes to terminate its international law obligations to the Union.[207] The approach taken will clearly be important for the determination of the scope of citizens' rights in the negotiations, in so far as the rights of EU citizenship are protected independently of nationality and/or may be treated as distinct from the national Member State's continued participation in the EU.

(2) Fundamental Rights in the UK and the EU

4.10. All UK citizens lawfully resident in EU countries will continue to benefit from the full application of the EU law framework for the protection of individual rights. Such will bind their host or nation state, and if they seek to pursue any challenge to an act within the scope of EU law, the general principles and the Charter will apply, in so far as they give rise to justiciable rights. Thus, within the Union, these rights will continue to have direct effect and will act as a trump card against any incompatible domestic law, policy or practice, which must be disapplied if inconsistency is identified (see Parts 2 and 3, above). The draft Legal Text proposes that the Charter and the general principles, as part of the body of EU law, will continue to apply to the EU-UK relationship during the proposed transition period (until 31 December 2020). A significant exception is made for Article 39 and 40 of the Charter (rights to vote and participate

[206] An official English translation of the judgment was not available at the time of writing. A translation has been prepared by those representing the Claimants in the case. It is available, here: https://waitingfortax.com/2018/02/13/decision-of-the-district-court-in-amsterdam/amp/?__twitter_impression=true

[207] Such a challenge may be considered premature without the terms of any Withdrawal Agreement; further challenges might be expected in due course. See R. McCrea, "Brexit EU Citizenship Rights of UK Nationals and the Court of Justice", U.K. Const. L. Blog (8th Feb. 2018), https://ukconstitutionallaw.org/2018/02/08/ronan-mccrea-brexit-eu-citizenship-rights-of-uk-nationals-and-the-court-of-justice/.

in elections).[208] The draft requires that the UK make provision for such law to be implemented consistently with the jurisprudence of the CJEU during that period.[209] This would have clear consequences for the Withdrawal Bill and it is far from clear that the UK will accept this position. The continuing relevance of the Charter and the general principles await the final text of the Withdrawal Agreement and any future agreement on the relationship between the EU and the UK. We return to the significance of fundamental rights in the future relationship of the UK and the EU below.

4.11. The most significant loss for UK citizens and residents in the UK – including for EU citizens so resident – will be in the substantive and procedural regression associated with the suspension of the application of the Charter and the UK's departure from the jurisdiction of the CJEU:

a. If the EU (Withdrawal) Bill passes as it is currently drafted:

i. The ECA 1972 will be repealed;
ii. The Charter will no longer directly apply to the UK, whether as EU law or as retained EU law;
iii. The General Principles will become part of domestic law in so far as they are recognised by the CJEU on exit day;
iv. Individuals will be prevented from pursuing remedies currently available when challenging a violation of EU law based on the general principles and/or the Charter. No longer will they be able to found a claim on this basis for either damages arising from failures in the implementation of EU law (as converted into retained EU law), nor will any challenge support the disapplication of incompatible primary legislation;
v. On exit day, the ability of the domestic courts to make any reference to the CJEU will end.

b. In practice this will mean that, for UK citizens and EU citizens resident in the UK following Brexit:

i. Individuals will no longer be able to directly rely upon the substantive provisions of the Charter which are not replicated in the ECHR and/or incorporated into domestic law through the HRA 1998;

[208] Draft Legal Text, Article 122.
[209] Ibid, Article 4.

ii. Challenges brought on EU law grounds against primary legislation will no longer lead to those Acts of Parliament being disapplied. In circumstances where primary legislation requires a particular result, an individual will have no substantive remedy for any violation of human rights, except a declaration of incompatibility pursuant to Section 4, HRA 1998;

iii. Damages for failure to implement the provisions of EU law – Francovich damages – will no longer be available; and

iv. The option of a reference to the CJEU will no longer be available to individuals who wish to challenge the interpretation and application of retained EU law by the domestic courts. This will become domestic law. Where appropriate, domestic courts and tribunals may consider the case law of the CJEU, but only the lower courts will be bound to follow that case law determined before exit day in the interpretation and application of retained EU law.[210]

4.12. Two examples illustrate the impact of these losses, briefly:

a. In *Benkharbouche and Another v Embassy of the Republic of Sudan*, two employees at a foreign embassy wanted to sue their employers in the Employment Tribunal, alleging unfair treatment, race discrimination and breaches of the rules on working time. Their case was barred by the application of the State Immunity Act 1972 and they complained that this was incompatible with the right to a fair hearing under both Article 6 HRA 1998, and Article 47 of the Charter. The language of the State Immunity Act 1972 was plain. The only remedy open under the HRA was a declaration of incompatibility. However, in so far as the claim related to EU law – race discrimination and working time – the State Immunity Act 1972 was set aside by virtue of the application of Charter and the ECA 1972; their claim could proceed and they could secure a remedy.[211] If this claim were brought following the implementation of the EU (Withdrawal) Act, if implemented in its current form, the claimants would not be able to rely on the Charter. In so far as they could argue that Article 47 was an accurate reflection of a general principle recognised by the CJEU before exit day, Schedule 1, to the Act would prevent any successful claim having the effect of disapplying the State Immunity Act 1972. The only remedy available would be a

[210] A fuller exposition of this likely regression in the protection offered to human rights in UK domestic law is provided by a significant number of commentators. See, for example, Angela Patrick, *Mapping the Great Repeal*, Thomas Paine Initiative (October 2016), https://rightsinfo.org/app/uploads/2016/12/Mapping-the-Great-Repeal-Thomas-Paine-Initiative-November-2016-For-RightsInfo.pdf; Tobias Lock, "Human Rights Law in the UK after Brexit", (2017) PL 117.

[211] *Benkharbouche & Anor v Embassy of the Republic of Sudan* [2017] 3 WLR 957 .

declaration. The Claimants would be unable to sue for damages and their only available option would be to lobby Parliament for an amendment to the State Immunity Act.

b. In *Watson*, outlined above, the High Court agreed with the view of two Members of Parliament who brought a judicial review, alleging that UK law on data retention, in the Data Retention and Investigatory Powers Act 2014 was unlawful and incompatible with EU law, and specifically, Articles 7 and 8 of the Charter. The Court of Appeal indicated its disagreement and referred the question to the CJEU. The CJEU concluded that the Act was unlawful and disproportionate.[212] If a similar challenge were to be brought to the Investigatory Powers Act 2016, following the implementation of the EU (Withdrawal) Act, what might the outcome be? The Charter would not be available. Nor would it be open to the domestic courts to refer the case to the CJEU. The Claimants would need to illustrate that the provisions of Articles 7 and 8 are replicated as recognised general principles in the CJEU case law, as retained EU law. Second, it would be open to the Claimants to argue that the provisions of Article 8 ECHR should be read in a manner consistent with the earlier case law of the CJEU in interpreting the earlier predecessor provisions (litigation currently before that Court is likely to consider the relevance of the CJEU jurisprudence in any event). Ultimately, however, again, if no Convention compatible reading of the offending legislation were possible (pursuant to s.3 HRA 1998), then the only remedy available would be a declaration. The offending law would remain in force. As explained above, inconsistent domestic provision on data protection could have significant consequences for the future relationship between the EU and the UK, previous cooperation arrangements, including with the US and Canada, having been declared unlawful by the CJEU and outside the competence of the EU institutions.

4.13. The case for and against a different legislative settlement for withdrawal is currently being debated in the UK's House of Lords:

a. Significant support has been extended from across the political spectrum and from civil society, including the Equality and Human Rights Commission of England and Wales, for an amendment to remove the bar on the Charter being incorporated alongside other legacy treaty and other rights, primary and tertiary EU legislation, in order to ensure the fair and full incorporation of that body of law.[213] On exit day, that EU legislation which is imported

[212] C-203/15 and C-698/15, *Tele2 Sverige AB v Post-och telestyrelsen* and *Secretary of State for the Home Department v Watson and Others* (21 December 2016).
[213] See, for example, Equality and Human Rights Commission, "What does Brexit mean for equality and human rights in the UK?", (20 July 2017), https://www.equalityhumanrights.com/en/our-human-rights-work/what-does-brexit-mean-equality-and-human-rights-uk.

into domestic law will apply within the EU in a manner circumscribed by the Charter; by removing the inherent limits imposed by the Charter's application, the mirror image retained EU law transposed becomes accordingly broader. Incorporation by virtue of Clause 4 of the Bill would arguably circumscribe the Charter in a manner which would make it workable as part of domestic law. The Charter would take effect only to the extent that it would pursuant to the ECA. The Bill would then leave it open to Ministers to remove or amend such sections as had become irrelevant or inappropriate, or which may need to be tailored to work effectively (for example, some references to domestic law protections in the Charter could become redundant or nonsensical). This would address concerns about any overreach for the Charter beyond the provisions of retained EU law. Whether it would be appropriate for Ministers to tinker with fundamental rights guarantees without proper Parliamentary oversight raises a distinct constitutional question for UK Parliamentarians. However, as outlined above, Ministerial overreach is an issue already live in debates on the Withdrawal Bill.

b. Amending the Bill to incorporate the Charter in this way has been criticised by some as both difficult and constitutionally inappropriate. Only those provisions already recognised to have direct effect can be incorporated into domestic law as retained EU legislation by virtue of Clause 4. In practice, this may mean that some of the most useful parts of the Charter are left behind and conversely some of the least useful parts automatically become part of domestic law.[214] Applying the Charter only to the implementation of EU law might make sense when it was an international mechanism placing boundaries on the scope of international standards; greater inconsistency might arise in limiting its application as domestic law only to that new category of domestic law derived from our EU legacy, retained EU law. Is an EU legacy sufficient to justify new fundamental rights standards for some forms of domestic law and not others?[215]

c. Alternative solutions to wholesale incorporation of the Charter include the incorporation of scheduled rights in the Charter with the express purpose of delineating the scope of retained EU law, or otherwise to incorporate the Charter rights into domestic law. This model would allow for an audit of the UK's human rights obligations and the relevance of Charter rights to EU retained law. It would allow Parliament to determine how these provisions would interact with the HRA 1998 remedies in practice. Clear provision could

[214] See, for example, Professors Mark Elliott, Stephen Tierney and Alison Young, "Human Rights Post-Brexit: The Need for Legislation?" (8 February 2018), https://publiclawforeveryone.com/2018/02/08/human-rights-post-brexit-the-need-for-legislation/.
[215] Ibid.

be made for Charter remedies to reflect domestic constitutional practice.[216] Amendments have been proposed to provide for non-regression and the protection of equality and non-discrimination in the implementation of the broad delegated powers in the Act.[217]

4.14. The UK Government continues to resist these proposals to ensure that the Charter sits alongside the legacy law incorporated into UK law as retained EU law. It remains the UK Government's view that "*The Charter did not create new rights, but rather codified rights and principles which already existed in EU law. By converting the EU acquis into UK law, those underlying rights and principles will also be converted into UK law, as provided for in this Bill.*"[218]

4.15. For the reasons outlined above, this is not an accurate or a complete answer to concerns raised by the incorporation of all of the acquis of the EU without the Charter. Briefly, (a) it is beyond simplification to call the Charter a simple, codifying document; (b) the Charter's provisions are entirely more accessible than the general principles ever could be, those principles only being determined in the piecemeal jurisprudence of the Court; (c) the EU (Withdrawal) Bill would not incorporate all the rights of the Charter considered to be founded on general principles, but only those general principles recognised by the CJEU before exit day. Finally, and in any event, the Bill takes steps to remove the remedies which currently attach to any ECA 1972 challenge whether based on the Charter or the general principles of EU law.

4.16. These factors, individually and cumulatively, raise serious concerns about the future protection of fundamental rights in the UK following withdrawal from the EU. In removing the application of the Charter, a significant layer of protection offered to the protection of human rights within the UK will, if the EU (Withdrawal) Bill is passed unamended, will plainly be lost.[219]

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[216] Ibid.

[217] Equality and Human Rights Commission, "House of Commons Committee Stage Briefing" (12 December 2017), https://www.equalityhumanrights.com/sites/default/files/briefing-eu-withdrawal-bill-commons-committee-stage-12-december-2017.pdf.

[218] Explanatory Notes, [99]. See also Department for Exiting the European Union, *Charter on Fundamental Rights: Right by Right Analysis*, p4 (5 December 2017), "*The Government has been clear that it does not intend that the substantive rights protected in the Charter of Fundamental Rights will be weakened. Those rights will continue to be protected in a number of ways. First, as explained above, rights will continue to be protected through the EU law that is preserved and converted by the Bill. Second, eighteen of the articles correspond, entirely or largely, to articles of the European Convention on Human Rights and are, as a result, protected both internationally and, through the Human Rights Act 1998 and the devolution statutes, domestically. Finally, the substantive rights protected in many articles of the Charter are also protected in domestic law via the common law or domestic legislation.*": https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/664891/05122017_Charter_Analysis_FINAL_VERSION.pdf.

[219] See, in addition, Joint Committee on Human Rights, First Report of Session 2017-19, *Legislative Scrutiny: The EU (Withdrawal) Bill: A Right by Right Analysis*, HL 70, HC 774, (24 January 2018), https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/774/774.pdf.

4.17. The failure by the UK Government to appreciate the relevance of the Charter to the protection of individual and fundamental rights within EU law is brought into particularly sharp relief when the position of Northern Ireland is taken into account. If, as the Joint Report proposes, all rights of citizenship including the protection of the EU Charter will be enjoyed by Northern Irish dual citizens, even when resident in Northern Ireland, the sustainability of such a two-tier approach to rights protection must inform both the continuing negotiations towards withdrawal and the shape of a future relationship between the UK and the EU.

B. Northern Ireland and the Good Friday Agreement

(1) Individual rights under the GFA

4.18. A confluence of geographical, historical, political and legal factors make Northern Ireland a special case when it comes to Brexit and individual rights. Negotiations on the status of Northern Ireland have already (and unsurprisingly) proved one of the most difficult challenges of the withdrawal process to navigate. It is clear that respect for the GFA and the rights it recognises will remain key to the going negotiations.

4.19. Individual rights in Northern Ireland currently benefit from multiple, interlaced layers of protection: under the GFA and subsequent agreements, the HRA, the ECHR and the Charter.[220] In addition to the rights under the ECHR / HRA and the Charter, covered earlier in this report, human rights are central to the GFA. They are the lifeblood of the agreement which was reached and approved by referendums, with universal suffrage, across the island of Ireland. Importantly, the GFA contains equivalence provisions whereby both Governments (of the Republic of Ireland and the UK) undertake to strengthen the protection of human rights and for the UK to complete incorporation of the ECHR into Northern Ireland law.[221] The GFA requires "*at least an equivalent level of protection of human rights as will pertain*" in Ireland as in Northern Ireland.[222]

(i) Citizenship, identity and passports

[220] For comprehensive treatment of this topic, see Report on How Designated Special Status for Northern Ireland within the EU can be Delivered: An Independent Legal Opinion commissioned by the European United Left/ Nordic Green Left (GUE / NGL) Group of the European Parliament (16 October 2017), available at http://www.guengl.eu/uploads/publications-documents/NI_Special_status_report_161017_FINAL_crops.pdf.
[221] GFA, 'Rights, Safeguards and Equality of Opportunity', [2].
[222] Ibid, [9].

4.20. The GFA recognises the right of all people of Northern Ireland to identify themselves as Irish, or British, or both, and to hold citizenship and passports accordingly. The GFA itself states that this "*would not be affected by any future change in the status of Northern Ireland*".[223] The Joint Report affirmed this position, stating that both parties recognise "*the birth right of all the people of Northern Ireland to choose to be Irish or British or both and be accepted as such. The people of Northern Ireland who are Irish citizens will continue to enjoy rights as EU citizens, including where they reside in Northern Ireland*."[224] The UK has committed to ensuring that, in Northern Ireland, "*no diminution of rights is caused by its departure from the European Union*".[225] In its position paper on Northern Ireland, the UK Government promised that people born in Northern Ireland who hold Irish citizenship will still benefit from EU citizenship after Brexit: "*As long as Ireland remains a member of the EU, Irish citizenship also confers EU citizenship, with all the rights that go with this. This is as true for the people of Northern Ireland who are Irish citizens – or who hold both British and Irish citizenship – as it is for Irish citizens in Ireland*." [226]

4.21. First, we note that there is an important distinction between the GFA's self-declaratory approach to whether an individual identifies as British, or Irish, or both, and the UK Government's reference to Irish citizens, i.e. those who have exercised their right to obtain an Irish passport.

4.22. Second, as Anthony Collins has remarked:[227]

> "*Whatever about the possibly questionable legality of stripping one's own nationals of rights as a consequence of leaving the EU, there is no obvious reason why citizens of another member state should be equally so deprived . This is all the more so where the right to such enjoyment has already been acknowledged in the Good Friday Agreement. Thus paragraph 52 of the Joint Report is far more than a simple standstill clause*."

4.23. It would therefore seem that all the people of Northern Ireland will retain the right to hold Irish (and therefore EU) citizenship even after Brexit, if they so choose. The Commission's draft Protocol on Ireland / Northern Ireland annexed to the draft Legal Text recognises: "*that Irish citizens in Northern Ireland, by virtue of their Union citizenship, will continue to enjoy, exercise and have access to rights, opportunities and benefits, and that this Protocol should respect and be without prejudice to the rights, opportunities and identity that come with citizenship of the Union for the people of Northern Ireland who choose to assert their right to Irish citizenship*".[228]

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[223] GFA, 'Constitutional Issues', [1](vi); British-Irish Agreement, Art 1(vi).
[224] Joint Report, [52].
[225] Ibid, [53].
[226] HM Government, *Northern Ireland and Ireland: Position Paper*, [14].
[227] Anthony M. Collins, *EU Law in Ireland Post-Brexit*, Seventh Annual Brian Lenihan Memorial Address (3 February 2018), 15.
[228] Protocol on Ireland / Northern Ireland, 99.

It is plain that, in order to provide that there is no such diminution, those rights must include each of the rights protected by the general principles and the Charter, as outlined in Part 2. As is clear, the Charter protects fundamental rights mirrored in the ECHR, rights uniquely protected by the Charter and citizenship rights such as the right to vote and participate in European elections. It is not entirely clear, however, how it is proposed to afford practical protection to rights beyond citizenship that are currently protected by EU law, such as representation and voting rights (discussed below), and the other specific rights discussed in this report.

4.24. It also appears that when the UK exits the EU, there will be a discrepancy between those living in the territory who hold Irish passports (or a passport of another EU Member State), who will continue to be EU citizens, and those living in the territory who only hold UK passports, who will not be (although under the GFA they will retain the right to hold Irish (and therefore EU) citizenship, if they so choose). Differential protection of human rights as between citizens of Ireland and the UK, and / or between citizens of Northern Ireland and the remainder of the UK, is likely to stir up enmities in relation to identity and lack of equivalence.

4.25. Collins also points out that access to EU rights for Irish citizens resident in Northern Ireland is of the greatest material importance, and necessitates access to courts that will enforce EU law, whether by giving standing to EU law in Northern Ireland or through references to the CJEU. If this is not possible, "*there will be a gap in judicial protection for Irish / EU citizens resident in Northern Ireland such that they will be effectively unable to assert their EU rights*."[229]

(ii) Voting and representation associated with EU citizenship

4.26. The rights of EU citizens are spelt out in Articles 20-24 TFEU. As explained in Part 2, these include, relevantly, the right to vote and to stand as a candidate in elections to the European Parliament and in municipal elections (Article 22(1) TFEU) in the Member State in which they reside, under the same conditions as nationals of that State. Article 10 TEU provides for the right of direct representation for citizens, and Article 39(1) of the Charter provides that "*every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State*".

4.27. Post-Brexit, there is a risk that Irish nationals living in Northern Ireland will be disenfranchised from their rights to democratic participation in the EU. This is a matter of particular concern

[229] Ibid, 17.

given the recognition in the GFA of the importance of democratic rights: the right to stand for election, and the right to vote.

4.28. If there were a suggestion that Northern Irish citizens should be entitled to some lesser form of EU citizenship without representation rights or rights to stand in the EU Parliament, perhaps based on a narrow interpretation of Article 22(1) TFEU, that would seem to contradict what has already been promised, and could be resisted on grounds of lack of equivalence, inconsistent with the obligations in the GFA.

4.29. The rights of citizens to be represented and to stand in the EU Parliament would entail the allocation of seats in the EU Parliament for EU citizens in Northern Ireland. Without some form of special status for Northern Ireland, this would create an unusual situation where a non-EU territory would be democratically represented in EU institutions. Various 'work-around' solutions have been proposed, such as having an 'Ulster' constituency covering the six counties of Northern Ireland, or treating Ireland as an expanded single constituency.[230] So far, some of these proposals fall short of realising the spirit of what was intended by the right of full and direct representation under EU law, including full voting rights and ability to stand in EU elections. It would appear that anything less than equivalence would fall foul both of the GFA requirements and the commitment seemingly made by the UK Government in the Joint Report. We note that the draft Legal Text, cited above, reflects that agreement when it provides in the Protocol that the UK "*shall ensure that no diminution of rights*" results from withdrawal (emphasis added).

(iii) Borders and Brexit

4.30. The issue of the land border between Ireland and Northern Ireland has so far proved impossible for negotiators to surmount. As well as customs and trade issues, the border clearly raises human rights issues, particular for border communities.

4.31. The Northern Ireland Human Rights Commission has given evidence to this effect:

> "*As the only part of the UK which shares a land border with the European Union the imposition of stringent border controls on access to UK territory will have significant impact upon the enjoyment of human rights for persons in NI, in particular upon the right to private and family life. A study in 2010 by the Centre for Cross Border Studies estimated that more than 23,000 people cross the border for work every working day. Statistics on the number of people who cross the border to access services, including children who may attend schools across the border, are not available. Arrangements for example to use cross*

[230] See, for example, Anthony M. Collins, EU Law in Ireland Post-Brexit, Seventh Annual Brian Lenihan Memorial Address (3 February 2018), 18.

border child care facilities are currently covered by the Treaty of the EU and the Services Directive. It took a recent social security legal decision based on EU law to allow a lone parent on low pay living in Northern Ireland to be able to use child care facilities in the Republic of Ireland and claim assistance within working tax credit. The implications of Brexit for the border are not yet clear, and the Commission advises the Committee to give specific consideration therefore to freedom of movement for persons living in the border areas of Northern Ireland and how this will impact on enjoyment of the right to private and family life."[231]

4.32. On the border issue, the Joint Report undertakes as follows:[232]

> "*The United Kingdom's intention is to achieve these objectives through the overall EU-UK relationship. Should this not be possible, the United Kingdom will propose specific solutions to address the unique circumstances of the island of Ireland. In the absence of agreed solutions, the United Kingdom will maintain full alignment with those rules of the Internal Market and the Customs Union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement*." (emphasis added)

4.33. In the absence of agreed solutions, "*the United Kingdom will ensure that no new regulatory barriers develop between Northern Ireland and the rest of the United Kingdom, unless, consistent with the 1998 Agreement, the Northern Ireland Executive and Assembly agree that distinct arrangements are appropriate*" (emphasis added). While this prompted celebration in some quarters, the meaning of "*full alignment*" is not clear; it is not a legally defined term of art, but an open-textured one, designed to be adaptable and to mean different things to different people.

4.34. The language in the draft Protocol on Ireland / Northern Ireland put forward by the European Commission recalls that the Joint Report "*outlines three different scenarios for protecting North-South cooperation and avoiding a hard border*".[233] The draft Protocol then highlights "*that discussions on the other scenarios may continue to be pursued in parallel, but that this Protocol is based on the third scenario of maintaining full alignment with those rules of the Union's internal market and the customs union which, now or in the future, support North-South cooperation, the all-island economy and the protection of the 1998 Agreement, and that it applies unless and until an alternative arrangement implementing another scenario is agreed*".[234]

4.35. The Commission has hereby set out its stall in relation to the 'back-stop' plan for Northern Ireland; the default, at least from the Commission's perspective, is full alignment in the sense of

[231] Written evidence from the Northern Ireland Human Rights Commission (HRB0030) (October 2016), available at http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/human-rights-committee/what-are-the-human-rights-implications-of-brexit/written/40635.pdf.
[232] Joint Report, [49]-[50].
[233] Draft Protocol on Ireland / Northern Ireland, 99.
[234] Ibid.

membership of the internal market and customs union. While this has prompted negative reactions from the Prime Minister as well as Conservative and DUP politicians,[235] it is now for the UK Government to put forward an alternative plan.

4.36. What is clear is that, first, the devil will be in the detail, and detail is urgently required; and second, it may be that in some respects, the result of Brexit is that Northern Ireland moves even closer to its southern neighbours. The people of Northern Ireland must understand how the Government intends to meet the requirements of the GFA. The wider community both in the UK and across the EU must understand how the commitments to the people of Northern Ireland will compare to the accommodation made for the rights and interests of the citizens and residents of the rest of the UK.

C. The future EU / UK relationship

4.37. In this section, we consider the impact and implications of the EU's commitment to individual and fundamental rights for the settlement of the terms of the future EU-UK relationship.

4.38. For UK nationals in Britain, it appears unlikely that beyond any agreed transitional period, that relationship will give rise to any individual rights that now derive from EU citizenship (subject to any consideration by the CJEU, or settlement in the agreement on the future EU-UK relationship). The implications of distinct treatment of citizens in Northern Ireland may or may not influence the Government's approach to closer cooperation with the EU, but at present there are no such indications being made by Ministers or officials. For the reasons outlined above, the constitutional and wider implications of a two-tier system of protection for individual and fundamental rights must be a relevant consideration for both teams of negotiators, for MEPs and the public as the negotiations continue. It remains far from certain that such a proposal is workable; either in Britain or in Northern Ireland.

4.39. The extent to which EU law on fundamental rights influences the relationship between the EU-UK relationship in the future will also depend entirely upon the nature of that relationship. Reports continue to suggest that, despite the advanced stage of negotiations, Ministers stand ready to contemplate 'no deal' might be reached.

[235] See e.g. "Boris Johnson: Irish border row being exploited to stop Brexit", *BBC News* (28 February 2018), http://www.bbc.co.uk/news/uk-politics-43221934.

4.40. In the months to come, to 29 March 2019 and beyond, the following broad human rights issues must inform the conduct of negotiations on the Withdrawal Agreement and on the terms of any subsequent agreement on the EU-UK relationship:

a. The Charter – together with the Treaties and the general principles protected by the CJEU – will remain relevant to any question of the competence of the EU to conclude any such agreement with the EU. Beyond approval and ratification and the involvement of the European Parliament in that process; MEPs and others will remain live to the potential for the Opinion of the CJEU to be sought. The binding nature of EU standards on fundamental rights should provide for EU institutions and MEPs a touchstone for both withdrawal and the post-Brexit future.

b. In any agreement on the future EU-UK relationship, whether in the negotiation of a free trade agreement or an association agreement or any other kind of partnership agreement, it will remain open to the EU to propose a minimum level of conditionality based on shared human rights standards. While the feasibility and extent of such conditionality may depend on the extent of cooperation proposed; it is arguably reasonable to set continued membership and shared commitment to the ECHR as a baseline for the continuation of any partnership. As outlined above – whether as part of the EEA or in freestanding association agreements – the overwhelming precedent in arrangements with partners within the Council of Europe is for the ECHR to provide the framework for partnership:

i. Through the case law of the EFTA Court, the commitments of the EFTA States in EEA law incorporate respect for ECHR standards, including as interpreted and applied by both the ECtHR and the CJEU.
ii. In less tightly drawn agreements to associate, with Ukraine, Georgia and Moldova, the ECHR and other common regional standards provide a common framework of understanding and an underpinning which while short of the guarantees of the Charter, stands to preserve a minimum commitment to fundamental rights on which to build.
iii. The settlement of a preferential free trade agreement, alternative to the EEA, within Europe is unknown. In those comprehensive FTA agreements recently settled by the EU in other regions, where there have been are fewer shared regional standards to draw upon, the EU has continued to take steps to forward progress on labour and environmental sustainability. In light of the extent of cooperation which the UK seeks – including on policing, criminal justice and security – it appears likely that a trade agreement is not alone likely to suffice. If and in so far as either an extended trade

agreement or an association or a cooperation agreement is settled. or individual agreements on sectoral or issue-based cooperation, the starting point for EU negotiators must be the precedents available for agreement with European partners, based on shared values, heritage and understanding, and reflected in the provisions of the ECHR.

4.41. At a minimum, the negotiation of a continuing, constructive relationship with the EU appears inconsistent with the Prime Minister's previously stated goal of removing the UK from the ECHR and the jurisdiction of the Strasbourg Court. On past precedent, it appears unlikely to be in the interests of the EU to concede to any continuing arrangement where the UK is free to depart from its commitment to those minimum standards in the Convention.

4.42. A no-deal scenario would put the furthest distance between the UK and the fundamental rights guarantees which bind the EU. However, it is clear that the UK retains an interest in continuing its relationship with the EU in some form; whether by supplementing trade on a WTO basis with a cooperation agreement or in some other form of association; the Union is not only the UK's closest valuable trading partner, it retains value for the purposes of enhancing national security. For reasons explained above, even in these circumstances where no formal deal is yet concluded; the legal standards which bind the EU are likely to be significant for the purposes of the UK's continuing relationship with it:

a. The indirect effects of EU law, including the binding application of the Charter will continue, in so far as EU law will bind the Union, its institutions and all of its Member States. From data sharing to extradition; from environmental standards to broadcasting, the rights of EU citizens and the law designed to protect them will bind both the Union and individual Member States in any contact they may have with the UK.

b. As the brief case studies outlined above illustrate, there are a range of valuable interactions which the UK actively seeks to continue, which have at their heart either the protection of individuals and the community; or which inherently impinge upon the rights of the individual. No matter how the future EU-UK relationship is governed, it is likely that a guarantee of equivalence or mutual recognition of minimum standards is likely to be sought in negotiation. EU negotiators should be fully aware of the political and legal difficulties created both by (a) the provisions and proposals in the Withdrawal Bill and (b) the politically unstable constitutional foundation for the protection of human rights in UK law. UK negotiators may seek to acknowledge that while a narrative grounded in greater national sovereignty lies behind both of these factors; compromise is likely to be required

to secure the benefits of closer cooperation with the Union even on a sectoral or issue-based approach to those priorities which matter most to the UK.

c. Finally, respect for the terms of the GFA must be a priority. The Joint Report illustrated, the UK is willing to temper its goals for absolute autonomy, in order to protect the Belfast Agreement. In at least part of the UK, the fundamental rights standards in EU law will seemingly continue to apply. Subsequent political attacks on the GFA are a significant cause for concern. Early clarity is needed on the substance of the agreement in the Joint Report and both parties should strive to provide it before the conclusion of Phase 2, to allow the input of citizens and civil society to be considered. The UK may face a politically and legally challenging range of choices between, on the one hand, a disruptive two-tier system for the protection of individual rights and, on the other, a model which allows for single market access and participation in a customs union but which does not meet the Government's stated goal of retaining absolute freedom to negotiate with third parties. Whether outcome results, any step which undermines the GFA will have potentially irretrievable consequences for the UK's international law commitments, its diplomatic global reputation and for domestic constitutional integrity.

5. CONCLUSION

5.1. In the 18 months between the referendum and the publication of the Commission's first draft Legal Text, it has become increasingly plain that Brexit will have unprecedented effect on how the lives of UK and EU citizens are lived. From how clean the air we breathe is, to the number of hours we work; from the safety of our medicines to security of our communities, EU law has for its Member States and citizens weight and significance beyond the trading health of the economy. The standards set within the EU rest not only on a commitment to citizens' rights, but on the recognition of shared values and fundamental rights designed to protect human rights and to embody minimum standards of fairness and equality.

5.2. From the outset, the significance of the GFA and the allied responsibility of the UK Government to ensure the integrity of the peace process - and the rights of the people of Northern Ireland - have been central to negotiations on a post-Brexit future. It remains deeply regrettable that there is no operating Executive in Northern Ireland. This debate continues to take place without the full benefit of official input from the local representatives of the people of Northern Ireland, through the Assembly mechanism established by the GFA.

5.3. The generation of media outrage, shock and horror from some political quarters in response to the publication of the EU Commission's first draft Legal Text is not surprising, but it is disappointing. The UK Government agreed in December 2017 that a solution must be found for Northern Ireland which respects the terms of the GFA and which preserves the rights of the Northern Irish people, including as citizens of the EU. The binding nature of the UK's international law obligations under the GFA requires no less.[236]

5.4. The first draft Legal Text produced by the EU Commission is just that: a starting point for negotiations. It is based upon the agreed back-stop, default proposal – a bottom line to secure the GFA – of full alignment between Northern Ireland and the EU. If the UK considers that an alternative model would be appropriate, workable and consistent with the GFA, it must now act to persuade the EU27 and the people of Northern Ireland of its merits.

5.5. We are still waiting for answers. It is clear that, in order to meet the terms of the GFA, the commitments made in the December 2017 Joint Report must be met. The people of Northern Ireland who are entitled also to enjoy Irish citizenship must continue to enjoy their rights as EU

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[236] Caoilfhionn Gallagher QC and Katie O'Byrne, *Report on How Designated Special Status for Northern Ireland within the EU can be Delivered, An Independent Legal Opinion Commissioned by the GUE/NGL Group of the European Parliament* (16 October 2017), available at http://www.guengl.eu/uploads/publicationsdocuments/NI_Special_status_report_161017_FINAL_crops.pdf.

citizens. There must be no diminution of rights – including *both* citizenship rights and the fundamental rights protected by EU law – as a result of withdrawal. Any other approach would not only endanger peace and stability; it would undermine the UK's credibility as a diplomatic partner.

5.6. Those politicians of all colours who have derided the GFA as an easily dismantled hurdle to a clean break have rightly been derided.[237] At a time when the UK may seek to conclude a brace of international agreements, throwing away the GFA would breed more contempt than confidence.

5.7. A solution will not be easy, but it will not be achieved by abandoning the UK's international law commitments and its respect for the rule of law. There are a range of potential solutions for Northern Ireland.[238] What has become plain in the public consciousness in the early months of 2018 is that negotiations must move beyond the language of "red lines" and "no deal" for a more than off-the-peg solution to be found for the special status of Northern Ireland.

5.8. Beyond Northern Ireland, a brief consideration of the EU's legal framework and its commitment to fundamental rights illustrates that a clean break consistent with some of the UK Government's most stark "red lines" may be difficult to achieve while securing the level of ongoing cooperation sought by many in Cabinet and in the UK's public agencies.

5.9. Within the European family of States, there is no recent example of an enduring relationship between a third State and the EU not grounded in a shared commitment to the European Convention on Human Rights. The tenor of the EU27 negotiating position will plainly be informed by the UK Government's wish-list for future market access and other forms of cooperation. The precedents remain. Within Europe, human rights go hand in hand with bilateral and multilateral relationships of the EU.

5.10. In every area of EU competence, the Union, its institutions and its Member States remain bound by the standards recognised in the general principles of EU law and enshrined in the Charter. From the environment to extradition, from data to dignity, the indirect effects of those standards

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[237] See, for example, The Guardian, "Kate Hoey accused of putting Brexit before Northern Ireland peace", (21 February 2018) https://www.theguardian.com/uk-news/2018/feb/21/mps-accuse-kate-hoey-of-putting-brexit-before-northern-ireland-peace.

[238] Caoilfhionn Gallagher QC, Katie O'Byrne, *Report on How Designated Special Status for Northern Ireland within the EU can be Delivered, An Independent Legal Opinion Commissioned by the GUE/NGL Group of the European Parliament*, (16 October 2017), available at http://www.guengl.eu/uploads/publicationsdocuments/NI_Special_status_report_161017_FINAL_crops.pdf. See also, Professor Steve Peers, "A Modest Proposal: Avoiding a Deadlock on the Irish border in the Brexit talks", (27 February 2018) http://eulawanalysis.blogspot.co.uk/2018/02/a-modest-proposal-avoiding-deadlock-on.html.

are already being felt as courts and diplomats within the EU27 States begin to question the relevance of potentially shifting rights commitments in the UK. If the requirements of the Charter, and the jurisdiction of the CJEU, have circumscribed the capacity of the EU to deal with the US and with Canada, why should the UK expect its future relationship might be free of such clear legal constraints?

5.11. Maintaining the degree of collaborative and mutually beneficial EU cooperation which the UK seeks, particularly in respect of security and policing, necessarily undercuts the scope for inviolable "red lines" on the reach of the Charter and the influence of the CJEU to be maintained. Deal or no deal, wishing for a future EU-UK relationship free from human rights ties will not make it so.

5.12. Understanding the significance of the GFA makes special status to address the unique complexities and challenges arising for Northern Ireland essential. Considering the role which fundamental rights plays in the European legal framework means any future EU-UK relationship must acknowledge the human rights commitments in the Charter and the jurisprudence of the CJEU. For either the EU27 or the UK Government to neglect these realities is to disrespect all the citizens of the both Unions, not only the people of Northern Ireland.

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