

EDITORIALS



Brexit's Great Repeal Bill will axe the right to health

Essential protections will be lost if government plans go ahead

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The fundamental right to health in the UK will be lost if the government proceeds with its plan not to convert the EU Charter of Fundamental Rights¹ into UK law, as announced in the white paper on the Great Repeal Bill.²

The value of this charter was shown last year, in both EU³ and UK⁴ courts, when the tobacco industry unsuccessfully challenged the new rules on plain packaging of cigarettes.^{5 6} One of the industry's arguments was that the rules violated its rights. Both the EU Court of Justice and the High Court in London used the right to health in article 35 of the charter as a counter weight to that argument. Mr Justice Green made the strongest judicial statement yet in the UK on this critical point:

[Tobacco regulations] are health measures. This is an area of legislative activity to which immense importance is attached and legislatures and decision makers are habitually accorded a wide margin of appreciation. Health is recognized as a fundamental right. Article 35 of the Fundamental Charter identifies access to health care as a fundamental right but also [original emphasis] makes a statement as to the weight to be attached to this right, namely "high."

The government's proposal not to maintain the fundamental rights charter means that after Brexit it will not be possible for a UK judge to use article 35 or other charter rights when interpreting UK laws that have derived from the EU. These include laws to protect public health such as on pesticide residues in food, health and safety at work, management and disposal of hazardous substances, regulation of medicinal products, and air and water quality. The change will considerably weaken the ability of judges in future to uphold the law if it is challenged by industry in the courts.

The government puts forward two arguments to support its intention to dispense with the charter. The first is that because the charter applies only when the UK is acting within the scope of EU law "its relevance is removed by [Brexit]." This is a technical point that ignores the serious implications of the change. At Brexit, UK laws that were derived from the EU are supposed to remain the law in the UK, but under the government's proposal judges will subsequently have to interpret

these laws without the charter's protections. Any public health laws introduced after Brexit will be similarly unprotected.

The government's second argument is that many of the charter's rights are also covered by the European Convention on Human Rights (ECHR) and other international treaties. The ECHR is a non-EU treaty and so outside the scope of Brexit, but it is only a partial substitute for the threatened fundamental rights charter. The two share some common elements—for example, on the rights to life and privacy—and the ECHR is the main legal basis for protecting civil and political rights in the UK through the Human Rights Act 1998. But it does not include the charter's many equality and solidarity rights, traditionally described as economic and social rights.

These include the right to health but also rights to equality and to fair and just working conditions as well as the rights of children, older people, and people with disabilities. Several of the rights in the charter are also wider in scope than those in the ECHR, including, for example, the right to an effective remedy and fair trial, and to same sex marriage. As for the rights enshrined in other international treaties and agreements, enforcement of those rights is notoriously weak because the necessary UK laws have rarely, if ever, been put in place—unlike the situation with the EU Charter of Fundamental Rights and the ECHR.

Successive UK governments have consistently opposed giving the same legal status to economic and social rights (including health) as that accorded to civil and political rights, concerned about the policy constraints this would entail. The charter cannot therefore be used as a sword in the UK. But it can be used as a shield, as testified to by Mr Justice Green, who used it to reject the tobacco industry's challenge to plain packaging.

The real protections for public health and inequalities that the charter represents will be set aside if the present government is re-elected in June and its plan to ditch the charter goes ahead. All those concerned about public health and social solidarity need to ask their parliamentary candidates to oppose the government's plan and to amend the Great Repeal Bill after the election in order to keep the charter's protections.

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- 1 European Union. The Charter of Fundamental Rights of the European Union. 2000. http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2010.083.01.0389.01.ENG&toc=OJ:C:2010:083:TOC
- 2 UK Government. The Great Repeal Bill white paper. Legislating for the United Kingdom's withdrawal from the European Union. Cm 9446. 2017. <https://www.gov.uk/government/publications/the-great-repeal-bill-white-paper>.
- 3 C-547/14 Philip Morris Brands SARL and Others v Secretary of State for Health. 4 May 2016. <http://curia.europa.eu/juris/liste.jsf?num=C-547/14#>
- 4 British American Tobacco & others v Department of Health [2016] EWHC 1169 (Admin). <https://www.judiciary.gov.uk/judgments/british-american-tobacco-others-v-department-of-health/>
- 5 Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC. OJ No. L 127 29.4. 2014. http://ec.europa.eu/health/sites/health/files/tobacco/docs/dir_201440_en.pdf
- 6 UK Government. Standardised Packaging of Tobacco Products Regulations 2015, SI 2015 No. 829. <http://www.legislation.gov.uk/ukSI/2015/829/contents/made>

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