Brexit and Judicial Power

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The Judicial Power Project aims to restore balance to the Westminster constitution by articulating the good sense of separating judicial and political authority. The prospect of Brexit is highly relevant to this aim. The referendum confirms the British people's commitment to self-government, parliamentary democracy, and the prerogatives of the nation-state. The rejection of continuing membership of the EU follows in part from the misuse of judicial power within the EU and the prospect of more such. Brexit addresses directly one part of the rise of judicial power in our governing arrangements. Strictly, it leaves untouched the UK's continuing subjection to the jurisdiction of the European Court of Human Rights (ECtHR) and the risk of wayward domestic judicial action. However, Brexit has wide implications for the future of judicial power in our constitution.

1. Judicial overreach as a partial cause of Brexit

Part of the reason for discontent with the UK's membership of the EU is concern about our Parliament's effective subjection to a foreign court. While this concern is often run together with objections to the supremacy of EU law itself, it is somewhat distinct. The particular role of the Court of Justice of the European Union (CJEU) has attracted much criticism in its own right. This criticism was and is justified to the extent that it rightly perceives that the CJEU has often been a lawless court, pursuing an integrationist agenda and willing if need be to extend or even subvert the treaties that establish EU law to this end.

The effective powers of EU organs have been extended by the CJEU, with several pivotal moments in EU expansion turning on judicial overreach. This has not only been problematic from a rule of law perspective, it has also made it much more difficult to trust treaty commitments entered into, for there has been a standing risk that they will not be taken to mean what they were plainly intended to mean.

The willingness of the CJEU to go beyond the law, and to do so precisely in order to extend and deepen the European state-project, is a problem recognised by many courts in member states, most notably the German Constitutional Court but also more recently the UK Supreme Court. Those courts have attempted to deter the CJEU from departing from the treaties, and from compromising the fundamentals of national constitutions, but largely to no avail. Disciplining the CJEU was a work in progress – and for remaining member states will remain so – but was not obviously capable of realisation. Whether or not the CJEU was originally conceived as a political court, it soon conceived itself so to be and has long been complacently accepted as being a political court, answering not to the law and to the ideal of the rule of law but rather, subject to political pressures and calculations, to an a priori goal of ever closer European union. This was not a happy constitutional arrangement.

The CJEU has had a particularly important role to play in recent times, often in parallel with the ECtHR, in citizenship and migration law. It has frustrated attempts to enforce the Dublin Regulation, which governs the responsibilities of member states for examining applications for refugee status, and looks set to continue to play an oversized role in determining how and to what extent member states may control their borders. The UK was not wholly involved in the EU's immigration regime, but was – and for the time being still is – subject to the EU Charter of Fundamental Rights (the Charter), which imports highly questionable parts of ECtHR doctrine, and has already been used by our domestic courts in surprising ways, setting it on a trajectory to become the new vehicle for decisive human rights litigation in the future.

2. The significance of Brexit for judicial power

Brexit promises to free the UK from subjection to the rule of the CJEU, which is an important dimension in the restoration of parliamentary democracy. It will also end judicial review of legislation on human rights grounds by way of the Charter or by way of general principles of EU law. This mode of review is much more hard-edged than the equivalent procedures under the Human Rights Act 1998 (HRA) and ECHR, for it can culminate in setting even statutes aside. It bears noting that the Charter is particularly problematic. It is wider than the ECHR, extending to a broad range of socio-economic rights. It was adopted by way of a deficient lawmaking process, with the UK initially objecting to the Charter giving rise to justiciable rights at all. The UK's accession to the Charter was rationalised by reference to Protocol 30, which was sold to Parliament as an opt-out but which was never likely to achieve this end and was soon declared by the CJEU to be entirely empty.

Membership of the EU and incorporation of EU law has influenced how British judges and lawyers think, both in relation to particular fields of law and in relation to the constitutional balance more generally. Withdrawal from the EU will not transform the

common law overnight, for the common law as shaped up by the ECtHR and the CJEU has for some years informed how our judges reason. Parliament will and should retain control over how and to what extent EU law is to be set aside, but inevitably the courts will also have to rethink various propositions. This may lead to greater internal coherence in judicial thought, to judges hewing more closely to the common law tradition, or it may license novel judicial action, freed from prior constraints. At worst, it could see a more or less conscious judicial effort to replicate, as "common law", the whole or a large part of the ECtHR and CJEU doctrines of fundamental or human rights. There is good reason to pay close attention to the legal terms of any transition from EU law and to the ways in which judges handle this transition and its consequences for legal reasoning in general.

It is possible that Brexit will help correct how some domestic judges think about the constitution. Membership of the EU accustomed judges and lawyers to thinking of Acts of Parliament as not in practice the highest form of law. Hence, they undertook a mode of constitutional review, which sometimes involved setting statutes aside, a mode of action that tended to undermine respect for parliamentary sovereignty. The high point of this drift towards disrespect is perhaps the attempt by Lord Hope and Lord Steyn to assert a domestic judicial power – entirely outside the EU context – to invalidate statutes that judges think are unjust or unprincipled. The attempt rests heavily on the assertion that membership of the EU sharply changed the nature of the constitutional order, such that parliamentary sovereignty was now outdated. Lord Neuberger (the President of the Supreme Court) and other judges have made similar, if more restrained remarks, extra-judicially.

The best explanation for judges setting aside statutes that are inconsistent with EU law has always been that this is what – for now – Parliament has chosen. That is to say, that doing so was a reflection of Parliament's decision to enact the European Communities Act 1972 (ECA), which gives effect to the UK's membership of the then EC. In repealing the ECA, Parliament will set this choice aside and thus, in one sense, will powerfully restate its continuing entitlement to legislate for the UK. It is to be hoped that this profound constitutional reordering may bear on how judges, lawyers and academics think, prompting them to recognise afresh that Parliament is constitutionally entitled to choose the law, which choices the courts should faithfully uphold.

3. Judicial power pending Brexit

The British people have voted to leave the EU, but the vote is not self-executing: Brexit requires action on the part of the political authorities. Art 50 provides for member states to begin a process of withdrawal from the EU when they convey to the European Council a decision to leave, which is to be taken in accordance with national

constitutional requirements. Most lawyers take the view that Her Majesty's Government has authority to initiate this process, exercising the royal prerogative to conduct foreign relations. However, some argue that any such action would be unlawful, and legal challenges are underway.

Professor Philip Allott (Cambridge) has proposed that the courts could simply conclude that Brexit was unlawful, on the grounds that the referendum was not in the public interest and the result was unreasonable. This is nonsense and no court would seriously entertain such an application. Dr Yossi Nehushtan (Keele) argues that it would be unlawful for the Prime Minister to take the referendum vote to be morally authoritative: instead the courts should require her to treat the vote as merely advisory and to consider it alongside factors that weigh against Brexit. Again, this is without legal foundation and there is no chance that this argument would succeed.

Much more serious are the series of challenges that have now begun before the courts. They are to be heard together in mid-October before the Lord Chief Justice, Lord Thomas, and two other judges. The lead claimant will be represented by Lord Pannick QC and law firm Mishcon de Reya. Their argument, in brief, is that initiating Art 50 would (eventually) lead to change in rights and duties in British law, that the Crown is unable to change domestic law by way of the prerogative, and hence that the use of Art 50 to leave the EU must be authorised in advance by an Act of Parliament. The argument is wrong and the courts should reject it. The European Communities Act 1972 incorporates the EU treaties as they exist from time to time. Thus, the Act presupposes adherence to or membership of the treaties, but presupposes, and does not at all limit, the prerogative power in relation to those treaties. It remains entirely open to Her Majesty's Government to initiate Art 50, which is a right under a treaty, notwithstanding that this may, eventually, by virtue of 1972 Act's own essential terms, bear on the scope of law incorporated by the 1972 Act.

The Mishcon de Reya challenge cannot itself make Brexit as such unlawful but seeks a judicial declaration to require an Act of Parliament before the Government is able lawfully to initiate Art 50. The point of the challenge, it seems obvious, is *delay*, either with a view to waiting for conditions to change so that calls for a second referendum might seem more plausible and/or to make it possible for anti-Brexit MPs and Peers to delay, complicate or otherwise frustrate the Government's intention to honour the referendum vote and to withdraw the UK from the EU. The legal challenge is arguable, even if it is likely to fail, but it is nonetheless in a sense a misuse of the court process. Initiation of Art 50, by a Prime Minister leading a Government commanding the ongoing support of the House of Commons, would hardly take Parliament by surprise. Parliament enacted the European Union Referendum Act 2015, by overwhelming majorities, to "give the British people the final say" about membership of the EU. It would have been lawful and constitutional, if not necessarily prudent, for Art 50 to

have been initiated on the morning of 24 June. These legal challenges aim to persuade the courts to raise the bar, to make Brexit politically and constitutionally ever more difficult. The courts should reject the invitation and leave to the Houses of Parliament the task of holding the Government to account for its exercise of the prerogative. The Government should, and doubtless will, make time in the Commons for debate of its Art 50 plans and timetable.

The legal proceedings now underway are dangerous. The courts have no choice, thus far, save to allow the arguments to be made before them. But if the courts are perceived to be helping to frustrate Brexit, to be standing in the way of the Government's intention to honour the referendum result, then this will undermine public confidence. And the simple act of hearing the challenges at all risks fuelling this perception, for there is at least a risk of delay, which is partly the point of the legal action. It would be best if the challenges are rejected clearly and quickly.

Should Parliament exercise its authority to limit the reach of problematic EU law, including unsound decisions of the CJEU, in British law *before* Brexit? Parliament undoubtedly has authority so to do in domestic law but any such action would breach EU law. There are good reasons to avoid the charge that the UK is flouting international legal order and/or to avoid the risk of undermining friendly relations with other EU member states. However, it may be that Parliament takes the view that national security or some other pressing national interest requires immediate action and/or that some decision of the CJEU goes well beyond the terms of the treaties to which the UK has acceded. In these circumstances, subject to questions about prudent foreign policy, it would be open to the UK to resist incorporation of the problematic judgments in question. Such resistance can draw upon remarks in the UK Supreme Court in recent cases. Lord Mance has outlined a principled case for resisting EU law that is inconsistent with fundamentals of our constitutional tradition and decisions of the CJEU that clearly exceed the terms of the treaties. He had in mind the Supreme Court leading such resistance, as well it might, but it would be equally open to Parliament to stand on the same ground and resist EU law on principle.

It is doubtful that the Supreme Court will act on Lord Mance's remarks pending Brexit, but much may turn on what the CJEU does between now and then, and, relatedly, how long it takes for the UK to leave the EU. It bears noting that the prospect of Brexit would undermine the threat of infringement proceedings against the UK, although again it is arguable that prudent foreign policy might warrant continuing observance of CJEU judgments, even when clearly wrong (unless they purport to treat Brexit as invalid or ineffective).

The threat that EU law poses to our parliamentary democracy does not come only from the CJEU. Just as problematic are domestic judgments that rely on, or misapply,

EU law. There is good reason, pending Brexit, to limit sharply the capacity of domestic judges to make use of the Charter. The last year has seen a number of very significant domestic misuses of the Charter, likely going beyond what the CJEU would require. Parliament should legislate to limit this capacity, imposing a duty on domestic judges not to make use of the Charter in ways that go beyond the UK's understanding of Protocol 30, since the Charter's effective non-application to the UK was something about which Parliament has received many assurances from the UK Government at the time the Charter was proclaimed and then at the time when it was given legal effect "subject to" Protocol 30. Alternatively, Parliament might act to require domestic judges to refer questions under the Charter to the CJEU rather than acting alone. This might both avoid the risk of domestic judges taking advantage of the power which the Charter effectively vests in them, and avoid diplomatically unnecessary confrontation with the CJEU. It would also delay any enforcement of the Charter, which may become moot if Brexit takes place in a timely fashion. While Parliament may at that point choose to maintain all existing EU law for the time being and only later to modify particular propositions, it should certainly cancel the Charter's application immediately.

4. Judicial power after Brexit

It is possible, as noted above, that this new public moment may serve to chasten judges, in the sense that Brexit is partly a renewed public commitment to parliamentary democracy. However, the prospect of Brexit may in fact encourage domestic judges to overreach. The energy and resources currently devoted to EU litigation will be redirected elsewhere, most obviously to ECHR/HRA litigation but also to the ordinary common law. For many judges and lawyers, Brexit will be taken to mean that an important restraint on elected politicians has been removed, which requires replacement. This view may be especially salient for so long as the Opposition appears to be floundering. Many in public life will now look to domestic courts and the ECtHR as bulwarks against the executive and against the Parliament they wrongly presume to be simply dominated by the executive. It is entirely possible that Brexit may, notwithstanding its intellectual foundations and political significance, lead to a more active and wayward domestic judiciary. This displacement activity may take the form of seizing the moment and indigenising much EU law, with the intended result that the common law is taken now to incorporate that part of the law which the judges in question want to retain. Some such tendency has already been in evidence in relation to human rights law, with "common law rights" being summoned up or enlivened as a technique to head off the risk of the HRA being repealed and/or the ECHR denounced. It follows that domestic judicial action will warrant continued scrutiny.

Many will say that the HRA and ECHR will be needed more than ever after Brexit. Alternatively, one might say that the case for repealing the HRA and/or withdrawing from the ECHR will be greatly reduced after Brexit, for it was EU law and the CJEU that constituted the main threat to our tradition of government. There are still very good reasons to repeal the HRA and/or to replace it with a more disciplined Act. The HRA undermines the rule of law, wrongly privileges judicial policy preferences, and weakens both sound judicial culture and robust parliamentary deliberation. And the ECHR is *routinely* misinterpreted by the ECtHR and domestic judges, one consequence of which is wrongly to limit the capacity of the proper authorities to expel dangerous persons and to enforce Parliament's immigration laws in a timely and predictable fashion. However, the reality of Brexit may weaken the case for withdrawal from the ECHR, at least in the short-term. Leaving the EU will place considerable strain on the integrity of the UK in view of the absence of majority support for Brexit in Scotland and Northern Ireland. Leaving the ECHR might compound these tensions, especially in relation to Northern Ireland, which may warrant caution.

Still, it is an open question whether full restoration of self-government is possible without exit from the ECHR. And in view of the renewed public commitment to parliamentary democracy and to border control there may be no better time to act. However, the more prudent course of action is likely to remain in the ECHR but to increase the distance between judgments of the ECtHR and British law. Thus, one should take to heart the lesson of Lord Mance in relation to the CJEU and not tolerate judgments of the ECtHR that undermine fundamentals of the common law tradition or, especially, that go beyond the terms agreed by the UK and other member states in adopting the ECHR in the first place. The ECtHR is often an inconstant court but is now clearly committed to a mode of interpreting the ECHR that undercuts the terms initially agreed and instead updates and changes them in light of its judgment of what now should be chosen. This mode of action is flatly inconsistent with disciplined legal technique and good government.

Limiting incorporation of dubious ECtHR judgments is difficult, partly because of the risk that the mode of limitation – say, adoption of a British Bill of Rights – may empower domestic judges to improperly frustrate executive and legislative choices. There are very real advantages in not being subject to the rule of a foreign court, but one should take care in avoiding this state of affairs that one does not substitute rule by a domestic court.

The exact shape of Brexit remains undecided. In deliberating about the terms of any new relationship which the UK may enjoy with the EU or with other states, the political authorities should very firmly and carefully avoid subjecting the UK to any alternative mode of judicial oversight. Membership, for example, of entities or arrangements such as the European Economic Area (EEA) or other trade arrangements, which increasingly

rely on international judicial enforcement, might well prove to be a form of submission to continued judicial supremacy. Upholding clear, agreed terms may be unobjectionable, provided they are open to subsequent democratic deliberation and amendment, but the UK must take care to avoid replicating its present subjection to an over-mighty and imperial judicial body.

5. An agenda for continuing reform

The Government should respond robustly to the litigation challenging its competence to exercise Art 50. Pending Brexit, and in line with Protocol 30 as explained to Parliament in 2007, Parliament should legislate to limit the use of the Charter by domestic judges. In negotiating with other EU states, and with members of the European Economic Area (EEA), the Government should avoid or minimise the UK's subjection to this and to any further binding international judicial oversight. Human rights law reform should continue, with Parliament repealing and replacing, or at least amending, the HRA with a view to restoring the rule of law, legislative freedom and good government. Relatedly, Parliament should specify human rights requirements so as to secure the rule of law and to limit and reverse judicial overreach, not least in relation to migration and border control. The UK should adopt a clear policy of resisting overreach on the part of the ECtHR, denying its authority to misinterpret the ECHR. Parliament should speedily reverse any domestic judgments that overreach constitutional bounds. The Government should responsibly and appropriately make more use of existing powers to make sound senior judicial appointments.