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Horizontal Dimension of Constitutional Social Rights

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***Abstract*—**The main purpose of this paper is to determine the applicability of the constitutional social rights in the so-called horizontal relations, i.e. the relations between private entities. Nowadays the constitutional rights are more and more often violated by private entities and not only by the state. The private entities interfere with the privacy of individuals, limit their freedom of expression or disturb their peaceful gatherings. International corporations subordinate individuals in a way which may limit their constitutional rights. These new realities determine the new role of the constitution in protecting human rights.

The paper will aim at answering two important questions. Firstly, are the private entities obliged to respect the constitutional social rights of other private entities and can they be liable for violation of these rights? Secondly, how the constitutional social rights can receive horizontal effect? Answers to these questions will have a significant meaning for the popularisation of the practice of applying the Constitution among the citizens as well as for the courts which settle disputes between them.

***Keywords*—**Constitution, horizontal application, private relations, social rights.

I. Introduction

TRADITIONALLY it is assumed that the constitution regulates the relations between an individual and the state (vertical relations), whereas the relations between private entities (horizontal relations) are regulated by the legal acts of lower rank. Such an understanding of the role of the constitution does not correspond with the current realities in which the constitutional social rights are more and more often violated by the private entities and not by the state. The private entities interfere with the privacy of individuals, limit their freedom of expression or disturb their peaceful gatherings. International corporations, banks or power companies may – similarly to the state – subordinate an individual in a way which may limit his or her constitutional rights.

Should therefore the private entities be bound by the constitutional social rights of other private entities, just like the state is bound by them? After all, a private entity which infringes someone's constitutional social rights is at the same time – contrary to the state-infringer – a beneficiary of these rights. On the one hand, expanding the function of the constitution to include the horizontal relations significantly increases its effectiveness and efficiency. The constitutional rights are of universal nature only when they are respected by everyone and not only by the state and its authorities. On the other hand, the necessity of taking into account the constitutional rights of other persons very often limits the autonomy of an individual to the extent which violates his or her constitutional rights.

Therefore, everything that, pursuant to the constitution, is prohibited to the state is not always prohibited to a private entity. The state cannot discriminate on the grounds of sex, but does it mean that also a private association cannot unite the representatives of one sex even though it is the will of its members? The state cannot limit the freedom of speech, but does the same restriction apply to the owner of a private supermarket who objects to distributing leaflets which promote certain contents on his premises? In searching for answers to this type of questions, we will limit our considerations only to the issue of constitutional social rights.

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II. Social Rights as Human Rights

Social rights are those rights which determine the material status of an individual and his or her physical and mental development. They ensure the participation of individuals in the state economy, allow for obtaining means of livelihood and the realization of basic material needs of human beings. Moreover, social rights guarantee access to cultural goods and the possibility to realize basic intellectual needs. Nowadays, among the commonly accepted social rights it is possible indicate the right to social security, the right to education, the freedom of artistic creation and scientific research as well as dissemination of the fruits thereof, the right to work and to rest, the right to have his/her health protected and the right to be protected against dishonest market practices.

In the legal doctrine there is no unanimity with regard to the issue of constitutionalisation of social rights. It is a controversy whether such kinds of human rights should be included into the text of the constitution or should be regulated only on the sub-constiutional level, mainly in a statute. Reluctance for the constitutionalisation of social rights results from the observance that those kinds of rights are closely connected with the economic conditions of a state and the level of its economic development. In times of recession the possibility of the realization of social rights are lower than in times of prosperity. The effect of constitutionalisation of social rights is that social rights must be realized to a certain degree (determined in a constitution) irrespective of current economic conditions of a state. Therefore, on the one hand this idea of constitutionalisation of social rights is beneficial for an individual while on the other hand; it is adventurous for a state. The limitation of the scope of the constitutionally guaranteed social benefits needs to pass an amendment to a constitution which, in many countries, is not easy at all.

Notwithstanding, most contemporary countries of the democratic world have decided for the constitutionalisation of

social rights. Among them is the Republic of Poland. The Polish Constitution [1] contains a separate chapter devoted to this category of human rights which is entitled „Economic, social and cultural freedoms and rights". Some of the rights regulated in this chapter such as the right to social security, the right to equal access to health care services financed from public funds and the right to universal and equal access to education are guaranteed only for Polish citizens. Other social rights included in this chapter such as the right to safe and hygienic conditions of work, the right to statutorily specified days free from work as well as annual paid holidays, freedom to choose and to pursue an occupation and to choose a place of work are safeguarded for anyone being under the authority of the Polish State.

III. Two Categories of Social Rights

Among the social rights there are such rights which can operate only in the relations between an individual and a state (vertical relations) and such rights which can operate also – or some of them only – in the relations between two individuals (horizontal relations). As an example of the first category of rights one can point out the right to social security whenever an individual is incapacitated for work by reason of sickness, invalidism or having attained retirement age. In the case of appearance of one of those social risks an individual is entitled to aid provided by a state in the form of a pension or retirement. An individual cannot claim another individual as the state is the only subject with the obligation to provide realization of the right to social security. As an example of the social rights which can be applied in the vertical as well as horizontal relations it is possible to indicate employee rights. Such rights as the right to a minimum level of remuneration for work, the right to safe and hygienic conditions of work, the right to statutorily specified days free from work and annual paid holidays, the right to organize worker's strikes or other forms of protest belong to the category of employee rights. Those rights operate both in the situation when an employer is a state and in the situation when an employer is a private entity.

IV. Models of Horizontal Application of Constitutional Rights

Nowadays various models of horizontal application of constitutional rights have been developed in the case law of different countries. Only some of those models are adequate for the social constitutional rights [2].

The first model is the model of direct horizontal applicability of the constitutional rights which is still excepted in Germany (to a very limited extent) and in Ireland. That model is based on the assumption that an individual may refer to the constitutional rights in a dispute with another private entity, whereas the protection of these rights may be sought under a claim pursuant to the provisions of the constitution. In Germany this model was applied in the post-war judicial decisions of the Federal Court of Labour and Federal Supreme Court. Although it was supported in the German doctrine (for example by Leisner, Gamillscheg, Ramm, Laufke, Müller), in the end it was rejected by the Federal Constitutional Court. Currently, the direct horizontal effect is assigned only to Article 9 sec. 3 of the German Constitution, according to which "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. Agreements that restrict or seek to impair these rights shall be null and void; measures directed to this end shall be unlawful". The second country which applies the model of direct horizontal application of constitutional rights is Ireland. In the 1970's the Irish Supreme Court developed the concept of a constitutional tort and at the same time allowed the enforcement of liability for damage caused by the violation of the constitutional law by a private entity [3]. If there is no adequate protective measure within the applicable law, an individual may formulate their claims under constitutional tort directly on the basis of a provision of the constitution. This model is still applied in Ireland.

The second model which should be included in our considerations is the model of indirect horizontal application of the constitutional rights. Its characteristic features can be found in the judicial decisions in Germany, Great Britain and the Republic of South Africa. In Germany this model has been applied in the judicial decisions of the Federal Constitutional Court since the issuing of the famous judicial decision of 1958 in the E. Lüth case [4]. It assumes that the Constitution, in its chapter regarding fundamental rights, indicates the objective order of values which has a radiating affect permeating the whole legal system and influencing the interpretation and application of all the subconstitutional acts. This permeating of the fundamental rights into the legal system takes place through general clauses and rules of private law, the content of which needs to be completed with the constitutional values. Two countries with the common law system, namely the Republic of South Africa and Great Britain, may constitute the comparative perspective for the German solution. In the first of these countries the model of the indirect horizontal application is simply specified in the Constitution of 1996 which states that the provisions enacting the constitutional rights bind the natural and legal entities only if their application is possible within the limits of applicability and if the nature of particular law and nature of all obligations under such a law are taken into consideration [5]. On the other hand, in Great Britain, where there is no written constitution, the discussion concerning the horizontal application of human rights developed on the basis of the Human Rights Act which incorporated in the state legal system the majority of rights included in the Convention for the Protection of Human Rights. These rights are taken into consideration while examining court disputes between private entities, however, the latter ones cannot directly refer to these rights in their mutual relations.

The third model included in my research is the model of positive obligations of the state concerning the protection of the rights of an individual, which was created within the jurisdiction of the German Federal Constitutional Court in the

1970's [6]. That model assumes that the state should protect an individual against infringement of their fundamental rights by another individual. It is based on the idea concerning the modification of the functions and duties of the state towards an individual and society. Initially the state was perceived as the main infringer of the fundamental rights of an individual formulating the individual's obligations of negative nature (obligation of non-interference), however, at present the state is perceived as a guarantor and protector of the fundamental rights of an individual of positive nature (obligation of protection). The comparative perspective for the German model of positive obligations of the state will be an analogous model created in the jurisdiction of the European Court of Human Rights. It is justified to mention this model as the Convention, similarly to the constitution, focuses on the protection of an individual against the infringement of their rights by the state and both models have been developed within the jurisdiction for several dozens of years.

The last model is the model of state action which can be found in the jurisdiction of the American Supreme Court. The model of state action apparently seems to be a contradiction of the thesis on the horizontal application of the constitutional rights as it assumes that the Constitution works only in the vertical relations. However, the concept of the functioning of the state is widely understood and sometimes it includes situations in which a private entity is the actual infringer of the constitutional rights. The American Supreme Court assumes that the functioning of the state infringing the constitutional rights may be understood as activities of a private entity which performs a public function awarded to it by the state, as well as activities of a private entity supported by the state to the extent where it is justified to blame the state for the acts of infringement of the constitutional rights performed directly by that entity.

Taking into account above considerations, it is necessary to emphasize that various models of the horizontal application of constitutional rights can be applied simultaneously and at the same time within the jurisdiction of a given state. However, only some of those models can be applied to the category of constitutional social rights. Therefore, to prove this thesis, we will examine how constitutional social rights can be applied in the horizontal relations of the labour and consumer character.

V. Labour Relations

Labour relations are the specific types of legal relations. On the one hand labour relations – as other horizontal relations – are based on the idea of equality, freedom of contracts and private autonomy. On the other hand the realization of those principles in practice is far from reality. In the case of a labour relation with a state employer it would be difficult to consider the issue of freedom of contracts and private autonomy as both parties to the labour contract are – by definition – not equal. However, even if such equality exists – as in the case of the labour relations with a private employer – those principles are not always respected. The main reason of this situation is the fact that an employer – irrespective of its legal character – is by definition the stronger party of a labour contract and can one-sidedly set such work conditions which the employee will have to accept (in case of his or her difficult material situation) even if he or she does not agree with it. This kind of factual subordination of the employee to the employer can be observed especially in the case of large corporations which demand from their employees' full time availability and loyalty. In such cases a labour relation more often ceases to be a horizontal relation and is transformed into the vertical relation in which the weaker party is subordinated to the stronger party [7].

The constitutionalisation of employee rights allows a state to interfere into the relations between an employee and employer to protect an employee against the harmful activity of the employer. Included in the text of the constitution such kinds of employee rights as the right to a minimum level of remuneration for work, the right to safe and hygienic conditions of work, the right to statutorily specified days free from work and annual paid holidays or the right to organize worker's strikes precludes the possibility to deprive an employee of those rights in a labour agreement. Labour agreements in which those rights would be abolished would be null and void because of the violation of the Constitution. In such a way we come to the conclusion that worker's rights guaranteed in the Constitution may be applied directly in the horizontal relations since a private employer is obligated to respect them just on the basis of constitutional provisions. An infringement of those rights by an employer is an enough reason for an employee to go to court and to demand the protection of his or her rights guaranteed in the Constitution. In practice, those kinds of disputes between an employee and an employer are adjudicated on the basis of statutory provisions which are more concrete and more precise than the provisions of the Constitution. If such statutorily provisions do not exist or if those provisions do not provide adequate protection of employee rights, the employee could demand such kind of protection on the basis of the constitution provisions by applying them directly. However, it is necessary to emphasize the subsidiary character of the direct application of constitutional rights in the labour relations. If the protection is sufficiently provided on the basis of statutory law there is no need to call the constitutional provisions.

The concept of the direct applicability of the constitutional rights in the labour relations was formulated in the German legal doctrine by H. C. Nipperday just after World War II [8] and it was applied in practice in the judgments of that time of the Federal Labour Court [9]. Initially, the Federal Labour Court claimed that many fundamental rights guaranteed in the German Constitution had direct horizontal effect and that individuals can be hold responsible for the violation of constitutional rights of others. Nowadays, this concept of direct application of constitutional rights is associated indisputably only with one provision of the German Constitution, namely with Art. 9 sec. 3, according to which "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. Agreements that restrict or seek to impair these rights shall be null and

void; measures directed to this end shall be unlawful". However, this concept of direct application of Art. 9 sec. 3 of the German Constitution seems to be exceptional and in the case of other fundamental rights this concept has been replaced by the concept of indirect application of those rights [10]. It assumes that the legal basis for the cases adjudicated by the courts in the field of labour law should be found primarily in a statute and only subsidiary in the constitution. It is a task of the court to refer to the constitutional rights and thus guarantee their indirect horizontal efficiency through the relevant interpretation of the statutory provisions, particularly those using general clauses and other uncertain legal notions [11].

VI. Consumer Relations

The other category of social rights which is commonly regulated in the current constitutions is the category of consumers' rights [12]. However, constitutional regulations of consumers' rights are more general and less concrete then constitutional regulations of employee rights. Therefore, consumers' rights – contrary to the employee rights – do not fit into this concept of direct application of constitutional rights. In the Constitution of the Republic of Poland the situation of consumers is regulated by Art. 76, according to which, public authorities shall protect consumers against activities threatening their health, privacy and safety, as well as shall protect against dishonest market practices. The scope of such protection shall be specified by statute. Expressed in this provision the general obligation of the public authorities to provide the protection for the weaker party of the economic relations is too general to determine on its basis what exactly is guaranteed to the consumers. However, there are no doubts that those consumers rights apply in horizontal relations, namely between a private entrepreneur on the one hand and a consumer on the other hand. The characteristic feature of these type of horizontal relations is lack of economic equality between their parties. Therefore, the horizontality of social rights in relationships between an entrepreneur and a consumer needs to be ensured by the state. Since the model of direct applicability of constitutional rights seems to be inadequate for such kinds of horizontal relations, there is a space for applying a model of positive obligations of the State. This model demands the activity of the state in the providing the protection for the weaker party of the consumers relations against the infringement of his or her rights by the stronger party which is – by definition – a professional. Firstly, such a protection should be guaranteed by the legislator by issuing adequate norms of private law taking into account constitutional rights of both parties of the horizontal relations. Secondly, such a protection should be provided by a court adjudicating private disputes emerging on the basis of those legal norms. In both cases the state acts as a guarantor of constitutional rights in the horizontal relations. Finding the private infringement of constitutional rights, a consumer may sue the state for neglecting the realization of the positive obligations of the protection of the constitutional rights.

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