TRYING TO KEEP THE CHARTER IS SENSELESS

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Executive Summary

Amendments have been put down to the Withdrawal Bill whose aim is that after exit day the EU Charter of Fundamental Rights should be part of UK law. These amendments are both undesirable and confusing for the following reasons.

(1) The genesis of the Charter was to protect the primacy of EU law from challenges on the ground that EU law lacked principles of fundamental rights. Reflective of that context, its text begins with the aspiration to ever closer union. Whereas all the rights in the European Convention on Human Rights are expressed in universal terms, no fewer than 23 of the 50 rights articles in the Charter refer to "the Union", "citizens of the Union" and "Member States". It is suffused with the project of European integration, and is an awkward document as part of the law of a non-member state.

(2) Revising the text by Henry VIII powers so as to make it applicable to the UK rather than the EU would be unsatisfactory. In places it would produce limp or bizarre text. In other places there would be issues of high policy as to how its text should be adapted, or whether text should be retained at all. A particular example of a controversial question which would arise is the treatment of the socio-economic rights in Title IV, since Protocol 30 of the Lisbon Treaty enacts that this Title shall not create new justiciable rights in the UK. The true nature of the document which would emerge from such an exercise, if conducted in a worthwhile fashion, would be a UK Charter of Fundamental Rights – itself a controversial project, and one which in any event should be produced only after proper consultation.

(3) Making the Charter part of domestic law could by a side wind undermine what has been called "the subtle compromise" of the Human Rights Act, by which parliamentary sovereignty is respected: that is, rather than judges being empowered to nullify Acts of Parliament, they make formal declarations of incompatibility.

The Charter has been used by domestic courts on several occasions in recent years to "dis-apply" provisions in statutes, in other words to override them:-

- In *Benkharbouche* the Charter was the tool by which a provision in the State Immunity Act 1978 was disregarded, although that Act does not implement, or have any direct connection with, any EU legislation.
- In *Vidal-Hall* the Charter was used to create an entitlement to a species of financial claim on which the relevant statute was silent.
- In *Watson* the Divisional Court, with the later approval of the CJEU, treated an entire chapter of an Act of the Westminster Parliament as of no validity by application of the Charter.

The scope of such potential undermining of parliamentary sovereignty is increased by domestic courts acceptance of the widest view of the scope of application of the Charter in two important respects where there is real lack of clarity as to EU law, namely:-

(a) The application of the Charter "horizontally" so as to create directly enforceable rights between private parties, as opposed to merely creating rights for individuals against the state; and

(b) The application of the Charter to anything "within the scope of EU law", as opposed to being limited to when "implementing EU law" – in other words, wherever there could have been an applicable instrument EU law, even if, in fact, there is not. Bearing in mind that under the Treaty of European Union most areas of potential legislative action are in respect of shared competences, where the EU has jurisdiction to act if it chooses, this extends the scope of the Charter to almost any situation.

(4) The effect of the proposed amendments is thoroughly unclear. The status and effect of the Charter after exit day will be left uncertain if amendments remove the proposed provisions relating to the Charter, whilst putting nothing in their place. By its terms the Charter applies to "Union law". As Professor Mark Elliott has said, this is "a restriction that would make no sense post-withdrawal". Although the substance of EU Regulations and the like will be similar, the text will be UK law, not Union law –

a significant difference in the nature of the law.

The Human Rights Act should apply to "EU-retained law", since it will have become domestic law: but it will also be confusing to have two separate rights regimes, both operating in domestic law.

The Bill, however, could be improved, and the protection of fundamental rights enhanced, by amendments:

(a) to enact that the Human Rights Act applies to EU-retained law;

(b) to modify the wording of cl.5(5), so that the Charter may be referred to by courts as a source of information as to fundamental rights recognised by the EU, and be used as a tool to assist interpretation of ambiguity in EU texts.

In a personal endnote, the author, who was a Remain campaigner, suggests that rights enthusiasts and Europhiles will damage, rather than enhance, their aspirations for the future by making this ill-fitting EU document the basis for a matter as important as the rights of British citizens.

Introduction

Amongst the amendments which the House of Commons will consider to the European Union (Withdrawal) Bill are a number whose aim, in broad terms, is that the European Union Charter of Fundamental Rights should be an instrument of domestic law after exit day. The result, if these proposals were adopted, would be confusing, undesirable, and probably not in accordance with the proposers' intentions. There are, however, some alternative amendments which could improve the Bill, and enhance protection of fundamental rights.

The Options before the House of Commons

The clause 5 options

At the heart of the debate is cl.5(4) in the Bill as introduced which states:-

> "(4) The Charter of Fundamental Rights is not part of domestic law on or after exit day."

This is immediately followed by a sub-clause to retain other fundamental rights and principles:-

> "(5) Subsection (4) does not affect the retention in domestic law on or after exit day in accordance with this Act of any fundamental rights or principles which exist irrespective of the Charter (and references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles).

A Labour front bench amendment would simply delete cl.5(4). An amendment tabled by a number of Conservative backbenchers would delete both cl.5(4) and cl.5(5).

So the options are a provision which purports to say that the Charter shall not be part of domestic law; or the absence of that provision. That latter is explained by the Conservative backbenchers in their Explanatory Statement:

> "To allow the Charter of Fundamental Rights to continue to apply domestically in the interpretation and application of retained EU law."

So, on the face of it, the choice is: Charter in, or Charter out. For reasons discussed below,

that is, at best, a significant oversimplification of the effect of the presence or absence of cl.5(4).

The Schedule 1 options

The Bill's Schedule 1 contains related provisions which are important in the present context. There is a Conservative backbench amendment to omit the whole of Schedule 1, or, as an alternative, paragraphs 1 to 3, which are the material ones in relation to fundamental rights. At present there is no similar Labour frontbench amendment, but in the light of recent statements by the Labour frontbench spokesman there may be a possibility of a Labour whip to support the Conservative backbenchers' amendment.

Schedule 1 paragraph 1[1] provides that retained EU law cannot be challenged on the ground that it is invalid, unless the European Court has decided that it is invalid before exit day. The newcomer to the world of EU law may find this an odd provision. He might think that either an instrument would bear the EU stamp of authenticity by publication in the Official Journal, or it would not. If it did, it would be valid; if not, not. And even if there is any doubt about that, the newcomer might think that only the EU's own court could remove the stamp of EU authenticity if by some procedural mishap it had been accorded to a flawed instrument. So what is the point of enacting a truism? And why would some people object to its enactment?

The answer lies in the fact that since the Lisbon Treaty, which stated that the Charter is to have "the same legal value as the treaties"[2], both the Court of Justice of the EU and domestic courts have started to hold that EU legislation, which had in procedural terms been perfectly properly enacted, is invalid by reason of the Court's opinion that it does not comply with some broadly worded feature of the Charter.

The second, related feature of Schedule 1[3] provides that after exit day there shall be no right of action in domestic law based on a failure to comply with a general principle of EU law and

[1] Schedule 1 paragraph 1 reads: "There is no right in domestic law on or after exit day to challenge any retained EU law on the basis that, immediately before exit day, an EU instrument was invalid"

[2] Treaty on European Union art 6

[3] Schedule 1 paragraph 3

that no court may quash an enactment on that ground. This, too, the amendment would seek to remove.

Reasons why attempting to retain the Charter in domestic law is senseless

The amendments which seek to retain the Charter, and its scope for impact, in domestic law after exit day should be rejected for the following reasons:-

(1) The Charter's text reflects that its purpose was connected to European integration, and it would be awkward as part of domestic law in a non-member state.

(2) Adapting the text of the Charter into a form appropriate for a domestic instrument would require considerable surgery, would involve controversial questions of high principle, should entail wide consultation, and would be unsuitable to be done under Henry VIII powers.

(3) The Charter has been used by domestic courts to treat statutes of the Westminster Parliament as invalid, thus departing from the respect which the Human Rights Act accorded to parliamentary sovereignty, and sometimes disregarding the limits which EU law ought to place on the Charter's scope.

(4) The effect of the proposed amendments is thoroughly unclear.

There are, however, weaknesses in the present wording of this aspect of the Bill. There are amendments which could improve it.

(1) The Charter's text reflects its genesis connected to European integration and would be inapt as part of domestic law in a non-member state

In the aftermath of World War II there were two great aspects to the movement for the reconstruction of Europe and the prevention ever again of the horrors of the first half of the 20th century. One was the concept of internationally recognised fundamental rights. The other was the proposal to pool national sovereignty in respect defined competences. These two movements were complimentary, but quite distinct. They were pursued through different

institutions, and adopted by different countries. The fundamental rights movement found expression through the European Convention on Human Rights, which was drafted within the Council of Europe and adopted in 1950. The pooling of sovereignty movement began with the establishment in 1951 of the European Coal and Steel Community by six countries; the same six proceeded in 1957 to establish the European Economic Community. Both movements have grown in the number of involved countries: now 48 countries are signatories to the Convention, whilst 28 are members of what is now the European Union.

For many years a commitment to human rights had no explicit place in the documents of the European Communities. The freedoms which the Communities were concerned to establish were the four economic freedoms of trans border commerce – free movement of goods, capital, services and labour. The aspirations of the Communities were at a macro, rather than individual, level. The preamble of the 1951 treaty begins with "world peace" and an affirmation of the contribution which an organised Europe can bring to civilisation and economic growth. As well as its famous aim of "ever closer union", the 1957 treaty's preamble speaks of improving employment, reducing regional imbalances, elimination of barriers to commerce, and, again, safeguarding peace. Human rights were dealt with by the parallel European organisation, and were not the business of the Communities.

This absence of any express commitment to fundamental rights first appeared as a problem in the German Federal Constitutional Court. It surfaced in 1974 in the case usually known as *Solange I*[4]. The background was the assertion by the European Court of Justice of the primacy of Community law. Although the Community treaties did not expressly assert the supremacy of Community legislation in the fields of Community competence, this was implicit. Because not express, it was left to the Court to enunciate it.

The issue first arose when the Netherlands introduced a new customs duty on a product called ureaformaldehyde. This was a direct breach of an article of the EEC Treaty which prohibited member states from imposing new tariffs. If this had been regarded as a mere breach of an international obligation, as normally the breach by a nation state of a treaty term would be, the issue might have taken years to sort out. To avoid the undermining of the efficient

[4] *Solange I* (1974) BverfGE 37, 271; reported in English at [1974] 2 CMLR 540

operation of the single market, in the *Van Gend en Loos* case[5] the Court held that treaty articles, provided they were clear and unconditional, must be given direct effect in national courts. The principle received its classic statement two years later in *Costa v ENEL*[6]:-

> "By creating a Community of unlimited duration, having ... real powers stemming from a limitation of sovereignty or transfer of powers from the state to the Community, the member states have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves."

In so far as a Community institution was seeking ways of enforcing rules in dilatory states, these actual decisions are unlikely to have upset many people in Germany. Making the system work efficiently must have corresponded with the national interest of Germany, a country which, like the United Kingdom, has been diligent in observing its international obligations. But the underlying principle was a different matter. In Germany, again rather like Britain, certain national principles of law were cherished. In the case of Germany, one of these was the Federal Constitution, in which fundamental rights was an essential feature. The German Court accepted that Community law was an autonomous system which stood alongside domestic law, but could not accept that it had a supremacy over the national constitution. Accordingly, the Court held:-

> " 24. ... in the hypothetical case of a conflict between Community law and a part of a national constitutional law or, more precisely, of the guarantees of fundamental rights in the Constitution, there arises the question of which system of law takes precedence, that is, ousts the other. In this conflict of norms, the guarantee of fundamental rights in the Constitution prevails as long as the competent organs of the Community have not removed the conflict of norms in accordance with the Treaty mechanism."

Some of us may lament that the sophisticated German understanding of how an autonomous European law could coexist with domestic law, and ultimately be ousted by it, hardly permeated the British consciousness, or dented the simplified loss of sovereignty analysis; but that is now just a might-have-been of history.

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[5] *N V Algemene Transport Van Gend en Loos v Nederlandse* Case 26/62 (1962): "... the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields ..."

[6] *Costa v ENEL* (6/64) [1964] ECR 585

The practical consequence of the *Solange I* judgment was to create an incentive within the European institutions for declarations of respect for fundamental rights at European level: by doing so, the German Court could be denied the pretext of the absence of such as a justification for a claim to a jurisdiction to review European legislation. There were such declarations on a number of occasions by the European Parliament, Council and Commission[7]. In a number of judgments the European Court of Justice enunciated the safeguarding of personal rights as a principle of Community law[8]. By 1986 this effort had done the trick so far as the German Court was concerned: in the judgment often referred to as *Solange II*[9] the Federal Constitutional Court held that the developments had been such that it would no longer claim a jurisdiction to review Community acts for compliance with fundamental rights.

The EU Charter of Fundamental Rights is presented as the drawing together in a single document of principles which have been recognised in different judgments or declarations over previous years. It is accompanied by Explanatory Notes, which repeatedly cite such earlier pronouncements as source material. The Luxembourg Court itself has recently recognised that the aim of the recognition of rights in EU law is to safeguard the primacy of EU law from the risk of challenges from national level on the ground of lack of attention to fundamental rights:-

> "31. It is also important to consider the objective of protecting fundamental rights in EU law ....
> 32. The reason for pursuing that objective is the need to avoid a situation in which the level of protection of fundamental rights varies according to the national law involved in such a way as to undermine the unity, primacy and effectiveness of EU law."[10]
> (emphasis added)

The connection between the Charter and the commitment to the EU's aims goes beyond its genesis. It is reflected also in its actual wording in many ways:-

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[7] Declaration of the European Parliament, the Council and the Commission on 5th April 1977, and declaration of the Council on 7/8th April 1978.

[8] e.g. *Johnston v Royal Ulster Constabulary* [1986] 3 CMLR 240 at [17]

[9] *re Wünsche Handelsgesellschaft* [1987] 3 CMLR 225

[10] *Siragusa v Regione Sicilia* [2014] 3 CMLR 13

(a) Its Preamble begins with the aspiration to ever closer union:-

> "The peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values."

(b) That those to whom it is addressed does not extend beyond the EU is expressly stated by art 51.1:-

> "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union ... and to Member States ...."

The words which follow confine the focus even more tightly to the EU:-

> " ... only when they are implementing Union law."

(c) Whereas all the rights in the European Convention on Human Rights are expressed in universal terms, no fewer than 23 of the 50 rights articles in the Charter refer to "the Union", "citizens of the Union" and "Member States"[11].

(d) Some parts of the Charter plainly could not continue to be appropriate , such as the right to vote in European Parliament elections, the right of access to EU documents, the right to refer to the European Ombudsman or the right to petition the European Parliament[12].

(e) Some rights are specifically expressed in terms of EU instruments: for example, the right to asylum is "in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union"[13].

For these reasons a mainland academic who has taken a particular interest in rights, Dr Eduardo Gill-Pedro, has concluded the UK would be right to "let go" of the Charter:-

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[11] See Articles 12.2, 15.2, 15.3, 16, 18, 22, 25, 26, 27, 28, 30, 34.1, 34.2, 34.3, 35, 36, 37, 38, 39.1, 40, 41.1, 41.3, 42, 43, 44, 45.1, 45.2, 46, 47 and 50.

[12] See Art.s 39, 42, 43 and 44.

[13] Art 18

> "... the point of the Charter ... is not to ensure the protection of fundamental rights per se, but rather to ensure that the project of European integration is not jeopardised by the requirement to protect fundamental rights.....
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> The Charter is thus best seen as a mechanism which is intended ... to ensure that the supremacy of EU law is accepted by national legal orders ...
>
> If it is the case that the UK no longer shares the objective of furthering European integration, then it does not make sense to remain bound by a Charter which will require the UK to interpret and apply fundamental rights in light of such an objective."
> (Eduardo Gill-Pedro, Faculty of Law, Lund University in "Learning to Let Go)[14]

In summary, the Charter is a document whose genesis was to protect the primacy of EU law and whose text is drafted to be applicable to institutions involved in European integration. It would be an awkward and ill-fitting document as part of the domestic law of a non-member state.

(2) Adapting the text of the Charter into a form appropriate for a domestic instrument would involve considerable surgery and issues of high principle, requiring wide consultation, and unsuitable to be done under Henry VIII powers

It may be argued that the Charter can be adapted to a text appropriate to UK application in just the same way EU Regulations will be. In respect of EU Regulations this is to be by a Minister using "Henry VIII powers" under cl.7 of the Bill to remedy deficiencies. In theory a similar exercise could be undertaken by a Minister in relation to the Charter; and in many articles the substitution of "UK" wherever "the Union" appears would work perfectly well. But if one follows through what would be entailed the idea may cease to look attractive even to great enthusiasts for the Charter.

Firstly, in some instances such substitution would produce text of limp meaning. For example art 34.2 reads:-

> "Everyone residing and moving legally within the European Union is entitled to social security benefits in accordance with Union law and national laws and practices."

[14] http://eulawanalysis.blogspot.co.uk/2017/09/learning-to-let-go-charter-of.html

Would it be an exercise of any sensible purpose to have a UK Charter of Fundamental Rights with so self-evident a proclamation as the following? --

> "Everyone residing and moving legally within the United Kingdom is entitled to social security benefits in accordance with United Kingdom law and national laws and practices."

The outcome of such an exercise would be even more bizarre in the case of art 36, which reads:-

> "The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union."

That would presumably become something like:-

> "The United Kingdom recognises and respects access to services of general economic interest as provided for in United Kingdom laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the United Kingdom."

In some important respects issues of high policy would be involved. A particularly controversial question would be whether title IV, which contains 12 socio-economic rights, would drop out. By art. 1.2 of Protocol 30 to the Lisbon Treaty it is provided:-

> "... nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law."

There would, therefore, be a compelling argument that, in order to preserve the status quo, the whole of Title IV should be omitted from any UK-version of the Charter. The only basis on which the Charter has application at present is pursuant to s.2(1) European Communities Act 1972 as "rights ... arising by or under the Treaties" which are to be "given legal effect". Cl.4 of the Bill provides that rights recognised under s.2(1) are to continue to be available; but there is no suggestion that EU rights which are not currently justiciable should become so. However, one can imagine that many of those keenest on retaining the Charter in some form would be distressed at the thought of a Conservative minister deleting the socio-economic rights.

More profoundly, one can ask: what would be the true nature of the document thus produced? That question comes into sharper focus if one asks the simple question: what would the title become? If the policy is throughout to replace "UK" for "EU", then it would be "The UK Charter of Fundamental Rights". Some of us have for many years argued in favour of just such an instrument, including seven out of the nine members of the Lewis Commission[15], but, as is well known, the idea of a UK Bill of Rights is controversial.

A Charter of UK Rights, derived perhaps to a significant extent from the EU Charter, but from which most socio-economic rights are absent, might be an idea with much to commend it. But for a document of such significance to emerge from a Minister's Henry VIII exercise would verge on the grotesque. As the Lewis Commission suggested, any such document should be the subject of wide consultation. Such consultation should, in particular, involve the devolved institutions in Scotland, Wales, and Northern Ireland. There could be great value in the suggestion made by Sir Jeffrey Jowell's Commission on devolution[16] of a commitment to human rights featuring in a Charter of Union; but all this is to envisage a free-standing exercise of some scale..

Accordingly, the process of transforming the text of the Charter into wording suitable for a UK-domestic document would entail not only considerable surgery but also issues of high principle, such as ought to involve the wide consultation appropriate for the drafting of a UK Bill of Rights – which, indeed, is what the exercise would really amount to.

(3) Retaining the Charter would distort the balance of the Human Rights Act

When the UK enacted the Human Rights Act 1998 it was a central part of the scheme that Parliamentary sovereignty be preserved: if a court considers a provision incompatible with a Convention right it is empowered to grant a declaration of incompatibility but cannot strike down an Act of Parliament. In practice on almost all the occasions when a court has made

[15] See "A UK Bill of Rights? The Choice Before Us", the report of the Government Commission chaired by Sir Leigh Lewis, December 2012

[16] "A Constitutional Crossroads: Ways Forward for the United Kingdom" published by the Bingham Centre for the Rule of Law, May 2015

a declaration of incompatibility under s.4 of the 1998 Act Parliament has subsequently legislated to remove the incompatibility. But it has been an essential part of the compromise represented by the Human Rights Act that the decision whether or not to do so remains with Parliament. Often the issue is what, in the words of articles 8, 9, 10 and 11 of the Convention, is "necessary in a democratic society" – which may ultimately be a decision of political policy. This balance has received wide support. For example, Lord Lester of Herne Hill QC, who campaigned for many years for the incorporation of the European Convention on Human Rights into British law has written:-

> "The Human Rights Act is a well-drafted and subtle compromise respecting both Parliamentary sovereignty and the need for effective legal protection of fundamental rights....
>
> Unlike most other constitutional systems, the Human Rights Act prevents the unelected judiciary from nullifying Acts of Parliament that violate our basic constitutional rights. Instead it enables the courts to make declarations of incompatibility with Convention rights, leaving it to the Government and Parliament to decide whether to amend the offending statute or to await a ruling by the European Court of Human Rights. In that way it is a more democratic and less judge-based than in most countries."[17]

The Charter has been treated by courts as empowering them to do the very thing which Parliament chose against in the Human Rights Act – to deem primary legislation to be invalid. This has occurred both in Luxembourg and in our domestic courts. The Court of Justice of the EU has on a small number of occasions since the Lisbon Treaty declared parts[18] or all[19] of EU legislation invalid on the basis of its opinion that the content of the legislation was in conflict with some broad principle in the Charter. On a number of recent occasions domestic courts have now declined to apply and enforce statutes of the Westminster Parliament for non-compliance with Charter principles: this has occurred not only when domestic courts have considered that this course followed a Luxembourg decision, but also

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[17] "A Personal Explanatory Note" Lord Lester of Herne Hill QC in the report of the Lewis Commission at p.231, op cit

[18] In *Association Belge des Consommateurs Test-Achats v Conseil des Ministres* [2012] 1 WLR 1933 the CJEU declared one part of a Directive invalid, thereby producing the exact opposite end result to that of the Directive as enacted.

[19] In *Digital Rights Ireland Ltd v Minister for Communications* (2014) C-293/12, C-594/12 the CJEU held an entire Directive invalid and of no effect.

when the domestic court was purely operating on its own opinion. Three significant cases of domestic courts "dis-applying" a statute have been *Benkharbouche*, *Vidal-Hall*, and *Watson*, each of which is discussed below.

The potential for parliamentary sovereignty to be undermined if the Withdrawal Bill appears to authorise continued use of the Charter in this way is increased by domestic courts' belief as to the width of the scope of application of the Charter. In two respects this belief may be wider than is actually justified by EU law. These respects are: (a) the application of the Charter "horizontally" so as to create directly enforceable rights between private parties, as opposed to merely creating rights for individuals against the state; and (b) the belief that the Charter is applicable where there could have been an applicable instrument EU law, even if there is not.

Benkharbouche

Benkharbouche v Embassy of Sudan[20] is a case which proceeded through every level upwards from Employment Tribunal, culminating in a decision of the UK Supreme Court in October 2017. It concerned claims by employees at foreign embassies in London against their employers. They complained inter alia of breaches of the UK statutory instrument which transposed the EU's Working Time Directive, and also of UK law implementing the EU's Race Discrimination Directive. By virtue of s.16 State Immunity Act 1978 sovereign states are immune from the jurisdiction of UK courts in respect of claims by employees of their diplomatic missions. Most of the very considerable argument in the case was as to whether international law required so wide an immunity. At all levels it was concluded that it did not. Since it did not, there was no obvious justification for a UK statute to preclude an effective remedy; and hence a breach of art 6 of the European Convention on Human Rights. If matters had stopped there, the course would have been straightforward – a declaration of incompatibility under s.4 Human Rights Act. Matters would have stopped there prior to the Lisbon treaty conferring on the Charter the same status as the treaty[21].

[20] *Benkharbouche v Embassy of Sudan* Employment Appeal Tribunal (Langstaff J) at [2014] 1 CMLR 40; Court of Appeal at [2016] QB 347; and *Benkharbouche v Secretary of State for Foreign Affairs* UK Supreme Court at [2017] UKSC 62.

[21] Treaty on European Union art 6

Granted, however, the status which the Charter now has, it was argued that a breach of the Charter ought to lead domestic courts to give a remedy as if the State Immunity Act did not exist. The Charter contains at art 47 a provision of effect similar to art 6 of the Convention. Therefore, it was argued that s.16 State Immunity Act should, in the jargon which has now come to be used, be "disapplied". The scenario of a member state failing properly to comply with its obligation to transpose an EU directive into national law is one which has been dealt with over many years: the principle has always been than whilst an aggrieved individual may be entitled to be compensated by the state by way of what are known as *Francovich* damages[22], a remedy cannot be claimed against another private individual as if the Directive had been fully transposed. In the language of EU lawyers, this is the principle that there is no horizontal effect. Now the embassy claimants were asserting the benefit of just such a horizontal effect. They did so in reliance on a 2010 Luxembourg decision, *Kücükdeveci*[23], that general principles of EU law can have horizontal effect. Langstaff J was persuaded that this was good EU law, but in a judgment worthy of more attention than it has yet received, he expressed some disquiet at the implications:-

> "63. This is not an easy position to reconcile with principles of legal certainty, which are also important general principles of any system of law: for it means that general principles, recognised as such by a decision of the court, unwritten and unpublished by the legislature, which point in a certain direction rather than giving concrete rules of law, and which might not accord with the traditions of the domestic jurisdiction of a particular member state are to be applied—and are not merely to be applied in what might have been thought their natural territory, in disputes between citizen and state, to protect the former from the power of the latter, but as between private individuals who must derive their knowledge of the principle at best from its recognition in other court proceedings. Moreover, if Mr Luckhurst is right, the application of these general principles by restatement in broad terms in the Charter (expressed to be binding on public authorities, and hence not expressly as between individuals) is to be sufficient to deprive specific and certain national provisions of their effect as between private litigants.
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> ....
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> 71. .... it may be seen as undesirable that the regime for paying respect to the ECHR, which carefully balances the roles of the courts and the legislature, does not operate where EU rights of a somewhat unspecific nature are concerned ..."

It is, perhaps, an indication of how quickly an outcome, whose novelty disturbed Langstaff J.,

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[22] named after *Francovich and Bonifaci v Italy* [1991] ECR I-5357

[23] *Kücükdeveci v Swedex GmbH & Co KG* (Case C-555/07) [2010] All ER (EC) 867

has ceased to raise eyebrows amongst the judiciary that when Lord Sumption was giving judgment in the UK Supreme Court three years later the ruling that clear words of the State Immunity Act should not be enforced was dealt with in a couple of sentences. Over the course of 40 pages of his Opinion he discussed whether international law required the width of immunity and whether in consequence the Act infringed art 6 the European Convention on Human Rights. He concluded that there was such an infringement and so a declaration of incompatibility was justified. He noted that, by reason of its similar effect, if there was a breach of art 6 there must also be a breach of art 47 of the Charter. Then in a single sentence he announced that this meant that the statute would not be enforced[24].

Vidal-Hall

In *Vidal-Hall v Google Inc*[25] the claimants alleged that Google had misused their private information as to internet usage and thereby breached s.13 Data Protection Act 1998. At an interlocutory stage the issue arose whether the effect of s.13 of the Act was to exclude damages where there was no pecuniary loss. The 1998 Act implemented the EU's Data Protection Directive. The first question, on which there was no Luxembourg Court authority, was whether the Directive on its true interpretation required member states to provide compensation for non-pecuniary distress. The Court of Appeal relied on articles 7 and 8 of the Charter which proclaim rights of privacy and to protect personal data as an aid to interpreting the Directive as requiring compensation for non-material loss. Thus far the Court was using the Charter in an uncontroversial manner, that is as an aid to interpreting an EU instrument. This led the Court to conclude that the 1998 Act had failed fully to implement the Directive.

Like the Embassy cases, this case was between private individuals, not a claim against a public authority of a member state. So on conventional EU law principles Vidal-Hall would have had no justiciable right against Google, and the remedy would have been a claim against the UK for *Francovich* damages (which in a case of only non-pecuniary loss would

[24] See paragraph 78 of Lord Sumption's opinion; up to paragraph 77 he has been dealing with the European Convention on Human Rights.

[25] [2015] 3 WLR 409 Court of Appeal (Lord Dyson MR, McFarlane, Sharp LJJ). On 23rd July 2015 the UK Supreme Court granted permission to appeal; the appeal has not yet been determined.

presumably have been very modest). However, the Court of Appeal held that article 7 and 8 of the Charter required the existence of a justiciable right against Google, and the consequent "dis-application" and setting aside of s.13(2) of the 1998 Act.

Watson

In 2006 the EU enacted a Data Retention Directive[26] requiring telecommunication providers to retain certain basic data (the "Who, When, Where" metadata) for 12 months. This is material which in the nature of things telecommunication providers hold at the time of the making of the communication, and often make their own use of for billing purposes. Sooner or later they will delete this data: what the Directive did was fix the earliest date for such deletion at a year later. The benefit of such retention was that in the event of the security service or police being able to satisfy an appropriate judge or authority of a justification for access, the data would still be available for a number of months. Once a suspicious individual has come to the attention of such security services a warrant may be obtainable for access to future communications, but experience has shown value in being able to discover with whom the suspect has already been in contact.

In 2014 in *Digital Rights Ireland* the Luxembourg court[27] held that this Directive was contrary to the Charter and that accordingly the Directive was invalid and of no effect. The UK was one of many countries which wanted to continue the data retention arrangements. Accordingly Parliament hastily enacted the data Retention and Investigatory Powers Act 2014.

Tom Watson MP and David Davis MP then brought proceedings for a declaration that aspects of this 2014 Act should be "dis-applied" as contrary to EU law. The Divisional Court acceded to this argument. The Court of Appeal was disinclined to do so, and referred the question to the Court of Justice of the EU. In December 2016 that Court handed down a judgment[28] which went further than the Watson claimants had ever put their arguments: it held that EU law wholly precludes any national legislation in a member state which requires

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[26] Directive 2006/24/EC

[27] *Joined cases C/293/12 and C/594/12*

[28] *Joined cases C-203/15 and C-698/15* . The *Watson* case was conjoined with a Swedish case, *Tele2 Sverige*

internet providers on a general basis to retain data as to who, when, where communicated. The broad effect is that it is currently contrary to EU law for Parliament to enact legislation along the lines of the 2014 Act.

The 2014 Act lapsed at the end of 2016: the security authorities are now obtaining access to have access to communications data for security purposes under a different regime pursuant to an older statute. This new regime has been challenged before the Investigatory Powers Tribunal. This Tribunal last year ruled that the new regime had be made essentially compliant with the European Convention on Human Rights[29]. Following the Luxembourg *Watson* decision a further challenge was heard that the regime was contrary to EU law. The Tribunal encouraged the Government to take the point that, whatever *Watson* might have decided in relation to ordinary criminal investigations, it could not apply to national security because national security is outside the competence of the EU[30]. Having been unconvinced by contrary arguments, the Tribunal duly delivered a judgment holding that *Watson* did not affect security services access to communications data, but, by reason of the importance of the question, referred it to the Court of Justice of the EU[31]. This saga, then, still has some way to run. What it demonstrates already is the remarkable reach of the Charter, and the unpredictability of its ramifications.

"Horizontal" application

The discussion above has demonstrated that domestic courts have on at least two occasions applied the Charter so as to create new rights between private persons. In *Benkharbouche* it has enabled employees to bring claims against an employer which were excluded by the clear words of a section of a statute. In *Vidal-Hall* it was used to allow an entitlement to recover against a computer company damages of a character which the statute did not permit.

As already mentioned, for decades the conventional approach of EU law has been that if a

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[29] *Privacy International v Security of State for Foreign Affairs* [2017] 3 All ER 647

[30] See Treaty on European Union art 4: "...national security remains the sole responsibility of each Member State"

[31] *Privacy International v Security of State for Foreign Affairs* judgment of Investigatory Powers Tribunal 8th September 2017

member state fails to give effect to a directive fully or at all, there is what is called "state liability": an individual who suffers loss by reason of the state's failure may claim *Francovich* damages[32] against the state. But if the cause of action which the directive ought to have created for an individual is against a private person, a court cannot pretend that the unimplemented directive has been given effect[33].

It is currently unclear whether EU law will depart from this principle in respect of failures to achieve Charter rights. On the one hand there is the *Kücükdeveci* case mentioned above, and some age discrimination cases[34]. On the other hand, in *NS* Advocate-General Trstenjak said:-

> "... article 1(2) of Protocol 30 first reaffirms the principle, set out in article 51(1) of the Charter, that the Charter does not create justiciable rights as between private individuals."[35]

In 2014 in *Association de mediation sociale v Union CGT*[36] the Luxembourg Court found that France had failed fully to implement an employment directive in respect of the manner of ascertaining whether the number of employees sufficient to bring certain obligations into play, and that this entailed a breach of employees' rights to consultation contrary to Charter art 27. Nonetheless, the Court rejected its Advocate-General's suggestion that it should use the Charter to permit a direct action by an employee against a private sector employer: it held that art 27 of the Charter could not be invoked to disapply national legislation, and that the employee's remedy lay in *Francovich* damages.

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[32] *Francovich and Bonifaci v Italy* [1991] ECR I-5357

[33] On the non-existence of direct horizontal effect between private citizens, see *Marshall v Southampton Health Authority* [1986] ECR 723.

[34] There is a slightly distinct short stream of Luxembourg case-law allowing the direct applicability of a general principle of EU law (rather than expressly relying on the Charter) in two age discrimination cases, the highly controversial decision *Mangold v Helm* [2006] All ER (EC) 383 and *Kűkűkdeveci v Swedex* [2010] All ER (EC) 867. Lord Mance in *USA v Nolan* [2015] UKSC 63 observed at [43] that it was unclear whether that line of law applied outside age discrimination cases. He also left open the question of horizontal reliance on the Charter.

[35] [2013] QB 102 at p.141, AG [173]

[36] [2014] ICR 411

Prof Paul Craig of Oxford University, who is a specialist in EU law, has concluded:-

> "I think it very unlikely that the CJEU will interpret the Charter so as to render its provisions in general directly applicable as between private parties. There will not in the jargon of the trade be direct horizontality flowing from the Charter, whereby individuals could use the Charter as the cause of action so as to impose obligations on other private parties."[37]

In summary, on an issue where there is real uncertainty as to how far the effect of the Charter extends in EU law most UK judges have uncritically accepted the widest thesis.

The "scope of EU law"

It may well be that those proposing the retention of the Charter in domestic law imagine that it could only be of application to an instrument of EU retained law, and thus of confined application. That may well be an underestimate of the range of its potential impact.

The Charter states its Field of Application thus in Article 51.1:-

> "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union ... and to Member States only when they are implementing Union law."
> (emphasis added)

The sources of Union law are regarded as being: the treaties and subsidiary conventions; acts of members states; Regulations; Directives; binding decisions issued by the Commission; case-law of the Luxembourg Court; and possibly soft law sources such as recommendations and opinions. So if a member state is implementing any of those, the Charter applies. That, the reader of art 51.1 might think, is where the Charter would stop.

What introduces doubt is the Explanation note to art 51 which states:-

> "As regards the Member States it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on Member States when they act in the scope of Union law"
> (Emphasis added)[38]

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[37] Supplementary written evidence to H of C European Scrutiny Committee inquiry into the application of the EU Charter to the UK (2014-15 session) page 4

[38] The Explanation note cites three little-known, pre-Charter cases of the Luxembourg Court as justification for the wide "scope of Union law" application: *Wachauf v The State* [1991] 1 CMLR 328,

To the ordinary reader the phrase "in the scope of Union law" may sound like the same thing as "when implementing Union law"; but there are dicta of the highest judicial authority suggesting that it brings in a much wider range of situations. For instance, it is suggested that it brings in the action of member states where an EU legislative instrument states that an area of activity is left to member states.

The potential for the "scope of Union law" note to bring in a situation where EU law was not being implemented, at any rate not in any direct sense, was illustrated by a first instance decision of Lloyd Jones J in *R (Zagorski) v Secretary of State for Business*[39]. This was an application by judicial review challenging the Minister's failure to impose an export ban on the sale of an anaesthetic, which had a range of possible uses, to US states who planned to use it in a cocktail of lethal injection drugs for executions. The claimant advanced various arguments, all of which failed. Before, however, rejecting the argument based on the Charter, the judge addressed the preliminary question of whether the Minister's decision was one taken when implementing EU law. The relevant EU Regulations, which in general strongly favoured free trade, allowed a discretion to member states whether to impose bans on various grounds of public policy. It was in exercise of that discretion that the British Minister decided not to impose an export ban. The imposition of prohibitions on exports was held by the judge to be "an area subject to close and detailed regulation by the EU". However, so far as EU Regulations were concerned, the Minister was free to choose to ban, or not to ban, export to the USA of this anaesthetic. Despite that, the judge held that in his failure to impose a ban the Minister was implementing EU law. To some people it will seem rather curious that when the EU says something is <u>not</u> being dealt with by the EU but rather being left to member states, the states are held by courts to be implementing EU law.

The weight to be attached to the "scope of Union law" phrase in the Explanation ought to have been reduced when it is observed that early drafts of the Charter had contained "scope

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Annibaldi v Commune di Lazio [1998] 2 CMLR 187, *Elliniki Radiophonia Tileorassi v Pliroforissis* [1994] 4 CMLR 540. Upon examination none justifies the proposition that EU law applies general principles of rights in any wider situations than where EU law is being implemented.

[39] [2010] EWHC 3110 at [66] to [70]

of Union law", and that the apparently narrower phraseology of "implementing Union law" became substituted in the approved draft. If parties in the course of travaux preparatoires change from a broader wording to a narrower wording, a court might well subsequently consider the change to the narrower wording indicative of the parties' intention.

Nevertheless, the idea has been adopted in UK legal circles that anything loosely connected with the EU's fields of activity is within the scope of the Charter. Lord Kerr of Tonaghmore in the UK Supreme Court in *Rugby Football Union v Consolidated Information*[40] said:-

> "The rubric "implementing EU law" is to be interpreted broadly and, in effect, means whenever a member state is acting 'within the material scope of EU law': see eg *R v (Zagorski)* ..."

This has been repeated a number of times in subsequent judgments, as authority for an expansive application of the Charter.

For example, the Divisional Court judgment in the case about the UK's Data Retention Act quoted Lord Kerr's words, and then crisply dealt with the applicability of the Charter by simply saying,

> "Data protection has been within the scope of EU law for 20 years"[41].

Very similar words to Lord Kerr's were used in the Court of Appeal's judgment in that same case[42]. There is a striking contrast with the approach of the German Federal Constitutional Court when in April 2013 it was considering a challenge to Germany's Counter-Terrorism Database Act: it held that since the German Act was not within the Charter because,

> "... there is no provision of Union law that obliges the Federal Republic of Germany

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[40] [2012] 1 WLR 3333 at [28]

[41] Op cit at [6]. The full title of the statute was Data Retention and Investigatory Powers Act 2014. There was a separate, far more compelling, reason why the Charter was applicable in that case. That is because the EU's e-Privacy Directive expressly required that national measures for the retention of data must be justified inter alia by reference to art 6(1) of the Treaty on European Union, which is the art which gives effect to the Charter.

[42] [2015] EWCA Civ 1185 at [92]

to establish such a database, impedes it from doing so, or prescribes anything about the content of such a database."[43]

The Luxembourg court has blown hot and cold on whether the Charter applies other than when an instrument of EU law is being directly implemented. Several recent decisions have indicated a cautious approach to when the Charter is applicable[44]. Against those, however, stand two leading CJEU cases in which an expansive application of the Charter was adopted – *NS* and *Åkerberg Fransson*.

NS[45]concerned an Afghan national who arrived in the United Kingdom via Greece and then claimed asylum. In accordance with the Dublin procedures the Home Secretary called upon Greece to consider his application: Greece would normally have been responsible. The relevant EU Regulation, having established the normal procedures, went on to provide that "by way of derogation" from them, any member state could consider an application for asylum. The applicant asked the Home Secretary to consider his application on the ground that his Charter rights would be at risk of infringement if he were returned to Greece. She declined to do so. He sought judicial review of her decision. The Court of Appeal referred questions to the Luxembourg Court. In addition to holding that Protocol 30 did not create a general opt-out for the UK, the Court held that the regulation created a discretionary power, that this was part of the whole mechanism for determining asylum applications, and that, therefore, a state exercising the discretionary power "must be considered as implementing EU law". Therefore, although the member state was making a decision in an area where EU law explicitly left a decision to the member state, and so presumably allowed the member state to decide either way, the Charter could require the decision to go in the direction which the court considered met the Charter's principles.

In *Åklagaren v Åkerberg Fransson*[46] the Luxembourg Court, rejecting the advice of its Advocate-General, expressly adopted "scope of EU law" as its test; or at any rate repeatedly

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[43] 1 BvR 1215/07 at [90].

[44] *Dano v Jobcenter Leipzig* [2015] 1 WLR 2519; *Jobcenter Berlin v Alimanovic* [2016] QB 308 ; *Jobcenter Recklinghausen v Garcia-Neto*, judgment 25th February 2016

[45] Cited above

[46] [2013] 2 CMLR 46

used the phrase in its judgment. The case concerned the imposition in Sweden of both an administrative penalty and a criminal penalty on a trader for VAT fraud. He claimed that the latter penalty infringed his right under the Charter not to be prosecuted twice for the same offence. The penalties were part of the general Swedish tax code. They were not enacted in order to transpose into domestic law the EU requirement of VAT. Therefore, several member states, the European Commission and the Advocate-General all argued that the penalties did not represent implementation of EU law. Nonetheless, the Court held that the Charter did apply.

Again, therefore, there is real lack of clarity whether EU law is represented by the narrower or the broader view of the Charter's scope. And here, too, UK judges have tended uncritically to accept the broadest thesis.

Summary on erosion of parliamentary sovereignty

Giving the Charter a role in the domestic law of the UK outside of the EU could drive a large hole in the arrangements by which the Human Rights Act upholds parliamentary sovereignty. In *Benkharbouche* the Charter was the tool by which a provision in the State Immunity Act was disregarded, although that Act does not implement, or have any direct connection with, any EU legislation. In *Vidal-Hall* the Charter was used to create an entitlement to a species of financial claim on which the relevant statute was silent. In *Watson* the Divisional Court, with the later approval of the CJEU, treated effectively an entire Act of the Westminster Parliament as of no validity or effect by application of the Charter[47].

UK courts have tended uncritically to accept the broadest positions as to the scope of application of the Charter in EU law on two issues of principle where EU law remains unclear. Firstly, there has been little mention in the UK cases of the doubts in Luxembourg jurisprudence whether the Charter should create new obligations horizontally between private persons. Secondly, UK judgments have tended to accept the wider test of application wherever something is within "the scope of EU law": bearing in mind that under the treaty of

[47] The order disapplied s.1 of the 2014 Act; this contained the whole of the provisions relating to retention of data, other than definitions and purely supplementary material in s.2. Later sections dealt with the distinct topic of investigatory powers.

European Union most areas of potential legislative action are in respect of shared competences, where the EU has jurisdiction to act if it chooses, this extends the scope of the Charter to almost any situation.

(4) The effect of the proposed amendments is unclear

The assumption of the proposers of the amendments, as expressed in their explanatory statements, is that:

(A) if cl.5(4) stands, it will not be available as a tool for the interpretation of retained law; and

(B) if cl.5(4) is deleted, the Charter will become part of domestic law.

Both assumptions seem, at best, over-simplifications.

It will be difficult for a British court to construe wording lifted directly out of EU legislation in isolation from the principles which inform the reading of the wording in its original setting as EU legislation; and there is nothing in the Bill which attempts to exhort courts to do so. In fact, the Bill goes somewhat further by cl.5(5), which is set out above, and which expressly enacts that fundamental rights or principles – presumably meaning EU law's rights or principles – will remain.

Accordingly, all that cl.5 seeks to achieve is to exclude elements in the Charter which are not found elsewhere in material relevant to a British court. Most of the content of the rights in the Charter is drawn from other sources, which will be part of domestic law. Specifically:-

(i) Many of the rights in the Charter are rights also found in the **European Convention on Human Rights.**

Since retained law will be part of domestic law, its interpretation ought to be subject to the enhanced interpretative principle in s.3 of the Human Rights Act. If it be felt, as it may be, that there is any doubt as to that, then this Bill

should be amended to make that explicitly clear.

(ii) Other of the rights are principles found in **EU case-law**. Examples are equality before the law, and the right to good administration.

(iii) Others again are simply statements of the effect of **EU legislation**: for example, art 32 on the protection of young people at work is stated in the Charter's Explanatory Notes to be based on Directive 94/33/EC which was transposed into UK law by the Management of Health & Safety at Work Regulations 1999.

Therefore, the true effect of the Bill, as it stands, is to exclude from domestic law propositions or mechanisms which are based only on the Charter. It is wrong to suggest that the Bill would prevent British courts from interpreting the text of EU retained law in the light of well established EU principles, including those of fundamental rights.

Turning to the situation if the amendments are carried, how far is it the case that that would make the Charter an effective part of domestic law? The short answer is: the situation would be confusing and uncertain.

The Charter states in art 51 that it applies only to "Union law". After the repeal of the European Communities Act 1972 becomes effective, EU law, as such, will cease to be given effect by domestic courts. What instead will be in force will be identically (or similarly) worded provisions which have assumed a new status by virtue of cl.3 or cl.4 as part of domestic law. The substantive effect will be similar, but the qualitative nature of the law different. They will not be Union law, but UK law. On what, then, could the Charter bite?

Therefore, in so far as the Charter goes beyond principles or propositions which are also found elsewhere, is thoroughly unclear what bearing the Charter could or should have. For this reason Mark Elliott, who is Professor of Public Law in Cambridge University, has expressed scepticism about seeking to retain it :-

"... retaining the Charter would be far from straightforward. For one thing, it

> presently operates only in areas to which EU law applies – a restriction that would make no sense post-withdrawal. Yet if the Charter were to be given global effect within the domestic legal system, that would create significant complications – not least its relationship with the Human Rights Act 1998."[48]
> (emphasis added)

Similar observations can be made about the effect of removing the paragraphs of Schedule 1. What that would do is remove the express provision excluding the power of a court to disapply or quash statutes: it would not enact a positive conferral on courts of such a jurisdiction. In the event of such silence, one would surely need to determine what jurisdiction a court had by general principles. Since the fundamental principle of the UK constitution is the sovereignty of Parliament, it is unclear whether there could be inferred out of silence a power for domestic courts to strike down statutes. Indeed, if UK courts should find themselves in future wondering whether or not they have the power to do that in operating a Withdrawal Act which is silent on the matter, the prospect of a fresh round of "Judges v People" newspaper headlines may cause nervousness in many quarters.

Another aspect of confusion which would be a likely result if the amendments are passed is the establishment of two different regimes of rights in UK law. That is because it is arguable that the Human Rights Act will apply to "EU-retained law" as soon as its nature changes upon exit day by this Bill into UK law. The Convention rights and the Charter rights are often the same, but sometimes there are differences in wording and the Charter has additional rights. The remedies would be different. This refers not just to the possible available of a strike down power in the court in relation to Charter rights; there would be no declaration of incompatibility available, and no liability of public authorities to pay damages, pursuant to ss.4 and 6-8 of the Human Rights Act, in respect of breaches of Charter rights. To have two variant rights regimes, both as part of UK domestic law, would surely be seriously muddling. There is widespread support for the aim of achieving as much certainty as possible as to the law after exit day. The amendments would tend to create uncertainty.

[48] at https://publiclawforeveryone.com/2017/07/14/the-eu-withdrawal-bill-initial-thoughts/

Amendments which could improve the Bill

The Bill could be improved by amendments in these respects:-

(1) Parliament could enact that the Human Rights Act applies to EU-retained law. This may be the case anyway: it would be helpful to make this clear and certain. The Strasbourg Court has accepted that the European Convention on Human Rights does not apply to legislation enacted by the EU[49]. The fact that the Convention does not apply to the EU was a major factor underlying the introduction of the Charter. But there is no reason in policy, and every consideration of principle, in favour of the Convention rights applying to the texts which have ceased to be Union law and been converted by the Bill into domestic UK law.

(2) Parliament could modify the wording of cl.5(5). This rather grudgingly seems to favour every general principle of EU law with the single exception that the Charter is not to be referred to. Since the Charter must on any sensible analysis be accepted as a significant EU statement of EU principles, this could appear a policy of determined ignorance. It would be both more gracious and more realistic to enact that the Charter may be referred to by courts as a source of information as to fundamental rights recognised by the EU, and be used as a tool to assist interpretation of ambiguity in EU texts.

These amendments would make a real contribution to the protection of fundamental rights in the sphere of EU retained law, without all the disadvantages inherent in the amendments currently proposed.

[49] *Bosphorus v Ireland* (2006) 42 EHRR 1

Personal endnote

There may be rights enthusiasts who, whilst conceding that the discussion above highlights real difficulties, will nonetheless feel inclined to back anything which could beef up judicial control of rights. They may feel that, however unclear the effect of the amendments, however unsatisfactory the Charter as a part of EU law, and however confusing to the Human Rights Act arrangements, something is always better than nothing. They should pause. They should remind themselves that 52% of the electorate voted Leave in the face of the advice of almost every authority on economics and trade. They should ponder whether splashing an EU label over the protection of rights is really their most constructive course of action.

There may also be Europhiles who feel so depressed and angry about leaving the EU that they feel inclined to back anything which keeps a bit of the EU in play. They, too, should ponder. Perhaps the most imaginative writing to emerge since the referendum from the mainland on how a UK role in Europe can be maintained is the proposal for a "continental partnership"[50] published by the Brussels-based think tank, the Breugel Group. This illustrated the scope for a new form of collaboration considerably closer than a simple free trade agreement, but starting from a frank acceptance of the implications of the referendum vote. If that is the intelligent direction for Europhiles, then seeking to empower British judges to override Parliament by use of a document suffused with European integration is surely just about the most unintelligent.

Having myself been a Remain campaigner, I hope that the sadness of 2016 will not be followed by a wholly avoidable cause for resentment against the EU felt by many our fellow citizens lasting years into the future.

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[50] "Europe After Brexit: A Proposal for a Continental Partnership" at http://bruegel.org/2016/08/europe-after-brexit-a-proposal-for-a-continental-partnership/