3rd International Conference

on Public Policy (ICPP3)

June 28-30, 2017 – Singapore

Panel T15P03 Session1

Europe after Brexit

Title of the paper

Human Rights under stress: Brexit and the implications for UK and EU human rights policy

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Date of presentation

28 June 2017

Introduction – the path to Brexit

'Britain [has] struggled to reconcile a past she could not forget with a future she could not avoid', so the broadcaster and journalist Hugo Young once said [Young, 1998, 1]. So, it can be said for the UK's approach in regard to the Brexit referendum of 2016 and its approach to dealing with the EU in the aftermath. For those campaigning for the UK's exit from the EU in the referendum and subsequently for the Conservative UK government, encouraged by its own erstwhile Leave campaigners, human rights was always a key aspect of Brexit. Of the EU's four freedoms[1], which are fundamental pillars of the EU's single market, that of the free movement of people was seen by Leave advocates as having opened the floodgates to mass immigration from elsewhere in Europe[2] with supposed harmful social and economic implications for the UK's citizens. Interestingly, those advocating Brexit have not been prepared to acknowledge that so much of the identity and what constitutes the EU is captured by reference to these freedoms and the broader human rights framework: a framework member states have, by and large, accepted and incorporated into their laws. The European Commission's declaration of 1968 that 'Europe is not only customs tariffs…[i]t must also be the Europe of the peoples, of the workers, of youth, of man himself' [quoted in Williams 2004, 174] is as relevant today as it was nearly 50 years ago.

The immigration issue was, of course, only one of many issues which were distilled into a simple choice between remaining in the EU and leaving and UK citizens were not provided with any guide as to what this might mean. The success of the Leave campaign and the 'demonising' of the human rights linkage to the EU has another internal, UK, dimension. Both the Remain campaign and, well before that, previous governments have failed to support both the EU and the involvement of EU laws, notably the European Convention on Human Rights (ECHR) in the UK's human rights framework. This view of the European influence over UK human rights law and policy was fed by a number of popular misconceptions and representations, including about the nature and strength of the link between the UK courts and the European Court of Human Rights (ECtHR), whose human rights are to be protected, and a failure to see international human rights as minimum standards [Ziegler, Wicks and Hodson 2015, 5]. The ECHR and the Charter have been criticised for relying on enforcement through international courts and bodies. Yet this legal constitutional

approach by the EU by design had sought to provide 'the advantages of distance and, to an extent, a necessary isolation from the immediate political fray… in order to ensure a degree of objectivity and protection for the individual' [O'Neill 2014].

This long campaign of undermining of rights in the UK dovetailed nicely with a fairly constant campaign by both major parties to, at best appease Eurosceptics and, more troubling, to seek to shift the responsibility for UK policy problems on to the EU [Gearty 2016a]. Even before the referendum, the Conservative government had announced its intention in 2014 to replace the Human Rights Act (HRA) with a Bill of Rights which would seek to remove the influence of the ECHR and be a narrower rights instrument. The years of undermining by both the UK Conservative and Labour parties of both the European Convention on Human Rights (ECHR) and its influence in the UK[3] stands in stark contrast to the roles played by both the UK parliament and the judiciary in incorporating EU law into the UK's human rights framework, most obviously through bringing the ECHR into UK law through its own HRA. This 'bi-polar' attitude of the UK towards EU human rights had begun with UK officials helping to draft the ECHR well before the UK joined the EU [Dickson 2011, 343].

Sovereignty in question

This paper, in addressing the human rights implications of the Brexit referendum decision, focuses upon the UK but recognises that the unprecedented move of a member state to leave the EU also has serious ramifications for the EU's human rights framework. Given the importance of the fundamental freedoms to what the EU sees as its identity, existence as well as its future, how the Brexit process impacts the UK human rights framework has the potential to have implications for the maintenance and promotion of the EU's own framework of human rights related laws and regulations. The departure of the 'awkward but effective partner' [Menon & Salter 2016,1298-1301] will create much uncertainty not just for the UK but for the remaining 27 EU member states and the EU's current and future arrangements.

The debate around what kind of Brexit the UK will pursue, how will the EU respond, and the implications for human rights in the UK reveals competing narratives about what sovereignty means. Should sovereignty be framed internally within the UK or

externally with reference to the UK's historical regional and global engagements? Legally, the scepticism about the UK's engagement with the EU around human rights comes from both the doctrine of parliamentary sovereignty and the dualist approach of the UK towards international treaty law whereby international law only becomes effective once enacted into domestic law [Gragl 2015, 278]. Politically, the sceptics see human rights as 'foreign' and in this case grafted on to UK law and policy by the EU [Wicks, Zeigler and Hodson 2015, 506]. This paper will argue that in interpreting Brexit and human rights in terms of competing narratives of sovereignty, this does not mean that human rights can ever be seen to be above politics. Rather it is about two competing views of sovereignty where one references sovereignty from both within and outside the state and the dynamic two-way legal and political relationship that has developed between the UK and the EU. The other view, identified with those advocating a 'hard' Brexit,[4] is a rather cynical or naïve one believing that political sovereignty starts and ends with domestic political institutions (the national rather than those 'difficult' regional ones). To believe that these institutions alone could set the human rights standards for the people without reference to the historical and institutional connections with the EU as well as globally seems to be the height of wishful thinking.

This approach, including that of the Prime Minister[5] at least before the recent General Election, is based on the false premise that to reclaim the UK's political sovereignty requires the removal of the UK's legal constitutional links with the EU. This is a politically constructed misunderstanding of both the nature of the relationship between political sovereignty and legal constitutionalism and of that between the UK's human rights framework and the EU. This is based upon a misperception that internal political sovereignty can be attained without reference to outside influences and that 'taking back control' of UK sovereignty was something that could be achieved by leaving the EU. It has also failed to recognise how the EU works whereby states pool and share their sovereignty and that, in doing so, they do not cede sovereignty to the independent EU institutions [Fossum 2017, 3; Gordon 2016, 340-41].

One irony in this approach has been that the attributed supremacy given to the referendum has arguably subverted the sovereignty of the parliament at Westminster [Barnett 2016, 5]. Another is that many who argued for the taking back of political

sovereignty by leaving the EU were not prepared to see that sovereignty exercised by the UK parliament at Westminster but rather exclusively by the executive government.[6] Equally it could be argued that while Prime Minister May was arguing for UK's sovereignty over its affairs as a result of Brexit, she seemed to indicate that a strong showing in the General Election of June 2017 would not only give the government a stronger negotiating position with the EU but strengthen its position vis-à-vis the parliament.

The Supreme Court having decided in November 2016 in the case of *R(Miller) v Secretary of State for Exiting the European Union* that is a matter for parliament to decide to exit, the House of Commons duly obliged in March 2017. Importantly, the case recognised that only the 1972 *European Communities Act* (UK), through which the UK joined the EU, afforded rights such as the free movement of people, European citizenship, and access to the European Court of Justice and therefore it was only the parliament which could remove them.

UK human rights and EU embeddedness

A complete withdrawal from the EU through the repeal of the *European Communities Act 1972 (UK)* reveals the complex nature of the institutional structure protecting human rights in the UK and how embedded EU human rights law is within that legal framework. By the time that the UK acceded to the European Community Treaties, the principles of the transfer of a certain degree of constitutional power from the Member States to what is now the EU were well-established. The superiority of what was then EC law over UK law was clarified in the 1990 case of *R v Secretary of State for Transport, ex p Factortame Ltd* (the Factortame case)[7] where the House of Lords effectively agreed with the European Court of Justice ruling that if a rule of national law precluded a national court from granting interim relief in a case concerning EC law, then the rule of national law had to be set aside. While legally the relationship between UK and EU law was once termed by Lord Denning in the *Bulmer v Bollinger* case of 1974[8] as European law being 'an incoming tide..flow[ing] into the estuaries and up the rivers', it is arguable given the UK lawyers' involvement in the European courts and the development of their jurisprudence that the relationship is more of a two-way one [Harvey 2016, 289].

The withdrawal would mean that the UK would no longer have to comply with the human rights obligations as contained within the EU treaties, the General Principles of EU law, including those dealing with fundamental rights, or EU directives and regulations protecting fundamental rights. The Charter of Fundamental Rights (the Charter) would not apply and the Court of Justice of the European Union (CJEU) would probably cease to have any jurisdiction within the UK nor refer questions of law to that court. However, the matter is open as to the status of existing precedents from the judgments of the CJEU or the European Court of Human Rights (ECtHR) [Joint Committee on Human Rights 2016, 27]. The ECHR is the subject of a separate agreement with the EU and would remain in effect after Brexit. However, the Prime Minister is on record, when campaigning for her job, that she would like to remove the ECHR's jurisdiction [Patrick 2016, 15]. The most recent Conservative Election manifesto has stated that the UK would remain a signatory of the ECHR 'for the duration of the next Parliament' [The Conservative and Unionist Party 2017, 37].

Human rights law and policy in the UK has a direct relationship to the constitutional arrangements between the UK and the EU as is the case with other states of the EU. Historically, it was the courts of certain Member States who were only prepared to accept the supremacy of EU law and the direct effect in the national legal orders if there was to be constitutional protection of basic human rights. For the UK to completely delink from the EU's involvement in UK law, whether that includes EU law, institutional engagement, EC Directives or the jurisprudence of EU courts, will not be a simple matter. Current UK human rights law and policy is the result of a cross-fertilisation of three discrete, but inter-related, regimes being the general principles of EU law, Convention rights recognised by the ECHR and the *Human Rights Act (UK)* 1998, and the common law [Beale, 2016, 273]. From a history of over 40 years of close engagement, there are many legal 'ties that bind' and the Brexit negotiations will not just be about the UK seeking to remove itself from the EU in terms of adherence to its norms, rules, laws and policies. What results from the negotiations will need to interpreted in terms of a new legal relationship which will be shaped by the political and economic dimensions as well as what is possible legally.

While EU human rights law is undoubtedly embedded in UK law, the argument made by the Leave campaigners that the ECHR effectively dictates UK human rights law is false. The ECHR states that the Member States 'shall secure to everyone within their

jurisdiction the rights and freedoms defined in Section 1 of this Convention' (Article 1). The ECtHR, when confronted with the argument about the obligations of states, has consistently held that states could decide at their discretion how they wish to discharge their duties [Tomuschat 2014, 169]. It was the UK which made the ECHR at least partially internally applicable and then in 1998 with the HRA, the UK effectively obligated UK authorities to take into account the ECHR and the judgments of the European Court of Human Rights in interpreting and applying domestic UK law. The result is that the ECHR serves as a guideline in the interpretation of UK law and UK laws must be compatible with the Convention. In each case before UK Courts, the ECHR rights form part of the set of standards relevant to the court's assessment [Feldman 2004, 99].

The Charter seeks to reflect the importance of certain EU principles including the right to the protection of human dignity and personal integrity, expression, the right to equality before the law and the principle of 'good administration' and environmental rights. With the Amsterdam Treaty of 1999 and the Lisbon Treaty of 2009 fundamental rights can now be considered a founding element of the EU. While some Charter rights are also found in the ECHR others, notably some social and economic rights, go beyond the ECHR [Joint Human Rights Committee 2016, 8]. These include the right to fair and just working conditions, the right to preventive healthcare, the right to good administration, the right to access to documents and a right to privacy.[9] By the time the Charter came into effect in 2009 the UK had secured an opt-out from its operation. This has not been the end of matter, however and, while still subject to some argument, the Supreme Court in a 2012 case, *Rugby Football Union v Consolidated Information Services*[10] confirmed that the Charter takes effect in national law, 'binding Member States when they are implementing EU law'.

The UK's HRA provides domestic protection of human rights but has been criticised for giving an expansive effect to both the ECHR rights and, particularly through section 21 (1), to the jurisprudence of the ECtHR. The two main criticisms are that it shifts political power from the executive and the legislative branches to the judiciary and that in so doing it undermines parliamentary sovereignty [Ewing 1999, 79]. The HRA is, in fact, a compromise document in that, like many other bills of rights, the courts can declare legislation to be incompatible with the ECHR but it cannot dis-

apply legislation. Importantly, UK courts in determining a question related to a ECHR right would have to 'take into account' but not necessarily follow existing law from the ECtHR [Dickson 2011, 351].

The UK Conservative government has postponed repeal of the HRA and enactment of a replacement, and probably diluted, Bill of Rights until after Brexit. In any event, the Scottish Parliament would need to consent to the repeal of the HRA and this is unlikely in the near future while, in Northern Ireland, concerns have been raised that the repeal of the HRA would breach the 1998 Good Friday agreement and violate an international treaty with the Irish Republic.[11]

Regional locations of human rights stress: the devolved jurisdictions

While legislation in the policy areas of greatest relevance to human rights are reserved to the parliament at Westminster, Brexit is likely to have a variable impact across the UK's regions and concerns have been raised from those with devolved powers. Of these, the majority in Scotland and Northern Ireland voted Remain in the referendum while the majority in Wales voted to Leave. Despite a report by the UK Institute for Government [Paun and Miller 2016] stating that all four leaders (the Prime Minister and the regional First Ministers) needed to agree on the 'core planks' of the UK's negotiating position before Article 50[12] is triggered, to avoid a 'serious breakdown in relations between the four governments and nations of the UK', the government at Westminster effectively went its own way on March 29.

Northern Ireland is a particular case where the implications for human rights from the Brexit negotiations will be profound. The nature of the border between Eire and Northern Ireland, and whether there is a custom border and restrictions on the flow of people and goods, will be determined by the final Brexit agreement. More importantly, the ECHR was an important part of the Good Friday Agreement between the parties to the sectarian conflict and that agreement has an international dimension in that Eire is also a party and has subsequently incorporated the ECHR into its legislation. The defeat of those seeking reunification of Ireland was 'masked in the language of victory on the human rights front' with commitment to the ECHR [Gearty 2016a, 183]. Should the UK seek to withdraw from the ECHR, taking with it Northern Ireland, then there is strong chance that the conflict might re-emerge. Sinn

Fein has recently done well electorally and with problems within the shared government in Belfast, a hard Brexit would increase the chances of a push for reunification with Eire.

Scotland, where the independence referendum of 2014 was narrowly defeated and where the Scottish National Party (SNP), still with a great majority of the Scottish seats in Westminster despite its reversals at the 2017 General Election, has made it clear that it would like to negotiate to remain a part of the EU. Scottish First Minister Sturgeon of the SNP has indicated that her government would like to acquire additional powers, such as over international trade and immigration, as part of the Brexit negotiations. Even before the SNP's reversals in the recent election, the UK government's Brexit Minister Davis dismissed these SNP demands saying that the arrangements to leave the EU would be a 'United Kingdom deal' [Brooks 2016].

Rights under stress? Whose rights?

Together with the stress placed upon the UK's human rights framework by the possibilities surrounding the nature and extent of the UK's departure from the EU and its institutions, there are number of particular rights where the stress is both more direct and immediate. Foremost amongst these since the Brexit decision have been those relating to the *residence rights* of those EU citizens living within the UK and those UK citizens living elsewhere within the EU.[13] The plight of these people has been raised with the government with concerns that unless particular provision is made for each group of people, they will each lose certain residence and related rights through no fault of their own.

With regard to the EU nationals living in the UK, one of the 'Brexiteers', Trade Secretary Liam Fox, has referred to the EU nationals living in the UK as one of the 'main cards' in the Brexit negotiations [Elgot 2016]. This raises the possibility that the UK government could seek to use the uncertainty over their residency and rights as a bargaining chip with the EU and has been criticised by the UK parliament's Joint Committee on Human Rights (JCHR) which has called on the government to frame the plight of these people within a broader call for a 'clear vision' as to how human rights will be affected by Brexit [Holcroft-Emmess 2016, Joint Committee on Human Rights 2016, 5]. Against the background of the Conservative government's earlier

plans to replace the HRA with a diluted Bill of Rights and the successful Leave campaign's anti-immigration stance, there is some concern that the government is focusing on what have been called 'national rights', rather than human rights for all [Hopgood 2016, 1]. In the months after the referendum the government was criticised for focusing on would seem to be on 'fewer rights for fewer people' [Patrick 2016, 7].

Most of these rights are found in the EU Citizens Directive 2004 [Directive 2004/38/EC] which relates to the free movement rights and residence rights of employed and self-employed people, students and economically inactive people. While permanent residence is available to these people if they have resided in the host country for a period of five years, they need to have exercised their 'treaty rights' during that time. The rules are complex and it is likely that matters will need to be decided on a case by case basis. Even the argument that these EU rights are somehow protected as 'acquired rights' has been brought into question with the House of Lords European Union Committee concluding that any such doctrine of acquired rights is limited in both scope and application [House of Lords 2016, 4]. Should there be forced expulsions of certain residents and if there is any explicit discrimination on the basis of nationality then this would likely be in breach of the ECHR's Article 14 on the non-discrimination in the enjoyment of the Convention's rights [Gearty 2016b].

The UK Parliament's JCHR made reference in a recent report to the right to family life which, while protected under ECHR Article 8 was not an absolute right and could be affected by Brexit where protection was not otherwise available under EU law. This would likely result in individual cases before the courts as people seek to avoid deportation [Joint Committee on Human Rights 2016, 4]. As regards UK citizens living elsewhere in the EU, apart from the remote possibility of deportation, questions remain as to their entitlements to the EU health care card and other social security benefits, especially if they have to visit the UK and seek to return to live in the EU. Many of those classified as economically inactive (such as retirees) would need to return to the UK should these benefits be withdrawn. They would then face uncertainty as to benefits in the UK under the 'habitual residence test' [Joint Committee on Human Rights 2016, 18]. Given the importance of the immigration issue for the Conservative government, this is likely to be a difficult area of

negotiations for the UK with the remaining 27 EU States recently articulating that as to both those EU citizens in the UK and those UK citizens elsewhere in the EU, there should be 'effective, enforceable, non-discriminatory and comprehensive reciprocal guarantees' to safeguard the status and rights derived from EU law at the date of the UK's withdrawal [European Commission 2017, 2].

In terms of immigration more generally and the EU's Dublin Framework on asylum applications, concerns have been expressed that without the 'reinforcing floor of minimum shared EU standards', a regressive race to the bottom might begin in the UK [Patrick 2016, 53]. Despite the Charter still applying, the UK government has already moved to circumscribe access to fair hearings for those subject to immigration control and EU standards adding to concerns that, to the extent that they have any reference in a post-Brexit UK, such standards might be considered by the government to be more a 'ceiling rather than a floor'.

Concerns have been raised that any decoupling of UK law from those underlying EU directives could negatively impact *workers rights* as the EU directives have been 'more worker focused' than the UK laws [Murkens and Trotter 2016, 7]. These directives protect information and consultation rights regarding redundancies and the transfer of undertakings and provide for collective representation in European works councils and European companies. There are EU norms such as the Working Time Directive (with its minimum health and safety requirements and which enshrines 20 days holiday per year) and the taking of parental leave which will have no effect upon the UK leaving the EU. Some of these EU derived worker rights may well survive Brexit given that reforms are unlikely to involve wholesale rejection of EU principles and rules.

The political and economic reality of the UK seeking an ongoing trade agreement with the EU, its biggest export market, could mean that the UK will inevitably have to accept a certain level of EU-compatible workplace regulation [Burd and Davies 2016]. It should be noted, however, that not all EU law is worker-friendly and elements of EU 'soft law' in the form of country specific recommendations allow for non-unionised workplace agreements in the UK. National trade union freedoms regarding collective action have also arguably been undermined by EU freedom of movement provisions and the EU's macroeconomic policy [Novick 2016].

Fears have been raised that with Brexit and the removal of the Charter and the EU Equality Framework of directives, there will be less support for the *equality and antidiscrimination rights* of ECHR's Article 14, as found within the *Equality Act 2010* (UK). This diminution of legal support, in terms of EU legal underpinning and reduced access to the EU court system, together with the rise in xenophobia that came in the aftermath of the 2016 Referendum, will mean that vulnerable groups will be more exposed and less protected. Much of the UK antidiscrimination legislation was introduced to give effect to EU legislation (such as the EU Equal Treatment Framework of 2000) and has been strengthened by decisions of the Court of Justice of the EU. The EU's laws and principles are broader than those in the UK's *Equality Act 2010* whose positive equality duty upon public bodies is about the procedural promotion of equality of opportunity rather than seeking to address socio-economic inequalities. Without the added protection of EU law in this area, UK laws provide little protection against parliaments enacting future antidiscrimination legislation or interpreting existing legislation without reference to equality concerns [O'Cinneide, 2016].

There have been calls by the Women and Equalities Committee of the parliament for the inclusion of an equality clause in the Great Repeal Bill to empower both the UK parliament and the courts to declare whether new laws are compatible with the existing equality principles [House of Commons Women and Equalities Committee 2017, 10; Collins 2017a]. The committee also advocated the setting up of an equality strategy and seek to ensure that current equality projects, such as around maternity leave and equal pay, continue to receive funding once the EU support ends.

Brexit is also likely to impact a number of rights secured through the National Health System and which indirectly affect people's ability to exercise their *right to health*. Changes to the immigration system may well adversely impact on the capacity to attract highly skilled and less skilled workers for the health and social care sector given there are already shortages. The UK Charities working in the social care sector received some 200 million pounds from the EU since 2014 and without this funding will need to look to the UK government in the future if they are to continue their work [Hughes 2017]. The removal of the EU's Working Time Directive might provide for greater flexibility but will also affect the current maximum hours worked [Simpkin and Mossialos 2017, 478]. EU laws which have facilitated mutual recognition of

professional qualifications, so important for health professionals coming into the UK from elsewhere in the EU, will be lost as will the European Health Insurance Card allowing UK travellers to access state provided health care elsewhere in Europe. The UK is less likely to be part of Europe-wide public health initiatives once out of the EU [Majeed 2017] and there will be a regulatory cost to the UK should it seek to replicate some of the EU regulations and directives that protect the right to health. At the same time, the UK will probably need to provide medical care for those retirees and others living elsewhere in the EU who currently enjoy EU health care benefits.

Other EU directives which will no longer have effect include those relating to water quality, both for drinking and bathing, environmental pollution standards and tobacco. While the EU has moved beyond EU standards in some cases, notably tobacco, being outside the EU will make the UK a target for corporate interests to seek to lower standards in some areas of environmental health. These pressures to remove protections could be increased as the UK finds itself facing economic challenges after Brexit [McKee and Galsworthy 2016, 4].

Another area of rights where recent EU case law has provided added protection has been in relation to the right to privacy in the context of *data protection and state surveillance*. For example, in a 2015 case against Google[14], the UK Court of Appeal applied the Charter and ruled that recovery for damages of nonmaterial loss could be made against Google for having collected private information about the claimants' internet usage and offering it to advertisers. In doing so, the Court ruled that a provision of the *Data Protection Act* 1998 (UK) which prevented the claimants from doing so was not to be applied. The CJEU has also held that the EU data retention Directive 2006/24 requiring telecommunications service providers to retain such data to combat crime was not compatible with Articles 7 (respect for private and family life) and 8 (protection of personal data) of the Charter. Again, while these rulings will have effect in the UK post-Brexit, there is some doubt as to how compatible UK law will be once it leaves the EU.

Disentangling from the EU: the Great Repeal Act and UK human rights

The UK government, in seeking to disentangle itself from those EU laws which have found their way into UK law, has set out a series of proposals which will end in the

Great Repeal Act. As well as EU law and Directives, there are something like 33 different European institutions which add to UK law and which relate to a vast range of day-to-day activities within the UK. This Act will repeal the *1972 European Communities Act* (UK)[15] and, importantly, transfer all EU legislation into UK law to give the government and the parliament time to decide what to keep and what to repeal. Parliament will then be able to amend, repeal and improve these laws as necessary after Brexit has been concluded at the end of March 2019.

Given the sheer volume of legislation that is affected and the limited time period, one problem is that the government may seek to use secondary legislation rather than primary legislation. This will not be given the same level of parliamentary scrutiny and would also include what have been called 'Henry VIII clauses' which allow legislation to be impliedly or expressly amended by subordinate legislation or executive action. This is matter of some concern given that this would be used by the government to choose which elements of EU law to keep or replace without opening this up to parliamentary scrutiny, possibly impacting rights such as around immigration and workers' rights [Collins 2017b].

The nature of the Great Repeal Bill and what it might mean for human rights was highlighted by the Joint Committee on Human Rights (JCHR). In calling for the early publication of the Great Repeal Bill, the JCHR acknowledged that without obligations under EU law fundamental rights could not be entrenched under the UK constitution and existing rights could possibly be repealed by secondary legislation [Joint Committee on Human Rights 2016, 6]. The General Election intervened before a Bill could be presented to the Parliament and in the wake of the government's shift to minority status, the Labour opposition has flagged that it will seek to defeat the Bill when it comes before the Parliament and instead have the UK negotiate tariff-free access to the EU and then legislate after that [Elgot 2017]. Labour well knows that access to the single market will not be accepted by the EU unless the UK also accepts the EU's four freedoms, as given in the European Council's statement if 29 June 2016 [European Council 2016]. The new minority UK government may well be forced to soften its approach to certain rights issues, such as those relating to residence rights, in order to pass the Great Repeal Bill through the parliament.

Concluding comments

The human rights debate around a post-Brexit UK is framed by competing narratives of political sovereignty. On the one hand, there is the internally-referenced position of those promoting a hard Brexit and seeking disengagement from the EU's human rights framework and on the other, an externally-referenced one which acknowledges the historical legacy of engagement with the EU and the permeable nature of the UK's political sovereignty. The Conservative government's embrace of a hard Brexit position, at least before it moved into minority status after the 2017 Election, reflects a politically constructed misconception of political sovereignty and a convenient misunderstanding of how the EU's legal constitutionalism has been developed. This approach, and the government's fixation on immigration, has placed additional stress upon particular rights and has the potential to limit the nature and scope of rights that will be protected in a post-Brexit UK.

The UK's departure from the EU will not mean the end of EU influence over UK law and policy given the nature of those legal and institutional ties that have developed over the past 40 years. In particular, the ECHR, as distinct from the Charter, will still be relevant to UK human rights law and the ECtHR will still have some jurisdiction and it can be expected that the UK courts will take note of its jurisprudence. The residual influence of EU human rights law and policy will remain regardless of how hard the UK government seeks to make its departure. Regardless of how comprehensive the UK government will seek to make the Great Repeal Bill, questions will remain as to whether the UK can avoid future EU interference in all manner of 'arrangements, values, rights or principles resulting from EU membership' without specific legislation [Elliott, 2016]. Try as the UK government might, in this globalised world law and policy cannot be placed 'back into its national box' [Murkens and Trotter 2016, 14]. Whatever the outcome, the national institutions will remain somewhat open to external influences, especially from those states and institutions with which there has been, and will likely continue to be, a close association. This does not mean, however, that rights protection will not be undermined by a government seeking to resist these pressures.

It is too early to tell how the shock result of the June 2017 UK General Election will affect the Conservative government's approach to negotiating Brexit. The Election

was supposed to be a Brexit election for Prime Minister May delivering an enhanced majority to strengthen her negotiating hand, both with the EU and within parliament. Human rights in a post-Brexit were not given much exposure in the campaign but the terrorist attacks on election eve led the Prime Minister to say that human rights laws would not be allowed to get in the way of new restrictions on terror suspects [Mason and Dodd 2017] while Labour responded by referring to the need to protect democratic values including through maintenance of the HRA. The resultant Conservative minority government with the support of the socially conservative Northern Ireland Democratic Unionist Party (DUP)[16] may well complicate the UK's negotiating position but will almost certainly weaken it. It is too early to know what concessions the DUP might exact from the Conservatives but the UK position on the Eire/Northern Ireland border may soften and Northern Ireland may be able to secure compensation for the loss of EU subsidies.

Should the Conservative government persist with a hard Brexit, there are concerns that the UK's focus on what are human rights worth protecting will narrow as it moves away from the EU. At a time when local and global challenges are pointing to the preservation of a more expansive notion of rights, notably to include economic and social rights, the UK may well be moving post-Brexit into a more isolationist focus on 'national' rights, including some and excluding others from protection. The indications so far from the UK government is that its focus is on the economic (and mainly trade) rather than the political or social dimensions when it comes to considering their future relationship with the EU. This ignores the place that rights have within the EU's view of itself and the very development of its legal constitutional approach to rights and the embeddedness of these fundamental freedoms within UK law.

Early indications from the negotiations reveal the EU reportedly taking a firm line on addressing residence and related rights for EU citizens in the UK and those UK citizens living elsewhere in the EU [Grace 2017].[17] While these rights require immediate attention, the loss of much of the EU's legal underpinning of the UK's human rights framework, and particularly if the government repeals the HRA, would reduce, if not remove protections in areas such as workers, equality and health rights. The Conservative minority government has yet to indicate that it is taking a softer line on rights and much depends on whether the government finds it has to

adopt a softer Brexit to seek access to the single market and thereby acquiesce to the EU's four fundamental freedoms. The UK approach is unlikely to change but the possibility remains that the EU will make demands across a range of issues, including on human rights, to the UK as a prospective trading partner and any transitional agreement, in place after the withdrawal agreement could bind the UK to the EU in various ways, including in relation to the individual rights for people within the UK.

What might Brexit mean for the EU? The EU's legal constitutionalism with its principles applying beyond state structures to provide individual rights, as recognised through treaty arrangements, are very much a part of what it is. It has developed from a dynamic process drawing on the 'converging approach' amongst EU member states with the ECtHR acting to validate the minimal human rights standards as identified in the practice within these states [Muller 2016, 1059]. This co-developing of rights standards seems to have been ignored by those advocating a hard Brexit but we can expect the EU negotiators to be alert to the member states' involvement in this process as they reflect on the importance of the fundamental freedoms in identifying what the EU stands for.

For the EU, the departure of a major player like the UK will have an impact in terms of the EU's budget as well as its global influence. In terms of rights, the departure is likely to represent a mixed picture given the UK's influence in advancing human rights more generally in the EU as well as its longstanding democratic values and common law rights. On a more positive note, the departure will possibly provide the EU with an opportunity to advance its integration without the 'awkward partner' [Menon and Salter 2016, 1318]. This may include the EU's further adoption, unhindered, of a more expansive notion of rights encompassing a broad range of economic and social rights.

The departure of a major state that, despite its awkwardness, has been a significant player in the development of human rights standards and related jurisprudence within the EU will undoubtedly have serious implications for the EU. Against the opportunities made available by not having to consult with future recalcitrant UK governments, the EU will be concerned that any diminishing of rights standards in the UK does not act to undermine its own rights regime, particularly if the UK moves

to delink from the ECHR. Losing a major member state which has been reasonably compliant as to human rights will undoubtedly undermine the EU's influence as a norms entrepreneur and driver towards more rights-based policy regionally and globally as well within the UK itself.

In considering the human rights dimension of Brexit, the ensuing debate has become not just about the UK's relationship with the EU going forward into a post-Brexit world but about political sovereignty and how a liberal democracy can strike the right balance between the principles of parliamentary democracy and the rule of law and the role of the courts. As to the EU and its human rights framework, developed by the convergence approach and underpinned by its own legal constitutionalism, this unprecedented departure has thrown open the question of how the EU will seek to protect and promote the rights of the people within its borders and engage around human rights with its remaining 27 members. Already, questions have been raised about the EU's competence in this area given it has been unable to counter Hungary's unilateral withdrawal from accepting asylum seeker transfers pursuant to the Dublin Framework.

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[1] EU's four freedoms are of people, capital, goods and services.
[2] Nicholas Watt, 'EU Referendum: Vote Leave Focuses on Immigration', BBC News, 25 May 2016, http://www.bbc.co.uk/news/uk-politics-eu-referendum-36375492.
[3] These concerns were also fed by certain elements of the UK media attacking the European Court of Human Rights (ECtHR) for certain judgments, in particular *Hirst v The United Kingdom (No.2)* 74025 [2005] ECHR 681, in relation to prisoner voting rights and the failure of the UK government to effectively comply.
[4] A 'hard' Brexit is typified by a view of the UK leaving the EU's single market and completely disengaging from the EU's institutions.
[5] Prime Minister May spelt this out in her speech setting out the government's general approach to the negotiations: Theresa May, 2017, 'The Government's Negotiating Objectives for Exiting the EU': https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech.
[6] In providing for a non-legally binding, pre-legislative, yes-no referendum on a complex set of constitutional relationships and then treating the result as set in stone, the Conservative government has arguably undermined the very parliamentary sovereignty it claimed to be restoring [Michael Bartlet, 2017].
[7] [1990] 2 AC 85.
[8] *Bulmer v Bollinger [1974] Ch401.*
[9] The Charter includes a broader range of rights but its scope is more restricted than the ECHR, applying only to public bodies making decisions within the scope of EU law.
[10] [2012] UKSC 55, paras 26-28.
[11] According to a Northern Ireland human rights organisation, the Committee on the Administration of Justice, the agreement commits the UK government to 'complete incorporation into Northern Ireland law of the European Convention on Human Rights' [McDonald 2015].
[12] Article 50 of the Lisbon Treaty on the European Union is the device by which a member state advises its withdrawal from the EU.
[13] It is estimated there are 3.1 million EU citizens living in the UK and 1.2 million UK citizens living elsewhere in the EU.
[14] *Google Inc v Judith Vidal-Hall, Robert Hann, Marc Bradshaw* [2015] EWCA Civ 311.
[15] The Act's section 2(1) explicitly states that legal acts under the EU Treaties are to be given legal effect in the UK.
[16] Concerns have been raised, even from within the Conservative party, as what this DUP support might mean for the progressing of certain rights such as LGBTI rights including same sex marriage.
[17] Article 50, the withdrawal provision of the Lisbon Treaty, is a part of EU law and must comply with the Charter and general principles of EU law. Though uncertain, this may result in some core EU rights remaining after withdrawal [Tridimas 2016, 313].