

Brexit: rights, risks and responsibilities:

What's at stake for human rights?

22nd February 2017

Human rights protecting fairness, justice and dignity risk erosion as a result of the United Kingdom's changing relationship with Europe. The protections that stand to be lost and the opportunities to advance rights must be assessed and more deeply understood by us all.

This meeting, co-hosted by the Scottish Human rights Commission and the Jimmy Reid Foundation, aims to raise awareness of the human rights and social protections we risk losing as the UK takes steps to leave the European Union (EU), and the opportunities to strengthen the protection and implementation of rights in Scotland.

RIGHTS AND RISKS

EU law rights and social protections

The UK leaving the EU will almost certainly mean that the Charter of Fundamental Rights (the Charter) will no longer directly apply to the UK or to Scotland. Other sources of EU law, such as Regulations and Directives and other acts of the EU, will also cease to apply, except when they have already been put into domestic law. The UK courts will no longer be obliged to follow the judgments of the Court of Justice of the European Union, or be able to refer questions of law to the Court for clarification in order to deliver domestic judgements.

The loss of the Charter means a reduction in ever evolving human rights protections and remedies in areas within the scope of current EU law, such as privacy, data protection and a fair hearing. Furthermore, without the Charter there is a loss of potential for the fuller protection of social rights and principles contained in the Charter, such as workers' rights, access to social security and healthcare.

Beyond the Charter, Brexit also means the loss of a substantial backstop of protections provided for in EU law against regression to our national laws in areas such as anti-discrimination, environmental protections and consumer rights, and the wider social protections provided for by the EU.

Even where current standards are replicated in UK laws, through for example, the Great Repeal Bill, they remain vulnerable to future repeal or regression and will not necessarily keep pace with any progressive developments at an EU level.

What's at stake from EU law?

EU law has advanced rights protections in areas such as:

Workers rights

For example, the EU Working Time Directive gives workers the right to a minimum number of holidays each year, rest breaks and a right to work no more than 48 hours per week. The Pregnancy Workers Directive and Parental leave Directive have also been put into domestic law providing minimum standards for family leave rights, adoption, shared parental leave and pay.

Data protection

The EU Data Protection Directive 95/46/EC resulted in the Data Protection Act 1998 (DPA) which means government bodies and organisations handling personal data have a duty to protect it from misuse or exploitation. Further case law has challenged parts of the DPA, for example where an internet service provider was collecting and handling information about a claimants internet usage for advertising purposes. A new EU data protection regulation is to come into force in 2018 and the extent to which it will be followed in the UK is unknown.

Privacy

In interpreting data protection directives the Court of Justice has found that where personal data is collected in order to prevent or detect crime, strict safeguards are required to protect individual rights.

Equality

The EU's Equal Treatment Directives form the basis of the Equality Act which consolidated equality law in the UK. EU law has enhanced protections in areas such as extending the scope of gender equality to discrimination against transsexual people, protecting against age and gender discrimination through providing different retirement ages for men and women was discriminatory, and extending discrimination by association in the case of carers.

Victims' rights

The Victims' Rights Directive ensures victims of crime and their family members have the right to information, support and protection, as well as procedural rights in criminal proceedings and training for professionals in contact with victims. It informs the Victims and Witnesses (Scotland) Act 2014.

For a detailed analysis of what's at stake please see the position papers developed by the Scottish Universities Legal Network on Europe- <https://sulne.ac.uk/>

European Convention on Human Rights and the Human Rights Act

Separately, the fundamental pillar of human rights protection in our law, the European Convention on Human Rights (ECHR), incorporated through the Human Rights Act (HRA) and enshrined in the Scotland Act, is also at peril.

The UK government has previously proposed repeal of the Human Rights Act and replacement with a British Bill of Rights and furthermore, has mooted the idea of complete withdrawal from the ECHR. No democracy has ever before taken such a step.

EU membership, and the application of the Charter, at a minimum, previously acted as a deterrent to withdrawal from the ECHR and provided a further layer of consolidated protections.

What's at stake from the ECHR?

The European Convention on Human Rights and Human Rights Act have advanced the protection of rights in a wide range of areas. Examples include:

- Challenging unsuitable living conditions for a severely disabled person
- Protecting the privacy of an individual from disproportionate state surveillance
- Placing restrictions on doctors placing "Do Not Resuscitate" notices
- Restoring the family life of a boy with autism and learning disability
- Advancing the protections of people with mental ill-health including the right to challenge treatment, to challenge detention and to enjoy a private and family life while in hospital
- Providing positive duties to protect individuals against the risk of suicide
- Providing positive duties to take seriously and thoroughly investigate claims of rape and sexual assault
- Holding the Ministry of Defence accountable for failures to protect soldiers in combat with suitable equipment or training

Beyond the courtroom, the duty under the Human Rights Act for all public authorities to act compatibly with Convention rights has contributed significantly to the ongoing development of a human rights culture in Scotland - this means putting people's rights at the heart of practice in schools, hospitals, care homes and all public service delivery.

For more examples of the benefits the Human Rights Act and the ECHR have brought to the UK please see Rights Info's "What human rights do for us":

<http://rightsinfo.org/infographics/what-human-rights-do-for-us/>

For examples of Scotland advancing a human rights culture in practice see Scotland's National Action Plan on Human Rights: <http://www.snaprights.info/>

RESPONSIBILITIES

Whilst the focus of Brexit negotiations will be our trading relationship with the EU, rights protections are intrinsic to this process and must not be forgotten, eroded or left at a standstill as a result of our newly negotiated relationship, whatever that may be.

This means the full retention and ongoing progressive development of human rights and broader social protections needs to be secured for both now and the future.

Furthermore Scotland must give serious consideration to what it can do within devolved competency to strengthen the protection of rights in the future.

Progression not regression in enhancing our laws

In December 2015 the First Minister of Scotland recognised that making international human rights treaties enforceable in domestic law is an “important part of the debate in ensuring people’s rights are at the heart of everything government does.” This includes treaties such as the Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities, International Convention on Economic, Social and Cultural Rights - all ratified by the UK.

In May 2016 it was set out that the government “will work with civic Scotland to establish a set of social and economic rights for all of Scotland’s citizens. By valuing and strengthening human rights, we can empower citizens and encourage better government.”

This is a clear recognition that even now, within current devolved competency, more can be done to strengthen the legal protection and enforceability of rights, as well as their implementation in practice.

As our constitutional framework evolves there is an opportunity for the greater protection of rights, beyond limited ECHR rights, which are civil and political in nature. By enshrining economic, social and cultural rights such as the right to an adequate standard of living and rights to housing, health and social security, Scotland would have a more complete and robust framework for assessing legislative and policy measures aimed at addressing poverty and inequality.

This meeting supports a call for all actors including civil society, the public sector, MSPs, councillors and the Scottish Government, to stand up for human rights in the period ahead and ensure they are not a casualty of our changing relationship with Europe, but rather are central to our constitution, laws, policies, practice and culture in a progressive Scotland.

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