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[Brexit's Great Repeal Bill will axe the right to health.](#)

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Brexit: the right to health for the axe

The fundamental right to health will be lost if the government proceeds with its plan announced in the white paper on the Great Repeal Bill¹ not to convert the EU Charter of Fundamental Rights² into UK law.

Last year, in both EU³ and UK⁴ courts, the tobacco industry unsuccessfully challenged the new rules on plain packaging of cigarettes.⁵ 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 makes a statement as to the weight to be attached to this right, namely ‘high’.” [Original emphasis]

The proposal in the white paper means that it will not be possible post-Brexit for a UK judge to use Article 35, and other Charter rights, when interpreting UK laws which have derived from the EU. **This supports deregulation. In future, if Parliament passes a law 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, or on air and water quality – judges will not be able to use the fundamental right to health, or other Charter rights, to uphold the law if it is challenged by industry in the courts as violating their rights.**

The government puts forward two arguments to support its intention. The first is that because the Charter only applies when the UK is acting within the scope of EU law “its relevance is removed by [Brexit]”. This is a technical point which ignores the substantive change. At Brexit, the current law in the UK which has been derived from the EU is supposed to remain the law in the UK, but judges will have to interpret it without the Charter's protections. **Post-Brexit, new laws protecting public health – such as those mentioned above, which are now within the scope of EU law - will not have to be interpreted by UK judges in light of the Charter.**

The government's second argument is that many of the Charter's rights are found in the European Convention on Human Rights (ECHR) and in other international treaties. The ECHR – a non-EU treaty and so outside the scope of Brexit – however is only a partial substitute for the Charter. The ECHR overlaps with the Charter – for example, on the rights to life and privacy – and is the main legal basis for protecting civil and political rights in the UK via 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. As well as health, these include rights to equality and to fair and just working conditions, and the rights of the child, elderly and disabled. Several of the Charter's rights are also wider in scope, for example the right to an effective remedy and fair trial and to same-sex marriage; and judges are required to disapply laws conflicting with the Charter's rights, not merely declare them to be incompatible and knock the ball back into the legislature's court. As for rights in other international agreements, enforcement of those rights lacks the strong and clear effect of the European Communities Act, and is notoriously weak.

Successive UK governments have consistently opposed giving the same legal status to economic and social rights 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.**

The modest advance but real protections for public health and inequalities which the Charter represents for the UK will be set aside if the government is re-elected at the general election and its plan to ditch the Charter goes ahead. It is essential that those concerned about public health and social solidarity 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.

- 1 The Great Repeal Bill: White Paper. Legislating for the United Kingdom's withdrawal from the European Union. Cm 9446. Available here: <https://www.gov.uk/government/publications/the-great-repeal-bill-white-paper> (accessed 07/04/17).
- 2 The Charter of Fundamental Rights of the European Union, OJ [2010] C 83/02, available here: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2010:083:TOC> (accessed 07/04/17).
- 3 C-547/14 Philip Morris Brands SARL and Others v Secretary of State for Health. Judgment available here: <http://curia.europa.eu/juris/liste.jsf?num=C-547/14#> (accessed 07/04/17).
- 4 British American Tobacco & others -v- Department of Health [2016] EWHC 1169 (Admin). Judgment available here: <https://www.judiciary.gov.uk/judgments/british-american-tobacco-others-v-department-of-health/> (accessed 07/04/17).
- 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, p1. Available here: http://ec.europa.eu/health/sites/health/files/tobacco/docs/dir_201440_en.pdf (accessed 07/04/17); and The Standardised Packaging of Tobacco Products Regulations 2015, SI 2015 No. 829, available here: <http://www.legislation.gov.uk/ukxi/2015/829/contents/made> (both accessed 07/04/17)

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