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Citation

Giannouloupoulos, Dimitrios. 2016. Fair Trial Rights in the UK Post Brexit. *New Journal of European Criminal Law*, 7(4), pp. 387-396. ISSN 2032-2844 [Article]

Persistent URL

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Fair trial rights in the UK post Brexit: out with the Charter and EU law, in with the ECHR?

Following the historic June 23 decision of the UK people to exit the European Union, confusion abounds about the future of Britain in Europe. With a negotiation possibly still months away, both the UK and the ‘remaining’ 27 EU Member States have held their cards close to their chest, that is assuming they have a master plan for the labyrinthine negotiation that awaits them. A June 24 New York Times op-ed spoke of ‘Britain’s Brexit leap in the dark’.¹ Four months on this pessimistic analysis does not seem at all far from the truth,² with Theresa May going so far as to suggest in Parliament that the UK has not decided yet how to proceed with Brexit:

It is about developing our own British model. So we will not take decisions until we are ready. We will not reveal our hand prematurely. And we will not provide a running commentary.³

As we are moving forward in these uncharted waters, in an environment of disorientation and ‘political poker’, we find ourselves left with little more than an ability for speculation. On the common market, immigration, agriculture, business and education, to take a few stark illustrations, all is really to play for in deciding the UK’s future relationship with Europe. The outcome of the negotiations can theoretically range from the extreme of quasi-EU member status to burning bridges with Europe, even if it is intuitive to predict that the UK and the EU will in the end settle for the middle ground.

In the area of criminal justice and human rights, however, we already have a solid indication of ‘the day after’, as a result of having had glimpses of it in the recent past. This is because the Lisbon Treaty – in giving the UK the ability to opt in and out of EU criminal justice legislation – has in reality brought about a de facto Brexit. In relation to fair trial rights, more specifically, the UK has, for the most part, chosen to not opt in to key legislation introduced – in the form of EU Directives – in the aftermath of a 2009 [Roadmap](#) which set out a gradual approach towards establishing a full catalogue of procedural rights for suspects

¹ R Cohen, [‘Britain’s Brexit leap in the dark’](#), The New York Times, 24 June 2016.

² P Papakonstantinou, ‘Uncertainty on both sides of the Channel’, Kathimerini, 28 August 2016 (in Greek).

³ J Henley and P Walker, [‘Brexit weekly briefing: we’re going to be kept in the dark’](#), The Guardian, 13 September 2016.

across the EU.⁴ The Roadmap Directives built on fair trial rights laid down in the Charter of Fundamental Rights of the European Union (the Charter). Now neither the Charter nor the Directives giving it effect will be relevant to the UK once it has formally exited the EU (with the exception of those Directives that will have already been transposed into national law, unless Parliament decides otherwise), and by definition the UK will no longer be part of this European integration process that has arguably triggered a fair trial rights ‘revolution’ in Europe.⁵

(Missing out on) the fair trial rights revolution in Europe?

Following on the Roadmap, the EU adopted far reaching Directives on the rights to [interpretation and translation](#) (2010), [information](#) (2012), and [access to a lawyer in criminal proceedings](#) (2013), taking a major first step in the direction of establishing common minimum standards for suspects and accused persons across the EU. These Directives, which signal ‘a fundamental shift in the focus of European criminal law, from a system privileging inter-state judicial and police cooperation to a system where the protection of the fundamental rights of the affected individuals should be fully ensured’,⁶ and which are already having a drastic effect in EU Member States,⁷ paved the way for a second generation of EU Directives on procedural rights. More specifically, on 15 December 2015 the Council and Parliament agreed a [Directive on procedural safeguards for children suspected or accused in criminal proceedings](#). On 9 March 2016 the Council adopted a [Directive that aims to strengthen certain aspects of the presumption of innocence](#), with an emphasis on the right to silence and the right against self-incrimination, and the right to be present at trial in criminal proceedings. Finally, days only after the June 23 referendum, the EU institutions took a major and final step forward in the Roadmap process, in agreeing the most controversial of the legal

⁴ The Roadmap stemmed from the European Council’s Stockholm Programme for ‘an open and secure Europe’, which placed special emphasis on the idea of ‘a Europe built on fundamental rights’ as one its basic tenets. Council of Europe, [The Stockholm Programme – An Open and Secure Europe Serving and Protecting the Citizens](#), 2 December 2009, 17024/09.

⁵ See generally LEAP and Fair Trials, [Defence Rights in Europe: The Road Ahead](#) (2016).

⁶ V Mitsilegas, ‘The Future of European Criminal Justice’, paper prepared for the Commission Expert Group on EU Criminal Law Policy, 12 March 2014. See also T Konstantinides and N O’Meara, ‘Fundamental Rights and Judicial Protection’ in D Acosta Arcarazo and CC Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (Hart Publishing, 2014).

⁷ See eg how the Directive on the right to access to a lawyer has been of paramount importance in leading the Dutch Supreme Court to recognise that, in addition to the right to consult a lawyer prior to interrogation, the suspect also has the fundamental right to have a lawyer present when interrogated by the police. D Giannouloupoulos and K Pitcher, [‘The Shifting Terrain for Suspects’ Rights in Europe – the Right to Legal Assistance Saga in the Netherlands](#)’, Fair Trials Blog, 23 May 2016.

texts that were planned as part of this highly ambitious project: the [Directive on the right to legal aid](#), which aims to increase ‘mutual trust’ among EU states and ultimately enhance European cooperation in criminal cases.⁸

Taking much of their inspiration from – and running parallel to – European Court of Human Rights jurisprudence that has had a cataclysmic effect in EU Member States, particularly those that had long resisted the idea of lawyers ‘entering the police station’, the Roadmap Directives underpin a fair trial rights revolution in Europe and an unprecedented coming together of EU Member States around a group of core pre-trial procedural rights.⁹ But the UK has chosen to stay out of this process. It has transposed the first two – less controversial – Directives on the right to translation and interpretation and the right to information, but has confirmed that it will not opt in to any of the Directives that followed.

The UK’s decision to not opt in to the Directive on the right to access to a lawyer in particular was perhaps the biggest oxymoron in this process of post Lisbon emerging isolationism in criminal justice matters; the UK had long led the way in Europe in legislating custodial interrogation rights and ensuring their effective implementation in practice.¹⁰ Compared to the shock waves that the new emphasis on custodial interrogation rights sent down the spine of other EU Member States,¹¹ the UK would have easily absorbed possible vibrations, simply by making adjustments to long standing legislation and practice. Yet the UK decided it should not partake in this process, taking everyone by surprise and signaling the shape of things to come.

Brexit’s damaging effect

Brexit can now exacerbate the increasingly ambiguous relationship with Europe on criminal justice matters. We must widen the angle of our vision to understand why. We must note, in

⁸ European Council – Council of the European Union, [‘Legal aid in criminal proceedings: Council and Parliament reach an agreement’](#); Fair Trials – Legal Experts Advisory Panel, [Position paper on the proposed directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings](#), February 2015.

⁹ See generally D Giannouloupoulos, [‘Strasbourg Jurisprudence, Law Reform and Comparative Law: A Tale of the Right to Custodial Legal Assistance in Five Countries’](#) (2016) 16 *Human Rights Law Review* 103-129.

¹⁰ Giving evidence before the Select Committee on Extradition Law, Baroness Ludford said characteristically: ‘I am sorry the UK has not opted into the directive on the right to a lawyer, because I think we have the gold standard on that in the EU and it is a pity that we do not show leadership on that particular measure.’ Select Committee on Extradition Law, Second report, [Extradition: UK law and practice](#) (2015) para 343.

¹¹ See eg the response of Scotland and France in D Giannouloupoulos, [‘“North of the Border and Across the Channel: Custodial Legal Assistance Reforms in Scotland and France”](#) [2013] *Crim LR* 369; D Giannouloupoulos, [‘Custodial Legal Assistance and Notification of the Right to Silence in France: Legal Cosmopolitanism and Local Resistance’](#) (2013) 24 *Criminal Law Forum* 291.

particular, that while the UK has not transposed post Lisbon Directives recognising key procedural rights, it has, on the other hand, opted in to a significant number of EU Directives – and opted back into key third pillar measures – designed to enhance judicial and police cooperation and facilitate the fight against crime, most notably the European Arrest Warrant. However, as Mitsilegas has demonstrated, this ‘varied landscape’ with regards to UK participation in EU criminal law measures has been posing ‘significant challenges for legal certainty, coherence and the protection of fundamental rights’ even prior to Brexit, and will considerably reduce the scope for criminal justice cooperation with the EU in the post Brexit era.¹² This is because the Roadmap Directives aimed to improve the balance between judicial and police cooperation measures that facilitate prosecution and those that protect procedural rights of the individual,¹³ with the aim, ultimately, to enhance mutual trust as the cornerstone of judicial cooperation in the EU.¹⁴ After Brexit, it will therefore be challenging for the UK to secure the former – even if it is through bilateral agreements with EU Member States – without subscribing to the latter.¹⁵ These two key areas of EU legislation in criminal law matters are now highly intertwined, and, once outside the opt in/opt out compromises previously allowed by the Lisbon Treaty, the UK will arguably no longer be able to cherry pick the instruments it prefers. Brexit will thus put the UK at a disadvantage on judicial and police cooperation in Europe.

Equally importantly, it is suspected persons in this country that are likely to be worse off as a result of the UK no longer following the EU in this recent, but powerful, upward trajectory towards legislating suspects’ rights. Of course, we should be under no illusion that fair trial standards in EU Member States have improved overnight, as a result of the coming into effect of EU Directives. Nothing could be further from the truth.¹⁶ In addition, the common law’s strong grounding on the adversarial tradition provides sufficient reassurance that the UK will *not* be left behind in Europe in relation to protecting fair trial rights. But all this is not to say that the UK system is above reproach¹⁷ or that it does not stand corrected by

¹² V Mitsilegas, ‘The Uneasy Relationship between the UK and European Criminal Law: From Opt-Outs to Brexit?’ [2016] Crim LR 517, 522. See also House of Lords, European Union Committee, [‘EU Police and Criminal Justice Measures: The UK’s 2014 Opt-Out Decision’](#), 13th Report of Session 2012-13, HL Paper 159.

¹³ Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, Recital 10.

¹⁴ Ibid., Recital 7.

¹⁵ Mitsilegas (n 12) 534.

¹⁶ See eg Ed Cape and J Hodgson, ‘The Right to Access to a Lawyer at Police Stations – Making the European Union Directive Work in Practice’ (2014) 5 *New Journal of European Criminal Law* 450.

¹⁷ Empirical research on suspects’ rights has time again brought to light very significant gaps in UK legislation and practice in relation to the exercise of custodial interrogation rights. See eg V Kemp and J Hodgson, ‘England and Wales: Empirical Findings’ in Vanderhallen et al. (ed), *Interrogating Young Suspects: Procedural*

external (European) oversight, or that it has not already benefited from the joined up work of the EU Member States and the institutions of the EU for that matter, not least in the context of the recent Roadmap Directives.

To take a few examples, the right to information Directive has led to the introduction in the UK of a revised 'Letter of Rights' and created a new obligation on police to provide sufficient information to the suspect prior to the interview as well as documents essential for challenging the lawfulness of arrest or detention when the suspect is booked in at the police station, at reviews or on charge. In other words, it filled an important gap in existing legislation. Opting in to the Directive on the right of access to a lawyer would have similarly put pressure on Parliament to widen the scope of the right to legal assistance, by extending its application to investigative and evidence gathering acts other than the questioning of the suspect, thus providing more substantial protections to suspects.¹⁸ Following the same line of reasoning, the new Directive on the presumption of innocence would have most likely necessitated reopening the discussion about the courts' power to draw adverse inferences from silence,¹⁹ a taboo of UK criminal justice that one hardly comes across in other parts of the world – including in the common law world – but that has mysteriously been taken as something of a given in the English Law of Evidence and criminal procedure.²⁰ It also hardly needs emphasising that, in view of the controversial cuts imposed by UK governments on legal aid in recent years,²¹ the forthcoming Legal Aid Directive would have provided a useful external point of reference to the relevant debate.

It must be stressed that by opting out of legislation that concerns fair trial rights, the UK has not just turned its back on Europe, it has also turned its back on its own history of noteworthy advances in this area; advances that have had a marked influence in Europe. With Brexit looming, it is therefore now reasonable to predict that the UK's ability to positively

Safeguards from an Empirical Perspective II (Intersentia, 2016); P Pleasence, V Kemp and NJ Balmer, 'The justice lottery? Police station advice 25 years on from PACE [2011] Crim LR 3.

¹⁸ Directive 2013/48/EU of 22 October 2013, L 294/1, Art 3.3(c).

¹⁹ Art 7(5) of the Directive states that 'the exercise by suspects and accused persons of the right to remain silent or of the right not to incriminate oneself shall not be used against them and shall not be considered to be evidence that they have committed the criminal offence concerned'.

²⁰ See, however, critiques of the power to draw adverse inferences, eg by Hannah Quirk, who has recently argued at the '[Criminal Law Reform Now](#)' conference that ss 34-38 of the Criminal Justice and Public Order Act 1994 should be repealed and the common law right of silence reinstated. See, in more detail, H Quirk, 'The Right of Silence in England and Wales: Sacred Cow, Sacrificial Lamb or Trojan Horse?' in J Jackson and S Summers, *Obstacles to Fairness in Criminal Proceedings* (Hart Publishing, forthcoming).

²¹ See generally T Smith and Ed Cape, 'The Rise and Decline of Criminal Legal Aid in England and Wales in A Flynn and J Hodgson (eds), *Legal Aid and Access to Justice: Comparative Perspectives of Unmet Legal Need* (Hart Publishing, forthcoming).

affect the practice of other countries on suspects' rights will be diminished.²²

This emerging isolationist trend has overtones of critiques of modern conceptions of the role of the UK in Europe, which went to the heart of the EU referendum debate, especially as regards the distorting effect of narrowly portraying the UK as solely being on the receiving end of EU pressures for reform rather than a modern nation central to the Union, capable to lead in Europe, positively affecting the attitudes of fellow EU Member States in its various interactions with them.²³

The way forward: a renewed emphasis on the ECHR?

The imminent departure from the Charter of Fundamental Rights and relevant EU Directives represents a missed opportunity for enhancing the protection of suspects' rights in the UK, sharing with European partners UK expertise on how to effectively implement them in practice and reinforcing 'mutual trust' as a basis for cross-European cooperation on criminal justice matters. But, on the other hand, both the Charter and EU legislation on fair trial standards are still in their infancy, and the UK has generally fared well under the sheer influence of the ECHR as regards the protection of suspects' rights in the recent past. Placing a renewed emphasis on ECHR jurisprudence to fill in the gap might therefore go some way towards guaranteeing the protection of key procedural rights, even if does not provide the momentum for the accelerated and comprehensive reforms that one might otherwise be able to envisage under the EU Directives and even if it cannot secure enforcement through the more rigorous mechanisms that are available to EU law.²⁴

We should, in particular, note here that it was Strasbourg that breathed new life to the EU project on common fair trial rights, after this had come to a standstill as a result of resistance from a number of influential EU Member States,²⁵ and that Strasbourg jurisprudence has

²² Cape notes that 'until now the approach of England and Wales has been regarded as something of a model', then suggests that, as a result of EU opt outs and backtracking on existing legal aid safeguards in the UK, this will no longer be the case. Ed Cape, '[Criminal Defence: The Value and the Price](#)', Keynote speech to Law Society Criminal Law Conference, May 2013.

²³ See generally D Giannouloupoulos, '[A Powerful Vision of Britain as a European Leader – Thank Gordon Brown for That](#)', *The Conversation*, 14 June 2016.

²⁴ Concern over the failure of many Member States to observe the ECHR fair trial requirements with satisfactory consistency was one the main reasons behind legislating the Roadmap Directives in the first place. See House of Lords, European Union Committee, '[Procedural Rights in Criminal Proceedings](#)' (2004-05) HL Paper 28, para 4.

²⁵ The European Commission's 2004 proposal for a framework decision on certain procedural rights throughout the European Union had the ambition to move EU law in this direction, but it soon 'became clear there was no collective political will to agree the provisions and the proposal was reduced to little more than a letter of intent which held no compulsion or compellability'. See European Criminal Bar Association, '[Procedural Safeguards](#)'.

continued to evolve – at an impressive pace – long after the first Roadmap Directives came into effect, being the key driving force for the substantial reforms of suspects’ rights that we have in recent years witnessed in Europe. What is more, ECtHR jurisprudence on suspects’ rights is now starting to directly take into account the Roadmap Directives.²⁶ This means that in subscribing to the Convention, the UK will at the same time be upholding guarantees that are part of the relevant EU Directives, in line with relevant interpretations adopted by the Court of Justice of the European Union (CJEU).

It can be argued therefore that the ECHR can, to some extent, provide an adequate substitute for the loss of the Charter, at least in relation to fair trials protections. The ECHR may also prove an easier pill for Eurosceptics in Britain to swallow. To their satisfaction, resistance to Strasbourg from the UK political and judicial establishment has risen to such levels in recent years²⁷ that they probably now consider the Convention an easy target, especially in comparison to the more interventionist role that the CJEU was posing (in their eyes), as a result of the far more rigorous enforcement mechanisms that the latter possesses in comparison with the ECtHR.

The ECHR under attack

Post Brexit Euroscepticism is, of course, anything but conducive to placing a renewed emphasis on the ECHR. The relationship of the UK with the ECtHR has become highly contentious in recent years, with Strasbourg decisions on prisoners’ rights, whole life tariffs, deportation of foreign suspected terrorists and the action of UK military forces abroad among other things generating fierce criticism from the tabloid press and even from the (Conservative-minded part of the) broadsheet press.²⁸ In response to these concerns, and seeking to appease Conservative voters that might otherwise have been lured by UKIP’s strong anti-European rhetoric, the Conservative party published in [October 2014 proposals](#)

But Strasbourg jurisprudence, starting with *Salduz v Turkey* (2008) 49 EHRR 421, turned the tide in favour of wider EU integration in this area.

²⁶ In *AT v Luxembourg* Application No 30460/13, Merits and Just Satisfaction, 9 April 2015, at para 87, the ECtHR drew on the Directive on the right of access to a lawyer to conclude that the lawyer’s presence during questioning will not suffice for the right to fair trial to be respected, and that national legislation must also provide for private consultation with a lawyer prior to the beginning of the interrogation. In *Zachar and Čierny v Slovakia* Applications Nos 29376/12 and 29384/12, Merits and Just Satisfaction, 21 July 2015, the Court relied on Directive on the right to access to a lawyer and the Directive on the right to information to decide that a waiver of the right to custodial legal assistance had not been effective.

²⁷ See eg such as reflected in the cases of *Hirst v the United Kingdom (No 2)* [2005] ECHR 681 and *Al-Khawaja and Tahery v the United Kingdom* (2009) 49 EHRR 1 respectively.

²⁸ See eg D Barrett, [‘Calls grow to boycott “toxic” human rights court’](#), The Telegraph, 9 July 2013.

seeking to eradicate the effect of the Convention in the UK. The main ambition was to ensure that the ECtHR would ‘no longer [be] binding over the UK Supreme Court’ and would ‘no longer [be] able to order a change in UK law’, and that ‘a proper balance between rights and responsibilities in UK law’ would be restored.

In November 2015, a blueprint for the UK Bill of Rights was leaked to the Sunday Times, and it went so far as to suggest that ‘under the new system, judges would not have to follow rulings of the ECtHR slavishly any longer, and that ‘instead, they [would] be able to rely on the common law or rulings by courts in other Commonwealth countries, such as Australia or Canada, when making their judgments’. These proposals revealed ‘grave misconceptions about the nature of the European Convention on Human Rights (ECHR) and its relationship with comparative law, if not a cynical attempt to trivialize the effects of putting in place a UK human rights system à la carte’.²⁹ It remains to be seen, when and if a consultation for a Bill of Rights is announced, whether the government is still subscribing to such a view of the Convention; concern has consistently been expressed that this is practically a plan for an ECHR-minus.³⁰

In the meantime, the UK continues to refuse to implement the judgment of the ECtHR in the case of *Hirst v the United Kingdom (No 2)* on the issue of prisoners’ rights to vote, delivered in 2005, which risks ‘undermin[ing] the standing of the UK’ and would also ‘give succour to those states in the Council of Europe who have a poor record of protecting human rights and who could regard the UK’s action as setting a precedent for them to follow’.³¹ Irrespective of how controversial the topic has proved to be, this is another illustration of the UK backtracking on its international human rights commitments instead of leading in Europe.

In light of the above, it is perhaps more convincing to predict that leaving the EU Charter and EU law risks creating momentum for a simultaneous exit from the ECHR, rather than contemplate the opposite, more specifically that a newly discovered confidence in the ECHR would somehow counterbalance the loss of rights that would have been afforded with the EU Directives. Conor Gearty’s acute warning – in the preface of his disturbingly timely [‘On Fantasy Island’ project](#) – captures this beautifully: ‘Now that the larger European entanglement has been successfully seen off, the time has come for finishing the unfinished

²⁹ D Giannouloupoulos, [‘The Bill of Rights leak shows draft plans are plainly flawed’](#), Solicitors Journal, 24 November 2015.

³⁰ See generally Joint Committee on Human Rights, [‘A Bill of Rights for the UK?’](#), 29th report (2007-8) HL paper 165/II, HC paper 150-II.

³¹ Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, First Report, [Executive summary](#), 16 December 2013.

business of human rights destruction’, he notes,³² bringing the two main targets of British Euroscepticism – EU membership and the ECHR – alarmingly close to each other. Now if these worrying predictions are correct, then the UK is heading straight to ‘a potential human rights legal deficit’, where – without the legal protections afforded by both EU law and the ECtHR, and in the absence of a written constitution – access to rights and remedies could be taken away without proper checks or safeguards.³³

A written constitution and a UK Bill of Rights

It was perhaps with the threat of such a legal deficit in mind that Dominic Grieve has recently suggested – at a recent ‘Britain in Europe’ event – that ‘Parliament should consider whether the time is right to draw up a formal written constitution for the United Kingdom’. The former Attorney General explained that ‘the government’s position had become more nuanced of late, with its proposals not only directed at the Strasbourg court but also against the “predatory activities of the European Court of Justice in Luxembourg”’. A written constitution, in combination with a Bill of Rights, ‘would allow the opportunity to define and protect rights constitutionally rather than via the ECHR’, so long as it were ‘compatible with our convention obligations’, he concluded. He emphasised, nonetheless, that the ECHR was ‘the single most important instrument for promoting human rights on the planet’ and a potential withdrawal of the UK would be ‘very damaging for the promotion of human rights elsewhere’.³⁴

With a departure from EU human rights law now a foregone conclusion, and with the ECHR teetering on the brink of a long awaited, politically calculated, decision by Theresa May’s government on whether to push forward with the proposals for a UK Bill of Rights, the idea of a written constitution, combined with a national Bill of Rights, carries a lot of force. Whether there is any political willingness to move in this direction is another matter.

On the other hand, we must pause to observe that, for all its worth, this solution would still place the UK in the second league of human rights protections in Europe. Written constitutions and Bill of Rights are a common phenomenon there, and they normally enjoy a harmonious existence with international human rights law (they are supposed to complement

³² C Gearty, [On Fantasy Island – Britain, Europe and Human Rights](#) (OUP, 2016).

³³ K Boyle, [‘The legitimacy of the EU referendum requires that citizens are informed of the implications of their decision’](#). Democratic Audit UK, 2 April 2016.

³⁴ See [‘Dominic Grieve QC: “It may be time to consider a written constitution”’](#), Solicitors Journal, 4 March 2016. The full lecture is available to watch from the BiE website: [‘Former Attorney General warns of ramifications from leaving the ECHR’](#), 21 March 2016.

each other). But such is the state of the debate on the UK's international human rights obligations at the moment that even an imperfect – ECHR-minus – system, based exclusively on national law, has a lot going for it.

Concluding thought

This contextual study of Brexit's ramifications for fair trial rights demonstrates that the UK Government must abandon plans for a potential withdrawal from the ECHR. It must instead re-establish faith in the much maligned Convention, if we are to grapple with the looming threat of an unprecedented human rights legal deficit.