Annotations on Protection of Established Position
- A Basic Normative Pattern

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Annotations on Protection of Established Position - a Basic Normative Pattern

By Ann Numhauser-Henning

1. Introduction

In Christensen’s theory of law as normative patterns in a normative field the normative pattern Protection of Established Position is described as a particularly influential basic normative pattern. In general, basic normative patterns are held to reflect normative practices functional to society and human relationships, and the pattern Protection of Established Position goes back to the quite rudimentary right of ownership in its conservative meaning, i.e. the right to one’s possessions and not to be deprived of them. The normative pattern Protection of Established Position is conservative in the way that it preserves the positions and social constellations which have been achieved. At the same time the pattern is ‘silent’ regarding how these positions were established and who can achieve them. Over time, this basic pattern has emerged in new areas of our lives, such as real estate property law and housing law, in the form of tenant security; social security law, in the form of the income-replacement principle; and in labour law, in the form of employment protection. In numerous studies of the social dimension of law the pattern Protection of Established Position has proven to be crucial for an understanding of legal developments.

These annotations are intended to recapitulate two recent ‘findings’ related to the normative pattern Protection of Established Position and thus confirm this pattern’s particular standing in normative developments.

2. Behavioural Economics and the Endowment Effect

In his 2011 best-seller Thinking, Fast and Slow the winner of the Nobel Prize in economics, American Psychologist Daniel Kahneman, has a chapter entitled ‘The Endowment Effect’ (Besitzneigungseffekten).2 The endowment effect – implying that people will pay more to retain something they own than to obtain something owned by someone else – is part of the prospect theory put forward by Kahneman and Tversky back in 1979.3 In this paper the authors use cognitive psychology to explain divergences of economic decision-making from neo-classical theory and the hegemonic idea of ‘rational choice’. Prospect theory was described in two stages, an editing stage and an evaluation stage. In subsequent theory development (known as the cumulative

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prospect theory) Kahneman and Tversky have come to concentrate on the evaluation stage.\(^6\) In the evaluation stage the individual is making ‘risky’ choices in relation to ‘a reference level’ reflecting the individual’s current position. Here, loss aversion (förlustaversion) has a significant standing—the pain is more substantial than the gain. There is an inherent preference for status quo—in relation to the current or actual reference level—and this is quite strong in that eventual losses by far outweigh eventual profit. To give up an established position typically hurts more than the pleasure one derives from obtaining an improved position.

These findings in behavioural economics are certainly in line with the significantly strong standing of the normative pattern Protection of Established Position in normative/legal developments. The endowment effect works to sustain this basic normative pattern and thus supports Anna Christensen’s theory of law as basic normative patterns. Basic normative patterns are thus taken to reflect and codify basic normative conceptions and practices in society, and thus the normativity beyond formal rules. Christensen says: ‘The basic normative patterns were there long before the modern legislator. They occur much like a lane in the woods . . .’ — An established position—here implying ‘the reference level’—is particularly difficult to give up; this is loss aversion. Regulations implying the ‘conservation’, i.e. protection, of established positions thus represent an important basic normative pattern identified in many studies of the social dimension, whereas legal solutions implying distributive patterns are often considerably weaker in legal developments (although such patterns also find some support in behavioural economics and the theory of social preferences).\(^7\) — At the same time, the fact that a ‘behavioural practice’ is given legal status reinforces its legitimacy and normative quality at societal level. This is, of course, even more true when a behavioural practice is included to the extent that it becomes a part of our ‘legal culture’ in the terms of Tuori.\(^8\)

The endowment effect does not apply indiscriminately. There is a difference depending on whether one’s possession is originally held for transitional purposes or if it is held for use. Here, too, there is an interesting parallel with my own and Christensen’s differentiation of owner’s rights as expressions for an established position and market-functional rights, respectively, as the point of departure for the theory of law as normative patterns in a normative field.\(^9\)

3. CJEU’s case law

Another recent example which confirms the strong impact of the normative pattern Protection of Established Position is the European Union Court of Justice (CJEU) judgments in two cases interpreting the European Council Directive 2000/78/EC, which establishes a general framework for equal treatment in employment and occupation\(^1\) (hereafter the Employment Equality Directive or simply the Directive). Both judgments concern the interpretation of art. 6.1 in the Directive; the article regulates the scope for justification of direct differential treatment on the grounds of age.

The first case is *Hennig*.\(^12\) This case concerns the permissibility of a system for public-sector contractual employees for whom pay is determined by age. The collective agreement, providing that the basic pay determined on appointment of the employee is based on the employee’s age, was found impermissible under art. 6.1 of the Employment Equality Directive, regarding a difference

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\(^7\) A Christensen, “Åganderätten skyddar din säng och ditt vapen”, article in the Swedish daily newspaper *Dagens Nyheter* 23 September 1994.


\(^11\) Of L 303/16, 2 December 2000.

\(^12\) Sabine Hennig v Eisenban-Bundesamt and Land Berlin v Alexander Mai, C-297/10 and 298/10 [2011] ECR I-07965.
in treatment based directly on the criterion of age. A reference to art. 28 of the Charter on the rights of the social partners to collective bargaining was dismissed, because the social partners must also exercise their rights within the scope of the Directive (judgment pp. 67-68). What makes the Hennigs case particularly interesting to us, however, is the role accepted for the social partners – a role of ‘transitionally’ overcoming age-discriminatory regulations – and the arguments accepted by the Court to this end. By substituting the collective agreement in place, the social partners had entered into a new agreement, ‘perpetuating’ to a certain extent the age discrimination instituted by the former agreement in order to ‘maintain the established rights [my italics] of employees as regards pay’ (the judgment p. 83). Here, the social partners’ aim was to replace a collective pay system based largely on age, and which was thus discriminatory, with a new system based on objective criteria. The question put to the Court read: ‘Does the right of collective bargaining give the parties to a collective agreement latitude to eliminate such [age] discrimination by transferring the employees to a new collective pay structure based on activity, performance and professional experience, while preserving their established rights [my italics] acquired in the old collective system?’ According to the Court ‘as regards the aim pursued by the social partners when negotiating … it appears … that when the contractual employees were reclassified in the new collective pay system it was ensured that they would keep their established rights [my italics] and would have their previous pay maintained’ (the judgment p. 89). The Court then refers to the earlier case Commission v Germany (see below), where the Court held that ‘the protection of the established rights [my italics] of a category of persons constitutes an overriding reason in the public interest which justifies that restriction, provided that the restrictive measure does not go beyond what is necessary for that protection’ (the judgment p. 90). ‘Leaving it to the social partners to strike a balance between their respective interests offers considerable flexibility, as each of the parties may, where appropriate, reject the agreement …’ It is thus apparent that the maintenance of earlier pay, and consequently of a system that discriminates according to age, had the aim of avoiding losses of pay and was a decisive factor in enabling the social partners to implement the changeover from the (earlier) system … The transitional rules … must therefore be regarded as pursuing a legitimate aim within the meaning of Article 6(1)…’ (the judgment p. 92). The agreement was also deemed to be appropriate and necessary because its ‘discriminatory effects will tend to disappear as the pay of employees progresses’ (p. 96) and ‘it was not unreasonable for the social partners to adopt the transitional measures implemented’; nor did the measures at issue go beyond what was necessary ‘having regard to the broad discretion enjoyed by the social partners in the field of determining pay’ (the judgment pp. 96-98). It ‘A measure in a collective agreement, …, which replaces a system of pay leading to discrimination on grounds of age by a system of pay based on objective criteria while maintaining, for a transitional period limited in time, some of the discriminatory effects of the earlier system in order to ensure that employees in post are transferred to the new system without suffering a loss of income’ (the judgment p. 99) was thus held to be in compliance with art. 6.1 of the Employment Equality Directive. – The AG in this case was V. Trstenjak, but the Court decided to proceed to judgment without an opinion from the AG.

The second case, Commission v Hungary,13 was not only about the acceptability of compulsory retirement as such – a practice accepted in principle by the CJEU through its earlier case law14 – but about reduced rights of persons in certain professional categories (judges, prosecutors and notaries) to continue working for when the age of compulsory dismissal was lowered from 70 to 62 years of age. According to the Commission, the Hungarian legislation was discriminatory on the grounds of age, because ‘lowering the age-limit for compulsory retirement applicable to judges,

prosecutors and notaries from 70 to 62 gives rise to a difference in treatment based on age between persons within a given profession' and 'the fact that, in the past, the persons concerned were subject to a more favourable scheme than that applicable to other public sector employees does not preclude that legislation from being discriminatory' (the judgment p. 24). According to the Court, however, whereas the Governmental aim of 'standardisation' as regards compulsory retirement age between different professional groups was acknowledged as a legitimate aim in relation to art. 6.1 of the Employment Equality Directive, the regulation concerned was deemed not to meet the requirements of being appropriate and necessary. This was done by way of an individual approach assessment of the employees in question and their 'well-founded expectation that they would be able to remain in office until that age [70]. ... the provisions at issue abruptly and significantly lowered the age-limit for compulsory retirement, without introducing transitional measures of such a kind as to protect the legitimate expectations of the persons concerned' (the judgment pp. 67-68).

The judgment is in line with the opinion of AG J Kokott. She, too, argues in terms of legitimate expectations (confiance légitime, p 65) and finds the immediate decrease in pensionable age from 70 to 62 years of age without transitional rules to be disproportionate in character.

As mentioned before, in Hennig the Court referred to the earlier case Commission v Germany\(^6\). This case concerned whether Germany had failed to implement the freedom of establishment principle in art. 43 EC. The Commission’s action was ‘directed at certain transitional provisions or “established rights” [my italics] to the extent to which they reserve the possibility of practising under German sickness insurance schemes solely to psychotherapists who practised under those schemes in a region of Germany during the reference period and refuse to grant that possibility to psychotherapists who practiced during the same period outside Germany under the sickness insurance schemes of another Member State’ (the judgment p. 17). The issue at stake was thus whether such transitional provisions – protecting the established rights of persons who had practised their professions in a specific (German) location during a given period – revealed an unacceptable restriction on the freedom of establishment. The traditional provisions constituted a derogation from a newly implemented quota system – a derogation which thus benefitted only psychotherapists who, during a reference period, had treated patients under German compulsory sickness insurance schemes. The crucial question was whether the fact that the provisions were transitional measures, designed to protect established rights, did indeed release Germany from the obligation to comply with the Treaty rules on freedom of establishment, and thereby implied that a restriction was justified. The transitional rules were found to be indirectly discriminatory on the grounds of nationality; the question was now whether they were nevertheless justified as appropriate and necessary. The Court held 'that the protection of an established right [my italics], namely, the retention of patients following several years of professional activity, constitutes an overriding ground of public interest' (the judgment p. 63) which may justify a restriction of the freedom of establishment, provided that the restrictive measure does 'not go beyond what is necessary in order to attain that objective' (the judgment p. 65). In the case in question the transitional rules were nevertheless taken to be disproportionate, and thus an unjustified infringement on the freedom of establishment.

AG Mengozzi had argued for the case to be dismissed as inadmissible, due to the failure of the Commission to act in good time to prevent – by means of the provisions available to it – the infringement in question (the opinion p. 60). Considering the substance of the case, AG Mengozzi – as the CJEU later did – also found the transitional rules at issue to constitute a restriction on freedom of establishment. The question was then whether we were faced with a justified restriction, i.e. one that ‘fulfilled imperative requirements in the general interests; if they are suitable for securing the attainment of the objective which they pursue; and do not go beyond

\(^{15}\)In addition, an argument about intergenerational fairness regarding access to employment was rejected following a close scrutiny of the logic of the measure at issue compared with that applied in Kiciauskевичi v Swedex GmbH & Co KG C-555/07 ECR I-10517.

\(^{16}\)The European Commission v Germany, C-456/05 [2007] ECR I-10517.
what is necessary in order to attain it’ (the opinion p. 94). The objectives of the rules at issue were termed as twofold: seeking to permit psychotherapists who had established a practice in Germany in the past to continue to practice, in the interest of the protection of established rights [my italics] and the protection of legitimate expectations’, and ‘to ensure that only a limited number of psychotherapists will be entitled to be admitted to practice independently of the actual need for care’ (the opinion p. 95). AG Mengozzi also considers such established rights and legitimate expectations to be regarded in principle as imperative requirements in the general interest (the opinion p. 96), and notices that the Commission does not find such objectives contrary to Community law (the opinion p. 97). Referring to the Court, which had earlier held ‘that substantive rules of community law must be interpreted, in order to ensure respect for the principles of legal certainty and the protection of legitimate expectations, as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, objectives or general scheme that such an effect must be given to them and that, although an individual cannot place reliance on there being no legislative amendment whatever, the principle of legal certainty requires that the legislature take account of the particular situations of traders and provide, where appropriate, adaptations to the application of the new legal rules’ (p. 98), the AG draws the conclusion that in principle, the transitional rules at issue are suitable for pursuing the objective (p. 101); nevertheless, the question still remained whether these rules are proportionate in nature. After detailed scrutiny, the AG – unlike the CJEU – comes to the conclusion that ‘the Commission has not shown that there is an alternative measure less restrictive of freedom of establishment which could achieve those objectives in an equally effective manner’; Mengozzi thus suggests the alternative of dismissing the action as unfounded (the opinion pp. 128-130).

In the Hennig case both the reference for a preliminary ruling (question 2) and the judgment of the Court were phrased in terms of protection of established rights – we are dealing with the maintenance of previously established levels of pay. The outcome also implies that the Court accepted direct differential treatment on the grounds of age in order to preserve such established rights. – In addition, in Commission v Germany the transitional rules at issue were framed as ‘established rights’. However, the outcome was that the rules were not justified as exemptions to the treaty-based freedom of establishment being disproportionate in character. In Commission v. Hungary on the other hand, the issue was framed in terms of legitimate expectations. In the past the protection of legitimate expectations has been considered an expression of protection of established position. An example is Nils Eliasson’s is doctoral thesis, in which he deals precisely with pension scheme reforms relating them to the normative pattern Protection of Established Position.17 In the case Commission v Germany, however, the AG argued the case in terms of both the protection of established rights and legitimate expectations, and referred to a former statement of the CJEU relating the protection of legitimate expectations to the principle of legal certainty (the opinion p. 98). This puts the protection of established rights – argued in terms of legitimate expectations – closer to general principles characterising a Rechtsstaat than the normative pattern Protection of Established Position proper.

These cases must be held to imply a strong argument as to the relative strength of the normative pattern Protection of Established Position. It is true that the scope for exemptions regarding directly differential treatment on the grounds of age is considerably broader than that for other non-discrimination grounds – compare art. 6.1 of the Employment Equality Directive.18 At the same

17 N Eliasson, Protection of Accrued Pension Rights: An Inquiry into Reforms of Statutory and Occupational Pension Schemes in a German, Norwegian and Swedish Context (Lund, Juristförlaget, 2001). Eliasson found that the protection offered by the different legal systems in question – Sweden, Norway and Germany – was phrased in terms of property rights, legitimate expectations, non-retroactivity, contract and also reasonableness (good faith). Eliasson found a test against legitimate expectations to be more accurate than solutions based on the protection of accrued property rights as such – also when taking into account the possibly frustrated contract between generations underlying the pension system at issue. – Compare also the case Commission v Hungary, where the CJEU obiter dictum accepted a general increase in the pensionable age from 62 to 65 years of age in Hungary, meeting reasonable demands on gradual transposition rules (the judgment p. 73).
18 Compare, however, the case Kenny et al v. Minister for Justice, Equality and Law Reform et al C-427/11 [2013] ECR I-00000, concerning equal pay for men and women. Here the CJEU found that ‘the interest of
time, in this context the somewhat earlier case Commission v Germany, referred to by the CJEU itself, concerns treaty rights. Moreover, the protection of established rights has been deemed a fairly strong argument for differential treatment on the grounds of age, as a transitional means to overcome collective bargaining practices only just held to be discriminatory in an unacceptable way. Therefore, in Henning the issue is really one of protecting an established position rather than established rights, in that we are dealing with future earnings. (On the other hand, what we have is an agreement on a certain level of pay, and for it to be changed or lowered a change in the contract is required, with all that this implies in terms of notice, etc.) In Commission v. Hungary we thus deal with pension rights, which arguably have the character of accrued rights, i.e. owners’ rights proper. Here, it is even more natural – and thus less remarkable – that the Court supports the maintenance of such rights, and does not consider it appropriate or necessary to set them aside – even though there is a legitimate aim for the pension reform as such. Accrued rights are protected as fundamental owner rights.\textsuperscript{19} The judgment of the Court, however, is not argued in such terms, but in the perspective of more general considerations regarding the difficulties for the individuals concerned to take the necessary measures given time constraints and other conditions, and as stated above, both the judgment and the opinion of the AG were argued in terms of legitimate expectations.

4. Final remark

These are but a few recent examples reflecting the relative importance and strength of the normative pattern Protection of Established Position in legal developments and representing, as it is, an important part of our legal culture in the terms of Tuori.\textsuperscript{20}

\textsuperscript{13} Good industrial relations may be taken into consideration by the national court as one factor among others in its assessment of whether differences between the pay of two groups of workers are due to objective factors unrelated to any discrimination on grounds of sex and are compatible with the principle of proportionality’. In the background there was an agreement on a ‘civilisation’ of certain activities replacing, but only successively, better-paid police officers (men) with civil servants (women) because (according to the national court) it ‘would be manifestly unfair and impractical to reduce the pay of the … officers assigned to those posts’.

\textsuperscript{19} Compare, for instance, the ECtHR cases Müllerv Austria (Application No. 5849/72), Stack and Others v United Kingdom (Application Nos. 6573/01 and 65900/01, as well as Gaygusuzv Austria (Application No. 17371/90).

\textsuperscript{20} K Tuori (2013).