What Could Have Been And May Yet Still Be: Brexit, the Charter of Fundamental Rights of the European Union and the Right to Have Rights

Abstract

This article considers the pervading influence of the Charter of Fundamental Rights of the European Union for the UK following Brexit. The UK Government has been clear in its wish that the Charter have no influence in the UK after the UK's withdrawal from the EU. However, the Government position shows a misunderstanding of the Charter, its potential ongoing effects notwithstanding Brexit, and the nature of the UK's Withdrawal Agreement with the EU. This article looks to inform British understandings of the Charter. The article argues that in the myriad positions that the UK may find itself following Brexit the Charter ought and likely will have some role to play. This proposition is based on a legalistic discussion of the relevant instruments but also on the theoretical understandings of one's "right to have rights" based upon the work of Hannah Arendt and furthered by Emmanuel Levinas.

Word count: XXXX

Introduction

The status to be afforded to the Charter of Fundamental Rights of the European Union (the Charter) following Brexit has been one of many points of disagreement among members of the UK Government and Parliament more broadly.[1] This article considers the role of the Charter for the UK outside of the EU whilst providing a theoretical and ethical basis for the Charter's continued application.

[1] HL Deb, vol 791, cols 1871-5 (18 June 2018); HC Deb, vol 642, col 908-74 (13 June 2018); HC Deb, vol 634, col 730-790 (16 January 2018).

The Charter rights go beyond the traditional civil and political rights recognised in the European Convention on Human Rights (the Convention) including, for example, rights such as a free education[2] and collective bargaining.[3] Where the Charter rights and Convention rights diverge the Charter rights are to be interpreted as having at least a corresponding level of protection to their Convention counterparts. The Charter rights do not allow for the floor on a particular right to be lowered beyond the Convention.[4] However, the concern here should not be focused on the content of such rights but rather their force and the role of the CJEU following Brexit. The UK government may expect that during the UK's transition and in any future UK-EU relationship the Charter will have no bearing on UK law.[5] However, this overly simplifies the situation. It is premature to say that the Charter will have no bearing on international proceedings involving the UK and perhaps also in domestic proceedings. The legal framework through which this might occur is discussed in detail below. The exclusion of the Charter from legislation incorporating EU law into British law[6] does not mean that the Charter can be disregarded due to the Charter being a consolidation the general principles which will assist in the interpretation of retained EU law following Brexit.[7] This is true of CJEU case law that will develop following Brexit as the general principles will continue to animate the Court and the Court may be called upon to adjudicate matters which arise between the UK and the EU. The consequences of this retention remain unclear but may be significant.[8]

[2] Charter art.14.

[3] Charter art.28.

[4] Charter arts.52-53.

[5] European Union (Withdrawal) Act 2018 s.5.

[6] European Union (Withdrawal) Act 2018 s.5.

[7] Barnard, "So Long, Farewell, Auf Wiedersehen, Adieu: Brexit and the Charter of Fundamental Rights"; Menelaos Markakis, "Brexit and the EU Charter of Fundamental Rights" [2019] Public Law 82.

[8] Baroness Kennedy of the Shaws and Alexander Horne, "Rights after Brexit: Some Challenges Ahead?" [2019] European Human Rights Law Review 457 p.459.

This article argues that the Charter will and should continue to be significant for the UK following Brexit. The paper proceeds in the following order. First, the UK's approach to the Charter is outlined alongside British misunderstandings of the same. The article then considers the background to the Charter along with art.51 both of which are key in interpreting the Charter's scope. Following a legalistic analysis of art.51 and the Charter's application, the article provides a theoretical and moral basis for an expansive application art.51 – drawing on the work of Arendt and Levinas – this expansive application provides the girding for the legalist understanding explored in the final section of the article which gives way to a robust and inclusive application of the Charter.

The Charter in Light of Brexit

The Charter exists apart from the Convention, the European Court of Human Rights and the Council of Europe. The Charter emerged out of a desire to consolidate the latent fundamental rights of EU law in an effort to make those rights "more evident".[9] These rights are deemed to be more visible in a single written instrument over a catalogue of CJEU case law or assertions that fundamental rights are inherent in EU law due to the constitutional traditions of the Member States.[10] The distillation of these fundamental rights into a single document has "transformed them into perceivable matter, a tangible good added to the patrimony of the individual".[11]

Consideration of the Charter from a British perspective may be met with puzzlement due to Brexit. However, the UK legislative framework for leaving the EU, "generates a host of questions"[12] on the

[9] The European Council, *Cologne European Council* (3 - 4 June 1999, 1999) Annex IV.

[10] Daniel Sarmiento, "Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe" (2013) 50 C.M.L. Rev. 1267 pp.1269-1270.

[11] Sarmiento, "Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe" p.1270.

[12] Scott Vesel and Nicola Peart, "Will the Fundamental Rights Enshrined in the EU Charter Survive Brexit?" [2018] European Human Rights Law Review 134 p.141.

continuing role of the Charter post-Brexit. The general principles of EU law will not be justiciable following Brexit and yet the same principles are to be retained to assist in the interpretation of retained EU law.[13] Therefore "a Charter right might sneak into 'retained EU law'"[14] as the Charter rights are seen to be a consolidation of general principles of EU law rather than a new body of rights entering EU jurisprudence.[15] To the extent that EU law is retained up to and until Parliamentary revision the UK courts will be required to pay mind to the CJEU jurisprudence.

The Charter should also be borne in mind by those in the European Economic Area (EEA). Members of the EEA are part of the European Free Trade Association[16] (EFTA) and thereby subject themselves to the Court of Justice of the European Free Trade Association States (EFTA Court) in matters concerning the interpretation of the EEA agreement.[17] The Charter is not incorporated into the EFTA instruments, however, the EFTA Court has held that the same fundamental rights which have been recognised by the CJEU (and consolidated in the Charter) are applicable to EFTA Member States.[18] Therefore, the Charter provides context as to the nature of the fundamental rights latent in the EFTA Court's jurisdiction. Assuming that the Charter rights will have no bearing on the UK following Brexit is short-sighted given the potential for dispute resolution between the UK, the EU or EEA states in the future which might yet involve the CJEU, the EFTA Court, or another supranational arbitrator.[19]

[13] European Union (Withdrawal) Act 2018 sch.1.

[14] Vesel and Peart, "Will the Fundamental Rights Enshrined in the EU Charter Survive Brexit?" p.141.

[15] Sarmiento, "Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe" pp.1269-1270.

[16] Agreement on the European Economic Area OJ L1 art.126.

[17] Agreement on the European Economic Area art.108; Agreement Between the EFTA States on the Establishment of a Surveillance Authority and a Court of Justice OJ L344.

[18] *Irish Bank Resolution Corp Ltd v Kaupthing Bank HF* (E-18/11) [2013] 1 C.M.L.R. 9.

[19] Christopher Vajda, "The EU and Beyond: Dispute Resolution in International Economic Agreements" (2018) 29 European Journal of International Law 205.

The Charter's role in the EFTA Court has been highlighted by Norwegian Supreme Court Justice Bårdsen who has suggested that it would be "awkward" for the EFTA Court to act as if the Charter did not exist.[20] Bårdsen goes on to note that fundamental rights of the kind found in the Charter are pervasive in the law and cannot flourish if compartmentalised among various supranational court jurisdictions.[21] Clearly in the view of Bårdsen the Charter has a role to play in the EFTA Court demonstrating the potential radiating and persuasive effects of the Charter rights and the CJEU's jurisprudence on the same.

The UK appears to favour a more bespoke relationship with the EU following Brexit through the implementation of bilateral agreements similar to those entered by Norway, Switzerland and Canada. Such agreements on their face have no relation to the Charter, however, as "EU fundamental rights are to be respected in the interpretation and application of all EU law",[22] including treaties with non-EU Member States,[23] the Charter may yet still have some permeating effect. Rights attaching to EU citizenship and transposed into bilateral agreements are to be interpreted in accordance with the jurisprudence of the CJEU.[24] In making agreements with third countries the EU regularly inserts a "human rights clause" requiring that respect for human rights is an "essential element" of the arrangement.[25] There is no mention of the Charter in these human rights clauses to date. However, there is a strong case to be made that the Charter rights will be considered in proceedings concerning human

[20] Arnfinn Bårdsen, "Fundamental Rights in EEA Law: The Perspective of a National Supreme Court Judge" (EFTA Court Spring Seminar, Luxembourg, 12 June 2015) [22].

[21] Bårdsen, "Fundamental Rights in EEA Law: The Perspective of a National Supreme Court Judge" [22].

[22] Astrid Epiney and Benedikt Pirker, "The Binding Effect of EU Fundamental Rights for Switzerland" in Norman Weiß and Jean-Marc Thouvenin (eds), *The Influence of Human Rights on International Law* (Springer 2015) p.230.

[23] Epiney and Pirker, "The Binding Effect of EU Fundamental Rights for Switzerland" p.230.

[24] Epiney and Pirker, "The Binding Effect of EU Fundamental Rights for Switzerland" p.235.

[25] Allan Rosas, "When is the EU Charter of Fundamental Rights Applicable at National Level?" (2012) 19 Jurisprudence 1269 p.1283.

rights clauses due to the position of the CJEU. The CJEU is typically the forum in which disagreements over the content of agreements between the EU and third party countries. In this the CJEU itself is bound by the Charter and so in interpreting any human rights clause the Charter rights will be in the mind of the Court.[26] This again may bring the UK under the influence of the Charter and the CJEU's commitment to coherence and homogeneity in bilateral agreements between the EU and third countries.[27]

The above discussion is a brief overview of the final arrangements possible for the UK notwithstanding EU membership. What is clear is that there are a range of possibilities for the Charter in the UK post-Brexit. In exploring the effects of the Charter rights it is worthwhile considering the case law of the CJEU and the instances in which the general principles of EU law and the Charter have been engaged to date.

Article 51 of the Charter

Article 51(1) states that the Charter rights are addressed to the institutions of the EU and the Member States but "only when they are implementing Union law". Therefore, art.51 presents a stumbling block for any argument that the Charter may have a role in the UK following Brexit. Nevertheless, before prematurely settling on this conclusion it is worthwhile considering the interpretation to be given to art.51. The intentions behind art.51 echo earlier case law from the CJEU and so an overview of pre-Charter cases provides useful context.

[26] Lorand Bartels, "The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects" (2014) 25 European Journal of International Law 1071; Eva Kassoti, "The Extraterritorial Applicability of the EU Charter of Fundamental Rights : Some Reflections in the Aftermath of the Front Polisario Saga" (2020) European Journal of Legal Studies < http://ejls.eui.eu/wp-content/uploads/sites/32/2020/06/Kassoti-ONLINE-FIRST.pdf>.

[27] Epiney and Pirker, "The Binding Effect of EU Fundamental Rights for Switzerland" pp.239-240.

Pre-Charter Case Law

The CJEU has long held that fundamental rights, as drawn from the constitutional traditions of the Member States, are part of the general principles of EU law.[28] It is the duty of the CJEU to ensure that the acts of EU institutions are compatible with the fundamental rights recognised by the Member States.[29] However, prior to the Charter coming into force challenges against EU institutions were scarce.[30]

Challenges against Member States where they were implementing EU measures were more common. When acting in pursuit of EU law Member States ought to have the same respect for fundamental rights as the EU institutions themselves.[31] Broadly, the CJEU's jurisdiction extends only to those areas which are within "the scope of Community law".[32] For example, an area found to be outside of the scope of Community law in the judgment of the CJEU is the regulation of private property as this is an area that EU law largely leaves to Member States.[33] In brief, prior to the Charter, the CJEU was willing to consider fundamental rights where domestic legislation was in play but only to the limited extent that the same pursued objectives of EU law.

The case law as to the limits of the CJEU's competence where a Member State derogates from EU law is rather more complex. In assessing permitted derogations from EU law the CJEU has made clear that

[28] *Internationale Handelsgesellschaft mbH v Einfuhr und Vorratsstelle für Gertreide und Futtermittel* (C-11/70) EU:C:1970:114; [1970] E.C.R. 1125; *Nold, Kohlenund Baustoffgrobhandlung v Commission of the European Communities* (C-4-73) EU:C:1974:51; (1974) ECR 491; *Wachauf v Germany* (C-5/88) EU:C:1989:321; [1991] 1 C.M.L.R. 328 [17].

[29] *Hauer v Land Rheinland-Pfalz* (Case 44/79) EU:C:1979:290; [1980] 3 C.M.L.R. 42.

[30] Vajda "The Application of the EU Charter of Fundamental Rights: Neither Reckless nor Timid?" pp.3-4.

[31] *Wachauf v Germany* (C-5/88) EU:C:1989:321; [1991] 1 C.M.L.R. 328.

[32] *Annibaldi v Sindaco del Comune di Guidonia* (C-309/96) , Opinion of AG Cosmas p.195.

[33] *Annibaldi* would work here

any permitted derogation from EU law must be interpreted in light of the fundamental rights of EU law which are influenced by the Convention.[34]

This approach of the CJEU in determining the application of the the EU's general principles, which account for the fundamental rights preceding the Charter, may be applicable to the UK post-Brexit. The UK may yet adopt a bilateral arrangement as discussed above. In the case of a bilateral agreement the UK will be implementing and perhaps derogating from agreements which link to EU law. The sticking point to this argument is of course that the UK will not be an EU Member State. However, nor are states in the EEA or involved in bilateral agreements. Yet the EFTA Court has been coy on the role of the Charter in the case of EEA countries leaving open a radiating influence but at the same time declining to give firm guidance[35] and those countries in bilateral agreements are subject to the CJEU in the interpretations that are given to their agreements.[36] This potential is borne out when the CJEU's approach to the scope and implementation of EU law is considered in line with the Charter.

Post-Charter Case Law and Charter Rights

Åkerberg Fransson[37] was the CJEU's first attempt to delineate art.51. The case concerned the penalties applied by Swedish authorities in the event of tax evasion where the guilty party would suffer a tax surcharge and a custodial sentence. The applicant argued that this contravened art.50 of the Charter – the "right not to be tried or punished twice in criminal proceedings for the same criminal offence". The trouble with this argument was demonstrating that the Swedish measures were implementing EU law.

[34] *Nold, Kohlenund Baustoffgrobhandlung v Commission of the European Communities* (n 28).

[35] Robert Spano, "The EFTA Court and Fundamental Rights" (2017) 13 European Constitutional Law Review 475.

[36] Epiney and Pirker, "The Binding Effect of EU Fundamental Rights for Switzerland" p.230; Rosas, "When is the EU Charter of Fundamental Rights Applicable at National Level?" p.1283.

[37] *Aklagaren v Åkerberg Fransson* (C-617/10) EU:C:2013:105; [2013] 2 C.M.L.R. 46.

The Grand Chamber in *Åkerberg* found that the requirements of art.51 were fulfilled as the Swedish authorities were implementing EU law. The CJEU read art.51 alongside art.325 of the Treaty on the Functioning of the European Union which broadly requires Member States to counter fraud to the same extent they would for state interests with respect to the financial interests of the EU. This provision is mirrored in the UK-EU Withdrawal Agreement and so the same interpretation could be adopted by the CJEU in equivalent circumstances concerning the UK after Brexit.[38] For the Grand Chamber the application of the Charter was to be determined by the "scope"[39] of EU law. The foremost limitations to this jurisdiction are art.6(1) of the Treaty on European Union (TEU) and art.51(2) of the Charter which prevent fundamental rights of the EU playing a role in circumstances outside of the competence of the EU framework. The Grand Chamber drew attention to the obligations of Directive 2006/112 finding that

> every Member State is under an obligation to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion.[40]

On that basis the penalties imposed in pursuit of these objectives must comply with the Charter rights.[41] The eventual customs arrangement for the UK following Brexit remains unclear but it is in the least arguable that in collecting duties on behalf of the EU, which has in the past been tabled as a customs option by the UK Government,[42] Charter rights may be pleaded in any related litigation.

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[38] Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community art.5 and Annex 2.

[39] *Åkerberg* [19].

[40] *Åkerberg* [25].

[41] The CJEU's reasoning is supported by Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/02.

[42] Department for Exiting the European Union, *The Future Relationship between the United Kingdom and the European Union* (Cmd 9593, 2018) pp.16-19.

The CJEU gave further guidance on art.51 in *Pelckmans Turnhout NV v Walter Van Gastel Balen NV*.[43] In *Pelckmans* the CJEU was asked to review Belgian legislation which prohibited seven day trading and required that there be one rest day per week for the majority of businesses. The applicant contended this amounted to a breach of arts.20 and 21 of the Charter, namely equality before the law and freedom from discrimination. The CJEU found that the national measure was not within the scope of EU law and therefore not subject to the Charter.

When compared with *Åkerberg* it is difficult to see what it is that led the CJEU to find that fundamental rights had a role to play in one case and not the other given that each explicitly referred to EU measures.[44] The CJEU's variable approach might be explained by the stakes in each of these cases. In *Åkerberg* the applicant's liberty was at risk whilst in *Pelckmans* the measures in question had only financial implications. This once again highlights the difficulties inherent in the Charter, based upon human rights, and the wider EU project, traditionally centred on economic freedom and integration. The question which the CJEU is indirectly grappling with is not the scope of art.51 in isolation but the purpose of the Charter when faced with potential human rights breaches in a community of shared values (economic, civil and political).[45] This task is made more difficult for the Court where "it is becoming increasingly difficult to find areas where Union law is totally absent…".[46]

That it is "becoming increasingly difficult to find areas where Union law is totally absent" is demonstrated in *Associacao Sindical dos Juizes Portugueses v Tribunal de Contas*.[47] The case involved salary reductions imposed by the Portugese legislature across the Portugese public sector including

[43] *Pelckmans Turnhout NV v Walter Van Gastel Balen NV* (C-483/12) EU:C:2014:304; [2014] 3 C.M.L.R. 49.

[44] As to the tensions between art.51 cases see Snell, "Fundamental Rights Review of National Measures: Nothing New Under the Charter?" pp.293-299.

[45] Piet Eeckhout, "The EU Charter of Fundamental Rights and the Federal Question" (2002) 39 C.M.L. Rev. 945.

[46] Rosas, "When is the EU Charter of Fundamental Rights Applicable at National Level?" p.1281.

[47] *Associacao Sindical dos Juizes Portugueses v Tribunal de Contas* (C-64/16) EU:C:2018:117; [2018] 3 C.M.L.R. 16.

judges. The Associação Sindical dos Juízes Portugueses, respresenting the interests of the Portugese judiciary, challenged the salary reductions on domestic constitutional grounds and in EU law leading the matter to be referred to the CJEU. The EU provisions relied upon were art.19 TEU and art.47 of the Charter, the principle of effective judicial protection of individual rights and the right to an effective remedy and fair trial respectively. The CJEU considered these matters as part of the overall package of protection flowing from "the common values on which the European Union is founded" found both in constitutional arrangements of Member States and EU law generally.[48] What is significant for the purposes of this work is reach the CJEU found the TEU to have into the Portugese domestic law where judicial independence was seen to be essential for the protection of the rule of law, a principle core to the EU. This willingness for the CJEU to see EU law as holistically permeating domestic law shows that where the stakes of a matter are sufficiently grave then the Court will act. The TEU was the primary instrument utilised by the Court to determine the "fields covered by EU law" resulting in a finding that "the existence of a virtual link"[49] between EU law and national measures was sufficient to activate EU law including the Charter. This is noteworthy for the UK as any UK-EU agreement following Brexit will, at least in part, be subject to EU law which in turn is subject to the very wide jurisdiction of the CJEU.

This willingness for the CJEU to intervene in matters concerning the domestic legal system is visible again in *European Commission v Poland*.[50] *Poland* concerned the lowering of the mandatory retirement age for Polish judges, serving past this retirement age was only possible with leave from the Minister of Justice for Poland. Article 19 of the TEU was again significant for the CJEU in determining that the measure was contrary to EU law in that it undermined the integrity of the judiciary who were required to rule upon EU law in the Polish courts. The concept of "fields of EU law" per TEU was noted as going beyond "implementation" per art.51 nevertheless it is difficult to discern where one ends and the other

[48] *Associação* [30].

[49] Laurent Pech and Sébastien Platon, "Judicial Independence Under Threat: The Court of Justice to the Rescue" (2018) 55 C.M.L. Rev. 1827 p.1827.

[50] *European Commission v Poland* (C-192/18) EU:C:2019:924; [2020] 2 C.M.L.R. 4.

begins, particularly where a bilateral agreement between the UK and the EU would likely be deemed a field of EU law. The subject matter of *Associação* and *Poland* is significant given that there is a review underway in the UK considering whether "there is a need to reform the judicial review process"[51] which seeks to curtail the ability of the courts to robustly review executive action.[52]

The Explanations to the Charter give additional detail on art.51. The Explanations note that the Charter "applies *primarily* to the institutions and bodies of the Union"[53] (emphasis added). The use of the term "primarily" suggests that the Charter is understood as at least possibly having some kind of influence beyond the immediate sphere of the EU. Secondly, the explanation of art.51 makes clear that "institutions" include all of those authorities set up by the Treaties. Of course, the CJEU itself is created by the TEU.[54] This gives further weight to the submission that the Court must observe the Charter rights in all adjudication, the CJEU as the apex court of the EU "assumes the role of protector against threats that its citizens face, and which the Member States cannot alleviate."[55] The following section will explore this idea of the CJEU being the protector of citizens from the perspective of one's right to have rights which arises out of phenomenological understanding of an individual's place in a community.

[51] Ministry of Justice, "Government Launches Independent Panel to Look at Judicial Review" <https://www.gov.uk/government/news/government-launches-independent-panel-to-look-at-judicial-review> accessed 10 October 2020.

[52] Mark Elliott, "The Judicial Review Review I: The Reform Agenda and its Potential Scope" <https://publiclawforeveryone.com/2020/08/03/the-judicial-review-review-i-the-reform-agenda-and-its-potential-scope/> accessed 10 October 2020.

[53] Explanations Relating to the Charter of Fundamental Rights [2007] OJ C 303/02 p.32.

[54] TEU art.13.

[55] Victor Roeben and others, "Revisiting Union Citizenship from a Fundamental Rights Perspective in the Time of Brexit" [2018] European Human Rights Law Review 450 p.473.

The Right to Have Rights

The foregoing discussion detailed the approach of the CJEU to fundamental rights both prior to and after the introduction of the Charter. It is clear from the above that the rights consolidated in the Charter are latent in the jurisprudence of the CJEU after being drawn from the constitutional traditions of the Member States. The Charter makes these antecedent rights more visible and easily pleadable against the institutions of the EU and the Member States. The CJEU of course is itself an institution of the EU and is the "protector" of individuals who come before the Court. In this role the CJEU has shown a willingness to rule on matters which on a plain reading of art.51 do not occur in the implementation of EU law.

This section considers the role of the Charter and relatedly the CJEU from a theoretical perspective and identifies why the Charter ought to have an ongoing role for the UK following Brexit. The following provides the fuel for an expansive and inclusive reading of art.51. This approach is largely based on the work of Arendt and Levinas. Frantziou has also utilised the same scholarship to demonstrate that:

> [A robust application of the Charter is] justified on the basis of the right to have rights, the Charter is ultimately intended to serve active forms of citizenship of the EU… [but also] does it not create rights/duties for the non-citizens finding him/herself in the scope of EU law?[56]

This phrase, "finding him/herself in the scope of EU law", neatly echoes the phraseology of the CJEU in determining when a measure will fall within the scope of EU law.[57] This understanding places the individual, irrespective of his or her citizenship, at the centre of asking whether EU law may itself be a trigger for the Charter's applicability. Moreover, this approach tallies with the intentions of the Charter

[56] Eleni Frantziou, "A 'Right to have Rights' in the EU Public Sphere? An Arendtian Justification for the Application of the EU Charter of Fundamental Rights" <http://epapers.bham.ac.uk/2192/> accessed 19 September 2019 p.23.

[57] *ERT* p.42.

broadly in putting the individual, over the State, at its "heart".[58] UK citizens will continue to find themselves in the scope of EU law following Brexit. This will most likely occur where UK citizens exercise rights secured in the agreed future relationship between the UK and the EU. Where this occurs it is absurd to suggest that the CJEU in adjudicating the effects of EU law would not in the least have regard to the Charter.

The fundamental rights recognised in the Charter are not only aspirational in their character but they are also "preconditions for the existence of a diverse and inclusive public sphere."[59] This concept of a "diverse and inclusive public sphere" exists apart from the legal and political structures of the EU and takes in the cultural sphere of Europe of which the UK is and will remain very much a part notwithstanding Brexit. It is this cultural sphere from which the constitutional traditions solidified in the Charter are drawn. Nevertheless, following the UK's exit from the EU, many UK citizens stand to lose "the entire social texture into which they were born and in which they established for themselves a distinct place in the world".[60] This loss is visible in the consequences of Brexit for Tooze, a UK citizen resident in Germany:

> What continues to be at stake for hundreds of thousands, now millions of people are really existential issues of where they live, and with what rights they live in the places that they live, and what the legal framework for their identity is. I was just having lunch with old German-American and British friends who don't know what the citizenship rights of their children are going to be who've spent their entire lives in the UK. I myself spent all of the formative years of my youth in Germany, never acquired a German

[58] Eleni Frantziou, "Constitutional Reasoning in the European Union and the Charter of Fundamental Rights: In Search of Public Justification" (2019) 25 European Public Law 183.

[59] Frantziou, "A 'Right to have Rights' in the EU Public Sphere? An Arendtian Justification for the Application of the EU Charter of Fundamental Rights" p.5.

[60] Hannah Arendt, *The Origins of Totalitarianism* (Meridian Books 1962) p.293. See also Eleanor Spaventa, "Mice or Horses? British Citizens in the EU 27 after Brexit as 'Former EU Citizens'" (2019) 44 E.L. Rev. 589 p.589.

> passport. It didn't seem necessary and I'm now faced with losing, you know the legal frame within which that dual identity made sense. [Brexit is] the most disruptive thing that's happened to me personally in my entire life.[61]

Tooze speaks as a British citizen living in the EU27. However, his observations are just as applicable to those UK and EU citizens residing in the UK. It is this outcome which Arendt's right to have rights seeks to prevent, for one's "place in the world" is not:

> merely a matter of possessing the right to enter and reside in a state of nationality to which a person's ties are merely formal, but to reside where one's relational community is situated.[62]

It is where one's relational community is situated where one exercises positive rights. Arendt's right to have rights is an a priori right to take part in one's political community and exercise the rights which flow from membership of that community. In the absence of a right to have rights one's ability to exercise rights which are termed fundamental or universal are vulnerable to countervailing political pressures. In Arendt's life this manifested in statelessness following the revocation of Arendt's German citizenship due to her being Jewish in Nazi Germany. Arendt learned that being a stateless refugee made her an "outlaw" subject to arbitrary power.[63] For Arendt and others made stateless:

> We became aware of the existence of a right to have rights (and that means to live in a framework where one is judged by one's actions and opinions) and a right to belong to some kind of organized community… [64]

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[61] Talking Politics, "Episode 139: Adam Tooze on Europe" 19 January 2019 <https://www.talkingpoliticspodcast.com/blog/2019/139-adam-tooze-on-europe> accessed 10 October 2020.

[62] Alison Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* (Oxford University Press 2012) p.24.

[63] Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* p.3.

[64] Arendt, *The Origins of Totalitarianism* p.296.

It is not suggested here that the experiences of Arendt and the millions of others who faced persecution and statelessness in Europe in the 1940s is in any way equivalent to the situation of UK citizens following Brexit. The aim here instead is to draw on the experiential similarities one sees in the comments of Tooze above. For Tooze and others in similar circumstances there is certainly "the loss of the entire social texture into which they were born and in which they established for themselves a distinct place in the world"[65] together with the loss of their "relational community".[66] It is this that allows for Arendt's work to be instructive here.

One exercises positive rights in their relational community. These positive rights do not exist in the abstract. This realisation forks into two avenues. The first is that by losing the ability to rely on the Charter rights for those in the UK (whether of British citizenship or otherwise) the individual's 'place in the world' is being drastically altered. No longer can a person in the UK rely upon the Charter rights against either the UK or the EU on a restrictive understanding of art.51. The second is the rescission of rights linked with citizenship of the EU for those British nationals who reside in the EU27 countries who concurrently face the destruction of their social texture and expulsion from their relational community.[67] UK citizens therefore find themselves excluded from a "community of fundamental rights".[68]

This is not to say anything of the philosophical conception of citizenship per the right to have rights approach. The rights contained in the Charter (and other fundamental rights instruments) that allow for

[65] Arendt, *The Origins of Totalitarianism* p.293.

[66] Kesby, *The Right to Have Rights: Citizenship, Humanity, and International Law* p.24.

[67] For the links between the transnational individual and their linked countries see Bosniak, "Multiple Nationality and the Postnational Transformation of Citizenship".

[68] Andras Jakab, "Application of the EU CFR by National Courts in Purely Domestic Cases" in Andras Jakab and Dimitry Kochenov (eds), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (Oxford University Press 2017) p.255.

the individual to take part in the political community. It is this participation that allows one to be a citizen in their constitutional polity[69] thereby calling for a wide and inclusive application of the Charter.

The right to have rights says nothing of the State's responsibilities towards individuals whether citizens of that State or otherwise as the right to have rights rests on positive law typically manifested through one's citizenship. There may be a right to have rights in the sense that membership of a political community and the ability to realise oneself within that community is achieved through the exercise of the rights that flow from membership but such realisations bring one to a paradox if one is to remain 'within the sphere of positive law'[70] which is required by Arendt due to experiences of the failings of natural law.[71] The difficulty here is that a binary approach to positive law and natural rights ignores that there can be unjust determinations of law that nevertheless follow positive rights. These realisations show "that there is a standard of right and wrong independent of positive right and higher than positive right: a standard with reference we are able to judge our positive right."[72] It is here that the 'phenomenology of the Rights of Man' from Levinas assists in going beyond positive and natural rights.[73] For Levinas one's right to have rights is not conceived in something higher than positive law or humanity itself but rather from the individual's shared responsibility to others.

The breadth of Levinas's writings makes it difficult to pin Levinas down to any one school of thought. For the purposes of this work it is Levinas's construct of the "Face" that is helpful for looking at the issues presented above in a new light. Bell develops the link between Arendt and Levinas in noting the human dignity aspect of rights by considering the "Face as the locus of human dignity"[74] – "In the Face

[69] Frantziou, "A 'Right to have Rights' in the EU Public Sphere? An Arendtian Justification for the Application of the EU Charter of Fundamental Rights" 25.

[70] Nathan Bell, "'In the Face, a Right Is There': Arendt, Levinas and the Phenomenology of the Rights of Man" (2018) 49 Journal of the British Society for Phenomonology 291 p.297.

[71] Bell, "'In the Face, a Right Is There': Arendt, Levinas and the Phenomenology of the Rights of Man" p.297.

[72] Leo Strauss, *Natural Right and History* (University of Chicago Press 1965) 2.

[73] Bell, "'In the Face, a Right Is There': Arendt, Levinas and the Phenomenology of the Rights of Man" p.291

[74] Bell, "'In the Face, a Right Is There': Arendt, Levinas and the Phenomenology of the Rights of Man" p.291.

– a right there is".[75] Much like Arendt, Bell is concerned with those who have been made stateless but in the 21st century and the same problem noted by Arendt arising in relation to those who do not have the legal grounding upon which to base their rights – namely citizenship.[76] It ought to be repeated, it is not suggested here that the enormous difficulties faced by those who are displaced or face persecution at the hands of the State are at all equivalent to the situation of UK citizens who stand to lose their EU citizenship and the related benefits of EU law including reference to the Charter.

The Charter has as its aim the respect and protection of human dignity;[77] this same human dignity is found in Levinas's "Face". Taking these realisations together allows for *all* individuals that come before the CJEU to benefit from the Charter rights irrespective of their citizenship within that community for the Face of another triggers a cavalcade of reflections that are:

> not a thought *about* – a representation – but at once a thought *for*, a non-indifference towards the other which upsets the equilibrium of the calm and impassive soul of pure knowledge. It is an awakening to a uniqueness in the other person which cannot be grasped by knowledge, a step towards the newcomer as someone who is both unique and a fellow being… The extreme precariousness of something unique, the precariousness of the stranger. The totality of exposure lies in the fact that it is not merely a new awareness of the familiar revealed through its true light; it is a form of expression, a primal language, a summons, an appeal.[78] (emphasis in original)

And so rights are owed to the individual not due to natural law conceptions of law or positivist understandings of legal and political membership vis a vis citizenship rather fundamental rights are owed by virtue of the phenomenological encounter that occurs between members of a community.

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[75] Emmanuel Levinas, "The Face of Stranger" [1992] Unesco Courier 1 p.67.

[76] Bell, "'In the Face, a Right Is There': Arendt, Levinas and the Phenomenology of the Rights of Man" p.293.

[77] Charter art.1.

[78] Levinas, "The Face of Stranger" p.67.

It is the recognition of the Face that a right arises. This is a right to human dignity which commands the other reciprocally to respect that dignity. This right to human dignity created by one's "shock encounter" with other individuals provides the kindling for Arendt's right to have rights and may be extrapolated onto a court as the subject to which that responsibility to respect human dignity ought to be commanded.[79] Article 1 of the Charter states that "human dignity is inviolable. It must be respected and protected".[80] For the CJEU to see this dignity and the rights that flow therefrom as dependent upon EU citizenship or a restrictive understanding of the scope or field of EU law would make the protections of the Charter hollow. The normative foundations for the CJEU to adopt a broad and inclusive approach to the Charter have been set in this section. The following section will build on these normative foundations by exploring how art.51 of the Charter may be reconceptualised to account for the phenomenological command for human dignity.

Broadening the Scope of Article 51

The theoretical basis for an expansive application of the Charter due to the duties owed to the individual is established above. However, it is clear from the case law which led to art.51 and its subsequent development that art.51 is not a straightforward provision and so a normative basis does not alone lead to a practical outcome. Article 51 is open to both a narrow and an expansive reading. Here the latter reading will be explored to demonstrate the manner through which the normative foundations outlined above may be achieved in practice.

[79] Bell, "'In the Face, a Right Is There': Arendt, Levinas and the Phenomenology of the Rights of Man".

[80] For an expansive discussion of human dignity in relation to the Charter see Catherine Dupre, "'Human Dignity is Inviolable. It Must be Respected and Protected': Retaining the EU Charter of Fundamental Rights after Brexit" [2018] European Human Rights Law Review 101.

The rethinking of art.51 considered here is built upon the work of Jakab.[81] The advantage of this approach is that it is based on a holistic reading of existing legislation.[82] A holistic view of the relevant legislation demonstrates the tenability of this approach.[83] In addition to the legal arguments there is also the paradoxical situation that is created by a fundamental rights charter which is limited in its scope.[84] The idea of "fundamental rights, but of strictly limited scope"[85] has echoes of the failings of human rights as noted by Arendt[86] and discussed in detail above. The submission here proceeds in three sections. First, the role of art.51 case law, and relatedly the Charter in general, is considered. Secondly, the idea of doctrinal triggers for application of the Charter rights is explored. This exploration will demonstrate that it is possible to understand the Charter as having a wide application on a purely legalistic and textual analysis. Thirdly, based on these doctrinal triggers, art.51 is reimagined to capture circumstances that would now be covered under the CJEU's current approach.

The Role of Article 51 Case Law in UK Courts Following Brexit

Assessing the role of art.51 case law following Brexit is a difficult task due to the ongoing uncertainty as to the future relationship between the UK and the EU. The Political Declaration attached to the Withdrawal Agreement[87] has been underplayed in this regard. Craig notes that the although brief in

[81] Jakab, "Application of the EU CFR by National Courts in Purely Domestic Cases".

[82] Jakab, "Application of the EU CFR by National Courts in Purely Domestic Cases" p.256.

[83] See also the expansive approach being taken to EU citizenship and fundamental rights in the following which support the tenability of the position of this article, Spaventa, "Mice or Horses? British Citizens in the EU 27 after Brexit as 'Former EU Citizens'"; Roeben and others, "Revisiting Union Citizenship from a Fundamental Rights Perspective in the Time of Brexit".

[84] Eeckhout, "The EU Charter of Fundamental Rights and the Federal Question" p.958.

[85] Eeckhout, "The EU Charter of Fundamental Rights and the Federal Question".

[86] Arendt, *The Origins of Totalitarianism* (Meridian Books 1962).

[87] Political Declaration Setting Out the Framework for the Future Relationship Between the European Union and the United Kingdom.

comparison to the Withdrawal Agreement the Political Declaration is far more significant for the UK's long term interests than the Withdrawal Agreement itself.[88] Following this it is noteworthy that, per the Political Declaration, the EU and the UK plan to establish "an ambitious, broad, deep and flexible partnership".[89]

This "ambitious partnership" will be based on a mutual respect for human rights, this respect will be based on the UK's respect for the Convention and the EU's respect for the Charter.[90] This might be seen to firmly discount the continuing effect of the Charter, however, the Political Declaration goes on to state that where there is a dispute relating to EU law then the matter should be referred to the CJEU.[91] The difficulties in determining which matters fall within the ambit of EU law and which measures are achieving the "implementation of Union law"[92] are clear from the discussion of art.51 above.

It is foreseeable that some EU law will form the framework or content of any future relationship between the UK and the EU as is the case with the EU's Association Agreements with third countries.[93] Therefore, where matters of EU law are applicable or where provisions of the Association Agreement are drawn from EU law then the jurisprudence of the CJEU will be relevant. For example the implementation of EU financial rules, competition rules and general regulatory alignment would fall within the purview of the CJEU which itself is subject to the provisions of the Charter.[94] There is doubtlessly a duality at play between the obligations placed on EU Member States by the Charter and

[88] Craig, "Brexit A Drama: The Endgame - Part I" p.167.

[89] Political Declaration Setting Out the Framework for the Future Relationship Between the European Union and the United Kingdom p.1.

[90] Political Declaration Setting Out the Framework for the Future Relationship Between the European Union and the United Kingdom [6].

[91] Political Declaration Setting Out the Framework for the Future Relationship Between the European Union and the United Kingdom [131].

[92] Charter art.51(1).

[93] See discussion in Part 0.

[94] *Åkerberg*.

those which might be termed “external aspects” referring to human rights in third countries. However, these two considerations are linked, “respect for fundamental rights within the EU is a legal obligation which trade agreements must comply with”.[95] This circularity goes further when “fundamental rights within the EU” are interegated into any agreement as is the case with the UK-EU Withdrawal Agreement which covers the transition period leading to the UK’s exit.[96] The EU as an institution may for these purposes be seen in the same way as the Member States “when they are implementing Union law”[97] or more broadly all “instutitions, bodies, offices and agencies of the Union… when they are implementing Union law”.[98] It is this latter interpretation which seems to be appropriate and binds the CJEU to observe the Charter in all it does including adjudication of agreements with third countries.[99] It is clear from the consideration of art.51 and associated case law that the Charter will have some role to play in the CJEU where the Court is tasked with adjudicating matters concerning the future relationship between the EU and the UK. These CJEU judgments will in the least be pleaded before the domestic courts and so will form part of judicial reasoning in UK courts. The idea of a wider approach to the Charter’s applicability is explored further below based on a revised understanding of art.51 and when it is that the Charter may be triggered.

[95] Vincent Depaigne, "Protecting Fundamental Rights in Trade Agreements between the EU and Third Countries" (2017) 42 E.L. Rev. 562 p.563.

[96] Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community art.2 states that the Charter is considered to be part of Union Law for the purposes of the Withdrawal Agreement. See also Alan Dashwood, “The Withdrawal Agreement: Common Provisions, Governance, and Dispute Settlement” (2020) 45 E.L. Rev. 183.

[97] Charter art.51.

[98] Charter art.51.

[99] *European Commission v Kadi* [2014] (C-584/10 P) EU:C:2013:518; 1 C.M.L.R. 24 [22].

Doctrinal Triggers

The duty of the CJEU to respect the fundamental rights contained in the Charter has been explained above. This section moves to consider the "triggers" that allow for the Charter to apply in circumstances involving the UK. The idea "doctrinal triggers"[100] is based on the work of Jakab who outlines how an expansive art.51 may be possible. The first doctrinal trigger concerns the idea of EU citizenship. It is accepted by the CJEU that an autonomous EU citizenship status exists[101] with the preamble to the Charter making clear the commitment to fundamental rights for all citizens of the EU. It is these rights which the European Commission has been so keen to protect for citizens of the EU27 who may continue to reside in the UK following Brexit. Notwithstanding the limitations imposed by art.51 and its associated case law the CJEU has shown a willingness to apply Charter rights where a person's EU citizenship is at risk by asking whether there is a deprivation in the enjoyment of Charter rights.[102] However, the appetite for such interventions is limited to family reunification cases rather than wider protection of Charter rights creating a situation of reverse discrimination[103] (discrimination of the majority of EU citizens who are not protected by the Charter in most instances)[104] due to the interpretation given to art.51.[105] To combat this, and in keeping with the right to have rights approach, the CJEU ought to instead recognise the bundle of rights that attach to EU citizenship as this route "would be to say that union citizenship [itself] triggers the application of the Charter."[106] It is foreseeable

[100] Jakab, "Application of the EU CFR by National Courts in Purely Domestic Cases" p.255.

[101] *Dereci v Bundesministerium fur Inneres* (C-256/11) EU:C:2011:734; [2012] 1 C.M.L.R. 45 [62].

[102] Iglesias Sara Sánchez, "Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?" (2014) 20 European Law Journal 464 pp.477-479.

[103] Chiara Berneri, "Protection of Families Composed of EU Citizens and Third-Country Nationals: Some Suggestions to Tackle Reverse Discrimination" (2014) 16 European Journal of Migration and Law 249.

[104] Sánchez, "Fundamental Rights and Citizenship of the Union at a Crossroads: A Promising Alliance or a Dangerous Liaison?".

[105] Eeckhout, "The EU Charter of Fundamental Rights and the Federal Question" pp.970-972.

[106] Jakab, "Application of the EU CFR by National Courts in Purely Domestic Cases" p.256.

that this would be relevant for EU citizens residing in the UK such as when they exercise their right to free movement within the EU and perhaps a post-Brexit UK.[107] Moreover, when exercising such freedom of movement respect would have to be afforded to other rights which are not linked with an individual's movement.

More concerning for those in the UK who consider the Charter to be inconsequential for the UK moving forward is the second doctrinal trigger which rests on the provisions of the TEU read alongside the Charter.[108] This approach is in keeping with the CJEU judgment in *Åkerberg* as it maintains the requirement that the complained of measure must be within the scope of EU law.[109] The effect of this second doctrinal trigger is that it extends what may be deemed within the scope of EU law. Article 7 of the TEU allows for the European Parliament, European Commission, the European Council or one third of the Member States to "determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2". Correspondingly art.2 of the TEU makes clear the following common values of the Member Staters: "…pluralism, *non-discrimination*, tolerance, justice, solidarity and equality between women and men…" (emphasis added).[110] Article 21 of the TEU goes on to state that:

> The Union's action on the international scene shall be guided by principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

[107] Aida Torres Pérez, "The Federalizing Force of the EU Charter of Fundamental Rights" (2017) 15 International Journal of Constitutional Law 1080 pp.1085-1086.

[108] Jakab, "Application of the EU CFR by National Courts in Purely Domestic Cases" pp.255-256.

[109] *Åkerberg* [19].

[110] See also TEU art.6.

Taking the above provisions together it is possible to "…use the formula developed in [*Åkerberg*] ('if it is *capable of indirectly affecting* EU law')...[to argue that]…basically *all human rights violations* can trigger the application of Article 51(1)…".[111]

The consequences of these observations for the UK courts links back to the discussion above with respect to the radiating effect of the general principles of EU law and the Charter rights in any case before the CJEU. Equally the judgments of the CJEU will have a persuasive effect on the UK courts.[112] The extent to which this will be the case will depend on the nature of the long term relationship between the UK and the EU. However, for the duration of the transition period it is clear the UK courts will be required to pay the same observance to judgments of the CJEU in much the same way as they are under the ECA 1972[113] and may refer matters to the CJEU for preliminary ruling.[114] Of course, arts.2 and 7 will have no direct effect in the UK following Brexit insofar as the UK will not be a signatory to the TEU. However, the UK will be a party to a treaty in the future that details the relationship between the UK and the EU. It is likely that such an agreement will require some observance of the general principles of EU law found in the Charter and a mechanism by which these principles can be enforced through arbitration. This is visible in the Association Agreements the EU currently has with third countries.[115]

A Reimagined Article 51 Alongside the European Convention on Human Rights and Subsidiarity

If it is accepted that art.51 may be reimagined in the method discussed above and based upon the approach of Jakab the follow up query may be how this sits within the framework of the EU given

[111] Jakab, "Application of the EU CFR by National Courts in Purely Domestic Cases" p.256.

[112] Dashwood, "The Withdrawal Agreement: Common Provisions, Governance, and Dispute Settlement".

[113] Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community art.127.

[114] Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community art.158.

[115] See for example Association Agreement Between the European Union and its Member States, of the one part, and Ukraine, of the Other Part OJ L161/3 ch.14.

principle of subsidiarity and the overlap Charter rights may have with a Member State's constitution and the Convention. Article 5 TEU recognises the principle of subsidiarity in the application of the Charter in that where an area is not in the exclusive competence of the EU, then the EU will only act where the action is best achieved at the level of the EU over the national jurisdiction.[116] The hope of subsidiarity is that decisions will be taken as close to the individual as possible without EU intervention and with a retention of national sovereignty unless the ends are not possible without EU action.[117] There is a textual analysis to be conducted in relation to art.5 TEU with respect to subsidiarity, particularly the use of the terms "sufficiently" and "better achieved".[118] If an end can be sufficiently or better achieved there is a necessary implication that the end may be achieved to some extent. This has echoes with other EU principles recognised in the TEU and incorporated into UK law – such as proportionality.[119] The difference is however in proportionality being a useful judicial tool to test EU and Member State acts. Whereas subsidiarity in the CJEU and EU is an ex-ante principle with Member States reviewing draft legislation before enactment at the EU level.[120] Article 5 of TEU recognises an ongoing observance of subsidiarity in the "institutions of the EU" but it is difficult to firmly consider subsidiarity a justiciable principle within the CJEU.[121] This suggests that whilst subsidiarity is an

[116] TEU art.5.

[117] Olivia Barton, "An Analysis of the Principle of Subsidiarity in European Union Law" (2014) 2 North East Law Review 83 p.84.

[118] TEU art.5(3).

[119] For a discussion of proportionality's role in the UK see Adam Ramshaw, "The Case for Replicable Structured Full Proportionality Analysis in all Cases Concerning Fundamental Rights" (2019) 39 Legal Studies 120.

[120] Katarzyna Granat, "Subsidiarity as a Principle of EU Governance" in Robert Schütze (ed), *Globalisation and Governance: International Problems, European Solutions* (Cambridge University Press 2018).

[121] *R. (British American Tobacco (Investments) Ltd) v Secretary of State for Health* (C-491/01) EU:C:2002:741; [2003] 1 C.M.L.R. 14 [173]-[185]; Christoph Henkel, "The Allocation of Powers in the European Union: A Closer Look at the Principle of Subsidiarity" (2002) 20 Berkley Journal of International Law 359, 366; NW Barber, "The Limited Modesty of Subsidiarity" (2005) 11 European Law Journal 308.

important symbolic principle the extent to which it has a practical role in the CJEU is weak.[122] This is particularly pronounced in the area of fundamental rights.[123] It might therefore be said that in enacting the Charter the principle of subsidiarity has been satisfied by virtue of the Member States' assent but also in art.53 of the Charter which recognises that the domestic constitutions of the Member States and observance of the Convention continue to act as a floor for rights protection which the Charter compliments.

The CJEU's approach in *Melloni v Ministerio Fiscal*[124] ought to be mentioned here in respect of the proposed lack of any barrier created by the principle of subsidiarity for a robust application of the Charter rights. *Melloni* concerned an Italian citizen, Melloni, who was tried in absentia in Italy. Soon after a European Arrest Warrant (EAW) was issued for Melloni who was in Spain. The sticking point in the case was the divergent approaches in Italy and Spain for those tried in absentia. In Italy those convicted in absentia had no recourse to appeal their conviction whereas the Spanish constitution secured the right to appeal as part of the overall right to a fair trial. The Spanish Constitutional Court referred the matter for preliminary ruling asking, inter alia, whether art.53 allowed the Spanish authorities to make execution of the EAW conditional on Melloni's conviction being open to review. In considering this the CJEU found that art.53 did not allow for the Spanish Court to make extradition conditional upon making a right of review available. In so finding the CJEU gave precedence to the uniform application of EU law across the EU and also to the primacy of EU law over national law. This is significant. The approach of the CJEU suggests that if the execution fell below the standards required of the Charter then perhaps a different view could emerge. However, as this was not the case the

[122] Werner Vandenbruwaene, "Multi-Tiered Political Questions: The ECJ's Mandate in Enforcing Subsidiarity" (2012) 6 Legisprudence 321.

[123] Granat, "Subsidiarity as a Principle of EU Governance" pp.296-300.

[124] *Melloni v Ministerio Fiscal* (C-399/11) EU:C:2013:107; [2013] Q.B. 1067.

supremacy of EU law took precedence. This approach is supported by the judgment in *Minister for Justice and Equality v RO*.[125]

The facts of *RO* are similar to *Melloni* in that the CJEU was asked to give judgment on a EAW issued by the UK for an individual in the Republic of Ireland. The individual submitted that this should not be possible due to the UK's pending exit from the EU which would necessarily involve a diminution of rights available to the complainant in the UK, including Charter rights. Following *Melloni* it might be thought that the matter would be fairly straightforward – the EAW should be executed. However, the Court found:

> *In the absence of substantial grounds to believe that the person who is the subject of that European arrest warrant is at risk of being deprived of rights recognised by the Charter*… the executing member state cannot refuse to execute that European arrest warrant while the issuing member state remains a member of the European Union.126 (emphasis added)

In this light *Melloni* can be recast as not being a distortion of "the genuine purpose of Article 53"[127] but rather not meeting the bar for an interference with the right to fair trial protected by art.47 of the Charter.

In considering the effects of a reconfigured art.51 it should be remembered that art.51 draws on the general principles of EU law as discussed above. Therefore, these same general principles are applicable to any future relationships the UK may have with the EU via the means discussed above. Based on this and the exploration of a reimagined art.51 above the Charter would be relevant where the freedoms or powers of any future agreement are in issue. Moreover, these rights may be pleadable in the

[125] *Minister for Justice and Equality v RO* (C-327/18) EU:C:2018:733; [2019] 1 W.L.R. 1095.

[126] *RO* [62].

[127] Elise Muir, "The Fundamental Rights Implications of EU Legislation: Some Consitutional Challenges" (2014) 51 C.M.L. Rev. 219 p.244.

international court, most likely the CJEU, that arbitrates litigation relevant to the eventual future arrangement.

Conclusion

The Charter has had an uncertain role in the UK since its inception. The UK's belief that the Charter was to have no force in domestic law due to a purported opt out was unfounded.[128] The intention on the face of the European Union (Withdrawal) Act 2018 is for the Charter to be excluded from retained EU law following the UK's departure from the EU. Yet the principles which give life to the Charter are said to be retained. The CJEU's jostling with the wording of art.51 demonstrates the challenge faced by any court in looking to delineate the scope of EU law and thereby of the Charter rights. The clarity offered by rethinking the nature of art.51 ensures the rights said to be fundamental and common to those in Europe are respected. This clarity, due to the retained nature of the Charter's general principles in the UK, is not limited to membership of the EU. This is particularly so given the constellation of positions with regard to the EU which are open to the UK over the coming months, years and decades. In each of these positions the pervading influence of the Charter is not far from sight.

The legal latitude for the Charter to continue having a pervasive effect on British law following the UK's exit from the EU has been demonstrated in the discussion of art.51 above. It is hoped that this argument has gained theoretical grounding from the analysis and application of Arendt and Levinas. From these writers it has been made clear that there is a "right to have rights" – without this the substantive rights recognised in the Charter are toothless. Therefore, it may be argued that those who benefit from the rights in the Charter equally have a right to continue benefiting from them. This is supported by Levinas's construct of the Face to represent the individual's normative obligations and expectations in relation to others. These obligations and expectations include appreciation that each

[128] *R. (NS) v Secretary of State for the Home Department* (C-411/10) EU:C:2011:865; [2013] Q.B. 102, [2012] 3 W.L.R. 1374.

individual "*suffers, is exposed and vulnerable*."[129] Human rights go some way to ensuring that an individual does not unduly suffer, face exposure or vulnerability. These expectations may be extrapolated to the State's place vis a vis its citizens further demonstrating the lack of weight given to the Charter and its purported rescission in the UK following Brexit. The UK would be wise to pause and reflect on the approach to be taken to the Charter going forward and how this might be addressed in the UK's future relationship with the EU.

[129] Bell, "'In the Face, a Right Is There': Arendt, Levinas and the Phenomenology of the Rights of Man" p.300.