

The EU's commitment to fundamental rights

Do EU fundamental rights have horizontal effect?

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Is it an appropriate question to ask?

- Orthodox view
 - HR invoked by individuals against the 'arbitrary interference by public authorities'
 - Vertical effect only
 - US largely maintained this view
- Cf Germany, ECtHR
- Particularly relevant in the social context (eg Arts. 28, 30, 31)



Why the increasing interest in the question of horizontality?

- Case C-282/10 *Dominguez*: AG Trstenjak
 - Rigid distinction between public and private is artificial [117]
 - Major power of large corporations [117]
 - Effectiveness [119]
- Paul Craig:
 - All legal relations are constituted by the state, in the sense that the law itself is constructed and supported by the state and so that law should be compatible with human rights

Position in the EU

- Fundamental rights
 - Treaty provisions (eg economic rights to free movement)
 - As general principles of law
 - In the Charter
- Vertical application
 - **Against the EU institutions**: Case 4/73 *Nold* (general principles); Joined Cases C-92/09 and 93/09 *Volker* (Charter), C-236/09 *Test-Achats* 'Articles 21 and 23 of the Charter state, respectively, that any discrimination based on sex is prohibited and that equality between men and women must be ensured in all areas. Since recital 4 to Directive 2004/113 expressly refers to Articles 21 and 23 of the Charter, the validity of Article 5(2) of that directive must be assessed in the light of those provisions'
 - **Against the MS**: Case 29/69 *Stauder* (general principles)

A shift away from the (vertical) orthodoxy I

- States themselves can invoke fundamental rights against individuals: Case C-112/00 *Schmidberger* (positive obligations); Art. 51(1) 'promote the application thereof'
- National courts must interpret national law in line with general principles in horizontal situations: Case C-180/95 *Draempaehl*; now reinforced by Article 51(1). Charter addressed to institutions (including CJEU) and MS (including national courts)

A shift away from the (vertical) orthodoxy II

- Fundamental economic rights in the Treaty have horizontal application: Art. 157 (Case 43/75 *Defrenne II*); Art. 45 (Case C-281/98 *Angonese*)
 - Query the position in respect of Arts 49 and 56 TFEU following Case C-438/05 *Viking* and Case C-341/05 *Laval*; certainly bind trade unions.
 - See also Joined Cases C-297/10 and C-298/10 *Hennigs and Mai* 'Where the right of collective bargaining proclaimed in Article 28 of the Charter is covered by provisions of European Union law [2000/78, it must, within the scope of that law, be exercised in compliance with that law (citing *Viking* and *Laval*) [67].
- General principles which give expression to a Dir. can be applied in a horizontal context even where an underpinning directive does not: Case C-555/07 *Kücükdeveci*

Case C-555/07
Kücükdeveci v Swedex

- It is 'for the national court, hearing a dispute involving the principle of non-discrimination on grounds of age as *given expression in Directive 2000/78* to provide, within the limits of its jurisdiction, the legal protection which individuals derive from European Union law and to ensure the full effectiveness of that law, disapplying if need be any provision of national legislation contrary to that principle' (para. 51)

So has horizontal direct effect been achieved?

- Meaning: *A going before national court alleging his (EU) fundamental rights have been infringed by B*
- Applies only to the Treaty provisions: Arts. 157 and 45 TFEU
- Otherwise largely interpretation (*mittelbare Drittwirkung*)
- Reluctance to extend *Kücükdeveci* beyond age discrimination? Case C-282/10 *Dominguez*

Case C-282/10 *Dominguez*

- D on long term sick leave
- Is her employer, *Centre informatique du centre Ouest Atlantique (CICOA)*, obliged to give her paid annual leave under Art. 7 of Dir. 2003/88 even though she did not work?
- French law required her to do a minimum of 10 days' actual work before being entitled to paid leave
- If this was a vertical direct effect situation, D could use the Directive to set aside conflicting provision of national law.

Case C-282/10 *Dominguez*: AG Trstenjak

- This is a horizontal situation of which she has 'absolutely no doubt' [56];
- So does Art.7 require the national court to disregard the conflicting national law?
 - No, applying the orthodoxy that unimplemented/incorrectly implemented directives have no HDE [62]
 - Interpretation of national rule (*Pfeiffer*) in the light of Art. 7 also not possible because *contra legem*

Case C-282/10 *Dominguez*: three alternative approaches I

- Direct application of Art. 31(2) of the Charter
 - Arts 28, 29 and 31 are all ‘rights’ (not principles)
 - But lack of HDE because Art. 51(1) applies only to EU institutions and MS (so their officials would benefit but not private individuals); see also Art. 52(1)
 - No provision for HDE in ECHR either (because of state’s duty of protection)

Case C-282/10 *Dominguez*: three alternative approaches II

- Direct application of a general principle
 - Entitlement to annual leave is probably a general principle of EU law [114]
 - It cannot be ruled out that GPs can have horizontal application [127]
 - Charter rights and GPs have equal status and can exist in parallel; giving horizontal effect to GPs means circumventing the limits in the Charter, so not possible
 - BUT, but GPs can give greater protection than Charter and can have HDE provided (i) there is a grant of a subjective right (ii) the GP is substantively unconditional and sufficiently precise. BUT right to annual leave probably does not satisfy these conditions

Case C-282/10 *Dominguez*: three alternative approaches III

- Application of the general principle as given specific expression in Dir. 2003/88
 - Case C-555/07 *Kücükdeveci*
 - Can this be transposed to annual leave? Possibly, but:
 - Risk of mixture of sources of law (ie all Dirs are sources of general principles)
 - The Dir. does not conclusively give specific expression to the principle
 - Absence of legal certainty for private individuals
 - Risk of inconsistency with provisions of the Charter
 - So, not possible, so fall back on state liability claim

Case C-555/07 *Kücükdeveci v Swedex*

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Case C-282/10 *Dominguez*: CJEU

- Avoided all difficulties
- Try *Pfeiffer* style interpretation
- f/w vertical direct effect (CICOA is a body operating in the field of social security) (and no HDE)
- f/w state liability

Conclusion

- Certainly not (yet) full horizontal application of EU fundamental rights
- But tentacles of EU law entering every more deeply into the sphere of private autonomy
- Case-by-case approach and some caution (*Dominguez* was Grand Chamber)