Horizontal Application of EU-Fundamental Rights

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I. German constitutional law
1. Horizontal effect of fundamental rights

The Weimar Constitution of 1919

Art. 118: ‘Every German is entitled, within the limits fixed by general law, to express his opinion freely in word, writing, print, image or otherwise. No employment contract may obstruct him in the exercise of this right; nobody may put him at a disadvantage if he makes use of this right. (…)’

Art. 159: ‘The right to form unions and to improve conditions at work as well as in the economy is guaranteed to every individual and to all occupations. All agreements and measures limiting or obstructing this right are illegal.’
The Basic Law of 1949

Basically, fundamental right are binding on the state only.

Art. 1(3) of the Constitution:

‘The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.’

See also section 78 of the Federal Constitutional Court Act:

‘If the Federal Constitutional Court comes to the conclusion that Federal law is incompatible with the Basic Law (...), it shall declare the law to be null and void. (...).’
An exception: Freedom of association

Article 9(3) sentence 1 of the Constitution:

‘The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession. \textit{Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful. (...)}.’
Federal Constitutional Court 7, 198:

‘Basic rights are mainly to protect the citizen against the state, but (...) they also incorporate an **objective order of values** which applies, as a matter of constitutional law, throughout the entire legal system.’

‘The substance of the basic rights finds its **indirect expression in the provisions of private law**, (...) and is best effectuated by the judges’ application of general provisions.’

‘Basic rights may be infringed by a judicial decision, that ignores the effect of basic rights on private law (...). **Judicial decisions on private law are subject to review by the Constitutional Court**, only in respect of such infringements of basic rights, not for errors of law in general.’
So-called doctrine of indirect effect of fundamental rights

In later judgments the focus shifted from ‘objectives order of values’ to an obligation of the state to protect fundamental rights.
The ‘keys’ to applying fundamental rights

Section 138 of the Civil Code:

‘(1) A legal transaction which is contrary to public policy is void.’

Section 242 of the Civil Code:

‘An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.’
2. Fundamental rights and judge-made law

Section 45(3) of the Labour Court Act expressly acknowledges the court’s task ‘to further develop the law’. 
Examples of ‘fundamental rights oriented’ judge-made law

Federal Labour Court 2, 221:

Employment obligation during employment relationship.

BAG (Great Senate) 27.02.1985:

Continued employment during unjust dismissal lawsuit.
See also

**Federal Labour Court of 28.02.2006**
(Right of access of trade union representatives):
‘As a legal regulation is lacking, the courts, due to their obligation to protect the fundament rights as enshrined in the Constitution, must fix the according rules by further developing the law.’

**Federal Constitutional Court of 27.01.1998**:  
‘Insofar as statutory dismissal protection cannot be applied, the general provisions of privare law ensure minimum protection as required by freedom of profession.’

Fundamental rights can give rise to an obligation of the state, based on those rights, to shape the rules of private law in a certain way.
I. EU-Fundamental Rights
1. Dogmatic framework

Direct and indirect effect
• Fundamental right leads to the conclusion that a private party breached the law or that a contractual term is invalid. Fundamental right leads to the disapplication of a provision (and may even be used as a substitute for the disapplied provision).
• Fundamental right „informs“ the courts and must be taken into account, in particular, when interpreting lower-ranking provisions.

Positive and negative effect
• Fundamental right leads to imposing an obligation on the other party.
• Fundamental right leads to the disapplication of a provision.
2. Possible arguments: Language

See, for instance, Article 27

Opinion A.G. Cruz Villalon, Case C-176/12 (Association médiation sociale):
‘The heading of the article in question is ‘Workers’ right to information and consultation within the undertaking’, the last detail meaning that it must be accepted that ‘the undertaking’ is in some way involved in the effectiveness of that right. (…).’
‘Duty to protect’

See ECHR of 13.06.1979, No. 6833/74 (Marckx v. Belgium)
‘[Article 8] does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective "respect" for family life.’

Art. 53(3) sentence 1 of the Charter
‘Insofar as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention.’
Formal status of the Charter

Article 6(1) TEU: ‘The Union recognises the rights, freedoms and principles set out in the Charter (...), which shall have the same legal value as the Treaties.’.

This, however, might not justify the conclusion that all provisions of the Charter benefit from the most extensive effectiveness that Treaty provisions have been assigned in the case law (see, in particular, the case law on Articles 45 and 157 TFEU: freedom of movement and principle of equal pay).
Article 51(1) of the Charter

according to which ‘[t]he provisions of this Charter are addressed to the institutions (...) of the Union (...) and to the Member States (...).’

Argumentum e contrario rejected by Advocate General Cruz Villalon, Opinion Case C-176/12 (Association médiation sociale): ‘(...) nothing in the wording of the Article (...) which suggests that there was any intention, through the language of that article, to address the very complex issue of the effectiveness of fundamental rights in relations between individuals.’ (note 31).
Opinion A.G. Trstenjak, Case C-282/10 (Dominguez):

‘At first sight, the wording of Article 31 of the Charter could induce the belief that horizontal effect is to be attributed to this provision and that it is to directly apply to the situation between employers and employees. (...). Under the first sentence of Article 51(1), however, the Charter just applies to ‘the institutions(...) of the Union ... and to the Member States only when they are implementing Union law’. (...). In my view, these provisions [Articles 51(1) and 52(2) indicate an intentional restricting of the parties to whom fundamental rights are addressed (...).‘ (note 80).
3. Horizontal use of the Charter by the ECJ in the past

Recognition of horizontal effect in EU-law.

Opinion A.G. Cruz Villalon, Case C-176-12 (Association médiation sociale):

‘(...) the idea that the fundamental freedoms of movement or particular principles such as non-discrimination on grounds of sex are relevant in private legal relations is an old and well-established one.’ (note 34).

‘(...) it would be paradoxical if the incorporation of the Charter into primary law actually changed that state of affairs for the worse.’ (note 35)
See, for instance:

**ECJ of 22.11.2011, Case C-214/10 (KHS AG v Schulte):**
Review of a collective agreement in the light of the Working Time Directive, but Art. 31(2) of the Charter also mentioned.

**ECJ of 08.09.2011, Cases C-297/10 and C-298/10 (Hennigs):**
ECJ of 19.01.2010, Case C-555/07 (Kücükdeveci):

Principle of non-discrimination on grounds of age as given expression by Council Directive 2000/78/EC must be interpreted as precluding certain national legislation, Art. 21 (1) of the Charter also mentioned.

Negative effect of fundamental right on relationship between private parties (sic).
See also Opinion A.G. Trstenjak, Case C-282/10 (Dominguez):

‘One further conceivable approach might consist of applying, in a relationship between private individuals, a general legal principle of EU law. (note 85).

‘It is indeed possible to conceive of cases in which protection of fundamental rights vis-à-vis private bodies would appear every bit as essential as against public authorities, so that failure to afford protection of fundamental rights would be tantamount to a breach of fundamental rights.’ (note 117).

Two requirements: Grant of a subjective right; substantively unconditional and sufficiently precise.
'Rights’ and ‘principles’

Art. 52(5) of the Charter:
‘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 cognisable only in the interpretation of such acts and in the ruling on their legality Charter does not explicitly assign the fundamental rights to either of the two groups.’.

Need to implement.
‘Further development of the law’ (and positive effect) precluded.
Opinion A.G. Cruz Villalon, Case C-176-12 (Association médiation sociale):

‘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.’ (note 45).
‘(...) the Member States [Ireland, Spain, France, Austria, Germany] which draw a distinction similar to that provided for in Article 52(5) of the Charter have established a category complementary to that of ‘rights’, a category incapable of giving rise to individual rights which can be directly relied on before the courts, but which is endowed with normative force at the constitutional level allowing the review of acts, primarily those of a legislative nature.’ (note 49).
4. A closer look: Articles 27, 31(2) of the Charter
Article 27 of the Charter

Opinion A.G. Cruz Villalon, Case C-176/12: ‘(...) the scope of the right directly guaranteed by the provision is extremely weak (...). This is confirmed by the fact that the article does not define any individual legal situations, leaving the European Union and national legislatures to give specific expression to the content and objectives determined by the principle.’ (note 54).

Judgment of the ECJ: ‘It is therefore clear from the wording of Article 27 of the Charter that, for this article to be fully effective, it must be given more specific expression in European Union or national law.’ (note 45). Facts of the case may be distinguished from those which gave rise to Kücükdeveci.
Article 31(2) of the Charter

Opinion A.G. Paolo Mengozzi of 12.06.2014, Case C-316/13 (Fenoll):

No direct horizontal application (reference to Opinion, Case C-282/10: ‘substantively unconditional and sufficiently precise’).