Horizontale werking van grondrechten

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Summary

HORIZONTAL EFFECT OF FUNDAMENTAL RIGHT. A CRITIQUE.

Horizontal effect of fundamental rights, *ergo* the effect of these codified rights *as such* in relations between private parties, is a theory which has received increasing attention and appreciation in recent decades. It is considered an extremely valuable and manifestly enriching innovation correcting private law. In reality, however, its potential is overrated.

Certainly part of this overestimation is caused by the belief that horizontal effect was originally conceived from the pure necessity to remedy gaps or even correct harsh provisions within private law. However, other factors also played a part in the generating case-law, including the desire to bid farewell, symbolically, to a recent totalitarian past. In fact, it is remarkable that this has been a constant element in the rapid emergence of horizontal effect in countries which have had such a history. Countries which lack this background have, instead, shown a rather moderate reception of the theory, often rooted in a *nil novi sub sole* impression, only in recent decades to be accelerated by the fashionable excitement about all things related to fundamental rights. The discrepancy and especially the older scholarly work and case-law in these countries provide a valuable lesson, a reprimand to an over-exaggerated claim of innovation by the concept of horizontal effect, for they prove that long before the breakthrough of horizontal effect, fundamental *values* were taken into account in interprivate relations as well (for example in the form of fundamental *freedoms*). In fact, this is hardly surprising: like constitutions and international fundamental rights declarations, private law provisions as well as their interpretations are exponents of the same scale of values that founds the whole legal system and these values have materialised themselves far more rapidly and accurately in private than public law. Much rhetoric about horizontal effect stems from the disinclination to recognize this common root in private law as well as from a correlated ignorance about the true state of private case-law before fundamental rights made their appearance in it. Moreover, if the genealogy of horizontal effect is really sought, then its oldest antecedents are not to be found in post-war Germany as is generally assumed, but in 19th century Swiss case-law hardly to be called eccentric, as well as in later equally sober Belgian, French and – with reservations – Dutch and even Weimarian decisions. In short, what formerly, within a private law perspective, was taken more or less for granted has only later been extolled, with zealous

scholarly enthusiasm and doctrinal considerations, as a revolutionary and innovative principle.

This often eager scholarly work is in itself worth some further commentary as it conceals more tension and contradiction then is generally realised. Horizontal effect may well be an semi-official dogma, but what this notion stands for is rather indistinct. The factors which drive this ambiguity are numerous. For example, from a comparative perspective, divergences in autonomy of horizontal effect in contrast to the generating though distinct vertical sphere are insufficiently perceived and lead to incorrect associations. Another, more crucial aspect is the cultivated vagueness about the rights which provoke horizontal effect; though fundamental rights constitute a reasonably delimited set *in se*, they sometimes undergo a far-reaching, almost hazy judicial development of which the offshoots are grafted onto the vague boundaries between fundamental and regular rights; scholarly writings take the liberty to promote fundamental *freedoms* and *values* to the status of fundamental *rights* and consequently render the horizontal effect issue meaningless as it has nothing to do any more with the necessity of effect of fundamental rights but solely with juris-political preferences. Also the deemed effect itself is interpreted broadly and often not purged of mere rhetoric or ornamental application of fundamental rights. Incidentally, even application of private law statutes which were designed as an expression of fundamental rights is denominated horizontal effect, an extremely paradoxical and misleading feature since the bare existence of such statutes makes recourse to horizontal effect actually redundant. Even the fundamental distinction within horizontal effect, namely between direct and indirect effect, is diffuse. For example, where direct effect in contemporary scholarly work as a rule stands for the application of fundamental rights in exactly the same way as within the vertical sphere (hence with application of the exclusion clauses), for others (mostly public law scholars) it denotes *every* effect where fundamental rights are applied straightforwardly, i.e. without these having been transformed to private law statutes, while some even seem to be unaware of this distinction and reduce horizontal effect as a whole to a strict interpretation of direct effect. Obviously a similar haziness dominates the notion of indirect effect which certain scholarly writings extend to the most vague, sometimes even solely vertical presence of fundamental norms. This divergence leads to frustrated communication and misleading conceptualization. It causes certain judgements or even whole legal systems to be catalogued as exponents of direct effect by one scholar and of indirect effect by another; it causes a certain author to be marked as advocating indirect effect by one colleague and – on the basis of the same publication – of direct effect by another; it causes a specific judgement to be presented as both containing and lacking horizontal effect. It is regrettable and indicative of the quality of the debate regarding a doctrine of which the analysis requires carefulness, nuance and a sense of detail that this post-

modern condition is insufficiently perceived and consequently mortgages the future debate and the usability of existing scholarly work.

Furthermore, it is not only the content covered by the notion of horizontal effect which is uncertain, but also the foundation of this concept itself. Often scholars limit themselves to the obvious observation that not only the State but also private parties can endanger a person's fundamental rights, refer to the authority that fundamental rights enshrine or simply to the fact that these rights already have infiltrated private law. However, none of these assertions is able to provide the reason or explain the need for or the suitability of immediate application of fundamental rights in interprivate relations. The main argument (i.e. the imbalance of power which dominates certain private relations), for example, is essentially a mere re-articulation of an extremely basic and founding principle of private law itself for which in this framework specific instruments have been developed (e.g. error, coercion, abuse of law) of which the accuracy and applicability manifestly transcend those of the fundamental rights which are essentially developed for application in vertical relations only. Why application of fundamental rights would be necessary or why these would constitute a most fitting instrument remains undeclared. Even though this would still leave room for a (*per se* usually superfluous) indirect effect, it would fail to justify a substantial part of contemporary horizontal effect case-law as these decisions regularly lack the despised imbalance of power or even give way to the superior party. Summarising, one can say that the doctrine has long gone beyond the mere aim of protecting the weaker party and hence can no longer find justification therein. However, it has to be recognised that this question regarding dogmatic foundation is becoming irrelevant as contemporary constitutions increasingly tend to include a (sometimes veiled) permission for or even obligation to horizontal effect.

Moreover, far more important for assessing the impact of horizontal effect is the analysis of its practical repercussions. Significant in this respect is the scholarly preference for indirect effect. Direct effect is considered impractical, unsatisfactory or even detrimental to the quality of the legal system. The same preference, though sometimes obscured by hints of pragmatism and fear of commitment, dominates case-law (which otherwise seems to differ somewhat, among others regarding the catalogue of fundamental rights applied). The consequence of this preference is that the interprivate effect of fundamental rights can in practice only be quite relative as they become disencumbered of all the traditional baggage, like the delimitation provided by exclusion clauses and the public law doctrine attached to them, *ergo* in most cases the fundamental rights will merely function as a simple source of recognition of fundamental values.

Nonetheless, at first sight the judiciary indeed seems to be in need of this inspiration. In contrast with the traditional representation according to which horizontal effect only regards sporadic though necessary recourse to fundamental rights, the case-law collection is quite extensive. However, no concentra-

tion of problematical case-types is to be observed, but rather diffuse impregnation of the whole of private law. What dominates is not *Lückenfüllung* or cases in which remedying of imbalances of power is impossible to attain through private law exclusively, but formal or even ornamental references to fundamental rights (without a pattern being recognizable though); traditional private law solutions often seem to become merely adorned with gratuitous references to fundamental rights or rephrased in this idiom only to result in the regular, traditional private law solutions.

Explanation of this phenomenon resides in the attraction which fundamental rights exert on members of the bar as well as the judiciary. Where, for the former, fundamental rights add lustre to the pleading, emphasise the importance of the interests involved, rearticulate other principles of law or function as *ultimum remedium* for an inferior position in court, for the latter they can provide a welcome embellishment as well as a rephrasing of unnamed interests, but especially an authoritative casting of decisions laid down on the basis of open or vague norms (which are always open to the suspicion of subjectivity). Regrettably, this fact is insufficiently perceived in scholarly works; on the contrary, an opposite tendency is perpetuated. Symptomatic is the scholarly alacrity with which decisions referring to fundamental rights are automatically perceived as a product thereof, in other words as if less substantial influence as it is recognised within the application of other rights (e.g. arguments ad abundance) simply ceases to exist when fundamental rights are under scrutiny.

As a result, the great and exaggerated expectations attached to fundamental rights become even more inflated. Moreover it has to be emphasised again that – on account of the preference for indirect effect – it is only a completely stripped-down version of the fundamental rights which is to take effect and this in situations far more complicated than the traditional ones for which they were designed (e.g. collision of fundamental rights, a complex situation customary within horizontal effect but unthinkable in the vertical sphere). In other words a far more complicated operation with far blunter instruments.

Nonetheless, horizontal effect is claimed to add real value to private law litigation. Firstly, fundamental rights are to be said to improve the articulation of the interest at stake within the litigation. This is a quite remarkable suggestion since it presumes the judiciary to be intellectually challenged as they are assumed only to be capable of recognizing the most fundamental principles of law only if explicit reference is made thereto. Secondly, fundamental rights are said to provide a sense of direction. However, this theoretically plausible assumption neglects the practical horizontal application of fundamental rights in which these rights present themselves especially as open norms which are able to justify deviating or even contradictory conclusions and offer no more purchase than trivial value assessments. Thirdly, it is suggested that horizontal effect would refine the process of balancing of interests, however, thereof is little proof; though a certain hierarchy of values does indeed crystallize, its

genesis is independent of fundamental rights, which generally only function as a representation of (some of) the values involved. Moreover, the settlement of disputes is almost always attained by use of the traditional private law technique according to which all the specific circumstances of the case are taken into account. Consequently, the idea of fundamental rights acting as a trump card does not fit within this framework, while case-law on the other hand does not indicate an indisputably more profound argumentation as a result of the invocation of these rights. Finally, horizontal effect is praised for reinforcing the protection of the weaker party. Leaving aside the question whether contemporary private law is indeed in need of such reinforcement, it should be said that the effect of fundamental rights can actually be less altruistic: fundamental rights do not always serve the interests of the weaker party but can also lead to a further deterioration thereof. Moreover, this argument raises questions regarding the legitimacy of horizontal effect judgements and the doctrine as a whole in as far as such effect would violate the integrity of private law in which the socially desired and democratically determined equilibrium between protection of the weaker party on the one hand and unacceptable behaviour on the other hand has been laid down conscientiously and coercively. Summarising, it seems that despite all these assertions the protection of fundamental values, norms and interests is seldom noticeably increased by horizontal effect; what horizontal effect *in globo* embodies is an unproductive excursion into abstract notions which finally only necessitates falling back on regular private law elaboration without any enrichment having been achieved.

Regardless of these more procedural enrichments, partisans of horizontal effect could also suggest (but rarely do) that significant added value could reside in its ability to converge (European) legal systems. However, in this regard, too, the outcome is disappointing. As case-law illustrates, this cannot be achieved by fundamental rights themselves, as they are too vague, too undetermined and on the other hand are cemented within a specific national context which, at least in their private law dimensions, defines their real outcome. Also they do not really function as enabler of comparative law, not even in so-called hard cases. A certain potential could be assumed in the case of orientation to ECHR case-law. However, this is strongly hypothetical as most case-law prefers to apply the national fundamental rights instead of being guided by the European Convention. Moreover, most references to Strasbourgian case-law seem to be of a formal, clichéd nature. Conclusion: in this regard, too, the significance of horizontal effect is rather limited.

Finally, as a last point of criticism it has to be noted that horizontal effect is not a wholly harmless praxis. We need no longer fear the old doom and gloom scenario which predicted a complete usurpation of private law, but rather a degeneration of the concept of freedom when protection of those who have consciously waived their fundamental rights is overemphasised (as real freedom requires responsibility), corrosion of the credibility of jurisprudence

as it becomes snowed under by hazy fundamental rights rhetoric, and, finally, a devaluation of fundamental rights themselves as they become overplayed because they are invoked habitually, trivially or even quite inappropriately.