

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).