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Book Section (Published)  
(Refereed)

*Original Citation:*

Kovacs, Erika (2015) The legal nature of Art. 30 CFREU - A human right, a fundamental right, a right? In: *New developments in EU labour, equality and human rights law*. University Osijek, Osijek. pp. 11-36. ISBN 978-953-8109-04-1

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## THE LEGAL NATURE OF ART. 30 CFREU – A HUMAN RIGHT, A FUNDAMENTAL RIGHT, A RIGHT?

### **Abstract:**

*The article provides for an analysis of the legal nature of Article 30 of the Charter of Fundamental Rights of the European Union, which declares “the right to protection against unjustified dismissal”. In the focus of attention is the question, whether this right constitutes a human or a fundamental right or it is a right without the status of being fundamental or alternatively only a basic principle.*

*The considerations are based on the legal theory of human rights and particularly social rights, as well as on the understanding of this right in the various international treaties and the constitutional traditions of the Member States. Furthermore, the article addresses the question of implementation of Article 30 in the national laws, scrutinizes the interpretation of Art. 51 Abs 1 of the Charter and highlights the deficiencies and possibilities. Also the image of this right mirrored in the European Union’s law and the case law of the Court of Justice of the European Union is examined.*

**Keywords:** *human rights; fundamental rights; dismissal law; the Charter of Fundamental Rights of the European Union*

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## I. INTRODUCTION

The right to protection against unfair dismissal lies in the middle of collision of various interests and rights, economic and legal theories. From an economic point of view, the uncertain role of dismissal protection in the various flexibility and security models, ranging from strong job security to the priority of the labour market coupled with loose dismissal protection makes it difficult to find the ideal level of protection to avoid the segmentation of labour market and minimize the overall costs for the society in the context of dismissal. From a fundamental rights perspective the right to protection against unfair dismissal is closely connected to the right to work and job security, whereas it conflicts with the freedom of business and the managerial prerogatives of the employer. As *Collins* highlights, this right is inherently related to and indeed rooted in human dignity and autonomy of each individual, as work is a crucial part of the personal development.<sup>1</sup>

The article makes an attempt to inquire the legal nature of the right to protection against unfair dismissal in general and more specifically the character of Art. 30 of the Charter of Fundamental Rights of the European Union (in the following: CFREU), which declares “the right to protection against unjustified dismissal”. In the focus of attention is the question, whether it is a human or a fundamental right or it is a right without the status of being fundamental or alternatively only a principle. The issue, whether and how Art. 30 is legally binding and for which personal scope, will be addressed.

To analyse the right to protection against unfair dismissal the following considerations are based on the legal theory of human rights and particularly social rights, the understanding of this right in the international treaties and the constitutional traditions in the Member States. Furthermore, the position of Art. 30 in Chapter IV on ‘Solidarity’ in the CFREU and the interpretation of the expression of Art. 51 Abs 1 “only when they are implementing Union law” will be scrutinized. The question here is how Art. 30 can be implemented into the national laws. Also the image of this right in the European Union’s law and the case law of the Court of Justice of the European Union (in the following: CJEU) will be examined.

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<sup>1</sup> H. Collins, *Justice in Dismissal. The Law of Termination of Employment*, Oxford, Clarendon press Oxford, 1992, pp.16-21.

## II. CLASSIFICATION OF LABOUR RIGHTS AS HUMAN RIGHTS – THEORETICAL BACKGROUND

### 2.1. Introduction

Labour rights are usually not in the mainstream of human rights theory and mechanism.<sup>2</sup> Human rights' activists rarely concentrate on the defence of workers' rights.<sup>3</sup> However, considering labour rights as human rights brings about the advantage (and disadvantage) that we adopt and apply the language, theory and typology of human rights to labour law.<sup>4</sup> The spread of human rights norms goes hand in hand with the globalization and is often seen as a counterweight and at the same time a moral consequence of it. However, this trend is significantly weakened by the lack of universal acceptance of human rights. One sarcastic remark on the claim of human rights to universalism even labels human rights as "the gift of the West to the Rest".<sup>5</sup>

The adoption of the CFREU as a legally binding document increased the role of the Union as a human rights actor. As *De Búrca* puts it, by the Charter of Fundamental Rights, "Europe has come to occupy a privileged place as the poster child for global human rights progress"<sup>6</sup>. However, she also argues that the attitude of the EU to human rights and its development is not a unidirectional progress, but can be rather characterised as a dialectical tension between national and EU actors; whereas EU bodies wish to strengthen human rights protection, governments seek to deter the same.<sup>7</sup> Nevertheless, the proclamation of the Charter signifies the "constitutional maturation of human rights within the EU legal and constitutional framework."<sup>8</sup>

Regarding labour rights the CFREU does not contain a consistent system, and in the literature the opinions are diverse on the nature of the articles proclaiming workers' rights. As *Bercusson* stated not all labour rights are fundamental and not all labour rights are de-

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<sup>2</sup> T. Novitz and C. Fenwick, *The Application of Human Rights Discourse to Labour Relations: Translation of Theory into Practice*, in C. Fenwick and T. Novitz (eds.), *Human Rights at Work. Perspectives on Law and Regulation*, Oregon, Oxford and Portland, 2010, p. 27.

<sup>3</sup> V. A. Leary, 'The Paradox of Workers' Rights as Human Rights', cited in L. A. Compa and S. F. Diamond (eds.), *Human rights, labor rights, and international trade*, Philadelphia, 1996, p. 22.

<sup>4</sup> P. Alston, 'Labour Rights as Human Rights: The Not so Happy State of the Art', in P. Alston (ed.), *Labour Rights as Human Rights*, Oxford, 2005, p. 1.

<sup>5</sup> B. Upendra, *The Future of Human Rights*, 2<sup>nd</sup> ed. Oxford, 2006, p. 33.

<sup>6</sup> G. de Búrca, 'The Road Not Taken: The EU as a Global Human Rights Actor' *American Journal of International Law*, no 105, 2011, pp. 649, 651.

<sup>7</sup> *Ibid*, p. 651.

<sup>8</sup> *Ibid*, p. 671.

clared in the CFREU.<sup>9</sup> Despite the legally binding CFREU, at European level a substantive system of European fundamental rights protection does not exist and the theory of fundamental rights in Union law is relatively sparsely sophisticated.<sup>10</sup> The reason for this lies inter alia in the case law of the Court of Justice of the European Union (in the following: CJEU), which has elaborated the substantive content of the rights differently extensively depending on the significance of the question for the future development of the Union law. In most cases the CJEU delivered a simplified proportionality test without elaborating the substantive subject of the right.<sup>11</sup> Until now the CJEU applied the fundamental labour rights only as additional argument next to secondary regulation, but not as a sole ground of inquiry, i.e. a real test of fundamental rights protection is still missing.<sup>12</sup>

## 2.2. Natural Rights – The Roots

There are different ways and methods to assess, whether certain rights can be qualified as human rights. The origin of the classification of workers' rights as human rights has its roots in the idea of *natural rights*. The idea of natural law dates back to Plato and Aristotle, amplified by the work of St. Thomas Aquinas.<sup>13</sup>

It is important to note that most philosophers of the 17<sup>th</sup> and 18<sup>th</sup>-centuries, who have dealt with natural rights and social contracts affecting partly also workers' rights do not address the problem of fair termination of employment.

The teaching of the Roman Catholic Church, starting particularly with Pope Leo XIII's encyclical *Rerum Novarum* of 1891, beyond mentioning human dignity has also acknowledged a range of workers' rights.<sup>14</sup> The recognized rights were for example just wage and safe working environment.<sup>15</sup> The protection against unfair dismissal directly did not appear in this text, although in the next decades measures were required to protect security of employment.<sup>16</sup>

<sup>9</sup> B. Bercusson, 'Social and Labour Rights under the EU Constitution', in G. de Búrca, B. de Witte and L. Ogertschnig (eds.), *Social Rights in Europe New York*, Oxford, 2005, pp. 169-197.

<sup>10</sup> K. F. Gärditz, '§ 4 Schutzbereich und Grundrechtseingriff', in C. Grabenwarter (ed.), *Europäischer Grundrechtsschutz*, Baden-Baden, 1st edn, 2014, pp. 161-192.

<sup>11</sup> *Ibid*, mn. 6.

<sup>12</sup> R. Rebhahn, '§ 16 Rechte des Arbeitslebens (Art. 27 bis 33 GRC)', in C. Grabenwarter (ed.), *Europäischer Grundrechtsschutz*, Baden-Baden, 1st edn, 2014, pp. 635-682.

<sup>13</sup> Novitz and Fenwick, p.5.

<sup>14</sup> Pope Leo XIII, *Rerum Novarum*, [http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf\\_l-xiii\\_enc\\_15051891\\_rerum-novarum.html](http://w2.vatican.va/content/leo-xiii/en/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum.html), (accessed on 15 September 2015).

<sup>15</sup> Novitz and Fenwick, p. 6.

<sup>16</sup> *Ibid*, p.6.

### 2.3. Connection to Human Dignity

Classification of a particular right as a human right has the precondition that the right has an inherent connection to and originates in dignity. The close link between certain labour rights and human dignity is obvious in case of prohibition of forced labour or of discrimination. Consequently, one can certainly argue that human dignity requires the application of human rights' theory to – at least – certain labour rights.

The connection between labour and human rights has been strengthened by the ILO's Decent Work Agenda.<sup>17</sup> As *Alston* puts it, decent working conditions can be only guaranteed, when labour rights are secured as human rights.<sup>18</sup> Only the acceptance of labour rights as human rights can counteract the otherwise inevitable 'race to the bottom' arising from the highly competitive global trade, which brings about not only the competition of national markets, but also that of national social standards. This idea is a main driving power for states to motivate their trading partner countries to adopt at least minimum labour standards.

In the British literature on dismissal law traditionally two theories have been represented as basis for the protection against unfair dismissal. First, the protection shall provide the worker 'job property' or 'ownership of jobs'<sup>19</sup> and second it shall guarantee his dignity. As the theories on the 'ownership of jobs' faded into the background, new ideas have been looked after to legitimize the limitation of the managerial power of the employers regarding the termination of employment. At this stage the idea came to the fore that the employment should bring a certain 'job satisfaction', i.e. the personality should be developed by the job.<sup>20</sup> Art. 30 in this context requires that the worker has to be treated with dignity during the termination of his employment relationship.

However, *Collins* states that the dismissal of the incompetent worker does not affect dignity.<sup>21</sup> Following this argument, also *Deakin/Morris* argues that dignity cannot create the legal basis for the protection against dismissal, as many dismissals simply do not touch human dignity, particularly those, which are based on the incapacity of the worker or the fact that the employer no longer requires his services (redundancy).<sup>22</sup>

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<sup>17</sup> Available at: <http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--en/index.htm>

<sup>18</sup> *Alston*, p. 1.

<sup>19</sup> One of the first authors dealing in detail with this topic was Meyers, see: *F. Meyers, Ownership of Jobs: A Comparative Study*, Los Angeles, University of California Press, 1964.; See also *W. Njoya, Property in Work*, 2007, p. 61.

<sup>20</sup> *Collins*, pp. 12-18.

<sup>21</sup> *Ibid*, p.17.

<sup>22</sup> S. Deakin and G. S. Morris, *Labour Law*, Oregon, Oxford and Portland, 6th edn, 2012, p. 419.

In my opinion it is evident that work significantly contributes to the improvement of the personality and self-satisfaction and so work performance constitutes an important segment of human dignity. However, regarding the termination of employment relationship, dignity only requires the protection against dismissals, which are based on unfair motives or are exercised in an unfair manner. Consequently, not every dismissal touches upon human dignity, but only the 'unfair' ones and so protection should be aimed at preventing these kinds of termination. The interesting final question is, whether dignity is affected by a dismissal, which occurs substantively and procedurally fairly, but results in an unfair situation for the worker, which affects negatively his dignity. It is controversial, whether dismissal law can/should make employer responsible for the situation of the worker after such dismissal, ie. whether it is justified to take social circumstances outside the employment relationship into consideration when making a decision on dismissal.

#### 2.4. Typology of Fundamental Rights of Workers

Labour rights cannot be classified in the framework of the traditional typology of fundamental rights, that sticks to the categorization of rights into generations or at least categories, like civil, political and social.<sup>23</sup>

Labour rights belong to different categories, which can be best illustrated by the variety of rights in the CFREU. The prohibition of forced labour (Art. 5) in Chapter I (Dignity) has the feature of civil right which shows also that it is coupled with the prohibition of slavery. The right to association in Art. 12 is part of the classical civil and political right to assembly. Also in Chapter II (Freedom) to be found the freedom to choose an occupation and the right to engage in work (Art. 15). Chapter III on Equality contains significant rights of the workers, i.e. the general principle on prohibition of discrimination, the equal treatment principle between men and women in work and special rights for the most vulnerable groups of children and disabled. The Chapter IV on solidarity includes rights that are more closely related to labour, but certain rights of this Chapter go even further and address policies outside of the range of social rights in a narrow sense. Environmental protection (Art. 37) and consumer protection (Art. 38) belong to the third generation of human rights.

As the classification of the Charter clearly proves, certain labour rights can be classified as social rights, while others should be seen rather as civil rights.<sup>24</sup> However, while classical civil rights are individual, certain labour rights have a collective character.

Regarding the substantive content of labour rights *Judy Fudge* points out that these can be classified neither in the traditional typology of negative and positive obligations, nor

<sup>23</sup> J. Fudge, 'The new discourse of labor rights: From social to fundamental rights?', *Comparative Labor Law and Policy Journal*, vol. 29, 2007., pp. 46-47.

<sup>24</sup> *Ibid.*

in the trichotomy of obligations to respect, protect and fulfil, since different labour rights require completely different attitude from the state.<sup>25</sup>

### III. THE IMPACT OF INTERNATIONAL DOCUMENTS ON ART. 30 CFREU

#### 3.1. The Positivist Approach - Integration into Human Rights Documents

In a positivist sense the incorporation of certain rights into international and European human rights treaties is a major sign for the legal nature of a human right.<sup>26</sup> *Alston's* first argument for accepting certain labour rights as human rights is that they were declared in the Universal Declaration of Human Rights (UDHR) of 1948 and have been adopted in several universal and regional treaties.<sup>27</sup>

The classic universal and regional international treaties dealing with human rights – the Universal Declaration of Human Rights, the two International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights, the European Convention on Human Rights (in the following: ECHR) as well as the European Social Charter – do not mention the right to protection against unfair dismissal. Also the Community Charter of the Fundamental Social Rights of Workers of 1989 did not contain this right.

The ILO has as early as in 1963 adopted its Recommendation No. 119 on the termination of employment, which was replaced by the Termination of Employment Convention (No. 158) and the Recommendation No. 166.

The revised European Social Charter (rev. ESC) integrated 'the right to protection in cases of termination of employment' into its Art. 24.

This right to protection against 'unjustified' dismissal appears at EU level rather late, only in the CFREU. Whereas most of the rights of the CFREU have been already included in the Community Charter of the Fundamental Social Rights of Workers in 1989, this was not the case regarding Art. 30 CFREU.

#### 3.2. The Relationship between Art. 30 CFREU and the International Treaties

The relationship between the rights in the CFREU and in international documents is anything, but clearly clarified. The specification of this relationship is generally hampered

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<sup>25</sup> *Ibid*, p. 50.

<sup>26</sup> Novitz and Fenwick, p. 3.

<sup>27</sup> Alston, p. 2.



by original terminological difficulties, like the legal qualification of the EU which ranges from a federal state through an international organization to a sui generis concept.<sup>28</sup>

The use of international documents to find the material, substantive content of a particular right ideally should have a legal basis and theoretical clarity, otherwise it can become boundless. *Krebbber* criticises that the CJEU regularly detaches from the normative basis and refers to rights in various documents in a very broad way. The references to these rights often happen without any determination of the substantive content of the right. As *Krebbber* puts it sharply, the CJEU tends to whisk social rights of different sources to a shallow mishmash with blurred contours.<sup>29</sup>

From a normative perspective it is very difficult to specify the relationship between international and Union law and the effect of international law to the law of the EU.<sup>30</sup> There is a clear tension between the EU's stressed commitment to international law on the one hand and the increasing emphasis of the autonomy of the EU resulting in the lack of a clear stance on the relationship of international law to EU law on the other hand.<sup>31</sup> The search for a more coherent approach to international law implies the question, whether the EU law or the international legal order has primacy over the other one.<sup>32</sup> In the *Kadi* judgment<sup>33</sup> the CJEU stated that "fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international instruments for the protection of human rights on which the Member States have collaborated or to which they are signatories. In that regard, the ECHR has special significance (...)"<sup>34</sup> However, the most important message of his judgment was the statement that the EU constitutional order has autonomy and primacy over international law.<sup>35</sup>

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<sup>28</sup> B. de Witte, 'The European Union as an international legal experiment', in G. de Búrca and Weiler, H.H. Joseph, (eds.), *The Worlds of European Constitutionalism*, Cambridge, 2012, pp. 19-56.

<sup>29</sup> "... der EuGH so weit geht, die sozialen Rechte der in Art. 6 Abs. 2 EU und Art. 136 EG genannten sowie weiterer Quellen zu einem seichten Einheitsbrei mit unscharfen Konturen zu verquirlen". S. Krebber, 'Soziale Rechte in der Gemeinschaftsrechtsordnung', *Recht der Arbeit*, 2009, pp. 224-236., 230.

<sup>30</sup> G. de Búrca and Weiler, H.H. Joseph, (eds.), *The Worlds of European Constitutionalism*, Cambridge, 2012, p. 108.

<sup>31</sup> *Ibid.*, p. 108.

<sup>32</sup> *Ibid.*, p.109. Gráinne de Búrca suggests an alternative, 'soft-constitutionalist approach'.

<sup>33</sup> Joined Cases C-402/05 PKadi [2008] and C415/05 P *Yusuf and Al Barakaat Foundation* [2008], para. 282.. See the analysis of this case *ibid.*, pp. 110-123.

<sup>34</sup> *Ibid.*, par. 283.

<sup>35</sup> See: G. de Búrca in J.H.H. Weiler, 'Dialogical epilogue', in G. de Búrca and J.H.H. Weiler (eds.), *The Worlds of European Constitutionalism*, Cambridge, 2012, pp.262-309. 279.

When thinking about the question, whether and if yes, to what extent the interpretation of the corresponding rights of the revised ESC, the ILO Convention No 158 and the ECHR effects the understanding of Art. 30 of the CFREU, the answers are numerous. Expressed clarification of the relationship is provided only by Art. 52 par. 3 CFREU, which is limited to those rights of the CFREU, which are also protected by the ECHR. The CJEU referred to the ECHR even before the adoption of the CFREU to substantiate fundamental rights.<sup>36</sup>

On the contrary, there is no general obligation of a consistent interpretation of the rights of the CFREU with those of the revised ESC or the ILO Constitution. Consequently, the protection provided by the CFREU can be theoretically lower than the protection by the mentioned documents.

Since the *Vandeweghe* judgment<sup>37</sup> the CJEU's settled case law is that the Court has no jurisdiction under Art. 267 TFEU to rule on the interpretation of provisions of international law which bind Member States outside the framework of EU law. The references to the ECHR and the Social Charters of the Council of Europe in the Preamble of the CFREU have not significantly changed this situation.

### 3.3. The European Convention on Human Rights

The European Convention on Human Rights does not contain the discussed right. However, Art. 6 of ECHR, which protects the right to a fair trial, can be invoked in this context as this right constitutes part of the right to protection against unjustified dismissal. Due to the reference of the CFREU to the ECHR in its Preamble and Art. 52. par. 3 the rights in the European Convention on Human Rights constitute central standards for fundamental rights protection and play a special role in the interpretation of the rights of the CFREU.

In the case *K.M.C. v Hungary*<sup>38</sup> the European Court of Human Rights (ECtHR) pointed out that a dismissal of a civil servant without giving reasons violated Art. 6 § 1 ECHR, because without knowing the reasons of dismissal "it is inconceivable for the applicant to have brought a meaningful action, for want of any known position of the respondent employer."<sup>39</sup> Recently the ECtHR delivered a judgment stating that the excessive length – more than six years – of litigation in a labour dispute violates Article 6 § 1 and Article 13 ECHR.<sup>40</sup> The ECtHR delivered some other judgments affecting the protection from

<sup>36</sup> Case C-260/89 ERT [1991] ECR I-2926, para.41-42.

<sup>37</sup> Case-130/73 *Vanderweghe* [1973] ECR I-1973, para.2. See also recently Case C-117/14 *Poclava* [2015]

<sup>38</sup> Application no. 19554/11 *K.M.C. v. HUNGARY* [2012]

<sup>39</sup> *Ibid*, para. 34.

<sup>40</sup> Application no. 48322/12 *Gazsó v Hungary* [2015]

dismissal, where the dismissal violated another fundamental right, like the freedom of religion or the freedom of expression.<sup>41</sup>

The linkage of the Union law to the ECHR is significantly stronger than to other fundamental rights documents due to the normative incorporation of the ECHR into the CFREU by Art. 52 par 3 CFREU and the institutional accession of the EU to the Convention by Art. 6 par 2 of the Treaty on European Union. The CJEU has even cited in its judgments the decisions of the ECHR.<sup>42</sup> In this context *De Búrca* criticises that the CJEU relies only on the ECHR, but notoriously refuses to cite or consider other international or regional human rights treaties.<sup>43</sup>

The lack of regulation of protection against unfair dismissal in the ECHR has an indirect, but significant negative effect on the appreciation of Art. 30 CFREU as a fundamental – or even human – right in the EU. This lies in the fact that the interpretation of human rights by the CJEU is closely related to and partly based on the case law of the European Court of Human Rights, but at most marginally considers the European Social Charter and the ILO Conventions and Recommendations.<sup>44</sup>

### 3.4. The ILO Convention No. 158

The states have been reluctant to ratify the ILO Convention No 158; until now only 36 countries, – 10 of which are EU Member States (Cyprus, Finland, France, Latvia, Luxembourg, Portugal, Slovakia, Slovenia, Spain and Sweden) – did so. Prima facie this is a small number, however, the Convention is rather in the middle field of ratifications.<sup>45</sup> The great aversion to this document is easy to understand, as it contains very extensive and detailed standards, which do not allow any separate national way in dismissal protection. The requirement of a broad range of detailed rules without the possibility to have some margin to adopt the rules to the organically developed national regulation naturally resulted in the high proportion of absences. The opponents of the Convention can bring up several arguments, starting from the excessive protection of workers, which is economically unacceptable and hinders new employments to the statement that the Convention does not regulate a model which is acceptable for all – or at least most of the – states and it should have rath-

<sup>41</sup> See the cases: J. Kenner, 'Article 30 - Protection in the Event of Unjustified Dismissal', in *The EU Charter of Fundamental Rights. A Commentary*, Oxford, Portland, Oregon, 2014, pp. 805, 814-815.

<sup>42</sup> Case C-438/05 *Viking* [2007] ECR I-10806, para.86.

<sup>43</sup> She highlights that "the EU and the ECJ draw sporadically and inconsistently on such international human rights sources and insist that the ECJ is the final and authoritative arbiter of their meaning and impact within the EU", p. 680.

<sup>44</sup> T. Novitz and P. Syrpis, 'Giving with the One Hand and Taking with the Other: Protection of Workers' Human Rights in the European Union', in C. Fenwick and T. Novitz (eds.), *Human Rights at Work. Perspectives on Law and Regulation*, Oregon, Oxford and Portland, 2010, pp. 463, 467.

<sup>45</sup> [www.ilo.org/dyn/normlex/en](http://www.ilo.org/dyn/normlex/en), (accessed on 15 September 2015)

er been limited to a minimum level of protection.<sup>46</sup> The majority of the states are not willing to undertake any – even minor – modifications of their existing regulation on dismissal, as it is a highly sensitive issue, deeply embedded in the social and economic environment.<sup>47</sup>

However, the Convention has a considerable indirect impact, e.g. their provisions have inspired Art. 24 of the revised ESC,<sup>48</sup> which again was the model for Art. 30 CFREU. By this indirect connection the ILO Convention influences the interpretation of Art. 30 CFREU.

It is worth considering the assessment of the nature of the right to protection against unfair dismissal in the framework of the ILO. Ever since the adoption of the ILO Declaration on Fundamental Principles and Rights at Work in 1998 the ILO differentiates between core labour standards, called fundamental rights of workers and other rights do not belonging to the core. This distinction shows the ILO's priority, however, the highlighting of the four fundamental rights does not automatically mean that all rights left beyond the group of the most favoured are not fundamental.<sup>49</sup>

The protection against unfair dismissal does not belong to the most prioritized area of the ILO, but under its Decent Work Agenda the ILO set four strategic objectives affecting dismissal protection, inter alia promoting jobs and extending social protection.

The CJEU in some cases refers to certain ILO Conventions following the reasoning of some parties in the cases, but the mentioned Conventions did not create a basis of decision.<sup>50</sup>

However, in the Viking and Laval judgments the CJEU argued that the right to take collective action, including the right to strike must be recognised as a fundamental right based on the argument that various international and EU instruments (ESC 1961, ILO Convention No 87, the Community Charter of the Fundamental Social Rights of Workers of 1989 and the CFREU) have recognised this right.<sup>51</sup> The acceptance of the right to strike as a fundamental right was basically underpinned by the argument that the majority of the relevant international and EU documents acknowledged this right.

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<sup>46</sup> See on this in detail: K. Lörcher, 'Internationale Arbeitsnormen unter ungerechtfertigtem Druck: - das Beispiel des Kündigungsschutzübereinkommens Nr. 158 der Internationalen Arbeitsorganisation (ILO)', *ZESAR*, 2012, pp. 263, 268-271.

<sup>47</sup> See the attitude of Germany to the Convention in *ibid.*, p. 266.

<sup>48</sup> *Explanatory Report - European Social Charter*, 1996, p. 86., available at: <http://conventions.coe.int/Treaty/EN/Reports/HTML/163.htm> (accessed 25 June 2015)

<sup>49</sup> 'Declaration on Fundamental Principles and Rights at Work and its Follow-up', available at: <http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang-en/index.htm>, (accessed 25 June 2015)

<sup>50</sup> See for example the reference of the Commission to the ILO Convention No. 171 of 1990 on night work in CJEU, Case C- 158/91 *Criminal proceedings against Jean-Claude Levy*, [1993] ECR I-4287, para. 18. and sometimes mentioned Convention No 111 prohibiting discrimination in the field of employment and occupation, e.g. CJEU judgment in Case C-555/07 *Kücükdeveci* [2010] para. 3. and CJEU judgment in Case C-144/04 *Mangold* [2005] para. 7

<sup>51</sup> Case C-438/05 *Viking* [2007] para.43. and C-341/05 *Laval* [2007] para. 90.

The Court of Justice has not mentioned the ILO Convention No. 158 until now. However, the two other courts, namely the Civil Service Tribunal and the General Court (Appeal Chamber of the first) delivered judgments<sup>52</sup> with some analysis of Art. 30 CFREU mentioning also the ILO Convention, but these statements are not standards of review beyond the civil service of the EU.

### 3.5. The Revised European Social Charter

Also the revised European Social Charter has integrated the right to protection in cases of termination of employment into its Art. 24. This article plays an extraordinary role in the interpretation of Art. 30 of the CFREU, as its explanation expressly refers to the revised ESC, as the basis on which Art. 30 CFREU was drawn. Therefore some authors argue that Art. 24 rev ESC and Art. 30 CFREU should be interpreted consistently in order to avoid double standards.<sup>53</sup> *Hepple* desires that “interpretations by the European Committee of Social Rights under the ESC should be of persuasive value.”<sup>54</sup> *Jääskinen* even argues that in cases, when certain rights are protected under the (revised) ESC and the CFREU, and the explanation expressly refers to the ESC, “the authors of the Charter have created a (rebuttable) presumption of homogeneity between the two instruments.”<sup>55</sup>

When comparing the wording of the right in the two documents the difference is striking. Whereas the CFREU only states the right of workers to protection, the revised ESC is more detailed and states the effective exercise of this right as a goal and specifies the requirements which a state has to fulfil in order to guarantee this right. Basically Art. 24 of the revised ESC requires three elements to ensure the effective exercise of this right: (1) the existence of a valid reason for the termination of the employment, (2) adequate compensation or other appropriate relief in case of termination without a valid reason and finally (3) the right to appeal to an impartial body. Compared to these specific requirements Art. 30 CFREU seems to be only an ‘empty cover’ as *Krebbler* properly puts it, since apart from the sole declaration of the right it does not deliver any specification of its content.<sup>56</sup>

<sup>52</sup> Judgment of the European Union Civil Service Tribunal, F 1/05 *Landgren* [2006] para. 69; Judgment of the General Court (Appeal Chamber) Case T-107/11 P *Schuerings* [2013], par. 101.; Judgment of the European Union Civil Service Tribunal Case F 109/13 DG [2004] para. 51-59.

<sup>53</sup> B. Hepple, ‘The EU Charter of Fundamental Rights’, *Industrial Law Journal*, vol. 30, 2001, pp. 225-231. 226. and Kenner *op. cit.* n 41 *supra*, p. 825.

<sup>54</sup> Hepple *op. cit.* n 53 *supra*, p. 226.

<sup>55</sup> N. Jääskinen, ‘Fundamental Social Rights in the Charter - Are They Rights? Are They Fundamental?’, in *The EU Charter of Fundamental Rights. A Commentary*, Oxford, Portland and Oregon, 2014, pp. 1703, 1707.

<sup>56</sup> S. Krebber, ‘Art. 30 GRCh’, in C. Calliess and M. Ruffert (eds.), *EUV/AEUV. Das Verfassungsrecht der Europäischen Union mit Europäischer Grundrechtecharta*. Kommentar, München, 4th edn, 2011, p. 2905.

The real impact of Art. 24 revised ESC on the Member States at international level has been very limited, as not all of them have adopted this article. Until March 2015, 26 states accepted Art. 24, which are the majority of the 43 Member States of the ESC. There are seven countries<sup>57</sup> who ratified the revised ESC, but refused the acceptance of Art. 24 and another ten states, who only ratified the 1961 ESC. Among the last states there are several Western European states with broad acceptance of social rights and high level of dismissal protection regulation, like Germany.<sup>58</sup>

The reluctance of acceptance proves that states are cautious to recognise any supranational right on dismissal law. This is particularly due to the fact that the European Committee on Social Rights interpreted Art. 24 in a very broad sense and elaborated very specific obligations for the parties. So for example it explained that a six months long probationary period<sup>59</sup> or the limitation of the compensation for an unlawful dismissal to a maximum of six months' wages were not in conformity with the Charter.<sup>60</sup>

It is important to note in this context that the opinions of the European Committee on Social Rights are not legally binding for the Member States and their courts, as it is a group of experts, but not a court, so it does not have the legitimation to deliver interpretation, which binds the national courts.<sup>61</sup>

It is crucial to note that not only those states are bound to Art. 24 rev. ESC, that expressly adopted this article, as the Union documents constituted a link between the law of the Union and the ESC. Art. 151 of the Treaty on the Functioning of the European Union (TFEU) refers to the fundamental social rights of the European Social Charter 1961 as a model, when it sets the objectives of social policy in the EU. As it is only a programmatic declaration, the Preamble of the CFREU is more important, since it mentions both Social Charters of the Council of Europe. Regardless of this reference, the CJEU has been very reluctant to invoke the ESC.<sup>62</sup>

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<sup>57</sup> The seven countries are: Andorra, Austria, Belgium, Bosnia and Herzegovina, Georgia, Hungary and Sweden.

<sup>58</sup> The mentioned ten states are: Croatia, Czech Republic, Denmark, Germany, Greece, Iceland, Luxembourg, Poland, Spain and Greece. See the list on the acceptance of the rights: [http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ProvisionTableRevMarch2015\\_en.pdf](http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ProvisionTableRevMarch2015_en.pdf), (accessed on 20 September 2015)

<sup>59</sup> So for example in case of Italy; see the Conclusions in 2008 and 2012 on Article 24. Available: <http://hudoc.esc.coe.int/eng>, (accessed on 20 September 2015)

<sup>60</sup> See e.g. the cases of Bulgaria and Estonia in the Conclusions 2007 and 2012 on Article 24. Available: <http://hudoc.esc.coe.int/eng>, (accessed on 20 September 2015)

<sup>61</sup> Rebhahn, *op. cit.* n 12 *supra* mn. 42.

<sup>62</sup> In some judgments the CJEU made a broad reference to the ESC 1961, so for example in Case C-438/05 *Viking* [2007] para.43.



## IV. THE EU AND SOCIAL RIGHTS

### 4.1. Subordination of the Social Rights to Economic Goals

The initially exclusively economic objective of the European Communities, namely the integration of the national markets of the Member States, has resulted in the priority of economic goals and freedoms over social rights. This tendency could be noticed in numerous directives and regulations in social law and also the CJEU has confirmed in some cornerstone cases – the most striking of them were the *Viking* and *Laval* judgments<sup>63</sup> – the privilege of economic freedoms or assumed economic interests over social rights. Heated debate took place regarding the mentioned decisions, which mainly focused on the question whether and if yes, how far the economic freedom of the EU can restrict the workers' rights to bargain collectively and to strike. The CJEU's position was clear as far as it gave prevalence to the economic considerations over workers' rights, even if at the same time it also clearly recognized the right to strike as a fundamental right of workers.<sup>64</sup>

The question is, how far we can adopt the arguments and the outcome of these judgments to Art. 30. Obviously, the statements in these cases cannot be directly applied to the interpretation of Art. 30, as in the contested cases the controversial rights were collective rights of the workers, which are expressly excluded from the competences of the EU. This is not the case regarding the right against unfair dismissal. However, the attitude of the Union on how to solve conflicts between economic and social goals is clear and gives some consideration regarding Art. 30 as well.

The opponents of the acceptance of social rights as human rights usually bring up the argument of the neo liberal economists, which is currently very influential in Europe. Representatives of this economic theory argue that labour standards act as a deterrent to the actors of the market and social rights create burdens directly on employers and indirectly on economic growth. They impair flexibility and competition and thus damage economic growth. Proponents of this theory have the opinion that overall economic growth can be best achieved by deregulation of labour law and this should contribute to the realization of the adequate standard of living of workers.<sup>65</sup> The background of this position at European level is the commitment of certain influential Member States to neo-liberalism instead of the other prominent political ideology, namely social democracy.<sup>66</sup> The earlier

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<sup>63</sup> S. Fredman, 'Transformation or Dilution: Fundamental Rights in the EU Social Space', *European Law Journal*, vol.12, 2006, p. 41.; S. Novitz, *op. cit.* n 44 *supra*, p. 465. D. Schiek, 'Re-embedding economic and social constitutionalism: Normative perspectives for the EU', in D. Schiek, U. Liebert and H. Schneider (eds.), *European economic and social constitutionalism after the Treaty of Lisbon*, New York, Cambridge, 2011, p. 17.

<sup>64</sup> *Viking*, para. 42-44. and *Laval* para. 89-91.

<sup>65</sup> Alston *op. cit.* n 4 *supra*, p. 5.

<sup>66</sup> Fredman *op. cit.* n 63 *supra*, p. 43.

positive image of labour/social rights as significant pillar of a welfare democracy has been clearly denigrated and they were made the scapegoat for the laziness of the economy. In my opinion economic considerations have restricted influence on the question, whether certain labour rights are regarded as human or fundamental right, because this classification is outside of the range of financial feasibility. One can argue against the declaration of certain rights in a particular state as a human or fundamental right with financial reasons, but cannot doubt the theoretical classification of these rights as human right.

Having this in mind any social right in the EU has to stand the examination of harmlessness for creating the European common market. Having said that *Novitz'* and *Syrpis'* statement: "in the EU context, human rights act as a 'shield', rather than as a 'sword',..."<sup>67</sup> seems to be true. This statement is still true, even if since the integration of the Social Chapter into the Treaty of Amsterdam the EU has several times acknowledged its commitment to the social rights, and the adoption of the CFREU has opened up a new chapter regarding social rights at EU level.

#### 4.2. The Socio-Economic Rights in the CFREU

The list of articles with socio-economic content in the CFREU is a mixture of disparate fundamental rights models, combining classical liberal rights with social principles.<sup>68</sup>

Based on the wordings of the socio-economic rights of the Charter two broad groups can be created.<sup>69</sup> As all classification regarding fundamental rights, this can only serve as a guidance, as the borders between the categories are floating. Differences can be noticed in the intensity of the protection (prohibition, individual right, "shall have the right", recognition and respect of a right) and in the addressee of the rights (worker, state, Union).

The strongest protection is provided by the articles, which formulate an expressed prohibition (e.g. Art. 5 – Prohibition of slavery and forced labour; Art. 21 – Non-discrimination; Art. 32 – Prohibition of child labour). Certain articles – and also Art. 30 belongs to this group – are formulated as positive rights providing a right to the individual ("Every worker has the right to..."; e.g. Art. 28 - Right of collective bargaining and action; Art. 31 – Fair and just working conditions). To the next group of rights belong those, which are 'softer' formulated, for example they state that the Union recognizes and respects rights (e.g. Art. 25 – The rights of the elderly; Art. 26 - Integration of persons with disabilities, etc). Finally in some cases the Charter only requires that someone, for example the family shall enjoy protection (Art. 33) or the Union shall respect diversity (Art. 22).

Leaving aside the socio-economic rights which do not refer directly to the employment relationship the classification of labour rights in a narrow sense in the Charter is

<sup>67</sup> *Novitz and Syrpis op. cit.* n 44 *supra*, p. 467.

<sup>68</sup> *Gärditz op. cit.* n 10 *supra* mn. 1.

<sup>69</sup> See also *Fredman op. cit.* n 63 *supra*, p. 56.



more homogeneous and more often creates the impression of positive, enforceable rights. This is certainly true for the important articles which are formulated in a negative form as prohibition of certain activities. Other rights regarding employment relationship and industrial relations are formulated as positive rights of the individuals (and their representatives) or in some cases the right or protection 'must' be ensured or guaranteed (e.g. Art. 23 – Equality between men and women; Art. 27 – Workers' right to information and consultation within the undertaking). These articles provide the image of being more hard law, than other socio-economic rights.

This classification does not reflect the traditional concern that only civil and political rights are formulated as 'rights,' whereas in the field of social law rather only 'principles' exist. Regarding labour rights we do not need to address the traditional division between civil and political rights on the one hand and socio-economic rights on the other hand, as labour rights are predominantly formulated as positive rights. Important is to note in this context that the Charter does not subordinate social rights to civil and political rights and the structure of the Charter does not suggest the priority of certain kind of rights above the others.<sup>70</sup>

The willingness of the state to accept labour rights as positive rights lies on the fact that it is not the addressee and so the costs linked to these rights are rather indirect through the employer as direct, which is not the case regarding rights on health care or housing.<sup>71</sup> The readiness to acknowledge positive rights significantly depends on the costs of each right.

Art. 30 is formulated as a positive, individual right, not only a declaration of a principle and directly the workers are addressed by this right. Art. 30 is negatively formulated as its aim is to protect workers against unfair dismissal and not to guarantee a fair dismissal. However, the negative wording requires positive actions. Protection implies an active policy and intervention from the state in order to guarantee the protection as opposed to the employer.

In case we accept the division of fundamental labour rights into 'procedural rights' or 'process rights' on the one hand and 'substantive rights' on the other hand,<sup>72</sup> Art. 30 shall be considered as a material right with certain procedural element, i.e. the right to a fair trial in case of unfair dismissal is part of this right.

### 4.3. The Constitutional Traditions of Member States

Even before the adoption of the CFREU as legally binding document the CJEU deduced the fundamental rights from the national constitutional traditions of the Member

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<sup>70</sup> Fudge *op. cit.* n 23 *supra*, p. 41.

<sup>71</sup> Novitz and Fenwick *op. cit.* n 2 *supra*, pp. 16-17.

<sup>72</sup> S. Deakin and F. Wilkinson, 'Rights vs efficiency?: The economic case for transnational labour standards,' *Industrial Law Journal*, vol. 23, no.289, 1994, p. 290.

States.<sup>73</sup> Since the CFREU there is also a normative basis for the consideration of the constitutions in the legal reasoning. Article 52 par 4. of the CFREU expressly states: “In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.”

The Constitutional traditions of Member States can serve as a source of norms regarding human rights of workers, but taking into account of the diversity of the systems, it is often difficult to draw general consequences from it.<sup>74</sup>

Remarkably, when the CJEU cited the constitutional traditions of the Member States,<sup>75</sup> it was not a condition of the citation, that the invoked right is recognised in the majority of the Member States.<sup>76</sup> Such references to the common constitutional tradition usually failed a plausible demonstration.<sup>77</sup> Loose references clearly contradict the formulation of the treaties<sup>78</sup> and the Preamble of the CFREU, which requires the consideration of constitutional traditions common to the Member States.

The overwhelming majority of the constitutions of the Member States has not incorporated the right to protection against unfair dismissal. Exceptions can be found in the Portuguese and Slovakian constitutions. Article 53 of the Portuguese Constitution states that “Workers are guaranteed job security, and dismissal without fair cause or for political or ideological reasons is prohibited.”<sup>79</sup> Furthermore, Article 36 lit b) of the Slovakian Constitution states that the law guarantees protection against arbitrary dismissal.<sup>80</sup>

<sup>73</sup> See in the early case law: CJEU Case C-11/70 *Internationale Handelsgesellschaft mbH*, [1970] para. 4. and CJEU, Case C-4/73 *Nold* [1974] para 13-14.

<sup>74</sup> Novitz and Syrpis *op. cit.* n 44 *supra*, p. 468.

<sup>75</sup> See in the early case law: See in the early case law: CJEU Case C-11/70 *Internationale Handelsgesellschaft mbH* [1970] para. 4. and CJEU Case C-4/73 *Nold* [1974] para 13-14.

<sup>76</sup> M. Breuer, ‘§ 7 Fundamentalgarantien’, in C. Grabenwarter (ed.), *Europäischer Grundrechtsschutz* (Baden-Baden, 1st edn, 2014), 303-346. mn. 1.

<sup>77</sup> Rebhahn *op. cit.* n 12 *supra* mn. 11.

<sup>78</sup> Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, A.1. first sentence.

<sup>79</sup> Artigo 53. Segurança no emprego: É garantida aos trabalhadores a segurança no emprego, sendo proibidos os despedimentos sem justa causa ou por motivos políticos ou ideológicos. In English: Article 53 (Job security). See the homepage of the Portuguese Parliament: <http://www.parlamento.pt/Legislacao/Paginas/ConstituicaoRepublicaPortuguesa.aspx> (accessed on 12 May 2015).

<sup>80</sup> Art. 36 „Zamestnanci majú právo na spravodlivé a uspokojujúce pracovné podmienky. Zákon im zabezpečuje najmä (...) b) ochranu proti svojvoľnému prepúšťaniu zo zamestnania (...)”. <http://www.narodnostnemensiny.gov.sk/druha-hlava/> In English: Art. 36 “Employees have the right to equitable and adequate working conditions. The law guarantees, above all (...) b) protection against arbitrary dismissal (...)”. See: <http://www.slovak-republic.org/constitution/> (accessed on 25 July 2015).

Consequently, due to the small number of states with constitutional recognition this right cannot be considered as a right guaranteed by the common constitutional tradition of the Member States.<sup>81</sup>

#### 4.4. The Constitutionalisation of Labour Law

The term 'constitution' was usually stuck to and reserved for the state, a national order. However, the legal developments of the European Communities in the 1960s and 1970s brought about the internationalisation of the constitutionalisation. The transformation of the CFREU into a legally binding document was one major step in the constitutionalisation of the Union law.<sup>82</sup> Also regarding the right to protection against unfair dismissal the CFREU was certainly the turning point.

The constitutionalisation of labour and socio-economic rights is regarded completely differently by scholars. The borderline usually, but not necessarily lies between the scholars, socialised in common law and civil (Roman) law. Whereas the first often take this process for granted or even welcome it, civil lawyers are more cautious and express concerns mainly due to the normative and democratic shortcomings of constitutionalisation.

The proponents of the constitutionalisation of labour law at European level see in this process a positive development that strengthens the protection of workers. *Schiek* argues that the reconciliation of social and economic dimensions of European integration is only possible by the re-embedding of EU-constitutionalism.<sup>83</sup> She understands EU constitutionalism as a dynamic process beyond positive law. *Liebert* also speaks about post-and transnational economic, social and democratic constitutionalism.<sup>84</sup> Social constitutionalism seems to be the answer to counterbalance economic challenges in the EU, even if some argues that it can undermine the economic integration.<sup>85</sup>

*Weiler* criticises the exaggerated and ubiquitous use of various constitutionalism theories, emphasising that particular terms like 'global constitutionalism' and 'constitutional pluralism' are recently fancy and politically correct without exact understanding of these expressions, but rather with a multiplicity of meanings.<sup>86</sup> He also expresses his doubt from

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<sup>81</sup> *Knecht* in *Schwarze/Becker/Hatje/Schoo* (ed.), *EU-Kommentar*, 3. Ed., p. 2688.

<sup>82</sup> *Gärditz op. cit.* n 10 *supra* mn 19.

<sup>83</sup> *Schiek op. cit.* n 63 *supra*, p. 18.

<sup>84</sup> U. Liebert, 'Reconciling market with Social Europe? The EU under the Lisbon Treaty', in D. Schiek, U. Liebert and H. Schneider (eds.), *European economic and social constitutionalism after the Treaty of Lisbon*, Cambridge, New York, 2011, pp. 47, 49-50.

<sup>85</sup> *Ibid*, 49.

<sup>86</sup> J.H.H. Weiler, 'Prologue: global and pluralist constitutionalism - some doubts', in G. de Búrca and J.H.H. Weiler, (eds.), *The Worlds of European Constitutionalism*, Cambridge, 2012, pp. 8-18.

a normative view and emphasises that the constitutional vocabulary should be restricted to the EU, as constitutionalism without some kind of democratic legitimacy is ‘highly problematic.’<sup>87</sup> *De Búrca* also states that the term constitutionalism has been eroded through overuse and overextension.<sup>88</sup> However, the two prominent scholars restrict their criticism to the constitutional development outside the EU.

To the contrary, *Rebhahn* strongly criticises the constitutionalisation of the European and national labour law.<sup>89</sup> He argues that the shift of the decision making power from the Parliaments to the courts (to the CJEU or national courts respectively) with the following loss of power of Parliament and policy as well as gain in power of the courts have serious adverse effects both on the democracy and the quality of legal doctrine. Constitutionalisation of labour law deprives the legitimate legislator the chance to regulate particular issues and leads to the supremacy of the courts and particularly the CJEU. This occurs by the interpretation of social and economic interests and their collisions as legal question, by shifting the debates from policy to law. This tendency entails the risk that conflicts of interests seem to have the glamour of objective questions, solved by experts, although they are about pure political debates and the distribution of resources. This is a serious risk for democracy and legal doctrine, as well.<sup>90</sup>

#### 4.5. Right or Principle?

Article 51 par. 1 CFREU requires to respect the rights and observe the principles, which suggests the differentiation between rights and principles. General Advocate *Cruz Villalon* in his opinion to the case *AMS* treated Art. 27 as a ‘principle’, but the judgment fails to qualify Art. 27 as a right or a principle. This reluctance of the CJEU indicates that the discussion on the nature of the articles of CFREU as rights or principles is even within the CJEU not finally settled.<sup>91</sup>

For the classification of Art. 30 it is crucial its wording, i.e. whether it provides precise rules regarding the content and addressees of this right. Art. 30 is ambiguous in this sense, since the first part of the sentence gives the impression of a real right, whereas the reference to the Union law and national laws weakens the unambiguity and increases the margin of elaboration for the Member States. As stated above Art. 30 is formulated as a

<sup>87</sup> *Ibid*, 12.

<sup>88</sup> *Búrca and Weiler, op. cit. n 30 supra*, p. 132.

<sup>89</sup> *Rebhahn op. cit. n 12 supra*, mn. 94-97. and R. Rebhahn, ‘Der Einfluss der Europäischen Grundrechtecharta auf das österreichische Arbeitsrecht’, in R. Rebhahn (ed.), *Grundrechte statt Arbeitsrecht?*, Wien, 2012, pp. 9, 30-31.

<sup>90</sup> *Rebhahn op. cit. n 12 supra*, mn. 54-57.

<sup>91</sup> M. Holoubek, ‘Keine mittelbare Drittwirkung für „Grundsätze“ der GRC’, *Das Recht der Arbeit* 21, 2015, p. 24.

positive, individual right, not only a declaration of a principle and directly the workers are addressed by this right. It aims at granting the workers appropriate protection, whereas the state has a margin for designing the specific rules.

When considering the question, whether Art. 30 can be regarded as a right, it is useful to realise that several fundamental rights do not fulfil the narrow definition of a ‘right’ – meaning an unconditional, self-standing claim of an individual, justiciable in front of a competent judicial organ.<sup>92</sup> Human and fundamental rights naturally need legislative elaboration to become enforceable entitlements and the legislator usually has a (great) margin of appreciation in the elaboration of the right.<sup>93</sup>

The very broad and general reference significantly lowers the possibility to control the compliance of the national regulation with this right, but – in my opinion – does not negatively influence the legal qualification of this article as a right. The reference to the Union law and the national laws in Art. 30 grants openness and dynamics to this right and expresses that it roots in the legal traditions of the Member States and indeed depends from the respective status of development of a society, its orientation to values and also financial situation.<sup>94</sup> I agree with the approach of *Rebhahn*, who argues that the reference gives a very wide scope to the Member States and the EU to regulate this right, which naturally restricts the possibility of the CJEU to control the compliance with Art. 30. However, the reference itself does not eliminate the legal nature of Art. 30 as a fundamental right.<sup>95</sup>

## V. IMPLEMENTATION OF ART. 30 IN NATIONAL LAWS – DEFICIENCIES AND POSSIBILITIES

### 5.1. Deficiencies

Fundamental social and labour rights are traditionally weak in terms of their justiciability, implementation and enforcement.<sup>96</sup> This statement is also true regarding the labour rights of the CFREU. Although the CFREU is extremely ambitious in the enumeration of social rights, it is very much cautious regarding the implementation of these rights. The inclusion of several rights in the solidarity chapter of the CFREU, which are expressly excluded from the competences of the EU, like the right to freedom of association, col-

<sup>92</sup> Jääskinen *op. cit.* n 55 *supra*, p. 1707.

<sup>93</sup> *Ibid.*, p. 1707.

<sup>94</sup> M. Fister, ‘Neuerungen bei den Grundrechten des Arbeitslebens’, in C. Grabenwarter, W. Pöcherstorfer and C. Rosenmayr-Klemenz (eds.), *Die Grundrechte des Wirtschaftslebens nach dem Vertrag von Lissabon*, 2012, pp. 45, 54.

<sup>95</sup> *Rebhahn op. cit.* n 12 *supra*, mn. 46.

<sup>96</sup> Bercusson *op. cit.* n 9 *supra*, pp. 180-181.

lective bargaining and strike brought about a general doubt on the implementation of the declared labour rights.

Ever since the *Åkerberg Fransson* judgment the opinion of the CJEU on the applicability of the fundamental rights of the CFREU is clear. It takes seriously the restriction of Art. 51, which lays down that the provisions of the Charter are addressed to the Member States “only when they are implementing Union law.” It states that “it has no power to examine the compatibility with the Charter of national legislation lying outside the scope of European Union law.”<sup>97</sup> The Member States are consequently only bound to respect the fundamental rights defined in the context of the Union when they act in the scope of Union law.

The fundamental social rights of the CFREU have a significant interpretative and programmatic effect on the institutions and bodies of the Union, so in the interpretation of Union law and in the elaboration of new law, the fundamental social rights should be considered and promoted.<sup>98</sup> As Art. 30 legally binds also the organs of the EU it is an extremely interesting question, whether the activity of the European Commission is bound to the fundamental rights of the CFREU. When taking Art. 51 par 1. seriously, this question has to be answered on the affirmative.<sup>99</sup> The Commission pursues the policy of flexibility by combining active and passive labour market policy measures with weak dismissal protection. Until now there is no sign that the open method of coordination of the European Commission would have been measured on Art. 30.

In the following the article focuses only on the possible implementation in the national laws. There are several conceivable ways, how Art. 30 can be implemented in national laws. The two most important possibilities are the following: a) through the implementation of the Union law and b) by the impairment of fundamental freedoms by a national rule. Also the national, particularly the Constitutional courts play an important role in the interpretation and implementation of Union law. In the following I will consider these options shortly.

## 5.2. Implementation through Union Law

The first possibility to apply Art. 30 CFREU is by the implementation of secondary Union law, dominantly directives. Art. 30 has to be applied in any case, if the Member States interpret, implement or enforce a directive or regulation of the European Union. The existing specific rules on dismissal in various directives open the door to implementation. Further, it is conceivable to apply Art. 30 in the context of directives which effect dismissal

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<sup>97</sup> Case C-617/10 *Åkerberg Fransson* [2013] para. 19.

<sup>98</sup> Jääskinen *op. cit.* n 55 *supra*, p. 1711.

<sup>99</sup> Rebhahn *op. cit.* n 12 *supra*, mn. 27.

law only indirectly by a broad interpretation of the scope of the directive. However, until now the Court of Justice refused to make use of both possibilities.

There is a strong opinion that Art. 51 par. 1 has to be interpreted in a narrow way, meaning that the rights of the CFREU bind the states only, if there is already a secondary legislation on a particular issue; ie. the national implementation requires the existence of (a precise) secondary legislation.<sup>100</sup> However, it is highly controversial, in which case a particular directive or regulation falls in the scope of a right. The protection against dismissal has been partly regulated in several directives, like in the Directive on the Transfer of Undertaking (2001/23/EC), on Maternity Leave (92/85/EC) and it was affected by the directives on equal treatment. The Directive on Collective Redundancies contains procedural rules of dismissal (98/59/EC) and the Directive on Fixed-Term Contracts (1999/70/EC) has an indirect effect on the dismissal law. The crucial question is, how far these fragmented rules on dismissal protection can be regarded as the 'implementation' of the generally formulated protection declared in Art. 30 CFREU.<sup>101</sup>

In a few cases national courts tried to argue in front of the CJEU that a certain issue falls within the scope of Art. 30 through a specific directive. The CJEU confirmed in every case that it takes the wording of Art. 51 CFREU seriously and the fundamental rights of the Charter are only applicable in situations governed by EU law.

For example in the case *Rodríguez Mayor*<sup>102</sup> the national court asked, whether the Spanish legislation on collective redundancies infringes Art. 30. The claimants criticized the rule which stated that in cases of death, retirement or incapacity of the employer, workers shall be entitled to payment of a sum equivalent to one month's remuneration. The Court declined to give a substantive answer based on the fact that the situation fell outside the scope of Directive 98/59/EC and, accordingly, outside that of Community law.<sup>103</sup> Remarkably, the same fact has not bothered the Court to rule on the central question of the case.

In the case *Poclava*<sup>104</sup> the question was, whether a one-year probationary period in Spain contradicts the directive on fixed-term contracts. The CJUE emphasised the difference between probationary period and fixed-term contract in order to state that the probationary period is not regulated by Directive 1999/70/EC and so the national rule falls outside the scope of EU law and the CJEU does not have jurisdiction to examine it on Art. 30 of the CFREU. Even if the Directive on fixed-term contract stresses that the contract

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<sup>100</sup> *Ibid*, mn. 20.

<sup>101</sup> See on this *ibid*, mn. 30.

<sup>102</sup> Case C-323/08 *Rodríguez Mayor* [2009]

<sup>103</sup> *Ibid*, 59.

<sup>104</sup> Case C-117/14 *Poclava* [2015]



for indefinite period is the usual form of contracts, it was not enough to give a basis for the examination of probationary period in the light of Art. 30.

In the judgment *Nagy*<sup>105</sup> the CJEU ruled that it did not have jurisdiction, where a Hungarian court referred a case on the same legal basis, on which the ECtHR delivered its *KMC versus Hungary* judgment. The CJEU ruled that the case did not concern the implementation of EU law.

The CJEU ruled in the judgment *AMS* that Art. 27 CFREU cannot be invoked “in order to conclude that the national provision which is not in conformity with Directive 2002/14 should not be applied.”<sup>106</sup> The CJEU resulted in this case that Art. 27 CFREU does not have horizontal direct effect, so it cannot overrule a national law, even if there is the Directive 2002/14 which makes the content of the right more precise and the national regulation was adopted to implement this directive. The CJEU highlighted that Art. 27 CFREU differs from the principle of non-discrimination on grounds of age laid down in Art. 21 (1) CFREU and judged in the *Küçükdeveci* judgment,<sup>107</sup> because Art. 27 CFREU needs the specification and is not sufficient in itself to confer on individuals an individual right.

Even if the CJEU did not state, its *AMS* judgment was based on the perception of Art. 27 as a principle instead of being a right. In order for a right of the CFREU to be fully effective it must be given more specific expression in European Union or national law.<sup>108</sup> This judgment indicates that the CJEU differentiates between principles and rights in their impact. Whereas ‘rights’ can have horizontal direct effect, ‘principles’ – as e.g. Art. 27 – do not have the same effect. Therefore – in my opinion – the findings of the CJEU in this judgment cannot be applied to Art. 30. When comparing the wording of Art. 27, Art. 21 (1) and Art. 30, the outcome is that the latter is more similar to the formulation of Art. 21 (1) regarding accuracy and cannot be classified as a ‘principle’.

The conclusion of the case-law of the CJEU is that for the implementation of the Charter it is necessary, that a secondary regulation is applicable to the situation, which does not only affect the same question in an abstract way, but more specifically. The CJEU has so far rejected to regard certain articles of the directives as implementation rules of Art. 30, which leaves open the question, which rules can be considered to implement the substantive content of Art. 30 and which are only indirectly – broadly – related to dismissal law. The border between abstract and direct influence of a certain field (here individual protection against unfair dismissal) is far from being clear.

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<sup>105</sup> Cases C-488/12 to 491/12 and 526/12 *Nagy and Others* [2013]

<sup>106</sup> CJEU judgment, Case C-176/12 *AMS* [2014] para. 48.

<sup>107</sup> CJEU judgment, Case C-555/07 *Küçükdeveci* [2010]

<sup>108</sup> CJEU judgment, Case C-176/12 *AMS* [2014] para. 45.



### 5.3. Violation of Fundamental Freedoms

The second major possibility to implement Art. 30 in national laws would be to find situations, in which the national rules on dismissal law directly affect the scope of Union law. The scope of Art. 30 CFREU is opened, if national regulation infringes a fundamental freedom of the EU. The question is, whether one can find situations, in which the national rules on dismissal law affect a fundamental freedom of the EU and thus fall into the scope of Union law. One could argue that the different levels of dismissal protection in the Member States could lead to situations, in which the free movement of workers or the freedom of establishment is constrained. *Rebhahn* mentions the example that the strong dismissal protection in Italy would be suitable to make this country less attractive for companies as location and in this way it impairs the freedom of establishment, even if it does not violate this principle. Furthermore, the weaker Austrian dismissal protection could attract Italian employees to take up employment in Austria instead of Italy and this also could maybe adversely affect the free movement of workers.<sup>109</sup> Impairment of a freedom of such a low intensity could theoretically provoke the application of the fundamental freedom and require a justification. The CJEU usually interprets the scope of freedoms very broadly and it fulfils the requirement of getting into the scope of the right, if a national measure makes the use of a freedom less attractive, i.e. the marginal impairment of the right is sufficient.<sup>110</sup> However, adopting such a broad perspective would lead to the situation that nearly all national regulations would implement Union law and would be bound on the CFREU.<sup>111</sup>

### 5.4. The Interpretation of National (Constitutional) Courts

The third way how Art. 30 CFREU can make a significant impact on national law is, if the Constitutional Courts or even national labour courts invoke Art. 30. For the possible role of the Constitutional Courts in the interpretation of Art. 30 Austria provides a good example. The Austrian Constitution is not only one piece of law, but a great number of statutes or particular articles of statutes have constitutional status. Also the European Convention on Human Rights is part of the Austrian Constitution. This fragmentation of the Constitution made it possible that 2012 the Austrian Constitutional Court elevated the CFREU to constitutional status. The legal basis for that was the principle of equivalence adopted by the CJEU.<sup>112</sup>

<sup>109</sup> *Rebhahn op. cit.* n 12 *supra*, mn. 34.

<sup>110</sup> *Ibid*, mn. 33.

<sup>111</sup> *Ibid*, mn. 35.

<sup>112</sup> The CJEU stated in its established case-law that “in the absence of Community rules governing the matter it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, however, that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and do not render virtually

The *Austrian Constitutional Court* in general has been the view that European Union law in general is not a standard for its scrutiny of Austrian law, however, this principle cannot be transferred to the Charter.<sup>113</sup> Further it follows from the principle of equivalence that also the rights of the CFREU can be invoked in front of the Constitutional Court as constitutionally guaranteed rights and they constitute a control standard ('Prüfungsmaßstab') in the process of the general compliance control of Austrian legislation. It added that the rights guaranteed in the Charter can be asserted as constitutionally guaranteed rights.<sup>114</sup>

The Court itself restricted this statement by saying that this rule applies only, if the right concerned in the CFREU is similar to the rights of the Constitution in terms of formulation and specification, meaning that certain precision in the wording is needed. The Court argued that the articles are different regarding their normativity, some of them are only guidelines or principles. It expressly mentioned Art. 22 (cultural, religious and linguistic diversity) and Art. 37 (environmental protection).<sup>115</sup> Therefore it is on a case-by-case basis to decide, which articles of the CFREU create a standard for the process in front of the Constitutional Court. Bearing in mind this restriction, it is not clear, whether Art. 30 fulfils the requirements of accuracy to be applied as a control standard.

The applicability of the CFREU on acts of the organs of the EU requires that these act in the implementation of the right of the EU, i.e. the contested case has to fall under the scope of the EU law. This has to be broadly understood and covers not only the implementation of Union law by courts and authorities, but also the enforcement of national implementation measures.<sup>116</sup>

Similar to the CJEU the *German Constitutional Court* interpreted Art. 51 par. 2 CFREU strictly reluctant.<sup>117</sup> It emphasised that national law which has the potential to influence the functioning of legal relationships regulated by Union law only indirectly, does not satisfy the requirement for the control of compliance with the standards of the Union's fundamental rights. It further highlighted that the required connection of a national regulation to Union law is not constituted by mere subject-matter reference of a rule to the abstract scope of Union law, by pure factual effects on the Union law or by indirect influence on legal relationships regulated by Union law.<sup>118</sup>

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impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness) (...)" CJEU Levez, 1 December 1998, C-326/96, par. 18.

<sup>113</sup> Austrian Constitutional Court, U466/11 ua, 14.03.2012. points 4.2. and 5.

<sup>114</sup> *Ibid*, points 5.5. and 5.8.

<sup>115</sup> *Ibid*, point 5.5.

<sup>116</sup> *Ibid*, point 6.

<sup>117</sup> BVerfG 24.4.2013 – 1 BvR 1215/07, mn 90-91. Available at: [http://www.bundesverfassungsgericht.de/SiteGlobals/Forms/Suche/Entscheidungensuche\\_Formular.html?language\\_=de](http://www.bundesverfassungsgericht.de/SiteGlobals/Forms/Suche/Entscheidungensuche_Formular.html?language_=de), (accessed on 23 June 2015)

<sup>118</sup> *Ibid*, mn. 91. and BAG 11.9.2013, 7 AZR 843/11, mn. 41.

The *German Federal Labour Court* also confirmed the interpretation of the CJEU. The plaintiff complained of the rule that during the six months waiting period the general dismissal protection does not apply, but the termination of contract can only be contested alleging the violation of good moral or breach of good faith. The German Court did not find any link to a particular directive and to the Union law, so the national law could not be scrutinised on the compliance with Art. 30.<sup>119</sup> However, it also stated that Art. 30 can be used to the substantial enrichment of certain indeterminate terms of the labour law by the national courts. As an example it mentioned the dismissal protection gained from the principle of performance in good faith pursuant to § 242 BGB (German Civil Code) for those not covered by general dismissal protection.<sup>120</sup>

## VI. CONCLUSION

“Social rights are like paper tigers, fierce in appearance but missing in tooth and claw.”<sup>121</sup> My analysis in this article came to the result, that *Hepple’s* apt general statement exactly describes the nature of Art. 30 of the CFREU.

The right to protection against unjustified dismissal does not seem to possess the same status as a human right like several other labour rights do, for example the prohibition of forced and child labour or the freedom of association. The missing or rare international and constitutional declarations of this right counteracts the acceptance of this right as a human right. This is also the result of a broad interpretation of this right, which does not only include protection against humiliating reasons and method of dismissal, but several other aspects. The broad understanding of this right brought about that only a fragment of the right against unfair dismissal is inherently connected to dignity and this raises serious doubts on the recognition of this right as a human right.

The answer to the question, whether the right to protection against unjustified dismissal in Art. 30 is a fundamental right is affirmative, which can be confirmed *inter alia* by the integration of Art. 30 into the CFREU.

The weakness of Art. 30 certainly lies in its implementation deficiencies. It provides a weak actual protection due to the implementation barrier of Art. 51 par. 1 CFREU and the restrained case law of the CJEU. However, the highlighted shortcomings regarding the implementation of Art. 30 do not change the legal nature of this article as an individual right of the worker.

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<sup>119</sup> German Federal Labour Court, BAG 8.12.2011, 6 AZN 1371/11, mn. 10, 12. Available at: <http://www.bag-urteil.com/08-12-2011-bag-6-azn-137111/> (accessed on 23 June 2015)

<sup>120</sup> *Ibid*, mn. 11.

<sup>121</sup> B. Hepple, ‘Enforcement: the law and politics of cooperation and compliance’, in B. Hepple (ed.), *Social and labour rights in a global context. International and comparative perspectives* (Cambridge, 2002), p. 238.