Fundamental Rights as a New Frame: Displacing the Acquis

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Impact of fundamental rights on the social '*acquis*' – Limited extension of social rights from the integration of the '*acquis*' into the Charter of Fundamental Rights – How the Charter contributed to the renewed force of the economic freedoms – Shift from fundamental rights to 'essential principles' of uncertain nature in the European Pillar of Social Rights – Possible transformation in the approach to social issues through interdisciplinarity

Introduction

Although the question was raised early on whether fundamental social rights are a rampart against free market domination or a way toward individualisation and privatisation leading to less solidarity,[1] there were until recently good reasons to think that the expansion of fundamental rights in the field of labour and employment law contributed to the improvement of workers' rights. Indeed, in spite of fears that social law could be reduced to vague notions leading to uncertain outcomes (in case law), efficient use was made of fundamental rights – including privacy, the protection of family life, free speech, freedom of association, and the right to strike – to challenge employers' decisions concerning workers, or to resist public policies restricting workers' rights.[2] This was particularly obvious in France, to take one illustrative example, where courts accepted the horizontal application of fundamental rights. Fundamental rights' increasing role in the field of labour law, especially since the 1990s, has benefited workers in most cases. They served as grounds to refuse the enforcement of contract terms that compelled geographical

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[1] *See* S. Deakin, 'Social Rights in a Globalized Economy', in P. Alston (ed.), *Labour Rights as Human Rights* (Oxford University Press 2005) p. 25.

[2] On the role of fundamental right in the field of labour law, *see* A. Lyon-Caen and P. Lokiec (eds.), *Droits fondamentaux et droit social* (Dalloz 2005).

European Constitutional Law Review, 14: 96–113, 2018

doi:10.1017/S1574019618000032

mobility.[3] They were used to oppose non-compete clauses,[4] and referred to when employers' control over private computer use at work was contested.[5] More recently, workers obtained protection from retaliation after bringing court actions against their employer on the grounds that their fundamental right to effective judicial remedy had been violated.[6] Of course, it was also clear that increased protection was never guaranteed, since restrictions on fundamental rights were also taken quite extensively into consideration. That was particularly obvious in the famous *Baby Loup* case, in which the highest French Court for civil matters considered that religious freedom did not entail the right for an employee to wear a headscarf at work when taking care of young children in a private childcare centre.[7] In that case, the resistance of workers' fundamental rights to employers' powers was tested, and failed. All in all, however, French case law shows that labour courts have exploited the potential of fundamental rights to increase worker protection.

This example, drawn from legal developments in one particular Member State, offers some explanation for the high expectations concerning the potential (positive) impact of social fundamental rights at the EU level. Expectations were even higher at the EU level, where social fundamental rights could be seen as a means of counterbalancing internal market rights granted by the treaty to economic actors (the right to free establishment and free provision of services, in particular). This is not to say, of course, that there were no doubts about the impact of the constitutionalisation of social rights and the capacity of fundamental rights to compensate for the fact that the 'basic constitutional Charter' (the Treaty)[8] was heavily tilted towards economic freedoms.[9]

Historically, the development of fundamental rights protection and the progress toward a Social Europe through legislation granting workers social rights were simultaneous processes. The fundamental right to equal treatment and

[3] *See* Cour de cassation, Chambre sociale, 13 January 2009, n° 06-45562 (right to privacy used to resist mobility requested by the employer).

[4] Cour de cassation, Chambre sociale, 13 July 2002, n° 99-43334 99-43336 (freedom to work used to challenge a non-compete clause included in the work contract).

[5] Cour de cassation, Chambre sociale, 2 October 2001, n° 99-42.942 (right to privacy).

[6] Cour de cassation, Chambre sociale, 6 February 2013, n° 11.11-740 (the Court considered that when a dismissal results from the worker's action in court, it is deemed null since that constitutes a violation of the fundamental right to effective judicial remedy, even if there is otherwise just cause for dismissal).

[7] Cour de cassation, Assemblée plénière, 25 June 2014, n° 13-28.369.

[8] ECJ 23 April 1986, Case 294/83, *Parti écologiste 'Les Verts'* v *European Parliament*.

[9] *See* N. Countouris, 'European Social Law as an Autonomous Legal Discipline', 28 *Yearbook of European Law* (2009) especially p. 108. For a detailed explanation of the limited force of social fundamental rights, *see* J. Fudge, 'The New Discourse of Labour Rights: from Social to Fundamental Rights?', 29(1) *Comparative Labor Law & Policy Journal* (2007) p. 29.

non-discrimination, for instance, has bloomed and expanded since *Defrenne*,[10] both in case law and legislation, and remains one of the most solid parts of the social '*acquis*'.[11] This convergence and mutual reinforcement is nothing to be surprised about. There were times when social rights clearly had the wind in their sails, coming from different directions and producing converging outcomes in a virtuous circle: progressive case law and the recognition of social rights as fundamental were concurrent with social legislation granting workers substantive rights. In a context in which fundamental rights are part of the social '*acquis*', displacement of the social '*acquis*' into the framework of fundamental rights is not an issue: they are one and the same thing. Similarly, the 1989 Charter of the fundamental social rights of workers did not displace the social '*acquis*': it contributed to social harmonisation as a point of reference for justifying the adoption of new directives in the early 1990s.[12] In turn, the Court of Justice relied on this legislative basis to identify 'particularly important principles of European Union social law' in order to ensure a higher level of protection for some of the provisions of social directives.[13]

However, this era of virtuous convergence remained limited in scope and time; ironically, it seems to have been brought to an end by the Charter of Fundamental Rights of the European Union, notwithstanding the long list of social norms that were included in the new instrument. The Charter may well be considered to be at the origin of the displacement of the social '*acquis*' into the framework of fundamental rights, which corresponded with a relative decline of social rights protection at the EU level.[14]

Decline not only meant that achievements in the social field stemming from the Charter remained very limited in number, but also that the Charter had an

[10] ECJ 8 April 1976, Case 43/75, *Gabrielle Defrenne* v *Société anonyme belge de navigation aérienne Sabena*.

[11] *Cf* the abundant legislation in this field, including Directive 2000/43 of 29 June 2000 concerning discrimination on race and ethnic origin, OJ L 180 of 19 July 2000, p. 22; Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303 du 2 December 2000, p. 16 and Directive on equal treatment of men and women in matters of employment and occupation of 5 July 2006, OJ L 204 of 26 July 2006, p. 23.

[12] This was illustrated, specifically, by the adoption of Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (OJ L 348, 28 November 1992 p. 1), and Directive 93/104/EC of 23 November 1993 concerning certain aspects of the organisation of working time (OJ L 307, 13 December 1993 p. 1). Both directives quote the Charter in detail in their recital.

[13] ECJ 26 June 2001, Case C-173/99, *BECTU*. For more recent confirmation, *see* ECJ 27 November 2011, Case C-214/10, *Schulte* and 24 January 2012, Case C-282/10 *Dominguez*.

[14] This type of displacement corresponds to the second meaning of displacement in C. Kilpatrick's introduction to this special issue (p. 4).

adverse impact on social rights. To be sure, hardly anybody would argue that the Charter – 17 years after it was solemnly proclaimed by the Commission, the Council and the European Parliament, and more than eight years after it was conferred the legal force of primary law by the Lisbon Treaty – has not served the cause of workers very much.[15] And this is true, it seems, for any potential impact the Charter could make on, for instance, the stimulation of social policy, the extensive interpretation of directives, and balancing the economic freedoms and social rights in case of conflict.[16] However, the meagre improvements are not the only consequence of the Charter in the social field: the Charter has also served, in a regressive sense, to bolster economic freedoms, especially the 'freedom to conduct a business', when a conflict with social rights emerges.

Not only were social rights not strengthened by their elevation to fundamental references in the Charter of Fundamental Rights, they actually seem to be better protected outside the realm of fundamental rights, where the economic freedoms dominate. In this sense, 'fundamentalisation' seems more like an empty gesture than either supportive of or creative in relation to existing rights. Whether or not this outcome should have been anticipated (after all, the collective rights of workers were shielded from antitrust law in the name of 'solidarity', and not because they were fundamental[17]), it confirms doubts about the ability of a transformation of social rights into fundamental rights to trigger social change in favour of workers or, more generally, the most vulnerable members of society.

The current form of concretisation of the Charter, which may be called regressive, does not take away one of the Charter's remarkable features, in terms of 'displacement': that it was explicitly meant to integrate the social *'acquis'*.[18] Formally, it looks as if social rights were synthesised, reframed (to fit in with the style of the Charter) and absorbed. This European approach to the

[15] *Cf* P. Syrpis, 'The EU's role in labour law: An overview of the rationales for EU involvement in the field', in A. Bogg, et al. (eds.), *Research Handbook on EU Labour Law* (Edward Elgar 2016) p. 31-32. For a contrasting approach to the impact of fundamental rights and the Charter, in the same book, *see* A. Davies et al., 'The role of the Court of Justice in labour law' p. 134.

[16] *See* O. de Schutter, 'L'affirmation des droits sociaux dans la Charte des droits fondamentaux de l'Union européenne', in A. Lyon-Caen and P. Lokiec, *Droits fondamentaux et droit social*, *supra* n. 2, p. 153.

[17] *See*, in particular, ECJ 3 March 2011, Case C-437/09, *AG2R* (which seems even stronger when compared to a decision on the same theme given by the French Conseil constitutionnel, 13 June 2013, n° 2013-672 DC). On this topic, *see*, recently, A. Supiot, 'Mutualisation: de quoi parle-t-on ?', *Recueil Dalloz*, 7 April 2016, p. 726.

[18] This aspect of displacement, that we would call displacement by absorption, corresponds to the first notion of displacement described in C. Kilpatrick's introduction to this special issue (p. 2) in the sense that the '*acquis*' is 'moved elsewhere'. But there is a nuance: the references in the Charter did not replace the social '*acquis*'. They copied it, and incorporated it, not without some changes, in another legal source.

constitutionalisation of labour law and its particular effect on the EU social '*acquis*' deserves, no doubt, to be revisited. This article will start by taking stock of the effects of this constitutional moment for European labour law: from disenchantment to regression.

But it would not be enough, at a time when the European Commission has just launched a new initiative to renew the approach to social issues, merely to look back and only consider what the 'fundamentalisation' of social rights has produced so far. Indeed, the 'European Pillar of Social Rights', as ambiguous and atypical as it is, does suggest a new way to address social issues - one that would not rely on the identification and recognition of the legal force of social rights (although affirming that they are 'essential principles'), but rather on what we choose to describe as 'interdisciplinarity' in the social field. In its third part, this article will consider the potential of this approach for the development of the social '*acquis*', as compared to the displacement of social rights into the Charter.

Fundamentalisation of social rights: the great disenchantment

Integration of the '*acquis*' into the Charter of Fundamental Rights has only rarely led to the extensive interpretation of social rights in case law. Rather, in a number of cases the Court of Justice has resisted such extensive interpretation.

Integration of the social 'acquis' *into the Charter*

One objective of the Charter was to gather the '*acquis*' into one document, making it more visible and accessible than the various references scattered throughout many legal instruments. As its preamble makes clear, the Charter only 'reaffirms' rights which result from other sources of law and, 'in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights'. To give just one example, the explanation relating to Article 27 of the Charter of Fundamental Rights points to the '*acquis*',[19] suggesting that the article was not only inspired by the '*acquis*', but should also be interpreted accordingly.

Enshrined in the Charter, the rights previously protected by legislative acts were symbolically elevated and reframed in the language of constitutional rights or

[19] 'There is a considerable Union "*acquis*" in this field: Articles 154 and 155 of the Treaty on the Functioning of the European Union, and Directives 2002/14/EC (general framework for informing and consulting employees in the European Community), 98/59/EC (collective redundancies), 2001/23/EC (transfers of undertakings) and 94/45/EC (European works councils)'.

principles. To be sure, social rights were not exactly rewritten in classical constitutional style. The 'EU touch' in this case consisted of amending most social provisions to state that the rights were to be conceived of 'in accordance with Union law and national laws and practices'. This addition did not dissimulate its aim: it was meant to limit the impact of the integration of social rights into the Charter and avoid, in particular, extensive interpretation of the scope of the rights. Even if the aim was always clear, the effect of this reservation was not. In particular, conformity with national practices is impossible to reconcile with the notion of fundamental rights. Thus, if there was no promise that some of the social rights mentioned in the Charter would be extended, but rather tentatively withheld, the exact outcome could not be predicted. In particular, integration of social rights into the Charter, namely when no reservation was made,[20] could have the effect of shielding them from revision. Greater stability, or resistance to legislative change, could be expected at both the national and European level. In addition, although the legal effects of social provisions in the Charter remain uncertain,[21] it seems that Member States, some of them at least, were convinced that they might be recognised legal force. If not, why would the UK and Poland insist on a protocol to the Lisbon treaty[22] that guarantees that 'nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom'?

However, the effect of the Charter on the development of social rights has remained an abstract idea: looking back on what has happened since the Charter emerged on the legal scene, it seems that the protocol (and the integration of the '*acquis*') was a useless burden.

The modest social outcome of fundamentalisation

There are rare cases in which the Court of Justice developed an extensive line of interpretation of EU social legislation relying, at least in part, on fundamental rights. To restrict ourselves to the case law of the European Court of Justice of course provides a very narrow perspective, but does shed some light on one important dimension of the phenomenon that is much easier to get a grip on than developments in national case law.

When considering the case law of the Court of Justice, the principle of non-discrimination must be treated separately: more than any other principle drawn

[20] Which is the case for Art. 29 (right to access to placement services) and Art. 31 (right to fair and just working conditions).

[21] On the uncertain effects of the Charter, *see* S. Robin-Olivier, 'La contribution de la Charte des droits fondamentaux à la protection des droits sociaux dans l'Union européenne: un premier bilan après Lisbonne', 1 *European Journal of Human Rights* (2013) p. 109.

[22] Protocol 30.

from the '*acquis*' and lodged in the Charter, it has continued to gain force and extend its scope of application – an evolution that was supported, although not systematically, by deliberate references in decisions to articles of the Charter.[23] The *Kamberaj* case[24] is a rare example in which the extension of the social '*acquis*' through the Charter was not only grounded on the principle of non-discrimination but also on another provision of the Charter. The Court considered that EU law does not allow a member state to refuse social advantages to third country nationals benefiting from Directive 2003/109.[25] The decision was not only grounded on the principle of non-discrimination, but also on Article 34 of the Charter, according to which 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'. Benefits fulfilling the purpose set out in that article of the Charter must, according to the Court, be considered part of the core benefits within the meaning of Article 11(4) of Directive 2003/109, for which no derogation from equal treatment is allowed.[26]

More recently, extensive interpretation of the '*acquis*' took place on the basis of Article 47 of the Charter recognising the right to effective judicial protection.[27] Article 47, of course, is not the most obvious result of the integration of the social '*acquis*' into the Charter. However, both the European Court of Justice case law and social directives had become more and more concerned with the enforcement of rights and sanctions before the Charter was drafted. As a result, judicial protection had become an important part of workers' rights in EU law and can thus be included in a constructive interpretation of the social '*acquis*'. The impact of its constitutionalisation in labour law gives an indication of the ability of provisions of the Charter aimed (namely if not only) at ensuring workers' protection to deliver effectively on this objective. And, paradoxically, in comparison with provisions of the 'solidarity' title (title IV) of the Charter, Article 47 has been more productive when used in labour law disputes. For instance, in a decision concerning the interpretation of Directive 96/71 on posted workers,[28] the Court held that under the directive read in the light of Article 47 of the Charter, a trade union must be able to bring an action before a court of the Member State where the work was performed in order to recover – for the posted workers – pay claims which relate to the minimum wage.[29] The law of the State of

[23] *See*, in particular, ECJ 11 November 2010, Case C-232/09, *Danosa*.

[24] ECJ 24 April 2012, Case C-571/10, *Kamberaj*.

[25] Directive 25 November 2003 concerning the status of third-country nationals who are long-term residents, OJ L 16, 23 January 2004, p. 44.

[26] *See* paras. 91-92 of the *Kamberaj* case.

[27] ECJ 12 February 2015, Case C-396/13, *Sähköalojen ammattiliitto*.

[28] Directive of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ 21 January 1997 L 18, p. 1.

[29] *See* para. 26.

the seat of the undertaking that posted the workers, which prohibited the assignment of claims arising from employment relationships, was suspended. Thus, Article 47 of the Charter was used to buttress a somewhat unorthodox solution involving conflict of law rules:[30] posted workers' protection prevailed over the Rome I regulation,[31] with the help of the Charter. In another even more recent decision,[32] the principle of effective judicial protection was this time invoked to aid the cause of workers employed under temporary contracts: the Court of Justice considered that provisions of the framework agreement on fixed-term contracts,[33] read in conjunction with that principle, preclude national procedural rules, which require a fixed-term worker to bring a new action in order to determine the appropriate penalty after a first judicial decision has established abusive use of successive fixed-term employment contracts.

In all of these rare cases in which the '*acquis*', as transposed into the Charter, has contributed to the strengthening of social rights, the provisions of the Charter were never granted direct effect nor used independently from other norms: only when they were combined with provisions of social directives (the '*acquis*' as it was before its reframing by the Charter) could an extension of social rights take place.

Missed opportunities

Parallel to the few examples showing that the fundamental rights listed in the Charter can sometimes contribute to the development of labour law or social protection, a number of other cases illustrate the resistance of the Court of Justice to extensive interpretation of the '*acquis*' in consideration of the social references in the Charter. In these cases, the Court of Justice refused to seize the opportunity to exploit the potentialities of the Charter. For instance, in the *FNV* case,[34] instead of considering that collective agreements made by representatives of independent workers were covered by antitrust rules, the Court could have referred to the right of collective bargaining mentioned in the Charter (Article 28) in order to extend the solution applied in *Albany*[35] to agreements between employers and workers. But it chose to ignore the Charter.

[30] For a criticism of the Court's reasoning on this matter, *see* S. Corneloup, 3 *Revue critique de droit international privé* (2015) p. 680.

[31] Regulation 593/2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ 4 July 2008, L 177 p. 6.

[32] ECJ 14 September 2016, C-184/15 and C-197/15, *Martinez Andrés*.

[33] Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by UNICE, CEEP and the ETUC, OJ L 175, 28 June 1999, p. 43.

[34] ECJ 4 December 2014, Case C-413/13.

[35] ECJ 21 September 1999, Case C-76/96.

More generally, the references contained within the Charter were not used to bridge gaps in the '*acquis*' or to address issues that had not been dealt with formally. This was also well illustrated by the *Poclava* case[36] in which fundamental rights could have been invoked to allow the scope of the Directive on fixed-term contracts[37] to be extended to flexible work arrangements that have the same effect on workers as fixed-term contracts (such as, in that particular case, a one-year probationary period for workers employed under contracts of indefinite duration). But the Court preferred a very formal interpretation of the Directive and refused to examine the case in light of Article 30 of the Charter, according to which 'every worker has the right to protection against unjustified dismissal'.

Quite surprisingly, while the fundamental references have revealed weaknesses, secondary legislation has, on its own, proved resistant to increased flexibility in work relations in a few important cases.[38] The Court of Justice seems more at ease forcing Member States to respect even extensively construed provisions of a directive than it is with wielding fundamental rights with uncertain force and content, and seems furthermore to be held back by the reluctance, if not frontal opposition, expressed by some of the Member States.

A fundamental setback: the renewed force of economic freedoms

At the EU level, the framework of fundamental rights and freedoms included, from the outset, deeply rooted economic freedoms; some of these are constituent elements of the internal market, while fundamental rights benefiting corporations marked the very beginning of the protection of those rights by the Court of Justice.[39] The inclusion of the 'freedom to conduct a business' in the Charter of Fundamental Rights illustrates that this line has not changed recently, in an era when fundamental rights have become a central point of reference in EU law development. The apparent balance struck between social rights and economic freedoms in the Charter has not prevented greater effect being accorded to the latter, nor the regressive effect of their renewed fundamentalisation.

[36] ECJ 5 February 2015, Case C-117/14.

[37] Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by UNICE, CEEP and the ETUC, OJ L 175, 28 June 1999, p. 43.

[38] *See* ECJ 10 September 2015, Case C-266/14, *Tyco* (on working time) and 25 February 2016, Case C-292/14, *Stroumpoulis* (concerning protection of workers in case of insolvency of their employer).

[39] *Cf* ECJ 17 December 1970, Case 11/70, *Internationale Handelsgesellschaft*: this first landmark case to deal with fundamental rights protection in the EEC concerned the application, to an undertaking, of the principles of freedom of action and disposition, economic liberty and proportionality.

Unequal forces

Social fundamental rights and economic freedoms have not been recognised as having the same legal force in EU law. Even when a provision of the Charter is supposed, according to its own language, to 'guarantee' a right, social references contained in the Charter only have direct effect when legislative intervention has made them sufficiently precise to be applied by courts. For instance, the right to information and consultation guaranteed to workers by Article 27 was considered to be without direct effect because it does not 'define any individual legal situation'.[40] According to the Court of Justice, to be 'fully effective' Article 27 must be given 'more specific expression' in EU or national law.[41]

That direct effect requires precision is hardly controversial: direct effect has always been conditional upon a sufficient degree of precision. As early as *Van Gend en Loos*,[42] in which the Court set out the criteria to be taken into account when deciding which norms produce direct effect, it was held that these norms had to be clear, precise and unconditional. However, as demonstrated by subsequent case law, these criteria were given extensive interpretation, particularly when treaty provisions were concerned, and the only true requirement became the possibility of effective enforcement, the 'justiciability' of the law.[43] If the meaning and exact scope of a provision raised questions of interpretation, the Court stated, 'direct effect requires that these questions can be resolved by the courts'.[44] This led to granting direct effect to all free movement provisions.[45]

How can this flexible approach to direct effect concerning economic freedoms, whose legal content and scope were largely defined by the Court of Justice itself without waiting for legislative acts to give them 'specific expression', be reconciled with the condition of 'more specific expression' being applied to Article 27? This, of course, can be considered to be just another illustration of the power of the Court of Justice regarding the effects of EU law norms. One consequence is an unequal distribution of legal force to the various fundamental rights and freedoms.

Inequality of force also emerges when the validity of European legislation is concerned. The success of actions for annulment based on fundamental social rights included in the Charter seems highly precarious. To be sure,

[40] Opinion of AG Cruz Villalon in Case C-176/12, *Association de médiation sociale*, § 54.

[41] ECJ 15 January 2014, Case C-176/12, *Association de médiation sociale*, § 45.

[42] ECJ 5 February 1963, Case 26/62.

[43] *Cf* D. Chalmers et al., *European Union Law*, 2nd edn. (Cambridge University Press 2010) p. 271; M. Blanquet, *Droit général de l'Union européenne*, 10th edn. (Sirey 2012) p. 281.

[44] ECJ 4 December 1974, Case 41/74, *Van Duyn*, § 14.

[45] On this expansion, *see*, in particular: B. de Witte, 'The Continuous Significance of Van Gend en Loos', in M. Poiares Maduro and L. Azoulai (eds.), *The Past and Future of EU Law* (Hart Publishing 2010) p. 11.

non-discrimination on the basis of sex led to the invalidation of Article 5(2) of Directive 2004/113.[46] But more recently, the Court refused in *Dano*[47] to consider whether the provisions of Directive 2004/38[48] restricting the right to equal treatment for the benefit of social advantages were in violation of the principle of non-discrimination based on nationality.[49] For other social references in the Charter, it was suggested that 'implementing legislative acts giving substance to the principle' could not be assessed on the basis of a fundamental social right because it would be a vicious circle: legislative acts of implementation would be reviewed in light of a principle whose content is precisely what is determined by those implementing legislative acts.[50] Does that mean, for instance, that a directive concerning working time, if regressive, could not be reviewed in consideration of Article 31(2) of the Charter?[51] If so, the contrast with the fundamental freedoms would be stark. Indeed, such a limitation of judicial review does not apply when fundamental freedoms are concerned: legislation adopted in order to ensure the functioning of the internal market is then vulnerable to judicial review based on fundamental freedoms.[52]

The Charter's support of free enterprise

Market freedom infringements of labour law did not need the Charter of Fundamental Rights: in this well-known chapter of the narrative on the holistic nature of the market and its impact on national labour law, *Viking*[53] and *Laval*[54] have become almost as familiar as the 'Polish plumber'. However, recent developments have taken a new direction: the impact is felt, this time, not on national labour laws, but on the European social '*acquis*'. Economic freedoms were boosted, namely, by the inclusion of the 'freedom to conduct a business' in the Charter. The increased force of the economic freedoms is sometimes made explicit, sometimes just looms in the background.

[46] ECJ 1 March 2011, Case C-236/09, *Test Achat*.

[47] ECJ 11 November 2014, Case C-333/13.

[48] Directive of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, 30 April 2004, p. 77.

[49] In particular, Art. 7(1)b requiring sufficient resources and health insurance to obtain a right of residence.

[50] Opinion of AG Cruz Villalon in Case C-176/12, *Association de médiation sociale*, § 69.

[51] 'Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave'.

[52] For an example: ECJ 15 January 1986, Case 41/84, *Pinna* (Art. 73(2) of Regulation no 1408/71 was declared invalid because it violated article 48 of the EEC treaty on free movement of workers).

[53] ECJ 11 December 2007, Case C-438/05, *Viking*.

[54] ECJ 18 December 2007, Case C-341/05, *Laval*.

In *Alemo Herron*,[55] the 'freedom to conduct a business' mentioned in Article 16 of the Charter and freedom of contract, which the former covers were, according to the Court of Justice, the formal basis for a decision overruling the traditional interpretation of Directive 2001/23 on transfers of undertakings.[56] On these grounds[57] – rather unstable since the UK Supreme Court, which had referred the question to the Court of Justice, failed to support such a construction of freedom of contract[58] – it was decided that dynamic clauses referring to collective agreements negotiated and adopted after the date of transfer must be considered unenforceable against the transferee.

Although less evident, the dominant position of fundamental freedoms in their economic dimension was also illustrated by the so-called 'new settlement for the UK in the European Union'. Members of the European Council agreed, in a serious reversal regarding that core element of migrant workers' protection under EU law, that discrimination on grounds of nationality concerning the benefit of social advantages could be accepted. On the one hand, discrimination was to be allowed 'to give Member States, with regard to the exportation of child benefits to a Member State other than that where the worker resides, an option to index such benefits to the conditions of the Member State where the child resides'. On the other hand, an 'alert and safeguard mechanism' allowing a Member State to 'restrict access to non-contributory in-work benefits to the extent necessary' was created.[59] Although fundamental rights were not explicitly mentioned, the decision made it possible to strip the free movement of workers of its social dimension. The added element of Brexit, which the 'settlement' intended to avoid, makes this decision obsolete. But it is nonetheless an indication of the relative force of economic freedom versus social

[55] ECJ 18 July 2013, Case C-426/11. For a critique of this decision, *see* P. Rémy, 'L'arrêt *Alemo-Herron* de la CJUE et la directive transfert : faut-il encore prendre au sérieux la Cour de justice?', 12 *Revue de Droit du Travail* (2013) p. 789; J.-P. Lhernould, 'L'actualité de la jurisprudence européenne et internationale. Le concessionnaire ne peut pas se voir opposer les conventions collectives postérieures au transfert d'entreprise', *Revue de Jurisprudence Sociale* (2013) p. 654; L. Driguez, 'Effet du transfert d'entreprise sur les droits conventionnels des salarié', *Revue Europe* (2013) p. 37; S. Robin-Olivier, 'Transferts d'entreprises : une jurisprudence à contresens', *RTD eur*. (2014) p. 525.

[56] Directive of 12 March 2001, OJ L 82, 22 March 2001, p. 16.

[57] The Court abandoned freedom of association as a means of limiting workers' rights protected by the directive, a flawed reasoning applied in 9 March 2006, Case C-499/04, *Werhof*. For a well-informed commentary criticising, the reference to freedom of association, *see* P. Rémy, 'Le renvoi à la convention collective dans le contrat de travail en droit allemand et la directive transfert (CJCE "Werhof", 9 mars 2006)', *Droit social* (2007) p. 341.

[58] *See Parkwood Leisure Ltd (Respondent) v Alemo-Herron (Appellants)* [2011] UKSC 26. In the opinion, Lord Hope mentioned (at § 47) that 'under domestic law the matter depended on the law of contract, under which parties are at liberty to agree to abide by agreements arrived at by a process in which they do not, and are not required to, participate'.

[59] Conclusions of the European Council meeting of 18 and 19 February 2016.

rights – and it may well have planted the seed for future claims by some Member States willing to change the regime of the free movement of workers.

An implicit bias in favour of free enterprise was also at play in a series of cases decided in the spring of 2015 involving collective redundancy.[60] In these cases, the Court of Justice affirmed a restrictive interpretation of Directive 98/59[61] principally on the grounds that the objective of that directive was not only to afford greater protection to workers in the event of collective redundancy, but also to ensure comparable protection for workers' rights in the various Member States and to harmonise the cost to EU undertakings that such protective rules entail. No fundamental right was mentioned, but the decisions suggest that free establishment within the EU and the right to conduct a business had been taken into account, while workers' right to information and consultation had been ignored. Social harmonisation was tailored to fair competition objectives, a solution at odds with the dominant trend in the case law of the Court of Justice, which usually favours the extensive interpretation of legislative provisions concerning workers' right to information and consultation.[62]

The last episode of the series is a synthesis of previous evolutionary changes, combining a regressive interpretation of the social '*acquis*' (Directive 98/59[63]) with an extensive conception of the freedom of establishment and the freedom to conduct a business as mentioned in Article 16 of the Charter. In *AGET Iraklis*,[64] the Court of Justice considered that free establishment entails 'the freedom to determine the nature and extent of the economic activity that will be carried out in the host Member State, in particular the size of the fixed establishments and the number of workers required for that purpose, and also (…) the freedom subsequently to scale down that activity or even the freedom to give up, should it so decide, its activity and establishment'.[65] As far as the freedom to conduct a business is concerned, the decision held that the establishment of a regime imposing a framework for collective redundancies constitutes interference with the exercise of that freedom and, in particular, the freedom of contract which undertakings in principle enjoy with respect to the workers they employ.[66] Contrary to the idea that *Alemo Herron*[67] was an isolated solution not capable of being applied beyond that specific case, the authority of that case was nonetheless

[60] ECJ 30 April 2015, Case C-80/14, *USDAW & Wilson*; 13 May 2015, Case C-182/13, *Lyttle*.

[61] Directive of 20 July 1998 on economic redundancies, OJ L 225, 12 July 1998, p. 16.

[62] The Court resumed its progressive approach in another line of cases: ECJ 9 July 2015, Case C-229/14, *Balkaya*, and 11 November 2015, Case C-422/14, *Pujante Rivera*.

[63] *Supra* n. 56.

[64] ECJ 21 December 2016, Case C-201/15.

[65] *See* para. 53.

[66] *See* para. 69.

[67] *Supra* n. 44.

affirmed, paving the way for further infringements of the freedom of contract upon work contract regulations.[68] Obviously, in this case the implementation of the Charter of Fundamental Rights did not support social rights' development, and there is even greater doubt that it could ever produce such a result on its own. In this context, the potential of the European Pillar of Social Rights, and the possibly new path it is taking, deserves attention.

The European Pillar of social rights: displacement through interdisciplinarity?

In the debate about re-launching initiatives in the social field, one of the more recent developments is the 'European Pillar of Social Rights'. The consultation on this initiative of the European Commission was launched in March 2016[69] and conducted with drums beating: just a year later, on 26 April 2017 the Commission issued a series of documents including a Recommendation on the European Pillar of Social Rights,[70] a Communication on 'Establishing a European Pillar of Social Rights'[71] and a Proposal for an 'Interinstitutional Proclamation on the European Pillar of Social Rights'.[72] A 'Reflection paper on the social dimension of Europe'[73] was also published the same day. At the social summit in Gothenburg on 17 November 2017, the Pillar was proclaimed by the European Parliament, the Council and the European Commission.[74] At first glance, the European Pillar of Social Rights could be considered just another step backwards, regressive as far as social rights are concerned: it is presented as an instrument that allows the further development of the Economic and Monetary Union. But this may not do full justice to the Pillar, which can also bring about a better approach to social issues through interdisciplinarity.

Essential principles: fundamental rights reengineered for the era of the EMU?

If the absorption of social rights into the Charter of Fundamental Rights took place at a time when the Union was centred on the internal market, it could well be that the 'essential principles' that are listed in the Pillar are their new avatar,

[68] For a critique of this decision, *see* E. Pataut and S. Robin-Olivier, 'L'envahissante irruption de la liberté d'entreprise en Europe, Remarques sur l'arrêt AGET Iraklis', in *Mélanges en l'honneur d'Antoine Lyon-Caen* (Dalloz forthcoming) and our observations on the case in F. Picod (ed.), *Jurisprudence de la CJUE 2016, Décisions et Commentaires* (Bruylant 2017) p. 284.

[69] COM(2016) 127 final, 8 March 2016.

[70] C (2017) 2600 final.

[71] COM (2017) 250 final.

[72] COM (2017) 251 final.

[73] COM (2017) 206 final.

[74] The 'official text' can be found online at <ec.europa.eu/commission/sites/beta-political/files/social-summit-european-pillar-social-rights-booklet_en.pdf>, visited 8 January 2018.

designed for a new era in which the EU has been repolarised around Economic and Monetary Union.

Indeed, the objective of the initiative is to achieve a 'deeper and fairer Economic and Monetary Union', which is an explicit indicator of the orientation (if not the bias, the instrumentalisation) of the whole enterprise; a 'Pillar' of social rights has to do with foundations and, therefore, with basic or fundamental rights as well. The structure of this 'Pillar' as prepared by the European Commission indicated that the goal was not to re-state or modify existing rights (the '*acquis*'), which remain valid, but to complement them by detailing a number of 'essential principles' which should 'become common' to participating Member States for the conduct of their employment and social policy. This language suggests that the Pillar could become a social Constitution for the Member States of the Euro area.

But the description of the new instrument does not stop at the reference to 'essential principles': 'once established, the Pillar should become a reference framework to screen the employment and social performance of participating Member States, to drive reforms at national level and, more specifically, to serve as a compass for renewed convergence within the euro area'. Thus, it is clear from the beginning that the new 'principles' are not meant, ultimately, to evolve into new rights. Conceived as instruments of the Economic and Monetary Union, their selection and formulation draw upon 'existing guidance in the European Semester of economic policy coordination' (in addition to being derived from EU secondary legislation and on 'soft law' guidance where it exists).

For the purposes of Economic and Monetary Union, the '*acquis*' is thus being displaced in another way: it becomes the material 'essential principles' are made on. These principles are related to fundamental rights substantially but not as a legal category. The objective pursued is to provide references to evaluate the performance and foster the convergence of Member States' employment and social policies. According to this description, the Pillar of Social 'Rights' could trigger another form of regressive displacement in the sense that it sets aside the concern for workers' rights to focus, rather, on performance and convergence.

This seems particularly evident when considering the Commission document on a 'social scoreboard' accompanying the Communication establishing a European Pillar of Social Rights. According to the Commission,

> the scoreboard benchmarks EU Member States performances vis-à-vis the EU and the euro area averages. Furthermore, it will provide the opportunity, at least for some of its elements, to compare the EU's performance with other international actors. Such a benchmarking exercise is supposed to serve as an empirical basis for renewed processes of mutual learning from best practices. The scoreboard also intends to allow the visualisation of longer-term trends. Where possible and relevant, as the Commission mentions, indicators are disaggregated by age, gender and/or educational attainment.

Twelve areas have been selected, in which societal progress is to be measured associated with one of the three chapters of the Pillar. The proposed indicators for each area are to be based on existing quantitative data collected by Eurostat and the Organisation for Economic Co-operation and Development.

This scoreboard is a good example of what Alain Supiot calls '*gouvernance par les nombres*':[75] measuring the outcomes of social policies with numbers and statistics. In this case, the assessment is rendered all the more problematic because the scoreboard refers to statistics that are already available, which casts doubt on their appropriateness for assessing progress towards social justice. For instance, 'under-achievement in education' is supposed to be assessed on the basis of statistics measuring low levels of achievement in mathematics by 15-year-olds derived from the Programme for International Students Assessment. The conclusions to be drawn from such a rough and ill-fitted indicator are just as obscure as the expected impact of this assessment. If the Pillar is to be based on trust in numbers, which greatly simplify comparisons both diachronically and synchronically, the data collection should probably be thought out more carefully.

Considering the scoreboard, other related questions emerge, among which is the nature of the relationships between the different indicators. Is there a hierarchy? What is, for instance, the relative importance of gender equality compared to the risk of poverty? These questions are of course not specific to the relationship between the various indicators that make up the scoreboard. This may be where such an instrument displays its virtues: by presenting social issues and the unavoidable accompanying questions in a simplistic manner, it in fact fosters a less segmented approach.

The potential of integrating economic and social approaches to social issues

Assessment of social performance and benchmarking are not the only methods that the social Pillar envisages. More traditional notions of labour law, based on the definition and protection of social rights, are also involved. In its first Communication, the Commission presented the Social Pillar as an occasion for revisiting a social '*acquis*' which has been established 'step by step, at different points in time, with some domains better covered than others'. It was put forward as an opportunity 'to take a holistic view of the "*acquis*", to review its relevance in the light of new trends and to identify possible areas for future action, at the appropriate level'. If this language is to be taken seriously, the Pillar could serve as a stepping-stone to bridge the gaps in the '*acquis*', an evolution that the Charter has so far not been able to achieve. As a matter of fact, all the recent initiatives of the European Commission meant to concretise the Social Pillar concern elements of the social '*acquis*' and aim to promote their development through legislative or

[75] A. Supiot, *La gouvernance par les nombres* (Fayard 2015).

non-legislative instruments.[76] This is a first lesson from the integrative approach to the Pillar: although couched in the language of management or economy, the Pillar is concretised making use of various instruments, including legal ones.

Thus, the Pillar could be seen as an opportunity for creating interdisciplinarity in the development of the social '*acquis*'. For instance, it is hardly up for debate that if the legal principle of equality or non-discrimination is to lead to social fairness, resources derived from sociology and economy, including statistics, will be needed. Continuing this line of thought, defragmentation of the definition and treatment of social issues at the EU level could be an appropriate way for avoiding decisions that hurt the most vulnerable parts of the population. Austerity measures for which no proof has been offered of their necessity, for instance, could be more easily contested if indicators of inequality and poverty were systematically used to monitor their impact and to address the adverse (social) impact of transformations of the law. Social and economic indicators could also be useful in cases like *AGET Iraklis*,[77] in which the Court of Justice takes for granted that regulating workers' dismissal has a restrictive impact on free establishment: they could contribute to weakening dogmatically preconceived notions concerning the impact of regulation on economic activity. The 'Guiding Principles on Business and Human Rights' of the UN[78] similarly indicates that States should not assume that businesses invariably prefer or even benefit from State inaction; rather, according to the commentary on the Principles, they should consider 'a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights'. The current indicators that make up the social scoreboard are probably too general, and too rough. But if they serve as true 'indicators', fostering questions for which answers are sought in the entire range of social sciences, they can also be used to support actions in favour of the protection of social rights. The Social Pillar offers an opportunity to strengthen social policy through the cross-fertilisation of law and other social sciences. Reversing the law and economics doctrine, this approach could provide fertile ground for the development of the social '*acquis*' – as long as it translates into a search for the best economic and legal choices leading to greater protection of social rights.

[76] New initiatives concern: work-life balance of parents and carers (proposal for a directive of the European Parliament and of the Council on work-life balance for parents and carers and repealing council directive 2010/18/EU, com/2017/0253 final); work contracts (revision of the written statement directive 91/533/EEC was launched on 26 Nov. 2017); access to social protection; and working time (*cf* the interpretative Communication of the Commission of 24 May 2017, 2017/C 165/01 on directive 2003/88/EC concerning certain aspects of the organisation of working time).

[77] *Supra* n. 64.

[78] High Commissioner for Human Rights, 'Guiding Principles on Business and Human rights: Implementing the UN protect, respect and remedy framework' (2011) p. 5.

Conclusion

Entrenched in the Charter of Fundamental Rights, social references have for the most part remained inert. Reframing the '*acquis*' in the language of fundamental rights has, until now, not actively served to expand the '*acquis*'. On the contrary, the Charter of Fundamental Rights of the EU, which also constitutionalised the 'freedom to conduct a business', has strengthened economic freedoms to the detriment of social rights. In this context, the renewal of Social Europe had to take new directions: new instruments, new methods, or the use of existing references in new ways were very much needed.[79] The European Pillar of Social Rights could provide a new framework within which new directions, based on interdisciplinarity, can be experimented.

[79] For instance, social mainstreaming based on Art 9 TFEU, or extending the scope of solidarity as a means of shielding activities from market rules. For an impressive list of new ideas, *see* the draft report for the European Parliament on a European Pillar of Social Rights, 13 September 2016, 2016/2095 (INI).

https://doi.org/10.1017/S1574019618000032 Published online by Cambridge University Press