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RIGHTS AFTER BREXIT

Submission to the Joint Committee on Human Rights
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JUDICIAL POWER PROJECT

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1. The Judicial Power Project considers the scope of judicial power within the constitution. The ongoing expansion of judicial power increasingly threatens the rule of law and effective, democratic government. The Project aims to address this problem – to restore balance to the constitution – by making clear the good sense of separating judicial and political authority. The Project is supported by Policy Exchange, the UK's leading think-tank.

Summary

2. The Committee's call for evidence implies a deep anxiety about the risks to the protection of human rights that withdrawal from the EU may or will generate. This brief submission aims to explain why the anxiety is misplaced and why withdrawal from the EU is likely, on the contrary, to improve the constitutional arrangements by which human rights are protected within the UK. This submission does not address human rights clauses in new trade agreements, save in the briefest terms.

General principle

3. Membership of the EU is obviously *not* essential to rights-protection, whether generally or in the specific context of the UK. Australia, Canada, and New Zealand, to mention only three examples, arguably protect rights at least as effectively as any member state of the EU and obviously much more effectively than some. Strikingly, these three Westminster democracies have not needed to rely on supra-national legal restraints – on subjection to international courts – to secure justice. And while Canada has a robust and problematic domestic charter of rights, New Zealand's bill of rights constitutes a much less significant restraint on its sovereign Parliament and Australia has no federal bill of rights at all.

4. The UK's record of rights-protection is comparable to these three non-EU states, but this record is not attributable to EU membership. More likely, it is testament to the UK's traditions of parliamentary government and common law and to the depth and dynamism of British politics and civil society. No doubt many rights that ought to be protected in a decent political community are currently protected in EU law, perhaps in part because of the UK's participation in its lawmaking processes since 1973, but this in no way establishes that on leaving the EU the UK will fail adequately to protect those rights.

5. The fundamental constitutional significance of the UK's withdrawal from the EU is that it will restore effective parliamentary freedom, authority, responsibility and judgment in relation to many public policy questions, including questions that touch on the rights and privileges that persons ought to enjoy. This restoration will enable Parliament freely to make its own legislative choices. Its choices will be rightly subject to fierce internal contestation and scrutiny, within and across the Houses of Parliament and in the wider public domain. Parliament will be accountable to the electorate for these choices, which will be informed by continuing norms of international law.

6. Subject to the terms of any transitional arrangement, the UK will in due course cease to be integrated into the EU legal order and subject to the jurisdiction of the Court of Justice (CJEU). The terms of any post-Brexit agreement between the UK and the EU might attempt to replicate elements of the legal status quo, viz. far-reaching substantive limits on the freedom of Britain's Parliament. Attempting to lock in, so to speak, such particular legal arrangements would, we submit, be a great mistake. It would fail to comply with the demand of the Brexit vote, which was to restore legislative freedom (including, among other matters, over migration law), and would make it extremely difficult to reform or update problematic legal provisions, save by way of unilateral British action, such as repudiating or flouting the agreement.

7. The assumption that such supra-national limits are needed fails to grasp the capacity of British parliamentary democracy to make suitable provision for rights protection, provision that might well be contested and changed over time, but in an open, fair and reasoned way. Again, the examples of Australia, Canada and New Zealand confirm by analogy Parliament's capacity to protect rights. The assumption that supra-national limits are required for the effective protection of rights in the UK also downplays the serious damage to the rule of law and democracy that is incurred by allowing such limits to be policed and constantly expanded by an aggressive and largely unaccountable international court such as the CJEU.

8. The UK's withdrawal from the EU will not of itself result in much immediate change of the law, provided Parliament's repeal or amendment of the European Communities Act 1972 is careful not to impair the automatic continuance of existing legal provisions. Thereafter, it will of course be open to Parliament, or the Government under delegated authority, to abolish or replace some of these provisions. The merits of such amendment or repeal should be determined on a case-by-case basis and by way of the ordinary legislative process. We submit that Parliament should be very careful not to enact sweeping Henry VIII powers to authorise amendment or repeal of maintained EU or EU-derived law by ministerial fiat.

9. Brexit will end the application of the EU Charter of Fundamental Rights in the UK. This is a welcome development. As the history of its haphazard drafting and eventual adoption makes clear, the Charter was not at first envisaged as forming a set of justiciable standards. The UK accepted its transformation into such, despite significant misgivings, with the ratification of the Lisbon Treaty including Protocol 30 which was ostensibly designed to secure the UK's understanding of the Charter's limited reach. That protocol has been a dead letter since inception, rendering hollow the Government's assurances to Parliament about the Charter's significance. Predictably, the Charter has not been confined to constraining action on the part of the organs of the EU, but has been invoked as a wider licence for the extension of judicial authority, especially that of the CJEU, over political authorities. Charter adjudication is, like much international human rights law, largely inimical both to the rule of law and to democratic self-government. Its demise in relation to the UK is a very welcome improvement in Britain's governing arrangements.

Trade provisions

10. After Brexit, it will of course be for the Government, accountable to Parliament and subject to its ratification, to decide on the terms of trade agreements it proposes or accepts. The merits of human rights provisions in such agreements will and should be open to discussion and challenge in Parliament and more widely. We take no view on what policy ought to be adopted, save to note that such provisions are entirely unnecessary for the protection of rights in the UK. Rights may be protected (and rights breaches avoided) without ever using the medium of human rights law and the UK's general law (criminal law, family law, etc.) routinely and effectively protects fundamental rights. None of this is to say that express human rights provisions in trade agreements are not valuable in relation to some countries. But it is to suggest caution before assuming that in the absence of such provisions an agreement automatically fails to respect rights.

Rights to remain

11. Subject to the terms of any transitional agreement, after Brexit the UK will no longer be obligated to accept the free movement of EU citizens. What is or should be the position of EU citizens who are lawfully resident in the UK at that point in time? This will of course be a question for the political authorities to decide, taking into account the UK's continuing international obligations, including the ECHR, and the position of UK citizens resident in the EU.

12. Art 8 of the ECHR has been wrongly used by the European Court of Human Rights to micro-manage European migration law and policy and to undermine enforcement of that law

and policy. It is an open question how far and for how long the UK should continue to conform to Strasbourg's usurpation of the state's prerogative to control who enters and remains within its borders. (Much of this case law is in the process of being taken up by the CJEU by way of the Charter, confirming that its demise in relation to the UK will not be something to lament.)

13. Here in particular, what ought to be done should not be settled by the human rights case law about rights to private and family life. Quite apart from Art 8, there are very good moral reasons, it seems to us, for Parliament and Government to guarantee the legal position of most EU citizens lawfully resident in the UK. It would be unconscionable to disrupt the lives of the many EU citizens and their families who have settled in the UK. It is certainly relevant that the EU citizens in question have always been lawfully present in the UK. However, different considerations may apply to those who meet the criteria for indefinite leave to remain, five years continuous residence, as opposed to those who do not and/or who have first entered the UK after 23 June 2016.

14. EU law, as construed by the CJEU, has long prohibited the UK from deporting EU citizens who have been convicted of crimes that would ground deportation of non-EU nationals. Deportation of an EU citizen has only been permitted in relation to very serious crimes where it is possible to establish an individual case of future risk. More recently, the CJEU has misconstrued EU law, including the Charter, by leveraging a child's EU citizenship to prevent the deportation of his or her non-EU relations.

15. It should be open to the Government, with Parliament's support, to choose to deport convicted criminals after Brexit notwithstanding the protection EU law has until now provided them. Art 8 of the ECHR will likely be called in aid in an attempt to maintain the substance of EU citizenship rights, viz. immunity from deportation save in relation to the most serious of crimes, but there would be good reason for Government and Parliament to resist any such argument. The question of which rights to reside EU citizens, law-abiding or otherwise, ought to enjoy after Brexit is for Parliament to decide. There are powerful reasons to maintain the entitlement to reside for most EU citizens here, but not all. Parliament should consider this question directly, taking into account the risk of adverse Strasbourg rulings, but not letting that risk itself settle what should be done.

The future of human rights law reform

16. Strictly, withdrawal from the EU has no bearing on the UK's membership of the ECHR or on the future of the Human Rights Act 1998 (HRA). However, it is likely that Brexit will encourage attempts to use the HRA and ECHR to limit Parliament's freedom to determine the terms of legal transition and/or to compensate for the diminution of supra-national legal constraint on the UK. Thus, one consequence of Brexit may be in relevant part an expansion or intensification of problematic rights adjudication, with consequent risks to the rule of law, good government and parliamentary democracy. If this possibility does eventuate, which turns on how British courts and the Strasbourg Court react to Brexit, domestic human rights law reform will be all the more relevant.