



The EU Charter After Brexit

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Table of Contents

1. Executive Summary.....	3
2. The Role of the Charter After Brexit	4
3. Consequences of Excluding the EU Charter from UK Law	5
4. Excluding the Charter and Retaining Fundamental Rights and Principles	6
5. The Role of the CJEU and the ECtHR	8
6. The EU Charter: Participative Accountability	9

The views expressed in this paper are those of its independent authors.

Executive Summary

This submission argues that it makes no sense to exclude the EU Charter of Fundamental Rights from the general logic of the European Union (Withdrawal) Bill,¹ which is to avoid regulatory gaps by bringing all existing EU law into UK law prior to exit and giving Parliament time later to decide which parts it wishes to retain or repeal. The attempt to exclude the Charter creates numerous anomalies and complexities, seriously undermining legal certainty and risking a diminution in rights. Clause 5's attempt to exclude the Charter while retaining 'fundamental rights or principles which exist irrespective of the Charter' leaves open so many complex questions as to put in doubt the feasibility or desirability of excluding the Charter in this way. Nor is it clear why incorporation of the Charter is regarded as problematic. Unlike the vagueness of terms such as 'fundamental principles', the Charter's *raison d'être* has always been to create a clear, transparent and democratic codification of such principles, holding both courts and EU institutions and Member States to account. It is argued that there are good reasons in principle and law to delete Clause 5(4) and allow the Charter to be incorporated so that Parliament can choose how to amend it with all other EU legislation after Brexit.

¹ 2017-19.

The Role of The EU Charter After Brexit

The Withdrawal Bill is designed to facilitate smooth legal transition when the UK leaves the EU. If it were not enacted there would be regulatory black holes affecting the areas currently governed by EU law. The Bill is predicated on the assumption that all existing EU law will be brought into UK law prior to exit, that any necessary changes will be made to render existing EU law fit for purpose on exit day, and Parliament will decide thereafter whether it wishes to retain, amend or repeal existing EU law.

This logic is embodied in Clauses 2 to 4, which ensure the continued existence of different types of EU law within the UK. Clause 2 deals with domestic statutes and statutory instruments that implemented EU law, normally directives. Clause 3 covers direct EU legislation, which principally means directly applicable regulations and decisions that could be legally effective within national legal orders without a national statute. Clause 4 retains directly effective rights that had hitherto been part of UK law through the European Communities Act 1972, section 2(1).

There are difficulties with these clauses, but they nonetheless follow the general logic of the Bill. Clause 5(4) is the exception, since it provides that the Charter is not part of domestic law on or after exit day. There is no warrant for this exception. If the logic of the Bill is followed, Parliament would decide what it wishes to do with the Charter post-exit. If the Charter were to be included within domestic law, then after exit day Parliament as the sovereign legislature would be able to determine, as part of the on-going process of adapting retained EU provisions, practical matters such as permitted litigants and defendant bodies, available causes of actions, and available remedies.

The Consequences of Excluding The EU Charter from UK Law

The exclusion of the Charter from domestic law will either lead to a **reduction** in the protection of rights, and/or a reduction in **legal certainty** surrounding their protection. An example illustrates this. In the recent Supreme Court decision of *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs*, Ms Benkharbouche argued that provisions of the State Immunity Act prevented her from enforcing her rights under the Working Time Regulations, based on the EU Working Time Directive, against the Sudanese embassy.² The Supreme Court concluded that her right of access to the court under Article 47 of the Charter had been breached. The Charter could be used to disapply these legislative provisions, enabling Ms Benkharbouche to protect her rights under the Working Time Regulations.

After exit day, Ms Benkharbouche would not be able to rely on the Charter and would have to pursue her claim using the Human Rights Act 1998, which has more limited remedial measures. The court could only declare the State Immunity Act incompatible with European Convention (ECHR) rights, and Ms Benkharbouche would have to wait for Parliament to address this incompatibility.

² [2017] UKSC 62.

Excluding the EU Charter and Retaining Fundamental Rights and Principles

A range of problems are caused by the inter-relationship between Clauses 5(4) and 5(5). On the one hand, Clause 5(4) excludes the Charter from domestic law after exit day. On the other, Clause 5(5) retains 'fundamental rights or principles which exist irrespective of the Charter', and its content is unclear. Moreover, Clauses 6(1) and (7) refer to principles of the Court of Justice of the EU (CJEU) and of EU law. Are these the same principles referred to in Clause 5(5)? In a similar vein, Clause 4 preserves directly effective rights. It may seem sensible to treat "rights" in Clause 5(5) as corresponding with rights in Clause 4, but the addition of the word "fundamental" in Clause 5(5) is then question-begging. The Bill does not clarify these important terminological issues.

If Clause 5(5) is read as affirming that recognised fundamental rights remain unaffected by Clause 5(4), it is unclear which references to Charter rights in existing case law are likely to be caught by it. Most cases refer to the Charter, the ECHR, and general principles in order to protect rights, making it hard to identify those which exist independently from the Charter.³

This confusion is not merely an academic debate, but has significant impact. Using the example above, if the right of access to court is retained through Clause 5(5), Ms Benkharbouche would not be able to rely on this general principle on its own, or to disapply legislation (Schedule 5, paragraph 3). However, she might be able to argue that the Working Time Regulations should be interpreted in line with

³ C-293/12 Digital Rights Ireland [2015] QB 127.

general principles of EU law, including an ability to plead her case before the court. If successful, the Working Time Regulations could then disapply the State Immunity Act, as this was enacted prior to exit day (Clause 5(2)). It is not clear whether the Regulations would be interpreted in this manner. Nor is it clear whether the courts would develop the common law in a manner which replicates any potentially lost Charter rights, adding to the uncertainty.⁴

⁴ UK courts may have regard to decisions of the CJEU and may use these to develop common law rights (clause 6(2)).

The Role of the CJEU and the European Court of Human Rights

Section 2 of the HRA 1998 requires UK courts to take account of jurisprudence of the ECtHR and Clause 6 of the Bill requires them to have regard to the CJEU case law. However, what are courts to do when the jurisprudence of the ECtHR and CJEU diverges? UK judges are legitimately concerned that Parliament addresses the basis on which they reflect on EU law in the interpretation of domestic law after Brexit. Ambiguity in the judicial mandate should be avoided, although space for dynamic reconciliation of inconsistencies in Luxembourg and Strasbourg practice must be created. The problem identified here is unlikely to arise frequently, since the CJEU is attentive to the practice of the ECtHR, but a better solution would be to accommodate and to align reference to both systems in the Bill.

A formula borrowed from section 60 of the Competition Act 1998 seems suitable:

consistency between the Bill and treatment of corresponding questions arising in EU and ECHR law shall be ensured so far as is possible (having regard to any relevant differences between the provisions concerned)

The EU Charter: Participative Accountability

In addressing these issues, it is important to be clear about the Charter's rationale. It was envisaged as a clear and comprehensible codification of the fundamental rights which constrain the CJEU, the EU institutions and the Member States acting within the scope of EU law. Previously, the scope of fundamental rights had been left to the CJEU. Far from affording more power to the CJEU or the EU, the Charter provides a clear codified set of rights to hold public authorities to account and enhance their democratic legitimacy.

It is not a top down instrument put in place by technocrats. Unlike the opaque inter-governmental process, the Charter emerged from a real participative process. During its drafting, EU citizens were encouraged to make representations online; all papers were immediately accessible; and open meetings were held for civil society. Rather than leaving it to judges to discern fundamental rights on a case-by-case basis, the Charter is a clear, transparent and democratic instrument to which everyone can refer. It is inevitable that fundamental rights are formulated in relatively general terms and require interpretation when applied to specific circumstances. But this problem is alleviated, since the Charter includes a higher level of detail to guide judicial decision-making than many older human rights instruments. Its incorporation after exit day is thus unlikely to cause major complications.