

Article 15

Article 15

Freedom to Choose an Occupation and Right to Engage in Work

1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.
2. 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.
3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.

Text of Explanatory Note on Article 15

Freedom to choose an occupation, as enshrined in Article 15(1), is recognised in Court of Justice case law (see inter alia judgment of 14 May 1974, Case 4/73 *Nold* [1974] ECR 491, paragraphs 12 to 14 of the grounds; judgment of 13 December 1979, Case 44/79 *Hauer* [1979] ECR 3727; judgment of 8 October 1986, Case 234/85 *Keller* [1986] ECR 2897, paragraph 8 of the grounds).

This paragraph also draws upon Article 1(2) of the European Social Charter, which was signed on 18 October 1961 and has been ratified by all the Member States, and on point 4 of the Community Charter of the Fundamental Social Rights of Workers of 9 December 1989. The expression ‘working conditions’ is to be understood in the sense of Article 156 of the Treaty on the Functioning of the European Union.

Paragraph 2 deals with the three freedoms guaranteed by Articles 26, 45, 49 and 56 of the Treaty on the Functioning of the European Union, namely freedom of movement for workers, freedom of establishment and freedom to provide services.

Paragraph 3 has been based on Article 153(1)(g) of the Treaty on the Functioning of the European Union, and on Article 19(4) of the European Social Charter signed on 18 October 1961 and ratified by all the Member States. Article 52(2) of the Charter is therefore applicable. The question of recruitment of seamen having the nationality of third States for the crews of vessels flying the flag of a Member State of the Union is governed by Union law and national legislation and practice.

Select Bibliography

- P Alston, ‘The General Comments of the UN Committee on Economic, Social and Cultural Rights’ (2010) 104 *Proceedings of the Annual Meeting (The American Society International Law)* 4–7.
- D Ashiagbor, ‘The Right to Work’ in G de Búrca and B de Witte (eds), *Social Rights in Europe* (Oxford, OUP, 2005).
- , *The European Employment Strategy: Labour Market Regulation and New Governance* (Oxford, OUP, 2005).
- M Bell, ‘Walking in the Same Direction? The Contribution of the European Social Charter and the European Union to Combating Discrimination’ in G de Búrca and B de Witte (eds), *Social Rights in Europe* (Oxford, OUP, 2005).

- H Collins, ‘Is there a Human Right to Work?’, in V. Mantouvalou (ed) *The Right to Work – Legal and Philosophical Perspectives* (Oxford, Hart, 2015).
- M Craven, *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (Oxford, Clarendon Press, 1998).
- S Deakin, ‘Article 1 – The Right to Work’, in N. Bruun, K. Lorcher, I. Schoemann and S. Clauwaert (eds) *The European Social Charter and the Employment Relation* (Oxford: Hart, 2017) 147
- J Elster, ‘Self-realization in Work and Politics: the Marxist Conception of the Good Life’ (1986) *Social Philosophy & Policy* 97–126.
- , ‘Is there (or should there be) a right to work?’ in A Gutmann (ed), *Democracy and the Welfare State* (Princeton, Princeton University Press, 1988).
- E Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis* (OUP 2019).
- B Hepple, ‘A Right to Work?’ (1981) 10(1) *Industrial Law Journal* 65–83.
- D Little, ‘Job Elster’ in W Samuels (ed), *New Horizons in Economic Thought: Appraisals of Leading Economists* (Cheltenham, Edward Elgar Publishing, 1992).
- V Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Oxford, Hart, 2015)
- , ‘Work and Private Life: Sidabras and Dziautas v Lithuania’, (2005) *European Law Review* 575
- G Mundlak, ‘The right to work: Linking human rights and employment policy’ (2007) 146(3–4) *International Labour Review* 189–215.
- C O’Cinneide, ‘The Right to Work in International Human Rights Law’, V. Mantouvalou (ed) *The Right to Work – Legal and Philosophical Perspectives* (Oxford, Hart, 2015).
- A Supiot et al, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (Oxford, OUP, 2001)

A. Article 15 and the Scope of EU Law

15.01 As the Explanations to the Charter acknowledge, from its earliest jurisprudence, the Court has sought to reassure Member States that EU law respects facets of the right to work which are contained in national constitutions, such as the right freely to choose and practice one’s trade or profession.¹

15.02 Early case law highlights the potential of the right now enshrined in Article 15 to constrain EU legislative and administrative action, granting individuals a right enforceable as against EU institutions. This is exemplified in *Hauer*,² in which it was argued that the prohibition on new vine plantings imposed by Commission regulation infringed the applicant’s fundamental freedom to pursue her occupation as a wine-grower; and in *Keller*, where it was argued that Council Regulations limiting the terminology which German producers could use to describe their table wines were incompatible with the freedom to pursue their trade, guaranteed in the Grundgesetz (the German Basic Law).³

15.03 However, the Court also acknowledged in *Nold* that the right to work can be limited to accommodate the overall objectives of the EU, provided that its substance remains untouched.⁴ The reason for this is that Article 15 interacts with the economic freedoms central to the internal market, which are now contained in Articles 26, 45, 49 and 56 of the Treaty on

¹ Case 4/73 *Nold* [1974] ECR 491 [12]–[14].

² Case 44/79 *Hauer* [1979] ECR 3727 [31]–[32].

³ Case 234/85 *Keller* [1986] ECR 2897 [8].

⁴ *Nold* (n 1) [14].

the Functioning of the European Union—the freedom of movement for workers, the freedom of establishment, and the freedom to provide services. These freedoms, alongside the competences of the Union in the coordination of social policy set out in Chapter X TFEU (and, particularly, Articles 153 and 156 thereof, which are specifically mentioned in the Explanations) provide a context for delineating the right to work within EU law.

15.04 These dimensions of the right to work can be seen in the way in which the separate sub-sections of Article 15 are addressed to different right-holders. First, the broadest manifestation of the right to work, enjoyed by ‘everyone’, is the right to engage in work and to pursue a freely chosen occupation (Art 15(1)). But for EU citizens, this right also entails the more specific freedom to engage in cross-border economic activity as a worker, self-employed person or service provider, conferred by the TFEU and reflected in Article 15(2). According to the Court of Justice, a logical component of this right of citizens to move freely is that they also enjoy a right to work: in *Collins*, the Court noted that EU citizens are entitled to equal treatment with nationals not only in respect of access to work, but also with regard to the social and tax advantages associated with employment.⁵ So, a defining feature of the right to work in Article 15 is that it very much reinforces the freedom of EU citizens to be economically active across the territory of EU Member States. Indeed, where the right to work is invoked against Member State restrictions on the single market, such as in *Gardella* (concerning the recognition of work in another Member State for pension purposes), *AV and BU* (concerning licensing restrictions for the sale of pharmaceuticals) and *Haralambidis* (concerning appointments to port authorities), the Court has treated the market freedoms as a *lex specialis* for Article 15.⁶

15.05 In contrast, the right of third country nationals to work and to choose an occupation does not encompass rights to free movement between Member States. Rather, as Article 15(3) makes clear, their rights have a specifically EU dimension only once third country nationals acquire authorisation to work within a Member State, which then entitles them to treatment equivalent to EU citizens in respect of their working conditions.

B. Interrelationship of Article 15 with Other Provisions of the Charter

15.06 The freedom to choose, which is at the heart of Article 15, encapsulates a liberty-right of each individual to pursue an occupation without arbitrary restrictions.⁷ At a general level, it can be said that Article 15 resonates with Article 1 of the Charter, on human dignity, because the freedom not to be forced to work is justified by the value of dignity. The right to work links to the concept of dignity in another sense, too: that the content of the work must be dignified or decent. Related to the notion of free choice of work is Article 5 of the Charter, which prohibits slavery and forced labour: the compulsion to engage in labour, or the condition of servitude, would be egregious breaches of the principle in Article 15.

15.07 Article 15 also resonates strongly with Article 16 of the Charter, which protects the freedom to conduct a business—and indeed, both Articles are based on case law in which the Court recognised the freedom to exercise an economic or commercial activity.⁸ Nevertheless, the Court has sought to clarify that, albeit linked, these provisions have a different scope: Article 16 exemplifies the freedom of enterprise, whereas Article 15 is addressed to individuals

⁵ Case C-138/02 *Collins* [2004] ECR I-2703.

⁶ Case C-233/12 *Gardella* [2013], EU:C:2013:449 [39]; Case C-465/18 *AV and BU* [2019], EU:C:2019:1125 [31]; Case C-270/13, *Haralambidis* [2014], EU:C:2014:2185 [61]-[62]; see also Case C-237/18 *Stiernon* [2018], EU:C:2018:630 [22]-[24].

⁷ On this aspect of the right to work, see H Collins, ‘Is there a Human Right to Work?’, in Mantouvalou (ed) *The Right to Work: Legal and Philosophical Perspectives*, Hart, 2015, p 17 at 21.

⁸ *Nold* (n 1).

seeking to participate in the free market.⁹ In this sense, Article 15(2) can be seen as complementing Article 45 of the Charter, which confers on every EU citizen the right to move and reside freely within the territory of the Member States.

15.08 Equally, if one considers Article 15 as enshrining a right to be economically active in the labour market, then it presupposes a right to access employment without being arbitrarily excluded, and a right not to be deprived of work without some form of due process. Article 15 thus interacts with a series of provisions of the Charter dealing with non-discrimination, working conditions, and protection from unjustified dismissal.

15.09 The absence of any possibility to engage in work can negatively impact the right to private and family life, enshrined in Article 7 of the Charter. In line with Article 15(3), the Charter right to work does not regulate the parameters of granting authorisation to work in the EU.¹⁰ However, in *M v Ministerstvo vnitra*, the Court's Grand Chamber endorsed the analysis of Advocate General Wathelet, who argued that, taken in conjunction with Article 7, it may be found to amount to a right not to be excluded from the labour market in certain circumstances (e.g. refugees released from prison, who are precluded from exercising the right work yet cannot be returned to their state of origin).¹¹

15.10 With regard to non-discrimination in employment, there is already a long tradition—as seen in the interpretation of the ESC—linking prohibition of discrimination in respect of access to employment with the overall right to engage in work and to pursue a freely chosen occupation.¹² A similar linkage between non-discrimination and the right to work can be seen in the context of the EU Charter, and in particular Articles 21 and 23 of Title III on Equality, which enshrine an open-ended right to non-discrimination and a more specific protection of gender equality, respectively. Exclusions from the labour market attributable to a failure to accommodate, e.g. a person's age, gender, or disability, have been related to Article 15 both by the Court and in a series of Opinions by Advocates General.¹³

15.11 Furthermore, the right to work encompasses more than freedom from coercion or freedom of occupation. The right to work in the broader sense entails a more positive dimension, which neatly ties Article 15 to aspects of Title IV on Solidarity. More specifically, the right to work presupposes a right to have work (which suggests a concomitant duty on the state or on employers to provide work), thus linking this provision to the right to access a free placement service, found in Article 29 of the Charter. The right to work also presupposes rights at work, such that the work is dignified or decent—what one might think of as the job security and 'fair working conditions' aspect of the right to work. This is in line with the decent work agenda of the International Labour Organisation. Similarly, as the UN Committee on Economic, Social and Cultural Rights asserts:

Work as specified in article 6 of the Covenant [the International Covenant on Economic, Social and Cultural Rights] must be *decent work*. This is work that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration.¹⁴

⁹ Case 134/15 *Lidl* [2016], ECLI:EU:C:2016:498 [26]; For a fuller analysis, see the Opinion of AG Bobek in this case, EU:C:2016:169, [20]-[30] and, especially, [27].

¹⁰ On this point, see the Opinion of AG Szpunar in Case C-544/15, *Fahimian* [2016] EU:C:2016:908, [29].

¹¹ Joined Cases C-391/16 *M v Ministerstvo vnitra* and C-77-78/17 *X v Commissaire général aux réfugiés et aux apatrides* [2019] EU:C:2018:486, [109]; and Opinion of AG Wathelet in the same case, EU:C:2018:486, [134].

¹² D Ashiagbor, 'The Right to Work' in G de Búrca and B de Witte (eds), *Social Rights in Europe* (Oxford, OUP, 2005) 252–53.

¹³ See, e.g.: Case C-159/10 *Fuchs and Köhler* [2011] EU:C:2011:508, [62-63]; Case C-141/11 *Hörmfeldt* [2012] EU:C:2012:421, [37]; Opinion of AG Kokott in Case C-546/11, *Dansk Jurist* [2013] EU:C:2013:68, [71] (age discrimination); Opinion of AG Sharpston in Case C-312/17, *Bedi* [2018] EU:C:2018:336, [51] (disability discrimination); Opinion of AG Kokott in Case C-356/09, *Kleist* [2010] EU:C:2010:532, [51] (gender discrimination).

¹⁴ UN Committee on Economic, Social and Cultural Rights: General Comment No 18, The Right to Work, adopted 24 November 2005, E/C.12/GC/18 6 February 2006; para 7.

15.12 On the basis of an understanding of the right to work as a right to decent work, articles 27 (workers' right to information and consultation) and 28 (right to collective bargaining and action) also have strong connections with the provision, because the protection of these rights can be viewed as essential for decent work. The right to work also links with the right to fair and just working conditions in article 31 of the Charter, which has started to feature prominently in recent case law.¹⁵ Similarly, any failure to protect workers against unlawful dismissal contrary to Article 30 could well amount to a breach of Article 15. The right to protection from unjustified dismissal is a provision which can be seen as a necessary corollary of the right to work, in two respects: first, dismissal deprives an individual of the ability to exercise their freely chosen occupation; second, dismissal without good cause diminishes the quality of the chosen work.

15.13 Article 15 also chimes with Article 32 of the Charter on the prohibition of child labour and protection of young people at work: the two provisions are mutually reinforcing, although they approach the same issue in different ways. Article 32 is motivated by a concern to protect children from economic exploitation, whilst Article 15 focuses on work being freely chosen. In the same way that slavery or forced labour would violate the right to work, so the exposure of children to work which is likely to interfere with their development or physical or mental health, or which is exploitative economically, would likewise run contrary to the principles underpinning Article 15.

15.14 Finally, Article 15 can be related to procedural rights and, especially, the right to an effective remedy, enshrined in Article 47 of the Charter. That is because, whereas the right to work may be subject to restrictions imposed, for example, by criminal law, as the Court affirmed in *PI*, the justifiability and proportionality of such restrictions is strongly compromised when they are not accompanied by a statement of reasons or follow a clear and transparent administrative process.¹⁶

C. Sources of Article 15 Rights

I. European Convention of Human Rights and European Social Charter

15.15 The European Convention on Human Rights (ECHR) makes no express reference to the right to work, but the European Court of Human Rights (ECtHR) has derived aspects of the right from article 8 of the Convention, which protects the right to private life.¹⁷ In addition, article 4 of the ECHR prohibits slavery, servitude, forced and compulsory labour, a provision that is related to a right to decent work, as analysed earlier, but also to free choice of work. The aspects of the right to work which have been recognised by the Strasbourg Court via these provisions can be seen as constituting a minimum obligation in the interpretation of Article 15 of the Charter, in line with Article 52(3) thereof. This reinforces the argument that Article 15 relates to aspects of private and family life and that it may give rise to a series of obligations not to be excluded from work in the absence of a meaningful choice to seek work elsewhere, as highlighted in Section I. B. above.

¹⁵ See, e.g. Joined Cases C-569/16 and C-570/16, *Bauer* [2018], EU:C:2018:871; Case C-684/16, *Max-Planck-Gesellschaft* [2018] EU:C:2018:874; and Case C-55/18, *CCOO* [2019] EU:C:2019:402.

¹⁶ Case C-230/18 *PI* [2019] ECLI:EU:C:2019:383, [81], [91].

¹⁷ See *Sidabras and Dziautas v Lithuania* 2004-VIII DR; 42 EHRR 104. For analysis, see V Mantouvalou, 'Work and Private Life: *Sidabras and Dziautas v Lithuania*' (2005) 30 *European Law Review* 573.

15.16 Additionally, the Council of Europe’s other human rights instrument, the ESC, prominently features the right to work in Article 1.¹⁸ Article 1(1) of the ESC would have it that the right to work is best understood as an obligation of the state (to maintain a high and stable level of employment). Article 1(2) highlights the economic freedom aspect (the right of the worker to earn his or her living), whereby the Contracting Parties undertake ‘to protect effectively the right of the worker to earn his living in an occupation freely entered upon’.

15.17 The European Committee of Social Rights (ECSR) views Article 1(2) as the core of the right, which it interprets as including a prohibition of discrimination in employment, the prohibition of forced labour, and the prohibition of practice that interferes with the right to earn a living in a freely chosen occupation.¹⁹ Still, although the focus in the ESC is on making work available for those who are seeking it, in interpreting the obligation imposed on states, the ECSR has been careful not to equate the right to work with a duty on states to guarantee a job for everyone who wants one.²⁰ Rather, the ECSR understands the objective of full employment in Article 1(1) as requiring states to adopt a coherent employment policy which aspires to full employment.

15.18. Moreover, the ECSR has deemed the right to work to be of ‘fundamental importance’ since the effective exercise of several essential rights contained in the ESC—rights to just conditions of work, to safe and healthy working conditions, to fair remuneration and to organise and bargain collectively—is ‘inconceivable unless the right to work is guaranteed first’.²¹ This suggests that there is a relationship of indivisibility and interdependence between these rights, with the right to work being a pre-condition for the enjoyment of other rights.

15.19 It is significant that, as the Explanations to the Charter note, Article 15 is rooted in the freedom, recognised in Article 1(2) ESC, to choose one’s economic activities, rather than in the other ESC subsections which locate the right to work in the idea of access to, and availability of, work. So, the most prominent dimension of the ESC’s understanding of the right to work—namely, the right to have work made available, implying a duty on the state to provide work—is missing from the EU’s version of this right.²² Furthermore, despite the fact that other ESC rights are protected in the Charter’s Solidarity Title, neither the Explanations to the Charter nor the Court’s case law attribute them to the right to work.

II. UN Treaties

15.20 Article 23(1) of the Universal Declaration of Human Rights provides that ‘Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.’

15.21 Several UN legal instruments recognise the right to work as a fundamental right. In particular, Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), deals with this right arguably more comprehensively than any other instrument. There is a range of jurisprudence, offering guidance in the construction of the right to work,

¹⁸ See C. O’Cinneide, ‘The Right to Work in International Human Rights Law’, in Mantouvalou (ed) *The Right to Work*, Hart, p 99, and S. Deakin, ‘Article 1 – The Right to Work’, in N. Bruun, K. Lorcher, I. Schoemann and S. Clauwaert (eds) *The European Social Charter and the Employment Relation* (Oxford: Hart, 2017) 147.

¹⁹ O’Cinneide, *ibid*, p 115.

²¹ Council of Europe, European Committee of Social Rights, *Conclusion I* (First supervision cycle, 1969–70, Denmark, Germany, Italy, Ireland, Sweden, Norway, United Kingdom), 13.

including the Draft Optional Protocol to the ICESCR,²³ and the General Comment on the right to work.²⁴

15.22 The UN Committee on Economic, Social and Cultural Rights issued a General Comment on Article 6 of the ICESCR on the right to work. Whilst not legally binding, the General Comments issued by the Committee carry ‘considerable legal weight’.²⁵ As Alston notes, the Committee seeks to maximise the value of its General Comments by making them ‘relatively detailed, closely aligned to the text of the Covenant, and overtly interpretative’,²⁶ with Article 6 being interpreted as ‘laying down specific legal obligations rather than a simple philosophical principle’.²⁷ General Comment No 18 makes mention of the right to work in Article 6, which is the proclamation of the right in a general manner, and then explains that Article 7 (right to fair and just working conditions) further develops the individual dimension of the right to work, and Article 8 (trade union rights) develops its collective dimension.²⁸ It claims that Articles 6, 7 and 8 are interdependent.²⁹ From the wording of the General Comment, it is a right that every human being has simply by virtue of being human.

15.23 In addition, the right to work is recognised in the following UN instruments:

- Article 8 paragraph 3(a) of the International Covenant on Civil and Political Rights (ICCPR);
- Article 5 paragraph (e)(i) of the International Convention on the Elimination of All Forms of Racial Discrimination;
- Article 11 paragraph 1(a) of the Convention on the Elimination of All Forms of Discrimination against Women;
- Article 32 of the Convention on the Rights of the Child; and
- Articles 11, 25, 26, 40, 52 and 54 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

III. Other Sources

15.24 Beyond the sources already listed, a number of regional instruments recognize the right to work, which can offer interpretive value for Article 15 – albeit not mentioned in the Explanations or the Court’s rulings. These include the African Charter on Human and Peoples’ Rights (Art 15) and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Art 6). These instruments affirm the principle that respect for the right to work imposes on states parties an obligation to take measures aimed at the realisation of full employment.³⁰

²³ Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights and the Report of the open-ended working group to consider options regarding the elaboration of an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

²⁴ UN Committee on Economic, Social and Cultural Rights, General Comment No 18, The Right to Work, adopted 24 November 2005, E/C.12/GC/18 6 February 2006. See G Mundlak, ‘The right to work: Linking human rights and employment policy’ (2007) 146(3–4) *International Labour Review* 189–215.

²⁵ M Craven, *The International Covenant on Economic, Social and Cultural Rights: A perspective on its development* (Oxford, Clarendon Press, 1998) 91.

²⁶ P Alston, ‘The General Comments of the UN Committee on Economic, Social and Cultural Rights’ (2010) 104 *Proceedings of the Annual Meeting (The American Society International Law)* 4–7.

²⁷ UN Committee on Economic, Social and Cultural Rights, General Comment No 18 (n 21), p 2.

²⁸ General Comment No 18, para 2.

²⁹ General Comment No 18, para 8.

³⁰ UN Committee on Economic, Social and Cultural Rights, General Comment No 18 (n 21).

15.25 Article 15 of the African Charter, in particular, focuses on the right to work ‘under equitable and satisfactory conditions’, and to receive equal pay for equal work, whilst the Additional Protocol to the American Convention talks of the right to work as including ‘the opportunity to secure the means for living a dignified and decent existence by performing a freely elected or accepted lawful activity’. This highlights the notion of the right to work as an essential means for realising other human rights, and as inherent and integral to human dignity.

D. Analysis

I. General Remarks

15.26 Is the right to work an economic freedom only, imposing primarily duties to refrain from interference? Or is the right to work better conceived as having positive dimensions, allowing individuals to attain self-realisation through work?³¹ Does exploitative work comply with the requirements of the right to work?

15.27 Whilst drawing upon Article 1(2) ESC, and thus recognising the economic freedom aspect of the right to work, Article 15 of the EU Charter makes no mention of full employment or the duty of the state to provide employment. The core of the right to work is located in the freedom to earn a living in a freely chosen occupation,³² coupled with the free movement rights granted to those who are also EU citizens.³³

15.28 The right to work as contained in Article 15, therefore, has a relatively narrow theoretical base and justification, when compared with the way in which the right to work is recognised in ILO, Council of Europe, or UN instruments. Whilst Article 15 places emphasis primarily on one dimension of the right to work, elsewhere, there is a clearer articulation of a number of distinct but interdependent elements of this right. The UN Committee on Economic, Social and Cultural Rights identifies three elements: availability, accessibility and acceptability/quality of work. Availability refers to the need for states to have in place specialised services to assist and support individuals to find employment: this much is reflected in Articles 1(3) and 1(4) of the ESC as well, which place an obligation on contracting parties to establish or maintain free employment services, and systems of vocational guidance or training. Accessibility of work requires measures to prohibit discrimination in entry to the labour market or particular jobs. Acceptability and quality speak to the need to guarantee just and favourable working conditions.³⁴

15.29 On the one hand, Article 15 has generally supported the interpretation of market freedoms alongside other fundamental rights, such as Article 47 and the provisions of the Solidarity chapter. On the other hand, its influence on accessibility of work has been more limited, while it has not had any apparent influence on the availability of work through, for instance, the introduction of a positive obligation to secure employment.

II. Scope of Application

15.30 The right to work is addressed to ‘Everyone’, a more generous personal scope than other rights connected to the right to work: for example, the right to protection against unjustified

³¹ Collins, (n 7), 32.

³² Ashiagbor (n 12), 242.

³³ Opinion of Advocate General Maduro in Case C-119/04, *Commission v Italy* [2006], EU:C:2006:65, [36].

³⁴ UN Committee on Economic, Social and Cultural Rights, General Comment No 18 (n 21), para 12.

dismissal in Article 30 is addressed to ‘Every worker’, as is the right in Article 31(2) to limits on working hours and to annual leave. The wide scope of the main provision in Article 15(1) also stands in contrast to the more particular specification of beneficiaries in Articles 15(2) and 15(3): explicit mention is made of the rights of third country nationals authorised to work in the territories of the Member States to working conditions which are equivalent to those of citizens of the Union. Thus, it would seem from an initial reading of the provision that the related right to equal treatment in work enjoys a narrower personal scope than the basic right to work.

15.31 The breadth of the right enshrined in Article 15(1) has nevertheless not resulted in a positive interpretation of the right to work as a right to access work, even though this has occasionally been suggested – albeit in a limited way and within the bounds of Article 51 of the Charter – in Opinions of Advocates General.³⁵

15.32 Similarly, there is no case law under Article 15 that scrutinises measures to combat unemployment or foster access to employment. First, the Charter’s protection of a right of access to a placement service (Article 29) has not been mentioned in any final judgments to date, thus preventing a concrete linkage between the right to work and the state obligation to assist job-seekers. Secondly, in *ONEm and M*, the Court refused to attach to Article 15(2) a requirement to pay unemployment benefits to part-time workers (as would have been the case for job-seekers), thus failing to build into its reasoning a discussion of whether the Charter right to work amounts to a right to *decent* work.³⁶

15.33 The Court’s interpretation of the scope of the protection in Article 15 thus raises questions as to whether this right should be further aligned with the sources of the right to work in European and international human rights law. Indeed, Article 52(3) of the Charter provides that in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the ECHR. As highlighted earlier, the Strasbourg Court has recognized aspects of the right to work as concrete elements of the right to private and family life and has also decided a line of cases on servitude, forced and compulsory labour.³⁷ The other international statements of rights on which the Charter draws in its preamble, including the ESC, do not benefit from a similar interpretive provision to the one involving the ECHR. Bob Hepple argued that, by analogy with the respect granted to the jurisprudence of the ECtHR, interpretations by the European Committee of Social Rights under the ESC should be of at least persuasive value.³⁸ While that is indeed suggested by the Explanatory note to Article 15, the Court has never actively used interpretations of the ESC to support its reasoning in judgments regarding this provision.

III. Specific Provisions

15.34 As the Explanations make clear, Article 15(3) is based on Article 153(g) TFEU, which empowers the Union to support and complement the activities of Member States with regard to conditions of employment for third country nationals legally residing in Union territory.

15.35 Article 15(3) recognises the right to work of third country nationals, but does so only to the extent that they are authorised to work in the territories of the Member States. In other words, Article 15(3) does not change the legal position of third country nationals in terms of

³⁵ See, in particular, the Opinion of AG Wathelet in *M* at n (11) and the Opinion of AG Sharpston in *Bedi*, at n (13).

³⁶ Case C-284/15, *ONEm and M* [2016] EU:C:2016:220, [33]-[34].

³⁷ *Siliadin v France* App No. 73316/01, Judgment of 26 July 2005; *Rantsev v Cyprus and Russia*, App No 25965/04, Judgment of 10 January 2010; *Chowdury and Others v Greece*, App No 21885/15, Judgment of 30 March 2017.

³⁸ B Hepple, ‘The EU Charter of Fundamental Rights’ (2001) 30(2) *Industrial Law Journal* 225–31, 226.

rights of access to national labour markets or free movement within the EU.³⁹ To do so would have had the effect of extending EU competence—modifying the powers of the Union, contrary to the restriction in Article 51(2) of the EU Charter. Furthermore, Article 52(2) of the EU Charter is applicable: rights recognised by the Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

15.36 Second, third-country nationals are granted entitlement to equivalent, not equal, working conditions to those of citizens of the Union. At first sight, therefore, Article 15 does not extend the principle of equal treatment to third country nationals with regard to rights at work. As the Explanatory Document confirms, ‘working conditions’, for this purpose, are to be understood in the sense of Article 156 TFEU. This suggests an exclusion of a right to fair remuneration, since Article 153(5) TFEU puts pay outside the competence of Union social policy.

15.37 Having said that, it is clear from elsewhere in the Charter that third country nationals are entitled to protection against unjustified dismissal (Art 30), to working conditions which respect their health, safety and dignity (Art 31(1)) and to limits on maximum working hours, rest periods and annual leave (Art 31(2)) since these rights apply to ‘every worker’. Furthermore, the Explanations also note that Article 15(3) has been based on Article 19(4) of the European Social Charter. Article 19 ESC deals broadly with the right of migrant workers and their families to protection and assistance; with Article 19(4) more specifically and expressly requiring that Contracting Parties secure for migrant workers lawfully within their territories ‘treatment not less favourable than that of their own nationals’ with regard to remuneration and other working conditions; trade union membership and the benefits of collective bargaining.

15.38 Despite the fact that several employment rights are protected in the EU Charter and that, as analysed above, important links can be drawn between these provisions and the right to work, mentions of the right to work in the Court’s interpretations of these rights remain scarce.⁴⁰

IV. Limitations and Derogations

15.39 Article 15 does not contain any express limitations on the right to work, although it is of course subject to the final provisions of the Charter and, in particular, the pronouncement in Article 52(1) that any limitation on the exercise of the rights and freedoms in the Charter must ‘be provided for by law and respect the essence of those rights and freedoms’, and also subject to the principle of proportionality. As made clear in some of the earliest of the Court’s human rights jurisprudence, rights freely to choose and practice one’s trade or profession can, if necessary, be restricted: such rights may be subject to limitations laid down in accordance with the public interest or subject to limits justified by the overall objectives pursued by the Union, on condition that the substance of these rights is left untouched.⁴¹

15.40 This approach has been confirmed in more recent case law.⁴² The following more specific trends with regard to limitations of the right to work may be observed. First, when it comes to Member State limitations, the Court appears to assess their justifiability by employing

³⁹ There is no single treaty base granting rights to third country nationals (TCNs), although Art 79 TFEU refers to the development of a common immigration policy, which would encompass conditions of entry and residence and the rights of third-country nationals residing legally in a Member State.

⁴⁰ A detailed search on curia.europa.eu of Article 15 on 5 August 2019 (search terms “15 of the Charter”, “15(1) of the Charter”, “15(2) of the Charter”, “15(3) of the Charter” revealed that this provision was mentioned in 13 judgments and orders and 16 Opinions at the Court of Justice level (as well as in 4 judgments by the General Court). Update of 9 November 2020: the provision was also mentioned in the judgment of the Court in *AV and BU* (n 6) on 19 December 2019. This is overall a low number of judgments at the Court of Justice level and can be contrasted to provisions with which the right to paid annual leave is closely related, such as the freedom to conduct a business, which has been mentioned in at least 33 judgments (based on the same search for Article 16).

⁴¹ *Nold* (n 1) [12]–[14].

⁴² *PI* (n 16) [66]; see also Case C-201/15 *AGET Iraklis* [2016], EU:C:2016:972 [70].

a reasonableness analysis, generally accepting national measures that pursue a legitimate aim and do not compromise the essence of the right to work.⁴³ As highlighted earlier, though, the intensity of the Court's scrutiny varies, and has been closer to a strict proportionality standard where the right to work is restricted in a procedurally unfair manner or coincides with discrimination.⁴⁴ Secondly, in tune again with its early case law, the Court has consistently resisted an understanding of the freedom to choose an occupation and to engage in work as a right to work free of regulatory restraints. It has thus taken a cautious approach towards challenges to EU measures perceived as rendering work more difficult or restricted, such as fishing quotas,⁴⁵ rules on professional privilege,⁴⁶ and asset-freezing (restricting not the possibility of work, but the enjoyment of its fruits by barring access to funds).⁴⁷

V. Remedies

15.41 How should the right to work, prevalent in so many human rights instruments, be enforced? To talk meaningfully about remedies, one needs to clarify, as Hepple does, against whom this right can meaningfully be asserted: the state; the employer, or other workers and trade unions.⁴⁸

15.42 Instruments such as Article 1(1) ESC and the ILO Employment Policy Convention No 122, which premise the right to work on overcoming unemployment, promoting full employment, and making work available, arguably cannot be the subject of individual rights but, according to Hepple, fall purely within the realm of social policy.⁴⁹ Article 15 of the Charter entails differences in this regard. Not only is it couched in the language of rights, rather than aspirational principles (a critique applicable to some of the employment rights listed within the Solidarity chapter, such as Article 27)⁵⁰ but, as noted earlier, it was recognized already before the Charter's entry into force as a possible limit on EU legislative action.⁵¹ Indeed, individuals have, albeit perhaps not as frequently as other provisions of the Charter, successfully invoked the right to work to challenge the legality of certain Member State measures, thus having those measures invalidated and/or securing compensation, as appropriate. For example, the Court has found that the closure of business premises on suspicion that unauthorized prostitution was taking place therein, without a possibility to challenge the closure decision and without the grounds being communicated to the owner, constituted a breach of Article 15 in conjunction with Article 47 of the Charter.⁵² It follows that Article 15 entails a duty to *respect* the right of individuals to freely enter a chosen profession by the EU and the Member States and allows its enforcement against EU and Member State authorities before national and EU courts.

15.43 But there is a broader question of whether a state-backed right to work follows from Article 15, as well. Jon Elster, reflecting on the value of meaningful work for self-respect, contemplates a legally enforceable right to work as embedded in the modern welfare state.⁵³ Whereas, ultimately, Elster rejects such a role for the state, arguing that the necessary state

⁴³ See, e.g., Case C-447/15 *Muladi*, EU:C:2016:533 [51]; *Gardella* (n 6) [39]. See also the Opinion of AG Bobek in Case C-190/16, *Fries* [2017] EU:C:2017:225 [65]-[78].

⁴⁴ *PI* (n 16) [81]; *Haralambidis* (n 6) [61].

⁴⁵ See, e.g., Case C-611/12 P *Giordano* [2014] EU:C:2014:2282.

⁴⁶ Opinion of AG Kokott in Case C-550/07 P, *Akzo Nobel* [2010] ECLI:EU:C:2010:229, [159].

⁴⁷ Case T-216/17, *Mabrouk* [2018] ECLI:EU:T:2018:779 [101]-[114].

⁴⁸ B Hepple, 'A Right to Work?' (1981) 10(1) *Industrial Law Journal*, 65-83.

⁴⁹ *Ibid.*, 70.

⁵⁰ On this, see further: Lord Goldsmith QC, 'A Charter of Rights, Freedoms and Principles' 38:5 (2001) *CML Rev* 1201.

⁵¹ *Nold* (n 1); *Hauer* (n 2); *Keller* (n 3).

⁵² *PI* (n 16) [91].

⁵³ J Elster, 'Is there (or should there be) a right to work?' in Amy Gutmann (ed), *Democracy and the Welfare State* (Princeton, Princeton University Press, 1988).

subsidy for work would undermine the satisfaction and self-respect that one could derive from it,⁵⁴ a series of other duties lie in the grey zone between respect and active fulfilment of the right to work, which need to be considered.

15.44 First, there are duties to protect this right by preventing third parties—such as employers or trade unions—from interfering with its enjoyment. It is under this rubric that one can consider job security and fair working conditions or decent work aspects of the right to work. The obligation on states to protect the right to work – rather than simply not to interfere with it– requires measures to prevent the violation of this right by individuals, groups (e.g. trade unions), and corporations, through appropriate legislative action. As already highlighted under D.II above, this is an aspect of the right to work that neither the Charter’s text nor the Court’s case law grapple with. A limited exception to this resides in cases dealing with the right to non-discrimination, where the Court has acknowledged the need for Member States to ‘promote diversity in the workforce’ in line with the Preamble to Directive 2000/78, when read in the light of the right to work– yet, this case law concerns the interpretation of existing legislation already listing this goal, rather than an active duty, e.g. to legislate for diversity.⁵⁵

15.45 Secondly, the question identified by Bob Hepple, namely whether the right to work may be addressed not only to state actors but also to private parties themselves, remains a pressing one.⁵⁶ The Charter of Fundamental Rights is capable of horizontal application in principle and the Court has found that some of its provisions which concern working conditions, as well as the right not to be discriminated against, enjoy horizontal direct effect.⁵⁷ At least through its interaction with other provisions of EU law, therefore, the right to work can indirectly be invoked in disputes governed by private law in the courts of the Member States and may thus create obligations for private actors, such as employers and trade unions. In turn, to the extent that the right to work may be violated in cases of unjustified dismissal, remedies drawn from national employment law, such as reinstatement, will also be relevant here.⁵⁸ Nevertheless, the right to work has not featured formally (i.e. by specific mention of Article 15) in case law in this field, so that it remains unclear whether it is *in itself* capable of forming the basis of remedies against private parties (e.g. in the positive sense of being provided with work). This can give rise to questions as to whether – and, if so, how – it could be used in cases of conflict between the market freedoms of the employers or with the rights of those employers, such as their freedom to conduct a business, protected by Article 16 of the Charter.⁵⁹

E. Evaluation

15.46 Human rights instruments which recognise the ‘right to work’ rarely interrogate or question what is meant by ‘work’. Work is not an uncomplicated good. Not all types of work should be viewed as compatible with the right to work. This is particularly evident when this

⁵⁴ Ibid, 74. See also Little (n 28).

⁵⁵ Hörmfeldt [37]; Fuchs and Köhler, [63].

⁵⁶ See further on this E Frantziou, *The Horizontal Effect of Fundamental Rights in the European Union: A Constitutional Analysis* (OUP 2019).

⁵⁷ See, respectively: Bauer (n 15); and Case C-555/07, *Kücükdeveci v Swedex GmbH* [2010] ECR I-365; Case C-193/17 *Cresco Investigation GmbH* [2019] EU:C:2019:43.

⁵⁸ J Howe, ‘Why Do So Few Employees Return to their Jobs? In Pursuit of a Right to Work Following Unfair Dismissal’, in Mantouvalou (ed) *The Right to Work*, p 255.

⁵⁹ See, for example, Case C-438/05, *The International Transport Workers' Federation & The Finnish Seamen's Union v Viking Line. ABP & Oü Viking Line Eesti* [2007] ECR I-10779, where the Court’s analysis was based on the market freedoms, rather than the right to work of the posted workers. For further discussion of this point, see Frantziou (n 63), chapter 5.

right is analysed in light of its underlying principles of non-exploitation or self-realisation. It has been argued that exploitative work can violate the right to work,⁶⁰ and it has also been suggested that there should be a distinction between ‘work’ and ‘labour’.⁶¹ On the analysis that grounds the right to work on a principle of non-exploitation, workplace exploitation of undocumented workers, for instance, may violate aspects of the right to work. On the analysis that grounds the right on self-realisation, work is limited to jobs that have an opportunity for self-realisation, while labour is the performance of a task dictated by someone else.

15.47 The Charter’s understanding of ‘work’ is still very much rooted in work as economic activity. There is scope, however, as illustrated in human rights theory and in other human rights instruments such as the ICESCR and the African Charter, to develop the right to work as more than a means to attain an adequate standard of living, and more than wage labour or professional activity.

⁶⁰ Mantouvalou, ‘The Right to Non-Exploitative Work’, in *The Right to Work*, p 39.

⁶¹ Collins (n 7) p 36.