

A happy Brexit? We should rather brace ourselves for a dramatic change in our democratic freedom – for the worse



As the Conservative MP and prospective scholar [Chris Heaton-Harris](#) reminds us, it is important when reflecting on Brexit within the academy to identify the potentially positive as well as the negative aspects of leaving the EU. **Conor Gearty (LSE)** scrutinises this notion of a happy Brexit, and outlines multiple areas in which the EU Withdrawal Bill will constitute a large transfer of power to the executive branch and may lead to the restriction of civil liberties. Brexit is Britain's Vietnam: every rational person knows it is not going well, but no one with authority seems able to say so.

A happy Brexit?

Much of the discussion at this stage is necessarily speculative as 'Brexit day' has yet to arrive; even the provisions of the EU (Withdrawal Bill) [currently before Parliament](#), intended to manage the change, may not reach the statute book in their final form. That said, and in the spirit of Heaton-Harris, two possible upsides present themselves. The ONS has reported a tangible rise in English (but only English) [happiness](#) since the Referendum vote, and it is hard not to see this as somehow causally connected. It is perfectly possible that economists overstate the link between material wealth and emotional and spiritual well-being. Major religions have over many centuries managed to make poor people feel good and there is no reason, in principle, why a well-told national story (one the English in general and [Jacob Rees-Mogg](#) in particular are good at: Agincourt; Churchill; heroic singularity etc.) might not work the same trick. And of course Brexit might deliver material gains in at least the medium term, so adding to the happiness one assumes, and perhaps eventually (or even immediately) drawing the citizens of the other Kingdoms into the happy net.

Civil liberties and Brexit

Second, there was and is undeniable strength from a civil liberties perspective in this idea of 'taking back control'. Civil liberties are linked to but not quite the same as human rights, overlapping but more targeted than human rights. They are concerned more with process than outcome, ensuring a politically free society in which liberty is maximised ([Gearty 2007](#)). In theory, Brexit should achieve this, and perhaps it might two or three further revolutions down the line. In the short term however if the Bill currently before Parliament emerges in anything like its current shape the effect of Brexit will be a large transfer of power to the executive branch, unprecedented in modern history, and one that itself threatens to be of doubtful legality (if the courts choose to follow up on their recent threats to oversee the legitimacy of primary legislation).

The details behind this will appear in a longer version of this blog on my own website, to be published very soon. In summary and for now it is hard to argue with the wise words of Conservative MP Dominic Grieve, when he [recently wrote](#) that the Brexit bill 'seeks to confer powers on the Government to carry out Brexit in breach of our constitutional principles, in a manner that no sovereign Parliament should allow.' This is I think very much the civil libertarian position, one that distinguished civil liberties advocate David Davis MP (who fought a [bye-election in 2008](#) on civil liberties, we should recall) would definitely share were he not the minister responsible for the measure.



[Burking Poor Old Mrs Constitution](#), (Wikipedia), licenced under [CC BY 4.0](#).

Human rights

Now on to our broader, closely-related topic. The first point to make here is that causality is complicated with regard to anticipated breaches of human rights post Brexit. We cannot be sure not only what kind of Brexit we will get (if we get one at all) but if/when we do what causes what – this is not like the body count in Vietnam or the Gulf War, bloodily tangible evidence of impact. If any deaths, ill-health or misery are caused by Brexit it will prove perhaps harder to gauge this than the rise in happiness tracked by the Office of National Statistics. And if we do find a spike in such statistical indicators it might be because of unrelated events, or (also possible) unrelated policies of the government – for example on austerity: the rise to 5.2 million of the number of children living in poverty that is predicted over the next five years by the [Institute of Fiscal Studies](#) flows from non-Brexit-related government welfare cuts that bite deepest on households with young families. If there is a hard Brexit one thing we can be sure of is a shrinking of opportunity for UK citizens – in terms of education abroad; freedom of movement; access to health care when abroad, and much else. Just because we can't yet see these people yet does not mean they will not exist.

The Charter

The vote to keep the EU charter out of UK law was defeated last night (21 November) by [just ten votes](#). So Clause 5(4) remains: 'The Charter of Fundamental Rights is not part of domestic law on or after exit day.' It's true that the Charter has had an influence on EU and therefore domestic law, as David Davis well knows with his own case (albeit eventually lead by Tom Watson) having been successful before the European courts: [The Davis and Watson case in the ECJ](#) engaged articles 7, 8 and 11 in a way that certainly added value to the argument, and there are many other examples.

But all is not as it seems. The [Explanatory Memorandum](#) assures us (at para 99) that 'The Charter did not create new rights, but rather codified rights and 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. 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.' So it's sort of still there. There is a complex [discussion on this](#) in letters exchanged between the chair of the Joint Committee on Human Rights Harriet Harman and David Davis, and much remains to be resolved as to what exactly is involved in applying principles but not rights. Perhaps so far as the Charter is concerned it is a bit like the impact of the EU on sovereignty which, as all will recall, the [Brexit White Paper](#) infamously summarised as follows: "Whilst Parliament has remained sovereign throughout our membership of the EU, it has not always felt like that." (Para 2.1)

EU citizens

There are some guarantees in the EU (Withdrawal) Bill – in particular free movement directives transposed into UK law. But questions have been raised about the coherence of this, given that the stuff being transposed is entirely based on an assumption about EU membership. Perhaps there is no meaning to the transposition. Even if there is how can we be sure that these will not change, either before or after Brexit Day?

So far as the first is concerned, of course, EU citizens here are a ‘bargaining chip’ (© [Liam Fox](#)) and the whole point of Brexit is surely its nationalist force – it is land, not the people on it that matter, and certain people on that land matter more than others. An especial folly of those advocating Brexit is to pretend this is not the case, trying to have their nationalist cake and eat it with human rights instruments. This cannot work.

And with regard to the second, post-Brexit situation, no promises from Theresa May’s administration, even if reflected in law, are worth the paper they are written on – the beauty of parliamentary sovereignty is, as every first-year law student will tell you, that Parliament cannot bind its successors. And this is the case however grand the role of the UK supreme court is promised to be. Unless we have a sharp constitutional change, that body is also slave to Parliament’s will. This is what ‘taking back control’ looks like. Every now and then the reality of this [surfaces](#) only to be quickly glossed over, by those for whom such truths must be avoided at all costs.

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The Irish

A particular subset of EU citizens are the Irish. As usual the Irish are simply ignored by the British Brexit-drivers: it is as though these advocates of withdrawal cannot get their heads around the changes achieved by Irish revolutionaries and their supporters in 1921. But how can the Common Travel Area revive if the frontier between the Republic of Ireland and the United Kingdom (including Northern Ireland) is an external EU border? How can people come and go between the two places – sooner or later this vast hole in the EU’s territorial integrity will have to be filled in. And what then? Will the UK retaliate against border controls in Dublin by imposing their own controls on the entry of the Irish into Britain and (even) Northern Ireland? Will the millions of Irish in the UK need to be registered? Will they be expelled to Ireland? Unfortunately, as we are beginning to see with so many of the implications of Brexit, wishing away a problem does not make it disappear. The Irish Taoiseach Leo Varadkar is [right to be concerned](#), and insults from [the British press](#) and patronising jibes from senior [Unionist politicians](#) will not make the issue go away. But then as so often with the proponents of Brexit, hit the person, not the argument. But even [the Mail](#) is now vaguely having to acknowledge Ireland is a separate state and not – like Wales and Scotland still – required to take instruction from the English on Brexit.

The right to security

No better explanation of the negative impact here can be found than that set out by May in the only speech she gave during the whole referendum campaign, on 26 April 2016. Here is *exactly* what she said then:

- The European Criminal Records Information System, Financial Intelligence Units, the Prisoner Transfer Framework, SIS II, Joint Investigation Teams, Prüm. These are all agreements that enable law enforcement agencies to cooperate and share information with one another in the fight against cross-border crime and terrorism. They help us to turn foreign criminals away at the border, prevent money laundering by terrorists and criminals, get foreign criminals out of our prisons and back to their home countries, investigate cases that cross borders, and share forensic data like DNA and fingerprinting much more quickly.

- In the last year, we have been able to check the criminal records of foreign nationals more than 100,000 times. Checks such as these mean we have been able to deport more than 3,000 European nationals who posed a threat to the public. The police will soon be able to check DNA records for EU nationals in just fifteen minutes. Under the old system it took 143 days. Last year, the French used information exchanged through the Prüm agreement to locate one of the suspected perpetrators of the November attacks in Paris.
- These are practical measures that promote effective cooperation between different European law enforcement organisations, and if we were not part of them Britain would be less safe.'

Social and environmental rights

It may well be that as [Professor Merris Amos](#) has observed, 'the real diminution in human rights protection actually lies further down the track when retained EU law is converted into domestic law'.

Potential changes could reach any or all of the following, and more besides:

- Equal pay; maternity; holiday entitlements; health and safety protection; agency workers; TUPE
- Clean air (Heathrow), clean beaches, unpolluted waters
- Protection of the rural environment
- Food safety

These are policy areas which have been largely developed and protected by EU law, often in the teeth of UK hostility. It is asking a lot to believe that they are bound to remain the same, especially as there is a very strong drive towards a low-regulation, business-friendly environment to take the place of the 'sclerotic' EU on the UK's departure. Powerful business leaders and politicians have been pushing such a view: people like [James Dyson](#); [Priti Patel](#) and [Martin Callanan](#), while the chair of the Institute of Directors [Lady Barbara Judge](#) has recently observed, arguing for change in this area, that 'long maternity leave is bad for mothers'. We can expect much more of the same – and of course, change will be often capable of being brought about by ministerial order – and even those bits of the current bill which make that impossible might themselves be changed. We really are in a world of executive power.

Certainly, the EU takes this possibility of a plunge downmarket in search of prosperity at any cost seriously – see the remarks of [Barnier on 20 November](#).

[The Human Rights Act](#)

An odd feature of the current crisis over Brexit is that [the Act survives](#), as does [membership of the Council of Europe](#), for now at any rate. It may well offer a degree of security against Brexit mayhem not only for European citizens but for local victims of serious intrusions into their rights as well. But the measure does not, of course, allow legislation to be overridden, and as we have seen the current Brexit Bill could change shape post-enactment to allow alteration of the Human Rights Act by ministerial order. May's record on human rights is extreme, epitomised by her [determination to leave the Council of Europe altogether](#). Expect more denunciations of human rights law as post-Brexit reality bites – 'taking back control' is a long war, fed by scapegoats for failure.

And what, in conclusion, of Labour? Rafael Behr is surely right when he wrote: [Brexit Tories open the door to revolution. Corbynites walked through](#). A Labour government is a high probability at some point soon, and one led moreover by Corbyn and McDonnell. If it comes before Brexit it may not stop withdrawal but under Keir Starmer's astute guidance it may produce a different negotiating atmosphere. If it comes after, what then for human rights? In the very old days people like myself (and old socialists like John McDonnell and Jeremy Corbyn – I am guessing without remembering confidently what their line was) were very suspicious of human rights as a tool with which the powerful could resist change. Will this be once again the case if private utilities and other companies fight back against nationalisation, using the property and due process rights they have under the Human Rights Act? Is forward into the next decade under Labour back to the 1970s so far as the war over human rights is concerned?

Last word

I will editorialise right here at the end. Brexit strikes me as our [Vietnam](#). Everybody rational knows it is – how can I put it politely? – not going well. But no one with authority seems able to say so. Does anyone have the clout and the courage to go with it? Where is our [Senator Eugene McCarthy](#)?

This post represents the views of the author and not those of the Brexit blog, nor of the LSE.

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