

The role of the EU Charter of Fundamental Rights in the protection of social rights

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Structure of presentation

1. Sources of social rights in EU law
2. The continuing significance of the Community Social Charter
3. Explaining the EU Charter of Fundamental Rights
 - a) sources
 - b) problem areas - case studies

Sources of social rights in the EU legal order

- ◉ Art 151 TFEU – references ESC and Community Social Charter (CSC) as sources of EU social policy – includes progressive improvement of living and working conditions
- ◉ case law of the CJEU – general principles and particularly important social rights
- ◉ EU legislation – includes ILO e.g. 2007 decision authorising ratification by Member States of the Maritime Labour Convention
- ◉ CSC
- ◉ Charter of Fundamental Rights sourced from, inter alia, from ECHR, ESC, Revised ESC, CSC

The continuing significance of the Community Social Charter – more than a staging post

- ◉ soft law but referenced in the TFEU, EU legislation and case law
- ◉ inspired by ILO and ESC – social rights focus
- ◉ act of “political will to build a Social Europe” – strengthening ESM not simply reflecting selected social rights
- ◉ includes decent work / fair remuneration, right to adequate social protection, decency in retirement
- ◉ legislative impulse on EU institutions and social partners; implementation obligation on Member States; non-retrogression

Charter of Fundamental Rights of the EU – points of contrast with the Community Social Charter

- ◉ ‘same legal value’ as the treaties – EU primary law – reaffirms rights
- ◉ broader focus - indivisible civil, political, economic and social rights, freedoms and principles
- ◉ no reference to the ILO in the Explanations
- ◉ selected social rights – missing ESC rights, dilution of social protection
- ◉ no legislative impulse on EU institutions but addressed to them
- ◉ no direct implementation obligation on the part of the Member States

Explaining the EU Charter of Fundamental Rights - sources

Art 6 TEU:

“The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.”

UN and CoE sources of social rights in the Charter explanations

- ◉ freedom of association, Art 12 – Art 11 ECHR
- ◉ right to education – Art 14 - Protocol to the ECHR
- ◉ right to engage in work, Art 15 – Art 1(2) ESC
- ◉ rights of the child, Art 24 – UN CRC
- ◉ rights of the elderly, Art 25 – Art 21 RESC
- ◉ Integration of disabled people, Art 26 – Art 15 ESC
- ◉ right of collective barg & action, Art 28 – Art 6 ESC
- ◉ job placement services, Art 29 – Art 1(3) ESC
- ◉ unjust dismissal protection, Art 30 – Art 24 RESC
- ◉ family and professional life – Art 33 - Art 16 ESC
- ◉ social security and assistance – Art 34 - Arts 12-13 ESC

EU sources of social rights in the Charter

- ◉ equality, Art 20 – case law
- ◉ non-discrimination, Art 21 – Art 19 TFEU
- ◉ cultural, religious, linguistic diversity, Art 22 - Art 167 TFEU
- ◉ gender equality, Art 23 – Arts 3 and 8 TEU, Art 157 TFEU
- ◉ workers' right to information and consultation, Art 27 – points 17, 18 CSC, Art 6 ESC
- ◉ fair and just working conditions, Art 31 – Dirs 89/391/EEC and 2003/88/EC
- ◉ prohibition of child labour and protection of young workers, Art 32 - Dir 94/33/EC, Art 7 ESC
- ◉ Arts 35-38: health care, services of general economic interest, environmental and consumer protection – TFEU

Explaining the EU Charter of Fundamental Rights – problem areas

- ◉ scope – Art 51, limited obligations on Member States, no extension of the field of application
- ◉ corresponding rights guarantee for the ECHR, Art 52(3), but not the ESC
- ◉ hierarchy of rights and principles – some rights are horizontal but others are not
- ◉ ‘principles’ are not freestanding judicially cognisable rights, Art 52(5)
- ◉ derogations – national laws and practices, Art 52(6)– subsidiarity applies
- ◉ balancing economic freedoms and social rights

Hierarchy of rights and principles

- ◉ **strong rights** – include non-discrimination, Art 21, gender equality, Art 23, working time, rest and paid annual leave, Art 31 (2), child labour, young workers, Art 32, maternity and paternity rights, Art 33
- ◉ **weak rights** – workers' right to information, Art 27, coll barg/action, Art 28, unjust dismissal protection, Art 30
- ◉ **mere principles** – levels of social security, Art 34(1) and Arts 35-38

Case study – scope of the Charter – Art 30, Nagy

“Every worker has a right to protection against unjustified dismissal, in accordance with Union law and national practice”

- ◉ no Commission proposal for a directive despite legal basis in Art 153 TFEU – unanimity requirement
- ◉ Art 24 RESC – 20/28 EU MS have ratified
- ◉ ILO Conv No 158 – 10/28 EU MS have ratified
- ◉ ECtHR, dismissal without giving reasons violates Art 6 ECHR – *K.M.C. v Hungary*, 2012
- ◉ Cases C-488-491/12 & 562/12 *Nagy and Others* – Court of Justice has no jurisdiction – no implementation obligation on Hungary

Case study – scope of the Charter – Art 31(2), *Strack*

- “Every worker has the right ... to an annual period of paid leave” – source, Art 7 of Directive 2003/88. Art 288 TFEU – directives addressed to MS
- CST and GC – Staff Regs autonomous – limited carry over period in the event of long-term sickness – shorter period than applies under case law
- Court of Justice, Case C-579/12 *RX-II Strack* - Staff Regs must be interpreted consistently with Charter and in conformity with case law on scope of the right to paid annual leave under the Directive to ensure the unity and consistency of EU law. Charter is yardstick for the measurement of the lawfulness of all EU acts

Case Study – horizontal application of the Charter, *Kücükdeveci*

- Case C-555/07 *Kücükdeveci*, national provisions falling within the scope of EU law must conform with general principles of EU law – principle of non-discrimination on grounds of age, Dir 2000/78/EC, Art 21 Charter
- national courts have a duty to disapply any contrary provision of national legislation falling within the scope of EU law irrespective of whether the case is referred to the Court of Justice

Compare with Case C-176/12 AMS

- ◉ Art 27 – workers' guarantee of information and consultation in accordance with national law and practices – see Dir 2002/14/EC
- ◉ French law excluded certain staff from the calculation of the threshold for worker involvement
- ◉ *Kücükdeveci* distinguished - not possible to infer from the wording of Art 27 or from the explanations that Art 3(1) of Dir 2002/14, as a directly applicable rule of law, lays down and addresses to the MS a prohibition on excluding from the calculation of the staff numbers in an undertaking a specific category of employees initially included in the group of persons to be taken into account in that calculation
- ◉ sourcing of Art 27 from RESC and CSC not discussed by the Court of Justice

Case study, Art 34(3) right or principle? *Kamberaj*

- ◉ “the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources” – in accordance with national law and practices
- ◉ Case C-571/10 *Kamberaj* – lower rate of housing benefit for non-EU nationals – Long-term Residents Dir 2003/109 – right to equal treatment but limited to “core benefits”
- ◉ Court of Justice held – was part of implementation of Art 34(3) therefore justiciable - left to national court to determine whether this amounted to a right to housing benefit

Balancing economic freedoms and social rights

- ◉ Example 1 - freedom to conduct a business, Art 16, based on case law of the Court of Justice trumps fundamental social rights, Art 28, right of collective bargaining, Case C-426/11 *Alemo-Herron*
- ◉ Example 2 – *Viking* and *Laval* – where should the centre of gravity lie between market freedoms and social rights after *Demir* (ECtHR)? Relevance of *Opinion 2/13* on Accession to the ECHR, 18 Dec 2014?

International legal obligations and dynamic interpretation of social rights

- ◉ CJEU's duty of interpretation – Art 19 TEU
- ◉ Cases C-335/11 and 337/11 *Ring and Werge* – UN Disability Convention invoked – ratification decision made it an integral part of EU law, Art 21 and Art 26 – dynamic interpretation of 'disability'