HOUSE OF LORDS
European Union Committee

House of Lords
London
SW1A 0PW

Tel: 020 7219 6083
euclords@parliament.uk
www.parliament.uk/lords

Rt Hon David Gauke MP
Lord Chancellor and Secretary of State for Justice
Ministry of Justice
102 Petty France
London SW1H 9AJ

26 June 2019

Dear Secretary of State,

As you know, since March 2019, the Justice Sub-Committee of the European Union Committee has been conducting a short inquiry into Rights after Brexit. We have taken evidence from a number of eminent lawyers and academics, as well as representatives of the devolved nations and the Equality and Human Rights Commission. In May we visited Edinburgh where we met with the Scottish Parliament's Equality and Human Rights Committee and the Chair of the Scottish Human Rights Commission. We would like to thank Edward Argar MP, Parliamentary Under-Secretary of State for Justice, for giving evidence on 11 June, and for his subsequent letter of 18 June which expanded on a number of issues raised at that evidence session.

As we close our inquiry, we would like to highlight several significant concerns. These can be usefully separated into four separate headings: the potential impact of Brexit on rights in the UK; specific issues which are likely to arise in the devolved nations; the position of the UK judiciary on the Court of Justice of the European Union; and the UK's future relationship, after Brexit, with the European Convention on Human Rights. Normally we would have raised these issues in a report. However, as I, and a number of the Members of the EU Justice Sub-Committee, are expecting to stand down in early July, we have instead listed our main concerns in this letter.

Rights in the United Kingdom

From the evidence that we received, we are convinced that there is a real risk that Brexit could lead to a diminution of rights protections in the United Kingdom. This arises in a number of ways.

First, we are clear that the Charter of Fundamental Rights ('the Charter'), which will not apply in the UK after Brexit, currently protects certain rights which are not covered by the European Convention on Human Rights (the 'ECHR'). Certain rights have greater protection under the

Charter. For example, the right to protection of personal data (including, for example, both state surveillance and private sector collections of private data) is more extensive under the Charter than the similar right to privacy protected by Article 8 of the ECHR.

We also note the loss of Article 20 of the Charter: the right to equality before the law. While this is also protected by Article 14 of the ECHR, under the ECHR this is not a freestanding right and can only be relied upon with another Convention rights. While various EU directives containing rights under Article 20 of the Charter have been incorporated into domestic laws, such as the Equality Act, and rights will also be retained by virtue of the EU (Withdrawal) Act 2018 ('the 2018 Act'), these domestic statutes could be subject to amendment after Brexit.

The Scottish Human Rights Commission indicated in its written evidence to us that this concern about the potential diminution of rights protection over time "is further increased by the Withdrawal Act provisions allowing ministers to manage legislative change to retained EU law and any other legislation impacted by Brexit, by statutory instrument." It suggested that these "Henry VIII powers" allow for changes to rights protections "without Parliamentary scrutiny and with no other mechanisms through which to protect retained rights from amendment."

This brings us to our second point which is that, while the applicability of the Charter of Fundamental Rights was limited (in the sense that it applies only to Member States when they are acting within the scope of EU law), nonetheless the remedies available under the Charter are more significant. Due to the supremacy of EU law, the courts currently have the power to disapply primary legislation which is incompatible with the Charter. After Brexit, and with the repeal of the European Communities Act 1972, the supremacy of EU law will end, and it will not be possible to challenge post-exit primary legislation in the domestic courts on the basis of non-compliance with the Charter.

An associated point is that the 'general principles' of EU law, which are recognised by the Court of Justice of the European Union (CJEU), will no longer by justiciable in the UK, and it will no longer be possible for individuals to bring a freestanding claim, or to quash legislation on the grounds that it breaches the general principles. However, they will be retained under the 2018 Act for interpretative purposes. We are concerned that this may lead to legal uncertainty as to how these general principles of EU Law should be applied by the Courts.

Marie Demetriou QC told us that the impact of this change would be "substantial" since litigants would no longer be able to bring certain types of judicial review claims based on the principle of proportionality (which is not available as a ground for judicial review in domestic law); nor would individuals be able to bring claims based on equal treatment in the same way. She concluded that judicial scrutiny of measures adopted by public bodies, including Parliament, will be conducted in a less rigorous or less intrusive way after Brexit because the general principles would not be available as grounds for judicial review. We were also told by Professor Colm O'Cinneide that the way in which the issue of the Charter and the general principles had been dealt with in the 2018 Act "will inevitably raise complicated issues about the attention that should be paid to the jurisprudence of the CJEU when it talks about general principles and, by extension, Charter rights."

We would also note that after Brexit, certain remedies, such as '*Francovich* damages', will be lost. The rule in *Francovich* was developed by the European court in order to provide effective protection to individuals for breaches of EU law rights. It provides that in certain circumstances, if the breach is sufficiently serious and if it has caused loss, the state is liable in

damages to compensate the individual. We received convincing evidence that while *Francovich* damages were very much a remedy of last resort, their loss would make a difference, since English law does not recognise the right of damages for breach of public law except in very narrow, specific circumstances where one can show a breach of a private right (for example the tort of malfeasance in public office). Professor Colm O'Cinneide told us that, where the elements of EU law that are retained within UK law by virtue of the 2018 Act cannot be applied directly to private relationships between, for example, private employers and private employees, "it will leave a gap in protection. Put in very simple terms, there may be rights breaches, potentially quite serous, for which there will be no remedies."

A further issue was raised by Aiden O'Neill QC, who said that the case law of the CJEU – notably Case C-684/16 *Max-Planck-Gesellschaft* – ensured that "clear and unequivocal provisions of the Charter will have direct effect against private individuals just as much as against public authorities". He indicated that this protection would be lost, because the Human Rights Act "applies only in relation to public authorities or private individuals carrying out a public function, whereas elements of the Charter were universally applicable, whether against a private body or not".

We are concerned that the Government's approach to the transposition of EU law, which has essentially involved copying EU law into UK domestic law, but then carving out a variety of exceptions, has the potential to cause serious legal uncertainty. Moreover, the areas that have been carved out should have been justified in a clear and compelling way by the Government. This has not happened. While it is legally possible to rationalise the changes that will be made, insofar as Brexit ends the supremacy of EU law, the removal of the Charter and other amendments made by the EU Withdrawal Act 2018 also appeared to have an ideological edge: the need to demonstrate that we had left both the EU and the jurisdiction of the CJEU. This was demonstrated by the fact that the Government insisted on retaining clauses excluding the jurisdiction of the CJEU even while negotiating a Withdrawal Agreement which retained a limited role for that court.

We see any move to distance ourselves from international human rights standards as a retrograde step. It will send a negative message to other countries, will have effects outside the UK, and will dilute the UK's commitment to rights. Moreover, if substantive rights were reduced after Brexit, we question whether the United Kingdom would be able to continue to participate in certain programmes with the EU, particularly those relating to data exchange and extradition.

Rights in the Devolved Nations

Turning to the separate question of rights in the devolved nations, the difference in approach to rights between the devolved nations, particularly Scotland, and the UK Government was clear and appeared to give rise to the risk of a fragmented approach to rights protections across the UK.

This is already the case in Northern Ireland, where rights protections are similar, but not identical to the rest of the UK. During our inquiry, we heard that the Charter of Fundamental Rights and general principles of EU law were of greater significance in Northern Ireland, as that nation is not subject to the Equality Act 2010. Significantly, in Northern Ireland equality and discrimination law is made up of a combination of legislation and government regulations issued under the European Communities Act 1972. While this law is preserved under the

2018 Act, some of our witnesses argued that that the status of equality law in Norther Ireland was less certain since "EU law has always previously provided its backbone." The Northern Irish Human Rights Commission (NIHRC) told us that while a majority of the substantive rights set out in the EU Charter would continue to have some measure of protection under domestic law after Brexit through common law and other statutory mechanisms, the loss of the Charter in its current form would "lead to a loss of legal certainty and consistency as legal cases would have to argue whether the EU Charter applies as well as how it applies." The NIHRC also told us that given that many EU-derived rights protections are transposed via subordinate legislation, (e.g. The Working Time Regulations), such Regulations would be subject to limited scrutiny should a Minister decide to revoke or amend them.

There had been an attempt to preserve this legal backbone provided by the Charter (which has been important for providing communities with confidence in the political arrangements) by including a "non-diminution commitment" relating to Northern Ireland in the Protocol to the Withdrawal Agreement. But given the uncertain future of that Agreement, and the ambitions to remove the Protocol (or 'backstop') on Ireland/Northern Ireland, it is far from clear that this clause will ever take effect. We note the NIHRC's view that the Charter "should be retained for Northern Ireland at least until a Bill of Rights for Northern Ireland is introduced."

In the absence of any progress on a Bill of Rights for Northern Ireland, combined with the suspension of the Northern Ireland Executive and the lack of members representing nationalist communities taking up their seat in the House of Commons, we felt that there was a risk that rights protections in Northern Ireland were being overlooked. This feeling was reinforced by Edward Agar's letter to us, which touched on the question of abortion law in Northern Ireland. We appreciate that this is a contentious issue and that the Government would prefer to allow locally accountable politicians to take forward a solution in this area. However, if the UK ends up being in violation of its international obligations under the ECHR and the Convention on the Elimination of Discrimination Against Women, we would expect direct action to be taken in an expeditious way, given that it is the UK Government which is responsible for the UK's compliance with international obligations.

The evidence we received from Scotland also focussed on the question of non-diminution of rights. In Scotland, we understand that the Scottish Government is contemplating a Bill to provide "human rights leadership", as well as seeking to ensure that rights in Scotland cannot be scaled back after Brexit. The Scottish Human Rights Commission told us that its three priorities were: to ensure no regression on rights standards; to keep pace with the EU's progressive development of standards; and to "be a leader" through advancing accountability by incorporating international human rights standards and engaging internationally with the progressive development of standards. There appears to be a clear divergence between the UK Government's approach to Brexit, with a clear focus on national sovereignty and the need to leave the jurisdiction of the CJEU, and the approach taken in Scotland.

Position of the Judiciary on the CJEU

In our evidence session with the Parliamentary Under-Secretary of State for Justice, we raised the question of what would happen in the event of Brexit to the UK judges on the CJEU. The Government's clear position is that under the terms of Article 128 of the Withdrawal Agreement, the UK will no longer have an Advocate General or judges on the CJEU during

the transition period. In the event of a 'no deal' Brexit on 31 October, it is assumed that the UK judges would have to leave the court.

This results in an undesirable and unfortunate period of uncertainty for the UK judges and their staff. We note Mr Argar's comment that you discussed "a range of issues" with the UK judges on the CJEU in June and would ask that you update us if there are any relevant developments in this area.

The UK's future relationship with the ECHR

When we started this inquiry, one of our primary concerns was that the Government had appeared to water down its commitment to the ECHR between two successive iterations of the draft Political Declaration published in November 2018. The draft version of 14 November said that the future relationship between the UK and the EU would be underpinned by a "reaffirmation of the UK's commitment to the European Convention on Human Rights". The final draft on the 22 November states that the UK would agree to "respect the framework of the ECHR". In oral evidence to us, the Parliamentary Under-Secretary of State assured us that this was not an attempt to diminish the Government's commitment to the ECHR and its associated court, but rather that, the use of the term "framework" was a "linguistic device that reflects the Convention system as a whole."

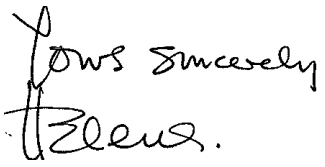
We were pleased that the Minister clarified this point and underlined that the Government is committed to maintaining the UK's "leading role in the promotion and protection of human rights, democracy and the rule of law." Nonetheless, we note his disclaimer that he could only speak on behalf of the current Government. As Angela Patrick told us in evidence, "none of the EU's international agreements with its European neighbours has been concluded without some underlying commitment to the European Convention on Human Rights". We believe that it will be incumbent on any new Government to give a clear and unambiguous undertaking that it intends to retain the UK's commitment to both the Convention and the European Court on Human Rights as part of the Government's negotiations for a future relationship with the European Union.

Once the picture on Brexit becomes clearer, we would encourage our successor committee and other relevant committees, including Parliament's Joint Committee on Human Rights, to keep the UK's standards under review to ensure that the removal of the Charter from domestic law does not further affect the substantive rights that individuals currently benefit from in the UK. In particular we would highlight the following issues:

- Whether the removal of the Charter and other associated changes we have raised causes legal uncertainty and a significant diminution of rights protections;
- The impact of the changes in the devolved nations and whether it leads to a fragmented approach to rights protections in the UK;
- Whether the rights of people in Northern Ireland as suitably protected after Brexit;
- How the UK's approach to any future deal with the European Union ensures that rights continue to be protected (and that we can continue to participate in EU programmes and initiatives).

We would be grateful for your comments on our concerns within the usual two-month timescale.

I am copying this letter to the Chair of the Joint Committee on Human Rights; Ben Macpherson MSP, Minister for Europe, Migration and International Development, Scottish Government; the Chair of the Equalities and Human Rights Committee of the Scottish Parliament and Les Saunders, Department for Exiting the European Union.



Baroness Kennedy of The Shaws
Chairman of EU Justice Sub-Committee