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Constitutional Rights: Horizontal Effect and Anti-discrimination Law in Hungary

Abstract. This contribution aims to examine how the Hungarian Constitution applies in private relations through judicial activity and how the anti-discrimination legislation influences this tendency. The current codification procedure of the new civil code calls for a thorough theoretical background in order to answer how its provisions relate to the Constitution. After the general overview of the practice of courts and the Constitutional Court, the criticism of scholars developed on the issue will shed light on the weaknesses, but in spite of them, the overall success of the theory of indirect horizontal effect. The paper will also deal with the horizontal effect of a specific constitutional right, namely the right to equal treatment. I examine the fairly new legal instrument, the act on the prohibition of certain forms of discrimination, and demonstrate how this new practice influences the idea of horizontal effect in constitutional law and what implications it has on the new Civil Code afoot. I argue that the act at first sight exists independently from the requirement of horizontal application of fundamental rights, but, in fact, it implicates the necessity to reconsider in its light how the Constitution applies in private relations.

Keywords: constitutional law, horizontal application, anti-discrimination legislation

The problem of horizontal effect of constitutional norms¹ arises in many modern democracies.² The legislative, the judiciary and 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? How constitutional rules apply exactly in private relations?

The doctrine of horizontal effect is primarily based on the recognition of the dangers posed to human rights by private entities. It is evident that states can

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¹ This problem is referred to in the literature also as horizontal applicability, third-party effect which is a literal translation of the German expression 'Drittwirkung.' All of those terms express the applicability of the constitution in private relations.

² E.g., Sajó, A.–Uitz, R. (eds.): *The Constitution in Private Relations: Expanding Constitutionalism*. Utrecht, 2006.

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 provisions bring 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. The 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.³ Therefore, the relation of the anti-discrimination legislation and the traditional concept of third party effect is of high interest. The aim of this essay is—regarding the contribution to the debate on how far the constitution applies in private relations—to discover this nexus, and draw the attention to the different context that the new anti-discrimination legislation created for the assessment of the implications of horizontal effect. This analysis will lead to the consideration of the controversies emerging in the codification process of the new Civil Code.

1. The constitution in private relations

The debate in Hungary on the issue of horizontal applicability of the constitution is fairly heated, with special regard at the present codification process of the new Civil Code.⁴ The fairly new act on equal treatment and the promotion of equal opportunities⁵ adds some interesting additional information to the discussion.

Some authors argue in Hungary that direct horizontal applicability is desirable to develop⁶ to gain the full protection of constitutional rights as the Constitution itself suggests, some others contest in favor of the autonomy of

³ Tushnet, M.: The relationship between judicial review of legislation and the interpretation of non-constitutional law, with reference to third party effect. In: Sajó-Uitz (eds.): *op. cit.* 169.

⁴ Vékás, L.: *Az új Polgári Törvénykönyv Elméleti Előkérdései* [The theoretical preliminary problems of the new civil code]. Budapest, 2001.

⁵ Act CXXXV of 2003 On Equal Treatment and the Promotion of Equal Opportunities, MK 2003/157. XII. 28.

⁶ Halmai, G.: Az Alkotmány mint norma a bírói jogalkalmazásban [Constitution as legal norm in jurisprudence]. *Fundamentum* 2 (1998) 77; Kovács, K.: Emberi jogaink magánjogi viszonyokban [Expanding the prohibition of discrimination in the European Convention of Human Rights]. *Fundamentum* 2 (1998) 85.

the civil law, and the impossibility of any kind of third-party effect of the Constitution.⁷ The advocates of the indirect horizontal effect state that the German model, *Drittwirkung*, would possibly suit the Hungarian system.⁸ Legal practitioners often find arbitrary solutions in individual cases due to the lack of adequate guidelines.⁹

As to the origins of the problem we must note the following. The first written constitution in the United States 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.¹⁰ In the United States, even these days, only the Thirteenth Amendment which prohibits slavery has direct horizontal effect,¹¹ while in other cases, the “state action doctrine”¹² 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.¹³ The German social state answers the question of horizontal applicability differently. In the famous *LüTh* decision,¹⁴ 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.¹⁵ These two examples provide us with two entirely different solutions to our question, namely the role of constitutional norms in private relations.

⁷ Vincze, A.: Az alkotmány rendelkezéseinek érvényre juttatása a polgári jogviszonyokban [Enforcing constitutional rules in private relations]. *Polgári Jogi Kodifikáció*, 6 (2004) 3.

⁸ Vékás: *Az új Polgári Törvénykönyv... op. cit.* and Sonnevend, P.: Az alapjogi bíráskodás és korlátai [Basic rights adjudication and its limits]. *Fundamentum*, 2 (1998) 79.

⁹ Halmai, G.–Tóth, G. (eds.): *Emberi Jogok* [Human Rights]. Budapest, 2003. 224.

¹⁰ *Ibid.*

¹¹ Tribe, L. H. (ed.): *American Constitutional Law*. St. Paul, Minn. 1988.

¹² E.g. Stone, G. R.–Seidman, L. M.–Sunstein, C. R. et al.: *Constitutional Law*. Boston, 1993. State action doctrine means that the Constitution directly applies if the court finds that the violation is imputable to the action of a state organ, or it occurred while a private actor fulfilled a state obligation.

¹³ E.g. Tribe, L. H.: *Constitutional Choices*. Cambridge, Mass. 1985.

¹⁴ *Bundesverfassungsgesetz*, 198 (1958).

¹⁵ Kommers, D. P.: *The Constitutional Jurisprudence of the Federal Republic of Germany*. Durham, North Carolina, 1989.

Similarly, we could mention as further examples Ireland¹⁶ and Poland,¹⁷ where constitutional norms have direct horizontal effect, or Slovakia, where neither ordinary courts nor the constitutional court or the legislature accept that constitutional rights have any effect on private relations.¹⁸ As to the European Union: the „ECJ has developed a limited doctrine of horizontal direct effect for some legal provisions of the Treaties. The principles of non-discrimination on grounds of sex and nationality and the fundamental freedoms—as far as powerful social associations confronting the individual are concerned—have a horizontal direct effect in this jurisdiction.”¹⁹

1.1. The perception of the Hungarian Constitutional Court and ordinary courts

Examining Hungary, an example of the young democracies of Central Eastern Europe, we cannot find final answers for the question of horizontal applicability. The Constitutional Court has never been clear on the general scope of the protection of fundamental rights. However, it implemented the doctrine of the objective institutional protection of fundamental rights.²⁰ In the 64/1991. AB decision, which dealt with the constitutionality of abortion, the Constitutional Court declared the following: “The state’s duty to respect and to protect subjective fundamental rights is not exhausted by the duty not to encroach on them, but incorporates the obligation to ensure the condition for their realization.”²¹

The Constitutional Court accepts that there is a burden on the state to act as a protective entity of human rights, in some cases in horizontal as well as in vertical relations; however it is not clear to what extent and in what way the

¹⁶ Casey, J. P.: *Constitutional Law In Ireland*. 2. ed. Dublin, 1992.

¹⁷ Kühn, Z.: Making Constitutionalism Horizontal: Three Different Central European Strategies. In: Sajó–Uitz (eds.): *op. cit.* 231–235.

¹⁸ *Ibid.* 229–231.

¹⁹ Case 43/75, Defrenne II v. Sabena, 1989 E.C.R. 455, para. 40; Case 36/74, Walrave v. Ass’n Union Cycliste Internale, 1974 E.C.R. 1405, paras. 16,19; Case 415/93 Union Royal Belge des Societes de Football Ass’n v. Bosman, 1993 E.C.R. I-4921, para. 82; Case 281/98, Agonese v. Cassa di Risparmio di Bolzano SpA, 2000 E.C.R. I-4139, paras. 30–36.

²⁰ Halmai, G.: The third party effect in Hungarian adjudication. In: Sajó–Uitz (eds.): *op. cit.* 104.

²¹ 64/1991. (XII. 17.) AB határozat, *Az Alkotmánybíróság Határozatai*, 1991. 297, 302 translated by Halmai: *ibid.* 104.

state should protect the individuals against each other. Taking a clear stance on these issues has always been postponed so far.²²

The Constitution contains several articles about the rights of the judiciary in Article 50 and 57.²³ However, article 70/K., in the chapter of fundamental rights and obligations, is in the center of the debates concerning the issue of horizontal effect. It states the following: “claims arising from infringement on fundamental rights, and objections to the decisions of public authorities regarding the fulfillment of duties may be brought before a court of law”.

Art. 70/K. is a rule that creates competence for the courts in case of the infringement of fundamental rights. However, the debate concerns the question if it declares that courts have to defend fundamental rights also in case of a conflict between private individuals where no other legal instrument applies. This controversy is rooted in the wording of this article, though it is quite clear that the intent of the framers was not as broad as to imply that the courts should apply constitutional provisions directly or indirectly.

The Constitutional Court declared in its decisions, defining the content of this article that this rule is not even as broad as to open the courts door in front of all claims concerning rights violation of state actors.²⁴ Hence, it is striking that the Constitutional Court has also never thought about the possibility of getting the judiciary to protect horizontal violations by referring to this article

²² Holló, A.–Balogh, Zs. (eds.): *Az értelmezett alkotmány* [The constitution interpreted]. Budapest, 2005. XII. chapter.

²³ Art. 57 (1) In the Republic of Hungary everyone is equal before the law and has the right to have the accusations brought against him, as well as his rights and duties in legal proceedings, judged in a just, public trial by an independent and impartial court established by law.

(5) In the Republic of Hungary everyone may seek legal remedy, in accordance with the provisions of the law, to judicial, administrative or other official decisions, which infringe on his rights or justified interests. A law passed by a majority of two-thirds of the votes of the Members of Parliament present may impose restrictions on the right to legal remedy in the interest of, and in proportion with, adjudication of legal disputes within a reasonable period of time.

50. § (1) The courts of the Republic of Hungary should protect and uphold constitutional order, as well as the rights and lawful interests of natural person, legal persons and unincorporated organizations, and should determine the punishment for those who commit criminal offenses.

(2) The courts should review the legality of the decisions of public administration.

(3) Judges are independent and answer only to the law. Judges may not be members of political parties and may not engage in political activities.

²⁴ 46/1994. (X. 21.) AB határozat. *Az Alkotmánybíróság Határozatai*, 1994. 260, 267–268; 998/B/1994. AB határozat. *Az Alkotmánybíróság Határozatai*, 2005. 752, 753.

where no other legal instrument applied. In sum, the meaning of this article is definitely diffuse, but could undoubtedly serve as a possible basis if the Constitutional Court wishes to hold that the judiciary is obliged to protect constitutional rights in private relations even if there is not any other applicable law.

However, in this case the Constitutional Court would face, as the German type real constitutional complaint does not exist in Hungary,²⁵ the problem that it cannot supervise and thus standardize constitutional interpretation. Presently, the Constitutional Court does not have the right to override and repair statutory or, in some courageous cases, constitutional interpretation of ordinary courts, while the ordinary courts does not seem to be competent to decide purely on grounds of constitutional provisions. They usually reject claims based only on the infringement of a constitutional right,²⁶ usually require a reference to a statute or a sub-statutory legal instrument to handle the case in the merits. Once, for example the state prosecutor argued that courts should take into consideration all legal arguments; hence the Constitution should also apply in private relations. The Supreme Court in its judgment replied that it was the exclusive competence of the Constitutional Court to interpret the Constitution and the task of the ordinary courts are to use all valid, thus presumably constitutional legal instruments.²⁷

Several times ordinary judges interpret the Constitution together with the applicable legal rule,²⁸ though usually do not name constitutional provisions. As the Civil Code, for example, in Art. 76 contains provisions on inherent personality rights,²⁹ the violation of these rights violates the Constitution as

²⁵ With the adjective “real” we distinguish here the German and the Hungarian type constitutional complaint, because in Hungary the applicants can solely turn to the Constitutional Court asking for the annulment of the legal instrument applied in their very case, and demand the Constitutional Court to prohibit the application of that unconstitutional law in the case retroactively, but can not ask for the supervision of the constitutionality of the legal procedure, and the interpretation of the ordinary court. Act 1989. XXXII. Art. 48.

²⁶ Halmai: The third party effect... *op. cit.* 106.

²⁷ BH 1994. I.

²⁸ E.g. Gazette of the Supreme Court 1992/14. BH1997. 489; BH 1998. 132; PKKB 29.P.87.533/1996/4. find this in Halmai: The third party effect... *op. cit.* 109.

²⁹ See Chapter VII of the Civil Code (Act. IV of 1959), the ban on discrimination between individuals according to sex, race, nationality and religion, and prohibition of infringements of personal honor and human dignity.

well. Judges deciding these cases, however, almost never refer to the Constitution, but merely to the Civil Code.³⁰

There are only few exceptions which show that the practice of the courts is not carved in stone. In an abortion case in 1998, the judge referred to the right to life provision of the Constitution and based its decision on the fetus's right to life, though no Hungarian statute declared this standpoint, and this view is inconsistent with the interpretation of the Constitutional Court.³¹ In another case the issue was gender discrimination in an employment matter. Here the court successfully referred directly to the constitutional provisions without naming any civil law rule.³²

These cases shed light on the perils of direct application of constitutional rules, show that there is not any guarantee for an interpretation consistent with the jurisprudence of the Constitutional Court. In the lack of the German type real constitutional complaint when the parties can question the constitutionality of the statutory interpretation of ordinary courts, and the Constitutional Court can revise the decisions of ordinary courts, it is probably not feasible to provide reliable, calculable decisions to the parties seeking the protection of the law.

Although judges usually do not adjudicate pure constitutional matters, in the flow of interpretation they are obliged to interpret the provisions of the legal instruments in conformity with the Constitution. Although this duty is not explicitly stated in any legal instrument, it follows from the competencies of the courts and the legal status of the Constitution as the basic law of Hungary, declared in the last provision of it.

I argue that the means in the Hungarian legal system and legal thinking are sufficient to talk about the indirect horizontal effect of constitutional rights. Although this interpretation does not have a binding force, a slight effort is enough to affirm this theory, because every step of the Constitutional Court and ordinary courts points towards this direction. Ordinary courts if open-minded are capable to carry out statutory interpretation in accordance with constitutional requirements.

³⁰ See e.g. Góman case, a Roma who was not served in a restaurant, *Fundamentum* 2 (1998) 133; Roma schoolchildren segregated graduation ceremony case, *Fundamentum* 3 (1999) 124.

³¹ For the full text of the judgement see *Fundamentum*, 2 (1998) 73. Comments on the decision e.g. Halmai: Az Alkotmány mint norma... *op. cit.* 77. Hanák, A.: Egy különös abortusz után [After a strange abortion]. *Fundamentum*, 2 (1998) 82.

³² Gender discrimination regarding the admission criterias to a job, *Fundamentum*, 4 (2000) 72.

Art. 38 of the 1989. XXXII. Act on the Constitutional Court ensures that judges can initiate the constitutional review of legal instruments to be applied in the procedure with the suspension of the case. Under the present rules, judges cannot deny the application of allegedly non-constitutional provisions, but are obliged to refer the case to the Constitutional Court in case of alleged unconstitutionality so that it decides on the constitutionality of the legal instrument. The parties can also initiate this step in the procedure. This would be an excellent vehicle to guarantee not only the constitutionality of the legal instruments,³³ but the constitutional interpretation of the law as well. Ordinary judges must have the right to ask for a constitutional interpretation of the law, if any doubt emerges.

Furthermore, the “law in action doctrine” existing in the jurisprudence of the Constitutional Court, namely that the Constitutional Court can examine and invalidate law if there is a *tendency* of unconstitutional interpretation, approves and helps to secure the guarantees of indirect horizontal effect. The roots of this idea imply the acknowledgment of indirect effect of the Constitution, namely the requirement that ordinary courts interpret legal norms in conformity with the Constitution. This doctrine was quite neglected for a long time and is rarely used in present jurisdiction as well, however forms the bases of some recent decisions, where the Constitutional Court declared unconstitutional and invalidated the guiding decisions of the Supreme Court, obligatory to lower courts.³⁴ This jurisprudence also helps to secure the constitutional interpretation of ordinary courts, because the Constitutional Court is able to act if the judiciary is on the wrong track.

In sum, on the surface both the standpoints of ordinary courts and the Constitutional Court are unclear on the issue of horizontal application. However, this overview suggests that the explicit introduction of indirect horizontality would not meet much resistance while it is already comfortable for the actors of the Hungarian courts.

1.2. Scholars' arguments

Having all this in mind, we examine the three main positions taken by Hungarian scholars regarding the horizontal application of constitutional rules *de lege ferenda*: one argues in favor of the exclusively vertical nature of the

³³ See examples to these motions *in* Uitz, R: Egyéni jogsérelmek és az Alkotmánybíróság [Violation of individual rights and the Constitutional Court]. *Fundamentum* 3 (1999) 39.

³⁴ 42/2005. (XI. 14.) ABH 2005. 504.

Constitution, and the other two represents direct and indirect horizontal application of it.

János Sári denies the horizontal applicability of the Constitution. He argues that Article 70/K. of the Constitution refers only to the infringement of fundamental rights by governmental bodies, but definitely does not include the right to issue a claim when the fundamental rights of a person are infringed by another private person. Hence the only possible textual ground on which horizontal applicability could be introduced into the Hungarian legal system is not a sound one.³⁵ Albert Takács's view is slightly less radical, although it leads us in the same direction. He states that it is not possible that ordinary courts base their decisions on the Constitution because practically the statutes must be able to govern private relationships. He claims that under Art. 32/A. of the Constitution, the Constitutional Court is the sole body that may decide on questions of constitutionality. He argues that 70/K. of the Constitution would be applicable only if there were no statutory provisions on fundamental rights, but in this case referring merely to constitutional provisions theoretically would also mean that statutes must be regarded as invalid when they conflict with the Constitution which is not acceptable under the current Constitution.³⁶

Contrary to this, Gábor Gadó and Gábor Halmai suggest introducing direct horizontal effect in the Hungarian legal system, where judges may freely interpret the Constitution and disregard unconstitutional rules,³⁷ what is more, judges should be empowered to base their judgments merely on constitutional provisions. Halmai argues that only the holding of the Constitutional Court's judgments should be binding on everybody, while the reasoning of the decisions, containing the interpretation of the Constitution, should not. The interpretation of the Constitution should belong to the competence of ordinary courts as much as to the Constitutional Court.³⁸ He also suggests the implementation of the the German type "real constitutional complaint" as a new competence for the Constitutional Court. This solution would bring a similar solution as the one of the German Constitutional Court, where the applicants

³⁵ Sári J.: *Alapjogok. Alkotmánytan II.* [Fundamental Rights. Constitutional law II], Budapest, 2000. 278.

³⁶ Takács, A.: Kinek feladata az alkotmány közvetlen alkalmazása? Fórum, [Whose task is the direct application of the constitution? Forum] *Fundamentum*, 2 (1998) 50–56.

³⁷ On the same opinion see Hanák A.: Egy különös abortusz. *op. cit.*, Halmai: Az alkotmány mint norma... *op. cit.* 77–81.

³⁸ *Ibid.*

may turn to the Constitutional Court if the law was presumed to be constitutional, but applied in an unconstitutional manner.³⁹

Halmai also argues that Art. 77 § (2) of the Constitution implies that judges have to apply the Constitution as much as other rules of the legal system,⁴⁰ while others suggest that Art. 77 (2) requires a different interpretation principally because of its historical background.⁴¹ Regarding the Supreme Court decision which stated that solely the Constitutional Court can interpret the Constitution,⁴² a counterargument may be that Art. 32/A. of the Constitution⁴³ does not require the exclusivity of the interpretative power, but purely wishes to fix the exclusive competence on the annulment of unconstitutional legal instruments.⁴⁴

Gábor Attila Tóth suggests that ordinary judges have the right to interpret the Constitution and apply it directly in the decision-making process, although this solution would require the implementation of the German type real constitutional complaint.⁴⁵ Krisztina Kovács also argues in favor of the direct horizontal effect of the Constitution. She states—sharing the view of Gábor Kardos—that the fundamental feature of rights requires their direct applicability in private relations as long as it does not interfere with the constitutionally protected sphere of private autonomy. This is how one may gain the full protection of fundamental rights.⁴⁶

Zoltán Lomnici is also in a fight for the rights of ordinary courts to interpret and take constitutional provisions into consideration while carrying out judgments. He respects the separation of powers between ordinary courts and the Constitutional Court, however finds necessary in certain cases to base ordinary court decisions solely on constitutional provisions. He bases his argument on Art. 70/K. of the Constitution, which he interprets as establishing the powers

³⁹ Halmai G.: The third party effect in Hungarian adjudication. *op. cit.* 112.

⁴⁰ Halmai G.: Az Alkotmány mint norma... *op. cit.* 77–81.

⁴¹ Sonnevend: Az alapjogi bírászkodás. *op. cit.* 79–84.

⁴² See BH 1994. I.

⁴³ Constitution 32/A. (1) The Constitutional Court should review the constitutionality of laws and attend to the duties assigned to its jurisdiction by law.

⁴⁴ Halmai: Az Alkotmány mint norma... *op. cit.* 80.

⁴⁵ Tóth, C. A.: Az emberi jogok bírói védelme [The judicial protection of human rights]. *Társadalmi Szemle*, 50 (1995) 39–44.

⁴⁶ Kovács, K.: *Emberi jogaink – magánjogi jogviszonyokban* [Human rights—in private law relations. *Fundamentum*, 2 (1998) 85–90. and Kardos, G.: Az új Alkotmány emberi jogi fejezete [The chapter on human rights in the new Constitution]. In: Ádám A. (ed.): *Alapjogok és alkotmányozás. Az emberi jogok szabályozása az új Alkotmányban* [Fundamental rights and making constitution: the regulation of human rights in the new Constitution]. Budapest, 1996. 17.

of ordinary courts to decide in all cases where there is violation of fundamental rights.⁴⁷

Pál Sonnevend convincingly argues in favor of indirect horizontal effect. He states that judges are not authorised to decide about the conflict of constitutional rights because Art. 8 (2) of the Constitution declares that in the Republic of Hungary regulations pertaining to fundamental rights and duties are determined by law. He takes the oneness of fundamental rights a starting point and claims that augmenting the right on one side will definitely lead to the diminishing of rights on the other side of the relation. When a judge has to decide in conflicts of fundamental rights, he will definitely diminish one right in favor of securing the other one. This is, in his view, not acceptable under Art. 8 (2) of the Constitution.⁴⁸

Sonnevend also suggests that a German type *Drittwirkung* solution should be applicable in Hungary.⁴⁹ He argues that Art. 70/K. of the Constitution may not be applied against non-state actors, meanwhile Art. 77 § (2) demands that the courts interpret the applicable rules in the light of the Constitution. Sonnevend also argues that it may follow from the practice of the Constitutional Court that a German type “real constitutional complaint” be implemented in Hungary, while the 23/1998. (VI. 29.) AB decision holds that there must be due reparation if the Constitutional Court has declared an infringement of a constitutional right.⁵⁰

In sum, we may note that it is hard to find the common denominator in the scholars’ views. This might be reasoned with the different interpretations of constitutional provisions. We observed that horizontal application of constitutional rights could be approached from several points of view and involves a broad range of aspects of modern constitutionality. There is an underlying question about the extent of fundamental rights and the separation of powers, namely who will and should decide on the concrete extent of rights protection. Many authors have fears from the loss or at least the diminishing of private autonomy; however it is very clear that this so called private autonomy is far from being absolute in present legal theory and practice as well. The duty to decide how the constitution applies in private relations should not be solely the task of judges, but burdens the legislative as well, if not primarily.

⁴⁷ Lomnici, Z.: Kinek a feladata az alkotmány közvetlen alkalmazása? [Whose task is the direct application of the Constitution?] *Fundamentum*, 2 (1998) 47.

⁴⁸ Sonnevend: Az alapjogi bírászkodás. *op. cit.* 80.

⁴⁹ *Ibid.* at 79–84.

⁵⁰ *Ibid.* at 83.

The essence of direct effect of fundamental rights is that the judiciary can specify rules in the light of the constitution where the legislature did not intend to regulate. The principal question is thus if the judiciary should have this competence or not. This problem occurs where the legislature has decided to refrain from regulating a certain private relations as a policy consideration, and the court applying this doctrine in fact overrides the decision of the legislature.⁵¹

The relations in modern societies indeed necessitate expanding the scope of the constitution, because private entities with enormous powers may represent a danger to fundamental rights.⁵² Nonetheless, I argue that direct horizontal applicability leads to arbitrariness, judicial legislation and what is even more important, suggests that there is not any segment of life free from legal intrusion.

It is problematic to demonstrate how fundamental rights in general have indirect horizontal effect, this question should not be forcibly answered in the same manner in case of different constitutional rights. This approach helps to liberate the issue from its dogmatic nature, and examine as a question of classic constitutional interpretation.⁵³

2. Constitutional and statutory anti-discrimination

We have learnt so far the most important decisions and scholarly developed ideas which influence the horizontal application of the Constitution. After having recognized that the question of third party effect emerges only in exceptional situations when ordinary laws fail to protect fundamental rights, a further step to make is to ask how ordinary laws protect constitutional rights. In Europe the anti-discrimination legislation is the best example to trace this phenomenon.⁵⁴ We have thus two tasks for the rest of this paper. Firstly we examine how the fairly new act on equal treatment interacts with the concept of horizontal applicability. Secondly we try to demonstrate what implications this new tendency has on the new civil code afoot.

⁵¹ Tushnet M.: The relationship between judicial review of legislation and the interpretation of non-constitutional law... *op. cit.* 170–171.

⁵² Cf. Walt, J. van der: Blixen's Difference: Horizontal Application of Fundamental Rights and the Resistance of Neocolonialism. *Law, Social Justice and Global Development Journal*, 2003 (1) <http://elj.warwick.ac.uk/global/03-1/vanderwalt.html>.

⁵³ Explanatory preamble to the Bill of fundamental rights which was eventually to become part of the Dutch Constitution. Clapham, A.: *Human Rights in the Private Sphere*. Oxford, 1993. 178.

⁵⁴ Sajó-Uitz (eds.): *op. cit.* 5.

I wish to demonstrate that anti-discrimination legislation, in fact, directs towards the direct effect of certain provisions of the constitution in certain well-defined matters. It introduces the direct effect in an indirect manner. The area, where the constitution applies with the help of anti-discrimination laws extends beyond the traditional private law protection of parties of generally weaker bargaining position, and aims to protect equal human dignity in these precisely defined private situations. I focus my research on provisions prohibiting discrimination on different grounds concerning the access to and supply of goods and services, which are available to the public, including housing. These new standards are in the crossfire of debates because they prohibit discrimination also in situations where previously the discrimination as such was not explicitly prohibited and the economic analysis of law questions the efficiency of such a rule.⁵⁵

However, I argue that the constitutional protection of equal human dignity indeed requires that the law intrudes into certain private spheres, which were previously free. This, however, cannot interfere unconstitutionally with the freedom to contract, which is a matter of private autonomy and thus rooted in the protection of equal human dignity as well. Having all this in mind, let us see how the horizontal effect of the constitutional right to non-discrimination in private relations develops through legislative vehicles.⁵⁶

⁵⁵ Cf. Menyhárd, A.: Diszkrimináció-tilalom és polgári jog [Prohibition of discrimination and civil law]. *Polgári jogi kodifikáció*, 8 (2006) 8, see generally Posner, R. A.: *Economic Analysis of Law*. 4. edition, Boston, 1992.

⁵⁶ I do not differentiate in this paper between non-discrimination and equal treatment, however I am aware of the fact that this difference in language is in the center of certain debates. Equal treatment can be interpreted in two ways: one understands non-discrimination when it comes to equal treatment, thus uses these two as synonyms, and the other means the positive duty to provide equal treatment for others. I argue that nothing in the constitutions leads into the direction to require the application of the second interpretation in relation to private matters, because it would pose a positive duty on citizens to solidaritate, and do help defenseless people in order to provide them equal treatment. I argue that the aim of equal treatment, when it has an additional meaning to non-discrimination can only be understood as the constitutional task and duty of the state. However, to elaborate on this issue would be a subject matter of another thesis, hence now, we need to take this standpoint as granted for the purpose of this paper, and regarded as underlined by the language of the Directive implementing the equal treatment between persons irrespective of racial or ethnic origin. The legislative intent is the following:

“For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.” (Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal

2.1. *The Constitution and the Act on equal treatment and the promotion of equal opportunities*⁵⁷

Art. 70/A. of the Hungarian Constitution states that

*(1) The Republic of Hungary should respect the human rights and civil rights of all persons in the country without discrimination on the basis of race, color, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever. (2) The law should provide for strict punishment of discrimination on the basis of Paragraph (1) (3) The Republic of Hungary should endeavor to implement equal rights for everyone through measures that create fair opportunities for all.*⁵⁸

Reading these articles the grammatical interpretation suggests that these provisions do not regulate the entire legal order, but purely circumscribe the tasks of the state. However, the Constitutional Court elaborated on equal dignity of persons concerning this provision, first in the 9/1990. (IV. 25.) AB decision (ABH 1990, 46). This standpoint led to the extension of the scope of the Constitution towards private relations in the 61/1992. (XI. 20.)⁵⁹ AB decision (ABH 1992, 280).⁶⁰

The constitutional provision prohibiting discrimination formulates boundaries for the legislation, and thus certainly influences up to a certain level private relations as well.⁶¹ However, the Court refused to determine what precise obligation the legislative has, where must be the discrimination outlawed in order to fulfill the requirements of the Constitution.⁶²

treatment between persons irrespective of racial or ethnic origin, Official Journal of the European Communities, L 180/24. 19. 7. 2000. Art, 2, 1.)

⁵⁷ Act. CXXV of 2003 on equal treatment MK 2003/157. XII. 28. Find the english text of the law at <http://www.egyenlobanasmod.hu/index.php?g=tej.htm>, when it is not otherwise indicated.

⁵⁸ 1949. XX. Act on the Constitution, paragraph 70/A.

⁵⁹ See further Sólyom L.: *Az alkotmánybíráskodás kezdetei Magyarországon* [Early years of constitutional adjudication in Hungary]. Budapest, 2001. 460, 463.

⁶⁰ Menyhárd, A.: *Diszkriminációtilalom és polgári jog* [Prohibition of discrimination and civil law]. In : Sajó, A. (ed.): *Alkotmányosság a magánjogban* [Constitutionality in civil law]. 2006. 132.

⁶¹ E.g. Györffy, T.: *Az alkotmánybíráskodás politikai karaktere* [The Political Character of Constitutional Adjudication]. Budapest, 2001. 133.

⁶² 45/2000 (XII. 8.) AB határozat (ABH 2000, 344.).

Before the accession to the European Union, in 2003, the Hungarian state implemented the Act CXXV. of 2003 on equal treatment and the promotion of equal opportunities (the Act on equal treatment). The birth date of this act is not accidental; it was urged by EU obligations,⁶³ which among others imposed the content of certain directives (2000/43/EC, 2004/113/EC directives).⁶⁴ Scholars state that it tries to touch upon “public private relations”⁶⁵ and prohibit discrimination on this field.

The preamble of the Act declares the aim of the legislation:

The Parliament, acknowledging every person’s right to live as a person of equal dignity, intending to provide effective legal aid to those suffering from negative discrimination, declaring that the promotion of equal opportunities is principally the duty of the State, having regard to Articles 54 (1) and 70/A of the Constitution, the international obligations of the Republic and the legal acts of the European Union, hereby enacts the following Act:

The Official explanation to the preamble states that according to the decade-long practice of the Constitutional Court, the prohibition of discrimination established in Art. 70/A. (1) in connection with human dignity stated in Art. 54 (1), establishes the duty of the state to protect and provide equal dignity for everybody in the legal system. In accordance with the interpretation of the Constitutional Court, the discrimination violates human dignity if it is arbitrary, does not have a rationally acceptable reason [35/1994 (VI. 24.) AB decision, ABH 1994, 197, 200]. The Constitutional Court declared the basic requirements concerning Art. 70/A. in its early decision, 61/1992 (XI. 20.):

⁶³ Art. 65 of the law on equal treatment: “This Act contains regulation in harmony with the provisions concerning law approximation of the Europe Agreement establishing an association between the European Communities and their Member States on the one part and the Republic of Hungary on the other part, signed in Brussels on 16 December 1991 and promulgated by in Act I of 1994, compatible with the following legal acts of the European Union”.

⁶⁴ Bíró, A.: Pro és contra, az egyenlő bánásmódról és az esélyegyenlőség előmozdításáról szóló törvény margójára [Pro and contra, to the margo of the law on equal treatment and promotion of equality of chances]. In: *Parlamentari ösztöndíjasok* [Parliament scholarship]. Budapest, 2004. at 316, 320.

⁶⁵ The expression is used first by the Final Concept to the Act, March, 2003. Cf. Farkas L.–Kádár A.–Kárpáti J.: Néhány megjegyzés az egyenlő bánásmódról szóló törvény koncepciójához [Some remarks to the conception of the act on equal treatment]. *Fundamentum*, 7 (2003) 121.

...the state as the public authority is obliged to provide equal treatment for all present on the territory of the state. In connection with this in cannot discriminate on grounds of ethnicity, colour, sex, language, religion, political or other opinion, ethnic or social origin, financial, natal or other situation. The prohibition contained in Art. 70/A. of the constitution does not only extend to human or basic citizen's rights, but this prohibition—when the discrimination violates the right to equal human dignity—extends to the whole legal system. (ABH 1992, 280, 281).

The Official explanation also draws the attention to the requirement following from Art. 8 (1) of the Constitution.⁶⁶ It declares that it is the principal aim of the state to respect and protect fundamental rights. The Official explanation refers then again to the practice of the Constitutional Court elaborating on the detailed content of this provision providing that the state has the duty under Art. 8 of the Constitution to provide sufficient conditions in order to protect these fundamental rights as the rights to equality and human dignity as well [64/1991 (XII. 17.) AB decision, ABH 1991, 258, 262].

Let us compare this argument to the one of the decision 45/2000 (XII. 8.) (ABH 2000, 344, 351). The Constitutional Court claimed here that the state does not have the duty to provide a uniform law on non-discrimination, there is no omission regarding the required level of rights protection on this field, although the state has not exhausted all possibilities in order to provide legislative protection.⁶⁷ It is easy to recognise the ambiguity of this statement. If the state

⁶⁶ Reasoning to the Act on equal treatment, Preamble point 2. Translated by the author of this paper.

⁶⁷ See the critics of this decision in Halmai G.: Hátrányos passzivizmus [Negative passivism]. *Fundamentum*, 4 (2000), and Halmai G.: Szükség van-e antidiszkriminációs törvényre Magyarországon? [Is an anti-discrimination law necessary in Hungary?] In: Petrétei J. (ed.): *Emlékkönyv Bihari Ottó egyetemi tanár születésének 80. évfordulójára* [Festschrift]. Pécs, 2001 and Kiss, B.: Az egyenlő bánásmód követelménye az Alkotmánybíróság gyakorlatában [The Duty of Equal Treatment in the Practice of The Constitutional Court]. *Acta Universitatis Szegediensis. Acta Juridica Et Politica*. 67/12 (2005) 15–16. Gábor Halmai and Balázs Toth suggest that the legislation is indeed in omission, when not enacting rules to protect individuals against every kind of discrimination. They base their arguments on Art. 70/A. (2) of the Constitution, which identifies as a state duty to punish all violation of discrimination enacted in paragraph (1) of the same article. Cf. Halmai, G.: Előszó [Foreword]. In: Halmai G. (ed.): *A hátrányos megkülönböztetés tilalmától a pozitív diszkriminációig – A jog lehetőségei és korlátai* [From the Prohibition of Negative Treatment to Positive Discrimination—Potentials and Limits of Law]. Budapest, 1998. 4; Tóth, B.: *Impossibile nulla obligatio est, avagy szülessen-e antidiszkriminációs törvény Magyar-*

can do even more than it presently provides in order to protect fundamental rights, namely to protect human dignity violation through discrimination, why does not it commit an unconstitutional omission if it fails to do so? This is a little bit controversial, but definitely demands the conclusion that the Constitutional Court holds, it is the duty of the state to provide protection, although the possible level of the exact constitutional protection has not been established. As a conclusion, the legislative is not constitutionally obliged under the present concept of the Constitutional Court to implement further measures on equal treatment or non-discrimination.

In the light of this, Art. 5 and 6 of the Act on equal treatment brings dogmatic novelty compared to any previous private law rules, because indeed requires the application of constitutional standards in private law matters. Moreover, the act goes much further than the required level by the EU in the above mentioned directives. We cannot find explicit orders in the directives to implement such a wide concept as the Hungarian one, intruding into the private sphere through assigning a barrier on all private actors concerning their choice to decide who they contract with, when they make a proposal to persons not previously selected to enter into contract, or invite such persons for tender or provide services or sell goods at their premises open to customers (Art. 5–6). Furthermore, the prohibition applies to all enlisted grounds (Art. 8), the legislative rejected the idea of the hierarchy of discrimination as well.

According to the original version of the Act, only Art 22 provided the possibility for exception. It is worth to see how constitutional adjudication sneaks into the words of the law.

The principle of equal treatment is not violated if

- a) the discrimination is proportional, justified by the characteristic or nature of the work and is based on all relevant and legitimate terms and conditions, or*
- b) the discrimination arises directly from a religious or other ideological conviction or national or ethnic origin fundamentally determining the nature of the organisation, and it is proportional and justified by the nature of the employment activity or the conditions of its pursuit.*

It is obvious for the first sight that the legislative (indirectly) required the judiciary to apply constitutional standards directly, by giving the same tests as

*ország*on [Impossibile nulla obligatio est, or do we want an antidiscrimination law in Hungary]. In: Halmai: *ibid.* 94.

the Constitutional Court has developed as a tool for the assessment of the legal debates.

However, a mistake poisoned the concept, because, it is well known that the test of the Constitutional Court does not sound exactly like this. Hence the rules were modified in 2006. The modification contains that Art. 7 should be completed with the following: if this law does not indicate otherwise, the acts do not violate the requirement of equal treatment

- a) if the fundamental right of a person is restricted in inevitable cases in order to provide the prevalence of an other fundamental right if the restriction is capable to reach the aim and proportionate with that.
- b) When in cases beyond Art. 1, the act has an objective reason under rational assessment.

The reasoning to the modification of this paragraph explains that the rules follow the jurisprudence of the Constitutional Court, which has stated in several decisions that an act is not discriminative when it restrict a fundamental right necessarily and proportionately, and a non-fundamental right in a not arbitrary manner. (e.g. 30/1997 (IV. 29.) AB decision, ABH 1997, 130, 140.).

Finally the Act indeed requires from the judiciary and the Authority⁶⁸ to assess individual cases in the light of the Constitution, applying the tests developed by the Constitutional Court. This phenomenon might be labeled as the “indirect direct” effect of the constitutional provision in a thoroughly circumscribed, but not quite narrow scope.

⁶⁸ As to the practice of the Authority established by the act, but working only since February 2005,⁶⁸ we must emphasize that the provision stated in Art. 5 a) means in fact that banks and insurance companies can make an offer, which is understood as a proposal to persons not previously selected to enter into contract. However it was not understood as such a contract, when a condominium did not enter into contract with a disabled, or a wholesale trade did not contract with a Roma. Demeter, J.: Az egyenlő bánásmód és az esélyegyenlőség előmozdítása [Equal treatment and the promotion of equal opportunities], *Acta Humana* 17 (2006) 53.

As to the second point b) of Art. 5, it regulates restaurants and pubs or discos, who intend to discriminate against Romas and others on grounds of skin colour. The interpretation problems from this regard has not yet emerged at the authority, and there were not yet many cases concerning the two other points of this statutory provision. Cf. Demeter: *ibid.*

In sum, we can already see that the most problematic point concerning the new law on equal treatment, which touches upon the problems raised in this paper relate to the provision Art. 5 point a), namely concerns the case when someone makes a proposal to persons not previously selected to enter into contract or invite such persons for tender.

2.2. *The codification of the new Civil Code: questions to be answered*

After having had regard on the interrelated nature of the concept of horizontal applicability and the Act on equal treatment, I would like to draw the attention to the present codification process of the new civil code. The constitutionally required level of protection against discrimination in private matters, and in relation to this the necessity of the declaration of indirect horizontal effect is a matter of current debates. I try to demonstrate that the above draw conclusions might help here to add to the solution of the emerging problems. First of all have a look at the standpoints of the scholars and the leader of the codification procedure, Lajos Vékás.

Vékás argues that it is not possible to measure constitutional rights in civil law adjudication with the tests developed in constitutional law. Civil law litigation, even if it concerns fundamental rights in conflict, is not about the constitutional evaluation of legal instruments. Hence it is a crucial question to answer how civil law courts should reach the required protection of fundamental rights.⁶⁹

Lábady emphasizes that the dogmatic of private law had great effect on the development of the Constitutional Court's jurisprudence. It is a tendency that private law gains the more and more territory from other public branches of the law, namely tries to incorporate important public law rules into its codes, because it feels the more and more concern about the public sphere.⁷⁰ This is why it becomes possible to use the same standards in private law as in constitutional law. Lábady argues that the Constitution binds everybody this is why it has to be directly applicable in private litigations as well. The Constitution determines private relations, because otherwise they would not be always consistent with constitutional values. This means first of all that statutes and other legal instruments have to be conform to the Constitution, and if there is no civil law regulation on the matter, the Constitution directly has to protect the individuals against each other.⁷¹ There are many civil lawyers however, who feel that it is impossible to give direct or indirect horizontal effect to the Constitution, because it is completely strange to the logic of private law.⁷²

⁶⁹ *Ibid.* 160.

⁷⁰ Lábady, T.: Alkotmányjogi hatások a készülő Ptk. szabályaira [Effects of constitutional law on the draft Civil Code]. *Polgári jogi kodifikáció*, 2 (2000).

⁷¹ *Ibid.* See also Lábady, T.: Alkotmányos alapjogok és személyiségi jogok [Basic rights and personality rights]. *Jogi Beszélgetések* [(Discussion in law]. Kaposvár, 2000.

⁷² Cf. Vincze: Az alkotmány rendelkezéseinek érvényre juttatása. *op. cit.*

Lábady puts the essence of the debate the following way: if the constitutional provisions should apply indirectly to private relations through interpretations of civil law rules, it is the task of the codification and the codificators to tell how and to what extent.

However, if the Constitution applies directly, it is not problematic to exclude any special rules from the Civil Code.⁷³ Vékás—rejecting Lábady’s views— draws the attention to the discretion of the judges in private matters. They intend to decide applying general clauses, and in this process they have the power to interpret legal rules, which will provide anyway the full protection of fundamental rights without any change in the legal system.⁷⁴

At present, the Civil Code in paragraph 76. contains the prohibition of discrimination as a traditional personality right. The ministerial reasoning of the 1959/ IV. Act on the Civil Code makes it explicit that the primary aim of the prohibition of discrimination is to protect individuals in private relations. In 2004, the Act on equal treatment amended this provision requiring equal treatment instead of non-discrimination of individuals.⁷⁵

Some examples from the jurisprudence of ordinary courts show how they interpret this general personality right provision; how far they went in the so called constitutional interpretation. In 2002, the court charged a pub owner to pay for non-pecuniary damage of Roma applicants, who were not allowed to enter to the pub.⁷⁶ Also, when Roma students of a school were organized separate farewell parties from non-Roma students, the court based its argumentation on Art. 76 of the Civil Code.⁷⁷ A handicapped person, who could not get into a bank building also sued with success.⁷⁸

The boundaries of the freedom to act in private relations are established in the Civil Code as well as in the Constitution, namely we may find obligatory general clauses in the civil law regulations as well. The main question thus refers to the content of these rules in private law, how they should comply with the Constitution if it comes to interpretation. Vékás argues in favour of the explicit codification of indirect horizontal effect, which would necessitate that the judges fill up the content of the general civil law provisions with

⁷³ Lábady: *Alkotmányjogi hatások... op. cit.*

⁷⁴ Vékás: *Az új Polgári Törvénykönyv... op. cit.* 159.

⁷⁵ 2003. évi CXXV. törvény 37. §, in effect from 01. 27. 2004, see this in: Menyhárd A.: *Diszkriminációtilalom és polgári jog. op. cit.* 34.

⁷⁶ EBH 2002, case 625.

⁷⁷ EBH 2001, case 515.

⁷⁸ BH 1995/12, 698. In accordance with similar cases and hypotheticals a recent study of Attila Menyhárd tries to prove that the limitation on private liberty will not produce general welfare. Menyhárd A.: *Diszkriminációtilalom és polgári jog. op. cit.* 8–15.

constitutional content.⁷⁹ However, it is still not clear what exactly this “constitutional content” means in case of the anti-discrimination provision.

At this point we might be able to refer to the implications of the solution of the anti-discrimination act. We can observe that the idea of indirect horizontality, where the Constitution radiates through the provisions of ordinary civil law, gives certainly less identified protection against non-discrimination in private relations, than the Act on equal treatment, with its “indirect direct” horizontal effect. Hence it is worth to consider that the Civil Code should regulate more extra-contractual relations in accordance with the Act on equal treatment in order to provide as wide protection as other vehicles of law on this field.

Also, it would be possible that the new civil code borrows the idea of the Act on equal treatment and introduces the “indirect direct” horizontal effect. The practical side of this suggestion, as we saw above, that the legislative, the codificators can determine the scope where the constitutional rules may intrude, but the way of constitutional adjudication can facilitates the right balance between the person’s liberty and equality in each and every case.

Above, we considered the principal difference between the three solutions and now we try to reconcile those. Namely acknowledge that accepting the direct effect would leave it with the judiciary to decide where the Constitution applies and what that provokes in private matters, even outside the sphere of present judicial intrusion. Contrary to this, in case of the indirect doctrine, the Constitution is not capable to intrude into the private sphere unless the ordinary law, preferably a general clause lives open the door for it.

The highlighted idea brings a new and important trend into this debate because offers a medium way hopefully a golden medium. The solution of the Act on equal treatment offers dogmatically a clear compromise between the three concepts of horizontal applicability of the non-discrimination clause of the Constitution. If the legislative wishes to extend the scope of the protection against arbitrary discrimination in private relations, the implementation of new provisions—declaring the “indirect-direct horizontal effect”—become necessary in order to reach demonstratively the desired level of protection. This solution preserves the idea of value monism, at the same time gives opportunity to the legislation to differentiate between private relations of different nature.

⁷⁹ Vékás L.: *Az új Polgári Törvénykönyv... op. cit.* 149, also in Vékás, L.: A szerződési szabadság alkotmányos korlátai [The constitutional limits of freedom of contract]. *Jogtudományi Közlöny* 47 (1992) 56–59 and Vékás, L.: Egyenlő bánásmód polgári jogi jogviszonyokban? [Equal treatment in private law relationships?] *Jogtudományi Közlöny*, 61 (2006) 355.

2.3. *Towards a solution*

Finally it would be important to give guidelines to the legislative concerning what to bear in mind when determining the scope of the constitutional protection in private law, when reconciling guiding constitutional rights.

There is no general right to liberty as such. The argument in case of a particular liberty is an independent argument from any other concerning other liberties.⁸⁰ The meaning of anti-discrimination can also be different in relation to property rights as in the context of school or voting.⁸¹ Contrary to the Anglo-Saxon system of constitutional rights, the justification of liberty and equality both root in the concept of equal human dignity in the Hungarian jurisprudence. The state recognizes everybody's right to equal human dignity; this is the basic rule of the Hungarian constitutional system. Furthermore individuals have the right against the legislature that it protects them against other citizens.⁸²

As both liberty and equality are grounded in the concept of dignity, and every case differs from the other, the legislative cannot set up more precise norms under the presently ruling constitutional theory than we have seen in the jurisprudence of the Hungarian Constitutional Courts or we found in the text of the Act on equal treatment. Balancing⁸³ must be the keyword.^{84, 85}

We must also consider that one of the principal problems of solving this battle between the right to liberty and equality lies in the fact that there is two equally valid interpretation of equality: "equality–non-discrimination (in the public sphere) and equality–equality in autonomy (in the private sphere)".

⁸⁰ Dworkin R.: *Taking Rights Seriously*. Cambridge, Mass. 2001.

⁸¹ Tushnet M.: The relationship between judicial review of legislation and the interpretation of non-constitutional law... *op. cit.* 180.

⁸² See the jurisprudence of the Constitutional Court above, and Alexy, R.: *A theory of constitutional rights*. Oxford, 2002. 324, 352.

⁸³ However, the "reluctance also may be apparent even when constitutional balancing is applied to private law adjudication which may itself sometimes require the balancing of countervailing private rights. To judges brought up in the tradition of the private law, the weighing of countervailing private rights may seem to involve balancing of a more limited and familiar kind than the weighing of more capacious public interests required in constitutional balancing." Quint, P. E.: Free speech and private law in German Constitutional Theory. *Maryland Law Review*, 48 (1988) 247, 290.

⁸⁴ Alexy: *A theory of constitutional rights...* *op. cit.* 82

⁸⁵ See a contrary opinion from the anglo-saxon heritage in Dworkin: *op. cit.* 184. He describes why constitutional rights should not apply to private relations. According to Dworkin the essence of constitutional rights is to give standards to policy consideration, to determine the limits of policy actions, hence they cannot be balances against each other per se.

Through anti-discrimination laws the legislative introduced equality in the meaning of public law, which has naturally changed the situation, because substituted the choice of the individual with the standards of the community.⁸⁶

The words of the constitutions refer to the duties of the state to do or to refrain from doing something. This would suggest that private actors can behave differently from state actors because the constitution names rules concerning public relations.⁸⁷ This paradigm is in alteration now, which makes confusion, and raises the question of value monism. But it is reasonable to accept the changing role of the constitutions, and it will help to understand the new phenomenons.

Even if we reject value pluralism, and accept value monism we can easily differentiate between public and private and within private relations as well with the help of the balancing system. Aharon Barak makes two clear case studies in order to illustrate the solution: The restaurant owner certainly have the right to choose who to contract with, but can not discriminate on the basis of race, gender or religion, meanwhile an owner, who wishes to rent out one room of his flat should have the right to pick whoever he likes. But what is the difference between the two cases? The “proper balance” between the right to get a service without discrimination and the right to freedom of contract will give a solution for the problem; namely, in the former case the right to get the service without discrimination prevails over the right of the owner to choose his guests. Meanwhile in the second case the right to choose freely a person to rent a room in my flat prevails over the others right not to be discriminated arbitrarily.

Barak continues that the root of this balance lies in the concept that the freedom of contract is stronger in relation to a person’s privacy, meanwhile it is weaker when directed against the public at large. Per analogiam—he demonstrates—the right not to be discriminated is weaker when offered to a general public. In this case, the discriminated person is segregated from the public on the basis of race, gender, religion etc. However, the right not to be discriminated becomes weaker when the service, in its nature is not open to the public but provided on a personal basis.⁸⁸

In order to understand the idea of the right balance, the assessment of bargaining power relations could also help if taken into account. If one party has power over the other one, if one of the parties is defenseless the sheer

⁸⁶ Sommeregger, G.: The Horizontalization of Equality. In: Sajó–Uitz (eds.): *op. cit.*

⁸⁷ Garvey, J. H.–Aleinikoff, A. T.: *Modern Constitutional Theory: A Reader*. St. Paul, Minn. Third Edition, 1994. 695.

⁸⁸ Barak, A.: Constitutional Human rights and Private law. In: Friedman, D.–Barak-Erez, D.: *Human Rights In Private Law*. Oxford, 2001. 39.

sense tells that the state has to protect the weak one in order to provide the same liberties to everyone because the stronger party is capable to take away the other's constitutional rights.⁸⁹

It is easy to understand that direct horizontal effect denies the public-private divide,⁹⁰ although this divide exists, because the results of the balancing will be definitely different on the different fields of laws. The anti-discrimination laws seemingly uphold the public-private divide; just shift the borders of it, meanwhile upholding the theory of value-monism.

Private law has always prohibited certain kinds of discrimination on certain grounds, but this issue at stake calls for a different approach. The legislation has developed the idea that fundamental rights indeed apply in private relations, and thus the legislative and the judiciary will apply the scrutiny developed by the national constitutional court. The standards became the same on both fields of private and public law, however we should not forget about the balancing of constitutional rights, which will provide different end results in cases of fields closer to the public law, than on fields closer to private matters.

We find a gradual system, where between the two ends, controversial cases with public law and private law elements emerge. The legislative must determine this scope of the potentially controversial cases and in those cases guarantee judicial assessment under constitutional standards ("indirect-direct horizontal

⁸⁹ This idea is present in many fields of legislation, such as consumer protection, employment matters, or certain rules of the Civil Code. For example, if there is one store in the village and the salesman does not want to serve somebody on the basis of his skin color, or handicap, we feel that the state should intervene and protect the individual. However, if there are several shops in the village and they have the same offer for the same price, and one of the owners does not want to serve a person with colored skin, the situation is slightly different. Here the situation is more horizontal in reality, because the discriminated person can go to the other shops and the discriminative owner is in a worse financial position as a result, because he loses a guest. However this reasoning leads us back finally to the "separate but equal" interpretation of equality, which was declared bad law a long-long time ago. (The idea of separate, but equal came from the U.S. Supreme Court decision, *Plessy v. Ferguson* (1896, 163 U.S. 537) and was overruled in 1954 by *Brown v. Board of education* (347 U.S. 483). In the former decision the court concluded that it is constitutional that states could prohibit the use of certain train carriages by blacks, if they were provided with other carriages.) This example calls our attention to the perils of this interpretation and affirms the view that the discrimination, which violates the human dignity of a person is not much different in horizontal and vertical private relations.

⁹⁰ See about these fears more, in Pfeiffer, Th.: Diskriminierung oder Nichtdiskriminierung—Was ist hier eigentlich die Frage? *Zeitschrift für das gesamte Schuldrecht*, (2002) 165; Pickler, E.: Antidiskriminierungsgesetz – Der Anfang vom Ende der Privatautonomie? *Juristenzeitung*, 57 (2002) 880.

effect”). In other cases following a constitutional balancing process within its own competence, the legislative can decide on excluding the possibility of the judicial direct application of constitutional norms in order to secure a calculable rights protection respecting the idea of separation of powers. This legislative decision, the Civil code e.g. can be subjected to review by the Constitutional Court. This modern constitutional idea definitely changes the role of the Constitution.

Conclusion

This contribution aimed to analyze the conception of the “horizontal effect of the Constitution”, namely how the Constitution applies in private relations through judicial activity and what the positions of the legislative and the constitutional court of Hungary are. I argued that the question as to whether constitutional rights apply in private litigations does not exclusively depend on the acknowledgement of direct or indirect horizontal effect. I suggested that it was better to leave the decision on this problem with the legislation and as to the measure already set up the review of the right balance will stay at constitutional courts as the final instance of constitutionality. In Hungary, where the constitutional court does not have the competence to review the decisions of ordinary courts, it is quite dangerous to require from the judiciary to apply constitutional norms in their vaguely abstract form. However, I demonstrated that the judiciary has to interpret legal provisions in the light of the constitution even if the doctrine of indirect horizontal effect is not explicitly introduced into the constitutional system.

A separation of power point of view supports my position. The constitution’s original purpose was to regulate the relation of the state and the individual. If there is intent to extend the scope of the constitution to certain private relations, it should be as well left with the legislative to determine, how far the constitution should apply in private relations. The necessity, proportionality test and the “objective reason” justification, that the constitutional court established as a standard to justify discrimination in certain cases applies thorough anti-discrimination laws presently as well in the described situations. The legislative in fact orders that judges decide on possible violations under these standards in the scope of cases the legislative previously determined in the Act. This is the “indirect-direct” horizontal application.

This idea could be useful when finding answers to the questions emerging in connection with the codification of the new Civil Code. Following the constitutional requirements of interpretation set up by the Constitutional Court, the

legislative has to take into account the constitutional right to equality and private autonomy, liberty (which is on the other side of the balance) when assessing the problem of discrimination. Hence it is fully possible to develop a different understanding of the principle of non-discrimination in public and private relations, what is more, it is hardly possible to say that it is exactly the same in these two relationships. Thereafter the legislative will determine the scope where the judiciary must be entitled to assess the individual cases, the acts of single private actors under pure constitutional standards.

* * *

This paper tried to offer a response as to whether the private law principles or common constitutional principles serve as a framework for the examination of the above issues. I argue that the present tendencies demand the “constitutional” answer: the fight for the enforcement of equal human dignity must be reconciled with economic and social rationality. This is forced by the inherent development of law, the changing role of the constitutions. However, as far as it is possible the legislative should decide on the just and precise balance between liberty and equality concerns and thus the traditional idea of “horizontal application of the Constitution” might loose voice.