A. Introduction

1. The outcome of the referendum held on the 23rd of June has resulted in various and competing perspectives in relation to human rights protection. Those UK human rights laws that do not derive from the implementation of EU legislation will not necessarily be affected. But drawing a clear-cut distinction is far from being an easy enterprise.

2. Both EU law generally and European human rights law are deeply entrenched and embedded in the law of the UK in very complex ways. Indeed EU human rights law, as represented in the EU’s own human rights instrument – the EU Charter of Fundamental Rights – is highly inter-twined with European human rights law as represented by the European Convention of Human Rights (ECHR) and the case law of the European Court of Human Rights (Strasbourg Court). Whilst in theory upon Brexit the EU Charter would cease to apply, in practice the position would be more complex. In pragmatic terms it might be better to leave existing domestic legislation implementing EU law as it is, with parliamentary intervention on a case-by-case basis and selected repeal of unwanted legislation.¹

3. So, there are serious difficulties in severing domestic law from EU human rights law because of the way that the various (UK, EU, ECHR) regimes of human rights protection are interlinked. This explains the difficulty in isolating the question of the human rights implications of Brexit from the debate concerning the UK’s relationship with the ECHR and the Strasbourg Court, and the prospect of a British Bill of Rights.

4. It should also be reminded that the result of the Brexit referendum was proclaimed to be binding, despite the fact that the referendum was in fact consultative – and therefore not binding – and that no super-majority threshold was set, which would normally be required under such circumstances. For this and other reasons, the democratic legitimacy of Brexit is questionable.² Furthermore, Brexit encroaches on devolved powers and abrogates individual rights of citizenship embodied in the EU citizenship UK citizens possess. This requires an extremely cautious and sensible approach to future Brexit negotiations with the EU.

5. This contribution will explore these issues, particularly from the perspective of three particular areas: gender and equality policy, children’s rights and external relations. Overall, the key message of this contribution is that the present authors, informed by the work they carry out in the Sussex European Institute and the Centre for Human Rights Research at the University of Sussex, are deeply concerned about the possible erosion of fundamental rights when/if the UK leaves the EU.

B. Gender and Equality Policy

6. In the area of gender equality, the EU has led the way in its development of provisions to address sex discrimination, particularly in the workplace, and there is a serious risk that when/if the UK leaves the EU this progressive legal protection could be eroded.

7. On the basis of the equal treatment principle now embodied in Article 157 TFEU, the EC in the 1970s adopted two directives that would become the bedrock of the Union’s gender equality policy over the next decades: the 1975 Equal Pay Directive (EPD) on the elimination of discrimination in all aspects of remuneration between men and women for work of equal value; and the 1976 Equal Treatment Directive (ETD) on equal treatment in access to employment and working conditions. The principle of sex equality was subsequently extended to the sphere of social security.

8. Since those momentous developments of the 1970s, the ECJ/CJEU elaborated and extended the EC/EU primary and secondary legislation on gender equality.\(^3\) In 2002, as a way of codifying the relevant case law of the ECJ but also the secondary legislation that had been put in place over the previous twenty years, the EU adopted the Equal Treatment in Employment Directive.\(^4\) Two years later, it also extended the prohibition against sex discrimination beyond employment in the access to and supply of goods and services.\(^5\) Substantial amendments of the 1976 Equal Treatment Directive have added definitions of indirect discrimination and sexual harassment. They also require Member States to set up equality bodies to promote, analyse, monitor and support equal treatment between women and men. The EU has also taken significant steps to improve access to parental leave for employees and to provide health and safety protection for pregnant and breast-feeding women at work.\(^6\)

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11. Marking a significant shift away from gender equality in employment and towards a more holistic view of equality as a fundamental right, the EU made legally binding its Charter of Fundamental Rights with the Lisbon Treaty. The Charter contains a basic ‘equality before the law’ guarantee (Article 20), as well as a non-discrimination provision (Article 21) and a reference to positive action provisions in the field of gender equality (Article 23).

12. The expansion of legally codified and enforceable rights in the area of gender equality and non-discrimination have been hugely significant for women in the UK. The UK has implemented the above measures into domestic law, with many provisions in the Equality Act 2010 being based on EU law. It is imperative that the Brexit debate places women’s rights (and worker’s rights) at the centre of its agenda, given that employers will be looking for ways to create a more flexible and cost-effective workforce and that equal rights and maternity rights can be financially costly, particularly for small businesses.

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C. Children's rights

13. Children’s rights in the UK have in many respects been enhanced by EU law and policy. The Inquiry rightly mentions the importance of Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography and Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims. These two Directives enhance greatly the protection offered to children and illustrate a ‘best practice’ at a global level on how child victims of trafficking and/or sexual exploitation should be protected and their welfare ensured. It is crucial to prevent a possible Brexit from jeopardising the value added by these legal instruments to the UK legal system.

14. In the particular field of EU labour and employment law, UK children have been both incidental and direct beneficiaries. As incidental beneficiaries, and as a consequence of their parents’ right to move and reside as workers throughout the EU, children have acquired specific rights, including the right to study and train in the host Member State under the same conditions as nationals of that State,10 and the right to remain in that State once the employment relationship or service provision activity of their parents ended.11 Children have also been indirect beneficiaries of the EU's sex (later, gender) equality agenda, discussed above.

15. Crucially, children’s rights have been directly enhanced by the Young Workers Directive (Directive 94/33/EC of 22 June 1994 on the protection of young people at work, YWD). The YWD imposes on Member States the obligation to protect children from economic exploitation and any work that may have a negative impact on their development or education. In particular, it sets the minimum age of admission to employment at 15, aligns this age with the educational system milestones, limits working time to 40 hours/week and 8 hours/day, and bans night work for children. The YWD also establishes several obligations that employers have in relation to child workers in the light of their vulnerability. These standards have been generally transposed into UK law, particularly into Part II of the Children and Young Persons Act 1933.

16. Although the YWD and its rules may be critiqued for its shortcomings, they overcame a worrying lack of protection for young people in UK labour policy. Yet, there has been a historical resistance from the UK government against the YWD, which is reflected in the four-year extension the UK obtained in relation to the deadline for implementing several (the most important) provisions of the YWD (Article 17(1)(b) YWD). Brexit could thus lead to a dangerous loss of rights for child workers, if the UK law reverts to its previous standards in this field.

17. Although children were already able to potentially benefit from existing EU equality instruments prohibiting discrimination on grounds of sex (discussed above) and race/ethnic background, the Equality Framework Directive allowed children to become explicit and core beneficiaries of EU equality law. This is a fundamental instrument for children: EU law enshrines their right to claim equality (interpreted in a broad sense, Article 3) and a significant degree of protection from discriminatory practices against them at work, above all on grounds of age (but also on grounds of sexual orientation, religious belief and disability).

18. If a possible Brexit eventually leads to weakening the rights and policies described in this section, there is the serious risk of entrapping children in a life-long cycle of low-skilled and low-pay employment, entailing the perpetuation of poor social and working standards, race-to-the-bottom-style competition, and a society unprepared to face the economic, environmental and technological challenges posed to us all in the future.

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D. International trade

19. As part of the EU, the UK is currently party to trade deals with human rights clauses written into them. A moot point remains whether the UK post-Brexit will have to renegotiate key aspects of its World Trade Organisation (WTO) rights and obligations. Some argue that the UK will be in the same position as a country that is seeking to accede to the WTO for the first time,\(^16\) and that it will have to sit down and negotiate its terms of membership with the other WTO Members who will have a power of veto over the outcome of these negotiations.\(^17\) Others disagree:\(^18\) Bartels, for example, argues that with regard to the multilateral WTO agreements the UK’s rights and obligations are not contingent on its EU membership. Following this view, even though the UK will need to submit a new schedule of commitments, objections to certification by other WTO Members will not have any legal consequences, as certification is not required for a schedule, or a change in a schedule, to be legally effective. So, the position of the UK within the WTO after Brexit could remain the same as it is at present.

20. To date the EU has concluded an array of international trade agreements that are different in nature and belong to very diverse contexts, namely purely trade relationships to much broader partnerships of which trade is only one element.\(^19\) Since the 1990s it is a standard policy of the EU’s trade relations with third countries that all agreements include a “human rights” clause which provides that respect for human rights, democracy and the rule of law constitute the basis for the agreement and represent the “essential element” of the agreement on which the reciprocal obligations of the parties are premised, so that human rights violations of a certain scale by one of them can amount to a material breach of the agreement and justify suspension or other counter-measures. In addition, there is also a “non-execution” clause stating that in the event that one party fails to comply with its obligations, the other party is able to adopt “appropriate measures”. There is also an “implementation” clause which provides that ‘the Parties shall adopt any general or specific measures required for them to fulfil their obligations under this Agreement, and shall ensure that they comply with the objectives laid down in this Agreement’.

21. The UK will need to focus on developing a new trade policy that needs to tackle conflicting pressures: on the one hand, maintain the competitiveness of

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\(^{19}\) Full text access to EU FTAs can be found at: http://ec.europa.eu/trade/policy/countries-and-regions/agreements/index_en.html #other_countries; specifically in relation to their labour provisions can be found at http://ilo.org/global/standards/information-resources-and-publications/free-trade-agreements-and-labour-rights/WCMS_115822/lang--en/index.htm#P4_728.
the British economy and thus promote a push for trade liberalisation and, on the other hand, consider the economic expectations of the British electorate motivated by a dislike for trade liberalisation.\textsuperscript{20} Future trade deals of the UK with third countries will to a good extent be determined and shaped by whatever type of EU-UK agreement and model is applied to the future EU-UK relationship, as well as the place of the UK within the WTO, which remains unsettled.

22. With this in mind, two possible scenarios/outcomes can be envisaged:

- the ‘renegotiation’ option;
- the ‘status quo’ option.

The ‘renegotiation’ option

23. A number of trade agreements that are binding on the UK have been concluded exclusively by the EU. After Brexit, these agreements would no longer apply to the UK, meaning that the UK would have to renegotiate them. The UK is also party to many preferential trade agreements with third countries negotiated by the EU and the Member States, which are known as ‘mixed agreements’. These would also have to be renegotiated. The UK could model its trade agreements on the current wording in EU trade deals and should refrain from setting higher standards, as this could jeopardise its trade deals with partner countries. The advantage of such approach is that the UK could build on extensive studies and reports conducted so far on EU trade deals and human rights conditionality. The UK could tailor its trade agreements to the needs and specificities of the partner country concerned. Relying on the EU model could also help the UK in tackling the conflicting pressures adverted to above and address legitimacy concerns both on the international and national plane.

24. Another option for the UK could be to develop its model of trade agreement and human rights conditionality on the basis of the general exceptions provisions under WTO law. However, there is a whole series of obstacles that limit their use for upholding human rights, particularly labour rights and environmental protection.

The ‘status quo’ option

25. Another scenario could be for the UK to remain a party of such preferential trade agreements (containing human rights clauses) to which it is attached.

through EU membership, as it is in its interests to do so. This could be included in the negotiations between the EU and the UK. If so, it would require the ratification of all the other 27 Member States. In practice, this would involve what Koutrakos has termed a ‘rolling over’ argument, according to which the UK would simply agree with partner countries to ‘roll over’ the provisions of existing agreements. 21 However, while at first sight this may seem like a pragmatic option, it would still require some degree of renegotiation, as the provisions of extant agreements would still need to be changed in the light of the new policy context of the UK.

26. It is difficult to state which is the preferable option, given that much will depend on the type of agreement concluded between the EU and the UK and on the views of the EU Institutions and the other Member States. The ‘status quo’ option might be more pragmatic at first glance, but it may prove to be as cumbersome and complex as the ‘renegotiation’ one.

E. Conclusion

27. The EU has long provided a safety net in terms of the protection of basic fundamental rights through its Treaties, its secondary legislation and its case law. If this safety net of legal protection is removed and national law built around EU provisions is repealed, this will leave individuals vulnerable and at risk of fundamental rights abuse. This is true of civil and political rights, but also true of social and economic rights, particularly in the contexts explored above of gender and equality policy, children’s rights and external relations.

28. If and when the UK leaves the EU, it will be more important than ever for the UK to develop a strong human rights policy. It will be crucial to retain the 1998 Human Rights Act or, in alternative (or in addition), introduce a comprehensive and substantial Bill of Rights. At any rate, the UK should remain a committed Party to the ECHR, which would soften any damage caused to domestic human rights law and policy by leaving the EU. Any move towards leaving the ECHR would simply lead the UK to become a pariah state in the international arena. Overall, and without ignoring the UK’s own constitutional arrangements, UK domestic courts will also need to see the jurisprudence of the Strasbourg Court as a ‘floor’, not a ‘ceiling’: UK courts should feel free to develop their own human rights case law,

provided it goes above and beyond what the Strasbourg Court requires.  

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