

Are social rights really rights?

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Issues

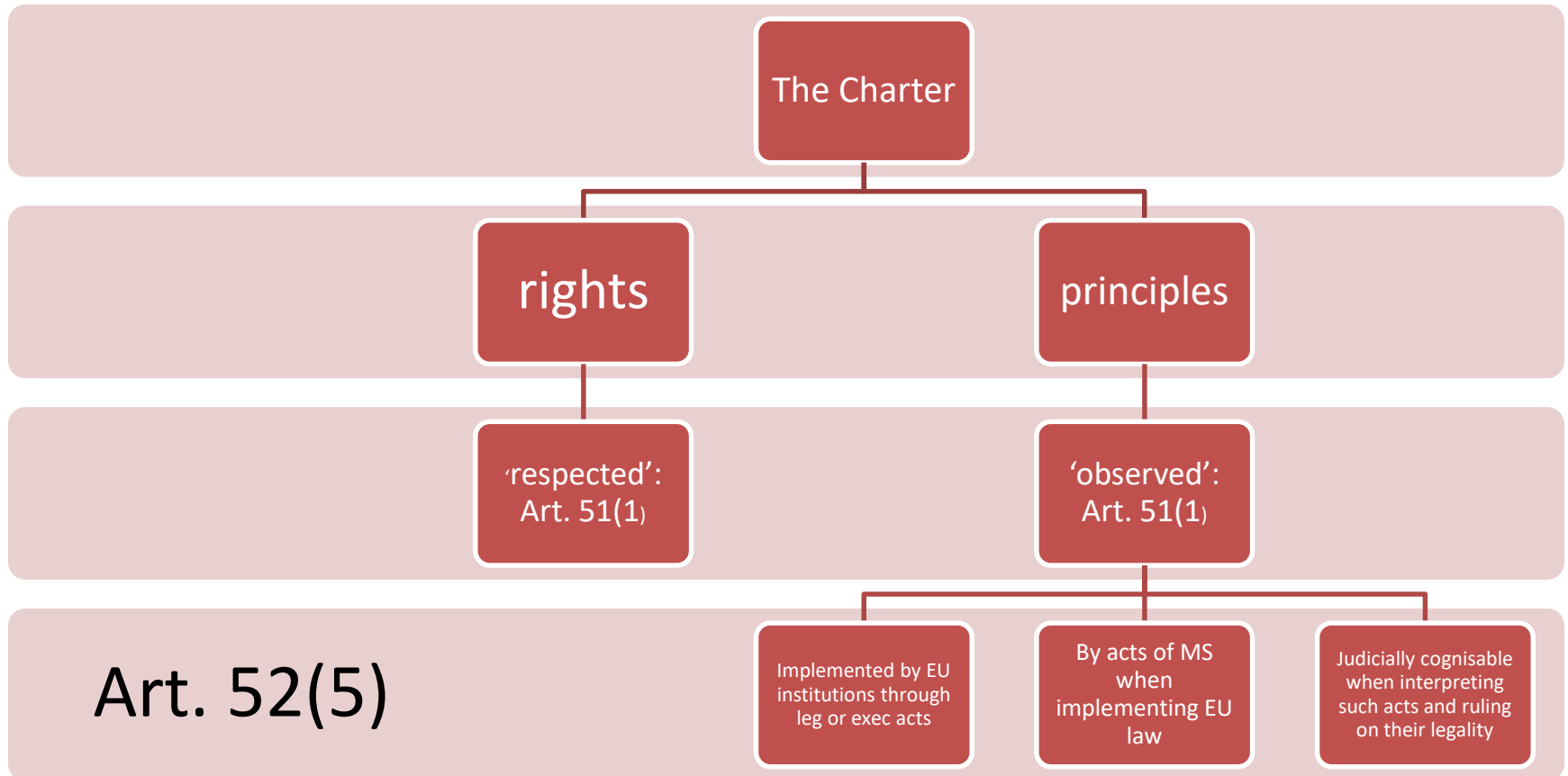
1. The rights/principles dichotomy in general

2. Social rights: rights or principles? Why the dichotomy

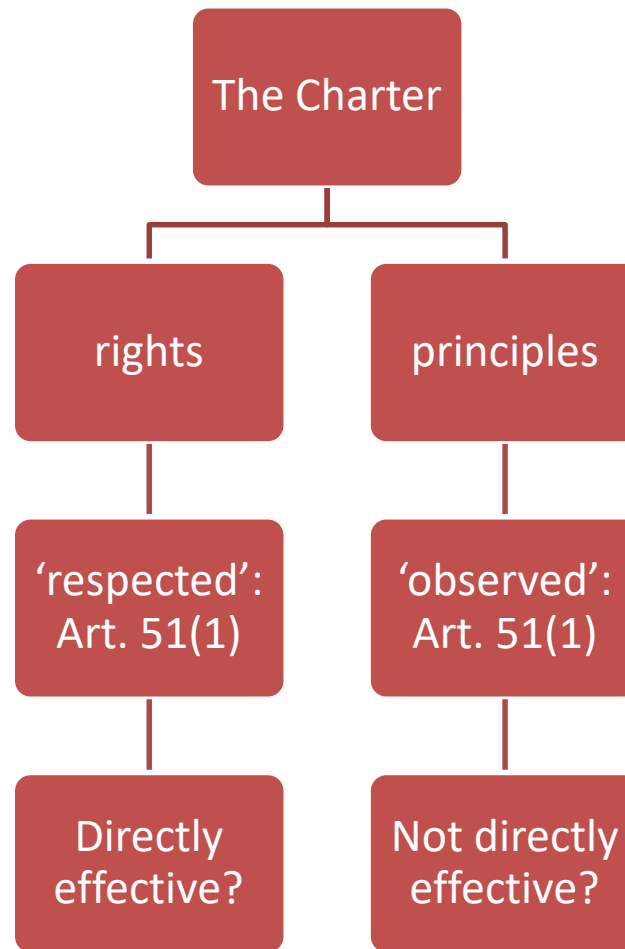
3. Specific social rights which are enforceable (rights)

1. RIGHTS/PRINCIPLES DICHOTOMY IN GENERAL

The rights/principles dichotomy



The rights/principles dichotomy (cont'd)



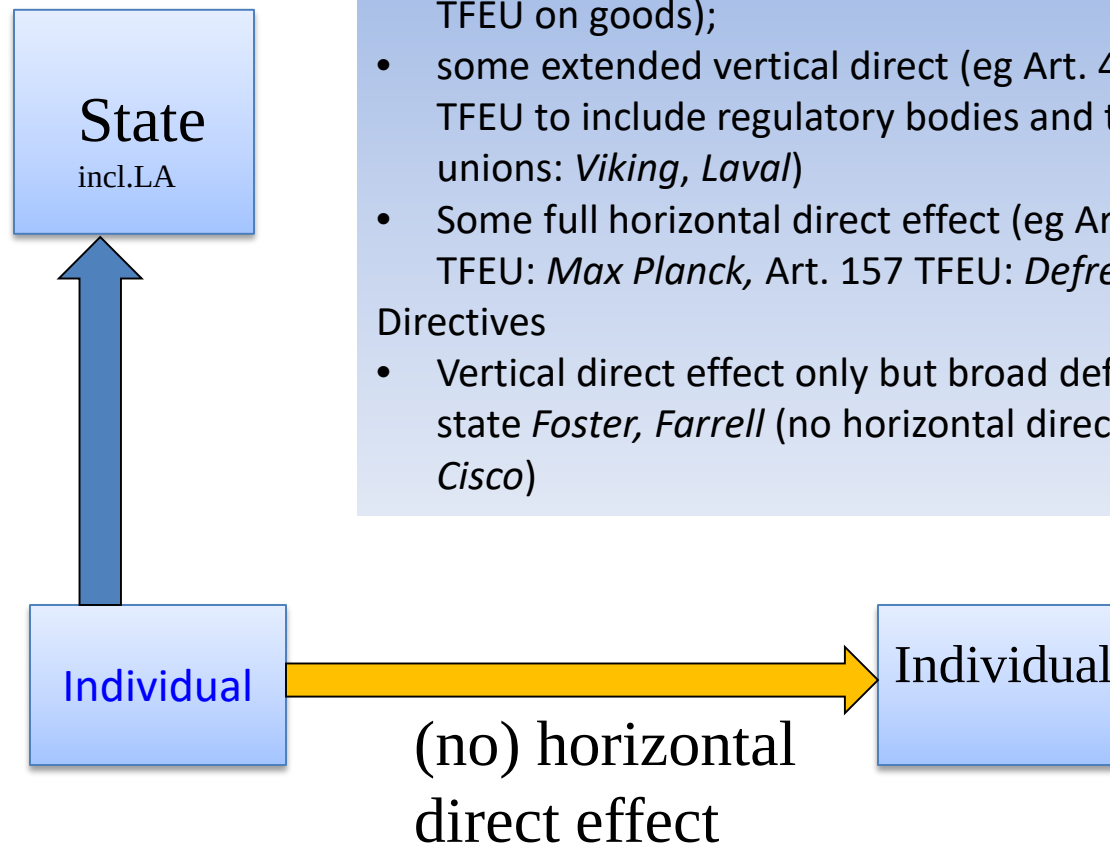
Case C-176/12 *Association de médiation sociale* AG's Opinion

Both in the actual Charter and in the constitutional traditions of the Member States, it is common to regard as 'rights' or 'social rights' that substantive content relating to social policy which, because *it cannot create legal situations directly enforceable by individuals*, operates only following action or implementation by the public authorities. They are (social) 'rights' by virtue of their subject-matter, or even their identity, and 'principles' by virtue of their operation.

Direct effect of EU law provisions

Vertical
direct
effect

Marshall I
(if clear, precise
and unconditional)



Treaty provisions

- mainly vertical direct effect (eg Arts. 34, 110 TFEU on goods);
- some extended vertical direct (eg Art. 49, 56 TFEU to include regulatory bodies and trade unions: *Viking, Laval*)
- Some full horizontal direct effect (eg Art. 45 TFEU: *Max Planck*, Art. 157 TFEU: *Defrenne*)

Directives

- Vertical direct effect only but broad definition of state *Foster, Farrell* (no horizontal direct effect: *Cisco*)

2. ARE SOCIAL 'RIGHTS' RIGHTS?

Social rights largely intended as principles

International law

- Eg European Convention v ESC

National constitutional traditions

- See eg AG in *AMS*

Art 1(2) of Protocol 30

- '[i]n particular, and for the avoidance of doubt, nothing in Title IV (...) creates justiciable rights applicable to (...) the United Kingdom except in so far as (...) the United Kingdom has provided for such rights in its national law

Decision in Case C-176/12 *Association de médiation sociale*

The unfortunate consequences of social rights not being ... rights

Constitutionally inferior

- *Alemo-Herron, Viking*

Court reluctant to use social 'rights' to challenge EU legislation

- Case C-434/11 *Corpul Național al Polițiștilor* Cf Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, 27 Feb 2018

Citizen disappointment

- citizens might be somewhat disappointed by what they see when they look through that window
- European Pillar of Social Rights

The European Pillar of Social Rights in 20 principles

The Pillar of Social Rights is about delivering new and more effective rights for citizens, built upon 20 key principles.

PAGE CONTENTS

**Chapter I: Equal opportunities
and access to the labour
market**

**Chapter II: Fair working
conditions**

The Pillar of Social Rights is about **delivering new and more effective rights for citizens**. It builds upon 20 key principles, structured around three categories:

- Equal opportunities and access to the labour market
- Fair working conditions
- Social protection and inclusion

3. SOCIAL RIGHTS WHICH ARE/CAN BE ENFORCEABLE (RIGHTS)

Equality principle as a right

1. Horizontal application of general principle: *Mangold*

- It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired.

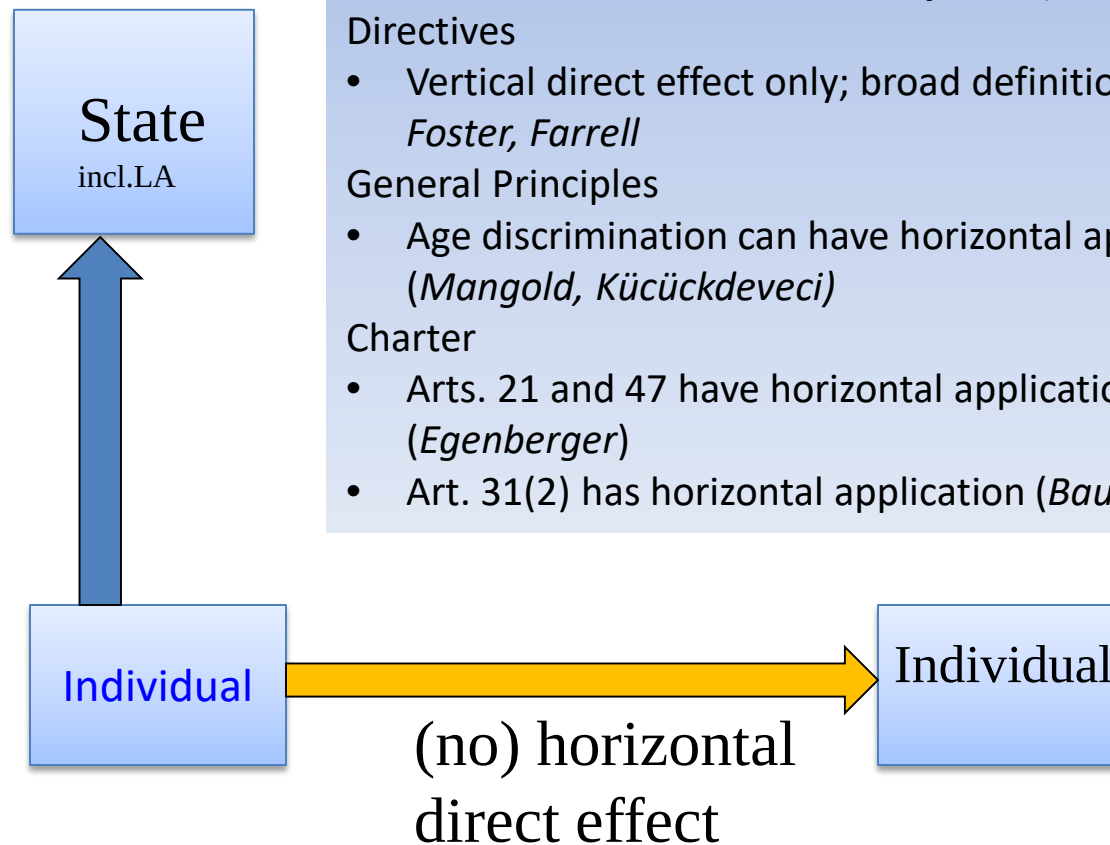
The Evolution of the Equality principle (right)

2. Charter equality right can have horizontal application (Art. 21)

- Case C-414/16 *Egenberger*
- The prohibition of all discrimination on grounds of religion or belief is mandatory as a general principle of EU law. That prohibition, which is laid down in Article 21(1) of the Charter, is sufficient in itself to *confer on individuals a right which they may rely on as such in disputes between them* in a field covered by EU law
- the national court would be required to ensure within its jurisdiction the judicial protection for individuals flowing from Articles 21 and 47 of the Charter, and to guarantee the full effectiveness of those articles by disapplying if need be any contrary provision of national law

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Directives

- Vertical direct effect only; broad definition of state
Foster, Farrell

General Principles

- Age discrimination can have horizontal application
(*Mangold, Kücükdeveci*)

Charter

- Arts. 21 and 47 have horizontal application
(*Egenberger*)
- Art. 31(2) has horizontal application (*Bauer*)

Paid annual leave: *Bauer*

Article 31(2) of the Charter enshrined the ‘right’ of all workers to an ‘annual period of paid leave’; the ‘essential principle’ of EU social law

Article 31(2) which provides in ‘mandatory terms’ that “every worker” has “the right” “to an annual period of paid leave” without, unlike Article 27, referring to ‘the cases and ... conditions provided for by Union law and national laws and practices’

Article 31(2) of the Charter had horizontal application:

- The right to a period of paid annual leave, affirmed for every worker by Article 31(2) of the Charter, is thus, as regards its very existence, both **mandatory and unconditional** in nature, the unconditional nature not needing to be given concrete expression by the provisions of EU or national law, which are only required to specify the exact duration of annual leave and, where appropriate, certain conditions for the exercise of that right. It follows that that provision is sufficient in itself to confer on workers a right that they may actually rely on in disputes between them and their employer in a field covered by EU law and therefore falling within the scope of the Charter...

Summary of Court's approach to horizontal application

Try interpretation first, if not

Try horizontal application – the following conditions need to be satisfied

- The right must be *mandatory* in nature – probably clear, precise and unconditional
- The right must be *unconditional*
 - not needing to be given concrete expression by the provisions of EU or national law ie provision must be self-sufficient (& no internal reference to limits)
- Fall within the scope of EU law

The Solidarity Title: rights v principles

Article no	Subject matter	Caveats in article	Right or principle	horiz. Enforceable?	Authority, if any
Art. 27	I&C	Yes	Principle	No	<i>AMS</i>
Art. 28	Collective bargaining and action	Yes	Principle?	No?	<i>Viking</i> (but cf 'right to strike')
Art. 29	Free placement service	No	Right?	No	
Art. 30	Protection in event of unjustified dismissal	Yes	Principle	No	
Art. 31	(1) Working conditions respect H&S	No	Right?		<i>Bauer</i>
	(2) Paid annual leave	No	Right	No	
Art. 32	Prohibition of child labour and protection of young people at work	No	Right?	?	
Art. 33	(2) Reconciliation of family and professional life (eg parental leave)	No	Right?	?	

CONCLUSIONS