

‘Unchartered’ waters: fundamental rights, Brexit and the (re)constitution of the employment law hierarchy of norms

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Abstract

The decision of the British people to leave the European Union (EU) raises foundational questions for many legal fields. The effects are especially likely to be felt within domestic employment law, which now has a strong basis in EU law. Of particular concern is the removal of the nascent EU fundamental employment rights influence over domestic legislation. Employment lawyers have long relied on fundamental rights as a means of preserving the autonomy of their subject from general private law. One manifestation of this turn to fundamental rights concepts has been the ‘constitutionalisation’ of employment rights. EU law, notably the Charter of Fundamental Rights, has become a key underpinning of this constitutionalisation process. This article considers the effects of the constitutionalisation in the United Kingdom employment sphere of some of the rights found in the Charter’s Solidarity Title, through its role in the emergence of a hierarchy of sources or ‘norms’ in the employment field. In order to address the question of the Charter’s influence on the hierarchy of sources in the employment context, three interrelated processes are examined. The article begins by exploring the ‘constitutionalisation’ process, by setting out the nature of the Charter and the effects of its employment rights on the hierarchy of sources. This is followed by a consideration of the ‘deconstitutionalisation’ process brought about by Brexit, before finally examining whether a potential ‘reconstitutionalisation’ process might be underway by looking at key terms of the EU (Withdrawal) Act 2018 and the potential to replicate the Charter in domestic law.

Keywords

The charter of fundamental rights, hierarchy of norms, employment rights, Brexit, constitutionalisation.

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I. Introduction

The decision of the British people to leave the European Union (EU) raises foundational questions for many legal fields. The effects are especially likely to be felt within domestic employment law, which now has a strong basis in EU law.¹ Of particular concern is the removal of the nascent EU fundamental employment rights influence over domestic legislation. Employment lawyers have long relied on fundamental rights as a means of preserving the autonomy of their subject. Of course, the autonomy of employment law can and has rested on other foundations such as social justice, the recognition of the employee as a weaker party, trade union law, solidarity, and public law, but rights concepts have become a useful tool in the quest to distinguish employment law from general private law.² One manifestation of this turn to fundamental rights concepts has been the ‘constitutionalisation’ of the rights governing the terms and conditions of the individual contract of employment. EU law, notably the Charter of Fundamental Rights (the Charter), has become a key underpinning of this constitutionalisation process.

This article considers the effects of the constitutionalisation in the United Kingdom (UK) employment sphere of some of the rights found in the Charter’s Solidarity Title (also known as Title IV), described here as constitutionalised ‘Employment Rights’. These Employment Rights include worker information and consultation, collective bargaining, protection from unfair dismissal, a guarantee of fair and just working conditions and the reconciliation of family and professional life. The impact of the Employment Rights is demonstrated through their role in the emergence of a hierarchy of sources or ‘norms’ in the employment field, a theme that is missing from the existing literature on the Charter. The concept of a hierarchy of norms is also a useful way in which to consider the relationship between the various sources of employment rights, particularly given that one of those sources is about to be removed.

It could be said that there are currently several confused hierarchies in UK employment law: that between EU law and domestic law, and those within domestic law itself. The question to be addressed here is whether the granting of legal effect to the Charter has allowed for an evolution in our understanding of the concept of a hierarchy of sources in the employment law context, a concept which is increasingly key to understanding the differing weight to be granted to the various sources of employment rights.

At an EU-domestic level, the impact of the Employment Rights is demonstrated via their constitutional functions, namely their use as a tool of interpretation and, more importantly, their use as a standard against which to examine the validity of EU and domestic legislation. As we shall see, the Charter’s position in the hierarchy makes it difficult to amend or repeal existing EU-derived employment legislation. At an entirely domestic level, the role of the Employment Rights is examined through the changing place of individual private agreement among the sources of employment law. The concept of a hierarchy of sources—and particularly the place of fundamental rights concepts within that hierarchy—can help us to determine the appropriate weight to be granted to the terms of the individual contract of employment.

Most civil law countries also have a clear concept of a hierarchy of sources within employment law, with collective and legislative norms taking priority over the terms of the individual

1. See e.g. Nicole Busby and Rebecca Zahn (eds.), ‘Studying EU Law in Scotland During and after Brexit’ SULNE October 2017.

2. Alan Bogg and others (eds.), *The Autonomy of Labour Law* (Hart 2015).

employment contract.³ This has not been true of the common law. To date, in the UK, no source of employment rights has been considered preponderant and the hierarchy at national level—to the extent that one can be said to exist—has shown itself capable of evolution or indeed inversion.⁴ The question is whether the domestic understanding of a hierarchy of sources has evolved under the influence of the Employment Rights. This question is particularly relevant given the impending absence of the Charter and the real risk that rights currently found in employment legislation will be diluted post-Brexit.

Having considered the influence of the Charter, this article then turns to Brexit and the extent to which it may lead to the ‘deconstitutionalisation’ of the Employment Rights, which in turn disrupts our emerging understanding of a hierarchy of norms in the employment context. Post-Brexit, existing EU employment law will have to be more explicitly integrated into the domestic hierarchy of norms if its continued protection is to be ensured. Finally, the ability of the Employment Rights to have continued value in the absence of the Charter and indeed employment legislation more generally, is assessed. Post-Brexit, it will be necessary to consider the extent to which the legislative and contractual brake provided by the Charter might be preserved. As discussed below, we may increasingly need to turn to the common law as an independent source of employment rights.

Although the Charter is not the only source of fundamental employment rights in the UK, it remains the most concrete. Unusually for an international rights instrument, the Charter contains employment rights alongside traditional civil and political rights. Due to the supremacy of EU law, the Charter also provides litigants with clearly defined remedies for the infringement of their employment rights. Having said that, the Charter is not an easy text to interpret or evaluate and its precise significance for employment law remains uncertain, given the relative lack of case law in what is admittedly an early stage of the evolution of the Charter, which was only granted full legal effect in December 2009.

In addition, there are a number of barriers standing in the way of the Charter’s development in the employment context, notably the controversial distinction drawn between ‘rights’ and ‘principles’, addressed below, and the ongoing prioritisation of economic integration over social rights within EU law more generally.⁵ Indeed, the Charter itself contains potentially unwelcome elements from an employee-protection perspective in the form of the freedom to conduct a business found in Article 16 and the attendant privilege granted to employer freedom over competing workers’ rights.⁶

The Charter has also long drawn ire from certain quarters of the UK political establishment.⁷ This was evidenced by the (attempted) UK ‘opt-out’ from the Solidarity Title, which turned out to

3. For e.g., the French Civil Code provides that the employer is bound by collective agreements via the contract of employment.

4. Simon Deakin and Gillian S. Morris, *Labour Law* (6th edn, Hart 2012) 58.

5. AG opinion in Case C-176/12 *AMS* ECLI: EU: C:2013:491; Siofra O’Leary, ‘The Charter and the Future Contours of EU Social and Employment Law’ in Allan Rosas and others (eds.), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart 2012) 317; Dorota Leczykiewicz, ‘Conceptualising Conflict between the Economic and the Social in EU Law after *Viking* and *Laval*’ in Mark Freedland and Jeremias Prassl (eds.), *Viking, Laval and Beyond* (Hart 2015) 307.

6. Jeremias Prassl, ‘Business Freedoms and Employment Rights in the European Union’ (2015) 17 *CYELS* 189.

7. See Boris Johnson, ‘There is only one way to get the change we want, vote to leave the EU’, *The Telegraph*, 16 March 2016.

have little practical effect.⁸ Charter-scepticism in the UK has clearly had a long pedigree, culminating in the EU (Withdrawal) Act 2018 (the Withdrawal Act), which makes clear that the Charter will no longer form part of domestic law post-Brexit.

Although the concept of an emerging employment law hierarchy of sources clearly transcends Brexit, recent political developments add a particular urgency to this question, given that the foundations of employment law are once again shifting due to the impending removal of the influence of EU law.⁹ If we can establish where EU fundamental rights currently fit into the domestic employment law hierarchy, we will be in a better position to identify areas where the Charter's absence is likely to be acutely felt and the extent to which its legacy might be preserved. In addition, it is useful to assess the current constitutional nature and effects of the Charter—albeit only in one regulatory field—before the UK embarks on its new constitutional journey without it. There might also be lessons for the remaining 27 Member States from a consideration of the Charter's precise constitutional status and reach into a domestic legal system.

In order to address the question of the Charter's influence on the hierarchy of sources in the employment context, three interrelated processes will be examined. Section II explores the 'constitutionalisation' process, by setting out the nature of the Charter and the effects of its Employment Rights on the hierarchy of sources. Section III sets out the 'deconstitutionalisation' process brought about by Brexit and considers whether a potential 'reconstitutionalisation' process might be underway by looking at key terms of the Withdrawal Act and the potential to replicate the Employment Rights in domestic law.

II. The Charter and the Constitutionalisation of Employment Rights

There are numerous Charter provisions that may have a bearing on the employment relationship, but the five Employment Rights found in the Solidarity Title are particularly relevant. These provisions have been selected for analysis given their particularly close connection to EU employment legislation. These are Article 27, which provides for worker information and consultation; Article 28 on the right to bargain collectively; Article 30 on the protection from unfair dismissal; Article 31 on the right to fair and just working conditions and Article 33 on family and professional life. Article 32 on the prohibition of child labour is also relevant, but there is no CJEU case law on this provision, perhaps due to its strong overlap with Article 24 on the rights of the child. Lessons will also be drawn from the equality law context where relevant, but as explained below, equality law transcends the employment context and occupies a somewhat privileged place among the Charter rights.

The content and sources of the Employment Rights have been dealt with comprehensively elsewhere.¹⁰ The intention here is to consider the effect of the 'constitutionalisation' of these rights on the employment law hierarchy of norms. In some instances, the constitutional status of

8. Catherine Barnard, 'The Opt-Out for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?' in Stefan Griller and Jacques Ziller (eds.), *The Lisbon Treaty: EU Constitutionalism without a Constitutional Treaty* (Springer 2008) 257.

9. For e.g., Lord Wedderburn, 'Inderogability, Collective Agreements, and Community Law' 21 (1992) ILJ 245.

10. Steve Peers and others (eds.), *The EU Charter of Fundamental Rights: A Commentary* (1st edn, Hart 2014); Filip Dorssemont and others (eds.), *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart 2019).

the Charter is somewhat taken for granted.¹¹ However, the meaning of the term 'constitution' is disputed, and the following assesses the Charter's place within existing understandings of the concept of constitutionalisation.

A. The Meaning of Constitutionalisation

i. Characterising the Solidarity Title. Before considering the impact of the constitutionalisation process, it is useful to clear up some terminology relating to the Charter's Solidarity Title. The first of the terms that have been used to describe the rights found in the Solidarity Title is 'social rights' or 'social provisions'.¹² Some of the provisions in the Solidarity Title derive from the European Social Charter (ESC), the social rights equivalent of the European Convention on Human Rights (ECHR) and indeed the Community Charter of Fundamental Social Rights of Workers (the Community Charter). The term 'social rights' is also referred to in the Social Policy Title of the Treaty on the Functioning of the European Union (TFEU). The latter is the source for much of the employment legislation emanating from the EU. For now, it can be noted that 'social rights' is a broad concept covering wider human needs beyond the employment relationship, such as the right to housing. Indeed, the social rights descriptor is applied to many of the Charter provisions beyond the Solidarity Title. For example, Article 12 on the freedom of association and Article 14 on the right to education both derive from the Community Charter and the ESC.

Beyond this textual account, there is no clear definition of the concept of a 'social' right, although a useful insight can be found in the Ohlin Report on closer European economic co-operation, which talks of 'instruments for solving certain (...) social problems'.¹³ However, the European Council has used both the labels 'social' and 'economic' when describing the rights found in the ESC.¹⁴ In the EU context, 'social rights' is not a term of art and it may be that the expression is used to distinguish socio-economic rights in general from the EU-specific economic rights, namely the four freedoms of the internal market (goods, services, capital and persons).

Despite these definitional issues, it will be shown in the discussion on the rights and principles distinction below, that the social rights label has been used to stultify the ability of litigants to rely on the Solidarity Title. A related descriptor for the Solidarity Title is 'labour rights'. Although narrower than social rights, this term still covers the working relationship beyond the mere contract of employment, such as the prohibition of forced labour, which is itself found in Article 5 of the Charter.

It is also possible that the Charter's Solidarity rights, including the Employment Rights, can be classified as 'human rights' given the close connection between its provisions and other international human rights instruments, with some of its provisions said to be derived from the ECHR and again the ESC. A consideration of the human rights nature of the Employment Rights is beyond the

11. Olivier De Schutter, 'The CFREU and its Specific Role to Protect Fundamental Social Rights' in Filip Dorssemont and others (eds.), *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart 2019) 9, 22.

12. Olivier De Schutter, 'The European Social Charter as the Social Constitution of Europe' in Niklas Brunn and others (eds.), *The European Social Charter and the Employment Relation* (Hart 2017) 11.

13. Report by a Group of Experts, *Social Aspects of European Economic Co-Operation* 74 (1956) International Labour Review 99.

14. Conclusions of the Cologne European Council, 3–4 June 1999, Annex IV.

scope of this article. It can be noted, however, that none of those rights make any pretence at being human rights at all. Rather, the rights are more restrictively those of ‘workers’, ‘their representatives’ and ‘every worker’. In addition, the Charter refers to ‘fundamental’ rights as opposed to ‘human’ rights. In fact, the Charter uses the term ‘human rights’ only once in Article 53 to refer to other more explicitly human rights documents such as the ECHR. In addition, the social or labour rights classification of the Charter’s Solidarity Title raises difficult issues as to the human rights nature of such provisions.¹⁵

However, it should be noted that all of the Charter’s provisions (including the Employment Rights) are said, in Article 1, to be underpinned by the notion of human dignity. According to the Explanations, ‘none of the rights laid down in this Charter may be used to harm the dignity of another person, and that the dignity of the human person is part of the substance of the rights laid down in this Charter’. The relevance of the connection between the Charter and the concept of human dignity is addressed below in the consideration of how the Charter’s provisions might be replicated post-Brexit.

As should now be clear, the term preferred here to describe the Charter provisions mentioned above is ‘Employment Rights’. This term is used to designate those rights that have a particularly close connection to the employment relationship. There are two benefits to the adoption of this term. First, it allows us to overcome some of the definitional issues associated with social and human rights concepts. Second, it allows us to distinguish between those rights and the other non-employment rights found in the Solidarity Title and indeed those social or labour rights found elsewhere in the Charter that may be relevant beyond the employment context. As set out in the introduction, the main interest in this article lies in the status of the Employment Rights as constitutional rights.

ii. *The Charter’s constitutional status.* There is no single understanding of what is meant by the term ‘constitutionalisation’. The first definition of the concept considered here is ‘the attempt to subject all governmental action within a designated field to the structures, processes, principles and values of a “constitution”’.¹⁶ The term ‘constitution’ is equally vague. Grimm attempts to define the modern constitution as: a set of legal norms; establishing and regulating the exercise of public power; founded on the agreement of the people; that forms a comprehensive framework; and is erected on the principle of the primacy of constitutional law.¹⁷ Loughlin, building on the characteristics set out by Grimm, describes a constitution as a formal contract drafted in the name of the ‘people’ to establish and control the powers of the institutions of government.¹⁸ The Charter is not explicitly stated to have been drafted in the name of the ‘people’, although the opening line of the preamble affirms that ‘[t]he peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values’. Article 51 of the Charter confirms that the Union and its Member States (when acting within the scope of EU law) are to ‘respect the rights, observe the principles and promote the application thereof in accordance with their

15. Virginia Mantouvalou, ‘Are Labour Rights Human Rights?’ (2012) 3 ELLJ 151, 164; Jay Youngdahl, ‘Solidarity First Labour Rights are not the same as Human Rights’ (2009) 18 New Labour Forum 30.

16. Martin Loughlin, ‘What is Constitutionalism?’ in Petra Dobner and Martin Loughlin (eds.), *The Twilight of Constitutionalism?* (OUP 2010) 47.

17. D Grimm, ‘Verfassung—Verfassungsvertrag—Vertrag über eine Verfassung’ in Olivier Beaud and others (eds.), *L’Europe en voie de Constitution* (Bruylant 2004) 279, 281–2.

18. Loughlin (n 16) 47.

respective powers'. Article 51 further clarifies that the Charter does not create any new rights or powers for the Union's institutions. These provisions encapsulate the 'instrumental' role for the Charter in controlling legislative action. The effects of this instrumental function are elucidated further below.

Another feature, at least of a written constitution, is that it represents the overthrow of existing traditional constitutions which were the products of 'accident and force' to be replaced with a new framework based on 'reflection and choice'.¹⁹ The Charter was expressly drafted in order to consolidate and codify in a single document the then diffuse sources of EU fundamental rights, thereby making them more visible and accessible to rights-holders.²⁰ As the Charter's Explanations make clear, those fundamental rights derive from a variety of other international and national rights sources and indeed from the nature of the Union itself in the form of the unwritten general principles of EU law. Therefore, the Charter does not represent a foundational moment in the constitutional history of the Union. As such, the 'symbolic' role usually attributed to constitutions does not necessarily apply to the Charter and it really would be a stretch to ascribe to it the 'sacred character' attributed to the US Constitution—the Bill of Rights it is not.²¹ Indeed, Lord Goldsmith, one of the British representatives on the body tasked with drafting the Charter emphatically declared that it was not an 'embryo constitution'.²²

Having said that, the Charter also has to be viewed in its broader context as having the same legal status as the EU Treaties, although even their designation as a 'constitution' is far from uncontroversial.²³ The Court of Justice of the European Union (CJEU) certainly views the Treaties as a 'basic constitutional charter', although that specific label was omitted from the Treaties following the negative referendums in France and the Netherlands on the proposed EU Constitution.²⁴ As Bell notes, however, instruments without the label 'constitution' may nonetheless receive the 'hierarchically superior' status often granted to constitutions.²⁵

Within employment law specifically, there have been various understandings of the term 'constitution' over time. Much of the existing literature does not expressly integrate the Charter into discussions surrounding the constitutionalisation of employment rights or addresses it only in passing. This is understandable given the relative lack of case law to date. It is therefore necessary to tie the Charter into existing understandings of constitutionalised employment rights.

At least five types of constitution in the employment context have been identified by Arthurs.²⁶ These types of constitution differ in their scope and coverage, and indeed in their proximity to the individual worker. The first type of constitution in the employment context is the enterprise constitution, which involves the constitutionalisation of employment relationships, but at the level of the individual company. The Charter, at Article 27, recognises the workers' right to information

19. Ibid [48].

20. Lord Goldsmith, 'A Charter of Rights, Freedoms and Principles' (2001) 38 CMLRev 1201.

21. Loughlin (n 16) 62.

22. Lord Goldsmith (n 20) 1216.

23. Joseph H. H. Weiler, 'Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision' 3 (1995) ELJ 219; Joseph H. H. Weiler, 'Editorial: Does the European Union Truly Need a Charter of Rights?' (2000) 6 ELJ 95.

24. Case C-26/62 *Van Gend en Loos* ECLI: EU: C:1963:1; Case C-294/83 *Parti Ecologiste, Les Verts* ECLI: EU: C:1986:166.

25. Mark Bell, 'Constitutionalization and EU Employment Law' in Hans W. Micklitz (ed.), *The Constitutionalization of European Private Law* (OUP 2014) 137.

26. Harry Arthurs, 'The Constitutionalization of Employment Relations: Multiple Models, Pernicious Problems' (2010) 19 *Social & Legal Studies* 403.

and consultation ‘within the undertaking’. According to the Explanations, this provision is linked to EU employment legislation such as Directive 98/59/EC on collective redundancies, Directive 77/87 EEC on the transfer of undertakings and Directive 94/45 EC on European Works Councils. Although Article 27 goes beyond the level of the individual workplace, deriving as it does from the Charter and legislation, it has a clear connection to the idea of constitutionalising workers’ rights *within* the enterprise.

The second type of constitution is the rights-based constitution, which again has a close connection to the individual worker. This litigation-driven form of constitution is well known in the employment context (and is the only one of the five categories that can easily be applied to the Charter as fleshed out below).²⁷ The third is the valorising constitution, by which it is meant that the constitution recognises, and gives value to, the importance of labour. For example, Article 15 of the Constitution of the German Weimar Republic called on workers to ‘participate in community with the employers and with equal rights, in the regulation of wages and employment as well as in the overall development of the productive forces’.²⁸ This type of constitution is clearly more abstract and distant from the terms and conditions of employment of the individual worker.

Fourth is the political constitution. This type of constitution is particularly in evidence in the UK and is made up of various written and unwritten constitutional rules, conventions, statutes and common law.²⁹ This constitution is not directly addressed to individual workers or even to the employment context, but may have an indirect impact, for example via the domestic integration of international rights instruments.³⁰

If the British Constitution does indeed fall into the category of political constitution, this has undoubtedly had a role to play in the hostility directed at the Charter in that country. A constitution through which constitutional values are largely reflected in unwritten, organic and non-justiciable tensions between institutional arrangements does not necessarily lend itself well to the integration of written, judge-centric constitutional texts.³¹ Much of the language of rights and remedies used to describe the Charter is largely alien to the British constitutional landscape. This can also partly explain the political scepticism directed at other recent attempts to formalise the UK’s constitutional arrangements, for example through the giving of further effect to ECHR rights via the Human Rights Act 1998 (HRA). The concept of the political constitution is not unknown in the employment law context. Wedderburn, for example, was an advocate of the political character of employment law. He argued that it was not possible to discuss employment law with impartiality or objectivity; it is simply another form of political engagement.³²

The fifth type of constitution is the economic constitution. The idea of an economic constitution in the employment context owes its origins to Sinzheimer and Kahn-Freund.³³ Although the two authors had differing conceptions of the economic constitution, particularly on the role of legislation in entrenching that constitution, the unifying theme is that the constitution should define the

27. Ibid [406].

28. Translation by Ruth Dukes in Ruth Dukes, ‘Constitutionalizing Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law’ (2008) 35 *Journal of Law and Society* 341, 349.

29. J. A. G. Griffith, ‘The Political Constitution’ (1979) 42 *MLR* 1.

30. Arthurs (n 26) 407.

31. Ibid 408; Loughlin (n 16) 63.

32. Alan Bogg, ‘The Hero’s Journey: Lord Wedderburn and the “Political Constitution” of Labour Law’ (2015) 44 *ILJ* 299, 300.

33. Dukes (n 28) 341.

fundamental values and structures of the employment relationship. Again, this goes beyond the individual employment relationship to include trade union rights and the regulatory power of the state.³⁴

At an EU level, the notion of an economic constitution has a wider meaning and has been described as ‘the assemblage of rules, some found in the Treaties and in general principles of law, others derived from case law and secondary legislation, which together determine the economic *raison d’être*, aims, policies and mechanisms of the European Union’.³⁵ This economic constitution could thus include aspects of EU law ranging from the single currency, freedom of movement and the creation of an internal market based on the principle of undistorted competition.³⁶ According to Deakin, we can describe these elements as forming part of a ‘constitution’ because ‘they operate in a more or less *functional* way to bring about what are taken to be core goals of the European project’.³⁷ It is well known that elements of this economic constitution have caused particular difficulties for employment law in recent years. We need only think of the deregulatory effects in the employment context of the Memoranda of Understanding (MoU) between the Troika (European Commission, International Monetary Fund and European Central Bank) and those countries in need of financial assistance following the economic crash of the late 2000s.³⁸ In addition, within the case law of the CJEU, employment rights are increasingly being viewed as inherent restrictions on the economic freedoms found in the Treaty or on the freedom to conduct a business found in Article 16 of the Charter.³⁹

It has been suggested that the Charter’s Solidarity Title can play a key role in redressing the imbalance between social and economic integration at EU level in the form of an emerging ‘social’ constitution for Europe. Two facets of this constitution are already in evidence. The first is the fact that the division of competence in the employment law field between the Member States and the EU is (indirectly) shifting in favour of the latter. The Union now has a clear role in reshaping national employment law in a deregulatory direction, again via the MoU and the internal market jurisprudence. In addition, the Treaty’s social policy title and the granting of legal effect to the Charter mean that social policy is now a key feature in the governance of the Eurozone.⁴⁰ Again, and as Deakin notes, it is not sufficient to point to the Solidarity Title’s inclusion in the Charter as evidence of constitutionalisation. More is needed to ensure that the Charter can play a genuine role in enhancing the idea of the ‘social’ as a counterbalance to economic and monetary considerations.⁴¹ For example, the Charter’s Solidarity Title can be used to end the pre-conception that employment rights are inherently subordinate to—or indeed act as restrictions on—economic

34. Ibid [343].

35. Simon Deakin, ‘In Search of the EU’s Social Constitution: Using the Charter to Recalibrate Social and Economic Rights’ in Filip Dorssemont and others (eds.), *The Charter of Fundamental Rights of the European Union and the Employment Relation* (Hart 2019) 53.

36. Ibid.

37. Ibid [58].

38. Simon Deakin, ‘Social Policy, Economic Governance and EMU: An Alternative to Austerity’ in Niklas Bruun and others (eds.), *The Economic and Financial Crisis and Collective Labour Law in Europe* (Hart 2014).

39. Case C-201/15 *AGET Iraklis* ECLI: EU: C:2016:972; Case C-426/11 *Alemo-Herron* ECLI: EU: C:2013:521.

40. Deakin, ‘In Search of the EU’s Social Constitution’ (n 35) 58.

41. Ibid [61].

rights (notably the Treaty freedoms). Admittedly, the case law on the application of the Charter to the MoU has been disappointing to date.⁴²

Despite the embryonic nature of the Union's social constitution, the Charter's role is already being challenged by the fledgling European Pillar of Social Rights (henceforth the Pillar). This is not a rights-instrument as such, but is rather a road map aimed at encouraging Member States to increase the level of social rights protection, including areas over which the Union has no competence, such as wages (fair remuneration is currently excluded from the Charter). The Pillar also makes clear that the Charter is one of its sources of inspiration, which may lead to a more expansive reading of the Pillar in those areas that are covered by both instruments, for example fair and just working conditions. The relationship between the Charter and the Pillar illustrates the benefit in having juridical status, with the legally effective Charter being granted constitutional status, while the Pillar is denied it. This is not to say that this will always be the case. In fact, the Pillar has a status similar to the Charter before it was granted full legal effect in 2009. A similar constitutional trajectory may await the Pillar.

The five categories of constitution identified by Arthurs can exist in tension with each other. For example, lofty aspirational commitments to the protection of workers (rights-based or valorising constitution) are not necessarily reflected in the underlying policy governing the regulation of the employment market (economic constitution).⁴³ In fact, it is possible to be sceptical of the benefits to individual workers of the constitutionalisation process in the employment context. Constitutionalisation is certainly not a panacea and as explained below, there are limitations to the effectiveness of the current Charter regime. However, this article seeks to highlight where the constitutionalised Employment Rights *are* useful and in any case to:

[t]hink about the constitutionalization of employment relations is productive in the sense that it requires engagement with the pernicious problems of articulating a “new normal”—a new normativity—that represents a better balance between workers’ interests and those of employers.⁴⁴

In other words, to constitutionalise an employment right may have a normative effect if not always a practical one. Thus, after Brexit, the Charter's Employment Rights may be robbed of their practical effect. Nevertheless, they may continue to have a normative effect, acting as underlying principles and values to guide the future direction of domestic employment law. In fact, this process is somewhat similar to what Dukes has described as the key meaning of constitutionalisation in the employment context.⁴⁵ It is a process of renegotiating the balance of power via a form of non-judicial constitutionalisation. It acknowledges various layers of state and non-state sources of normativity and the need to mediate between them.⁴⁶ This article takes that idea further, by examining the extent to which this mediation has taken on a juridical character in the form of a hierarchy of norms.

Another understanding of constitutionalisation views the concept as referring to the ‘processes by which an increasing range of public life is being subjected to the discipline of the norms of (. . .)

42. Menelaos Markakis and Paul Dermine, ‘Bailouts, the Legal Status of Memoranda of Understanding, and the Scope of Application of the EU Charter: *Florescu*’ (2018) 55 CMLRev 643.

43. Arthurs (n 26) 414.

44. *Ibid* [403].

45. *Ibid* [416].

46. *Ibid*.

legal constitutionalism'.⁴⁷ Legalism is the theory of constitutionalism which vests in the judiciary the role of determining the meaning of the constitution and the enforcement of its provisions (rather than leaving the contestation of constitutional norms in the political sphere).⁴⁸ Viewed in this way, constitutionalisation:

[b]oth proclaims basic rights as trump cards in the political game and maintains that the nature, scope, and status of these rights must be determined by a small cadre of judges. [It is] the process of extending the main tenets of liberal-legal constitutionalism to all forms of governmental action.⁴⁹

A key pre-requisite to this process, is the presence of legislation that can be reviewed for compatibility with the constitution.⁵⁰ The Charter and EU employment legislation do indeed have an intimate relationship. The Explanations to the Charter outline this close connection, with a number of the Charter's Employment Rights being described as deriving from pre-existing employment legislation. This relationship has, in fact, been described as circular, with the Charter being used to assess the validity of employment legislation, which itself is said to have provided the inspiration for the Charter provision in the first place.⁵¹

Of course, EU legislative intervention in the employment relationship cannot itself be described as constitutionalisation. It is necessary to distinguish between 'ordinary' employment legislation and legislation that has been constitutionalised or at least has constitutional significance.⁵² Again, the constitutional significance of EU employment legislation is made clear by the Charter's Explanations. A number of pieces of legislation are described as sources of the rights found in the Charter's Solidarity Title. With other rights, notably in the equality context, the CJEU has gone further in finding that certain legislative provisions are no more than 'mere expressions' of an underlying and pre-existing general principle.⁵³ This (controversial) approach has been reinforced since the Charter was granted legal effect, given that this document codifies the already-existing general principles. As we shall see in our discussion of the preservation of the general principles in the Withdrawal Act, the effects of this added constitutional validity being granted to EU legislation may have significant consequences for the continued protection of employment rights post-Brexit.

Finally, a more straightforward—indeed the most ubiquitous—understanding of constitutionalisation is that it describes a process by which certain legal norms are entrenched and attributed with higher legal status.⁵⁴ It is this understanding of constitutionalisation that is most relevant for the present discussion. This description clearly applies to the Charter, which has the same legal value as the EU Treaties according to Article 6 of the Treaty on European Union (TEU).

It has not always been possible to perceive a clear hierarchy of norms within EU law and indeed the usefulness of this concept has been called into question (at least when it comes to distinguishing

47. Loughlin (n 16) 61.

48. *Ibid* [58].

49. *Ibid* [61].

50. *Ibid*.

51. Niall O'Connor, 'Interpreting Employment Legislation through a Fundamental Rights Lens: What's the Purpose?' (2017) 8 *ELLJ* 193.

52. Bell (n 25) 139.

53. Case C-144/04 *Mangold* ECLI: EU: C:2005:709; Case C-555/07 *Kücükdeveci* ECLI: EU: C:2010:21.

54. Bell (n 25); Arthurs (n 26).

between the various types of EU legislation).⁵⁵ Although the Treaty does not use the term ‘hierarchy’, it is clear from the phrase ‘same legal value’ that different sources of EU law have differing weight.

Ziller explains the concept of a hierarchy of norms in the following terms. The hierarchy exists due to the relationship between two legal sources, with the legitimacy of one norm being conditioned by its conformity with another more important (i.e. superior) norm.⁵⁶ One reason why a norm might be considered more important than another is that it may be located in a legal instrument, which is formally superior (formal hierarchy).⁵⁷ Another ‘material’ approach to the hierarchy would suggest that norms might have a superior status due to the importance of the value they encapsulate, for example human dignity (material hierarchy).

Quite clearly, there was a hierarchy within EU law prior to the granting of legal effect to the Charter in the Lisbon Treaty. The Union’s primary law (the Treaty) prevailed over secondary law even if this relationship was not couched in the language of hierarchy. With the enactment of the Charter, there was an introduction of more explicitly rights-based or constitutional language into the hierarchy. The Charter, which we have just determined is a constitutional fundamental rights document, sits at the pinnacle of the EU-domestic hierarchy of norms. General EU law comes next as it must comply with the Charter, but can also be used as a standard against which national law falling within the scope of EU law must comply. This is followed by domestic law, which as we shall see, also includes norms deriving from the individual contract of employment.

The effects of granting constitutional status to the Charter on the hierarchy of norms can be seen by looking at its constitutional functions. It has already been mentioned that the Charter has an instrumental purpose, with that purpose being to control the exercise of legislative and executive power. This purpose can further be broken down into two constitutional functions. The first is the Charter’s role as a tool of interpretation (the interpretative function). The second is the Charter’s role as a standard for the review of both EU law and domestic law falling within the scope of EU law (the derogation function).

iii. The Charter’s constitutional functions. The role of the Charter as a tool of interpretation is confined solely to EU law, as the CJEU does not have the competence to interpret national law. The CJEU uses the Charter to bolster its purposive approach to the interpretation of employment legislation.⁵⁸ For example in *ANGED*, the CJEU referred to Article 31(2) of the Charter on fair and just working conditions to reinforce its conclusion that paid annual leave ‘must be regarded as a particularly important principle of European Union social law from which there can be no derogations’.⁵⁹ The importance of Article 33(2) on the protection from dismissal on grounds of maternity and the right to maternity and parental leave has similarly been recognised, with the CJEU emphasising that this provision is a fundamental right of EU social law.⁶⁰ That provision has also been found to be intimately tied to the equality principle, which may account for the CJEU’s frequent overlooking

55. Jacques Ziller, ‘Hierarchy of Norms Hierarchy of Sources and General Principles in European Law’ <papers.ssrn.com/sol3/papers.cfm?abstract_id=2467982 > 334, accessed 15 July 2019.

56. *Ibid* [336].

57. *Ibid*.

58. O’Connor (n 51).

59. Case C-78/11 *ANGED* ECLI: EU: C:2012:372 para. 16.

60. AG opinion in Case C-12/17 *Dicu* ECLI: EU: C:2018:195; Case C-174/16 *H* ECLI: EU: C:2017:637.

of the rather narrowly drafted Article 33(2) in favour of the Charter's equality rights.⁶¹ Indeed, it has been suggested that the content of Article 33(2) is actually more restrictive than its sources of inspiration in the ESC and EU legislation on pregnant workers.⁶²

More significant for our discussion on the hierarchy of norms is the derogation function. This function refers to the Charter's use as a standard against which to assess the validity of EU law and national law falling within the scope of EU law. There are no examples of the Employment Rights being used to assess the compatibility of EU legislation with the Charter, but illustrative of this possibility is the case of *Test-Achats*.⁶³ In that case, the CJEU found that an unlimited derogation to the equal provision of services Directive 2004/113/EC permitting lower insurance premiums for women was not compatible with the equality provisions of the Charter. Because there is no case law on the matter, the potential for the Employment Rights to act as a standard of review of EU legislation must be largely speculative.

Thus, it has been suggested, for example, that the Working Time Directive (WTD), with its numerous opt-outs and derogations may be particularly apt for review in light of the Charter given its close connection to article 31(2). According to O'Leary, such opt-outs may be 'viewed in a different, and perhaps stricter light if the right from which they derogate has been included in the Charter as a fundamental right to which the EU adheres'.⁶⁴ It may well be the case that the granting of legal status to the Charter will have the effect of limiting the ability of the Union to adopt legislation restricting or further derogating from a right contained therein.⁶⁵

Due to the link between EU employment legislation and the Charter, the Employment Rights also have the potential to act as a standard against which to review national implementing legislation. Article 31 is the right that has been most frequently invoked in the review of national legislation. The CJEU's use of Article 31 is illustrated by the opinion of Advocate General (AG) Tanchev in *King*.⁶⁶ In that case, a Mr King had been employed under a 'self-employed commission only contract', which was silent on the issue of paid annual leave. He was subsequently offered a standard employment contract that did deal with annual leave but turned this down, preferring to remain self-employed. He was dismissed on his 65th birthday and sought to claim allowance in lieu for the leave that he had not taken over the course of his employment.

The question for the AG was whether a worker such as Mr King, who had been afforded a right to paid leave only part way through the employment relationship, lost that right if he did not take steps to enforce or invoke it. The UK Working Time Regulations 1998 (WTR) at regulation 13 stipulate that employees must take their paid annual leave in the relevant year or the right is extinguished. Fundamental rights concepts played a prominent role in this case, with the AG holding that:

[i]n the light of the considerable normative weight of the right to paid annual leave under EU, international and Member State law, requiring a worker rather than an employer, to take steps to create

61. Case C-149/10 *Chatzi* ECLI: EU: C:2010:534.

62. Csilla Kollonay Lehoczky and Barbara Kresal, 'Article 33' in Filip Dorssemont and others (eds.), *The EU Charter and the Employment Relation* (Hart 2019) 583, 596.

63. Case C-236/09 *Test-Achats* ECLI: EU: C:2011:100.

64. O'Leary (n 5) 324.

65. Alan Bogg, 'Article 31' in Steve Peers and others (eds.), *The EU Charter of Fundamental Rights: A Commentary* (1st edn, Hart 2014) 867.

66. AG opinion in Case C-214/16 *King* ECLI: EU: C:2017:439.

an adequate facility for the exercise of paid annual leave would unlawfully make the existence of the right subject to a pre-condition.⁶⁷

The AG continued by noting that:

[t]he dominance in the case-law of disagreements concerning the conditions for the exercise of paid annual leave, rather than its existence, might well be reflective of the status of the right (. . .) embedded as it is in the corpus of fundamental rules of labour law to which adherence is generally rigorous.⁶⁸

The AG then conveyed more precisely the impact and significance of Article 31 of the Charter, holding that this provision ‘is a specific manifestation of respect for human dignity’, which is further evidenced by the Explanations which point to the fundamental rights credentials of paid annual leave.⁶⁹ Although the precise mechanisms for ensuring respect for this right was left to the Member State court, the effect of Article 31 was to ‘remove any doubt whether it is the employer or the worker who should bear the risk of non-compliance with the right’.⁷⁰

In contrast to Article 31, the other Employment Rights have been relatively weak as standards of review. With Article 33(2), the CJEU has emphasised that fundamental rights concepts found in the Charter cannot extend the field of application of EU law.⁷¹ The CJEU continues to overlook Article 33(2) in cases where it may have been relevant, including cases in which the AG had referred to it.⁷² Regarding Article 30, the CJEU usually finds that the issue at hand is outside the scope of EU law and therefore the Charter is of no application or that legislation relating to Article 30 is not really at issue.⁷³ Article 27 has served litigants little better.⁷⁴ Article 28 has perhaps had the weakest role to play either as a tool of interpretation or as a standard of review. It is well known that the CJEU has declared the fundamental rights status of the right to strike as a general principle of EU law. In *Laval*, the CJEU held that:

[a]lthough the right to take collective action must therefore be recognised as a fundamental right which forms an integral part of the general principles of [Union] law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions.⁷⁵

Since then, the use of Article 28 has been confined to considering whether rules set down in collective agreements could be reviewed for compatibility with EU law.⁷⁶ The use of the Charter by the domestic courts in the UK has been equally disappointing. Potential explanations for the domestic judiciary’s lack of reliance on the Charter include its relatively recent introduction into

67. *Ibid* para. 4.

68. *Ibid* para. 29.

69. *Ibid* paras. 35 and 36.

70. *Ibid* para. 44.

71. Case C-366/18 *Ortiz Mesonero* ECLI: EU: C:2019:757.

72. AG opinion in Case C-12/17 *Dicu*.

73. Case C-395/15 *Daouidi* ECLI: EU: C:2016:917; Case C-323/08 *Mayor* ECLI: EU: C:2009:770.

74. AG opinion in Case C-176/12 *AMS* para. 2.

75. Case C-341/05 *Laval* ECLI: EU: C:2007:809 para. 91.

76. Case C-297/10 *Hennigs* ECLI: EU: C:2011:560 para. 66.

domestic law, greater familiarity with the ECHR and questions over the legal status of the Charter's provisions.⁷⁷

The above provides an overview of the Charter's constitutional functions and the role that the Employment Rights have played to date. Despite its nominal hierarchical superiority, it is clearly not possible to view the Charter (or even the Solidarity Title/Employment Rights) as a monolith. Differing weight has been attributed by the CJEU to various Charter rights. Indeed, for much of its history, the Charter has been (rightly) lambasted for its limited capacity in the employment context. There are several barriers standing in the way of the ability of litigants to rely on the Charter, some of which were alluded to in the introduction of this article. These constitutional limits include the distinction drawn between rights and principles, and the attempt by the UK to opt out of the Solidarity Title altogether.

iv. The Charter's constitutional limits. The first constitutional brake on the Charter's application is the distinction between rights and principles. This distinction, which is contained in Article 52(5), was intended to ensure that the rights found in the Charter's Solidarity Title would not become directly effective fundamental rights. Article 52(5) therefore provides that principles only lead to rights to the extent that they are implemented in national law, or EU law in those areas where the EU has competence. Article 51(1) further emphasises the distinction, providing that rights must be 'respected', whereas principles must merely be 'observed'. The EU institutions should not violate the principles, but they have no mandate to implement them as rights outside their own competence.⁷⁸ Principles only become significant when the CJEU is called on to interpret or review acts adopted by the EU or by the Member States when implementing EU law.⁷⁹ In other words, principles can only function if they are implemented or concretised in legislation.

This position was reinforced by a textual reading of the Charter's provisions, many of which are said to be subject to 'EU law, national laws and practice'. In *AMS*, AG Cruz Villalón also noted that the designation of a right as 'social' usually indicates that no subjective (directly enforceable) right is to be derived from it. For the AG, social rights might therefore be described as rights by their nature and content, but principles in terms of their operation.⁸⁰ This 'systemic' argument was also used to deny the status of rights to those provisions found in the Charter's Solidarity Title, including at least some of the Employment Rights.

We know from *AMS*, that Article 27 is too vague to be relied on by litigants in and of itself and is therefore a principle. Article 30 is guaranteed only in accordance with Union law, national law and practices, which suggests that it, too, is a principle. Article 28, is somewhat unusual in that it is firmly couched in the language of rights and, as mentioned, the general principle has been recognised as such by the CJEU.⁸¹ However, in the UK, there is no positive right to strike and Article 28 is subject to Union law, national laws and practices.

Article 31 has been expressly found by the CJEU to constitute a right. In *Bauer*, the CJEU held that Article 31(2) constituted a 'right' to paid annual leave rather than a principle. It followed that 'the provision is sufficient in itself to confer on workers a right that they may actually rely on in

77. Catherine Barnard, 'So Long, Farewell, Auf Wiedersehen, Adieu: Brexit and the Charter of Fundamental Rights' (2019) 82 MLR 319, 360.

78. Goldsmith (n 20) 1213.

79. Koen Lenaerts, 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012) 8 EuConst 375, 399.

80. AG opinion in Case C-176/12 *AMS* para. 45.

81. Case C-438/05 *Viking* ECLI: EU: C:2007:772.

disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter'.⁸² In other words, Article 31(2) was also capable of horizontal direct effect, i.e. it could be invoked by parties to a private dispute. Article 33(2) is the only other Employment Right not subject to Union law, national laws and practices. The case law and the Explanations suggest that it, too, is a right, rather than a principle.⁸³ It, too, may potentially be capable of horizontal direct effect, given the similarities with Article 31(2).

Taken as a whole, it can be said that the real distinction lies not between rights and principles as such, but between those Charter provisions that are capable of direct effect and those that are not. This also means that the categories of rights and principles might actually overlap, with directly effective principles actually being rights. This also reflects a Dworkinian understanding of the rights and principles relationship, with principles giving rise to rights.⁸⁴ This idea of inter-relationship between the rights and principles can be taken further and it has been suggested that the real problem lies in the 'fundamental asymmetry between constitutional adjudication and (constitutional) legislation in the European order'.⁸⁵ In other words, the contest is not between civil and political rights and social rights (or principles), but rather between the granting of constitutional status to social rights coupled with the relative lack of EU competence to legislate in the employment sphere, thereby leaving at least some of the Employment Rights without concrete operation.

At the time of the Charter's drafting, the British delegation was not content that the rights and principles distinction would be enough to prevent the creep of the Solidarity Title, with the UK seeking an 'opt-out' from the Charter.⁸⁶ However, this attempted opt-out can be described as the 'triumph of rhetoric over reality' given that the Charter most certainly applies to the UK as an EU Member State when it acts within the scope of EU law (for example, when it implements EU legislation). Certainly, in the case of Article 31, the relevant rights have been provided for in national law via implementing legislation (the WTD). In addition, because Article 31 does not refer to national law or practice, it is unlikely that the interpretative value of Article 31 is diminished.⁸⁷ The only true opt-out from the Charter, Barnard suggests, is to be found in Article 1(2) of Protocol 30, which provides that:

[i]n particular, and for the avoidance of doubt, nothing in Title IV (...) creates justiciable rights applicable to (...) the United Kingdom except in so far as (...) the United Kingdom has provided for such rights in its national law.

This provision serves the role of making sure that if any of the provisions of the Solidarity Title are in fact classed as rights (such as Article 31 and potentially Articles 28 and 33(2)) they are not directly justiciable in respect of the UK.⁸⁸ In other words, they cannot be directly invoked by litigants in domestic courts.

82. Cases C-569/16 and C-570/16 *Bauer* ECLI: EU: C:2018:871 para. 54.

83. Case C-366/18 *Ortiz Mesonero*.

84. Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977).

85. Florian Rödl, 'Re-thinking Employment Relations in Constitutional Terms' (2010) 19 *Social & Legal Studies* 241, 246.

86. Protocol No. 30 [2007] OJ C 306/157. See also Cases C-411/10 and C-493/10 *NS* ECLI: EU: C:2011:865.

87. Bogg (n 65) 850.

88. Barnard, 'The Opt-Out for the UK and Poland' (n 8) 268.

The Protocol therefore had potential implications for the place of at least some of the Employment Rights within the domestic hierarchy of norms by excluding the ability of employees to rely on them directly. In reality, the effects of this limited opt-out were more muted. For most purposes, it was the employment rights in underlying legislation that were at issue rather than the Charter itself. Indeed, we know that at least in the case of the Employment Rights, they are largely restatements of existing legislative rights.⁸⁹ In addition, litigants could seek to rely on underlying general principles which continued to apply in parallel to the Charter.⁹⁰ The protection of fundamental rights is one such general principle. In addition, the Protocol was largely targeted at the two provisions that had provoked the most concern from the UK delegation, namely, Articles 28 and 30.⁹¹ Given the prevalence of Article 31 in the CJEU's jurisprudence, it is clear that the Protocol was poorly targeted. Finally, there was nothing preventing the CJEU from relying on the Charter (or indeed any rights instrument) as a guide to interpretation, in the same way it had done prior to the entry into force of the Lisbon Treaty.⁹² As Dougan succinctly put it, 'the Protocol emerges as a fantasy solution to a fantasy problem: the Charter is not actually a serious threat to UK labour law (...) it is not really an opt-out from anything'.⁹³

In addition to these legal limitations, the Charter itself is a rather unambitious document when it comes to the protection of employment rights. First, the Charter contains a bald list of such rights, in contrast to other international rights instruments. Notably absent is the right to fair remuneration, which can be found, for example, in Article 4 of the ESC or at an EU level in Principle 6 of the Pillar. Beyond its content, the Charter can also be characterised by its limited functions. We have looked at two such functions attributed to the Charter, namely, its derogation and interpretation functions. As Jääskinen points out, however, social rights (including the Employment Rights) can have several additional functions. Social rights may create subjective individual rights. They can confer legislatures with a mandate to achieve social objectives. Social rights can also have a programmatic effect in the sense that there is a 'best endeavours' obligation to realise rights as far as possible. Finally, social rights might have a competence effect, granting the legislature competence in the social sphere that it might not otherwise have.⁹⁴

Despite disputes surrounding the value and status of the Charter, it is now clear that its Employment Rights are mostly legislative rights as they derive from pre-existing employment legislation. They are also almost certainly constitutional rights given that they are found in a document, which meets at least some of the criteria usually attributed to a constitution. We have now determined that the Charter's Employment Rights have clear constitutional functions, leading to an EU-UK hierarchy of sources, which can result in the disapplication of national law that conflicts with the Charter. We can now turn to assess the impact of the Charter on the domestic employment law hierarchy of norms.

89. Michael Dougan, 'The Treaty of Lisbon 2007: Winning Minds, not Hearts' 45 (2008) CMLR 617, 667.

90. Catherine Barnard, *EU Employment Law* (OUP 2012) 33.

91. Barnard, 'The Opt-Out for the UK and Poland' (n 8) 262.

92. *Ibid* [267].

93. Dougan (n 89) 670.

94. Niilo Jääskinen, 'Fundamental Social Rights in the Charter—Are They Rights? Are the Fundamental?' in Steve Peers and others (eds.), *The EU Charter of Fundamental Rights* (1st edn, Hart 2014) 1703.

B. The Domestic Hierarchy of Norms

It can be seen from the discussion on constitutionalisation that the Charter has already had an impact on the EU-domestic hierarchy of norms. The granting of constitutional status to the Charter allows for its use as a tool of interpretation and a standard of review of EU and national implementing legislation, therefore allowing that legislation to be displaced. The question to be addressed now is whether the constitutionalisation of the Charter has had any impact on the hierarchy between *domestic* sources of employment norms. This domestic level can be further subdivided into an external and internal hierarchy. The term ‘internal’ refers to the terms of the individual employment contract, while the term ‘external’ is intended to invoke the hierarchy of sources that exists outside the contract of employment.

i. The external hierarchy. The sources of employment norms that are external to the employment contract include the Charter itself, legislation, collective agreements and the common law. The relationship between the Charter and employment legislation has already been outlined. We have seen that many of the Charter’s Employment Rights derive from pre-existing EU employment legislation.

Where the effects of fundamental rights arguments are most open to being felt is in the relationship between the common law and employment legislation. There is no doubt that in many instances, domestic employment legislation (whether derived from EU law or not) and the common law enjoy an intimate relationship. We need only think of the fact that access to the protection contained in numerous legislative instruments is dependent on classification as an ‘employee’ or a ‘worker’, the tests for which derive largely from the common law.⁹⁵ In the famous words of Kahn-Freund, despite legislative intervention, the common law employment contract remains ‘the cornerstone of the edifice of labour law’.⁹⁶ Some authors have gone so far as to say that employment law lacks autonomy from the common law in that ‘[e]mployment rights may be radically affected by common law precedents argued in an entirely different legal context’, which has the effect of linking ‘the current system inextricably with the past’.⁹⁷

Indeed, the UK courts have traditionally viewed the common law contract of employment as having primacy, with any legislative intervention being seen as ‘essentially parasitic’ on the contract.⁹⁸ As Davies notes, however, this relationship has now largely been inverted, with the courts recognising that it is legislation that forms the primary focus of employment regulation, with the contract ‘playing a supplementary role where the two interact’.⁹⁹ Nevertheless, there are still numerous examples of common law contractual principles being used to interpret employment legislation with the effect of impeding the protective aim of that legislation.¹⁰⁰ This has largely been a domestic matter, with little consideration given to the constitutional Charter underpinnings of employee-protective legislation.

95. See *Yewens v Noakes* (1880) 6 QBD 5430; *Stevenson, Jordan & Harrison v MacDonald & Evans* [1952] 1 TLR 101.

96. Otto Kahn-Freund in A Flanders and H Clegg (eds.), *The System of Industrial Relations in Great Britain* (1954) 44.

97. Deakin and Morris (n 4) 57 and 59.

98. Hugh Collins, ‘Contractual Autonomy’ in Alan Bogg and others (eds.), *The Autonomy of Labour Law* (Hart 2015) 60.

99. Anne Davies, ‘The Relationship between the Contract of Employment and Statute’ in Mark Freedland and others (eds.), *The Contract of Employment* (OUP 2016) 73.

100. See for e.g. definition of constructive dismissal under s 95(1)(c) ERA 1996.

It would be possible post-Brexit to continue to exclude the common law's application via legislation. Clear examples of this approach can already be found in the non-derogable provisions of the Employment Rights Act 1996 (ERA), as well as the definition of direct and indirect discrimination under the Equality Act 2010. In certain circumstances, the common law has also been malleable to legislative intervention, leading to an absorption of social rights standards. This is largely due to the recognition that the employment contract is not an ordinary contract and so cannot be subjected to the full force of commercial contractual principles.¹⁰¹

What this means, then, is that when we talk about the operation of common law contractual rules to legislation, we really mean the common law of the *employment* contract i.e. contract law as modified to take account of the requirements of the employment context. Given that the common law has been receptive to social standards, taking its lead from legislation, the question arises whether there is any added value, from the perspective of the domestic courts, of that legislation having a fundamental rights underpinning in the Charter.

There is very little evidence that the UK courts have been relying on the Charter when it comes to interpreting EU-derived domestic legislation.¹⁰² However, it is suggested here that the area that is most open to being influenced by the Charter is the issue of the personal scope of EU employment legislation/domestic implementing legislation. As we shall see below, this will remain a live issue post-Brexit given that existing EU employment legislation has been expressly domesticated.

Before a litigant can rely on a legislative right, including a right that is grounded in the Charter, they must first bring themselves within the personal scope of that legislation. Much of EU employment legislation leaves it to the Member States to determine the legislation's precise personal scope. In UK law, the definition of the employee set out in s 230 ERA is rather open-ended and it has been left to the courts to develop various common law tests to flesh out the meaning of the concept. Some of these common law tests, such as the requirement for 'personal service' or 'mutuality of obligation' have been used to deny employee status to claimants.¹⁰³ In recognition of the difficulties that this strictness was posing for the protection of employment standards, the UK legislature—largely but not exclusively in its implementation of EU law—began to extend the scope of employee-protective legislation to a new category of 'workers'.¹⁰⁴

The EU legislature was already long cognisant of the fact that employee-protective legislation may require a broader personal scope than merely 'employees'. For this reason, EU employment legislation is also usually stated to apply to the wider category of 'workers'. The concept of the worker here should not be confused with that found at national level. In EU law, the worker concept must be given an autonomous Union definition, although this will influence the domestic definition to the extent that it is used to govern the personal scope of implementing legislation.

At an EU level, Bell has analysed the CJEU's treatment of the personal scope of employment legislation. He found that although there is no 'right' to be treated as a worker or an employee, the CJEU does modify its approach depending on the nature of the underlying legislative rights in question. Long before the enactment of the Charter, the CJEU in interpreting notions such as 'worker' has shown an awareness of the constitutional significance of concepts such as the free

101. *Autoclenz Limited v Belcher* [2011] UKSC 41.

102. Barnard, 'So Long, Farewell' (n 77).

103. *Express and Echo Publications v Ernest Tanton* [1999] EWCA Civ 949.

104. See s 230 ERA 1996 and s 2 WTR 1998.

movement of workers.¹⁰⁵ When it came to determining the personal scope of rights-based legislation, the CJEU already had a constitutionalised starting point in the form of the definition of a worker for the purposes of free movement law.¹⁰⁶

In domestic employment law, by contrast, it has been remarked that ‘parties may exercise their freedom of contract to draw up their relationship on some contractual basis other than that of a contract of employment’, thereby avoiding supposedly mandatory employment legislation. In other words, the parties can enjoy freedom *from* the employment contract.¹⁰⁷ Put differently, the parties (although in practice, only the employer) exercising their freedom of contract could draft the agreement in such a way to avoid the obligations contained in worker-protective legislation. Even without considering any implication of the constitutionalised Employment Rights, this proposition is not entirely true. In cases such as *Autoclenz*, the courts have been rather forceful in disallowing the negation of employee/worker status through the use of substitution or ‘no obligation’ clauses.¹⁰⁸ The question is whether Charter rights-based legislation has the effect of broadening the personal scope of that legislation *even* in the face of competing domestic definitions of personal scope.

It has been noted that the ability of the parties to contract out of employment status has already been negated by the broadening of the personal scope of domestic legislation to workers rather than merely employees. This has been true of the UK’s implementation of EU employment legislation, including legislation that has an Employment Rights basis in the Charter, for example the WTR, which apply to ‘workers’.

As with the definition of the ‘employee’, or the ‘employment contract’, the domestic legislative definition of the worker is left open-ended and is dependent on further common law elucidation. This gives the domestic courts many opportunities to undermine worker protection and thereby access to Charter Employment Rights. However, we also have the EU definition of the worker with which to contend. The CJEU has already said that the worker concept must be defined broadly given the importance of access to certain fundamental employment rights such as paid annual leave. Here, there was very little leeway granted to the national courts to derogate from the protection set out in the legislation by narrowing its personal scope. However, this protection has been somewhat undermined by the increased elision of the worker and employee concepts in the UK courts.

In *Tomlinson*, Mr Justice Bristow remarked that ‘it is the employee’s situation as a party to a contract of employment which is the subject of protection by the legislation which it did not enjoy under the common law. Unless he was a party to a contract of employment, the statute cannot and does not give him a right’.¹⁰⁹ The same is true of a worker. If an applicant cannot bring himself within the definition of that term, he will have no right to statutory protection, regardless of whether that statute was implementing a Charter Employment Right.

Another thing to note is that the common law courts, unlike their EU counterpart, have taken a decidedly non-purposive, indeed outright formalistic approach to the interpretation of protective statutes. For Cabrelli, this preference for literal interpretation ‘functions to legitimize the

105. Bell (n 25) 160.

106. Case C-256/01 *Allonby* ECLI: EU: C:2004:18.

107. David Cabrelli, *Employment Law in Context* (1st edn, OUP 2014) 65.

108. *Autoclenz Limited v Belcher* [2011] UKSC 41 [2011] IRLR 70.

109. *Tomlinson v Dick Evans ‘U’ Drive Ltd* [1978] ICR 639, 642–643.

enterprise's inherent capacity to frustrate the operation of employment laws'.¹¹⁰ This literal approach, emphasising autonomy and the written contract, can have serious consequences for the effectiveness of employment legislation. In addition, the criteria used to determine worker status are very similar to those found in the definition of the employee. First, there must be personal service and second, both concepts involve a level of economic dependency as well as mutuality of obligation. Despite these similarities, the courts have at times been cognisant of the need to adapt common law tests in the worker context. The mutuality of obligations test was, for example, found in the *James v Redcats* to relate to the first level of mutuality—i.e. the wage-work bargain (similar to consideration in ordinary contract law)—rather than with the continuing nature of the relationship (as required for employee status).¹¹¹ Therefore, certain tests are already easier to meet for workers than they are for employees. To date, however, no specific consideration has been given to the fact that some legislation, which applies to workers, is also protecting a fundamental Charter Employment Right when deciding whether a litigant is a worker, an employee or neither.

An interesting illustration of this point can be seen in a number of recent cases on worker status.¹¹² In most, the applicants were seeking to benefit from statutory protections, including the national minimum wage, whistle-blower protection (no EU underpinning), limited working hours and non-discrimination (an EU Charter rights underpinning). In the well-known *Uber* case, for example, the tribunal was asked to consider whether Uber taxi drivers were workers or self-employed. Having found that they were indeed workers, the tribunal helpfully dealt with the claim for limited working time and the minimum wage under separate headings.¹¹³ It is useful to see if any difference of treatment was evident when it came to defining the working time of the drivers and their wage rates given that outside the scope of EU law, the domestic courts are free to arrive at a national law definition of the worker concept.

Starting with working time, the tribunal set out the definition found in regulation 2(1) WTR which provides that working time is 'any period during which he is working, at his employer's disposal and carrying out his activities or duties'. The tribunal adopted a decidedly non-purposive approach to the interpretation of this concept, with the focus remaining largely on the technicalities of the contractual relationship between Uber and the drivers. The drivers were only to be considered as working while within their territory, with the Uber app switched on, and when they were available and willing to work. There was no reference to the purpose of the underlying regulations nor to the fact that they derive from EU law, which is underpinned by a Charter Employment Right.¹¹⁴ Adopting the same close factual (contractual) analysis, the tribunal concluded that the drivers undertook 'unmeasured work' for the purposes of national minimum wage legislation.¹¹⁵

Having said that, the domestic courts are beginning to show a greater willingness to engage with legislative (fundamental) rights fundamental rights concepts. In *Bates van Winkelhof*, a whistle-blowing case, the Supreme Court was faced with the question of whether a partner in a law firm could be a 'worker'. The Court found, through an analysis of existing case law that a pattern was emerging whereby the protection of employment law was extended to those who were nominally

110. Cabrelli (n 107) 71.

111. *James v Redcats Ltd* [2007] ICR 1006.

112. *Secretary of State for Justice v Windle & Arada* [2016] EWCA Civ 459; *Pimlico Plumbers Ltd v Smith* [2017] EWCA Civ 51; *Aslam & Farrar v Uber* (2202550/2015) and *Dewhurst v Citysprint UK Ltd* (2202512/2016).

113. *Aslam & Farrar v Uber* (2202550/2015).

114. *Ibid* [122].

115. *Ibid* [127].

self-employed but in a position of dependence. The worker concept should not, therefore, be defined restrictively.¹¹⁶ Thus, the courts emphasise the importance of the underlying rights to extend the personal scope of the legislation. This is also reflective of the approach Bogg suggests should have been taken by the Court of Appeal in the just discussed *Uber* case. He notes that the issue in this case was the extent to which the terms of the individual agreement can oust statutory protections by circumscribing the boundaries of employment status, or perhaps to put it another way, their relative position in the hierarchy of norms.¹¹⁷

Bogg argues that the ‘worker’ concept is a creature of statute, not the common law, therefore it is incorrect to overly focus on the terms of the ‘contract’ when determining employment status. Instead of this ‘contractual’ approach, the courts should adopt a purposive ‘statutory’ approach, recognising that the purpose of the worker concept was to extend the coverage of fundamental social rights such as the minimum wage and limited working time.¹¹⁸ These cases are examples of how the courts might read across employment rights concepts in order to widen the personal scope of domestic legislation, here to include the non-autonomous self-employed within the definition of the worker. This could be described as a form of common law constitutionalisation of the worker concept, derived from an ordinary domestic statute albeit underpinned by fundamental rights principles found elsewhere, including the Charter.

A clear illustration of this approach can already be seen in *Unison*, which has been described as demonstrating the courts’ constitutional commitment to ensuring that workers are able to enforce their employment rights in the courts, a right which is classed as a public good rather than a private service.¹¹⁹ This case concerned the validity of the UK Government’s introduction of fees for access to Employment Tribunals in 2013. These fees had led to a significant reduction in the number of claims being brought to tribunals. In quashing the fees, the United Kingdom Supreme Court (UKSC) relied heavily on the common law right of access to justice, noting that ‘the right of access to justice is not an idea recently imported from the continent of Europe, but has long been deeply embedded in our constitutional law. The case has therefore been argued primarily on the basis of the common law right of access to justice’.¹²⁰

This decision can be heralded as signalling the ability of the common law adequately to protect rights post-Brexit or indeed that the relevant fundamental right—here access to the courts has been ‘Brexit-proofed’. However, this is to overlook the engagement (albeit limited) undertaken by the Court with Article 47 of the Charter. The UKSC concluded that ‘the Fees Order imposes limitations on the exercise of EU rights which are disproportionate, and that it is therefore unlawful under EU law’.¹²¹ Therefore, even if not crucial to the decision, the Charter (and the protection of EU-derived employment rights) provides the backdrop. Similarly, in a post-Brexit employment law case, the spectre of the Charter is likely to loom-large, even when the domestic courts are ostensibly only relying on principles merely derived from existing CJEU case law. As discussed

116. *Bates van Winkelhof v Clyde & Co LLP* [2014] UKSC 32 [41] Lady Hale. See also *Pimlico Plumbers Ltd and another v Smith* [2018] UKSC 29.

117. Alan Bogg, ‘Between Statute and Contract: Who is a Worker?’ (2019) 135 LQR 347.

118. *ibid.*

119. Alan Bogg, ‘The Common Law Constitution at Work: *R (on the application of Unison v Lord Chancellor)*’ (2018) 81 MLR 509; 510; *UNISON v The Lord Chancellor* [2017] UKSC 51.

120. *Ibid* [64].

121. *Ibid* [117].

below, there may be lessons in this approach for the continued ability of the common law to ensure the protection of EU-derived fundamental (constitutional) rights post-Brexit.

The above discussion shows us that common law tests such as those governing employment statuses do not necessarily yield in the face of legislation with a Charter rights underpinning. This is not to say, however, the common law courts have not been receptive to legislative standards (which in turn might be underpinned by the Charter's Employment Rights), as evidenced by the less formalistic approach taken in cases such as *Bates* and *Unison*. Clearly though, the Employment Rights themselves have had very little impact on the external hierarchy of norms at domestic level, beyond the role the Charter has in the implementation of EU employment legislation. Given the Charter's relative lack of influence at this level, it might be thought unlikely that it would have any impact on the relationship between the terms of the contract itself. Nonetheless, it is worth looking at the internal hierarchy, both for the sake of completeness, but also because it is here that debates as to the influence of employment rights considerations are likely to be played out if worker-protective legislation is stripped away post-Brexit and we are left with the common law as the sole source of employment rights protection.

ii. *The internal hierarchy.* The employment relationship is necessarily incomplete by design. It simply is not possible to set out the entirety of the rights and obligations of the parties in advance. One mechanism used to remedy this incompleteness is the development of implied terms at common law. The ability of the external norms set out above to influence the employment relationship may be helped or hindered by the hierarchy of sources within the employment contract itself. In other words, the relationship between express and implied terms. The express terms have traditionally taken precedence over the implied terms, which are only ever dispositive (derogable). The question to be addressed here is the extent to which employment rights concepts embolden the courts' use of common law implied terms to preserve employment standards, even in the face of express agreement to the contrary.

Implied terms are usually said to be 'binding in the absence of manifested assent to the contrary'.¹²² As such, they can easily be excluded by express agreement of the parties to the employment contract. As Cabrelli notes, 'whether and if so how, a rule of law ought to emerge whereby implied terms are treated by the common law as mandatory and so impervious to disapplication' is a contentious issue.¹²³ He points to public policy as a potential source of such inderogability, but recognises that there is little judicial or legislative appetite for such an approach. It may be the case in the future that only those implied terms that are seen as 'fundamental' might become inderogable, for example the implied term of mutual trust and confidence (MTC).¹²⁴

The implied term of MTC performs two functions. First, it protects the employee's legitimate expectations. Second, it controls the behaviour of the employer. Collins has described this idea as 'legal heresy', marking a rupture with the ordinary principles of contract law under which implied terms are ousted by the express contractual provisions.¹²⁵ Another issue is the extent to which the development of implied terms in the common law contract of *employment* depends on the existence

122. Randy E Barnett, 'The Sound of Silence: Default Rules and Contractual Consent' (1992) 78 Virginia Law Review 821, 825.

123. Cabrelli (n 107) 232.

124. *Malik v Bank of Credit and Commerce International SA* [1997] UKHL 23.

125. Hugh Collins, 'Legal Responses to the Standard Form Contract of Employment' (2007) 36 ILJ 2.

of underlying legislative concepts. There is no doubt that the existence of a written list of employment rights, whether contained in the Charter or ordinary legislation, has had the effect of emboldening the courts to develop implied terms. In their absence, it is likely to be viewed as best left to the legislature.

This issue leads to a broader question of whether the private agreement between the parties to an employment contract should be allowed to oust legislative protection. This is the distinction between *ius cogens* (non-derogable) and *ius dispositivum* (derogable) rights.¹²⁶ The problem with the current judicial approach is that ‘whether the right operates as a “ceiling” or a “floor” of employee protection really depends on the source of the derogation being considered’.¹²⁷ For example, as just noted, legislation will generally prevail over competing common law concepts. Future discussion of the Charter’s role in this context is likely to focus on the potential impact of the freedom to conduct a business (and the freedom of contract) found in Article 16 of the Charter. As mentioned in the introduction, that provision has already introduced a deregulatory thrust into the employment sphere. It may well be that in future, any law imposing compulsory or mandatory norms (as opposed to a mere default or derogable rule) is likely to be subject to challenge based on Article 16.

In any event, the Charter has not had the effect of introducing any notion of inderogability in the domestic employment context, save to the extent that the UK legislation must be compatible with EU law (including the Charter). The domestic hierarchy of norms may be disrupted, or at least modified in the presence of fundamental rights, but this phenomenon was already in evidence when it came to the changing (constitutional) relationship between the common law and employment legislation. There is no particular consequence of either invoking the notion of fundamental rights generally or the Employment Rights specifically. To date, the courts have addressed the preservation of the core content of the employment relationship through ordinary contractual principles, such as implied terms.

Having explored the constitutionalisation of the Employment Rights and their role in the employment law hierarchy of norms, we can now turn to consider the effects of Brexit and the de-constitutionalisation of those rights for the continued relevance of fundamental employment rights in the UK.

III. Brexit and the Reconstitution of the Hierarchy of Norms

The previous section showed that at the domestic level, the Charter has had very little impact on the hierarchy of norms in the employment context. One of the ironies of Brexit is that the related Charter-scepticism has led to a need to consider more carefully the precise place of the Charter and EU-derived rights more generally and to accommodate them within domestic constitutional arrangements. The UK Government has made it clear that, in its opinion, there can be no real Brexit without removing the UK from the somewhat ambiguously termed ‘direct jurisdiction’ of the CJEU. It will fall on the UK courts to take on the full range of tasks associated with the interpretation and application of (former) EU employment legislation. Section 2(1) of the Withdrawal Act provides that EU-derived legislation applicable before Brexit will continue to have

126. Bernard Rudden, ‘Ius Cogens, Ius Dispositivum’ (1980) 11 *Cambrian Law Review* 87, 88.

127. David Cabrelli, ‘Towards a Prohibition of the Derogation of Employment Rights’ 2007 <ssrn.com/abstract=1011171> 16, accessed 21 July 2019.

effect in UK law. This means that the Charter's Employment Rights will, at least for the time being, continue to have legislative status, for example via the WTR. Section 5(2) also creates a new category of 'retained EU law', for example the WTD, which will continue to have supremacy in the 'interpretation, disapplication or quashing of any enactment or rule of law passed or made before exit day'. This may have continued significance for the ability of litigants to enforce their EU-derived employment rights. In *Benkharbouche*, for example, Article 47 of the Charter on the right to an effective remedy was used to disapply national legislation preventing embassy workers from enforcing their employment rights.¹²⁸

Most significantly, for present purposes, section 5(4) provides that 'the Charter of Fundamental Rights is not part of domestic law on or after exit day'. As Barnard notes, the Charter's jettisoning breaks the mould of the Withdrawal Act, which is ostensibly about continuity rather than divergence.¹²⁹ This presents some major practical difficulties. First, it is often impossible to pinpoint precisely the influence of the Charter. Sometimes, the Charter is front and centre in employment law decisions.¹³⁰ In others, it is barely mentioned (if at all).¹³¹ In earlier cases, the CJEU may simply have been reticent in its use of the Charter, recognising the sensitive nature of constitutionalised employment rights.¹³² In any case, stripped of its constitutional status into the future, the Charter may prove little threat to the amendment or repeal of domestic employment legislation, save to the extent that the supremacy principle continues to apply on a limited basis to retained EU law.

Having said that, section 5(5) preserves fundamental rights that exist autonomously of the Charter and 'references to the Charter in any case law are, so far as necessary for this purpose, to be read as if they were references to any corresponding retained fundamental rights or principles'. It has already been mentioned, that in a few cases, the CJEU has referred to EU legislation as a mere expression of an underlying fundamental right (whether found in the Charter or the general principles). However, the status of the Employment Rights as general principles remains unclear.

It has been suggested that all the Charter's rights could be viewed as the codification of existing general principles.¹³³ Indeed, this may be an unintended consequence of the UK's continued insistence that the Charter was no more than a codification exercise for existing rights. In any event, the Withdrawal Act provides that the general principles cannot act as a standard of review for retained EU law.¹³⁴ This will prevent the *Mangold/Kücükdeveci* situation whereby the underlying general principle was used to disapply the offending legislation.¹³⁵ Finally, section 6 provides that the courts should continue to follow CJEU case law that existed on exit day. Ironically, the falling away of Protocol 30 may grant licence (however unlikely) to the courts to draw more liberally on CJEU case law in which provisions such as Article 31(2) were relied on directly by litigants. The courts could also take note of the fact that certain rights now found in retained EU legislation derive from provisions of the Treaty which explicitly class them as fundamental social rights. There is, however, also provision for the higher courts to depart from this case law should

128. *Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62.

129. Barnard, 'So Long, Farewell' (n 77) 350.

130. AG opinion in Case C-214/16 *King*.

131. Case C-395/15 *Daouidi*; Case C-323/08 *Mayor*; Cases C-229/11 and C-230/11 *Heimann* ECLI: EU: C:2012:693.

132. Case C-173/99 *BECTU* ECLI: EU: C:2001:356.

133. Barnard, 'So Long, Farewell' (n 77) 350.

134. Although see *Walker v Inmospec* [2017] UKSC 17.

135. Case C-144/04 *Mangold*; Case C-555/07 *Kücükdeveci*.

they consider it appropriate to do so. At the time of writing, there were ongoing debates surrounding the passage of the Withdrawal Agreement Act as to the precise role of the courts in this context. To see how these provisions might work in practice, we can return to the case of Mr King and consider what might have happened had his case arisen after Brexit.

It will be remembered that in *King*, the applicant had been denied paid annual leave on the basis that the UK's WTR provided for the extinguishment of that right if not taken within a particular leave period.¹³⁶ Post-Brexit, the UK courts would be faced with a provision of domestic law, namely section 13 WTR that on its face allowed for the denial of the right to paid annual leave in the applicant's circumstances. Nevertheless, section 13 would have to be read consistently with the equivalent provisions of retained EU law, namely Article 7 WTD, which as we know from the Withdrawal Act continues to have supremacy. The text of Article 7 is not of much help as it essentially contains the bare statement that workers are entitled to annual leave of a specified duration. However, Article 7 has already been interpreted by the CJEU in its case law as being 'a particularly important principle of Union social law from which there can be no derogation'. This means that Member States are entitled to regulate the modalities of the right but not its *existence*. It is not apparent what justification a domestic court might raise for departing from this line of case law, given the clear instruction in the Withdrawal Act that existing jurisprudence should be followed. However, a likely significant difference between the CJEU's judgment in *King* and the hypothetical domestic court's approach is the extent of reliance on fundamental rights concepts. First, litigants will no longer be able to rely on the horizontal direct effect of Charter Employment Rights, as happened in *Bauer*.¹³⁷ Second, the domestic court may recognise the existence and relevance of Article 31(2) of the Charter, but it is unlikely to play a significant role in its reasoning, with the court able to arrive at the same decision as the CJEU using existing EU case law and, perhaps, domestic constitutional principles as it did in the above-discussed *Unison* case and in those cases on worker status.

Where does this leave the 'constitutional' status of the Charter in the UK post-Brexit? On the face of it, the Charter has been stripped of its constitutional status. In reality, the situation is much more complex. First, the continued (limited) supremacy of retained EU law has been explicitly recognised by the Withdrawal Act. This suggests that existing EU-derived employment legislation (as interpreted in light of the Charter's Employment Rights) will continue to have a superior status within the domestic employment law hierarchy of norms. In other words, it has an enhanced constitutional status. Second, the general principles, which themselves can be described as 'constitutional' will continue to apply in the UK (again in a more limited form).

If we look again at the 'functional' definition of constitutionalisation suggested by Deakin, it could also be argued that the Withdrawal Act has the express function of addressing the continued relationship between EU and UK law and the place of retained former EU law within the domestic hierarchy of norms. Going beyond this, it would be no exaggeration to suggest that the Withdrawal Act is worthy of the status of constitutional legislation, similar to the HRA. The Act certainly meets some of the criteria for a constitutional statute set out by Baker. He suggests, for example, that legislation which alters the powers of Parliament or transfers powers (as by devolution or international treaty) and which would be difficult in practice to reverse should be granted constitutional

136. Case C-214/16 *King*.

137. Cases C-569/16 and C-570/16 *Bauer*.

status.¹³⁸ This criterion clearly applies to the Withdrawal Act, which involves the transfer of powers from the EU to the domestic level. It may well be the case, therefore, that the Charter will continue to have at least residual constitutional status for some time to come. Given the impending absence of the Charter and the limited constitutional continuity provided by the Withdrawal Act, it may be necessary to look elsewhere to ensure the continued applicability of the Employment Rights found in the Charter.

Brexit must also be viewed against the general backdrop of scepticism towards international rights instruments. This scepticism somewhat impedes the usefulness of employment lawyers (re)connecting with alternative rights texts in the absence of the Charter. Obviously, it is possible to develop the law to go as far as desired to protect workers, but this is largely a political question and in the current domestic climate, it is unlikely that we will see any increased legislative protection in the near future. It really is doubtful whether existing alternative sources of employment rights can replicate the level of protection granted by the Employment Rights currently found in the Charter. The most obvious candidate, the ECHR does not guarantee a right to worker consultation, unfair dismissal protection or fair and just working conditions. The only Employment Right expressly replicated in the Convention is Article 28 on the freedom of association which is found at Article 11 ECHR, but the European Court of Human Rights' treatment of that provision has been chequered at best.¹³⁹ In addition, the remedies available under the ECHR pale in comparison to those found in the Charter. If UK employment law violates the ECHR, there will merely be a judicial declaration of incompatibility rather than the invalidation of the domestic law currently allowed by the Charter. Similar limitations apply to other rights instruments such as the ESC. These limitations must be coupled with 'the reluctance of successive governments to embrace international human rights instruments and to meet commitments to which they have subscribed'.¹⁴⁰

Another alternative source of protection for the Employment Rights is via any future free trade agreement between the UK and the EU. Paragraph 2 of the revised non-binding Political Declaration of 19 October 2019, which governs the future UK-EU relationship, sets out the determination of both parties to 'safeguard' workers' rights. Paragraph 77 similarly provides for a level playing field and open and fair competition, including in the area of social and employment standards which should be maintained 'at the current high levels provided by the existing common standards', although there is recognition that 'the precise nature of commitments should be commensurate with the scope and depth of the future relationship'. All references to the level playing field were removed from the legally binding Withdrawal Agreement. Similarly, the Withdrawal Agreement Act, which was granted royal assent in January 2020 no longer contains any clauses dealing with the protection of EU-derived workers' rights, with those clauses to be replaced by a promised Employment Bill.¹⁴¹

We should remain sceptical of using a free trade agreement as a rights-protective mechanism. The best we can hope for is the maintenance of equivalent employment 'standards'. However, the EU and its Members States will remain bound by the Charter in all their dealings and, to this extent,

138. House of Lords Constitution Committee 15th Report, July 2011, *The Process of Constitutional Change*, para. 11; First Report of Session 2013–14, May 2013, *Ensuring standards in the quality of legislation*, para. 139.

139. App No 34503/97 *Demir and Baykara*; App No 68959/01 *Enerji Yapi-Yol Sen*; App No 319045/10 *RMT*.

140. K. D. Ewing, 'Constitutional Reform and Human Rights: Unfinished Business?' (2001) *Edinburgh Law Review* 297.

141. House of Commons Library, 'Removal of Workers' Rights in the new EU (Withdrawal Agreement) Bill, 20 December 2019.

the Charter's influence on the UK is preserved. The CJEU is also likely to play a role, if as yet uncertain, in any future UK-EU dispute resolution mechanism. In any event, existing EU employment rights will be protected from modification during the transition period which will run until at least December 2020.

In the absence of clearly enforceable international employment rights, the only remaining legal source capable of reflecting the Charter's Employment Rights is the common law. We have already noted that the use of the common law to protect and promote access to employment rights is beginning to attract attention from the courts. We have also already considered the way the common law interacts with employment legislation, notably in the context of the worker concept. There is a clear potential there for the courts to take account of the nature of an underlying right when interpreting and applying legislation. If that legislation is removed (as is likely to be the case post-Brexit), it is not obvious how the common law itself might step into the breach to ensure the continued (autonomous) protection of the Charter's Employment Rights, although the idea that the common law itself protects certain employment rights is beginning to be explored.¹⁴²

Perhaps we need to extend to the employment context the distinction that according to Elliot:

can—and needs to be—drawn between values associated with the common law and rights protected by it. It is true, for example, that the ECHR embodies rights that amount to specific manifestations of values that, at some level of abstraction, are reflected in the English common law tradition.¹⁴³

It is perhaps a futile exercise to embark on a search for employment rights contained in the common law. A more fruitful exercise may be to look for its underlying values. It is suggested that one such expression of the underlying values of the common law of the *employment* contract will be the continued development of the above-mentioned term of MTC, which will be implied as a 'necessary incident' of the contract of employment, i.e. a term implied in law, regardless of the intentions of the parties.¹⁴⁴ The test for the implication of a term at common law is one of 'necessity' – in other words, it is based on wider considerations of public policy rather than necessity in terms of efficacy.¹⁴⁵

Clearly, this implied term is incapable of transposing the level of detail contained in the Employment Rights and accompanying Explanations. It will be recalled that Article 31, for example, guarantees workers a right to limited working hours, daily and weekly rest as well as paid annual leave. The accompanying legislation, the WTD, fleshes out this provision with quantitative guarantees for each right (e.g. four weeks' annual leave). Common law implied terms will not be able to bear the weight of such a specific provision, but it may embody a more general principle that employees should be protected from over-work, perhaps linked with human dignity in a way that is reflective of the Charter's Employment Rights.¹⁴⁶

142. Bogg, 'The Common Law Constitution at Work' (n 119); Joe Atkinson, 'Implied Terms and Human Rights in the Contract of Employment' (2019) ILJ, Advance Article, 21 February 2019.

143. Mark Elliot, 'Beyond the European Convention: Human Rights and the Common Law' (2015) CLP 1, 5.

144. Edwin Peel (ed.), Treitel, *The Law of Contract* (14th edn, Sweet & Maxwell 2016) 255.

145. Cabrelli (n 107) 156.

146. *Johnstone v Bloomsbury Health Authority* [1992] QB 333.

Conclusion

There is no doubt that the Charter—and fundamental rights concepts more generally—have had a significant role to play in shaping the identity of modern employment law. Of course, not all employment lawyers see the benefits in underpinning employment law with constitutional rights capable of judicial protection. Indeed, judicial history warns us to be sceptical of the value of (EU) fundamental rights-based reasoning in the employment context.¹⁴⁷ Nevertheless, the role played by fundamental rights in shaping employment law should not be underestimated. The Charter, as the rights instrument with the most direct impact on the domestic employment sphere has had a particularly prominent place in the construction of this new identity.

The starting point of this article was to show that it is indeed possible to integrate the Charter into existing understandings of the concepts of constitution/constitutionalisation. This was achieved by mapping the constitutional course of the Employment Rights found in the Charter. It was shown that the Charter's Employment Rights have long held legislative status and they are capable of classification as constitutional rights. Determining the constitutional status of the Charter was a useful endeavour in itself and allowed us to assess the Charter's constitutional starting point in the run up to Brexit. The method chosen to examine the precise reach of the Charter into the employment sphere was through the emerging notion of a hierarchy of norms.

The effects of this constitutionalisation process on the EU-domestic employment law hierarchy of norms have been clear. The Charter has already been used to steer the interpretation of EU-derived employment legislation in a more worker-friendly direction. The Charter's Employment Rights also have the potential to act as bulwarks against any attempt to encroach on the existing levels of employee-protection found in that legislation. At an entirely domestic level, the Charter's impact has understandably been less obvious given the Charter's limited scope. Nevertheless, the Charter has an indirect role to play via domestic legislation implementing EU employment rights. That legislation has the effect of limiting the ability of parties to the employment relationship to contract out of legislative rights, including those rights that reflect underpinning Charter Employment Rights. Brexit disrupts this carefully charted constitutional course, leaving the Charter's continued status in the UK in doubt.

It is also unfortunate that the UK is abandoning the Charter at the same time that the Union is beginning to integrate it more carefully into the development of employment legislation. The Charter is likely to be central to future discussions on legislative reforms aimed at increasing employee-protection at Union level, with the UK now obviously being left behind. The Charter's impact can already be seen in the recently published Directive on transparent and predictable working conditions, in which the Charter's Article 31 is granted a prominent position in the opening paragraph of the legislation. Tellingly, this is followed by Principles 5 and 7 of the Pillar. The emerging discourse between the Charter and the Pillar is likely to prove fruitful in future legislative proposals.

Constitutional niceties aside, the greatest risk to the protection of employment rights in the UK may lie not in the removal of the Charter itself, but from the ensuing watering down of legislative protections, which themselves have long been a target of Eurosceptic politicians.¹⁴⁸ John Major famously secured a UK opt-out from the social chapter of the Maastricht Treaty, although Tony

147. Case C-201/15 *AGET Iraklis*; Case C-426/11 *Alemo-Herron*; Case C-438/05 *Viking*; Case C-341/05 *Laval*.

148. Busby and Zahn (n 1).

Blair did eventually sign up. The UK was also hostile to the introduction of legislation such as the WTD, ensuring that the legislation contained an opt-out to the 48-hour working week and even (unsuccessfully) challenging the validity of the Directive before the CJEU.¹⁴⁹ Then, of course, there was the attempted opt-out from the Charter's Solidarity Title, which culminated in the abandonment of the Charter altogether in the Withdrawal Act.

At least some of this hostility stems from a misunderstanding of the purpose of EU employment law, which is only ever intended to set minimum standards—it is the floor below which Member States are not permitted to go. However, they are often explicitly permitted to improve workers' rights above that minimum threshold, as the UK has done on occasion.¹⁵⁰

At the same time, it is possible that we employment lawyers are being too gloomy. The reality is that EU law does not form the foundation of the entirety of domestic employment law. Important areas such as unfair dismissal and the right to a minimum wage will not be (directly) affected by Brexit. In addition, the significant impact that EU employment legislation has had in the UK is unlikely to change any time soon. First, much of existing EU employment law reflects accepted international standards found, for example, in the ESC. Second, aspects of EU employment law supplemented rights already found in domestic law. Finally, as mentioned, the EU is likely to insist on close alignment on employment rights in return for a trading agreement. Over the longer term, however, it is difficult to see how the UK rejects the opportunity presented by Brexit to remove some of the EU employment rights that it has long demonised and it is here that the absence of the Charter and its brake on legislative activity will be most keenly felt.¹⁵¹

This article has had the purpose of at least identifying those areas of domestic employment law that are most dependent on the Charter and thereby most vulnerable to its repeal. By understanding the continued place of the Charter's Employment Rights within the employment law hierarchy of norms, we are better placed to determine where fundamental rights arguments might continue to be relevant in resisting the limitation of legislative rights. With Brexit, the Charter will now more carefully have to be integrated within the domestic sources of employment law. Despite the Withdrawal Act's insistence that the Charter will no longer apply, its legacy is likely to live on even if its constitutional status now rests on a much weaker foundation.

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149. Case C-84/94 *UK v Council* ECLI: EU: C:1996:431.


150. For e.g. through the provision of 5.6 weeks paid annual leave, rather than the 4 weeks required by EU law.

151. Benjamin Kentish, 'Brexit: Official documents raises prospect of tampering with workers' rights to boost economy', *The Telegraph*, 9 February 2018.

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