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Human Rights Protection and the Perils of Majoritarian Democracy: The Prospective Demise of the EU's Charter of Fundamental Rights (CFREU) in the UK

Dr John Cotter

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Dear Editor,

On 30 March 2017, the UK Government published a White Paper on the so-called 'Great Repeal Bill', in which it announced its decision to remove the CFREU[1] from UK law.[2] The fanfare with which this announcement was received in Eurosceptic circles is indicative of a significant cultural clash between British majoritarian democracy and European constitutional democracy, a clash that, for some at least, became an important issue in the referendum debate.

In the UK, parliamentary sovereignty is traditionally regarded as the cornerstone of the constitution, and is often reduced to the formula 'whatever the Queen-in-Parliament enacts as a statute is law'.[3] An important consequence is, as Dicey wrote, that 'no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament'.[4] Even more emphatically, Sir Leslie Stephens stated that Parliament could legislate to have all blue-eyed babies put to death.[5] However, Sir Leslie also observed that legislators 'must go mad before they could pass such a law, and subjects be idiotic before they could submit to it'.[6] This latter statement reveals something perhaps about traditional British attitudes to rights protection: Parliament can be assumed to be rational and civilised, with elections or the threat of civil disobedience being the ultimate checks on abuse of legislative power.

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[1] Charter of Fundamental Rights of the EU (CFREU).

[2] Department for Exiting the European Union, *Legislating for the United Kingdom's withdrawal from the European Union* (Cm 9446, 2017) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/604514/Great_repeal_bill_white_paper_print.pdf> accessed 31 March 2017, [2.21-2.25].

[3] See for example, Alison L Young, 'Sovereignty: Demise, Afterlife, or Partial Resurrection?' (2011) 9(1) International Journal of Constitutional Law 163, 163.

[4] Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (10th edn, Macmillan & Co 1959) 39-40.

[5] Leslie Stephen, *The Science of Ethics* (GP Putnam's Sons 1882), 145.

[6] ibid.

If the traditional understanding of parliamentary sovereignty, insofar as it relates to protection of individual rights, is based on an optimistic, or naïve, view of human nature, constitutional democracy shares Lord Acton's concern about absolute power corrupting absolutely.[7] It should hardly be surprising that constitutional democracy, with its checks on legislative power, has generally been preferred in continental Europe, given the bitter experience of the twentieth century. Constitutional democracy proceeds on the basis that majoritarian mandate for legislative action is not in itself a basis for legitimacy. Legislation is, therefore, subject to judicial review to prevent what John Adams called the 'tyranny of the majority'.[8]

European legal integration in the latter half of the twentieth century has meant that Britain's majoritarian democracy has had to accommodate elements of constitutional democracy. The most obvious example has resulted from the UK's EU membership. Section 2 of the European Communities Act 1972 recognises the supremacy of EU law, and the full extent of this supremacy was realised fully in *Factortame (No 2)*, in which the House of Lords, confirming the ruling of the CJEU,[9] held that a British court is obliged to disregard any provision of an Act of Parliament that is contrary to EU law. [10] However, from the viewpoint of UK constitutional law, and this was confirmed recently by the UK Supreme Court in *Miller*, Parliament has at all times retained ultimate sovereignty, since the supremacy of EU law is a creature of the 1972 Act. [11]

The UK's reception of the ECHR[12] serves as a further example. The ECHR subscribes essentially to the idea of constitutional democracy. The ECHR established the European Court of Human Rights, which involved, in Maxwell-Fyfe's words, 'some voluntary surrender of … the sovereign right to supress liberty…'[13] The UK did not, of course, initially give the ECHR any binding force domestically, and when Parliament did give some legal

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[7] 'Power tends to corrupt, and absolute power corrupts absolutely…' Letter from Lord Acton to Bishop Mandell Creighton (5 April 1887).
[8] John Adams, *A Defence of the Constitutions of Government of the United States of America, Vol 3* (William Cobbett 1787), 291.
[9] Case C-213/89 *The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* [1990] ECR I-2433.
[10] *R v Secretary of State for Transport, ex parte Factortame (No 2)* [1991] 1 AC 603.
[11] *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [60] (Lord Neuberger) (Lady Hale, Lord Mance, Lord Kerr, Lord Clarke, Lord Wilson, Lord Sumption and Lord Hodge concurring).
[12] European Convention on Human Rights (ECHR).
[13] First Session of the Consultative Assembly held at Strasbourg 10 August to 8 September 1949: Sittings held from 16 August to 8 September 1949 (as cited in Alastair Mowbray, *Cases, Materials, and Commentary on the European Convention on Human Rights* (3rd edn, Oxford University Press 2012), 6).

effect to it through the Human Rights Act 1998, it did so in a way that preserved parliamentary sovereignty. Thus, while a declaration of incompatibility may be obtained from certain domestic courts under section 4, there are no means by which a court may invalidate a statutory provision.

The UK's withdrawal from the EU, and the simultaneous repeal of the 1972 Act, will significantly affect judicial protection of fundamental rights in the UK. At present, it is only through recourse to EU law that UK courts and tribunals can protect litigants' individual rights in any binding sense from legislative interference. Although the CFREU is binding on Member States when they are implementing EU law only,[14] it is an important source of protection against national legislative interference with individual rights, particularly in the UK, where the ECHR lacks the power to compel Parliament. The UK Government in the aforementioned White Paper has asserted that it is its intention that 'the removal of the Charter from UK law will not affect the substantive rights that individuals already benefit from in the UK'.[15] The White Paper points to the fact that many CFREU rights are contained elsewhere in the body of EU law, which will be incorporated into UK law.[16] The Government also argues that many CFREU rights are protected by the ECHR, and that there is no plan to withdraw from the ECHR.[17] These claims, however, ignore the fact that the CFREU's demise will strip UK domestic courts, as well as the CJEU, of any means of controlling parliamentary abuses of fundamental rights.

The significance of the CFREU in the UK is perhaps demonstrated best by the CJEU's December 2016 ruling in the joined cases of *Tele2 Sverige* and *Watson and Others*.[18] In these cases, the Court ruled, *inter alia*, that Articles 7, 8 and 11 CFREU – the rights to privacy, protection of personal data, and freedom of expression respectively – prohibit national legislation which, for the purpose of fighting crime, provides for general and indiscriminate data retention. The result of the ruling in the UK context is that section 1 of the Data Retention and Investigatory Powers Act 2014 is contrary to EU law and, therefore, a nullity.

[14] CFREU, art 51(1).
[15] Department for Exiting the European Union (n 1) [2.25].
[16] ibid.
[17] ibid [2.22]. The document is silent on the fate of the Human Rights Act 1998.
[18] Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB and Watson and Others* ECLI:EU:C:2016:970.

Watson and Others began life in the High Court of England and Wales, commenced by a number of applicants, one of whom was David Davis MP, now Secretary of State for Exiting the EU, who also introduced the aforementioned White Paper. It should not escape Mr Davis' notice that had his action been commenced after the enactment of his 'Great Repeal Bill', the best he could have obtained from UK courts would be a non-binding declaration of incompatibility. By pleading the CFREU, Mr Davis and his fellow applicants were able to gain access to the CJEU via the preliminary reference procedure, access that the 'Great Repeal Bill' will remove, and ultimately succeeded in invalidating a serious incursion by the Westminster Parliament into privacy rights. This case should serve as a warning of the perils of unrestrained majoritarian democracy, and should demonstrate how much poorer human rights protection in the UK will be without the CFREU.

Is mise le meas,

Dr John Cotter