

LIBERTY

LIBERTY'S SUBMISSION TO THE HOUSE OF LORDS EU JUSTICE SUB-COMMITTEE INQUIRY INTO 'RIGHTS AFTER BREXIT'

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ABOUT LIBERTY

Liberty is an independent membership organisation. We challenge injustice, defend freedom and campaign to make sure everyone in the UK is treated fairly. We are campaigners, lawyers and policy experts who work together to protect rights and hold the powerful to account.

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at libertyhumanrights.org.uk/policy.

CONTACT

Nadia O'Mara

Policy and Campaigns Officer

020 7378 5251 | nadiaom@libertyhumanrights.org.uk

Sam Grant

Policy and Campaigns Manager

020 7378 5258 | samg@libertyhumanrights.org.uk

INTRODUCTION

1. Fundamental rights protections have not been paid due attention throughout the Brexit process to date. As such we applaud the EU Justice Sub-Committee for holding an inquiry into this critical issue of importance to everyone in the UK.
2. Liberty took a neutral stance on the Brexit referendum and we remain neutral as to whether or not the UK leaves the European Union (EU). However, when it comes to fundamental rights protections, we do not espouse neutrality. No matter whether a person voted to leave or remain in the EU, no one voted for fewer rights.
3. The protection of human rights forms a constitutional core of the EU. Respect for fundamental rights is recognised as a foundational element of the EU's constitutional framework and as part of the general principles of EU law, binding on Member States (MS) and protected by the Court of Justice of the European Union (CJEU).¹ Over the course of its membership with the EU, this deepening commitment to substantive and effective rights protection has had a profound impact on the UK's own human rights framework. As such, the UK's exit from the EU was always going to be a delicate, complex process with significant fundamental rights implications.
4. Unfortunately, human rights discourse in the context of Brexit has so far been defined by equivocation on the part of the Government. While the Government has made vague commitments to non-regression this is offset by a series of developments which suggest a troubling direction of travel for rights protections after Brexit:
 - The express failure to retain the EU Charter of Fundamental Rights ('the Charter') under the EU (Withdrawal) Act 2018;²
 - A dilution in language around the UK's commitment to the European Convention on Human Rights (ECHR) in the political declaration on the future relationship with the EU;³
 - A reaffirmation by the Government of the Conservative Party's 2017 manifesto commitment on repeal and replace of the Human Rights Act 1998 (HRA) while the process of EU exit is underway.⁴
5. The overall picture regarding our fundamental rights is therefore one of profound uncertainty. What does seem certain is that the Government's approach to Brexit will result in a weakening of fundamental rights protections across the UK.

¹ Doughty Street Chambers, 'Report on Human Rights Implications of UK Withdrawal from the EU: An Independent Legal Opinion Commissioned by the European United Left/ Nordic Green Left (GUE/NGL) Group of the European Parliament', pp. 3-4.

² EU (Withdrawal) Act 2018, s. 5(4) <http://www.legislation.gov.uk/ukpga/2018/16/crossheading/retention-of-existing-eu-law/enacted>.

³ For an overview of the change, see letter dated 19 December from Lord Boswell Chairman of the EU Select Committee to the Rt Hon David Gauke MP, Lord Chancellor and Secretary of State for Justice <https://www.parliament.uk/documents/lords-committees/eu-justice-subcommittee/CWM/LBtoDG-ECHR-PoliticalDeclaration191218.pdf>.

⁴ Letter dated 4 January 2019 from Edward Argar MP, Parliamentary Under-Secretary of State for Justice to Lord Boswell, Chairman of the EU Select Committee <https://www.parliament.uk/documents/lords-committees/eu-justice-subcommittee/CWM/EAtolB-PolDeclarationReferencetoECHR040119.pdf>.

6. Looking beyond Brexit, it is imperative that positive steps are taken to mitigate uncertainty around the UK's human rights framework. Much work will need to be done to restore the rights protections stripped out of our domestic framework by this Government in its handling of the Brexit process. The protections offered by the ECHR incorporated through the HRA will become all the more critical as a baseline for human rights in the UK.

LOSS OF THE CHARTER OF FUNDAMENTAL RIGHTS

7. To date, the express failure of the EU (Withdrawal) Act 2018 to incorporate the EU Charter of Fundamental Rights ('the Charter') within the corpus of 'retained EU law' is the most significant rights implication of Brexit.⁵ The impacts of the loss of the Charter are manifold and include:
 - **Less power to protect rights:** The Charter provides deeper and more effective protection for fundamental rights than is available elsewhere in UK law. The loss of the Charter risks depriving people of an effective remedy for rights violations. The Charter – while limited in its scope of application to matters pertaining to EU law – nevertheless offers a direct right of action and a powerful remedy where a challenge is successful – the disapplication of primary legislation.
 - **Creation of substantive rights protection gaps:** The Charter includes rights that do not have domestic equivalents. The Government's own 'right by right' analysis clearly shows this, despite purporting to do the opposite.⁶ Rights protections that will fall away without the Charter include the enforceable right to human dignity, the freestanding right to data protection, comprehensive protection for the rights of the child, refugee rights, the right to conscientious objection and a positive right to education.⁷ By way of example, the legal challenge Liberty brought for our client Tom Watson MP to the Data Retention and Investigatory Powers Act (DRIPA) 2014 under Article 8 of the Charter would not have been possible without the Charter.⁸ At first instance, the Court in that case noted that the Charter "clearly goes further, is more specific, and has no counterpart" in other privacy laws.⁹
 - **The loss of what could have been:** Like the ECHR, the Charter is a 'living instrument', designed to be flexible and dynamic so that it can develop to reflect social change and be interpreted in light of present day conditions. The progressive approach to interpretation adopted by the CJEU is a key driver in this respect. In the relatively short life of the Charter, already we have seen the progression of rights protection, for example the 'right to be

⁵ See Liberty's submission to the Joint Committee on Human Rights inquiry into the Human Rights Implications of the EU (Withdrawal) Bill and legal opinion of Jason Coppel QC for the Equality and Human Rights Commission on 'European Union (Withdrawal) Bill – EU Charter of Fundamental Rights' (5 January 2018) <https://www.equalityhumanrights.com/sites/default/files/eu-withdrawal-bill-legal-advice-jason-coppel-qc.pdf>.

⁶ HMG, 'Charter of Fundamental Rights of the EU Rights by Right Analysis' (December 2017) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/664891/05122017_Charter_Analysis_FINAL_VERSION.pdf.

⁷ Liberty, 'Bringing human rights home? What's at stake for rights in the incorporation of EU law after Brexit' (January 2018) <https://www.libertyhumanrights.org.uk/sites/default/files/Bringing%20human%20rights%20home%20-%20Jan%202018.pdf>.

⁸ Joined Cases C-203/15 and C-698/15, Tele2 Sverige v Post-och Telestyrelsen (21 December 2016).

⁹ *David Davis and Others v Secretary of State for the Home Department* [2015] EWHC 2092 (Admin) [80].

forgotten'.¹⁰ It is therefore impossible to predict the true extent of the loss to rights protections consequent on the failure to retain the Charter.

- **Confusion and a lack of legal certainty:** In removing the Charter, there will result considerable legal uncertainty and confusion. In the absence of the Charter, the corpus of retained EU law is incomplete; many EU legal instruments that will be 'retained' contain direct references to the Charter. This uncertainty will likely produce significant amounts of litigation seeking to establish whether and to what extent Charter rights continue to have effect in domestic law.

RIGHTS PROTECTIONS IN THE WITHDRAWAL AGREEMENT AND FUTURE RELATIONS

8. The Withdrawal Agreement negotiated between the UK and EU does not itself have a great deal to say expressly on the matter of fundamental rights protections as they apply to the UK as a whole. That said the Ireland/Northern Ireland Protocol does speak specifically to human rights protections. Of particular relevance looking forward is Article 4, which safeguards individual rights in Northern Ireland, upholding the commitment that there will be no "diminution of rights" in the region *as a result of Brexit*. Others have assessed this provision in some detail and we do not seek to rehearse their excellent analysis here.¹¹
9. The accompanying political declaration on the future relationship between the UK and the EU speaks more directly to the role of the ECHR.¹² This Committee is very aware of the change of drafting as between the summary draft published on 14 November 2018 and the final version published on 22 November 2018.¹³ In response to a letter seeking clarity on the change in drafting from Lord Boswell, Chairman of the EU Committee, Edward Argar MP, Parliamentary Under-Secretary of State for Justice, stated that "this difference in wording does not represent a change in the UK's position on the ECHR" and that the "UK has no plans to withdraw".
10. However, it is Liberty's view that any change to drafting – particularly where it is dilutive – is significant. The change of drafting suggests that the UK wishes to retain a position where it could dilute its commitment to the full mechanism of the ECHR, specifically its system of enforcement. While the UK may not plan to withdraw from the ECHR in its entirety, rights are only meaningful if they are effective and therefore our commitment must extend to its full system of enforcement. There can be no question of a break in the formal link between the UK courts and the European Court of Human Rights after Brexit. It is fundamental to the future protection of human rights that the UK remains committed to the ECHR and its full mechanism of enforcement. Liberty considers this the absolute baseline requirement for a rights-respecting UK after Brexit.

¹⁰ Case C-131/12 *Google Spain SL and Google Inc. v Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja Gonzalez* [2014] and as now reflected in the 'right to erasure' under Article 17 GDPR.

¹¹ C McCrudden, 'Brexit, Rights and the Northern-Ireland Protocol to the Withdrawal Agreement' (December 2018), in particular from p. 15 <https://www.thebritishacademy.ac.uk/sites/default/files/europe-futures-brexit-rights-ireland-northern-ireland-protocol-withdrawal-agreement.pdf>.

¹² Draft political declaration setting out the future relationship between the European Union and the United Kingdom (22 November 2018) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/758557/22_November_Draft_Political_Declaration_setting_out_the_framework_for_the_future_relationship_between_the_EU_and_the_UK_agreed_at_negotiators_level_and_agreed_in_principle_at_political_level_subject_to_endorsement_by_Leaders.pdf.

¹³ See n. 3.

11. Looking ahead to the next stage of negotiations with the EU on the future relationship, there may be opportunities – if leveraged – to push for stronger rights protections to be written into any future treaties.
12. There are particular opportunities for this in the context of policing and judicial cooperation in criminal justice matters and with respect to data protection. The language of the political declaration is most robust on human rights in these areas.¹⁴ The Government has been clear in its desire to maintain close security cooperation with the EU – for example through access to its databases.¹⁵ As reflected in the drafting of the political declaration, such cooperation requires fundamental rights protections on both sides.¹⁶ The same principle applies to data protection rights after Brexit. Any data sharing between the EU and a third state requires an assessment by the European Commission that the UK's laws on data protection are adequate, or equivalent, to the measure in the EU regime and provided for in Articles 45-47 GDPR. If the UK is serious about achieving a data sharing agreement at or beyond adequacy, it would therefore need to maintain data protection standards at pace with EU standards.¹⁷
13. During the Brexit process to date, Parliament has struggled to meaningfully influence the Government's negotiating position with the EU. Recent developments suggest that Parliament will push for a greater oversight role in negotiations on future relations.¹⁸ Should this happen, it would provide the best opportunity to date for parliamentarians to ensure that the Government puts fundamental protections front-and-centre of its negotiating strategy with the EU.¹⁹

FUTURE FRAMEWORK FOR RIGHTS AFTER BREXIT

14. It has been difficult to get a straight answer from the Government on the future of the HRA. This has been Liberty's direct experience of trying to engage the Department for Exiting the European Union and the Ministry of Justice on this issue throughout the Brexit process.
15. As the Committee is aware, in Mr Argar's response to the letter from Lord Boswell, he restated the Conservative Party's 2017 manifesto position that it would not

¹⁴ Draft political declaration, [7] and [84].

¹⁵ Prime Minister Theresa May's speech at the 2018 Munich Security Conference (17 February 2018) <https://www.gov.uk/government/speeches/pm-speech-at-munich-security-conference-17-february-2018>. However, the UK is unlikely to achieve as close a cooperative relationship as it would like. The current drafting of the political declaration only mentions ongoing UK access to some EU databases – specifically Passenger Name Record (PNR) databases and Prüm (DNA, fingerprints and vehicle registration data). The database that the UK is most keen to retain access to – SIS II – is not mentioned.

¹⁶ In the current drafting this commits the UK to respecting the ECHR and the EU to both the ECHR and the Charter.

¹⁷ Even if the European Commission were to grant the UK adequacy, the CJEU retains jurisdiction. The CJEU has previously struck down the 'Safe Harbor' agreement between the EU and the US following the Schrems case (Schrems v Data Protection Commissioner [2015]) and more recently the CJEU declared that the agreement envisaged between the EU and Canada on the transfer of PNR data may not be concluded in its current form due to incompatibility with the Charter <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-07/cp170084en.pdf>.

¹⁸ See for example, Institute for Government 'Parliament acts fast to keep control of Brexit' (4 April 2019) <https://www.instituteforgovernment.org.uk/blog/parliament-acts-fast-keep-control-brexit>.

¹⁹ Following the Prime Minister's offer to sit down for talks with Jeremy Corbyn in pursuit of a 'joint plan' on Brexit on 2 April 2019, Liberty wrote to both the leader of the opposition and the shadow Brexit secretary, Keir Starmer asking that they ask for a change in the language of the political declaration, shoring up rights protections along the lines of the summary draft <https://www.libertyhumanrights.org.uk/sites/default/files/Letter%20to%20Jeremy%20Corbyn%203%20April%202019.pdf>.

repeal or replace the HRA while the process of EU exit is underway. Most recently however, in response to oral questions from members of the SNP, Mr Argar appears to soften the Government's position by dropping the reference to the Brexit process, stating only that the Government is "not considering amending or repealing" the HRA.²⁰

16. While this may be a cause for celebration, Liberty is cautious not to jump to conclusions too quickly. If the Government was in fact changing its position on repeal and replace of the HRA, one would hope for a much clearer statement. Instead, the ambiguity and uncertainty that has so plagued the human rights and Brexit debate persists.
17. What is certain however is that in the absence of the EU Charter and its system of enforcement, the human rights protections enshrined in the ECHR and incorporated in domestic law vis-à-vis the HRA are more important than ever. What is heartening is Mr Argar's acknowledgement of the HRA's role in giving effect to the ECHR in domestic law. It can only be hoped that this is recognition by the Government of the critical role that the HRA specifically plays.

CONCLUSION

18. Brexit has had two notable impacts on human rights protections in the UK. The first is a loss of substantive rights protection through the loss of the Charter. The second is the creation of profound uncertainty. This is the case on both a macro and micro level. On a macro level, the future of the UK's human rights framework after Brexit is not guaranteed: beyond the loss of the Charter, the future of the ECHR and HRA are not iron clad. On a micro, individual, level it is not clear whether and to what extent rights from the Charter will continue to apply after Brexit – making it difficult for a person to know what their rights are. Following Brexit, there will be much work to be done by parliamentarians, lawyers, campaigners and members of the public to restore our rights to their current status.

²⁰ <https://hansard.parliament.uk/Commons/2019-03-12/debates/A61D0B42-060A-4599-BD48-DBD0B5A63BBE/EuropeanConventionOnHumanRights?highlight=human%20rights#contribution-CB154AE2-34F5-42D5-8D8F-034E8BF3585F>