

The role of the explanations relating to the Charter

An originalist approach to the definition of the normative
content of fundamental social rights

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The identification of the normative content of rights: Institutional implications



- ▶ What is the normative content of Charter rights?
- ▶ Who defines the content of Charter rights?
- ▶ How should rights be defined?

Who defines the content of rights?



- ▶ Vertical perspective: EU vs Member States.
- ▶ Horizontal perspective: legal vs political institutions.
- ▶ Counter-majoritarian critique: to what extent is a matter constitutionalised or, put differently, de-politicised?

How should rights be defined?



- ▶ Pre-Charter: Article 19 TEU (ex-Article 220 EC Treaty).

« The Court of Justice of the European Union ... shall ensure that in the interpretation of the treaties, the *law* is observed ».

- ▶ Evaluative approach: reference to constitutional traditions, and international human rights treaties.

How should rights be defined?



- ▶ The Charter as a ‘new parameter of interpretation’ of fundamental rights (Amalfitano).
- ▶ Article 52(3) EUC: ECHR as a minimum level of protection.
- ▶ Article 52(4): common constitutional traditions as source of guidance.
- ▶ Article 52(7): explanations relating to the Charter constitutes a source of inspiration.

What has the Charter changed ?



- ▶ Has the entry into force of the Charter prompted a shift in the interpretation of fundamental social rights?
- ▶ Vantage point: entry into force of the Charter.
- ▶ Other relevant parameter: type of right concerned?
- ▶ Continued prevalence of past case-law/ limited impact of Charter on interpretation of right of equal treatment.

Mangold and Küçükdeveci: law-making in disguise?



- ▶ Article 19 TEU, a source of unbridled expansion of EU law?
- ▶ Discovery of a general principle of equal treatment irrespective of age unsupported by common constitutional traditions and international law.
- ▶ Core/periphery: how far should the general principle be fleshed out by reference to secondary law (i.e. Equal Treatment Directive)?

AMS as the turning point?



- ▶ Originalist understanding of Article 27 of the Charter.
- ▶ Limited or no justiciability of Article 27 inferred from reference to additional implementing measures (See also C-356/12 Glatzel).
- ▶ Core/periphery: the normative content of that provision must be ‘inferrable’ from the wording and explanations relating to that provision.



Bauer and Max-Planck: An originalist understanding of Article 31(2) of the Charter

- ▶ Mandatory character of the right to paid annual leave: primary law guarantee.
- ▶ Justiciability defined by reference to the explanations relating to the Charter.
- ▶ Over-constitutionalisation?