



**The Charter of Fundamental
Rights in UK law after Brexit:**

*Why the Charter should not be
transposed*

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The Charter of Fundamental Rights in UK law after Brexit:

Why the Charter should not be transposed

Introduction

The government's European Union Withdrawal Bill proposes not to transpose the Charter of Fundamental Rights of the European Union into UK law after Brexit. A number of opposition MPs, and some rebels on the government benches, have tabled amendments proposing that it be retained as part of UK domestic law. The government is right to deny the Charter a place in UK law after exit for the following reasons:

- 1) The Charter would duplicate and overlap with rights protections already provided by the common law and the Human Rights Act 1998, which will automatically apply to EU-derived law when it is converted into UK law under the Bill. This level of uncertainty and likely confusion regarding the fundamental rights of the citizen against the state should be unacceptable in a democracy governed by rule of law.
- 2) If retained, the Charter would grant UK courts the power to strike down Acts of Parliament passed prior to Brexit which fall within the very broad scope of "implementing EU law". The granting of this power, which would create considerable constitutional uncertainty, has not been tested by the democratic deliberation that should precede such a momentous change.

- 3) Acts of Parliament passed after Brexit would also be beholden to the Charter, as courts might read it as a 'constitutional statute' protected against implied repeal. No satisfactory political argument has been advanced that would justify this limitation on Westminster's legislative freedom after Brexit.
- 4) The power the Charter would wield if retained would be inconsistent with the aim of the Withdrawal Bill to reinstate Parliamentary sovereignty by repealing the European Communities Act 1972.
- 5) The effects of the Charter, whether applied to UK laws made before or after Brexit, cannot be predicted as its operation would be dependent on the rapidly evolving and expansionist case law of the European Court of Justice, and would open the door to judicial adventurism in our own courts.

The position of the political parties on the Charter

Under clause 5(4) of the European Union Withdrawal Bill, the government proposes that the Charter of Fundamental Rights of the European Union will not be among the EU laws that will be transposed into UK law after our exit from the European Union. This proposal is in accordance with a pledge made in the 2017 [Conservative Party manifesto \(page 37\)](#). The Labour Party and the Liberal Democrats advocate the retention of the Charter of Fundamental Rights – neither party pledged this in their manifestos. Sir Keir Starmer, the Shadow Secretary of State for Exiting the European Union, has proposed [six key tests](#) for Labour's approval of the EU Withdrawal Bill, the third of which – 'Does it defend

rights and protections and prevent a race to the bottom?’ – impliedly commits Labour to retention of the Charter.

The proposed amendments

Senior Labour MPs, including leader Jeremy Corbyn and Sir Keir Starmer, have tabled amendment 46, moving that the exclusion of the Charter from EU retained law be removed from the Bill

Conservative rebels on the other hand, among them Dominic Grieve and Kenneth Clarke, have tabled amendment 8, with support from Liberal Democrat leader Sir Vince Cable. It proposes that the Charter ‘continue to apply domestically in the interpretation and application of retained EU law.’

A more modest proposal is made by Labour MPs Chris Leslie and Pat McFadden. They propose in New Clause 16 that within one month of Royal Assent of the Withdrawal Act, the government lay a report before both Houses reviewing the implications of removing the Charter, and specifying the government’s policy regarding the rights covered by the Charter.

The Charter

The Charter was originally adopted as a political declaration and was intended to form part of the later abandoned European Constitution. It acquired binding legal force in EU law at treaty level with the Lisbon Treaty which came into force in the EU in December 2009. Its stated purpose was the ‘protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter.’ This would be done, the Charter proposed, not by creating new rights under EU law, but by

imposing an overarching framework that would ensure that EU rights effective in, and implemented by, EU member states would be interpreted so as to give effect to fundamental rights already recognised by EU law.

The UK and Poland, concerned that the Charter would increase the scope for strike-down of national laws on the grounds of non-compatibility, secured what they thought was an opt-out from the Charter. The addition of Protocol 30 to the Charter meant that:

Article 1:

The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

In particular, and for the avoidance of doubt, nothing in Title IV of the Charter [social and economic rights] creates justiciable rights applicable to Poland or the United Kingdom.

The opt-out was heralded in the UK by then Prime Minister Blair as a clear recognition by the EU of the UK's political will not to be bound by the provisions of the Charter. Despite the seemingly clear wording of Protocol 30, however, the European Court of Justice was prepared to make no such recognition: the Protocol, it held, was no opt-out but a mere 'comfort clause'. The Charter applied, and applies, in the UK and Poland just as it does in all other EU member states (Case C-411/10, *R*

(NS (Afghanistan)) v Secretary of State for the Home Department [2013] QB 102).

Such, then, was the Charter's rather ignominious route into UK law. That the UK came to be bound by it in a less than satisfactory manner does not, however, dispose of the key question – now that the Charter is law in the UK, are there any satisfactory grounds for retaining it after Brexit?

To answer that question, this paper takes as its starting point the purposes of the EU Withdrawal Bill [as stated to the House of Commons by David Davis](#) upon its second reading: first, the preservation of legal certainty for business and individuals; second, the facilitation of future UK-Europe trade by preserving the EU's regulatory regime in law. It then considers whether the Charter is necessary for achieving these purposes or is even consistent with them.

Legal certainty: UK laws made prior to Brexit

If we start from the position that the eventual Withdrawal Act should aim to prevent disruption to businesses and individuals by preserving their current rights and obligations, then retention of the Charter would at first blush seem to be justified as a means of maintaining legal certainty. If it is law now, this argument would go, then preservation of legal certainty means it should remain law after Brexit day. This analysis is, however, superficial. Due to the vagueness of its wording, and to the unpredictability of the case law interpreting it, the Charter would, if retained, both corrode the legal certainty sought by the Withdrawal Bill, and also squander Brexit's golden opportunity to regain proper standards of legal certainty befitting the UK's respect for the rule of law.

It should first be noted that the Charter was confirmed as having direct effect in the UK as late as 2013. It therefore cannot be said to be a long-standing and integral part of the UK's legal order, such that its removal would have a seriously disruptive effect. Moreover, in the four years since its introduction, cases involving the UK have created more confusion than clarity as to the Charter's supposed scope to enforce, but not create, rights.

Furthermore, any certainty guaranteed by the Charter's retention would be outweighed by the uncertainty arising from the power it gives to courts to disapply a wide and unpredictable array of legislation, including acts of Parliament – the supreme status of which is the foundation stone of legal certainty in the UK. The power to disapply – amounting, in effect, to a strike-down power – is created by article 51(1) of the Charter, in combination with the ECJ developed doctrine of the primacy of EU (formerly Community) law:

The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity ***and to the Member States only when they are implementing Union law***. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. [Emphasis added]

This means that, were the Charter retained, any EU laws transposed by the Withdrawal Act – which by definition would be instances where the UK ‘implements Union law’ although that concept extends more widely – could be declared unlawful by a UK court, if the pre-Brexit case law of the ECJ had decided that the EU law in question did not respect, observe and promote the Charter. As demonstrated by the recent decision of the Supreme Court in *Benkharbouche* (discussed below), the retained Charter could also disapply a statute of domestic origin if a court found the statute would prevent the implementation of retained EU law in a manner consistent with Charter rights. Crucially, under clauses 5(2) and 6(4) of the Withdrawal Bill, pre-Brexit decisions of the ECJ applying to retained EU law will be as strictly binding upon UK courts as the decisions of the UK’s own Supreme Court.

The Charter is therefore a considerably more powerful instrument than the Human Rights Act 1998. That Act allows courts to declare statutes incompatible with its provisions, and provides ministers with powers to rectify quickly such incompatibilities, but stops short of allowing judges to disapply primary legislation.

There are two clear problems with the Charter’s wide-ranging power. First, the certainty that would be achieved by transposing EU law by means of the Withdrawal Act would, in fact, be a precarious one – the Charter would provide a trapdoor through which laws intended by Parliament to form part of the UK’s domestic law after Brexit could be snatched away by dint of ECJ jurisprudence. Second, this would defeat the aim of regaining sovereignty – Parliament would repeal the European Communities Act 1972, thereby removing the self-imposed

restraint on its sovereignty in s.2(4), only to surrender its control over a large and unpredictable array of pre-Brexit law.

Against this, it could be argued that the uncertainty described above would in fact be limited – after all, under clause 5(1) of the Withdrawal Bill the only laws vulnerable to strike-down under the Charter would be laws enacted prior to Brexit, and only ECJ case law made prior to Brexit would have binding effect. The scope of the Charter’s strike-down powers would therefore, one could argue, be finite and certain.

This argument will not work, however. While it is possible in the abstract to define when and to what laws the Charter’s power of disapplication would apply, in practice the range of concrete instances where it would apply is so broad as to defy foresight. Parliament therefore could not intend a predictable set of circumstances in which the Charter’s power of disapplication would bite – for the simple reason that one cannot intend what one does not foresee. Instead, the retained Charter could only work as, in effect, an open-ended commitment – Parliament would intend the Charter to disapply primary legislation as provided for, from time to time, by the Charter and the ECJ’s interpretation of it. This is an unacceptably unclear basis on which to enshrine such a far-reaching constitutional innovation.

Charter retention an open-ended commitment to ECJ case law

The Charter’s articles provide many rights, but few words telling judges what they mean. Its wording is extraordinarily vague. Even the limited clarity provided by article 52(3) – which states that Charter rights corresponding to ECHR rights share the same meaning and scope – is

rendered somewhat dim by the proviso that the Charter can nevertheless exceed the scope of Convention rights. To determine the meaning of the mass of open-ended rights provided by the Charter, UK judges would have to import a large, unpredictable and unscrutinised slew of ECJ case law, in order to use their power to disapply both primary UK legislation and the EU laws which Parliament intends to transpose through the Withdrawal Bill. Retaining the Charter in the Act would therefore confer upon the courts, more or less blindly, wide powers to thwart the Act's very purpose of securing the place of acquired EU law on the statute book. It is markedly inconsistent that some of those who criticise the Withdrawal Bill for empowering the executive to change the law without (they say) adequate scrutiny, are now proposing to hand similar, far broader powers to courts and with far less scrutiny.

It is also important to note that few ECJ cases are decided purely on Charter provisions, relying instead on EU legislation, treaty provisions and general principles of EU law. The reliance on general principles of EU law in deciding Charter cases poses a problem for the proposal to retain the Charter in UK law. This is because the Withdrawal Bill, while providing for the incorporation of general EU law principles into UK law (clause 6(3)), proposes to disallow any right of action relying on them as such (schedule 1 para 3). Were the Charter retained, however, it would in many cases really be a Trojan horse, a form of action that would allow judicial decisions to be made on the basis of those general EU principles disallowed as a cause of action by the Bill. As such, schedule 1 paragraph 3 of the Bill would be circumvented.

The rebels on the government benches seem to have recognised that retention of the Charter would conflict with the removal of general

principles as a cause of action – amendments 10 and 11 therefore propose to exclude that removal also from the Bill. This resolves the immediate conflict, but points to another problem – for these further amendments surely concede that the Charter could only work in domestic law after Brexit if it carried with it in train a much wider range of ECJ case law, thereby making ever more inscrutable and open-ended the legal after-effects of the UK's EU membership. This conflicts directly with the Bill's aim to clarify and stabilise the body of EU law as it will stand on Brexit day.

Charter retention would therefore necessarily entail the dynamic and evolving operation of EU law – despite the circumscriptions of the end of EU legal supremacy, and the merely persuasive authority of ECJ decisions post-Brexit. This will not be domestication, any more than a tiger is domesticated by inviting it into one's living room. If the Charter can only be made to work by an ever-increasing commitment to the vague and ill-defined fundamental principles of a legal order that the UK seeks to depart from, then it cannot be consistent with departure. If the proposers of the amendment wish to make a workable case for retention, it follows that they must really make the politically much bolder case for barely leaving at all.

Finally it should be noted, as an aside, that to some extent the UK legal system has trodden this path already. The Human Rights Act's direct incorporation of European Convention rights left judges to interpret laws that were, by Parliament's standards, very broadly worded, with the option (if that is the correct interpretation of s.2's 'take account of') of turning to Strasbourg's jurisprudence for assistance. The result, perhaps predictably, was a far greater than expected influx of non-UK

jurisprudence, as judges reached to Strasbourg for guidance on the meaning of the new laws, and a departure from the courts' usual incremental progress. If it is correct to say that retention of the Charter would result in the same difficulties, then it must be correct to say that the wise course of action would be to avoid making a similar mistake twice.

What is 'implementing Union law' for the purposes of the Charter?

The second reason why the Charter is unclear and uncertain in itself, and not simply in its likely effect on the statute book, is because it is unclear which UK laws, if any, would and would not be caught within its wide-ranging provisions. Article 51(1) says simply that its provisions apply to member states 'only when they are implementing Union law.' A number of difficulties arise here.

Under a literalist interpretation, the proposed amendments to the Bill would lead to the result that the EU Charter could not apply to the UK at all, since the UK will not be a Member State and therefore will be outside the scope of Article 51(1). However, the Charter as converted into UK law by the Bill would presumably be read as applying to the UK as if it were still a Member State, and presumably Articles of the Charter which apply to 'citizens of the Union' would be read as still applying to UK citizens even after they have ceased to be such. This reading would produce the consequential effect, possibly unintended by the proponents of the amendments to the Bill, that Article 15(1) of the Charter would continue to confer on EU27 citizens full free movement of persons rights inward to the UK even though UK citizens after exit will enjoy no such rights.

It should be noted too that the idea that the UK after Brexit will be implementing EU law badly misconceives the envisaged new legal order. The relation between the UK's retained EU law, and EU law itself, will be historical rather than dynamic: the UK will be implementing law of EU origin, and that origin will be relevant to its legal meaning, but it will be law transformed by the process of incorporation. The US Supreme Court, in *District of Columbia v Heller* ([554 US 570 - 2008](#)), analysed the meaning of the US Second Amendment by interpreting the English statute from which it derived, the Bill of Rights 1689 – however it is doubtful that any American lawyer would interpret it as a mere implementation of English law.

The proposers of the amendment might argue that the problem of 'implementing Union law' could be resolved by using the amendment powers proposed by clause 7 of the Withdrawal Bill Article 51(1), so that 'implementing Union law' would be changed to 'implementing retained EU law'. Even here, further difficulties would arise. As it currently stands, a minister could only use the amendment power if he or she considered it 'appropriate' to do so in order to remedy a deficiency which would prevent the Charter from operating effectively. There is certainly a deficiency, as pointed out above, but it would be arguable in court that it is not within the appropriate consideration of a minister to make such a change, for it would alter the purpose of the Charter – from an international human rights instrument regulating how the UK and EU states protect rights when implementing a shared set of laws, to a domestic instrument applying only to the EU laws that the UK Parliament has decided to retain. If such a challenge succeeded, it would be for Parliament, and not the executive, to decide how the Charter

should be amended – and to decide also on the doubtful utility of an instrument that could only be made to work by altering both its text and its fundamental purpose.

Similarly, if the EU (Withdrawal) Bill were successfully amended so as to limit ministerial alteration of retained EU law to merely ‘mechanical’ changes – an amendment supported by those backing Charter retention – the same outcome would surely ensue: substituting ‘EU retained law’ for ‘Union law’ would be no mere mechanical change, and it would again be for Parliament to decide what the true purpose of the Charter should be.

If then, as seems likely, the amendments necessary for the effective operation of the retained Charter would have to be decided by Parliament anyway, it makes sense for Parliament to have that debate now while it is considering the Withdrawal Bill. The most reasonable outcome of that debate, we argue, is to reject retention: it would harm rather than protect legal certainty; and, as argued below, to remain part of the EU rights regime would be incompatible with Brexit, while as a purely domestic rights regime the Charter would be redundant and obfuscatory.

‘Implementation’ an unacceptably low threshold

Even if we put to one side the question of how the Charter would need to be amended, and by what constitutional process, the body of law it applied to, however named, would in any case be unpredictable in its scope. This is because, following the decision in *Åklagaren v. Hans Åkerberg Fransson* ([Case C-617/10](#)), the ECJ operates a very broad

definition of which national laws it thinks implement, or should implement, EU law for the purpose of Art 51(1) of the Charter. This case, which will continue to be binding on all pre-Brexit law, means that the potential scope of application of the Charter is not just to EU-derived national law but extends also to related law of purely national origin. This would mean that if the Charter were given post-Brexit legal force under the Bill, it would in principle apply not just to retained EU law under the Bill but also to an uncertain area of related law of domestic origin. For the purposes of the Charter, any UK law that overlapped with EU law, even coincidentally, might be held to be an area where the UK is 'implementing' EU law which would invite the oversight of the Charter.

A recent example of this was in *Janah v Libya; Benkharbouche v Embassy of the Republic of Sudan* [\[2015\] EWCA Civ 33](#), in which the Court of Appeal held that the employment rights of two embassy workers were within the scope of the EU-derived Working Time Regulations; a decision subsequently affirmed by the Supreme Court at [\[2017\] UKSC 62](#). Under UK domestic law, sections 4 and 16 the State Immunity Act 1978 should have operated to protect the embassies' immunity from actions arising from contracts of employment, thus barring the employees' claims. However, once it was established that the matter fell within EU law, Article 47 of the Charter, granting the right to a fair trial, gave the Court of Appeal and the Supreme Court the power to 'protect' that right to the extent of overriding the inconsistent provisions of the 1978 Act. The main problem with this decision is that rather than the Charter being limited to protecting the rights of persons within the jurisdiction of the courts of the UK, it has been interpreted as compelling the UK to extend the jurisdiction of its courts over diplomatic missions in the face of a clear policy decision in the delicate field of international

relations, implemented by Parliament in the 1978 Act, that diplomatic missions should be immune from claims in these circumstances.

The Supreme Court's decision has two important consequences. First, the Charter has the unforeseen effect of allowing the Working Time Regulations to limit Parliament's ability to shape customary international law on how far state immunity should be protected. Under the Charter, UK legislation cannot go beyond the minimal obligation without being unlawfully disproportionate, even though (as acknowledged in paragraph 66 of the judgment) there is clear disagreement among the states as to what the obligation should be. The effect is to take away a competence from the UK. Second, the decision could have serious adverse consequences for UK diplomats and diplomatic missions overseas if other countries strip away diplomatic immunities in a similar way, arguing that their own courts systems entitle them to remove immunities which they have previously guaranteed to UK diplomats.

Secretary of State for the Home Department v Watson [[Joined Cases C-203/15 and C-698/15](#)] is another instance of a court, the ECJ this time, using the Charter's power to disapply an Act of Parliament concerning a matter of 'high policy'. In this case the ECJ held that the 'E-privacy Directive' (2002/58/EC), which restricts the retention of personal electronic data within the electronic communications sector, could, in the light of the Charter's privacy protections in articles 7 and 8, be extended to disapply UK national security legislation allowing data-gathering. The effect of the decision was to hold that legislation enabling the executive to protect citizens – the fundamental justification of the state's power – could not only come under judicial review (a

controversial but not inarguable proposition) but could do so by means of judicial creativity rather than by the express licence of clear, positive law. It is profoundly unacceptable that the gestural wording of the Charter, and the unpredictable meanings which the ECJ might give to it from now until Brexit day, could carry within it further latent powers to overturn accepted norms of governance in the name of public safety.

ECJ cases involving the UK have shown that once the ECJ's low threshold of 'implementation' is met, the Charter's powers can be given full and free rein – the result, for EU member states, is a low degree of protection for their national laws; for the UK after Brexit, the effect of Charter retention would be a low degree of protection for statutory law, the supreme status of which is (or should be) a determinative guarantee of certainty in the UK legal order. Lord Steyn in the noted *Jackson* case ([\[2005\] UKHL 56](#)) held in *obiter dicta* that the common law could disapply primary legislation in circumstances where Parliament was committing a flagrant abuse of power, for instance in abolishing judicial review of actions of the executive. The envisaged threshold was high, clear and predictable. The Charter has no such threshold. Those proposing that the UK retain the EU's Charter must convincingly argue the following:

- 1) That previous Charter cases point to a sufficiently clear and predictable set of future circumstances in which Parliament's power to determine the law will be defeated through the operation of the Charter;
- 2) That it is reasonable and desirable for all Charter-engaging EU law to disapply any law passed by Parliament prior to Brexit.

Legal certainty: UK laws made after Brexit

The promise of the Withdrawal Bill is that it will take a ‘snapshot’ of EU law; that retained EU law will remain supreme over any inconsistent UK law enacted or decided prior to Brexit, but that it will not bind Parliament from amending or repealing it in the future, when the UK will be able to seek a more comfortable accommodation with the law it has inherited from the EU.

While the main danger of the Charter is in its effect on pre-Brexit UK law, it might nevertheless apply to a UK law made after Brexit if that law implemented EU law. One can envisage this happening if, for instance, Parliament passed a law that shadowed a post-Brexit EU directive for the sake of maintaining regulatory convergence with the EU trading bloc. Another example is envisaged by the Withdrawal Bill at clause 5(3), in which Parliament would modify a law transposed from EU law prior to Brexit – such a statute could also be understood for the purposes of the Charter to be an implementation of EU law.

Once again, as discussed above, the proposers of retention face difficult questions as to the further consequential amendments that the Charter would require. If they envisage it applying to post-Brexit implementations of EU law, as well as retained law, the Charter would need to be amended accordingly. That would then raise the question of whether the UK wished such post-Brexit laws to be bound by the Charter as a matter of course, or whether it would be better to opt in to Charter protection on a case-by-case basis. One must consider also the EU position – would it accept such a cherry-picking approach, or would it be

more likely to demand that the UK operate the Charter in all of its interactions with the EU?

The Charter as ‘constitutional statute’

More pressing, however, is the possibility that the retained Charter might limit Parliament’s new-found freedom after Brexit, specifically in cases where it sought to repeal a right conferred by retained EU law which is also found in the Charter. Say, for instance, Parliament after Brexit sought to amend or repeal UK health and safety legislation that implemented EU directives – the proposed legislation could prove inconsistent with article 31 of the Charter, which protects the right to working conditions respecting health and safety. In such a circumstance, could a UK court hold that by retaining the Charter Parliament had bound itself to respect the Charter rights contained within the health and safety legislation?

One simple (and desirable) answer the courts might come to in this hypothetical scenario would be to hold that the new health and safety legislation simply repealed the Charter provisions, expressly, or impliedly following the doctrine of implied repeal. Indeed, as an aside, those proposing to retain the Charter must consider whether the likelihood of its eventual repeal, due to the conflicts it would inevitably cause, would be so great as to make retention a sterile and fruitless venture in the first place.

An alternative, and more troubling, answer would say that while the Charter could not grant courts the power to disapply provisions of an Act passed after the date of exit, due to clause 5 (1) of the Withdrawal Bill,

this would not necessarily mean the courts would therefore accept that the Charter could be repealed away simply by passing new laws inconsistent with it. There is arguably a strong possibility that, if the Charter were retained, the courts might enshrine the Charter as a 'constitutional statute', which would therefore protect any Charter-activating laws from implied repeal by post-Brexit legislation.

It would be reasonable for UK courts to assume that Parliament's intention in retaining the Charter was, as with the Human Rights Act 1998, to incorporate a set of fundamental rules that govern how other laws have effect – indeed, the Charter would be a dead letter if interpreted in any other way. As such it would be mere obedience to the intention of Parliament for courts to hold, following the decision in *Thoburn* ([2002] 4 All ER 156), that the Charter must have a superior status to the laws that it frames in order for it to perform its intended normative role. Therefore legislation inconsistent with the Charter arguably would not repeal the Charter even to the limited extent necessary to give effect to the new legislation, unless the legislation explicitly stated that its purpose was to repeal the Charter or one of its provisions.

This would be unacceptable for a number of reasons. First, the 'constitutional statutes' that Laws J determined as being protected from implied repeal in *Thoburn* included Magna Carta, the Bill of Rights, the ECA 1971, and the Human Rights Act 1998 – that is to say, watershed statutes that shaped the UK's constitutional landscape. The Charter should not be given such status because it did not become law through public debate conducted by elected representatives in Parliament – the political case for its having constitutional status in UK law has not been

made out through the proper democratic process. In fact, quite the opposite – it entered UK law as the result of failed diplomacy and judicial legerdemain in Luxembourg.

Second, giving protected constitutional status to the Charter after Brexit, which is a necessary corollary of its retention, could considerably stifle administrative and law-making processes. In drafting legislation, Parliament would have to consider how it could get past the rebuttable presumptions of the common law, how it would be compatible with Convention rights, *and* how it would give effect to the vague and expanding rights of the Charter, which frequently but not always overlap with the Convention.

Likewise, public bodies would face an onerous amount of compliance work – decisions would need to forestall challenges on common law grounds of judicial review, as well as HRA and Charter grounds. It is difficult to see how this duplication of rights protection, and the complication it would cause, would be justified by any extra value that the Charter would bring beyond the protections of the common law and the Human Rights Act. The crowd of limitations it would impose on legislators and decision-makers would go against the value of common law protection of rights as stated by Sir John Laws – that it prevents the executive, and to some extent Parliament, from acting oppressively, but without denying them the efficacy they require in order to govern effectively (*The Common Law Constitution*, Cambridge University Press 2014, p.3).

Given these problems, one wonders what the real purpose is of proposing these amendments to the Bill. It is an effect, and perhaps

increasingly a purpose, of human rights-based law that the elevated sacredness of such laws makes amendment or repeal politically very difficult. No government would wish to stand accused of removing rights that are supposedly, as the term 'human rights' asserts, fundamental to our humanity. Indeed, it could be argued that it is such sensitivity to the elevated stature of human rights law, and its fixed permanence, that motivates the proposed retention of the Charter. However it does no harm to the rightful stature of human and fundamental rights law to say that not all instruments designed to protect them are well made or deserving of unconditional protection. If the proposers of Charter retention would accept that a process of rights sacralisation has led our American allies to a sometimes perverse adherence to their Second Amendment rights, they would surely accept that we should not make a similar mistake in approaching the Charter.

Competing fundamental rights

A key argument against retention is that it would fruitlessly duplicate rights protections already incorporated in UK law, principally in the Human Rights Act 1998 but also in the common law, thereby generating uncertainty around provisions that are designed to protect the rule of law and regulate the relationship between citizen and state. The lapidary wording of the Charter would be neither definitive nor authoritative when thrown into an uneasy and indeterminate admixture of competing bodies of rights law, all claiming to have a determinative say on fundamental rights. To borrow a comparison used by Lord Pannick in *Miller*, it would be a curious state of affairs indeed if there were more authoritative clarity about the restrictions on dangerous dogs than about the citizen's fundamental rights against the state. Nor is it clear how the

cruces in modern human rights law – the right to life of members of the armed forces, assisted dying, the freedom of the press versus the right to privacy – would be in any way clarified or resolved by the addition of another, competing layer of fundamental rights law.

Furthermore, there are beyond doubt profitable doctrines within ECJ jurisprudence, especially for instance the doctrine of proportionality – however, given that the common law has the flexibility to embrace doctrines from European civil law and make them its own (and has done since at least Lord Mansfield), it would be wildly disproportionate to hold that the common law can only benefit from the gems of European law by accepting lock stock and barrel an instrument as monumental and disruptive as the Charter. The judgment of Lord Reed in the recent *Unison* case is a strong statement of the common law’s ability to develop in parallel with EU law while retaining its self-sufficiency.

There is one way in which retention of the Charter *would* facilitate certainty – it would bring to a certain, but hasty and premature, conclusion the political and legal debate surrounding the issues of whether courts should have power to strike down legislation on human rights grounds, and of whether fundamental rights might be better protected on the civic, national plane rather than at the supranational level. The government’s 2012 Commission on a Bill of Rights ([*A UK Bill of Rights? The Choice before Us*](#)) made clear that these issues remain contentious and undecided among politicians and lawyers. We should not allow discussion of such a momentous issue to be forced to a premature conclusion by the rush to amend the Withdrawal Bill and, in the case of some of the amenders, to embarrass the government of the day.

In the nightmare scenario, a hasty decision to retain the Charter, with all of the constitutional difficulties that it would bring, would be one we would be forced to repent at leisure, if it led the EU to demand retention of the Charter as a condition of any withdrawal agreement securing future UK-EU trade.

Finally in this section, it is important to state that opposition to the Charter should not be advanced as, or misrepresented as, a stalking horse for a campaign to eventually repeal the Human Rights Act. Retention of the Charter can and should be attacked on its own merits. No position is taken either way on repeal of the Human Rights Act by holding that human rights would not benefit from being at the centre of a turf war between Strasbourg and Luxembourg, nor by holding that the Human Rights Act is still a live issue deserving of further debate.

Convergence

The second main reason for transposing EU law into UK law after Brexit is that it would facilitate anticipated future trade between the UK and the EU. As is often remarked, the UK and EU have the unique advantage of embarking on a potential free trade agreement in which both parties already have identical regulatory regimes. This principled basis for transposition could not, however, justify retention of the Charter, because it is not reasonable or proportionate to say that trade between the two parties would require harmonisation of their fundamental rights regimes – any more than it is reasonable to hold that a future trade deal with the United States should entail incorporation of its Bill of Rights.

The purpose of the Charter as stated in its preamble is to facilitate the ever closer union of EU member states by creating a commonality of legal and ethical purpose – a commonality similar to that which glues together nation states. As the UK's withdrawal will, it is hoped, create a much looser, but no less amicable, bond between the UK and the EU, the justifying rationale of the Charter will cease to apply to the UK – the laws governing the fundamental rights of UK citizens will revert to being an internal matter for the UK. There are no grounds, in law or reason, for saying that trading parties need to mirror one another's rights regimes in order to trade or cooperate with each other.

Once this justification for retention disappears, it becomes difficult to see on what principled basis the amenders think the Charter ought to continue to apply. As argued above, it cannot be on the basis that retention would aid the certainty or clarity of the rule of law. Even if the amenders resorted to arguing that the Charter would be a tailored and therefore superior mechanism for ensuring that EU-derived law gave effect to fundamental rights, they would surely struggle to argue convincingly that it would be *so much* better than the protection already offered by the rest of the retained *acquis*, by the Convention and by the common law that all of the disadvantages of retention would be outweighed.

As argued above, if the UK is to have a supreme rights charter on its statute book, it should be as the result of principled argument about its constitutional virtues and specifically about the best means of preserving the rule of law. Such a charter should *not*, however, enter UK law by the back door, as the holdover of a body of law accepted by the UK as the means of trading and cooperating at the international level. The

principled basis on which the UK accepted EU legal supremacy, i.e. as an enabler of international trade and concerted action, could not serve as a principled basis for a supreme rights charter, which would rest on principles of a different kind. To hold that it could, and that the Charter could simply be retrofitted, would make a mockery of our claim to be a nation that conducts its law and politics according to principle.

Conclusion

There are, this paper argues, no grounds for retaining the Charter of Fundamental Rights which are not outweighed by the serious disadvantages of retention. The principal disadvantage would be an unclear and confused rights regime, which would grant too much weight to the unpredictable and uncertain jurisprudence of the ECJ. Retention would also rush to a hasty and premature conclusion the important national debate about whether the UK wishes to enable courts to strike down Acts of Parliament on fundamental rights grounds.

Retention of the Charter would have the effect of substantially limiting the UK's political freedom of action post-Brexit, thus diminishing one of the prizes sought by Leave politicians and campaigners, and by the majority of voters who voted to leave the EU. It may be that such a limitation is in fact not the purpose of the amenders; however it must be pointed out that this would indeed be the *effect* of the proposed amendments – it is therefore right that those proposing them be asked to justify the political consequences of what they propose.

It is important also to consider that retention of the Charter would not merely damage such legal certainty as already exists in the UK's legal

order, and therefore with it the rule of law. It would also squander the precious opportunity created by Brexit to recalibrate UK law so that it can incorporate the good and useful laws it inherited from its time in the EU, while also, crucially, reinstating a better standard of legal certainty that could be relied on to protect the rule of law to a proper democratic standard. That means such clarity of statutory wording, and such judicial fidelity to the meaning of that wording, that it would be difficult for a law to be misused as a means of pursuing political aims not expressly allowed by that law. This is no mere fastidiousness, or fetishisation of process for its own sake – it is fundamental to fairness and to democracy that political arguments be advanced in an open forum, where they can be properly heard and argued by representatives of those whose interests are at stake. Litigation exclusively *inter partes*, whether in the UK or in Luxembourg, is no such forum. In deciding to leave the EU, the UK has withdrawn its consent from a court that has shaped the political future of Europe's citizens through a supreme decision-making process in which they were not represented. The principle that underpinned the UK's decision to leave must enliven the process at every step of the way, if we are to make the most of it.

To argue against the retention of the Charter of Fundamental Rights is to defend the UK's constitutional principles, and to oppose those who are heedlessly indifferent to their value in guaranteeing our past and future stability and well-being.