SOCIAL RIGHTS IN THE CHARTER: EMPLOYMENT AND SOCIAL SECURITY

1. SOCIAL PROTECTION AND THE IDEA(LS) OF EUROPE

European Social Charter of 1961

1.1 In 1961 the European Social Charter was opened for signature. This was a document produced in the middle of the Cold War under the auspices of the Council of Europe (then made up of the non-Communist liberal social democratic states of primarily Western Europe). In an implicit counter to the claims of the Eastern bloc that it was only in countries under State socialism that workers' rights were protected, the European Social Charter of 1961 guaranteed, among other social and economic rights:

- employment protection rights, such as the right to work in a safe environment under just conditions for fair remuneration, and the right to organise and collectively bargain in trade unions;
- welfare rights, such as the protection of health, access to social and medical assistance, social security and social welfare services; and
- special social, legal and economic protection for the disadvantaged and potentially socially excluded, such as children, mothers and families, the disabled, the old, and migrant workers and their families.

1.2 The 1961 European Social Charter was very much understood to be a classic inter-state Treaty, which had implications for States from the point of view of imposing obligations under public international law, but not necessarily creating rights for individuals within those States. There was no procedure for individuals to make complaints of breach of its provisions by a Member State. A protocol was added to the Social Charter in 1995 allowing for the possibility of collective complaints being made by international and national organisations of employers and of trade unions to the Social Charter's Committee of Independent Experts.[1] In May 1996 the Council of Europe produced a

[1] See R Brillat, 'A New Protocol to the European Social Charter Providing for Collective Complaints' [1996] *European Human Rights Law Review* 52.

revised European Social Charter, updating and altering some of the substantive provisions of the original 1961 Social Charter.

The Treaty of Rome 1957 and workers' rights

1.3 The third preamble to the 1957 Treaty of Rome (now the TFEU) affirms:

> "as the essential objective of the [Member States'] efforts, the constant improvements of the living and working conditions of their peoples."

1.4 The EU has always had competence to pass legislation governing employment protection, under what was formerly Article 118 of the Treaty of Rome. This referred to matters relating to:

> "employment, labour law and working conditions, the right of association and collective bargaining between employers and workers"

1.5 However, EU legislation pursuant to this Treaty provision required unanimous backing from the Member States, and in the face of consistent opposition particularly from the UK Government, notably during the 1980s and early 1990s, little progress was made. Thus only four directives were adopted in this way:

- the Collective Redundancies Directive 75/129/EEC[2]
- the Acquired Rights Directive 77/187/EEC[3]
- the Insolvency Protection Directive 80/987/EEC[4] and
- the Directive on Written Particulars of Employment Contracts 91/533/EEC[5].

Community Charter of Fundamental Social Rights of Workers

1.6 In December 1989, all of the then Member States – with the exception of the UK – signed up to the Community Charter of Fundamental Social Rights of Workers.[6] This was a

[2] [1975] OJ L48/29. The original Collective Redundancies Directive was subsequently repealed and replaced by Council Directive 98/59/EC [1998] OJ L225/16.

[3] [1977] OJ L61/26. This Directive was subsequently repealed and replaced by Council Directive 2001/23/EC [2001] OJ L61/26.

[4] [1980] OJ L283/23. The original Acquired Rights Directive was subsequently repealed and replaced by the consolidating and codifying Employment Protection (Insolvency) Directive 2008/94/EC [2008] OJ L283/36.

[5] [1991] OJ L288/32.

[6] 9 December 1989, COM(89) 471 final.

political declaration with no binding legal force or effect, which enumerated a series of social and labour rights for workers such as:

- the improvement of living and working conditions of all workers, including rights to paid annual leave and weekly breaks;
- the right to an adequate level of social security benefits;
- freedom of association in trade unions, and the rights to strike and to negotiate and conclude collective agreements;
- equal treatment between men and women;
- the right to information, consultation and participation in decisions involving major changes in the workplace and/or the workforce;
- and the protection of the young, the elderly and the disabled in the workplace.

Opt-out from the Social Chapter

1.7 During the negotiations prior to the Maastricht Treaty, it was proposed that the substance of the rights set out in the Community Social Charter (which echoed many of those already contained in the 1961 European Social Charter) should be fully incorporated into EU law by appropriate amendments to the Treaty of Rome (to be known as "the Social Chapter").

1.8 However, the UK again did not agree, and since Treaty amendments also have to be agreed unanimously, a compromise was reached whereby EU institutions and procedures could be used to implement social rights but the UK would be excluded from the EU decision-making procedures on these issues and any legislation adopted would not apply to the UK.[7]

Avoiding the Social Chapter opt-out – employment rights as a health and safety measure

1.9 The UK's opt-out from the Community Social Chapter meant that any EU social legislation which was to apply to all of the Member States had to be presented in another guise, for example as workplace health and safety, which permitted legislation to be adopted by majority vote.

[7] Treaty on European Union, Agreement on Social Policy concluded between the Member States of the European Community with the exception of the UK (Protocol 14 to the Maastricht Treaty).

1.10 This was what happened with the original Working Time Directive[8] - which sought to regulate, among other things, the maximum length of the working week, night working and paid annual leave.[9] The UK subsequently pursued an unsuccessful legal challenge to the Council's decision to adopt the Directive under health and safety provisions.[10]

Avoiding the Social Chapter opt-out – employment rights as a free movement measure

1.11 Another employment law measure, Directive 96/71/EC[11] on the rights of workers posted to other Member States, was successfully adopted by the EU to apply to all Member States under the Treaty provisions governing free movement of services.

Ending the Social Chapter opt-out

1.12 The Labour Government which was elected in the United Kingdom in May 1997 had pledged that it would reverse the UK's opt-out from the Social Chapter, and consequently it was agreed in the Amsterdam Treaty that the provisions of the Agreement on Social Policy should be incorporated within the main body of the EC Treaty and that any general EU legislative provisions which had been adopted by the other Member States under the Social Chapter during the UK opt-out would be extended to apply to the UK too.[12]

2. THE CURRENT TREATY BASIS FOR WORKERS' SOCIAL PROTECTION MEASURES IN THE EU

2.1 Post-Lisbon, Article 151 TFEU provides as follows:

> "The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989

[8] Directive 93/104/EC [1993] OJ L307/18 was presented as a health and safety measure, in further implementation of the programme envisaged by the Framework Health and Safety Directive 89/391/EC, and under the legislative procedure contained in what was then Art 118A of the Treaty of Rome 1957 allowing for qualified majority voting.

[9] See also the Pregnant Workers Directive 92/85/EEC [1992] OJ L348/1

[10] Case C-84/94 *UK v Council* [1996] ECR I-5755.

[11] [1996] OJ L18/1.

[12] See, e.g., Directive 97/74/EC [1998] OJ L10/22 extending the European Works Council Directive to the UK; Directive 97/75/EC [1998] OJ L10/22 extending the Parental Leave Directive to the UK; Directive 98/23/EC [1998] OJ L131/10 extending the Part-time Workers Directive to the UK.

> Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

2.2 Article 151 TFEU goes on to provide for the implementation of measures (whether laws, regulations or administrative action) by the Union and the Member States which are aimed at "the approximation of provisions" in this area across the EU, while

> "tak[ing] account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union's economy".

2.3 While expressly excluding "pay, the right of association, the right to strike or the right to impose lock-outs", and respecting "the right of Member States to define the fundamental principles of their social security systems", Article 153 TFEU specifies EU competence to make directives which set out minimum requirements (always allowing Member States to maintain or introduce more stringent protective measures compatible with the Treaties) in the following fields:

(a) improvement, in particular, of the working environment to protect workers' health and safety;

(b) working conditions;

(c) social security and social protection of workers;

(d) protection of workers where their employment contract is terminated;

(e) the information and consultation of workers;

(f) representation and collective defence of the interests of workers and employers, including co-determination;

(g) conditions of employment for third-country nationals legally residing in Union territory;

(h) the integration of persons excluded from the labour market, without prejudice to any EU vocational training policy made under Article 166 TFEU;

(i) equality between men and women with regard to labour market opportunities and treatment at work.

2.4 Under Article 153 TFEU the European Parliament and the Council may also adopt non-harmonising measures designed simply to encourage cooperation between Member States in "the combating of social exclusion" and in "the modernisation of social protection systems".

2.5 Further, Article 156 TFEU tasks the Commission with encouraging cooperation and coordination of social policy action among the Member States, particularly in matters relating to: employment; labour law and working conditions; basic and advanced vocational training; social security; prevention of occupational accidents and diseases; occupational hygiene; and the right of association and collective bargaining between employers and workers.

2.6 Article 155 TFEU envisages a special legislative procedure for Social Chapter measures, whereby legislation should, if possible, be agreed by negotiation between "the two sides of industry" or in Euro-speak as "the Social Partners". Currently, the Social Partners at EU level comprise the European Trade Union Congress (ETUC) on the employee side, and the Union of Industrial and Employers' Confederations of Europe (UNICE) and European Centre of Employers and Enterprises providing Public Services (CEEP) representing, respectively, private- and public-sector employers. Any resulting concluded contractual agreements between management and labour at the EU level might then be implemented as binding law either at the level of Member States or, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. [13]

[13] It should be noted, as reiterated in Joined Cases C-297/10 and C-298/10 *Hennigs v Eisenbahn-Bundesamt* 8 September [2011] ECR I-nyr at paras 65-68 - that in order to be legally enforceable any collective agreement has to be compatible with the general principles of EU law, as well as with any relevant specific provisions of EU secondary law:

> "66. The nature of measures adopted by way of a collective agreement differs from the nature of those adopted unilaterally by way of legislation or regulation by the Member States in that the social partners, when exercising their fundamental right to collective bargaining recognised in Article 28 of the Charter,

Secondary EU law in the field of employment protection

2.7 European Union directives now cover the following areas of general employment protection law:

(1) the employees' right to information as to their contractual terms of employment[14];

(2) the establishment of a European Works Council or other procedures for informing and consulting employees in EU-wide (groups of) undertakings[15];

(3) worker involvement in the European Company (*Societas Europaea*)[16];

(4) the information and consultation of employees to promote social dialogue between management and labour[17];

(5) the rights of workers to rest breaks, rest periods and paid annual leave,[18] with specific provision in relation to workers in the road transport sector[19];

(6) the protection of young people at work[20];

(7) the right to parental leave on the birth or adoption of a child[21];

(8) the rights of part-time workers[22];

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have taken care to strike a balance between their respective interests (see, to that effect, *Rosenbladt*, paragraph 67 and the case-law cited).

67 Where the right of collective bargaining proclaimed in Article 28 of the Charter is covered by provisions of European Union law, it must, within the scope of that law, be exercised in compliance with that law (see, to that effect, Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union ('Viking Line')* [2007] ECR I-10779, paragraph 44, and Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 91).

68 Consequently, when they adopt measures falling within the scope of Directive 2000/78, which gives specific expression in the field of employment and occupation to the principle of non-discrimination on grounds of age, the social partners must comply with that directive (see, to that effect, Case C-127/92 *Enderby* [1993] ECR I-5535, paragraph 22)."

[14] Contracts of Employment Directive 91/533/EEC [1991] OJ L288/32.

[15] European Works Council Directive 94/45/EC [1998] OJ L254/64. This Directive has subsequently been repealed and replaced with effect from 6 June 2011 by European Parliament and Council Directive 2009/38/EC [2009] OJ L225/16.

[16] European Company Directive 2001/86/EC [2001] OJ L294/22.

[17] Information and Consultation of Employees (Social Dialogue) Directive 2002/14/EC [2002] OJ L80/29.

[18] Working Time Directive 2003/88/EC [2003] OJ L229/9.

[19] Road Transport Working Time Directive 2002/15/EC [2002] OJ L80/35.

[20] Young Workers Directive 94/33/EC [1994] OJ L216/12.

[21] Parental Leave Directive 96/34/EC [1996] OJ L145/4. This Directive has been repealed and replaced with effect from 8 March 2012 by Council Directive 2010/18/EU [2010] OJ L68/13.

(9) the rights of fixed-term workers[23];

(10) the rights of temporary agency workers[24];

(11) the rights of posted workers[25];

(12) the rights of workers on business transfers to protection and preservation of their acquired employment rights[26];

(13) the rights of workers in the event of collective redundancies[27]; and

(14) the rights of workers on the insolvency of their employer.[28]

2.8 And the substantive equality law of the EU now covers the following areas of discrimination in the workplace:

(15) equality between men and women; [29]

(16) discrimination based on transgendered status; [30]

(17) discrimination based on racial or ethnic origin; [31]

(18) discrimination based on disability; [32]

(19) discrimination based on age; [33]

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[22] Part-time Workers Directive 97/81/EC [1998] OJ L14/9.

[23] Fixed-term Workers Directive 99/70/EC [1999] OJ L175/43.

[24] Agency Workers Directive 2008/104/EC [2008] OJ L327/9.

[25] Posted Workers Directive 96/71/EC [1996] OJ L18/1.

[26] Acquired Rights Directive 2001/23/EC [2001] OJ L61/26.

[27] Collective Redundancies Directive 98/59/EC [1998] OJ L225/16.

[28] Insolvency Directive 2008/94/EC [2008] OJ L283/36.

[29] See: Equal Treatment (Employment) Directive 2006/54/EC; Pregnant Workers Directive 92/85/EEC; Equal Treatment (Self-employed) Directive 86/613/EEC; Equal Treatment (Social Security) Directive 79/7/EEC; and Equal Treatment (Goods and Services) Directive 2004/113/EC.

[30] See Case C-117/01 *KB v National Health Service Pensions Agency and Secretary of State for Health* [2004] ECR I-541 paras 33–35 and Case C-423/04 *Richards v Secretary of State for Work and Pensions* [2006] ECR I-3585

[31] See Race Discrimination Directive 2000/43/EC and Case C-54/07 *Centre for Equal Opportunities and Combating Racism v Firma Feryn NV* [2008] ECR I-5187.

[32] See Employment Equality Directive 2000/78/EC and Case C-303/06 *Coleman v Attridge Law* [2008] ECR I-5603 and Case C-13/05 *Chacón Navas v Eurest Colectividades SA* [2006] ECR I-6467(Grand Chamber).

(20) discrimination based on sexual orientation; [34]

(21) discrimination based on religion or belief. [35]

2.9 In all of these specific areas of employment protection claimants can rely on the EU law general principles including those also now embodied in the Charter of Fundamental Rights to claim the full protection of the law and their rights.

3. EU FUNDAMENTAL RIGHTS AND EMPLOYMENT RIGHTS

General Principles Jurisprudence of the CJEU

3.1 The CJEU has noted the following social rights as being fundamental rights implicit within the EU legal order and protected as general principles of EU law:

(1) the right to exercise one's chosen trade or profession[36];

(2) the right to join a trade union[37];

(3) the right to engage in collective bargaining[38];

(4) the right to strike or to pursue other industrial action, provided that where such action impacts upon any the "four freedoms"[39] of EU law (free movement of capital, of

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[33] See Employment Equality Directive 2000/78/EC and Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-9981; Case C-341/08 *Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] ECR I-47; and Case C-555/07 *Seda Kucukdeveci v Swedex GmbH & Co KG* [2010] ECR I-365

[34] Employment Equality Directive 2000/78/EC and Case C-267/06 *Maruko v Versorgungsanstalt der Deutschen Bühnen* [2008] ECR I-1757 and C-147/08 *Jürgen Römer v Freie und Hansestadt Hamburg* 10 May [2011] nyr (GC) at [53]-[64]

[35] Employment Equality Directive 2000/78/EC

[36] Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727.

[37] See Joined Cases C-193/87 & C-194/87 *Maurissen and another v Court of Auditors* [1990] ECR I-95.

[38] See Case C-271/08 *Commission v Germany* [2010] ECR I–7091 at para 37:

> "[T]he right to bargain collectively … is recognised both by the provisions of various international instruments which the Member States have cooperated in or signed, such as Article 6 of the European Social Charter, signed at Turin on 18 October 1961 and revised at Strasbourg on 3 May 1996, and by the provisions of instruments drawn up by the Member States at Community level or in the context of the European Union, such as Article 12 of the Community Charter of the Fundamental Social Rights of Workers adopted at the meeting of the European Council held in Strasbourg on 9 December 1989, and Article 28 of the Charter of Fundamental Rights of the European Union ('the Charter'), an instrument to which Article 6 TEU accords the same legal value as the Treaties."

[39] See Case T-115/94 *Opel Austria GmbH v Council of the European Communities* [1997] ECR II-39 at para 108.

goods and of services[40] and of workers and establishment[41]) it will be licit only if it could be said to be *proportionate* in all the circumstances, which is to say, the industrial action:

(i) reasonably falls within the scope of a legitimate purpose recognised as such by the CJEU (such as the protection of jobs or conditions of employment);

(ii) "is suitable for ensuring the achievement of the objective pursued and does not go beyond what is necessary to attain that objective"; and

(iii)the union does not have other means available to resolve the dispute;

(5) the right to freedom of expression within employment,[42] against a background of duties relative to the maintenance of mutual[43] trust and confidence within that employment[44];

(6) the right not to be discriminated in employment on the basis of (other EU) nationality.[45]

3.2 In *NS v. Home Office* the Grand Chamber CJEU confirmed that:

> "[T]he Member States must not only interpret their national law in a manner consistent with European Union law but also make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the European Union legal order or with the other general principles of European Union law (see, to that effect, Case C-101/01 *Lindqvist* [2003] ECR I-12971, paragraph 87, and Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, paragraph 28)." [46]

[40] See Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareforbundet* [2007] ECR I-11767.

[41] See Case C-438/05 *International Transport Workers' Federation v Viking Line ABP* [2007] ECR I-10779.

[42] Case C-150/98 P *Economic and Social Committee v E* [1999] ECR I-8877 at para 13.

[43] See Case T-203/95 R *Connolly v Commission* [1995] ECR II-2919 at para 35.

[44] See Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611 at paras 127–29; and *Commission v Edith Cresson* [2006] ECR I-6386.

[45] Case C-214/94 *Ingrid Boukhalfa v Germany* [1996] ECR I-2253, applying the EU prohibition against nationality discrimination to a Belgian national and permanent Algerian resident who was employed by the German authorities in their embassy in Algeria, to require her equal treatment with employees of German nationality.

[46] Joined Cases C-411/10 and C-493/10 *N. S. v Secretary of State for the Home Department* 21 December [2011] ECR I-nyr at para 77

The EU Charter of Fundamental Rights

3.3 Since the coming into force of the Lisbon Treaty provisions according the Charter of Fundamental Rights of the European Union ("CFR") with "the same legal value as the Treaties" (Article 6 TEU), the CJEU now, as a matter of course, refers to provisions of the Charter in its judgments.

3.4 It is now clear that any proper understanding of the intent and effect of EU law has now to be done against a background of an appreciation of the terms of the EU Charter of Fundamental Rights, as interpreted by the CJEU.

3.5 A brief survey of the ever burgeoning Charter jurisprudence shows that the CJEU uses the Charter as a source of general principles of EU law, against which provisions of Directive and EU regulations (and provisions of EU soft law) have to be interpreted and applied. Indeed, the rights set out in the Charter appear to be being treated by the European Court as the paramount provisions of the EU against which even primary provisions of the EU law in the Treaties may be measured and assessed.

3.6 And unsurprisingly, perhaps, given the CJEU's continuing history of "discovering" fundamental rights as unwritten general principle of EU law, [47] the express provisions of the Charter are not seen as *confining* the Court of Justice. Instead the Luxembourg Court maintains its "dynamic" approach, with the express rights set out in the Charter being seen as the starting point of any consideration of EU law, rather than an end-point of discussions as to the nature, extent and effect of EU law.

3.7 Article 51(1) CFR provides that the provisions of the Charter bind the Member States when they are implementing EU law. [48] When a provision of EU law (whether primary EU law in the Treaties or secondary provisions of EU law in directives or regulations) expressly allows for the exercise of a discretionary power by a Member State, the

[47] See for example: Case C-114/04 *Mangold* [2005] ECR I-9981; Case C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co KG* [2010] ECR I-365; and Case C-132/11 *Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH v Betriebsrat Bord der Tyrolean Airways Tiroler Luftfahrt Gesellschaft mbH* 7 June [2012] ECR I-nyr on age discrimination as an unwritten general principle of EU law, albeit now reflected in the terms of the Equality at Work Directive 2000/78/EC and Article 21 CFR

[48] See orders in the following cases among others: Case C-339/10 *Asparuhov Estov and Others* [2010] ECR I-11465, paragraph 13; Case C-457/09 *Chartry* [2011] ECR I-819, paragraph 25; and order of 14 December 2011 in Joined Cases C-483/11 and C-484/11 *Boncea and Others*, paragraph 29

Member State must exercise that power in accordance with EU law. [49] Consequently, as the Grand Chamber of the CJEU confirmed in *NS v. Home Office*:

> "…a Member State which exercises that discretionary power must be considered as implementing EU law within the meaning of art.51(1) of the Charter." [50]

3.8 Similarly, a Member State is implementing EU law for the purposes of Article 51(1) if it exercises a power of derogation from a provision of EU law. [51] Where the requisite connection has been established between the (in)action of the Member State and EU law, the CJEU claims jurisdiction to rule on all and any Charter issues which might arise in a preliminary ruling, including the issue of what is required of the Member State to comply with the individual's fundamental EU Charter right to an effective remedy (Article 47(3) CFR).

Provisions of the EU Charter of Fundamental Rights ("CFR") relevant to employment

Trade union freedoms

3.9 Article 12(1) CFR is in the following terms:

> "Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests."

3.10 This EU Charter provision corresponds to the terms of Article 11 ECHR (which is noted below) and therefore, in accordance with Article 52(3) CFR, it falls to be interpreted and applied in a manner which is consistent with the Convention provision, as understood in the jurisprudence of the European Court of Human Rights.[52]

Freedom to choose and pursue and occupation or business

3.11 Separately, Article 15(1) CFR provides:

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[49] See among other decisions C-5/88 *Wachauf v Germany* [1989] ECR 2609.

[50] Joined Cases C-411/10 and C-493/10 *NS v. Home Office* 21 December [2011] ECR I-nyr, [2012] 3 WLR 1374 at §68

[51] C-260/89 *Elleniki Radiophonia Tileorassi (ERT) v Dimotiki Eatairia Pliroforissis* [1993] ECR I-2925 ("*ERT*")

[52] See Case C-400/10 PPU *J McB v LE* [2010] ECR I-8965 at para 53

> Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.

And Article 16 CFR states that:

> The freedom to conduct a business in accordance with Union laws and national laws and practices is recognised.

3.12 In contrast to Article 12 CFR, Articles 15 CFR and 16 CFR are *not* rights which correspond to anything expressly set out in the European Convention on Human Rights. They are instead, derived from the aforementioned case law of the Court of Justice[53] (which, in turn, has taken the concept from the principle contained in the post-War German Constitution, the *Grundgesetz*, which, in the light of the history of the 1930s Nuremberg laws which began the persecution of Germany's Jews by prohibiting their access to certain professions, recognised the right to pursue the occupation of one's choice as a fundamental constitutional right). A recent example of the CJEU grappling with these rights is seen in *Deutsches Weintor eG v. Land Rheinland-Pfalz* [54]

Employment protection rights

3.15 Article 35 CFR is one of the provisions contained in Title IV of the EU Charter of Fundamental Rights which is headed 'Solidarity' and sets a number of rights and principles in the area of socio-economic rights. These are derived from a variety of provisions, including the original 1961 and revised 1996 European Social Charter, and the 1989 Community Charter on the rights of workers. The following may be relevant to the area of general employment protection:

- Article 27 CFR: workers' right to information and consultation within their employment;

- Article 28 CFR: workers' and employers' right of collective bargaining and action, including strike action;

[53] See, eg, Case 4/73 *Nold* [1974] ECR 491 at paras 12-14; and Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727.

[54] Case C-544/10 *Deutsches Weintor eG v Land Rheinland-Pfalz* 6 September [2012] ECR I-nyr at paras 45, 52

- Article 29 CFR: workers' right of access to placement services;

- Article 30 CFR: workers' right to protection in the event of unjustified dismissal[55];

- Article 31 CFR: workers' right to fair and just working conditions, having regard to their health, safety and dignity, including, specifically, the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave;

- Article 32 CFR: prohibition of child labour and the protection of young people at work;

- Article 33 CFR: the right to protection from dismissal from employment for a reason connected with maternity, and the right to paid maternity leave and to parental leave following the birth or adoption of a child.

Provisions of the EU Charter of Fundamental Rights on Social Solidarity

3.13 The remaining of Title IV Solidarity rights are not confined to the workplace but apply in society at large. Thus we have:

- Article 34 CFR on social security and social assistance;

- Article 35 on health care

- Article 36 on access to services of "general economic interest"

- Article 37 on environmental protection; and

- Article 38 on consumer protection.

[55] In Case C-361/07 *Polier* 16 January [2008] ECR I-6* (sum pub), a French court made a preliminary reference on the compatibility with Art 30 CFR and other International Labour Organisation ('ILO') and European Social Charter provisions of a new form of employment contract (*contrat nouvelle d'embauche*) in France under which the employee's normal statutory employment protection was suspended for the contract's first two years. The CJEU held that the dispute fell outside the scope of EU law and that it was therefore not competent to answer the reference.

3.14 Article 34 CFR spells out the rights to social security and social assistance recognised as protected as a matter of EU law. Article 34(1) CFR confirms the right to social protection 'in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment'. The Praesidium Explanations to the Charter note that this provision is based on Articles 153 and 156 TFEU, as well as on Article 12 of the European Social Charter[56] and point 10 of the Community Charter on the Fundamental Social Rights of Workers.[57]

Social security rights

3.15 Article 34(2) CFR observes that everyone residing and moving legally within the EU is entitled to social security benefits and social advantages in accordance with EU law and national laws and practices. The Praesidium Explanations note that this paragraph is based on the terms of Articles 12(4)[58] and 13(4)[59] of the European Social Charter, and on point 2 of the Community Charter on the Fundamental Social Rights of Workers,[60] and

[56] Art 12 of the European Social Charter, so far as relevant, states: 'With a view to ensuring the effective exercise of the right to social security, the Parties undertake: (1) to establish or maintain a system of social security; (2) to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security; (3) to endeavour to raise progressively the system of social security to a higher level ...'

[57] Point 10 of the Community Charter on the Fundamental Social Rights of Workers provides: 'According to the arrangements applying in each country: every worker of the European Community shall have a right to adequate social protection and shall, whatever his status and whatever the size of the undertaking in which he is employed, enjoy an adequate level of social security benefits; persons who have been unable either to enter or re-enter the labour market and have no means of subsistence must be able to receive sufficient resources and social assistance in keeping with their particular situation.'

[58] Art 12(4) of the European Social Charter provides: 'With a view to ensuring the effective exercise of the right to social security, the Contracting Parties undertake: ... (4) to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure: (a) equal treatment with their own nationals of the nationals of other Contracting Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Contracting Parties; (b) the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Contracting Parties.'

[59] Art 13(4) of the European Social Charter, so far as relevant, states: 'With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake: ... (4) to apply the provisions referred to in paragraphs 1, 2 and 3 of this article [on the right to social and medical assistance] on an equal footing with their nationals to nationals of other Parties lawfully within their territories, in accordance with their obligations under the European Convention on Social and Medical Assistance, signed at Paris on 11 December 1953.'

[60] The Community Charter of the Fundamental Social Rights of Workers states at point 2: 'The right to freedom of movement shall enable any worker to engage in any occupation or profession in the Community in

also reflects the rules arising from (the now repealed) Regulation (EEC) 1408/71 and Regulation (EEC) 1612/68.

3.16 Lastly, Article 34(3) CFR, which provides that, with a view to combating social exclusion and poverty, the EU '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 the rules laid down by EU law and national laws and practices, is said, in the Praesidium Explanations, to be a right which the EU must respect in the context of policies based on Article 153 TFEU on the social protection of workers. The Praesidium Explanations note that this Charter formulation in Article 34(3) CFR 'draws on' Article 13 of the European Social Charter[61] and Articles 30[62] and 31[63] of the revised Social Charter, and on the already noted provisions of point 10 of the Community Charter on the Fundamental Social Rights of Workers.

3.16In *Kamberaj v Autonomous Province of Bolzano* the Grand Chamber CJEU considered the application of the principles regarding the elimination of social exclusion and poverty contained in Article 34 CFR to the issue of the entitlement of third-country nationals who were lawfully long-term residents to social benefits. The issue was whether or not such

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accordance with the principles of equal treatment as regards access to employment, working conditions and social protection in the host country.'

[61] Art 13 of the original 1961 European Social Charter, so far as relevant, states: 'With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake: (1) to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition; (2) to ensure that persons receiving such assistance shall not, for that reason, suffer from a diminution of their political or social rights; (3) to provide that everyone may receive by appropriate public or private services such advice and personal help as may be required to prevent, to remove, or to alleviate personal or family want ...'

[62] Art 30 of the revised 1996 European Social Charter is in the following terms: 'With a view to ensuring the effective exercise of the right to protection against poverty and social exclusion, the Parties undertake: (a) to take measures within the framework of an overall and coordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance; (b) to review these measures with a view to their adaptation if necessary.'

[63] Art 31 of the revised European Social Charter is in the following terms: 'With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed: (1) to promote access to housing of an adequate standard; (2) to prevent and reduce homelessness with a view to its gradual elimination; (3) to make the price of housing accessible to those without adequate resources.'

individuals were able to rely upon this Charter provision to claim equal treatment with other EU nationals with regard to social security, social assistance and social protection, in particular housing benefit for low income tenants. The Grand Chamber stated:

> "when determining the social security, social assistance and social protection measures defined by their national law and subject to the principle of equal treatment enshrined in Article 11(1)(d) of Directive 2003/109, the Member States must comply with the rights and observe the principles provided for under the Charter, including those laid down in Article 34 thereof. Under Article 34(3) of the Charter, in order to combat social exclusion and poverty, the Union (and thus the Member States when they are implementing European Union law):
>
> > '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 the rules laid down by European Union law and national laws and practices'…..
>
> [A]ccording to Article 34 of the Charter, 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. It follows that, in so far as the benefit in question in the main proceedings fulfils the purpose set out in that article of the Charter, it cannot be considered, under European Union law, as not being part of core benefits within the meaning of Article 11(4) of Directive 2003/109. [64]

Protocol 30 and the national carve-out from Charter Solidarity rights

3.17It should be noted that Protocol 30 TEU apparently seeks to carve out an exception or opt-out for both Poland and the UK in relation to the application of these Title IV Charter provisions, by providing in Article 1(2) of the Protocol that

> "nothing in Title IV 'Solidarity' of the Charter creates justiciable rights applicable in Poland or in the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law."

The Thatcher legacy of an 'anti-Social Europe' would appear to live on in this Protocol. The Poles seems more embarrassed by this opt-out as is plain from the terms of their Declaration appended to the Lisbon Treaty which states:

> Poland declares that, having regard to the tradition of social movement of 'Solidarity' and its significant contribution to the struggle for social and labour rights, it fully respects social and labour rights, as established by European Union law, and in particular those reaffirmed in Title IV of the Charter of Fundamental Rights of the European Union.

3.18The terms of Protocol 30 were briefly considered by the CJEU in its judgment in *N. S. v Secretary of State for the Home Department* where it observed:

[64] Case C-571/10 *Servet Kamberaj v Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES)* 24 April [2012] ECR I-nyr at para

"119. Protocol (No 30) does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol. Thus, according to the third recital in the preamble to Protocol (No 30), Article 6 TEU requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that article. In addition, according to the sixth recital in the preamble to that protocol, the Charter reaffirms the rights, freedoms and principles recognised in the Union and makes those rights more visible, but does not create new rights or principles.

120 In those circumstances, Article 1(1) of Protocol (No 30) [65] explains Article 51 of the Charter with regard to the scope thereof *and does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those Member States from ensuring compliance with those provisions.*

121 Since the rights referred to in the cases in the main proceedings do not form part of Title IV of the Charter, there is no need to rule on the interpretation of Article 1(2) of Protocol (No 30)." [66]

3.19 The tenor of this judgment suggests that it would be unlikely, should the issue ever come directly before it again, for the CJEU to attribute any greater legal weight to Article 1(2) (or any other provisions) of Protocol 30. Protocol 30 may now perhaps best be seen as a time-specific political face-saving measure, rather than any form of binding legal opt-out for the UK or Poland from any substantive charter provision, even those concerning Solidarity.

3.20 In any event, given that both Poland and the UK already recognise most of these "solidarity rights" – notably the right not to be unfairly dismissed, the right to strike, and the right to limitation on working and to paid leave – and given that the Charter (which under Article 6(1) TEU is to be regarded as primary EU law of an equivalent status to the Treaties) avowedly contains only existing rights which were already (albeit sometimes implicitly or inchoately) recognised under EU law, [67] then it could be argued that Member

[65] Article 1(1) to Protocol 30 states:

"The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms."

[66] Joined Cases C-411/10 and C-493/10 *N. S. v Secretary of State for the Home Department* 21 December [2011] ECR I-nyr at para 77

[67] The Praesidium Explanations relating to the Charter [2007] OJ C303/17. – *which, under Article 52(7) CFR are to "*be given due regard by the courts of the Union and of the Member States" states as follows in relation *to Article 30 CFR*

"*Protection in the event of unjustified dismissal*

This Article draws on Article 24 of the revised Social Charter. See also Directive 2001/23/EC on the safeguarding of employees' rights in the event of transfers of undertakings, and Directive 80/987/EEC

States existing unfair dismissal law now falls within the ambit of EU law [68] and hence under the ultimate scrutiny of the CJEU for its compliance with general principles of EU law. [69]

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on the protection of employees in the event of the insolvency of their employer, as amended by Directive 2002/74/EC."

[68] See, for example, *Bleuse v MBT Transport Ltd and another* [2008] ICR 488, EAT at para 34:

> "34. … Ms Kreisberger [for the claimant] says that the employment tribunal's decision to decline jurisdiction denies the claimant an effective remedy in respect of the rights conferred by Community law. In this context it was further submitted that unfair dismissal is the domestic implementation of a right derived from Community law, namely the right not to be unjustifiably dismissed, found in article 30 of the Charter of fundamental rights of the European Union (OJ 2000 C364, p 1), and that the courts similarly had to construe the territorial scope of unfair dismissal law so as to give effect to that right."
>
> ….
>
> 62 Ms Kreisberger … does submit that the law of unfair dismissal can also be seen as implementing a material Community right, or at least something closely analogous to it. She contends that such a right is conferred upon the claimant pursuant to the Charter of fundamental rights of the European Union. Article 30 provides:
>
> > 'Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices.'
>
> ….
> 66 In my judgment it is impossible to say that the unratified Charter confers any directly effective rights on anyone. Indeed the fact that, as the Court of Justice says, it is not a legally binding instrument seems to me to make the contrary argument impossible to sustain. No court has accepted an argument that the provisions of this unratified charter, at least unratified at the time the issues in this case arose have conferred any enforceable rights on European citizens. I therefore reject this part of the argument."

[69] See Steve Peers Supremacy, equality and human rights: comment on Kucukdeveci (C-555/07) (2010) European Law Review 854-5:

> "Prior to the entry into force of the Treaty of Lisbon, the Court's practice was (from 2006) to refer to the Charter as, in effect, a subsidiary measure "reaffirming" the rights which formed part of the general principles of EU law. However, the Case C-555/07 *Kücükdeveci v. Swedex* [2010] ECR I-365 judgment is a turning point, as the first case where the Court refers to the new legal status of the Charter as set out in the Treaty of Lisbon. But it is noticeable that, in this judgment, the Court still refers primarily to the general principles of the European Union as a source of human rights rules, particularly in the latter part of the judgment when assessing the legal effect of the EU rules under discussion. By way of comparison, most other relevant judgments of the Court since the entry into force of the Treaty of Lisbon have referred exclusively or primarily to the Charter as a source of human rights rules.
>
> The divergence of approach in the *Kücükdeveci* judgment might be explained by the very recent entry into force of the Treaty of Lisbon at the time of the judgment, but another possible explanation is that, as noted above, a Protocol to the Treaties restricts the legal effect of the Charter, in particular as regards *challenges to the validity of national law* and the justiciability of social rights, in the United Kingdom, Poland and (in future) the Czech Republic--but there is nothing in that Protocol to limit the legal effect of the general principles of EU law. It is obviously tempting to conclude that the Court has avoided any questions as to the impact of the *Kücükdeveci* judgment in these Member States by referring to the legal effect of the general principles, rather than the Charter.

4. SOCIAL EMPLOYMENT PROTECTION PROVISIONS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

4.1 Any proper understanding of the Charter's provisions also necessarily requires a proper understanding of the relevant Strasbourg jurisprudence since Article 52(3) of the Charter requires that those Charter rights which correspond to rights already guaranteed by the ECHR be given the same meaning and scope as, and no lesser degree of protection than, provided under the ECHR. In *J McB v LE* the CJEU ruled that where Charter rights paralleled ECHR rights, the Court of Justice should follow any "clear and constant" jurisprudence of the European Court of Human Rights, noting that:

> "It is clear that the said Article 7 [of the EU Charter] contains rights corresponding to those guaranteed by Article 8(1) of the ECHR. *Article 7 of the Charter must therefore be given the same meaning and the same scope as Article 8(1) of the ECHR, as interpreted by the case-law of the European Court of Human Rights* (see, by analogy, Case C-450/06 *Varec* [2008] ECR I-581, paragraph 48). [70]

4.2 This, it is suggested, will inevitably have the result that EU law and ECHR law will increasingly come to be seen as "a single, converging legal system" (see for example the *Handbook on European non-discrimination law* [71]) which has been produced by the EU's Agency for Fundamental Rights together with the European Court of Human Rights with the express purpose of drawing together Strasbourg and Luxembourg equality law case law.) There is then no doubt about the growing convergence between EU law, particularly as influenced and interpreted in the light of the EU Charter of Fundamental Rights, and the ECHR and the consequent need to understand the jurisprudence of the European Court of Justice in any application of EU law falling within the ambit of the Charter. As has been noted:

> "With the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights of the European Union became legally binding. Furthermore, the Lisbon Treaty provides for EU accession to the European Convention on Human Rights. In this context, increased knowledge of common principles developed by the Court of Justice of the European Union and the European Court of Human Rights is not only desirable but in fact essential …. [72]

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[70] Case C-400/10 PPU *J McB v LE* [2010] ECR I-8965 at para 53

[71] Available at http://fra.europa.eu/fraWebsite/attachments/FRA-CASE-LAW-HANDBOOK_EN.pdf

[72] *Handbook on European non-discrimination law* (Luxembourg: Publications Office of the European Union, 2011) a joint production of the EU's Agency for Fundamental Rights and the European Court of Human Rights at 3. This book is described by the Agency of Fundamental Rights in their press release of 21 March 2011 as:

4.3 And as Advocate General Trstenjak has observed

> "[T]he judgments of the European Court of Human Rights essentially always constitute case-specific judicial decisions and not the rules of the ECHR themselves, and it would therefore be wrong to regard the case-law of the European Court of Human Rights as a source of interpretation with full validity in connection with the application of the Charter. [73]
>
> This finding, admittedly, may not hide the fact that particular significance and high importance are to be attached to the case-law of the European Court of Human Rights in connection with the interpretation of the Charter of Fundamental Rights, with the result that it must be taken into consideration in interpreting the Charter. [74]
>
> 147. This view is confirmed in the case-law of the Court of Justice, which systematically takes into consideration the case-law of the European Court of Human Rights on the relevant provisions of the ECHR in interpreting the provisions of the Charter of Fundamental Rights.[75]" [76]

4.4 The existence of the original European Social Charter 1961, with its emphasis on collective social, economic and welfare rights, was in the past sometimes used by the European Court of Human Rights to justify and explain its own somewhat restrictive approach to the interpretation and application of the ECHR in cases raising employment protection issues, for example on the question of a right to union recognition in the

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> "the first publication to present and explain the body of non-discrimination law stemming from the European Convention on Human Rights and European Union law as a single, converging legal system."

[73] See also the Opinion of Advocate General Poiares Maduro of 9 September 2008 in Case C-465/07 *Elgafaji* [2009] ECR I-921, paragraph 23.

[74] See also, in this connection, Von Danwitz, T., Article 52, in *Europäische Grundrechtecharta* (ed. Tettinger, P./Stern, K.), Munich 2006, paragraph 57 et seq., who stresses, on the one hand, that the Charter of Fundamental Rights does not accord the European Court of Human Rights the exclusive power of interpretation of the relevant rights, but, on the other, concedes that the Court of Justice is bound by the interpretation by the European Court of Human Rights of the rights under the ECHR in so far as it may not fall short of the level of protection guaranteed by the European Court of Human Rights. See also Lenaerts, K./de Smijter, E., 'The Charter and the Role of the European Courts', *Maastricht Journal of European and Comparative Law* 2001, p. 90, 99, who appear to accept that the Court of Justice is required to respect and adopt the relevant case-law of the European Court of Human Rights.

[75] See, most recently, Joined Cases C-92/09 and C-93/09 *Volker and Markus Schecke* [2010] ECR I-0000, paragraph 43 et seq. See also *Elgafaji*, cited above in footnote 30 above, paragraph 44, in which the Court stressed as an *obiter dictum* that the interpretation given in that judgment of the relevant provisions of Directive 2004/83 was fully compatible with the ECHR, including the case-law of the European Court of Human Rights relating to Article 3 of the ECHR. In Case C-400/10 PPU *McB* [2010] ECR I-8965, paragraph 53, the Court expressly found, with regard to Article 7 of the Charter of Fundamental Rights, that that provision must be given the same meaning and the same scope as Article 8(1) of the ECHR, *as interpreted by the case-law of the European Court of Human Rights*.

[76] Case C-411/10 *NS v Secretary of State for the Home Department* the Opinion of Advocate General Trstenjak of 22 September 2011 at paras 146-7

workplace[77] or on the right to strike.[78] But more recent case law from the Strasbourg Court – decided, in, part under the influence of the jurisprudence of the CJEU – has shown a greater willingness to allow for the use of Convention rights to provide protection in the workplace.

Article 6 ECHR and the fair trial rights of employees

4.5 In *Pellegrin v France*,[79] the European Court of Human Rights sought specifically to realign its case law with that of the CJEU on free movement of workers, in relation to the fairness rights to be accorded employees in the public sector. Subsequently the *Pellegrin* criteria were further modified by the Grand Chamber of the Strasbourg Court in *Vilho Eskelinen and Others v Finland*[80] to give Article 6 fairness protection to a broader range of public service so as to ensure compatibility with the earlier CJEU jurisprudence seen in *Johnston v Chief Constable of the RUC*[81] on the reach of fundamental fairness and court access rights even in relation to employment in the police, and in *Sirdar v Ministry of Defence*[82] to working in the armed forces.

4.6 In *Cudak v Lithuania*[83] the Grand Chamber held that a secretary employed in the Polish embassy who was dismissed after claiming she had been sexually harassed by a member of the diplomatic staff, was unlawfully denied her right of access to a court to determine her claim for unfair dismissal. The Strasbourg Court held that there was no basis for court access to be denied on the basis of Poland's claim to State immunity when the secretary's job did not involve her performing any functions related to the exercise of sovereignty by the State concerned.

[77] See, eg, *National Union of Belgian Police v Belgium* (1979-80) 1 EHRR 578; *Swedish Engine Drivers' Union v Sweden* (1979-80) 1 EHRR 617; *Schmidt and Dahlström v Sweden* (1979-80) 1 EHRR 632; *Council for Civil Service Unions v UK* (1987) 50 D&R 228, (1988) 10 EHRR 26.

[78] *National Association of Teachers in Further and Higher Education v United Kingdom* [1998] ECommHR (First Chamber, 16 April 1998); for commentary, see [1998] *European Human Rights Law Review* 773.

[79] *Pellegrin v France* (2001) 31 EHRR 651.

[80] *Vilho Eskelinen and Others v Finland* (2007) 45 EHRR 43 (Grand Chamber).

[81] Case 222/84 *Johnston v Chief Constable of the RUC* [1986] ECR 1651.

[82] Case C-273/97 *Sirdar v Ministry of Defence* [1999] ECR I-7403 at para 20.

[83] *Cudak v Lithuania* (2010) 51 EHRR 15.

4.7 In *Lombardi Vallauri v Italy*[84] the Strasbourg Court extended the principle of Article 6 fairness protection even to employment in the private sector by holding that held that in the circumstances of the non-renewal of the contract of a long-serving legal academic in a private Catholic university, the Italian courts should have required the university (and by necessary implication the Church authorities) to provide full and proper reasons for the claims made against the applicant which led to the non-renewal of his employment contract. Had the Italian courts done so, this would have allowed the applicant both to know just what was being said against him and, if so advised, to challenge its accuracy contest any supposed link between the opinions ascribed to him and his teaching activities. The university's mission to deliver a Catholic education could not, in the Strasbourg Court's view, justify such a basic denial of the applicant's rights to a fair process.

Article 8 ECHR and the right to work in a chosen profession

4.8 In the wake of the express recognition of the right to work in a chosen profession as a fundamental right of EU law,[85] the European Court of Human Rights has, in turn, sought to find such a right in the ECHR. It has done so by giving a broad interpretation to Article 8 ECHR so as to include a right to earn a living through the pursuit of a chosen profession as an aspect of an individual's private life.[86] Legislative or administrative measures which have the effect of preventing or disproportionately impeding an individual from pursuing his chosen trade or profession within a contracting state may be said for the purposes of Article 8 ECHR to constitute an interference with private life.[87]

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[84] *Lombardi Vallauri v Italy* [2009] ECHR 39128/05 (Second Section, 20 October 2009).

[85] Case 4/73 *Nold* [1974] ECR 491 at paras 12–14; and Case 44/79 *Hauer v Land Rheinland-Pfalz* [1979] ECR 3727.

[86] See, e.g., the decisions of the ECtHR in the following cases: *Sidabras v Lithuania* (2004) 42 EHRR 104; *Turek v Slovakia* (2006) 44 EHRR 861; *Molka v Poland* [2006] ECHR 56550/00 (Fourth Section, 11 April 2006); *Lykourezos v Greece* (2008) 46 EHRR 7; *Campagnano v Italy* (2009) 48 EHRR 43; and *Žičkus v Lithuania* [2009] ECHR 26652/02 (Second Section, 7 April 2009) at para 28.

[87] See *R (Wright) v Secretary of State for Health* [2009] 1 AC 739, HL and *R (L) v Commissioner of Police of the Metropolis* [2010] 1 AC 410 *per* Lord Hope of Craighead at para 24:

> "Excluding a person from employment in her chosen field is liable to affect her ability to develop relationships with others, and the problems that this creates as regards the possibility of earning a living can have serious repercussions on the enjoyment of her private life … She is entitled also to have her good name and reputation protected … As Baroness Hale said in *R (Wright) v Secretary of State for Health* [2009] 1 AC 739, paragraph 36, the fact that a person has been excluded from employment is likely to get about and, if it does, the stigma will be considerable."

Article 8 ECHR and the right to respect for private life in (and from) the workplace

4.9 In *X v Commission*,[88] the CJEU had regard to Article 8(1) ECHR and found that the Commission as an employer had breached the individual's right to respect for his private life in requiring a compulsory AIDS tests of its employees.

4.10 Following this, in *Alison Halford v United Kingdom*,[89] the European Court of Human Rights also recognised that the individual has rights of respect for private life even within the workplace, which rights must be protected and respected by the employer. The Strasbourg Court held that telephone taps carried out on both Assistant Chief Constable Halford's office and home telephones by her employer to gather material to assist in their defence against sex discrimination proceedings brought by her were an unlawful violation of her Article 8 ECHR rights.

4.11 Similarly in *Copland v United Kingdom*,[90] the Strasbourg Court held that monitoring by an employer of an employee's telephone, e-mail and Internet usage while at work and without her knowledge constituted a violation of her right to respect for private life and correspondence. It was irrelevant that the data were not disclosed to anybody or used against the employee in disciplinary proceedings.

4.12 In *Bernhard Schüth v Germany*,[91] the Strasbourg Court considered the lawfulness of the dismissal of a Church employee (the organist and choirmaster in the Catholic parish) on grounds of conduct falling within the sphere of his private and family life, namely the fact that he had separated from his wife in 1994 and in 1995 moved in with a new partner who was then expecting his child. In finding his dismissal from his position by the Church authorities to be incompatible with respect for his Convention rights, the ECtHR found that the German labour courts had failed properly to take into account and balance the applicant's right to respect for his private and family life against the interests of his

[88] Case C-404/92P *X v Commission* [1994] ECR I-4347.

[89] *Alison Halford v United Kingdom* (1997) 25 EHRR 523.

[90] *Copland v United Kingdom* (2007) 45 EHRR 37.

[91] *Schüth v Germany* (2011) 52 EHRR 32 at paras 67-72

Church employer. While the Strasbourg Court accepted that in signing the employment contract, the applicant had entered into a duty of loyalty towards the Catholic Church which limited his right to respect for his private life to a certain degree, his signature on the contract could not be interpreted as an unequivocal undertaking to live a life of sexual continence in the event of separation or divorce.[92] This decision is to be contrasted with the subsequent *Fernandez Martinez v. Spain* [93] where the dismissal of an individual, a laicised Catholic priest, from his position as a teacher of religion and morals in a State school following the withdrawal of the necessary episcopal approval as a result of the teachers public association with a movement seeking to promote married priests with the Latin-rite was held not to breach the individual's Convention rights. And in *Pay v UK* [94] the Strasbourg Court upheld the Convention proportionality of the dismissal of a probation officer who worked with sex offenders, once his out-of-work involvement in hedonist and fetish clubs and in selling bondage and sadomasochism products had become public and was brought to the attention of his employer.

4.13 Any failure within a Member State's domestic context by a (public or private) employer properly to respect an individual's Convention right to respect for private life within the course of his employment may be taken into account in a variety of contexts, including in assessing the fairness of any dismissal connected to or resulting from the ex facie interference with this Convention rights

[92] Compare and contrast with the decisions of the European Court of Human Rights in: *Michael Obst v Germany* [2010] ECtHR 425/03 (Fifth Section, 23 September 2010), where the Strasbourg Court accepted the Convention compatibility of the German labour courts' upholding of the lawfulness of dismissal and excommunication of a Mormon individual who had been employed by the Mormon Church as director for Europe of their public relations department, after he had confessed to the church authorities of an adulterous affair and *Siebenhaar v Germany* [2011] ECHR 18136/02 (Fifth Section, 3 February 2011) where the Strasbourg court held that the dismissal of a Catholic kindergarten teacher by Protestant Church for her active commitment to a third religious community - which styled itself the Universal Church/Brotherhood of Humanity - was justified. See also the Strasbourg Court's non-admissibility decision in *Pay v UK* [2008] ECHR 32792/05 (Fourth Section, 16 September 2008) (also reported in [2009] IRLR 139), upholding the Convention proportionality of the dismissal of a probation officer who worked with sex offenders, once his out-of-work involvement in hedonist and fetish clubs, and in selling bondage and sadomasochism products, had become public and was brought to the attention of his employer.

[93] *Fernandez Martinez v. Spain* [2012] ECHR 56030/07 (Third Section, 15 May 2012)

[94] *Pay v UK* [2008] ECtHR 32792/05 (Fourth Section, 16 September 2008) (also reported in [2009] IRLR 139)

Article 10 ECHR on freedom of speech and the workplace

4.14 In the 1985 application *Van der Heijden v The Netherlands*,[95] the European Commission of Human Rights accepted that dismissal from employment for exercising the right to free expression could constitute a penalty or restriction on that freedom just as much as a specific prohibition on free speech. The Strasbourg Court disagreed, however, stating in 1986 that the Convention protected freedom of expression, not a right to job security.[96] The Commission ruled in the same year that a Belgian teacher had been lawfully dismissed after she appeared on television to complain about State discrimination against homosexuals, citing her own case in which she ascribed her failure to be promoted to head teacher to the fact that she was herself gay.[97] . Both the Commission and Court took the view that acceptance of public office whether in becoming a judge or a senior civil servant, or local government officer, or, indeed, a teacher[98] could legitimately bring with it certain restrictions on free speech.

4.15 The Strasbourg jurisprudence began to alter with the 1995 decision in *Vogt v Germany*, where the European Court of Human Rights held by the narrowest of margins (10:9) that dismissal by the German authorities of a State-employed teacher in a permanent post by reason of her membership of the German Communist Party (DKP) constituted an unlawful interference with her right to free expression.[99] Further, in *Wille v Liechtenstein*, the European Court of Human Rights affirmed that sitting judges have rights to free expression under Article 10 ECHR to allow them to comment on constitutional matters[100]; and in subsequent cases the Strasbourg Court has confirmed

[95] *Van der Heijden v The Netherlands* [1985] ECommHR 11002184 (8 March 1985); (1985) 41 D&R 268

[96] See the *German Probationary Teachers* cases, *Kosiek v Germany* (1986) 9 EHRR 328, concerning a physics teacher who was also a member of the neo-Nazi German National Democratic Party (NPD), and *Glasenapp v Germany* (1987) 9 EHRR 25.

[97] *Morissens v Belgium* [1988] ECommHR 11389/85 (3 May 1988); (1988) 56 D&R 127.

[98] See *Ahmed v United Kingdom* (2000) 29 EHRR 1, where the Court upheld the decision of the Commission in *Ahmed v United Kingdom* [1995] ECommHR 22954/93 (12 September 1995), (1995) 20 EHRR CD72 .

[99] *Vogt v Germany* (1995) 21 EHRR 205.

[100] *Wille v Liechtenstein* (1999) 30 EHRR 558. See too on judges as whistleblowers, *Kudeshkina v Russia* [2009] ECHR 29492/05 (First Section, 26 February 2009) para 94: 'The Court observes that the applicant made the public criticism with regard to a highly sensitive matter, notably the conduct of various officials dealing with a large-scale corruption case in which she was sitting as a judge. Indeed, her interviews referred to a disconcerting state of affairs, and alleged that instances of pressure on judges were commonplace and that this problem had to be treated seriously if the judicial system was to maintain its independence and enjoy public confidence. There is no doubt that, in so doing, she raised a very important matter of public interest, which

that journalists employed by public service concerns may legitimately air criticisms of their employers[101] on the basis of their responsibilities to contribute to and encourage public debate, it being in the nature of their professional functions to impart information and ideas,[102] and that there is little scope under Article 10(2) ECHR for restrictions on debate of questions of public interest.[103]

4.16 The question as to what responsibility, if any, the State has to ensure that there is respect for the individual employee's freedom of expression by private, i.e. non-State, employers is a vexed one. In *Rommelfanger v Germany*,[104] the applicant, a doctor, was dismissed from his position in a Catholic hospital after expressing views on abortion in print and on television, which views were not in conformity with official Church teaching. The Commission held that the State might be in breach of its obligation to respect free speech rights if it permitted a situation in which there was no 'reasonable relationship between the measures affecting freedom of expression and the nature of employment as well as the importance of the issue for the employer'. It held on the facts that views on abortion were important enough within a Catholic context to justify the dismissal of a physician from his employment with the Church.

4.17 The European Court of Human Rights has now extended the protections of Article 10 ECHR to acts of whistle-blowing by public servants acting responsibly and in good

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should be open to free debate in a democratic society. Her decision to make this information public was based on her personal experience and was taken only after she had been prevented from participating in the trial in her official capacity.'

[101] See *Fuentes Bobo v Spain* (2001) 31 EHRR 50 at para 38; and *Wojtas-Kaleta v Poland* [2009] ECHR 20436/02 (Fourth Section 16 July 2009) at para 46. See too *Manole and Others v Moldova* [2009] ECHR 13936/02 (Fourth Section, 17 September 2009).

[102] See, however, *Stoll v Switzerland* (2008) 47 EHRR 59 (Grand Chamber):

> 'Notwithstanding the vital role played by the press in a democratic society, journalists cannot, in principle, be released from their duty to obey the ordinary criminal law on the basis that Article 10 affords them protection. Paragraph 2 of Article 10 does not, moreover, guarantee a wholly unrestricted freedom of expression even with respect to press coverage of matters of serious public concern (see, for example, *Bladet Tromsø and Stensaas v Norway* [GC], no 21980/93, § 65, ECHR 1999-III, and *Monnat v Switzerland*, no 73604/01, § 66, ECHR 2006-…). … Hence, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism (see, for example, *Fressoz and Roire v France* [GC], no 29183/95, § 54, ECHR 1999-I; *Monnat*, cited above, § 67; and *Pedersen and Baadsgaard v Denmark* [GC], no 49017/99, § 78, ECHR 2004-XI).'

[103] See, among other authorities, *Surek v Turkey (No 1)* (1999) 7 BHRC 339.

[104] *Rommelfanger v Germany* [1989] ECommHR 12242/86 (1989) 62 D&R 1514

faith.[105] In its unanimous decision in *Guja v Moldova*, the Grand Chamber of the Strasbourg Court stated:

> [A] civil servant, in the course of his work, may become aware of in-house information, including secret information, whose divulgation [*sic*] or publication corresponds to a strong public interest. The Court thus considers that the signalling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection. This may be called for where the employee or civil servant concerned is the only person, or part of a small category of persons, aware of what is happening at work and is thus best placed to act in the public interest by alerting the employer or the public at large. In this context, the Court has had regard to the following statement from the Explanatory Report to the Council of Europe's Civil Law Convention on Corruption (see paragraph 46 above):
>
> > 'In practice corruption cases are difficult to detect and investigate and employees or colleagues (whether public or private) of the persons involved are often the first persons who find out or suspect that something is wrong'.
>
> …
>
> The Court reiterates that there is little scope under Article 10 § 2 of the Convention for restrictions on debate on questions of public interest (see, among other authorities, *Sürek v Turkey (no 1)* [GC], no 26682/95, § 61, ECHR 1999-IV). In a democratic system the acts or omissions of government must be subject to the close scrutiny not only of the legislative and judicial authorities but also of the media and public opinion. The interest which the public may have in particular information can sometimes be so strong as to override even a legally imposed duty of confidence (see *Fressoz and Roire v France* [GC], no 29183/95, ECHR 1999-I; and *Radio Twist, AS v Slovakia*, no 62202/00, ECHR 2006-...).[106]

Article 11 ECHR and the right to strike

4.18 In more recent case law from the Strasbourg Court, the terms of the European Social Charter and ILO Convention have been used to inform and elucidate rights implicit in Article 11 ECHR which guarantees the individual's rights of freedom of peaceful assembly and freedom of association with others, including the right to form and joint trade unions for the protection of the individual's interests. The Strasbourg Court has effectively now read into Article 11 ECHR a right of workers, even those employed in the

[105] See, however, *Poyraz v Turkey* [2010] ECHR 15966/06 (Second Section, 7 December 2010), where the Strasbourg Court found that Art 10 ECHR had not been breached as a result of a defamation case taken by a judge against a civil servant who had been appointed to investigate complaints as to the judge's conduct, which report was then leaked. The Court held that in failing to distance himself from the report's contents to avoid damaging the honour of others, the civil servant had failed to display the necessary discretion required of him, and so his comments implicitly endorsing the finding of the leaked report were not protected by Art 10 ECHR. The Court observed that increased vigilance was required of civil servants in charge of investigations involving information covered by an official secrecy clause designed to ensure the proper administration of justice.

[106] *Guja v Moldova* [2008] ECHR 14277/04 (Grand Chamber, 12 February 2008) paras 72, 74.

public service, to be able to engage in collective bargaining[107] and in industrial action[108] on the basis that the right to strike is a 'complement to collective bargaining'.[109]

Article 1 of Protocol 1 ECHR and the right to practise a profession

4.19 In a weaker and less consistent line of case law, the right to practise a profession has also been said by the Strasbourg Court to be a 'possession' for the purposes of Article 1 of Protocol 1 ECHR.[110]

No jurisdiction of the European Court of Human Rights over employment with the EU institutions

4.20 It should perhaps be borne in mind that all of the aforementioned Convention rights cases concern employment in and by Contracting States. The European Court of Human Rights has held that it does not have jurisdiction to become involved in labour conflicts between international civil servants and their employing international organisations,

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[107] In *Demir and Baykara v Turkey* (2009) 48 EHRR 54 the Grand Chamber of the Strasbourg Court held, under reference to the jurisprudence of the International Labour Organisation and the terms of the European Social Charter, that the right to collective bargaining is 'an essential element' of the right to freedom of association in Art 11 ECHR.

[108] See *Enerji Yapi-Yol Sen v Turkey* [2009] ECHR 68959/01 (Third Section, 21 April 2009), which concerned a prime ministerial ban on public sector employees taking part in a national one-day strike. The ECtHR observed (in an unofficial translation from the original French text) as follows:

> "The terms of the Convention require that the law should allow trade unions, in any manner not contrary to Article 11, to act in defence of their members' interests … Strike action, which enables a trade union to make its voice heard, constitutes an important aspect in the protection of trade union members' interests … The Court also observed that the right to strike is recognised by the [ILO's] supervisory bodies as an indissociable corollary of the right of trade union association that is protected by ILO Convention No 87 on trade union freedom and the protection of trade union rights (for the Court's consideration of elements of international law other than the Convention, see *Demir and Baykara*, cited above). It is recalled that the European Social Charter also recognised the right to strike as a means of ensuring the effective exercise of the right to collective bargaining. As such the Court rejected the Government's preliminary objection."

See also *Danilenkov v Russia* [2009] ECHR 67336/01 (Fifth Section, 30 July 2009), where the Strasbourg Court referred to and relied upon the European Social Charter and ILO Convention Nos 87 and 98 in upholding the complaint by Kaliningrad dockers of a breach of Art 11 ECHR arising from their less favourable treatment because of their participation in industrial action.

[109] *Federation of Offshore Workers' Trade Unions (OFS) v Norway* (2002) ECHR 2002–VI, 301, ECtHR, at p 320.

[110] See *Karni v Sweden* (1988) 55 DR 157 and *Lederer v Germany* [2006] ECHR 6213/03 (Fifth Section, 22 May 2006). See also *Adams v Scottish Ministers* 2003 SC 171 (OH), 2004 SC 665 (IH); and *Jain and another v Trent Strategic Health Authority* [2009] 1 AC 853 (HL) *per* Lord Scott of Foscote at paras 12–14 and *per* Baroness Hale at para 44.

whether that be the EU[111] or, indeed, the Council of Europe itself,[112] at least in cases where the respondent State had neither directly nor indirectly intervened or become involved in the proceedings brought by the international civil servants. In such cases the international civil servant has to rely upon procedures for the resolution of employment disputes provided for within the internal legal system of the international organisations involved. In the case of employment within the EU, there is now the specialist Civil Service Tribunal for the EU. In relation to employment with other international organisations, contractual provision may be made for the jurisdiction to be given to the Paris-based Administrative Tribunal of the International Labour Organisation (ILOAT).[113]

5. CONCLUSION

5.1 It is clear that social protection rights are now deeply embedded within the foundational texts both of the EU and, increasingly under the influence of the CJEU, in the jurisprudence of the ECtHR whose recent case law has effected the indirect influence of EU social protection law across the states of the Council of Europe.

5.2 The law is in a state of rapid transformation and development with the two courts – the CJEU and ECtHR – seeming almost to vie with each other in increasing social protection throughout Europe. We live in interesting times.

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[111] *Connolly v 15 Member States of the European Union* [2008] ECHR 73274/01 (Fifth Section, 9 December 2008).

[112] *Boivin v 34 Member States of the Council of Europe* [2008] ECtHR 73250/01 (Fifth Section, 9 September 2008).

[113] Art II, para 5 of the ILOAT Statute provides, so far as relevant, as follows:

> "The Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other international organisation … which has addressed to the Director-General a declaration recognising, in accordance with its Constitutions or internal administrative rules, the jurisdiction of the Tribunal for this purpose."