

## RIGHTS AND PRINCIPLES IN THE EU CHARTER OF FUNDAMENTAL RIGHTS

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### Abstract

*This article analyses the distinction between rights and principles in the EU Charter of Fundamental Rights. On the basis of an analytical definition of Charter rights, it shows that Charter principles differ from Charter rights in nature: they are non-relational and not intersubjective; they contain mere duties without corresponding claim-rights. This has consequences for their justiciability, which the Charter itself limits. The article dismisses any suggestion that the characterization of a Charter provision as belonging to the realm of economic, social and cultural rights determines its nature as a principle. Instead, a more nuanced approach is advocated. It further argues that Charter principles are binding regardless of their implementation and that the latter only matters for their justiciability.*

### 1. Introduction

Almost ten years after the entry into force of the EU Charter of Fundamental Rights (CFR) and nineteen years since its solemn proclamation at the Nice summit, the distinction between rights and principles drawn in various of its provisions remains nebulous. Already the Preamble of the solemnly proclaimed version of the Charter stipulated that the “Union therefore recognizes the rights, freedoms and principles set out hereafter.” Article 51(1) CFR translates this commitment into binding legal text addressed to both the Member States and the institutions and bodies of the Union, obliging them to “respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.”<sup>1</sup> The Treaty on a Constitution for Europe then added what is now Article 52(5) CFR, which underscores the

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1. See Charter of Fundamental Rights of the European Union, O.J. 2000, C 364/1.

difference in nature between Charter provisions containing rights and those containing principles:

“The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality.”

The rights-principles divide, therefore, suggests that rights and principles are of a fundamentally distinct normative nature and entail different legal consequences. In contrast to rights, principles require implementation and are only justiciable as far as the legality or interpretation of their implementing acts is concerned. Remarkably – and with some notable exceptions<sup>2</sup> – not many attempts have been made at clarifying the differences between both types of norm and some even claim that the difference is – in practice at least – redundant.<sup>3</sup> In addition, little has been written about the nature of rights in EU law.

This article aims to rectify this by providing a comparative analytical framework for rights and principles under the Charter. It is suggested here that an analysis of the nature of Charter principles is best conducted by contrasting them to fundamental rights protected by the Charter. That analysis provides the basis for a discussion of the different legal effects rights and principles produce and how principles can usefully be identified amongst the provisions of the Charter. The approach taken is an analytical one, based on the well-known rights framework developed by Hohfeld.<sup>4</sup> While it is not the first

2. See e.g. Prechal, “Rights v principles, or how to remove fundamental rights from the jurisdiction of the courts” in De Zwaan, Jans and Nelissen (Eds.), *The European Union: An Ongoing Process of Integration* (TMC Asser Press, 2004), p. 177; Craig, *The Lisbon Treaty* (OUP, 2010), pp. 216–221; Krommendijk, “Principled silence or mere silence on principles? The role of the EU Charter’s principles in the case law of the Court of Justice”, 11 EuConst (2015), 321; Ladenburger, “EU institutional report” in Laffranque (Ed.), *The Protection of Fundamental Rights Post-Lisbon: Interaction Between the EU Charter of Fundamental Rights, the European Convention on Human Rights and National Constitutions* (Tallin University Press, 2012), pp. 183–186; Opinion of A.G. Trstenjak in Case C-282/10, *Maribel Dominguez v. Centre informatique du Centre Ouest Atlantique and Préfét de la région Centre*, EU:C:2011:559, paras. 75–79; Opinion of A.G. Cruz-Villalón in Case C-176/12, *Association de médiation sociale (AMS)*, EU:C:2013:491, paras. 43–80.

3. Peers and Prechal, “Article 52” in Peers et al. (Eds.), *The EU Charter of Fundamental Rights* (Hart, 2014), para 52.190.

4. Hohfeld, “Some fundamental legal conceptions as applied in judicial reasoning”, 16 *Yale Law Journal* (1913), 16.

attempt at employing a Hohfeldian analysis in EU law,<sup>5</sup> it is, to the author's best knowledge, the first time the rights and principles in the Charter are analysed in this way.

In this context, one cannot stress enough the need for an autonomous interpretation of what Charter principles are.<sup>6</sup> The term "principle" is ubiquitous in the EU Treaties, in domestic (constitutional) law,<sup>7</sup> and in legal theory, but there is no singular understanding of it. Take the EU Treaties, for example. The preamble to the TEU mentions the "principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law"; then there are the principles of sincere cooperation, of conferral, of subsidiarity, and of proportionality;<sup>8</sup> not to mention the general principles of EU law, which guarantee fundamental rights outside the Charter.<sup>9</sup> In addition, even some provisions containing rights refer to principles. A famous example is Article 157(1) TFEU, which embodies the "principle of equal pay," in relation to which the ECJ expressly dismissed the suggestion that because the Treaty called it a principle it could not confer a right.<sup>10</sup> To avoid confusion, this article, therefore, treats Charter principles as a separate and autonomous category of principles.

The analysis unfolds as follows: first, the article defines rights in EU law on the basis of an analytical approach inspired by Hohfeld; the resulting clearer conceptual understanding of these rights provides the springboard for a second step, which concludes that the difference between rights and principles lies in the non-relational and non-intersubjective nature of the latter. In short, they contain mere duties without corresponding claim-rights and thus they belong to the realm of objective law. As shown in a third step, this has consequences for their justiciability, as rights are *per se* justiciable and their violation results in some form of remedy. By contrast, principles are only justiciable when implemented and even then only insofar as questions of

5. Previous examples – all concerned with the direct effect of Directives and related concepts – include Hilson and Downes, "Making sense of rights: Community rights in E.C. law", 24 EL Rev. (1999), 121; Coppel, "Rights, duties and the end of Marshall", 57 *Modern Law Review* (1994), 859; Eilmannsberger, "The relationship between rights and remedies in EC law: In search of the missing link", 41 CML Rev. (2004), 1199, at 1238; a more recent use of Hohfeld concerning EU rights more generally can be found in Bengoetxea, "Rights (and obligations) in EU law" in Jones, Menon and Weatherill (Eds.), *The Oxford Handbook of the European Union* (OUP, 2012).

6. A more general argument for an autonomous understanding of EU fundamental rights is made by Augenstein, "Engaging the fundamentals: On the autonomous substance of EU fundamental rights law", 14 GLJ (2013), 1917.

7. For an overview of various types of principles in Member State constitutions, see A.G. Cruz-Villalón in Case C-176/12, *AMS*, para 48.

8. Arts. 4 and 5 TEU.

9. Art. 6(3) TEU.

10. Case C-43/75, *Defrenne v. Sabena*, EU:C:1976:56, para 28.

interpretation and validity of the implementing act are concerned. In three further steps, the article then explores criteria for the identification of principles in the Charter, the conditions under which they must be deemed implemented, and the extent to which they are justiciable.

## 2. Defining EU fundamental rights

### 2.1. *The conceptual void: Rights in EU law*

There is currently no accepted definition of rights in EU law. This may seem odd given that the ECJ's jurisprudence is full of references to rights. Not only did the ECJ discover fundamental rights as part of the general principles of EU law many decades ago,<sup>11</sup> but the existence of an individual right is also a key element of the EU law remedies of State liability<sup>12</sup> and Union liability.<sup>13</sup> Furthermore, the principle of direct effect is closely linked to the concept of rights.<sup>14</sup> Despite the importance of that concept in EU law, the ECJ's pronouncements tend to be just that: short statements that a right exists without elucidating on what the concept of a right entails.

The ECJ is mainly concerned with the question of whether or not a right exists. For instance, in assessing whether there is a right to collective action in EU law, the Court in *Laval* pointed to various international law instruments recognizing such a right before pronouncing that "the right to take collective action must therefore be recognized as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures."<sup>15</sup> When determining whether directives confer rights, the Court tends to be equally concise, though there are rare examples of more in-depth legal reasoning. In *Leth*, the ECJ referred to the decision in *Wells*<sup>16</sup> – which had not used the term "right" in this regard – to conclude that

11. Starting with Case C-29/69, *Stauder v. Stadt Ulm*, EU:C:1969:57.

12. The conditions for Member State liability as formulated in Joined Cases C-46 & 48/93, *Brasserie du Pêcheur SA v. Bundesrepublik Deutschland and The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and others*, EU:C:1996:79, para 74 are that "the rule of [Union] law breached is intended to confer rights upon [individuals], the breach is sufficiently serious and there is a direct causal link between the breach and the damage sustained."

13. See Case C-352/98 P, *Bergaderm v. Commission*, EU:C:2000:361 where the ECJ transposed the *Brasserie* conditions to claims for non-contractual liability of the Union under Art. 340 TFEU.

14. Direct effect amounts to more than just the creation of individual rights, see Prechal, *Directives in EC Law*, 2nd ed. (OUP, 2005), pp. 226–241.

15. Case C-341/05, *Laval*, EU:C:2007:809, para 91.

16. Case C-201/02, *R (Wells) v. Secretary of State for Transport, Local Government and the Regions*, EU:C:2004:12.

Directive 85/337/EEC “confers on the individuals concerned a right to have the environmental effects of the project under examination assessed.”<sup>17</sup> In other cases the Court’s assessment was more elaborate: in *Peter Paul* it pointed to the purpose of Directive 94/19 on deposit-guarantee schemes – “to guarantee to depositors that the credit institution in which they make their deposits belongs to a deposit-guarantee scheme, in order to ensure protection of their right to compensation in the event that their deposits are unavailable, in accordance with the rules laid down in that directive,” but found that this did not entail an individual right on part of depositors “to have the competent authorities take supervisory measures in their interest.”<sup>18</sup>

The lack of pronouncements on part of the ECJ concerning the nature of rights is not surprising, for it is in most cases irrelevant. National courts asking the ECJ for guidance are chiefly concerned with questions around whether an individual claimant can rely on a provision of EU law, which is certainly the case if it contains a right and if the individual claimant is a holder of that right.<sup>19</sup> A precise analysis of what constitutes a right under EU law – apart from the fact that it is a subjective entitlement of sorts – is not normally necessary. Yet it is most helpful if one (a) wants to gain conceptual clarity over the rights-principles distinction in the Charter and (b) be in a position to precisely define the entitlement it gives.

## 2.2. An analytical approach to rights in EU law

The two main theories in legal philosophy dealing with the prior question of what should count as a right are the will theory (or choice theory)<sup>20</sup> – which says in essence that a person has a right if they have the power to alter another’s duty – and the interest theory (or benefit theory),<sup>21</sup> which says that rules confer rights if they aim at furthering individual interests. This legal

17. Case C-420/11, *Leth v. Austria*, EU:C:2013:166.

18. Case C-222/02, *Peter Paul*, EU:C:2004:606, paras. 29–30; a detailed discussion – as part of a State liability case – of whether a Directive confers a right can be found in Case C-178/94, *Dillenkofer*, EU:C:1996:375, paras. 30 et seq.; also in Case C-127/95, *Norbrook Laboratories Ltd v. Ministry of Agriculture, Fisheries and Food*, EU:C:1998:151, para 108.

19. The latter aspect has given rise to some discussions on standing notably in German scholarship, which considers the ECJ’s test based on whether the interests of the individual have been affected (*Interessenttheorie*) to be more generous than the German test requiring that the concrete norm must have the purpose of protecting the individual (*Schutznormtheorie*), see e.g. Epiney, “Primär- und Sekundärrechtsschutz im Öffentlichen Recht” 61 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* (2002), 362.

20. Notably proposed by Hart, *Essays on Bentham: Jurisprudence and Political Philosophy* (OUP, 1982).

21. *Inter alia* defended by Raz, “Right-based moralities” in Waldron (Ed.), *Theories of Rights* (OUP, 1984), p. 182 and MacCormick, “Rights in legislation” in Hacker and Raz (Eds.),

philosophical debate is not a key concern of this article. Positive EU law largely determines that most provisions in the EU Charter contain rights. Charter principles, which are equally a creation of positive law, display many of the same features of rights – in that they aim to promote specific interests, for instance – so that the will theory and interest theory debate cannot provide much assistance in the task of defining the nature and function of principles.

Instead, this article is based on an analytical approach to rights which will facilitate the task of teasing out the differences between the two concepts. Most analyses in legal theory – regardless of whether they are rooted in the interest or will theory – define rights in opposition to duties. A person is said to have a right if another has a corresponding duty.<sup>22</sup> Raz, for instance, defines rights thus: “x has a right” if and only if x can have rights, and other things being equal, an aspect of x’s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.<sup>23</sup>

The American legal theorist Wesley Newcomb Hohfeld advocated a more complex definition of the term “right” having noted that the “inadequacy and ambiguity of terms unfortunately reflect, all too often, corresponding paucity and confusion as regards actual legal conceptions.”<sup>24</sup> He famously proposed a sophisticated analysis of “rights” as a set of fundamental legal relations consisting of jural correlatives and jural opposites.

According to Hohfeld, a right – or, better, a claim-right – in the strict sense correlates with a duty, i.e. if A is said to have a claim-right against B, then B is under a corresponding duty.<sup>25</sup> Its (logical) jural opposite is a no-claim. Another sub-category of right according to Hohfeld is the privilege (or liberty) which correlates with a no-claim and whose jural opposite is a duty. If someone has a privilege, they are under no duty and consequently no-one has a corresponding claim-right against them.

A key difference between a claim-right and a privilege is that the claim-right can only be understood with reference to another person: A has a

*Law, Morality and Society: Essays in Honour of HLA Hart* (OUP, 1977), p. 189; for an overview of this debate see Waldron, “Introduction” in Waldron (Ed.), *Theories of Rights* (OUP, 1984), pp. 1, 9–13.

22. See e.g. Austin, “Lecture XII” in Robert Campbell (Ed.), *Lectures on Jurisprudence* (1875), p. 229; Kelsen, *Pure Theory of Law*, 2nd ed. (Max Knight trans, University of California Press, 1967), pp. 125–130; O’Neill, “The dark side of human rights”, 81 *International Affairs* (2005), 427, at 428.

23. Raz, “On the nature of rights”, 43 *Mind* (1984), 194, at 195; the quote makes it apparent that Raz is a proponent of the above-mentioned interest theory.

24. Hohfeld, op. cit. *supra* note 4, at 29.

25. Others prefer the term “claim” in order to avoid any confusion with the term “rights” in the overarching sense.

right that B *phi* denotes a claim-right; whereas A has a right to *phi* denotes a privilege (with *phi* representing a verb).<sup>26</sup>

Claim-rights and privileges are primary rules in that they require people to perform certain actions or to refrain from performing them. Hohfeld further distinguishes a set of secondary rules – powers and immunities. These rules determine how the content of primary rules can be changed.<sup>27</sup> Powers and immunities are only of tangential relevance to this article, so that the following summary must suffice. A power denotes the ability to change a given legal relation, i.e. another person has a liability to have their relations changed. Its jural opposite is a disability. By contrast, an immunity is one's freedom from another's legal power, i.e. another person has a disability with respect to the immunity. Its jural opposite is a liability.

Hohfeld's analysis brings to the fore two characteristics of rights. First, they are relational, in that they always entail a correlative: a claim-right entails a corresponding duty and a privilege entails a corresponding no-claim. Second, rights are intersubjective,<sup>28</sup> i.e. they define the relationship between two persons: the right-bearer and the addressee. This shows that they are subjective entitlements.

While Hohfeld and other theorists have mainly been concerned with rights in private law, and situations where subjects of private law are rights-holders and rights-addressees, their findings equally apply to fundamental constitutional rights such as those protected by the Charter,<sup>29</sup> which has private actors as rights-holders and the Union and/or the Member States as addressees.<sup>30</sup>

### 3. The difference between rights and principles

Having concluded that Charter rights should be understood as relational and intersubjective in nature, this section of the article identifies the key

26. Wenar, "The nature of rights", 33 *Philosophy and Public Affairs* (2005), 223, at 225.

27. The term "secondary rules" including rules of change was introduced by Hart, *The Concept of Law*, 3rd ed. (OUP, 2012), pp. 94–95.

28. See Bengoetxea, op. cit. *supra* note 5.

29. As e.g. done by Wenar, op. cit. *supra* note 26, or O'Rourke, "Refuge from a jurisprudence of doubt: Hohfeldian analysis of constitutional law", 61 *South Carolina Law Review* (2009), 141; as Smet has pointed out, however, the Hohfeldian framework loses its value when dealing with conflicts between fundamental rights Smet, *Resolving Conflicts Between Human Rights* (Routledge, 2016), pp. 57–61.

30. See Art. 51(1) CFR; note, however, that the ECJ has recognized the horizontal effect of some Charter rights: see Case C-414/16, *Egenberger*, EU:C:2018:257 (Art. 21(1) CFR) and Joined Cases C-569 & 570/16, *Bauer and Broßnann*, EU:C:2018:871 (Art. 31(2) CFR); a broader discussion on whether and to what extent Charter rights are capable of applying horizontally would go beyond the scope of this article.

differences between rights and principles in analytical terms before demonstrating what this means in practice. This discussion is preceded by a brief background on why the Charter draws a distinction between rights and principles, and why principles are chiefly found in the broad domain of economic, social and cultural rights (ESC rights).

### 3.1. *Background to the rights-principles distinction in the Charter*

Looking at the drafting history of the Charter – as it is evident from the documents produced by the Convention drafting it – one can discern a marked reluctance among members of the Convention to give ESC rights the same effects as civil and political rights. For instance, an early draft of the Charter contained an express clause mandating that the Union and the Member States “shall observe the social rights and implement the social principles set out in this Charter.”<sup>31</sup> The fact that the distinction between rights and principles was confined to the title on social rights – now largely in Title IV Solidarity – suggests a concern on the part of Convention members that unless the distinction were introduced, social rights would become too powerful.<sup>32</sup> Further evidence of an intense debate about the inclusion of social rights in the Charter can be found in numerous (unsuccessful) suggestions by Convention members to delete many of the provisions embodying social rights in their entirety.<sup>33</sup> The rights-principles distinction thus appears to have been a compromise position.<sup>34</sup> An additional concern – probably due to the positive obligations that many ESC rights entail – was the preservation of the principle of conferral.<sup>35</sup> As is evident from a number of Charter and Treaty provisions,<sup>36</sup> the drafters of the Charter, of the Constitutional Treaty, and of the Lisbon Treaty were all adamant that the Charter should not result in new competences for the Union.

Scepticism towards ESC rights is of course not peculiar to members of the Convention but shared by some legal scholars, especially as far as their justiciability is concerned. They argue that ESC rights differ in nature from of civil and political rights: for one, ESC rights are not universal as the

31. See Charte 4383 Convent 41, Art. 31.

32. For a first-hand summary of the convention discussions on social rights, see Braibant, *La Charte des droits fondamentaux de l'Union européenne* (Éditions du Seuil, 2001), pp. 44–46.

33. See Charte 4383 Convent 41.

34. Brecht, “Änderungen an der EU-Grundrechtecharta”, 8 *Zeitschrift für europarechtliche Studien* (2005), 355, at 368–369; see also European Convention, WG II-WD 13, fn 12.

35. Prechal, op. cit. *supra* note 2, p. 179.

36. Notably Art. 51(1) and (2) CFR as well as Art. 6(1) TEU.

obligations they carry are only created by positive law;<sup>37</sup> and ESC rights require positive action on part of their addressee whereas civil and political rights involve mere negative obligations.<sup>38</sup> Furthermore, decisions about ESC rights are said to be too complex for the judiciary to make and are thus better left to the field of politics.<sup>39</sup> This is captured in a quote by John Rawls, who contended that “[w]hether the constitutional essentials covering the basic freedoms are satisfied is more or less visible on the face of constitutional arrangements and how these can be seen to work in practice. But whether the aims of the principles covering social and economic inequalities are realized is far more difficult to ascertain.”<sup>40</sup> A similar conclusion – that ESC rights should not be subject to judicial review – relates to the separation of powers. The precise content of (indeterminate) social rights should be the subject of democratic debate<sup>41</sup> and it should not be left to democratically unaccountable courts. It is argued that ESC rights are different from civil and political rights in this regard, as they usually require the allocation of resources, which is a function reserved to the legislature and not the judiciary.<sup>42</sup> This balance of powers argument is potentially even stronger in the EU context where the horizontal balance of powers between the various EU institutions is complemented by the – politically more important – vertical balance of powers between the Union and the Member States echoed in the fears of a competence creep mentioned above.

It is not the purpose of this article to engage in a detailed discussion on the justiciability of ESC rights<sup>43</sup> but to show that these concerns are not

37. O’Neill, op. cit. *supra* note 22, at 431; Nagel, “The problem of global justice”, 33 *Philosophy & Public Affairs* (2005), 113, at 130.

38. Nolan, Porter and Langford, *The Justiciability of Social and Economic Rights: An Updated Appraisal* (Originally prepared for the Human Rights Consortium, Belfast, Northern Ireland, available at: <papers.ssrn.com/abstract=1434944, 2007> (last visited 19 July 2019), at 9–10; this was also a key concern in the convention drafting the Charter, see Braibant, op. cit. *supra* note 32, p. 44.

39. See Nolan, Porter and Langford, op. cit. *supra* note 38, at 17–18.

40. Rawls, *Political Liberalism: Expanded Edition* (Columbia University Press, 2005), p. 229; note, however, that Rawls is in favour of a fair distribution of wealth, see Rawls, *A Theory of Justice* (Harvard University Press, 1971); for a Rawlsian critique of Rawls’ own approach, see Waldron, “John Rawls and the social minimum”, 3 *Journal of Applied Philosophy* (1986), 21–33.

41. See e.g. Gearty, “Against judicial enforcement” in Gearty and Mantouvalou, *Debating Social Rights* (Hart, 2011), p. 53.

42. For a discussion of this argument see Plant, “Needs, agency and rights” in Sampford and Galligan (Eds.), *Law, Rights and the Welfare State* (Croom Helm, 1986), pp. 23, 31 et seq.

43. The most comprehensive discussion can be found in Nolan, Porter and Langford, op. cit. *supra* note 38; see also UN Committee on Economic, Social and Cultural Rights, General Comment No. 9, para 10; Boyle and Hughes, “Identifying routes to remedy for violations of economic, social and cultural rights”, 22 *International Journal of Human Rights* (2018), 43; Gerstenberg, “The justiciability of socio-economic rights, European solidarity, and the role of

universally shared. Indeed, the counter-arguments to these claims are largely convincing and there is no principled reason why ESC rights should not be justiciable. This is because assertions based on the different nature of justiciable civil and political rights and non-justiciable ESC rights are flawed. Civil and political rights do not always simply require the addressee to refrain from interfering, but they frequently require positive action. For example, the ECtHR has a rich case law on positive duties resulting from the civil and political rights contained in the ECHR, such as the protection of minors against inhuman and degrading treatment in private schools.<sup>44</sup> Some civil and political rights even presuppose expenditure on part of the addressee, such as the right to free elections or the right to a fair trial as neither can be guaranteed without spending on part of the State.<sup>45</sup>

Equally, some ESC rights involve negative obligations: for instance, the right to strike – as protected in Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) – obliges the State not to interfere with collective action. Hence the dividing lines between civil and political rights and ESC rights are not sharp – and are in parts arbitrary<sup>46</sup> – and cannot therefore serve as a rational basis for accepting or denying the possibility of judicial review.<sup>47</sup> Judicial review of ESC rights – much like that of civil and political rights – also performs a counter-majoritarian function in that it serves to protect minorities and in particular the most marginalized groups. Where the latter claim violations of ESC rights, they tend to have the most at stake so that a role for the courts in these circumstances is justifiable despite the budgetary consequences – and related interference with the legislature's budgetary powers – their decisions may have.<sup>48</sup> Finally, the alleged vagueness of ESC rights – as epitomized in the Rawls quote – is chiefly due to “their exclusion from processes of adjudication rather their inherent nature.”<sup>49</sup> Furthermore, those opposed to the justiciability of ESC rights tend to not take into account that the positive obligations entailed by many ESC rights only require a party to the various international instruments guaranteeing them “to take steps . . . to the maximum of its available

the Court of Justice of the EU”, 33 YEL (2014), 245; Feria-Tinta, “Justiciability of economic, social, and cultural rights in the inter-American system of protection of human rights: Beyond traditional paradigms and notions”, 29 Hum.Rts.Q. (2007), 431.

44. *Costello-Roberts v. United Kingdom*, Appl. No. 13134/87, (1993) Series A No. 247-C.

45. Nolan, Porter and Langford, op. cit. *supra* note 38, at 10.

46. See General Comment No. 9, para 10.

47. See Mantouvalou, “In support of legalisation”, in Gearty and Mantouvalou, op. cit. *supra* note 41, p. 110.

48. Nolan, Porter and Langford, op. cit. *supra* note 38, at 13.

49. Liebenberg, “Socio-economic Rights” in Chaskalson et al (Eds.), *Constitutional Law of South Africa* (Juta, 1996), 41–11, as quoted in Nolan, Porter and Langford, op. cit. *supra* note 38, at 11.

resources” with the aim achieving progressively the full realization of ESC rights.<sup>50</sup> This suggests that the debate on whether ESC rights are justiciable is rather misplaced; the better debate is the one about the extent of judicial review concerning these rights: whether it should be procedural or substantive and whether it should be a last resort supplementing other mechanisms for their realization, such as pre-legislative scrutiny.<sup>51</sup>

Coming back to the Charter, one can therefore observe the following. First, the distinction between principles and rights, which – as will be shown – is most relevant in Title IV on Solidarity, was mainly motivated by concerns about the justiciability of ESC rights and the balance of powers between the EU and its Member States.

Second, these concerns are largely unfounded. The general justiciability of ESC rights means that one should not conclude that all Charter provisions containing ESC norms are automatically principles, or that all provisions in Title IV of the Charter should be presumed to contain principles and not rights.<sup>52</sup> Instead, for each provision in the Charter, a decision needs to be made whether it contains rights or principles or both. While one might be tempted to argue that the nature of the EU as a supranational entity and of EU law as supranational law would militate in favour of potentially less intrusive principles compared with potentially intrusive rights, Gerstenberg has convincingly argued that the ECJ is in fact rather well placed to adjudicate on socio-economic matters, as this would enable it to counter-balance the bias inherent in EU law that favours economic constitutionalism at the supra-national level to the detriment of socio-political constitutionalism at the domestic level.<sup>53</sup> He argues that the ECJ's jurisprudence has the potential of opening up a discursive space where EU-wide understandings of “fundamental and social principles, on the one hand, and the equally contested domestic conceptions of law, on the other hand, may be mutually justified in the light of one another in an ongoing, interminable, and mutually corrective search for discursive congruence.”<sup>54</sup>

Third, the reason for the distinction cannot therefore be found in a categorization of the type of right to which a provision belongs, but it is to some extent arbitrary.

Fourth, even if one considers the rights-principles distinction to be misguided, it is part of positive law. This means that there is a need for further

50. See Art. 2 ICESCR.

51. On these various options, see Boyle and Hughes, *op. cit. supra* note 43, at 57; on pre-legislative fundamental rights scrutiny in the legislative process of the EU, see Kosta, *Fundamental Rights in EU Internal Market Legislation* (Hart, 2015), pp. 38–89.

52. As suggested by A.G. Cruz-Villalón in Case C-176/12, *AMS*, para 55.

53. Gerstenberg, *op. cit. supra* note 43, at 267.

54. *Ibid.*, 268.

clarity on the nature of principles as opposed to rights, and there is a need for criteria determining which Charter provisions contain rights and which contain principles.

As pointed out in the introduction, the term “principle” is ubiquitous in EU law and references to “principles” can be found throughout the EU Treaties. Yet all of these principles are of a different nature – including foundational values, competence limits, standards of judicial review, and indeed rights. This means that we cannot readily find answers to the meaning of Charter principles by comparing them to other principles in the EU Treaties. This observation is even more valid for domestic understandings of the term principle (or *principe* or *Grundsatz*, etc). Instead, the Charter principles can be seen as an attempt to bridge differing understandings of ESC rights and their justiciability in the constitutional traditions of the Member States.<sup>55</sup> For instance, the Irish Constitution contains “directive principles of social policy.” While their drafting history reveals a similar scepticism towards judicially enforceable ESC rights as the Charter principles,<sup>56</sup> these directive principles of social policy differ, in that Article 45 of the Irish Constitution says that they “shall be the care of the Oireachtas [Parliament] exclusively, and shall not be cognizable by any Court under any of the provisions of this Constitution.” By contrast, Charter principles are judicially cognizable once implemented, albeit to a limited extent. Hence an autonomous understanding of Charter principles is warranted.

Importantly, even within the domain of legal theory, there is no shared understanding of the term that could be helpful. A famous use of the term “principle” is made by Dworkin, who distinguishes principles from rules, as being of a logically different nature: whereas rules apply in an all-or-nothing fashion – resulting in their not being able to conflict if both rules are to be valid – principles do not spell out the legal consequences that follow automatically when their conditions are met.<sup>57</sup> In contrast to rules, principles are not definitive but *prima facie* requirements.<sup>58</sup> While it could well be true that all Charter principles also happen to be Dworkinian principles, it is not true that all Charter rights are Dworkinian rules: most do not apply in an all-or-nothing fashion, but the question whether they are violated or not depends on other – often imponderable – factors, notably on whether the essence of the rights has been affected or whether a derogation is proportionate or not.<sup>59</sup> Hence the distinctions between rights and principles suggested by legal theorists are

55. Peers and Prechal, op. cit. *supra* note 3, para 52.161.

56. Hogan, “Directive principles, socio-economic rights and the constitution”, 36 *Irish Jurist* (2001), 174, at 175–179.

57. Dworkin, *Taking Rights Seriously* (Duckworth, 1977), pp. 24–25.

58. Alexy, *A Theory of Constitutional Rights* (Julian Rivers trans, OUP, 2002), p. 57.

59. See the test set out in Art. 52(1) CFR.

unlikely to coincide with the rights-principles distinction positively drawn by the drafters of the Charter.<sup>60</sup>

### 3.2. An analysis of Charter principles

#### 3.2.1. Are social rights special?

As a general rule, there is no reason why social rights cannot be analysed in the same way as civil and political rights.<sup>61</sup> For instance, the right to collective bargaining and action protected by Article 28 CFR can primarily be conceived of as a privilege in Hohfeldian terms: workers and employers may negotiate and conclude collective agreements and take collective action, on the one hand, and the addressees of the right – the Union and the Member States – have no claim against those acting collectively that they should not do so. But Article 28 CFR also entails a claim-right against these addressees, placing them under a duty not to interfere with collective bargaining and action. Moreover, Article 28 CFR entails an immunity against any legislation that would restrict the right in a manner incompatible with Article 52(1) CFR. Right-holders further have a power to limit their right to collective action (e.g. a promise in a collective agreement not to go on strike for a certain period).

It has been contended that certain social rights do not contain duties, but constitute mere “manifesto rights.”<sup>62</sup> Examples given include the right to be housed or the right to be fed.<sup>63</sup> However, this is too sweeping a statement. It depends on the concrete formulation of the provision at hand. If there is no positive legal basis for such a claim-right, one could contend – as Feinberg does – that the claim does not have a corresponding duty; or that it is a claim against all the world. Yet this presupposes that the claim in the example is a legal claim rather than a moral claim. In legal terms, the right to adequate housing or the right to food can very well be constructed in a way that it embodies a duty on the State to act. For instance, ICESCR recognizes the right of everyone to an adequate standard of living for himself, including adequate housing, and then spells out the obligations for the State parties to “take appropriate steps ensure the realization of this right.” It is possible to construe this as entailing a homeless person’s claim-right to be housed, with the State

60. See e.g. Wellman, *An Approach to Rights* (Kluwer, 1997), p. 77 who highlights that application of Hohfeld’s fundamental legal conceptions requires a detailed study of the law of the land.

61. See e.g. as far as Hohfeld is concerned Załuski, “On social rights from an analytical and philosophical perspective”, 13 *Archiwum Filozofii Prawa i Filozofii Społecznej* (2016), 76, at 77–78.

62. Ibid., 78–80; Feinberg, *Social Philosophy* (Prentice-Hall, 1973), p. 67.

63. Feinberg, “Duties, rights, and claims”, 3 *American Philosophical Quarterly* (1966), 137, at 142.

being under a corresponding duty to do this. How the State goes about facilitating this right is then within its discretion.

Equally, the provisions in the revised European Social Charter on which Articles 25 and 26 of the Charter of Fundamental Rights are based, place the parties under concrete obligations, e.g. to “guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution.”<sup>64</sup> The concrete expression of the right in the relevant human rights document is crucial. It follows that the decision of the drafters of the Charter to guarantee the content of these social rights in the form of Charter principles only, and not rights, is not rooted in their nature, but was a political choice.

### 3.2.2. *Charter principles as objective obligations*

What then distinguishes Charter rights from Charter principles?

The Charter Explanations fail to provide an exhaustive list of those Charter provisions embodying principles, but they do contain some examples: Articles 25, 26, 34(1) and 35–38 are said to contain principles, and Articles 23, 33 and 34 are identified as containing elements of rights and principles though the Explanations are no more precise than that. With the exception of Articles 23, 25 and 26, these provisions are found in Title IV on Solidarity, and even though Articles 25 and 26 are found Title III on Equality they are based on ESC rights found in the revised European Social Charter as the Charter Explanations reveal.<sup>65</sup>

Of the known principles, the wording of Articles 37 and 38 CFR is the most removed from the language of rights. Article 37 says that a “high level of environmental protection and the improvement of the quality of the environment must be integrated in the policies of the Union and ensured in accordance with the principle of sustainable development.” It mirrors the horizontal environmental clause in Article 11 TFEU, which is one of the “provisions having general application.”<sup>66</sup> One encounters some difficulty in breaking Article 37 CFR down into the elements of a right. The only element that can be discerned is that of a duty placed upon the Union. If Article 37 CFR embodied a right, one would expect that duty to correlate with a

64. See Art. 23 ESC (revised).

65. Art. 37 CFR differs in this regard as it is based on – and nearly identical to – Art. 11 TFEU, a cross-cutting environmental integration norm. Art. 36 reflects Art. 14 TFEU, another norm of general application; whereas Arts. 35 and 38 are partly reflected in Arts. 168 and 169 TFEU, respectively.

66. Art. 11 TFEU reads: “Environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.”

claim-right. Yet there is no evidence that Article 37 confers a claim-right on anyone. Neither can one find any evidence that Article 37 entails a privilege, a power or an immunity.

It should be noted in this connection that not every duty implies a right.<sup>67</sup> There can be duties that do not entail a claim-right. And this is what Article 37 CFR seems to be. The same goes for Article 38 CFR, which places the Union under a duty to “ensure a high level of consumer protection” broadly reflecting Article 12 TFEU.<sup>68</sup>

The drafting of some of the remaining known principles – particularly Articles 25 and 26 of the Charter – appears to make things more complex, or at least less straightforward. They state that the Union recognizes and respects “the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life” and “the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.”

Both provisions make reference to rights; but instead of saying that “every elderly person (or every person with a disability) has the right to” – a formulation found throughout the Charter – the Union (and not the Member States) merely recognizes and respects these rights. In a similar vein, Article 34(1) CFR stipulates that the “Union recognizes and respects the entitlement to social security benefits and social services.” And even more strikingly, Article 35 CFR says that everyone “has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices”, but the Explanations identify this as a principle.

An innocent reader unfamiliar with the rights-principles distinction would thus not necessarily conclude that these provisions did not embody a right. After all, the Court of Justice has a track record of reading subjective rights into objectively formulated provisions, such as the fundamental freedoms.

This does not mean that principles are not binding. On the contrary they entail legal duties – and according to Hohfeld this means that the Union has no privilege in their regard, i.e. it has no discretion not to comply with the demands of the principle.<sup>69</sup> The fact that the duty does not entail a claim-right simply means that the Charter principles belong to the realm of objective law,

67. Austin, *op. cit. supra* note 22, p. 229; Wenar, *op. cit. supra* note 26, at 243–246.

68. Art. 12 TFEU states: “Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities.”

69. On discretion resulting from a privilege, see Wenar, *op. cit. supra* note 26, at 227.

i.e. the entirety of legal norms that do not confer individual entitlements.<sup>70</sup> Any benefits one might derive from it are therefore mere reflexes of this objective law but do not flow from subjective entitlements.<sup>71</sup>

The difference between Charter rights and Charter principles is therefore that rights are relational and intersubjective,<sup>72</sup> whereas principles impose a one-sided non-relational duty on the Union or the Member States.<sup>73</sup>

### 3.2.3. Consequences of the divide

It is widely accepted that EU law follows the maxim “*ubi ius ibi remedium*” (lit. where there is a right there is a remedy).<sup>74</sup> Hence the violation of a Charter right must in principle be justiciable and must result in some form of remedy. This is underpinned by the right to an effective remedy guaranteed by Article 47 CFR.<sup>75</sup> Of course, EU law differs from domestic legal orders in that it

70. The term “objective law” (objektives Recht; droit objectif) is employed in order to distinguish it from “subjective law” (subjektives Recht; droit subjectif). The term is necessary in languages – such as German or French – that use the same word (Recht; droit) to denote both law and right; see e.g. Kelsen, *General Theory of Law and State* (Anders Wedberg trans. Harvard University Press, 1999), p. 78. This article uses the term “objective law” as it adds clarity – especially for readers familiar with its German and French conceptions – and to better illustrate the difference between a right and a legal reflex.

71. The concept of a legal reflex – defined as law factually benefitting the individual without granting them a subjective right – goes back to Jellinek, *System der subjektiven öffentlichen Rechte* (Mohr Siebeck, 1892), pp. 63–76.

72. See Bengoetxea, op. cit. *supra* note 5.

73. This is also the view espoused by A.G. Cruz Villalón in Case C-176/12, *AMS*, paras. 50–56. Those familiar with the objective side of fundamental rights in German constitutional law might be tempted to think that Charter principles are merely part of that (additional) objective dimension that fundamental rights contained in the German Basic Law have, and which the Federal Constitutional Court has used *inter alia* to allow for their horizontal effect in certain cases (on this see e.g. Alexy, op. cit. *supra* note 58, pp. 328–333). This would not be accurate, however, as Charter principles only have an objective side. By contrast, under German law, subjective fundamental rights are bolstered by the additional recognition of an objective side that goes further by radiating into the entire legal order. Of course, there are principles in primary law that are relational, such as the principle of institutional balance. Charter principles, however, are not.

74. See e.g. Case C-6/60 IIM, *Humblet*, EU:C:1960:48 page 571; Case C-199/82, *San Giorgio*, EU:C:1983:318, para 12; Opinion of A.G. Fennelly in Case C-18/94, *Hopkins and Others*, EU:C:1995:423, para 50; Eilmannsberger, op. cit. *supra* note, at 1236; Tridimas, “Liability for breach of community law: Growing up or mellowing down?”, 38 CML Rev. (2001), 301; Hofmann and Warin, “Identifying individual rights in EU law” (2017) University of Luxembourg Law Working Paper Series 2017-004; critical of the Court of Justice’s practice in this regard is Beal, “*Ubi Ius, Ibi Remedium*: Do the Union courts have the ‘Latin for Judging’?”, 20 *Judicial Review* (2015), 115.

75. This right is also recognized as a general principle of EU law, see Case C-222/84, *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary*, EU:C:1986:206, para 18.

largely relies on the enforcement of EU law rights in the legal orders of the Member States, so that according to Lenaerts “there is effectively a division of functions between the EU legal systems, with the former providing the rights and the latter the remedies.”<sup>76</sup> The individual remedies are subject to the Member States’ procedural autonomy: this means that both the conditions for standing and the actual remedies available may differ from Member State to Member State, provided that they comply with the principles of effectiveness and equivalence.<sup>77</sup> An alleged violation of a Charter right by a Member State when implementing EU law should therefore give the complainant standing in the national courts of that Member State. Furthermore, the national court is bound to give effect to that right and decide whether the Member State has violated its duties under the Charter and if so provide the complainant with an effective remedy available under national procedural law.

By contrast, where the alleged violation concerns a Charter principle things are different. Article 52(5) CFR expressly says that “principles may be implemented by legislative and executive acts taken by . . . the Union, and by acts of the Member States when they are implementing Union law .... They shall be judicially cognizable only in the interpretation of such acts in the ruling on their legality.” This shows that, as a rule, principles are not judicially cognizable. They cannot therefore be invoked before a court, unless they have previously been implemented, and even then only in certain cases.<sup>78</sup> In short, in contrast to rights they are not automatically justiciable.

This has three consequences: first, they cannot of themselves give an individual standing before a national or Union court; second, their violation does not automatically result in a remedy; third, they cannot even be considered by a court, unless they have been implemented and even then only insofar as the implementing act itself is concerned. E.g. in a case where an individual has standing for another reason but nonetheless claims that a piece of Union legislation should be interpreted in light of a Charter principle that it clearly does not implement, a court must not take the principle into account.<sup>79</sup> It should be noted that it is not uncommon for a violation of EU law not to give

76. Lenaerts, “National remedies for private parties in the light of the EU law principles of equivalence and effectiveness”, 46 *Irish Jurist* (2011) 13.

77. The foundational case is Case C-33/76, *Rewe v. Landwirtschaftskammer für das Saarland*, EU:C:1976:188; for an overview of the complex case law in this field, see e.g. Craig, *EU Administrative Law*, 2nd ed. (OUP, 2012), pp. 703–727.

78. The German wording of Art. 52(5) CFR is a little clearer: “Sie können vor Gericht nur bei der Auslegung dieser Akte und bei Entscheidungen über deren Rechtmäßigkeit herangezogen werden;” and so is the French version: “Leur invocation devant le juge n’est admise que pour l’interprétation et le contrôle de la légalité de tels actes;” as is the Spanish version: “Sólo podrán alegarse ante un órgano jurisdiccional en lo que se refiere a la interpretación y control de la legalidad de dichos actos.”

79. On the meaning of “implementing” in Art. 52(5) CFR see *infra*.

rise to a subjective right to challenge the violation;<sup>80</sup> however, the consequences of Article 52(5) CFR go further in that they preclude any judicial challenge based on a principle or its invocation as an interpretative aid, unless it has been implemented.

This reinforces the above conclusion that Charter principles are not simply truncated rights,<sup>81</sup> but that they differ from rights in nature.

### 3.2.4. *Identifying Charter principles*

Which Charter provisions then must be qualified as mere principles and not rights? The Charter itself does not provide any guidance, but presupposes the distinction. As argued above, Charter principles belong to the realm of objective law and are non-relational. This means they contain duties but do not entail corresponding claim-rights. As will be shown, the objective law character of Charter principles is reflected in their wording.

On the basis of the non-exhaustive list of provisions identified as principles in the Charter explanations, principles can have three types of wording. First, there is wording devoid of any rights language, such as can be found in Articles 36–38 CFR. These articles best mirror the conception of principles as objective duties without a correlating claim-right. Their identification as principles is unproblematic.

Second, the formulation “the Union recognizes and respects” is found only in Articles 25, 26, 34(1) and (3) and 36 CFR, all of which the Explanations identify as principles. Even though the wording of some of them, e.g. Article 25 CFR, could be construed to embody a right, this suggests that the “recognizes and respects” wording is determinative of their nature as a principle. The formulation indicates that the “rights” or “entitlements” referred to in these provisions are not immediate, but require implementation before they can be invoked by those covered.

Third, while using rights language, Article 35 CFR only confers a right “under the conditions established by national laws and practices.” Much like the “recognizes and respects” formulation, this suggests that, for it to become effective, Article 35 requires implementation. It does therefore not in and of itself provide standing or a remedy, and is thus not a right. Consequently, it should be understood as being couched in objective law terms and thus as a principle. There is nonetheless a problem with this argument. There are numerous other provisions in the Charter, which seem to be subject to similar

80. See e.g. Case C-222/02, *Peter Paul*; see also Thorson, *Individual Rights in EU Law* (Springer, 2016), p. 28.

81. This seems to be implied by A.G. Cruz Villalón in his Opinion in Case C-176/12, *AMS*, para 62, when he says that by implementation a principle could “become a judicially cognizable right.”

caveats, but not all of these are principles. For instance, Article 28 CFR provides for a right to collective bargaining and action “in accordance with Union law and national laws and practices.” Yet most commentators agree that Article 28 CFR contains a right. Hence a mere reference to Union law or national laws and practices cannot be determinative. In particular, the formulation “in accordance with” is ambiguous: it is used not only in Article 28 CFR, but also in Article 34(1) and (3) CFR, which in contrast to Article 28 CFR, embody principles, not rights.

It is worth delving a little deeper, however, and comparing the French and German language versions. In these languages, Article 35 CFR grants a right of access to healthcare “dans les conditions établies par les législations et pratiques nationales” and “nach Maßgabe der einzelstaatlichen Rechtsvorschriften.” The same wording in German can also be found in Article 34(1) and (3) CFR and a very similar wording in French (“selon les règles établies”), whereas the English language version relies on the rather more ambiguous “in accordance with.” That wording can be found throughout the Charter, but it lacks nuance: where principles identified by the Charter Explanations are concerned, the French and German versions use the language above – and only in these cases; but where rights are concerned, for instance in Article 28 CFR, “in accordance with Union law and national laws and practices” translates as “conformément au droit de l’Union et aux législations et pratiques nationales” and “nach dem Unionsrecht und den einzelstaatlichen Rechtsvorschriften und Gepflogenheiten.” The use of “in accordance with” in this case appears to merely indicate that the right concerned is relative in nature and that it can therefore be restricted; whereas the formulation found in Articles 34(1) and (3) and 35 CFR suggests a *conditionality* that the provision – like all Charter principles – requires implementation. This implies the non-relational, and thus objective, nature of the provision concerned.

It is therefore suggested that the objective nature of a Charter provision is reflected in its wording. It is therefore largely determinative of its characterization as a right or a principle.<sup>82</sup> The Charter Explanations and the pre-Charter jurisprudence of the Court of Justice – e.g. on the right to take collective action – give additional guidance.

Apart from the Charter provisions identified as containing principles in the Explanations, the wording of Article 27 CFR suggests that it is a principle, as it decrees that workers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and

82. See also A.G. Cruz Villalón in Case C-176/12, *AMS*, para 54.

practices.<sup>83</sup> The English wording (“in the cases and under the conditions provided for”) is reminiscent of that of Article 35 CFR. This includes the French version (“dans les cas et conditions prévus”) even though the German wording (“in den Fällen und unter den Voraussetzungen”) differs. In each language, however, the conditionality of implementation shines through, so that Article 27 CFR should be classed a principle.

### 3.3. *Implementation of Charter principles*

This leads to the question under which circumstances principles must be considered as implemented so that they are judicially cognizable, and to the further question, how far their resulting justiciability goes. As argued above, principles are distinct from rights in that they merely entail duties, but do not come with a corresponding claim-right. It is not clear, however, whether these duties incumbent upon the Union – and at times the Member States – exist continuously or only if and insofar as the principle has been implemented. Further, it is unclear in how far a principle – once implemented – is justiciable, i.e. what the restriction to its justiciability “in the interpretation of [implementing] acts and in the ruling on their legality” is supposed to mean. Both case law and academic commentary are confused on these points.

Before addressing the implementation question, it is important to point out that when it comes to justiciability not all principles are *prima facie* the same. Articles 35, 37 and 38 CFR contain principles that are also found in Articles 168(1), 11 and 12 TFEU respectively. The Union must adhere to these provisions in all circumstances. Articles 11 and 168(1) TFEU are truly cross-cutting provisions demanding the integration of high levels of environmental and health protection in all Union policies and activities.<sup>84</sup> Article 12 TFEU is slightly less strongly formulated but has similar breadth. Article 9 TFEU – which by contrast to the provisions just cited is not mentioned in the Charter Explanations – is more broadly formulated, but its reference to “the guarantee of adequate social protection” broadly coincides with Article 34 CFR.

In Article 52(2) CFR, the Charter contains a provision according precedence to the Treaties in cases where Charter rights are also recognized therein, the obvious intention being to limit the potential effects of the Charter and to avoid contradiction between its provisions and those of the Treaties. While the wording of Article 52(2) CFR implies that it does not apply to

83. Lenaerts, “La solidarité ou le chapitre IV de la Charte des droits fondamentaux de l’Union européenne”, 21 *Revue Trimestrielle des Droits de l’Homme* (2010), 217, at 229.

84. E.g. recently, the Court held that it followed from Art. 11 TFEU that “the objective of sustainable development henceforth forms an integral part of the common commercial policy.”

principles, it would not make much sense to arrive at a different conclusion for the relationship between principles that have an equivalent in the Treaties. Even in the absence of a conflict rule such as Article 52(2) CFR, the limitations as to the justiciability of Charter principles contained in Article 52(5) CFR can only apply to provisions in the Charter so that their TFEU twins are not affected by it. Whether one is therefore in favour of extending Article 52(2) CFR to principles by analogy or not, does not make a big difference in terms of outcome.

Turning now to the implementation of principles, the first question is whether implementation is a prerequisite for the existence of an objective duty flowing from the principle or whether implementation is simply a requirement for the justiciability of the principle. One can find evidence for both views in the pronouncements of the Court of Justice and one of its advocates general. In *Glatzel* – still the only case in which the Court has expressly identified a Charter provision as a principle – the ECJ suggested that Article 26 CFR did not require the Union to adopt any specific measures and that in order “for that article to be fully effective, it must be given more specific expression in European Union or national law.”<sup>85</sup> If fully effective in this sense means justiciable, there is not a problem. However, if fully effective means that the duty incumbent upon the EU and its Member States only starts to exist once implementation has taken place, then this would be problematic.<sup>86</sup>

There are very good arguments in favour of assuming that the objective duty entailed in Charter principles exists independently of whether the principle has been implemented or not. First, such an understanding would be in line with the analysis conducted above: principles are to be conceived of as duties without a correlating claim-right and are thus different from rights in the sense that they are not relational. Second, this solution would mean that all Charter principles – whether mirrored in the Treaties or not – would have the same legal nature. Third, this would chime with the wording of Article 52(5) of the Charter, which makes the judicial cognizability of principles subject to their implementation. Fourth, it would be compliant with the wording of Article 51(1) CFR, which requires principles to be observed and promoted without placing this duty under a condition. Fifth, a solution making the binding character of principles dependent on their prior implementation would lead to the result that it would be entirely in the discretion of the Union and its Member States to decide whether they wanted to comply with a given Charter principle. This outcome would, however, appear rather odd in light of the fact

85. Case C-356/12, *Wolfgang Glatzel v. Freistaat Bayern*, EU:C:2014:350, para 78; the Court reasoned in a similar manner in Case C-176/12, *AMS*, EU:C:2014:2, para 45.

86. This would seem to be the view put forward by Lenaerts, op. cit. *supra* note 83, at 223, who considers that principles are potestative in nature.

that Charter principles are contained in a piece of EU primary law that purports to reflect the values common to the peoples of Europe, whose validity surely cannot depend on the discretion of the Union or the Member States. Finally, this view is supported by Advocate General Cruz Villalón's Opinion in *AMS* where, having concluded that Article 27 CFR was a principle, he suggested that it had to "be interpreted only as an obligation to act, requiring the public authorities to take the necessary measures to guarantee a right."<sup>87</sup>

The consequence of the view advocated here is that the Charter principles are always binding, but that their justiciability requires their prior implementation. This can be squared with the Court's pronouncement in *Glatzel* that a Charter principle "does not require the EU legislature to adopt any specific measure" given that the binding character of a principle only removes the legislature's discretion as far as the question is concerned *whether* it needs to comply. It leaves intact the legislature's discretion as to *how* it should comply.<sup>88</sup>

### 3.4. *Judicial cognizability of principles*

Having established that implementation matters only for the judicial cognizability of Charter principles, two questions need to be answered: first, what constitutes such implementation and second, which measures can be reviewed on the basis of an implemented principle?

Article 52(5) CFR – as well as the Charter explanations – are silent on the first question and merely state that an implementing act can be either legislative or executive in nature. The Court's case law contains some clues, at least. In both *Glatzel* and *Kamberaj* the Court cited references contained in the preamble of directives before concluding that these directives should be considered an implementation of a principle.

*Glatzel*, as mentioned, is the only case to date in which the Court expressly recognized a Charter provision – Article 26 CFR – as a principle. The applicant had been denied a driving licence for heavy goods vehicles due to the fact that he had lost vision in one eye. The decision of the national authority was based on the minimum standards of physical and mental fitness for driving propelled vehicles laid down in Directive 2006/126.<sup>89</sup> The applicant

87. A.G. Cruz Villalón in Case C-176/12, *AMS*, para 54.

88. It should be noted that the existence of an objective duty independent of an implementing act does not mean that any implementation could be based on the competence contained in Art 352 TFEU. Such an understanding would be contrary to the clear desire of the Member States that the Charter does not create new competences found in Arts. 6(1) TEU and 51(2) CFR.

89. Directive 2006/126 of the European Parliament and of the Council of 20 Dec. 2006 on driving licences, O.J. 2006, L 403/18 (Annex III).

therefore claimed that the Directive was *inter alia* in violation of Article 26 of the Charter, which requires the integration of persons with disabilities. The earlier case of *Kamberaj* concerned the equal treatment of third-country nationals in the allocation of housing benefit. The applicant claimed that a requirement to have worked for three years before being eligible for housing benefit, which applied to non-EU nationals only, was in violation of Article 34 (3) CFR and Directive 2003/109.<sup>90</sup>

Whereas in *Kamberaj* a broad reference that the Directive respects the fundamental rights and observes the principles recognized by the Charter appeared to suffice for Article 34(3) CFR to be deemed as implemented,<sup>91</sup> in *Glatzel* the Court looked at the stated aim of the Directive – making it easier for disabled persons to drive vehicles – to conclude that this Directive implemented Article 26 CFR.<sup>92</sup> The approach in *Glatzel* is preferable in that it considers whether the subject-matter of the implementing act in question coincides with that of the principle in question. A subject-matter based approach has the advantage of removing any discretion on part of the Union legislature and the national legislature as to whether they would like to see the principle implemented. It also removes any issues with legislation predating the Charter, which might not reflect the language of the Charter. A subject-matter based approach should therefore consider whether the Union – or Member State when implementing Union law – can be deemed to have discharged the objective duty placed on them by the principle.<sup>93</sup>

This leads to the second question, that of what types of measures are reviewable once a principle has been implemented. Article 52(5) CFR states that principles “shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality.” The wording suggests a relatively narrow justiciability, restricted to the implementing act itself. The Court in *Glatzel* confirmed this reading as far as legality challenges are concerned, and its ruling in *Kamberaj* shows how a Charter principle can be used to clarify the meaning of an implementing act.

Craig argues for a broader view given that the examples in the Charter Explanations draw on the precautionary principle and principles used in agricultural law, which did “not only apply when the challenged act is designed directly to implement those principles.”<sup>94</sup> A similar concern is raised

90. Council Directive 2003/109/EC of 25 Nov. 2003 concerning the status of third-country nationals who are long-term residents, O.J. 2003, L 16/44.

91. Case C-571/10, *Servet Kamberaj v. Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and Others*, EU:C:2012:233, para 79.

92. Case C-356/12, *Wolfgang Glatzel v. Freistaat Bayern*, para 75.

93. A similar approach is also proposed by A.G. Cruz Villalón in Case C-176/12, *AMS*, paras. 63–66.

94. Craig, op. cit. *supra* note 2, p. 220.

by Advocate General Cruz Villalón, who argues that there would be a vicious circle if reference to “such acts” were applied exclusively to implementing acts. After all, “those implementing legislative acts would be reviewed in the light of a principle whose content . . . is precisely that which is determined by those implementing legislative acts.”<sup>95</sup> It is not clear where under this view one would need to draw the line between reviewable and non-reviewable acts. That distinction needs to be drawn, however, given that Article 52(5) CFR means that not all Union acts can be reviewed on the basis of a principle.

Hence a restriction of the judicial cognizability of principles to implementing acts is preferable, as it is not only in accordance with the wording of Article 52(5) CFR, but it also allows for more clarity. Nonetheless, this does not mean one should ignore Craig’s concerns, but it is suggested that these can be addressed by adopting the relatively broad subject-matter oriented understanding of what constitutes an implementing act.<sup>96</sup>

It should be noted in this regard that under Article 52(5) CFR principles can not only be invoked before a court in order to invalidate or narrowly interpret an implementing act – as a sword so to speak – but they can also serve in defence of an implementing act. In *Philip Morris*, for instance, the Court used the requirement of a high level of human health protection laid down *inter alia* in Article 35 CFR to conclude that restrictions on the labelling of packs of tobacco products did not interfere disproportionately with Article 11 CFR.<sup>97</sup>

### 3.5. Is the distinction between rights and principles relevant in practice?

Some commentators have argued that the difference between rights and principles is largely redundant given that the decisive question under EU law is not whether a provision confers a right on an individual, but whether it has direct effect.<sup>98</sup> Though contested in detail,<sup>99</sup> the doctrine of direct effect

95. A.G. Cruz Villalón in Case C-176/12, *AMS*, para 69.

96. The restriction of the judicial cognizability of Charter principles to (widely understood) implementing acts, chimes with the concept of *justiciabilité normative* in French law, which was one of the role models for Charter principles. An example given by Guy Braibant, who was one of the members of the Charter Convention, confirms this. He suggests that if an EU directive were to ban all welfare benefits relating to housing, this would not be acceptable for a court in light of the principle contained in Art. 34 CFR, see Braibant, op. cit. *supra* note 32, p. 46.

97. Case C-547/14, *Philip Morris Brands and Others*, EU:C:2016:325, paras. 157–191.

98. Peers and Prechal, op. cit. *supra* note 3 paras. 52.188–52.190; a similar argument was already made in Prechal, op. cit. *supra* note 2, p. 183.

99. For discussions of some of the finer points, see e.g. Dougan, “When worlds collide! Competing visions of the relationship between direct effect and supremacy”, 44 CML Rev. (2007), 931; Lenaerts and Corthaout, “Of birds and hedges: The role of primacy in invoking norms of EU law”, 31 EL Rev. (2006), 287 (on direct effect and primacy); Prechal, op.

concerns the ability of individuals to invoke provisions of EU law before domestic courts. The provision of EU law at issue must be “sufficiently clear, precise and unconditional” to qualify for direct effect.<sup>100</sup> Like the rights-principles distinction, direct effect is therefore concerned with the justiciability of a provision. Those arguing that at least in practice there is no difference between rights and principles contend that no matter whether a Charter provision is designated a right or a principle, its justiciability only really depends on whether it is sufficiently clear, precise and unconditional. If a right is so vaguely formulated that a court cannot in practice apply without further legislative guidance, then it is non-justiciable. By contrast, if a principle has been implemented, then Article 52(5) CFR decrees that it becomes justiciable.

It is true that in some cases there may be no practical difference, so that Braibant’s expectation that a judge would be able to construct a theory that would amount to their recognition as a right, may well come true.<sup>101</sup> Indeed, the Court of Justice has a track record of finding Treaty provisions – notably Article 49 TFEU – directly effective that at first glance would have to be classified as conditional upon the adoption of Union legislation.<sup>102</sup>

Nonetheless, it is maintained here that the difference does matter.<sup>103</sup> A main finding of the analysis carried out above was that principles are structurally different from rights, in that they are not relational as they merely stipulate a duty, but no correlating claim-right. In practice the difference will mainly be visible when it comes to standing. Whereas Charter rights give standing in and of themselves, Charter principles do not. Of course, once standing has been granted, the judicial review that follows can take into account objective law as well as rights.<sup>104</sup> But this does not alter the fact that principles differ from rights in nature.

In addition, the wording of Article 52(5) CFR remains relevant and cannot be ignored: principles are judicially cognizable only in the interpretation of implementing acts and in rulings on their legality. Depending on whether the Court of Justice prefers a narrow view or a broad view of this limiting

cit. *supra* note 14, pp. 216–270 (on direct effect of directives); and for a general overview Craig and De Búrca, *EU Law*, 6th ed. (OUP, 2015), Ch. 7.

100. This definition goes back to Case C-26/62, *van Gend & Loos*, EU:C:1963:1.

101. Braibant, op. cit. *supra* note 32, p. 46.

102. See famously Case C-2/74, *Reyners v. Belgium*, EU:C:1974:68.

103. This is also implied by Lenaerts, op. cit. *supra* note 83, at 224, who draws a distinction between directly effective implementations of principles and those that do not have direct effect.

104. For instance, in the EU context, once a person has standing under Art. 263(4) TFEU, the ECJ is free to review the legality of an EU act by way of a Charter principle (or any other objective law-standard).

provision, the categorization of a Charter provision as a right or a principle will be of great relevance.

#### **4. Conclusions**

This article was an attempt to shed light on the distinction between rights and principles found in the EU Charter of Fundamental Rights. It argued that the reason for the distinction between rights and principles cannot be attributed to the type of fundamental right – civil and political or economic, social and cultural – that a Charter provision reflects. Instead, the reason for the distinction is a political choice made by the drafters of the Charter, which means that it is to an extent arbitrary. Nonetheless, the distinction is relevant in practice as the categorization of a Charter provision as a right or a principle determines the extent to which it is justiciable.

This article started with an analysis of what constitutes EU rights in order to provide the clarity needed to understand what distinguishes rights from principles. This analysis concluded that the key difference between a Charter right and a principle lies in the non-relational and non-intersubjective nature of the latter. Whereas rights can be expressed as a set of Hohfeldian incidents with correlatives, principles cannot. They are instead best characterized as pertaining to the realm of objective law in that they consist in duties without corresponding claim-rights. Principles are therefore different in nature from Charter rights and they do not mature into rights by being implemented. This does not mean, of course, that certain social rights that the Charter only guarantees as principles cannot be rights under EU law; the possibility of such rights being considered part of the general principles of EU law – the original locus of EU fundamental rights – remains.

The duties found in Charter principles are binding on the EU (and the Member States when implementing EU law) regardless of whether the principle has been implemented. Implementation is only relevant for their justiciability. The article argues in favour of a broad understanding of what constitutes implementing acts taking a subject-matter based approach. At the same time, it argues that the types of acts reviewable should be confined to implementing acts as this is first compatible with the wording of Article 52(5) CFR and it allows for a relatively clear demarcation of the reach of Charter principles.