

# Judicial lawmaking in disguise?

The role of the explanations relating to the Charter in the interpretation of fundamental social rights

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# Identifying the normative content of fundamental rights



- ▶ Three questions.
- ▶ What is the appropriate level of protection (material aspect)?
- ▶ Who decides on the appropriate level of protection of fundamental social rights (institutional aspect)?
- ▶ How should fundamental rights be defined (methodological aspect)?

# How should fundamental rights be defined



- ▶ How to isolate the ‘fundamental boundaries’ of rights (Weiler, 2009).
- ▶ Fundamental rights are particularly prone to the ‘temptations of teleology’ (Steiert & Coghlan, 2021; Lenaerts, 2020).
- ▶ Approach based on the principles of democracy and rule of law (Conway, 2012, but see also Davies, Dawson, etc.)
- ▶ The Charter as a ‘new parameter of interpretation’ intended to alleviate competence creep concerns.

# Case study: horizontal direct effect



- ▶ Research question: does the entry into force of the Charter marks a shift with respect to the interpretation of fundamental rights? Has the Charter changed anything? And if so, to what extent?
- ▶ Time period I: case law pre-Charter.
- ▶ Time period II: case law post-Charter.

# The interpretative shortcomings of Mangold and Küçükdeveci



- ▶ Identification of general principle of non-discrimination on the basis of age.
- ▶ ECJ: GP derives from constitutional traditions, as well as international law... But limited recognition of that right at national and/or international level.
- ▶ Evaluative approach? (Lenaerts; Sharpston in Bartsch; Kokott in Audiolux).

# A solution grounded on the evaluative approach?



- ▶ Mandate to identify fundamental rights (under the guise of general principles) derived from Article 19 TEU and Article 267 TFEU.
- ▶ ECJ follows evaluative approach to identify EU fundamental rights.
- ▶ Combination of comparative and teleological approaches (Lenaerts).
- ▶ But, outcome must be supported by ‘recognised legal interpretation methods’ (BVerfG, Honeywell).

# The interpretative shortcomings of Mangold and Küçükdeveci



- ▶ Identification of the normative content of the GP of non-discrimination on the basis of age.
- ▶ Content fleshed out by close reference to secondary law (ie, Equal Treatment Directive)... But this is justified on policy, rather than normative grounds (Tridimas).
- ▶ Methodological shortcomings fuelled criticism about judicial activism (Herzog), or formal (il)legimacy of that judgment (Mazak).

# The Charter as a 'new parameter of interpretation'



- ▶ Codification of pre-existing, as well as 'new' fundamental (social) rights.
- ▶ Identification of sources of inspiration for the interpretation of Charter rights.
- ▶ Art. 52(3)-(4): ECHR and common constitutional traditions are authoritative sources of interpretation.
- ▶ Art. 52(7): The explanations relating to the Charter must be « given due regard » in the interpretation of Charter rights.



# The (contentious) interpretative value of the explanations



- ▶ Should the explanations be deemed as an expression of the authentic interpretation of the Charter, or rather as mere travaux préparatoires ? Ziller; Lenaerts, 2013).
- ▶ They are more than a commentary, but less than legal interpretation; they should simply be taken into account (Jacqué).
- ▶ ‘It would be very difficult, if not impossible, for the Court to go against the explanations relating to the Charter, as this would constitute judicial activism’ (Lenaerts, 2020).

# What has the Charter changed?



- ▶ Association de Médiation Sociale: The turning point?
- ▶ Literal construction of Article 27 of the Charter.
- ▶ Limited (Amalfitano) or absence (Tridimas) of justiciability inferred from reference to additional concretizing measures.
- ▶ Content of Article 27 must be ‘inferable’ from wording, as well as explanations relating to that provision (para. 46).

# What has the Charter changed?



- ▶ Bauer and Max-Planck: Shades of originalism...
- ▶ References to additional measures as a token of the intention of the drafters to exclude the justiciability of Charter provisions (AG Bot).
- ▶ Identification of the content of Article 31(2) in the light of the explanations relating to that provision (and by reference to Article 7 of Directive 2003/88).

# What has the Charter changed?



- ▶ ... concealing the teleological undertones of these judgments.
- ▶ Article 31(2), read in the light of Directive 2003/88 entails the ‘effective possibility’ to take up leave.
- ▶ ‘Effective possibility’ to take up leave reaches (far) beyond the very wording of Art. 7 of Directive 2003/88 (let alone Art. 31(2) EUC).