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## Scottish Universities Legal Network on Europe

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### The Charter of Fundamental Rights and Brexit

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**In your allocated sector:**

- 1. Please explain the key rights that are protected and are therefore at risk following the UK's exit from the EU?**

**For the purposes of considering how Scotland may continue to protect these rights following an exit from the EU and for exploration of further future devolution of powers in certain areas to Scotland, please explain whether the rights fall within areas devolved to Scotland or currently reserved areas.**

**Please also identify, broadly, the main EU and implementing (UK/Scotland) legal sources (and where relevant make reference to other international legal sources for example, the Council of Europe).**

The Charter of Fundamental Rights (CFR) sets out the full range of civil, political, economic and social rights of EU citizens and of all persons resident in the EU. Although it is part of the EU's constitutional law,<sup>1</sup> the CFR does not in itself create any key rights but reaffirms those provisions which exist elsewhere in EU law and which originate from a range of sources, including '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 (CJEU) and of the European Court of Human Rights (ECtHR).'<sup>2</sup>

Its stated aim is to 'strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.'<sup>3</sup> It does this by articulating relevant principles in a series of statements which are divided into six Chapters under the following headings:

- I. Dignity
- II. Freedoms
- III. Equality
- IV. Solidarity
- V. Citizens' rights
- VI. Justice

The CFR's scope is extremely broad: it contains fifty substantive Articles, each covering at least one—and many several—rights and freedoms. Whilst incorporating the ECHR,<sup>4</sup> its scope is broader and its provisions update the rights contained therein in line with changing social and economic circumstances. Furthermore, the CFR contains some additional protections, for example in the broad area of social rights and, more specifically, in relation to non-discrimination.

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<sup>1</sup> Article 6(1) TEU grants the CFR the same legal value as the Treaties making it a primary source of EU law.

<sup>2</sup> Preamble, para 5.

<sup>3</sup> Preamble, para 4.

<sup>4</sup> and must be interpreted in the same manner, see Article 52 (3) CFR.

When the incorporation of the CFR into the EU's constitutional law was initially proposed, the UK and Polish governments sought certain assurances that the Charter would not extend the EU's competence to legislate in specified policy areas with the UK's concerns focused on Chapter IV. This resulted in the addition of Protocol 30 to the Lisbon Treaty.<sup>5</sup> However, although Protocol 30 casts some doubt on the enforceability of particular provisions in certain national courts in some circumstances, in practice its effect is questionable as it is unlikely to provide any safeguard against the potential for further expansion of the CFR's social provisions.

The consolidation of modern economic and social rights alongside their more traditional and established civil and political counterparts does not automatically convey equality in application across the full range. Furthermore, it is not clear whether the social provisions contained in Title IV CFR are principles or rights – the former being merely aspirational and thus requiring legislative effect and the latter being directly justiciable. Although Article 52(5) CFR provides that principles will not be directly effective in national courts, its meaning requires further interpretation by the CJEU. The Explanations to the CFR have been revised to provide further guidance in this respect,<sup>6</sup> including examples of 'principles' from the Solidarity Title,<sup>7</sup> however they also state that some articles may contain elements of rights and principles.<sup>8</sup> This suggests that some social and economic rights will not be mere principles but may give rise to justiciable rights.

In the current context, the most directly relevant provisions are to be found in Chapter IV Solidarity which contains most, but not all, of the economic and social rights covered by the Charter. Under the UK's devolution settlement, the provisions relate to areas which are currently reserved including: Article 27 Workers' right to information and consultation within the undertaking; Article 28 Right of collective bargaining and action; Article 29 Right of access to placement services; Article 30 Protection in the event of unjustified dismissal; Article 31 Fair and just working conditions; Article 32 Prohibition of child labour and protection of young people at work; Article 33 Family and professional life.

In addition, Article 5 of Chapter I Dignity provides for the Prohibition of slavery and forced labour. Further provisions that may have application in the context of social protection are: Chapter II Freedoms which includes Article 8 Respect for private and family life; Article 10 Freedom of thought, conscience and religion; Article 11 Freedom of expression and information; Article 12 Freedom of assembly and association; Article 15 Freedom to choose an occupation and the right to engage in work, Article 16 Freedom to conduct a business<sup>9</sup> and Chapter III Equality which provides: Article 20 Equality before the law; Article 21 Non-discrimination; Article 22 Cultural, religious and linguistic diversity; Article 23 Equality between men and women and integration of persons with disabilities. The provision, in Article 47 of Chapter VI Justice, of the Right to an effective remedy may be relevant in guaranteeing the assertion of labour/social rights in certain contexts.

In terms of its application post-Brexit, Article 51(1) addresses the CFR 'to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the

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<sup>5</sup> Protocol 30 on the Application of the Charter of Fundamental Rights of the European Union to Poland and the United Kingdom, discussed further below.

<sup>6</sup> OJ 2007 C303/1.

<sup>7</sup> eg Art 26 on the integration of persons with disabilities.

<sup>8</sup> eg Art 23 on equality between women and men and Art 33 on family and professional life.

<sup>9</sup> See Case C-426/11 *Alemo-Herron v Parkwood Leisure Ltd*, in which the CJEU noted that the Acquired Rights Directive (2001/23/EC) must be interpreted in accordance with Art 16 CFR.

Member States only when they are implementing Union law'.<sup>10</sup> Subject to the latter proviso, the institutions and the Member States are obliged to respect, observe and promote the rights and freedoms set out in the Charter. Under s. 29 Scotland Act 1998 Acts of the Scottish Parliament must not contravene the CFR and the same is true for actions of the Scottish Ministers under s. 57 of the Act.

Article 51(2) makes it clear that the Charter does not establish 'any new power or task', or 'modify powers and tasks as defined in the Treaties'. It cannot therefore extend the competences which the Treaties confer on the EU. Thus, if the UK withdraws from its EU membership, the CFR's provisions will cease to have any direct application in and of themselves, placing greater emphasis on the provisions from which the CFR's rights and principles derive, i.e. the instruments of international law including the ECHR and associated case law of the European Court of Human Rights as well as domestic provision by way of the Human Rights Act 1998 (HRA). However, as Catherine Barnard has noted,<sup>11</sup> there are likely to be 'residual effects' of EU human rights law which would require specific legislative intervention. Nevertheless, once the CFR ceases to be binding on the UK and to have effect in its domestic law, individuals within the UK will lose the additional protections that it currently provides as well as any potential future application. As its scope is wider than the ECHR and many of its provisions are more directly enforceable due to their expression within EU law and implementation through domestic law, the overall effect will be a reduction in human rights protection. To date the CFR has been relied upon in several cases to ensure that EU legislation is interpreted in line with fundamental rights, which then must be given effect by the Member States.<sup>12</sup> Furthermore, the consolidating role played by the CFR, by which it provides a guarantee that domestic provisions which fall within the scope of EU law will be interpreted in line with the ECHR,<sup>13</sup> will be lost. Removing the current protection of human rights standards from the UK's constitutional law will leave the path clear for a potentially radical overhaul of human rights legislation within the UK.

In relation to what Scotland could do to lessen the impact of Brexit, the rights and principles covered by the CFR are so broad and diverse that they would each require specific consideration. In broad terms those provisions which can be categorised as human rights<sup>14</sup> could be the subject of specific Scottish protection as there is nothing within the devolution settlement which prevents this. As Schedule 4 of the Scotland Act merely protects the HRA from being modified by an Act of the Scottish Parliament, any Scottish-specific legislation would have to comply with the UK legislation but could have higher levels of protection. However, in the case of those rights and principles which relate to employment<sup>15</sup> and equality,<sup>16</sup> there will be limits on Scotland's ability to legislate as employment law is a reserved matter and the same is generally true of equality law.

## **2. Please explain as clearly as possible the impact these rights have; what are the public benefits of these rights? Give specific examples where possible.**

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<sup>10</sup> K. Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 ECLR 375, 377.

<sup>11</sup> 'The implications of Brexit for fundamental rights protection in the UK, Report of the hearing held on 25th February 2016', LSE Commission on the Future of Britain in Europe, p. 7.

<sup>12</sup> See, for example, Case C-149/10 *Zoi Chatzi v Ypourgos Oikonomikon* [2010] ECR I-8489.

<sup>13</sup> Article 52(3).

<sup>14</sup> eg. Article 5 of Chapter I Dignity; Chapter II Freedoms.

<sup>15</sup> Under Chapter IV Solidarity.

<sup>16</sup> Chapter III Equality.

The range of rights and principles protected by the CFR are broad and all are more directly provided for elsewhere. However, as outlined in Tobias Lock's paper on Human Rights, the value of the CFR lies not in its provision of substantive social rights *per se*, but rather in the valuable contribution that it makes to the interpretation of a range of rights and also in its contribution as a consolidating instrument which articulates and strengthens the protection of human rights within the UK's constitutional law.

**3. What are the reasonably anticipated developments in this area of rights? (At the EU and / or Council of Europe).**

**How might this be found out and explored further (contacts in Brussels/Strasbourg?)**

The most likely source of development relating to the CFR is through its further interpretation by the CJEU and also in the judgments of the ECtHR. In charting the CJEU's engagement with the CFR between 2009 and 2012, de Búrca<sup>17</sup> has identified a substantial increase in the number of cases in which a provision of the Charter was cited or argued before the Court. Furthermore, the Court gave prominence to the CFR's application in a growing number of cases and this trend has continued.

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<sup>17</sup> G de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013) 20 Maastricht Journal 168.

- 4. What is the sectoral potential for Scotland to progress/lead in this area of social protection/rights? Practically, how might it do so? (For example what kind of engagement could Scotland pursue with supra-national and international treaty bodies or organisations?)**

**You may wish to consider: a) current devolved position;**

**b) with further devolution of powers (explaining which powers would need to be devolved to enable Scotland to be a leader);**

**c) as an independent nation.**

This question is not directly applicable to the CFR. In relation to the equalities area, see the separate paper by Muriel Robison. In relation to the employment area, see the separate paper by Rebecca Zahn. In relation to the overarching area of human rights, see the separate paper on Human Rights by Tobias Lock.