



Law Society
of Scotland

Joint Select Committee on Human Rights Inquiry into the European Union (Withdrawal) Bill

The Law Society of Scotland's Response

November 2017



Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

General Comments on the European (Withdrawal) bill Clause 5

The Society's Constitutional Law Committee welcomes the opportunity to consider and respond to the Joint Select Committee on Human Rights consultation: Inquiry into the European Union (Withdrawal) Bill.

We note that Clause 5(4) provides that the Charter of Fundamental Rights is not part of domestic law on and after exit day. Paragraphs 99 and 100 of the Explanatory Notes argue that it is unnecessary to include it as part of retained EU law because the Charter merely codifies rights and principles already inherent in EU law and would therefore form part of that law when it becomes retained EU law. However even if this were the case it would then make no difference if the Charter did form part of retained EU law. This does not, therefore, appear to be a sufficient reason for excluding the Charter from forming part of retained EU law in the same way as other pre exit EU law.

It makes sense for the Charter to form part of retained EU law because it only applies in areas to which EU law applies. We have suggested that the Government should reconsider its decision not to include the Charter as part of retained EU law which would then form part of domestic law on and after exit day. It would at least be helpful to our domestic courts to rely upon its terms when determining the validity, meaning and effect of retained EU law.

Some might argue for the Charter to form part of domestic law for all purposes and quite separate from retained EU law. This would be likely create complications with its relationship to the rights under the ECHR and the Human Rights Act 1998.

Fundamental rights and principles of EU law

We believe it would be helpful if the Government could identify what fundamental rights or principles it considers are retained in domestic law and whether, or to what extent, they are included in the definition of "retained general principles of EU law" in clause 6(7). We note the comments of Dominic Raab MP, the Minister of State in the Ministry of Justice and Robert Buckland MP, the Solicitor General in the debate on the bill on 21 November at col. 970 that an analysis of the sources of rights will be published on 5

December. We hope that notwithstanding if the comment by the Solicitor General that there “is no single definitive list of general principles” col.971 that the sources paper will provide some further clarity.

The fundamental rights and principles which exist “irrespective of the Charter” should be set out in the bill.

Defining "Fundamental rights and principles"

Clause 5 of the bill provides exceptions to the savings and incorporation which are set out in Clauses 2, 3 and 4. The first exception deals with the principle of supremacy of the EU Law and the second exception is the Charter of Fundamental Rights.

Clause 5(4) provides “The Charter of Fundamental Rights is not part of domestic law on or after exit day.” Clause 5(5) goes on to state “Sub section (4) does not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter...”

There is no definition of fundamental rights and principles in the interpretation provisions in clauses 6(7) or 14(1). It appears therefore that "fundamental rights or principles" comprise all those rights or principles which exist notwithstanding the Charter.

Clause 6(7) defines “retained general principles of EU Law” as meaning “the general principles of EU law, as they have effect in EU law immediately before exit day and so far as they –

- (a) relate to anything to which section 2, 3 or 4 applies, and
- (b) are not excluded by section 5 or schedule 1

(as those principles are modified by or under this Act or by other domestic law from time to time).”

Schedule 1 paragraph 5 provides an interpretation which reflects on both clause 5 and Schedule 1:

“(1) references in section 5 and this Schedule to the principle of the supremacy of EU law, the Charter of Fundamental Rights, any general principle of EU law or the rule in Francovich are to be read as references to that principle, Charter or rule so far as it would otherwise continue to be, or form part of, domestic law on or after exit day in accordance with this Act”.

Therefore there is no definition of fundamental rights and principles in the bill and the Explanatory Notes do not provide sufficient information to assist in the interpretation of clause 5.

The Explanatory Notes in paragraph 99 state that “the Charter did not create rights, but rather codified rights in 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. The references to the Charter in the domestic and CJEU case law which is being retained, are to be read as if they referred to the corresponding fundamental rights.”

In paragraph 100 the Explanatory Notes state “Given that the Charter did not create any new rights, sub section (5) makes clear that, whilst the Charter will not form part of domestic law after exit, this does not remove any underlying fundamental rights of principles which exist, and EU law which is converted will continue to be interpreted in light of those underlying rights and principles.

The White Paper Legislating for the United Kingdom’s Withdrawal from the European Union” states:

“2.21 One of the general principles of EU law is respect for fundamental rights, which includes many of the rights we refer to as human rights in the UK. In leaving the EU, the UK’s leading role in protecting and advancing human rights will not change. The EU codifies fundamental rights in the Charter of Fundamental Rights, which has the same legal status as the EU treaties.

2.22 The Charter 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. The ECHR is an instrument of the Council of Europe, not of the EU. The UK’s withdrawal from the EU will not change the UK’s participation in the ECHR and there are no plans to withdraw from the ECHR.

2.23 The Charter only applies to member states when acting within the scope of EU law, so its relevance is removed by our withdrawal from the EU...It cannot be right that the Charter could be used to bring challenges against the Government or for UK legislation after our withdrawal to be struck down on the basis of the Charter. On that basis the Charter will not be converted into UK law by the Great Repeal Bill...

2.25 The Government’s intention is that the removal of the Charter from UK law will not affect the substantive rights that individuals already benefit from in the UK. Many of these underlying rights exist elsewhere in the body of EU law which we will be converting into UK law. Others already exist in UK law, or in international agreements to which the UK is a party..."

The White Paper was correct in stating that the Charter is only one element in the UK’s human rights architecture (para 22)

We recommended that the Government should reconsider this matter and take stock of the deep concerns which are held by many, including the Society, about the potential for erosion of human rights which may occur as a result of removal of the Charter and the creation of difficulties for the UK Courts in interpreting the EU derived UK law in the absence of the Charter.

There is no actual definition of the term ‘fundamental rights and principles’ in the Bill but rather some brief directions on how to find fundamental rights and principle irrespective of the Charter. This however means that one will have to analyse the Charter in order to find out what fundamental rights and principles it contains and then match them against those which exist irrespective of the Charter.

EU Fundamental Principles which are provided for under EU Law.

The following Fundamental Principles in EU law are generally recognised:

Proportionality

Like the principle of subsidiarity, the principle of proportionality regulates the exercise of powers by the European Union (EU). It seeks to set actions taken by EU institutions within specified bounds. Under this rule, the action of the EU must be limited to what is necessary to achieve the objectives of the Treaties. In other words, the content and form of the action must be in keeping with the aim pursued.

The principle of proportionality is laid down in Article 5 of the Treaty on European Union. The criteria for applying it are set out in the Protocol (No 2) on the application of the principles of subsidiarity and proportionality annexed to the Treaties.

Laboratoires Pharmaceutiques Bergaderm SA v Commission of the European Communities Case C-352/98 P. (2000).

For contractual or non-contractual damages claims under Articles 268 and 340 TFEU, there must be an infringement of rights, which is sufficiently serious, and causes loss.

Heidi Hautala v. Council of the European Union Case T 14/98 [1999] ECR II-2463 (Court of First Instance).

The applicant contended that the Council had illegitimately refused to grant access to documents that were not covered by the exemption on public interest. The Court held that the principle of proportionality required the Council to consider partial disclosure. Derogation from the right of access must be limited to what is appropriate and necessary.

Subsidiarity

The principle of subsidiarity is defined in Article 5 of the Treaty on European Union. It aims to ensure that decisions are taken as closely as possible to the citizen and that constant checks are made to verify that action at EU level is justified in light of the possibilities available at national, regional or local level.

Specifically, it is the principle whereby the EU does not take action (except in the areas that fall within its exclusive competence), unless it is more effective than action taken at national, regional or local level.

Federal Republic of Germany v European Parliament and Council of the European Union.

Compliance with the principle of subsidiarity was one of the conditions covered by the requirement to state the reasons for Union acts, under Article 296 TFEU.

Philip Morris Brands SARL and Others v Secretary of State for Health.

Judicial review of compliance with the principle of subsidiarity requires a determination of whether the Union legislature was entitled to consider, on the basis of a detailed statement, that the objective of the proposed action could be better achieved at Union level.

Legal certainty

The concept of legal certainty has been recognised as one of the general principles of European Union law by the European Court of Justice since the 1960s. It is an important general principle of international and public law, which predates European Union law. The principle enforces the requirement that the law must be certain, clear and precise. The legal implications of a particular law must be foreseeable, especially when applied to financial obligations. Laws adopted within the EU must have a proper legal basis.

Legislation in member states must be worded so that it is clearly understandable by those who are subject to the law.

Regina (Drax Power Ltd and another) v HM Treasury and another.

The claimant's request for judicial review was dismissed on the grounds that the exemption in question fell within the scope of European Union law, its removal was justified in the public interest and came within the appropriate margin of discretion.

Bank Austria Creditanstalt AG v Commission of the European Communities Case T-198/03.

Secondary legislation which prohibits disclosure of information to the public must be regarded as covered by professional secrecy. Conversely, where the public has a right of access to documents containing certain information, that information cannot be considered to be of the kind covered by professional secrecy.

Equality before the law

Article 19 TFEU confers power to the EU institutions in order to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Additionally, Article 20 of the EU Charter of Fundamental Rights states that 'everyone is equal before the law.' Further provisions and directives set out that equality must be ensured in specific areas, such as equal treatment of men and women in the workplace. Gender equality has been a key principle of the EU ever since the Treaty of Rome introduced the principle of equal pay for men and women in 1957. Using the legal basis provided by the Treaties, the Union has adopted thirteen directives on gender equality since the 1970s.

Franz Egenberger GmbH Molkerei und Trockenwerk v Bundesanstalt für Landwirtschaft und Ernährung Case C-313/04.

The case considered the validity of a Commission regulation with regards to the duty not to discriminate between producers or consumers within the Community.

'Private Equity Insurance Group' SIA v Swedbank AS Case C 156/15.

The principle of equality before the law requires that comparable situations should not be treated differently and that different situations should not be treated in the same way, unless such different treatment is

objectively justified. A difference in treatment is justified if it is based on an objective and reasonable criterion.

It should be noted that most of these cases relate to actions against the EU institutions and the validity of secondary legislation.

Status of Fundamental Rights and Principles

In our view the “fundamental rights and principles” will be part of “retained EU Law” following exit.

However as we have noted Clause 6(7) provides that “retained general principles of EU Law” means the general principles of EU Law as they have effect in the EU Law immediately before exit day and so far as they –

(a) relate to anything to which Section 2, 3 or 4 applies and

(b) are not excluded by Section 5 or Schedule 1,

(as those principles are modified by or under this Act or by other domestic law from time to time)”.

The intention of the bill appears to provide that fundamental rights and principles are part of retained EU Law however the principle of the supremacy of EU Law applies on or after exit date to the interpretation, disapplication or quashing of any “enactment or rule of law passed or made before exit day”. There is therefore an implicit assumption that a general principle of EU Law is a “rule of law” as provided in Clause 5(2).

However, to the extent that the fundamental rights or principles of EU law which are saved in clause 5(5) fall within the general principles of EU law, the saving appears to have limited effect because of paragraph 3 of Schedule 1 which provides:

"3 (1) There is no right of action in domestic law on or after exit day based on a failure to comply with any of the general principles of EU law.

We look forward to seeing the Government amendments which have been promised by the Solicitor General on 21 November 2017.

(2) No court or tribunal or other public authority may, on or after exit day— (a) disapply or quash any enactment or other rule of law, or (b) quash any conduct or otherwise decide that it is unlawful, because it is incompatible with any of the general principles of EU law".

Justiciability of Fundamental Rights and Principles

Identifying the “fundamental rights and principles” which will be justiciable in domestic law post-exit is not clear nor easy. Clause 5(5) states that removal of the Charter from domestic law does “not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter”. Therefore to ascertain which rights or principles will be

justiciable one must identify what the fundamental rights and principles are which exist irrespective of the Charter. This involves reflection on the content of the Charter.

The EU Charter of Fundamental Rights is a single document that sets out all the fundamental rights protected in the EU. It draws on the ECHR, European Social Charter and other international human rights conventions. It is worded to take into account all previous ECJ case law, however it enjoys a higher degree of legitimacy, as it has been ratified by all Member States on behalf of their citizens.

The Charter contains six categories including: Dignity, Freedoms, Equality, Solidarity, Citizens' Rights, and Justice. It has been binding in the EU since 2009 under the Treaty of Lisbon.

Title I – Dignity (Articles 1 to 5)

The articles uphold the rights to human dignity, life and integrity, whilst reaffirming the prohibition against torture and slavery.

Title II – Freedoms (Articles 6 – 19)

The articles uphold the rights to liberty and respect for private and family life, the right to marry have a family, and the rights to freedom of thought, conscience and religion, expression and assembly. They also affirm the rights to education, work, property and asylum.

Title III – Equality (Articles 20 – 26)

The articles reaffirm the principle of equality and non-discrimination as well as respect for cultural, religious and linguistic diversity. They also grant specific protection to the rights of children, the elderly and persons with disabilities.

Title IV – Solidarity (Articles 27 – 38)

The articles ensure protection for the rights of workers, including the rights to collective bargaining and action, as well as fair working conditions. They also recognise additional rights and principles, such as the entitlement to social security, the right of access to health care and the principles of environmental and consumer protection.

Title V - Citizens' Rights (Articles 39 – 46)

The articles list the rights of citizens of the Union: the right to vote and to stand as a candidate in elections to the European Parliament and in municipal elections, the right to good administration, the rights to petition, to have access to documents, to diplomatic protection and to freedom of movement and of residence.

Title VI – Justice (Articles 47 – 50)

The articles reaffirm the rights to an effective remedy and fair trial, the right of defence, the principles of legality and proportionality of criminal offences, and the right to protection against double jeopardy.

Scope of Character

The Charter operates within the limits defined in the treaties - Article 52(2).

The Charter's preamble states that it "reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case law of the Court of Justice of the European Union and of the European Court of Human Rights."

Therefore it is in the context of this list of background human rights and public international law that the fundamental rights and freedoms which exist irrespective of the Charter can be found. One of the principle sources is the European Convention on Human Rights (ECHR) and the rights which flow from that convention:-

The right to life, Prohibition of torture, Prohibition of slavery and forced labour, Right to liberty and security, Right to a fair trial, No punishment without law, Right to expect a private family life, Freedom of thought, conscience and religion, Freedom of expression, Freedom of assembly and association, Right to marry, Right to an effective of remedy.

The Government has stated in the Brexit White Paper that the UK's withdrawal from the EU will not change the UK's participation in the ECHR and there are no plans to withdraw from the ECHR.

Accordingly the exercise of rights under Human Rights Act 1998 and support for convention rights in the context of devolved matters under the Scotland Act 1998, the Wales Acts 2006 and 2017 and the Northern Ireland Act 1998 will apply as they do currently. Court Actions to assert the human rights of a victim or to address incompatibility or that legislation is outside the legislative competence of a devolved legislature will be possible.

There is more difficulty where the Charter has referred to rights which are not ratified into domestic law and which rest on UN conventions or other international instruments.

Article 6 of the Treaty and European Union (TEU) identifies the three sources of fundamental rights law as:-

1. The Charter.
2. The general principles of EU Law as established by the Court of Justice, the European Union; and
3. The European Convention of Human Rights.

Articles such as Article 23 (equality between men and women) follow the Convention on the Elimination of all Forms of Discrimination against women (CEDAW). Article 24 on the Rights of Child is based on the New York Convention on the Rights of the Child (1989).

Article 25 on the rights of the elderly draws on Article 23 of the European Social Charter and Articles 24 and 25 of the Community Charter on the Fundamental Social Rights of Workers.

Article 26 on the Rights of Persons with Disability is based on Article 15 of the European Social Charter and point 26 of the Community Charter the fundamental social rights of workers and reflects the UN Convention on the rights of persons with disabilities.

Unless these provisions have been ratified into national law they cannot be the basis of action in Courts in the UK but can only be adjudicated on the international plane. In relation to other rights which could have been adjudicated before the Court of Justice the European Union (CJEU) that route will be terminated by Clause 6 of the bill.



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