

THE CONSTITUTION IN PRIVATE RELATIONS

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The problem of horizontal effect of constitutional norms arises in many modern democracies. The legislature, the judiciary and the constitutional courts seek answers concerning the nature of the modern protection of fundamental rights: what does the constitution command in the judicial assessment of private relations? How are constitutional rules binding if they are binding at all in certain private relations? The doctrine of horizontal effect is primarily based on the recognition of the dangers posed to human rights by private entities. In our contemporary world individuals and private entities can violate human rights as extensively and, sometimes more frequently than the state can.

It is evident that states can always implement rules in order to protect defenseless individuals from the derogatory conduct of other private entities, as far as this does not contradict the constitution: private law brings good examples for this and the fairly new anti-discrimination legislation also belongs to this category. As the state has this regulatory power, in most of the cases it is not necessary to invoke one's fundamental rights granted by the Constitution in legal debates, but it is enough to call a statutory provision when seeking legal protection. Horizontal effect of constitutional rights is thus a "residual category", which means that the horizontal application of constitutional rights occurs only if ordinary legislation fails to protect fundamental rights. A good example could be the relation of the anti-discrimination legislation and the traditional concept of third party effect. Concerning the prohibition of arbitrary discrimination they both serve the same ends, they can, however, conflict when supplementing each other, thus the fight for competencies between the judiciary and the legislative organs becomes clear in this relation.

In order to illustrate my point, I would call for a simple example: A Roma wishes to rent my flat which I refuse to let him, however, I contract somebody else at the same time, who is not a Roma on less favorable terms than what the Roma offered to me. The situation clearly shows that I did not want the Roma to rent my flat because he is Roma. Does he have a *constitutional right* not to be discriminated by me, can he sue me for this conduct referring to the constitutional provision prohibiting discrimination? Or at least: does the constitution bind the judiciary to interpret general clauses of law in a way which favors the Roma's position? Does the constitution oblige the legislative to implement rules to punish me if I discriminate in this way? Under traditional constitutional theory

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it was easy to give a negative answer to these questions, because the constitutional task was to protect the individual against state actions. The relations of private actors belonged to the field of private law. However, now, in contemporary social states, in the privatized world where private entities are sometimes as powerful as state actors, it is a sound claim on behalf of the individuals that the state should somehow provide the same guarantee of protection against equally powerful private and public entities. But what is the best method for changing the role of the constitution, who can decide on this issue, and where are the new limits? These are the questions in the crossfire of recent debates.

Direct and indirect horizontal applicability of the constitution alone raise several questions, many of which cannot be the subject matter of this thesis. I try to focus on the principal relevant issues for my purposes, such as the justifications and implications of these doctrines and the reliability of these systems from a rule of law prospect, in order to provide an overview.

This thesis chose to exhibit six jurisdictions with different emphasis: My starting point was to examine the Hungarian controversy as an example for what young democracies have to face. In studying the Hungarian situation, I found that the broader description of the German example could help to understand the evolution of the extension of certain fundamental rights in horizontal relations, since the Hungarian constitutional system as interpreted by the constitutional court has become very close in nature to the German one. Apart from their internal similarities, these countries are both member states to the European Union (EU). Analyzing the tendencies in the EU concerning the protection of fundamental rights and in private relations is essential to understand what kind of pressure the Hungarian law and legal thinking must face. Thus, I have chosen to examine primarily the Hungarian, the German, and the EC/EU jurisdictions from the perspective of third party effect.

As to the origins of the problem, however, one has to mention the first written constitution in the United States which was undoubtedly drafted with the aim to govern the relationship of the state and its citizens. The Bill of Rights incorporates limitations on the competencies of the Congress concerning some fundamental rights of citizens, but does not contain any requirement concerning private relations. In the United States, even these days, only the Thirteenth Amendment which prohibits slavery has direct horizontal effect, while in other cases, the “state action doctrine” applies. However, in spite of the clear lack of mandate to apply the Constitution in private relations, U.S. courts tend to find state action in more and more dubious situations. The German social state answers the question of horizontal applicability differently. In the famous *LüTh* decision, the German Federal Constitutional Court (GFCC) declared that besides individual and collective rights, the post-war 1949 German Constitution incorporates an objective order of values as well. These objective values are present in the entire legal system, thus courts are constitutionally obliged to interpret all norms that apply to private relations in the light of the Constitution. These two examples provide us with two entirely different solutions to our question, namely the role of constitutional norms in private

relations. Similarly, we must mention as a further example for the contradictory assessment of the role of constitutional norms in private relations Ireland and Poland, where constitutional norms have direct horizontal effect.

As to the European Union, we can observe that the ECJ has developed a limited doctrine of horizontal direct effect for some legal provisions of the Treaties. Primarily only the principles of non-discrimination on grounds of sex and nationality and the fundamental freedoms have a horizontal direct effect in this jurisdiction. However, recent trends show that a lot has changed in the EU jurisdiction, namely one could find more and more cases where the ECJ declared that not only a part of the fundamental freedoms but also certain fundamental rights can have direct horizontal effect.

In Hungary, the doctrinal debate on the issue of horizontal applicability of the constitution is fairly heated, especially a propos the present codification process of the new Civil Code, but also with regard to the drafting process of the new Constitution.

Some authors argue that direct horizontal applicability is desirable to develop to gain the full protection of constitutional rights as the Constitution itself suggests, some others contest in favor of the autonomy of the civil law, and the impossibility of any kind of third-party effect of the Constitution. There are also worshippers of the indirect horizontal effect, stating that the German model, *Drittwirkung*, would possibly suit the Hungarian system. Legal practitioners often find arbitrary solutions in individual cases due to the lack of adequate guidelines.

Along with examining the Hungarian controversy on the issue and the constraints coming from the side of the European Union, I will discuss the field of non-discrimination with special regard. Non-discrimination was the dynamo of the development of the doctrine of third party effect and presently the controversy concerning the effect of the constitutional provision of non-discrimination in private relation is at its peak. Non-discrimination laws have been born implementing EU directives, and referring to the constitutional provisions which prohibit discrimination, as a source of the legislative duty. The question is how these tendencies relate to the traditional concept of horizontal applicability. My suggestion is that anti-discrimination legislation creates the requirement of direct application of the constitution in certain private matters.

I demonstrate further that the indirect horizontal effect operates as an inherent feature of the Hungarian constitutional system. No matter of review guarantees or explicit declarations: judges have to interpret legal provisions in the light of the constitutional regulations and thus understand law together with its constitutional constraints.

My aims were descriptive and analytical. Regarding its chronological order the thesis first wishes to analyze the conception of the “horizontal effect of the Constitution”, namely how the Constitution applies in private relations through judicial activity and how the problem relates to the traditional concept of public private divide, the classic role of constitutional and private law. Thereafter in the second chapter the thesis examines the three main concepts of how the constitution may apply in horizontal relations,

namely gives an overview on the jurisdiction of the US, with special regard to the so called “state action doctrine”, describes the German “Drittwirkung” model and shows that certain countries such as Ireland and Poland openly accepted that the Constitution applies in private relations as well. After having overviewed the main points of these systems the thesis concludes to demonstrating the advantages and disadvantages of these conceptions with special regard to the German model as German jurisdiction often serves an example for Hungarian legal solutions.

After the first two chapter’s general overview of the practice of courts and the constitutional courts and the criticism of scholars developed on the issue, the third part of the thesis deals with the problem of horizontal effect in a Hungarian context with special regard to a specific constitutional right, namely the right not to be discriminated in certain private relations. I examine first the Hungarian constitutional environment, the concrete constitutional provisions that might be the basis of the acknowledgement of horizontal application of the Constitution. The thesis draws special attention to the opinion of the Constitutional Court, ordinary courts and scholars. This chapter describes the legislation promoting the prohibition of certain forms of discrimination as well, and demonstrates how this new tendency influences the idea of the third party effect in constitutional law. I argue that the laws on equal treatment exist at first sight independently from the horizontal application of fundamental rights, although, in fact, they create the requirement of the direct application of constitutional rights in certain private relations; thus implicates the necessity to reconsider the third party effect doctrine in its light.

This chapter last but not least suggests that in order to implement either the indirect or the direct form of horizontal effect, judges must interpret constitutional provisions. This requires certain interpretative skills that could be achieved with the knowledge of dogmatic concepts of interpretation of the Constitution and fundamental rights developed by the Constitutional Court. This is the so called necessity-proportionality test used for assessing constitutional rights.

The last part of the thesis sheds light to the interrelated nature of the jurisdiction of the European Union and Hungary as member state to the Union. The thesis describes how the jurisprudence of the Union developed regarding the protection of fundamental freedoms and fundamental rights as well, and demonstrates with cases of the European Court of Justice that the jurisprudence develops into the direction that leads to the acceptance of the applicability of certain fundamental rights in certain private relations. This tendency shows that it will be a part of the jurisdiction of the member states as well to apply fundamental rights to the assessment of certain private conflicts as well when it comes to the sphere of EU competencies. This requirement might encourage judges to apply constitutional norms of the internal legal system in other private relations as well on the pattern of EU law. This could have an effect on the openness of ordinary judges to constitutional problems and the constitutional environment of legal provisions in general.

As a conclusion the thesis points out that having in mind the system of separation of powers and the Hungarian legal environment and related legal culture it is of high importance to accommodate judges to pay more attention to the constitutional interpretation of legal norms when applying them. This process could be promoted by the codification of this interpretative obligation in the Civil Code and in the Constitution as well. As these codification procedures are presently open the thesis gives *de lege ferenda* suggestions regarding the text of the Civil Code and the Constitution.

