18 The Social Side of the Right to Work in the Recent Case-Law of the CJEU*

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18.1 Introduction

While the legal nature of fundamental social rights in EU law changes across time,[1] and such rights are also difficult to interpret,[2] in spite of these difficulties they reflect such general values which appear both among the aims of the EU and in the priority areas of social policy.[3] The fundamental rights of workers constitute such general values, although EU law in this regard shows some uncertainty and a patchwork development.[4] It seems that the legal system of the EU necessarily acknowledges and expressly protects more and more considerations of labour and social rights as the obligations of Member States derived from international legal obligations.[5] On the one hand, fundamental rights of employees[6]

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1 However, it is not an exclusively EU phenomenon, since global trends also show transformation in regulating the labour market and the constitutional – fundamental – rights of workers. See in detail: H. Rab, "A szociális jogok alkotmányos védelmének szerepe a megváltozott munkaeropiac keretei között", in: M. Homoki-Nagy – J. Hajdú (eds.), *Ünnepi kötet Dr. Czúcz Ottó egyetemi tanár 70. születésnapjára*, SZTE ÁJK, Szeged 2016, pp. 527-533.

2 A. Jacobs, "Labour Law, Social Security Law and Social Policy After the Entering Into Force of the Treaty of Lisbon", *European Labour Law Journal*, Vol. 2, No. 2, 2011, pp. 131-137.

3 Prohibition of age discrimination is a good example. See: E. Kajtár Edit – F. Marhold, "The Principle of Equality in the Charter of Fundamental Rights and Age Discrimination", *European Labour Law Journal*, Vol. 7, No. 4, 2016, pp. 321-342.

4 S. Guibboni, "Social Rights and Market Freedom in the European Constitution: A Re-Appraisal", *European Labour Law Journal*, Vol. 1, No. 2, 2010, pp. 164-169.

5 Fundamental rights conventions of the International Labour Organization (ILO) and the European Social Charter (ESC) created by the Council of Europe should be mentioned as the original sources of employees' rights. The Member States are legally bound by the international legal obligations stemming from these instruments.

6 Nevertheless, it is still a question which rights pertain to this category. I think the rights stated in the ESC could be a good solution but neither regarding employment nor regarding social protection is there a detailed list, because of the shared competeneces in the field of social policy. See in connection with the fundamental labour and social rights of the ESC: N. Casey, "The European Social Charter and Revised European Social Charter", in: C. Costello (ed.), *Fundamental Social Rights – Current European Legal Protection & the Challenge of the EU Charter of Fundamental Rights*, Trinity College Dublin 2000, pp. 55-60.

cover the most basic values reflecting the human right nature of social rights;[7] these must be protected in respect of persons working for remuneration as a form of social motivation. On the other hand, looking at the economic side of this group of rights, the fundamental rights of employees are the basis for the free movement of workforce.[8] On the whole, it can be stated that one of the key issues of the free movement of workers within the scope of fundamental freedoms is the right to engage in work. In this paper I analyse the practical approach of this fundamental social right.

Taking the Green Paper of 2006 as a starting point for describing the major problems emerging the EU labour market, we may say that it merely focuses on modern, flexible forms of employment,[9] and on improving productivity and employers' efficiency, without elaborating on the protection of workers. Similarly, the Lisbon Strategy does not focus on strong guarantees of social rights.[10] As far as the catalogue of the minimum of social rights is concerned, since unanimity is difficult to achieve, the basis of comparison is fluid in respect of relevant EU regulation.[11] The flexibility of the rights of employees may give rise to challenges when interpreting the principle of equal treatment[12] or the right to work,[13] for in a civil law labour law system the premise of the freedom of contract may easily run counter to these guarantees.[14]

The present paper examines how and to what extent the most fundamental social rights are granted to employees under EU social policy in the present social and economic framework, and how these affect the structure and dynamics of employment relationships on the free labour market. To be more precise, from among the fundamental social rights – besides mentioning the relevant general principles – I will analyse the right to work. This is justified by its universal legal nature and its decisive effect on other labour and social rights. In my opinion, scientific discussion centring on this right is indispen-

7 V. Mantouvalou, "Are Labour Rights Human Rights?", *European Labour Law Journal*, Vol. 3, No. 2, 2012, pp. 152-154. and 158.

8 R. Nielsen, "Free Movement and Fundamental Rights", *European Labour Law Journal*, Vol. 1, No. 1, 2010, pp. 19-21.

9 Green Paper – Modernising labour law to meet the challenges of the 21st century, Commission of the European Communities, Bruxelles, 22 November 2006. See the impact of the Green Paper through the Hungarian example: P. Sipka, "The Regulation of the Working Conditions As a Limit of Flexible Working – The Effects of the Green Paper Through the Hungarian Example", *Procedia Economics and Finance*, Vol. 23, 2015, pp. 1515-1520.

10 R. Blanpain, "European Social Model (ESM): Myth or Reality?", *European Labour Law Journal*, Vol. 1, No. 2, 2011, pp. 142-144.

11 I. McCormack, "Fundamental Social Rights – a trade union perspective", in: Costello (ed.) pp. 11-12.

12 C. Barnard, "The Future of Equality Law: Equality and Beyond", in: C. Barnard – S. Deakin – G.S. Morris (eds.), *The Future of Labour Law*, Hart Publishing, Oxford – Portland Oregon, 2004, pp. 213-215.and 227-228.

13 Mantouvalou (footnote no. 8.) pp. 153-155. and 168-169.

14 The Hungarian labour law reform can be a good example because it was based on the traditional structure of the employment relationship and it was a complex reform and of course, it took into consideration the developments of EU labour law. See in detail: T. Gyulavári – N. Hos, "The road to flexibility? Lessons from the new Hungarian Labour Code", *European Labour Law Journal*, Vol. 3, No. 4, 2012, pp. 252-269.

sable, since it greatly affects the legal status and economic possibilities of workers. A right formulated in an abstract and general way, it is typically beyond, or at least not at the centre of scholarly analysis, the latter focusing primarily on the rights of employees. At the same time, it is unnecessary to emphasize the relevance of the right to work[15] in the sense that it is clearly of high importance among social and economic rights, and may even be regarded as a kind of theoretical – and therefore necessarily practical – key right when it comes to social and employment issues. A survey of the legal landscape shows that in EU law this fundamental right has never been paid much attention to,[16] and one of the reasons for this is the disputed EU legal assessment of social rights.[17] The second reason is its relatively scarce regulation,[18] while the third reason is inherent in the multi-faceted forms of national regulation in the Member States, where the right to work is regarded as a constitutional right.[19] As a social premise in national regulation, its diverse manifestations are worth further analysis even if it is undisputed that the underlying right to work is embedded in international law.[20]

In view of the above, I will seek to fill the above-mentioned gap in scholarly literature at least in part by concentrating on the content of this right, its position in EU law, its application in legal disputes originating from the Member States. Thus, I will attempt to interpret this right on the basis of the relevant judgments of the Court of Justice of the European Union (CJEU). It should be added that this interpretation is limited in respect of the following aspects: I will only focus on the 'latest' decisions not only for reasons of brevity and consistency, but also because the analysis of the right to work based on legal practice is only truly of substance starting with 2010.[21] In the following few pages, keeping in mind the above- mentioned hypotheses and limitations, I will try to give a complex summary of the concept of the right to work according to EU law on the basis of certain judgments, which may be interpreted on the merits.

15 This right has a key-role concerning the social rights, social benefits, treating unemployment and affects labour market policies. See in detail in a wider context: N. Gundt., "The Right to Work, EU Activation Policies and National Unemployment Benefit Schemes", *European Labour Law Journal*, Vol. 5, No. 3-4, 2014, pp. 349-365.

16 Meaning the special role of social policy in helping establish the Single Market. See: M. Rocca, "Enemy at the Flood (Gates) – EU "Exceptionalism" in Recent Tensions with the International Protection of Social Rights", *European Labour Law* Journal, Vol. 7, No. 1, 2016, pp. 52-55. and 63-64.

17 Rocca pp. 51-52. and 75.

18 V. Papa, "The Dark Side of Fundamental Rights Adjudication? The Court, the Charter and the Asymmetric Interpretation of Fundamental Rights in the AMS Case and Beyond", *European Labour Law Journal*, Vol. 6, No. 3, 2016, pp.

19 See the Hungarian legal approach: P. Tilk, "A munkához való jog és egyes aspektusai az ombudsmani gyakorlatban", *Acta Humana: Emberi jogi közlemények*, Vol. 15, No. 1, 2004, pp. 61-80.

20 S. Laulom – C. Tessier, "Which Seccurites for Workers in Times of Crisis? An Introduction", *European Labour Law* Journal, Vol. 5, No. 3-4, 2014, pp. 209-210.

21 The reason is the entry into force of the CHFR, which regulates the right to work on the level of primary EU law. Such rules were missing in EU law before this legislative step was taken in EU social policy and fundamental right law.

My hypothesis is that in most of the cases, the economic side of the right to work outweighs its social side, a circumstance which, in itself would not be a problem, when it comes to the requirements of the labour market and the freedom to choose an occupation. However, the enforcement of worker's rights and its legal nature are altogether a disputed category in the social policy of the EU, consequently, the level and form of legal protection of employees is closer to the minimum of what should be expected. However, within the realm of the freedom of work these rights cannot be neglected, furthermore, on the basis of the Charter of Fundamental Rights of the European Union (CHFR) the fundamental character of the right to work should justify its effective enforcement in practice. Namely, as expressed in the title, the classical, social interpretation of the right to work and its enforcement are the subject of the present paper. Naturally, I shall also pay some attention to the right's economic side, mainly because it may be restricted. At the end of this analysis, general conclusions may be drawn regarding the level of legal protection of employees on the basis of the CJEU's case-law on the right to work. The question asked in the title – whether the right to work is an economic or social-type right – is not a poetic question, and I am going to answer it in the conclusion. In EU law (as in national law), the right to work is placed at the intersection of economic and social rights, therefore, in my opinion, when it comes to assessing the circle of the fundamental rights and the free movement of workers, social aspects cannot be left unconsidered. This paper is an important part of a larger research project focusing on the legal position and emergence of workers' fundamental rights in the framework of 21st century labour law trends. Assessing a fundamental labour right from a partly theoretical and partly practical point of view, focusing on the recent case-law of the CJEU will be an important contribution to scholarship. This is because on the one hand it reflects the position of the CJEU concerning a relevant fundamental right, while on the other hand – besides elaborating on further labour law questions – the CJEU reveals the place it assigns to labour and social rights, in particular, the right to work in the current legal construct.

In my opinion, the most authentic source for exploring current trends is the CJEU. Therefore, I will analyse judgments that interpret the CHFR's chapter concerning the rights of workers (IV. Solidarity), in which interpretations of the right to work appear. As a primary legal source, the CHFR[22] gives a first-hand interpretation of workers' fundamental rights, consequently, it sheds light on employment protection rules developed on the basis of Charter principles.

18.2 'Solidarity' and the Right to Work in EU Law

Although several judgments have been rendered with respect to the protection of fundamental rights since the CHFR entered into force on 1 December 2009, the CJEU under-

22 E. Várnay – M. Papp, *Az Európai Unió joga*, Wolters Kluwer, Budapest 2016, p. 177.

takes a veritable interpretation of single fundamental rights only in a few cases. Nevertheless, this continuously changing case-law can be a sound basis of the present analysis, since the application of the CHFR in the context of social policy and its position in EU law are indisputable.[23] Let us take a look at a good example for the latter: the 'Hungary-related case-law[24] regarding unjustified dismissal eloquently demonstrates that Article 54 of CHFR governs a field which may be regarded as the core of social policy, and employees' rights.[25] While this restriction is acceptable from the point of view of EU law,[26] from a a labour law perspective, it can hardly be accepted.

In the course of this research and the present analysis, aspects of labour and social law shall be brought to the fore, while the substantive analysis and the criticism of the EU law side of the question will be given less attention. The concept of the right to work in the CHFR may be examined through analysing the judgments,[27] consequently, additionally I am examining the regulatory difficulties in the social policy of EU[28] concerning the fundamental rights of workers. It should be added that this group of questions is highly relevant from the perspective of the functioning of the internal market and in particular, the free movement of workers,[29] even though where the latter is concerned, economic considerations are far removed from the traditional idea of social welfare and protection. This analysis is relevant, since two decades earlier the CJEU stated in the *Schröder* judgment[30] that the principle of equal pay for equal work is a two-sided principle – on the one hand, it has a social side and constitutes a human right aspect, while on the other hand, it has an economic side, with market considerations. Yet, according to the CJEU the social element of the principle of equal pay is more dominant, in spite of the existence of important economic grounds for restricting the principle. Therefore, although fundamental labour and social rights shall be considered, taking both aspects into account, their legal nature must be assessed in light of the tendencies emerging in the jurisprudence of the CJEU. As for the right to work, the same considerations apply.

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23 See in detail: S.I. Sánchez, "The Court and the Charter: The impact of the entry into force of the Lisbon Treaty on the ECJ's approach to fundamental rights", *Common Market Law Review*, Vol. 49, No. 5, 2012, pp. 2565-1611.

24 Order of 16 January 2014 C-614/12. and C-10/13. joint cases *József Dutka (*C-614/12*) v. Mezogazdasági és Vidékfejlesztési Hivatal and Csilla Sajtos (C-10/13) v. Budapest Főváros VI. Ker. Önkormányzata* [2014], Order of 10 October 2013 C-488/12., C-489/12., C-491/12., C-492/12. and C-526/12. joint cases *Nagy Sándor and Others v. Hajdú-Bihar megyei Kormányhivatal* [2013], Order of 16 January 2008 *C-361/07. Olivier Polier v. Najar EURL* [2008].

25 B. Hepple, "Fundamental social rights since the Lisbon Treaty", *European Labour Law Journal*, Vol. 2, No. 2, 2011, pp. 150-154.

26 B. Bercusson, ""Horiziontal" provisions – Title VII General provisions governing the interpretation and application of the Charter (Articles 51-54)", in: B. Bercusson (ed.), *European Labour Law and the EU Charter of Fundamental Rights*, Nomos, Baden-Baden 2006, pp. 404-414.

27 See: Várnay – Papp pp. 214-218.

28 Hepple pp. 150-154.

29 Guibboni pp. 161-168.

30 Point 57 and conclusions of Judgment of 10 February 2000 *C-50/96. Deutsche Telekom AG v. Lili Schröder* [2000].

The following analysis focusing mainly on the case-law should yield a concept of, or at least, a guideline for conceptualizing the social protective side of employment relationships as interpreted under EU law.[31] Referring to the above-mentioned example, a strict, legal protective-oriented interpretation of Article 30 of the CHFR would result a great limitation of freedom of contract of the parties. Termination of employment – even if dismissal is problematic in case of a basically permanent legal relationship[32] – is such a basic economic interest, being part of the autonomy of the employer, as the establishment of employment. In general, it is an accepted paradigm[33] that rules restricting termination put more emphasis on the interests of the worker. The question is how such protection can be guaranteed where Article 30 cannot be directly applied.

From the viewpoint of labour law, the most important part of the CHFR is Chapter IV entitled Solidarity.[34] Of course, general concepts of the CHFR and other segments of primary law[35] pervade the substance of this chapter, nevertheless, this catalogue of rights is worth analysing. With the title Solidarity, the EU legislator intends to express that the chapter includes fundamental rights of mainly labour law character,[36] stressing the importance of the different forms of solidarity – e.g. between the employer and the employees. The rights enshrined in Chapter IV may be regarded as the most important fundamental rights of workers. Of course, the list seems incomplete when compared with the Community Charter of Fundamental Social Rights of Workers of 1989 (CCFSRW), which never entered into force.[37] It should be noted that experiences of the legislature, jurisprudence, and in general, the society and the economy in the past decades justify the 'withdrawal' from these rights.[38]

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31 Regarding this concept see in detail: T. Gyulavári, "A gazdaságilag függo munkavégzés szabályozása: kényszer vagy lehetoség?", *Magyar Munkajog*, Vol. 1, No. 1, 2014, pp. 7-13., T. Gyulavári, *A szürke állomány. Gazdaságilag függo munkavégzés a munkaviszony és az önfoglalkoztatás határán*, Pázmány Press, Budapest 2014, pp. 143-198., T. van Peijpe, "EU Limits for the Personal Scope of Employment Law", *European Labour Law Journal*, Vol. 3, No. 1, 2012, pp. 31-53. and B. Waas, "The Legal Definition of the Employment Relationship", *European Labour Law Journal*, Vol. 1, No. 1, 2010, pp. 45-57.

32 Z. Petrovics, "A jogellenes munkajogviszony-megszüntetés jogkövetkezményeinek margójára", in:I. Horváth (ed.), *Ünnepi tanulmányok Dr. Hágelmayer Istvánné születésnapjára*, ELTE Eötvös Kiadó, Budapest 2015, pp. 368-369.

33 See: ILO Termination of Employment Convention, 1982 (No. 158) and Article 24 of the revised ESC.

34 Berke points out that the CHFR contains the most fundamental labour and social rights for the employees fulfilling the minimum requirements of fundamental right protection. See in detail: Gy. Berke, "Az Európai Unió Alapjogi Chartájának alkalmazása munkajogi (szociálpolitikai) ügyekben", *HR & Munkajog*, Vol. 2, No. 11, 2013, pp. 8-14.

35 Title X of the Treaty on the Functioning of the European Union (TFEU) Articles 151-161.

36 T. Blanke, "10. Workers' right to information and consultation within the undertaking (Article 27)", in Bercusson pp. 257-258.

37 Both the way of guaranteeing the fundamental rights and their catalogue were different in the original CCFSRW. See: <www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/community-charter-of-the-fundamental-social-rights-of-workers>.

38 This "withdrawal" does not change the universality of social rights and this is the basis of the legal protection of employees. See: Gy. Kiss, *Alapjogok kollíziója a munkajogban*, Justis, Pécs 2010, pp. 69-70.

Although it will be examined in detail in the following, it is worth mentioning that the right to work is not included in Chapter IV among the fundamental labour rights featured there. However, due to its relevance and social aspects, it is justified that we examine it along with the 'solidarity' rights. Firstly, because the CJEU itself is keen to refer to Article 15 CHFR in different labour law disputes.[39] Second, the social – and partly economic – side of the right to work constitutes the basis for other fundamental labour and social rights, as a consequence, it cannot be separated from the latter on the grounds that it is regulated among the fundamental economic rights. It should be noted that the latter solution is actually in line with the legal construct defining the main concept of the free movement of workers.[40]

18.3 Recent Case-Law of the CJEU Concerning the Right to Work

18.3.1 The Legal Nature of the Right to Work Enshrined in Article 15 of the CHFR

Article 15 CHFR states that everybody has the right to engage in work and to choose their occupation freely. The importance of the right to work is evidenced by the fact that beyond EU law, it is also guaranteed under international law.[41] A traditional social right, the right to work may be classified as a second generation human right.[42] However, the EU's legal and economic approach to this right is oriented on the scope and the limitations of the legal nature of the right to work: namely, the fact that it is not a subjective right. Besides, it is apparent that in EU law, the right to work primarily appears as a legal basis or at least a complement to the free movement of workers.[43] Basically, the right to work restricts the modern concept of the principle of contractual freedom[44] and the flexible structure of employment, consequently. As a result, the protected status of the employee emerges as a challenge,[45] even though it is generally regarded as an underlying theoretical principle.[46]

39 For example legal disputes connected to access to social benefits, equal employment and dismissal.
40 Nielsen pp. 19-21.
41 See para. (1) of Article 23 of the Universal Declaration of Human Rights (UDHR) and para. (1) of Article 6 of the International Covenant on Ecomoic, Social and Cultural Rights (ICESCR).
42 C. O'Cinneide, "The Right to Work in International Human Rights Law", in: V. Mantouvalou (ed.), *The Right to Work – Legal and Philosophical Perspectives*, Hart Publishing, United Kingdom – North America 2015, pp. 99-101.
43 Nielsen pp. 19-21.
44 The economic side of the right to work more dominant than respective social considerations. See: Kiss (footnote no. 38) pp. 275-276.
45 It must be added that the CHFR guarantees legal protection against unfair dismissal separately in Article 31.
46 M. Freedland – N. Kountouris, "The Right to (Decent) Work in a European Comparative Perspective", in: Mantouvalou (ed.) pp. 123-136.

In its judgment of 7 April 2016 *C-284/15. Office national de l'emploi (ONEm) and M v. M and Others, and Office national de l'emploi (ONEm) v. Caisse auxiliaire de paiement des allocations de chômage (CAPAC)* [Information not available] concerning the interpretation of Regulation 1408/71/EEC,[47] the CJEU was faced with problems of interpretation concerning the right to social security guaranteed across the Member States. At stake was that in case EU law should not guarantee the possibility of engaging in work in a Member State other than the Member State of origin, workers would be stripped of their most fundamental social rights. In my opinion, it may result in an inappropriate assurance of right to free movement in the labour market, since in case of employment across Member States, no comprehensive assurance of social rights can be provided. The right to work is such a fundamental requirement in every labour market that establishing or terminating employment relationships are tied to appropriate guarantees, notwithstanding the fact that in itself the right to work cannot ensure the socio-economic mobility of the individual.[48] It should be noted that this primary collision also emphasizes that free movement across the Member States in itself does not provide social guarantees to employees. At the same time, on this issue, it should be up to the CHFR to compensate for such differences, since the CHFR, together with the chapter 'Social Policy' of the TFEU provides a full catalogue of social rights recognized and ensured in the Union labour market.[49] Consequently, the rights of workers recognized and protected by the CJEU focus less on the social side of the employee status, and are strongly influenced by economic aspects. This shows the paradox inherent in the legal concept of the right to work: social rights based on solidarity cannot be totally compatible with the polarized principle of freedom of contract, while also respecting the social protection of employees.

As far as the content of the right to work is concerned, the present judgment analyses whether paragraph (2) of Article 15 CHFR[50] – together with Article 45 TFEU[51] – is breached by a regulation of Member State which does not conclude the temporal scope of part-time employment not preceded by an insurance relationship in the Member State. Namely, time-in-service is not accepted as a basis for granting unemployment benefits. Clearly, this national regulatory solution affects several aspects of the right to work, such as obtaining unemployment benefits, social security guarantees and ultimately, the free movement of workers.

47 Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

48 Kiss (footnote no. 38) pp. 280-281.

49 Due to diverse national social policies such fundamental rights may differ to a great extent, including, for example the scope of the right to work.

50 According to this article every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.

51 Para. (1) secures the freedom of movement for workers within the EU, para. (2) abolishes discrimination on grounds of nationality regarding the main aspects of employment, para. (3) lists the essential elements of this freedom and para. (4) addresses employment in the public service as an exception.

In Point 30 of the judgment, the CJEU states a de facto connection between Articles 45 and 48 of the TFEU[52] and Paragraph (2) of Article 15 of CHFR, asking whether the relevant rule of social coordination is valid or not with regard to these regulations.[53] In my opinion, from this point of view, the adjudication of the right to work is also problematic because it is not clear what genuine safeguards for the fundamental rights of workers are included in it. The validity and applicability of the relevant regulation of social coordination cannot be questioned if the protection of the fundamental social rights of the employees is included in the right to work. Referring to the *Gray* judgment,[54] the CJEU accepts the viewpoint according to which the Member States can define the conditions on which basis the employees are urged to find a job in the country where contributions are paid for them by the employer.[55] The CJEU comes to the conclusion that there are no such issues on the basis of which the above-mentioned primary law – in the scope of the guarantee to the right to work and the free movement of workers – would be related to the social coordination regulation.[56] Finally, the CJEU emphasizes that on the basis of Paragraph (2) of Article 52 of the CHFR, the fundamental rights ensured in the CHFR can be interpreted only with the conditions and restrictions implemented by the CHFR and the TFEU. Such is the right to work according to Point 33 of the judgment, and the CJEU states that it is not more than an addition to Article 45 of the TFEU, so no further interpretation is necessary. Accepting the importance of free movement, without a single mention of the right to work, which is connected to it, the CJEU refers to the *Gardella* judgment,[57] on which basis in Point 34 and in the final conclusion, it is confirmed that the discussed regulation of the Member States does not limit the right to work. Consequently, the fundamental right of the employees to social security is not violated, neither does it put obstacles in the way of free movement. However, it may be assumed that the right to work can be restricted as a result of such open limitation of social benefits applied in a Member State.

In my opinion concerning the content of right to work, the CJEU did not thoroughly take into consideration the facts of the case, since the direct connection that is clear in Articles 45 and 48 of the TFEU would create the grounds for a higher level of protection

52 Article 48 prescribes actions that can support working in different Member States starting based on social security.

53 Para. (3) of Article 67 of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

54 Judgment of 8 April 1992 C-62/91. *Gordon Sinclair Gray v. Adjudication Officer* [1992].

55 Judgment of 7 April 2016 C-284/15. *Office national de l'emploi (ONEm) and M v. M and Others, and Office national de l'emploi (ONEm) v. Caisse auxiliaire de paiement des allocations de chômage (CAPAC)* [Information not available], point 31.

56 Judgment of 7 April 2016 C-284/15. *Office national de l'emploi (ONEm) and M v. M and Others, and Office national de l'emploi (ONEm) v. Caisse auxiliaire de paiement des allocations de chômage (CAPAC)* [Information not available], point 32.

57 Judgment of 4 July 2013 C-233/12. *Simone Gardella v. Istituto nazionale della previdenza sociale (INPS)* [2013].

of this right. In my view, the right to work means more than a transnational guarantee of social security and enforcement of free movement,[58] and its main proof is that in EU law, it is placed among the most important fundamental rights. In this context, the safeguarded aspect of this right should also be brought to the fore. Furthermore, the above-referred Point 33 of the judgment is contradictory, since assuming that there is an essential legal relationship between Article 15 of the CHFR and Article 45 of the TFEU, it is not clear why it is necessary "to go further" in application than to accept that the guarantee of the right to work is well established, a strong human right on the primary EU law level, to be respected on the level of both the Member States and the EU. Namely, according to the conclusion and the statement of facts, it would be justified to clarify the extent to which the right to work includes several aspects of social security and the effects that such limitations in the labour market may exert on the right to work.

In Judgment of 10 September, 2014 C-270/13. *Iraklis Haralambidis v. Calogero Casilli* [2014], the CJEU analysed the relevant regulations of the CHFR concerning the connection between the content of right to work and equal treatment. Starting from the right to work and the application of the relevant directives, the CJEU also pays attention to the concept of employment relationships in legal practice, thus giving a kind of clue to the content of the right to work. The right to work, or the violation of freedom to engage in work was examined on the basis of a national regulation, which made it possible to give a position (chairman of port authority) regarded as a public office under national law only to the citizens of the given Member State.

Paragraph (2) of Article 21 of the CHFR prohibits discrimination on grounds of citizenship, which is the basis of the free labour market,[59] and in this case it should be interpreted together with Article 15 of the CHFR. The CJEU states in Points 26-41 of the judgment – starting from Article 45 of the TFEU, the *Lawrie-Blum*,[60] *Petersen*,[61] *Committee v. the Netherlands*,[62] *Bettray*[63] and *Sotgiu* judgments[64] – that the legal relationship in question is an employment relationship according to the EU law concept, consequently, the right to work is applicable. Concerning the concept of the employment relationship, the CJEU pays attention to the personal and economic subordination of the

58 C. Vigneau, "7. Freedom to choose an occupation and right to engage in work (Article 15)", in: Bercusson pp. 178. and 181-186.

59 F. Strumia, "European Social Citizenship: Solidarity in the Realm of Faltering Identity", *European Journal of Social Law*, Vol. 1, No. 2, 2011, pp. 122-140.

60 Judgment of 3 July 1986 C-66/85. *Deborah Lawrie-Blum v. Land Baden-Württemberg* [1986].

61 Judgment of 28 February 2013 C-544/11. *Helga Petersen and Peter Petersen v. Finanzamt Ludwigshafen* [2013].

62 Judgment of 22 October 2014 C-252/13. *European Commission v. Kingdom of the Netherlands Királyság* [2014].

63 Judgment of 31 May 1989 C-344/87. *I. Bettray v. Staatssecretaris van Justitie* [1989].

64 Judgment of 12 February 1974 C-152/73. *Giovanni Maria Sotgiu v. Deutsche Bundespost* [1974].

employee, and the type of activity, too.[65] In my opinion, this interpretation is broad, since in the opinion of the advocate general, the view that this concept even regards the worker who works in a clearly civil law context as an employee,[66] is not necessarily an accurate view seem from the classical concept of an employment relationship.[67] It should be noted that the CJEU has stated several times that the recognition of this concept is of high importance, mainly because of the necessary legal protection of the employees. Thus, a classical, socially motivated regulative approach emerges, which also appears in the duality of economic and social interests.[68] At the same time, the judgment also shows that besides traditional considerations – or instead of them – the concept of freedom of contract has to be dominant. The underlying reasoning is that, if the legal relationship of a member of a management board of a private company can be regarded as an employment relationship, broadening the legal protection, we diverge from the well-known concept of an employment relationship. In my opinion, these conceptual considerations may affect the scope of right to work because their content can change according to the legal relationships that they are applied to.

The CJEU concludes that this kind of restrictive regulation of a Member State contradicts Article 45 of the TFEU but we can also indirectly conclude that it also runs counter to Article 15 of the CHFR. Consequently, concerning the restriction of the right to work, the CJEU is less strict to economic limitations than to social restrictions, and on this basis, the CJEU prefers the economic side of the right to work. A further consequence of the above legal interpretation can be that in the legal application of Article 15 of the CHFR, it can essentially be substituted by Article 45 of the TFEU.

This theoretical possibility is confirmed in Point 36 of the opinion of the advocate general, since it states that the regulation of the CHFR that was referred to does not have more content than Article 45 of the TFEU, and only such obligations which are at least tacitly included in Article 45 of the TFEU are imposed on the Member States. Finally, the right to work – contrary to the concept of employee or working time – is not a unified EU law concept, it does not have common, special EU law content. Concerning content, it is worth mentioning the scope of influence of the right to work, since the CJEU partly clarifies which persons are the potential beneficiaries of the right to work. The widening interpretation of the concept of an employment relationship clearly shows that in the

65 Gy. Kiss, "Foglalkoztatás gazdasági válság idején – a munkajogban rejlo lehetoségek a munkajogviszony tartalmának alakítására (jogdogmatikai alapok és jogpolitikai indokok)", *Állam- és Jogtudomány*, Vol. 55, No. 1, 2014, pp. 38-45. Regarding the specialities of economically dependant work see in detail: T. Gyulavári, "Trap of the Past: Why Economically Dependent Work is not Regulated in the Member States of Eastern Europe", *European Labour Law Journal*, Vol. 5, No. 3, 2014, pp. 267-278. and F. Rosioru, "Legal Acknowledgement of the Category of Economically Dependant Workers", *European Labour Law Journal*, Vol. 5, No. 3-4, 2014, pp. 279-305.

66 Opinion of Advocate General, point 33 referring to Judgment of 11 November 2010 C-232/09. *Dita Danosa v. LKB Lizings SIA* [2011], points 45-51. and conclusions.

67 Kiss (footnote 39.) pp. 235-237.

68 Gyulavári (footnote 32. "A szürke…") pp. 143-145.

conceptual focus of the right to work, there is the free movement of workers and the fundamental rights of employees, rather than the strict interpretation of the status of employees.

Furthermore, attention should be paid to Points 71-78 of the advocate general's opinion on the Judgment of 26 September 2013 C-546/11. *Dansk Jurist- og Økonomforbund v. Indenrigs- og Sundhedsministeriet* [2013]. In these points, the following question arises with reference to Article 21 of the CHFR and analysing Paragraph (1) of Article 15,: is the national regulation a disproportional restriction of the right to work according to which retirement is mandatory for the employees if they fulfil the conditions of pension entitlement? It is a fact that a certain regulation based on the worker's age makes employment difficult, and may restrict the right to work, even if ex lege mandatory retirement does not necessarily violate a fundamental right.[69] In this regard, it is important to refer to the *Andersen* judgment,[70] since the key issue of the restriction of the right to work is proportionality and necessity. However, based on these judgments, we cannot answer the question whether, on the basis of Article 15 of the CHFR, what extent of liability the Member States have in guaranteeing the right to work, and what those cases of open restrictions are which practically preclude some individuals from the scope of this right based on age. In my opinion, at this point the function of the fundamental right to work may counter the right to social security, but eventually, both of these rights serve the same purpose, but it seems that in some cases the Member States have to favour one of them.

In Judgment of 12 December 2013 C-361/12. *Carmela Carratù v. Poste Italiane SpA* [2013], the question arises whether the right to work is breached if the employer terminates a fixed-term employment relationship. This infringement is relevant in case of a discriminative termination by the employer, since the right to work may be violated as a consequence of illegal conduct. To raise the mainly theoretical question is also justified by Directive 1999/70/EC,[71] since it is natural that the social interests of the employee have to be respected at the termination of employment, so any disadvantageous working conditions of employees who work fixed-term may violate the fundamental right to work. In this sense, a so-called precarious, vulnerable worker's legal status will be highly probable in the case of such employer's acts, therefore the scope of right to work needs to cover these special areas as well. On the one hand, the direct link to anti-discrimination in employment justifies this idea, and on the other hand, the right to work cannot be interpreted only as a universal social and/or economic right because it has to secure the proper ways of legal protection even for atypically employed or vulnerable groups of workers.

69 See the conclusions of Judgment of 16 October 2007 C-411/05. *Félix Palacios de la Villa v. Cortefiel Servicios SA* [2007].

70 Judgment of 18 December 2008 C-306/07. *Ruben Andersen v. Kommunernes Landsforening* [2008].

71 Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

18.3.2 The Conceptual Aspects of the Right to Work

In the following section, I will briefly discuss some other relevant recent judgments in which the CJEU – contrary to the above subchapter – draws conclusions on content and extent rather than starting out from the fact that the right to work is a fundamental right and that it is one of human right nature. The CJEU comes to such conclusions in connection with specific labour law disputes, or a legal dispute not closely related to labour law. These cases are important, too, on the one hand, this right can be analysed directly from the viewpoint of practice through a less direct "fundamental right-focused" analysis, and on the other hand, the right to work examined together with other norms of labour law can be placed into context. In my opinion, it is important because it is easier to express the significance of the right to work through specific examples even if several times – generally contrary to the labour law norms – social interests are mostly left without attention in connection with the right to work.

Furthermore, in my opinion, the right to work – in this respect – can influence the content of certain other labour rights, since the scope and applicability of the right to work ensure the theoretical background for the examination of the regulation of social content anyway. In my understanding, labour rights should be looked at in this way because without the above-mentioned social aspect of such an important right (as the right to work), these norms cannot be complete even if we nowadays look at labour law as a field of law closer to economic interests than to traditional social values. I think all these values – that also appear in the CHFR, furthermore, even to a limited extent but in the TFEU as well – are essential for talking about a legal system of norms called "labour law" and the right to work is the very basis of this system. Or, at least it should be so, this is why I think that a slightly different approach will become necessary at this point, as compared to sub-chapter 18.3.1.

All these considerations are true for both the laws of the Member States and EU law, although the duality of the above-mentioned economic and social sides makes the interpretation of this right difficult. However, the interests to be protected – that is, the interests of the workers – are clear in the original motivations of this right. As I mentioned when I discussed the interpretation of this right as a fundamental right, the right to work is of high importance in engaging in work up to the period after the termination of the employment relationship,[72] which inevitably localises several substantial questions of employment in general.

The fundamental right character of the right to work is also mentioned in Judgment of 6 September 2012 C-544/10. *Deutsches Weintor eG v. Land Rheinland-Pfalz* [2012], the subject of which is not labour law. Also, it is mentioned together with the freedom to

72 P. Sipka, "A Kúria döntése a munkaviszony megszunéséról: a munkához való jog védelme", *Jogesetek Magyarázata*, Vol. 6, No. 2, 2015, pp. 37-39.

conduct a business (Article 16 of the CHFR) in Point 44 of the judgment. Although the economic connection between these two entitlements is incontestable, the above-mentioned problem which emerged about emphasizing the social aspect of this right urges us to further examinations. Importantly, in Point 54 of the judgment, the CJEU reminds us that if a Member State prohibits or restricts a professional activity, it does not necessarily breach Articles 15 and/or 16 of the CHFR. The reason for this is that the right to work cannot be interpreted as an unlimited fundamental right, and its content can be interpreted on the basis of its social function. In my opinion, it also means that the function of the right to work is unclear on a social level, or at least, it would make more sense to make those aims of the labour market, labour law, employment policy, mutatis mutandis social aims unambiguous, on the grounds of which their social role can be judged. Undoubtedly, even the economic aspect of the right to work has a great influence on the social situation, the empowerment of the employees and employers, so its social purpose should be defined from this viewpoint. The fact that it can be restricted may be traced back to these circumstances, but we also have to consider that in the labour market – after all, in society –it is the personal social interests of the employees that are in the centre concerning the right to work, even if the state can "freely" shape the content and scope of this right.[73] Consequently, bearing in mind the aim, which is legal and protects common interests, and proportionality, the restriction of the right to work basically does ot arise, but according to the judgment, the circumstances are closer and closer to the legal limitation.

In Judgment of 30 April 2014 C-390/12. *Robert Pfleger and Others* [2014], the right to work appears as a summary, in Articles 15-17 of the CHFR, while in connection with the restriction of the freedom of service, it is represented as Article 56 of the TFEU. The judgment states that the right to work is violated if a national law prohibits certain economic activities disproportionately, without a justified aim, so in this way, the right to work can be mentioned together with the limitation of right to conduct business, in a wider interpretation with the freedom of contract. In my opinion – although it is a general conclusion – it is very important to come to such a conclusion because it clearly shows the economic side of the right to work but at the same time, the social interests also appear in it. The reason for the latter is that prohibiting an economic activity – for example, a certain profession or job – cannot be judged alone based on its effects on the labour market and the economy because at the same time it affects the available workforce, the job opportunities, etc. as well. I think that some thinking outside the box can clearly show the difference between this approach and the dominance of economic interests shown above; supporting workers and job seekers in the labour market has its social and economic advantages for the whole society but letting the Member States limit this

73 See a huge segment of the Hungarian legal interpretation: P. Gulyás, "A munkához, a munka és a foglalkozás szabad megválaszásához való jog az Alkotmánybíróság gyakorlatában", *Esély: társadalom- és szociálpolitikai folyóirat*, Vol. 13, No. 5, 2002, pp. 38-44.

kind of freedom to a harmful extent will diminish both sides of this right and will result in great disadvantages in the labour market. So, according to this judgment, we can understand the reason why the right to work is mentioned together with other economic rights in the CHFR but we also need to understand that promoting the economic needs and interests even through this fundamental right does not make the social considerations of the right to work unnecessary because the needs and rights of unemployed people, precarious workers, socially deprived members of the society and all persons who try to be productive for their societies should be respected in the first place because their efforts can lead to the already-mentioned economic circumstances, concerning for example, the right to work itself.

Finally, it should be noted that the right to choose occupation freely, and the limitation thereof emerge as recurring issues in cases of employment discrimination, too, so I would like to mention Judgment of 9 March 2017 C-406/15. *Petya Milkova v. Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol* [2017] and Judgment of 28 July 2016 C-423/15. *Nils-Johannes Kratzer v. R+V Allgemeine Versicherung AG* [2016] of the latest decisions. In such types of legal disputes, the CJEU often refers to the extent of the regulation of employment anti-discrimination, in which scope, according to the relevant directives,[74] the right to work is mentioned among the questions where the principle of equal treatment must be guaranteed. Namely, the prohibition of discrimination is also governing with regard to engaging in work,[75] and at the same time, it also means that unjustified and disproportional restrictions in this regard are prohibited in the regulation of the Member States. Otherwise, its connection to equal treatment also raises the problem of the fundamental right character, since essentially, the above mentioned social consideration is the same regarding both of these rights – at least regarding employment – but the regulation and the content of these rights can be different on the basis of the case-law of the CJEU. I think that ensuring equal treatment in the labour market can guarantee the effective safeguarding of the right to work, and of course, these aspects should appear in the jurisprudence of the CJEU.

18.4 Conclusion – Economic or Social?

When summing up the fundamental right character of the right to work, it can be stated that the CJEU does not support this with real content, although it is the responsibility of Member States on the level of domestic law, and it is very important from the viewpoint of the fundamental rights of workers. The right to work appears in three areas in the

74 See Directives 2000/78/EC, 2000/43/EC and 2006/54/EC.

75 See the following two judgments. Judgment of 21 July 2011 C-104/10. *Patrick Kelly v. National University of Ireland (University College, Dublin)*[2011], Judgment of 19 April 2012 C-415/10., *Galina Meister v. Speech Design Carrier Systems GmbH* [2012]. These cases are very important from the aspect of the burden of proof in discrimination cases.

interpreted case-law, and these areas are in closely connected to each other. Firstly, we note the freedom of engaging in work and choosing occupation freely, secondly, the possibility of accessing social rights, thirdly, categorising legal relationships of employment with regard to their legal quality. We can come to the conclusion that the CJEU mainly regards this freedom from an economic rather than a social aspect, which basically restricts this right of the workers on the basis of the CHFR. Of course, limitation is possible but we should pay attention to the fact that without the effective performance of this right, no fundamental labour or social rights can be enforced, so it is assumed that in the concept of the CJEU, the classical employee protection approaches should be reflected.[76] It also seems that the right to work is interpreted broadly in the case-law of the CJEU, but its limitation – even if it raises problems of sharing competences at the same time – regarding economic aspects is legitimised, since the issues of the labour market or employment policy are such aspects.

It seems like the main question may be modified, since concerning the CHFR the fundamental right character and importance of the right to work cannot be questioned, its realisation is another problem. Clearly, the CJEU focuses on the economic side of this right in the judgments, which partly expresses the preferred value, partly generates pressure, since the regulative logics of the CHFR do not necessarily bring the social considerations regarding this entitlement to the fore. To this, I would add that the CHFR adjudges solidarity, namely traditional social rights similarly to the right to work,[77] consequently, the similarity of the methods of legal interpretation and legal application raises the need for a kind of unified regulation, or at least, the need for approaching these. However, the right to work still remains problematic because as a consequence of its social function, the restriction of flexible interpretation, the relative freedom of limitation practically make substantial improvement almost impossible. At this point, it is necessary to refer to the concept of the "European Pillar of Social Rights",[78] since its main point is to improve and create closer cooperation between Member States in the field of employment policy and social issues. In my view, it is clear that the importance of the most fundamental social values will come to the fore in EU law and policies in the following years but it cannot be denied that regarding issues of social policy, the need for safeguarding and respecting social interests, and the need for genuine legal protection are not new requirements.[79] Concerning the right to work, it is not necessarily the lack of the social aspect or the fact that it is underrepresented that may require examination but rather, the social requirements cited in the judgments which are reflected in the EU labour market.

76 Vigneau pp. 173-178.

77 See in detail: Papa pp. 199-214.

78 See: <http://ec.europa.eu/social/main.jsp?langId=hu&catId=1226> (30.06.2017.) and <www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0010+0+DOC+XML+V0//HU> (30.06.2017.).

79 Rocca pp. 52-55.

In summary, it can be concluded that concerning the fact that the right to work is securely embedded in the law, the CJEU definitely regards it as a fundamental right of an economic nature, while its values on a national or EU level are much rather values of social interests. Is it sufficient to assign the social aspect to the regulations of Member States? Maybe it is not the best solution concerning its fundamental right character and the free movement of workers but the jurisprudence of the CJEU does not show substantial improvement in comparison to the applied methods before the entry into force of the CHFR.