



HORIZONTAL OR THIRD-PARTY EFFECT OF HUMAN RIGHTS: INTERNATIONAL DECISIONS AND NATIONAL TENDENCIES IN RETROSPECTIVE

EFICÁCIA HORIZONTAL OU PERANTE TERCEIROS DOS DIREITOS HUMANOS: DECISÕES INTERNACIONAIS E TENDÊNCIAS NACIONAIS EM RETROSPECTIVA

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Abstract

This paper aims to describe the phenomenon of horizontal or third-party effect of human rights under international law, through its concept, application and enforcement. This phenomenon is ruled by the codes of conduct for international corporations issued by the Organisation for Economic Co-operation and Development and by numerous norms issued by the International Labour Organization. Some relevant international claims judged by the European Court of Human Rights and the Inter-American Court of Human Rights will also be addressed here. Last but not least, this paper will present some general tendencies of the debate on third-party effect of human rights in countries like Germany, US, France, Spain and Portugal, and Brazil.

Keywords: Human rights. Horizontal or third-party effect. International decisions. National tendencies.

Resumo

Este artigo tem como objetivo descrever o fenômeno da eficácia horizontal ou perante terceiros dos direitos humanos no âmbito do direito internacional a partir de seu conceito, aplicação e implementação. Esse fenômeno vem sendo regulado pelos códigos de conduta para empresas multinacionais editados pela Organização para Cooperação e Desenvolvimento Econômico, assim como por normas editadas pela Organização Internacional do Trabalho. Também serão abordados aqui alguns casos relevantes julgados pelas Cortes Europeia e Interamericana de Direitos Humanos. Por fim, serão apresentadas algumas tendências gerais do debate sobre a eficácia perante terceiros dos direitos humanos em países como Alemanha, Estados Unidos, Espanha e Portugal e Brasil.

Palavras-chave: Direitos humanos. Eficácia horizontal ou perante terceiros. Decisões internacionais. Tendências nacionais.

I. DESCRIPTION OF THE HORIZONTAL OR THIRD-PARTY EFFECT OF HUMAN RIGHTS (*DRITTWIRKUNG*)

1. Concept

Drittwirkung, or the third-party effect of human rights is a complex phenomenon. It can be described as an individual claim for State protection against the breach of human rights in criminal, administrative, labour and social law committed by a private person (PETERS, 2003, p. 15). In other words, the State has a positive obligation under the respective national law to provide its nationals

sufficient protection when their fundamental rights are violated by other private actors, such as associations, family, political parties or multinational enterprises.

2. Application and Enforcement

Under international law, the State's obligation to provide its nationals sufficient protection against the violation of their fundamental rights is provided by Art. 2 (1) International Covenant on Civil and Political Rights (1966). Regionally, such duty is enshrined in Art. 1 European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (ECHR) and in Art. 1 (1) American Convention on Human Rights (1969) (ACHR).

Under regional human rights law, the application and enforcement of *Drittwirkung* comprise different views. On the one hand, *Drittwirkung* means that regional human rights provisions can be applied in legal relations between private parties. On the other hand, it enables an individual to insist that his fundamental rights be upheld against another individual (DIJK; GODEFRIDUS; HOOF, 1998, p. 23). The defenders of the latter position hold that the third-party effect of human rights exists only when "an individual in his legal relations with other individuals is able to enforce the observance of the law concerning human right *via* some procedure or other" (Ibid.).

As to the latter view and in connection with the ECHR, however, it is only possible to lodge a claim against a Contracting State, not directly against an individual. A complaint directed against an individual is not compatible with the content of Arts. 19, 24, 25, 31, 32 and 50 ECHR and consequently is not admissible *ratione personae*. As a result, an individual can only indirectly argue a breach of his fundamental rights by another individual (indirect *Drittwirkung*). In other words, the Contracting State can be held responsible for a violation committed by its own national (Ibid.).

The ECHR served as model for the elaboration of the ACHR, and the provisions of both conventions concerning the State's positive obligation to protect operate similarly (DRÖGE, 2003, p. 282-283). With regard to the enforcement of the third-party effect of human rights, the same conclusions applied to the ECHR could *a priori* hold true for the ACHR.

II. CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES

In recent years, multinational enterprises were involved in a great number of human rights violations, such as inhuman labor conditions, child labor, the repression of union members, which "increased the public awareness of the negative effects brought about by the transnationalization of commercial enterprises". (TEUBNER, 2011, p. 18). The public awareness provoked the need of submitting multinational enterprises to public or private codes of conduct. Although such codes have "a voluntary character and [are] not legally binding" (SANDERS, 1982, p. 241), they serve as parameters to increase international corporations' responsibility in industrial and employment relations.

Two codes deserve special attention: the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises of 21 July 1976 (OECD Code) and

the International Labour Organization (ILO) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy of 16 November 1977 (ILO Code).

1. The OECD Code

The OECD Code deals with a large number of issues, particularly on employment and industrial relations in connection with the right to freedom of association and the right to bargain collectively. It stipulates that enterprises should “respect the right of their employees to be represented by trade unions and other bona fide organisations of employees, and engage in constructive negotiations...” (At para. 1 OECD Code). Furthermore, they should provide notice of any change in their operations to representatives of their employees and to governmental authorities, as well as co-operate with them in order to reduce as much as possible practicable adverse effects (At para. 6 OECD Code) They should also implement their employment policies without discrimination (At para. 7 OECD Code).

These guidelines are general in scope and are not legally binding (At para. 6 OECD Code; see also SANDERS, 1982, p. 241). In other words, they remain mere recommendations (TEUBNER, 2011, p. 19). Although the OECD Member States are not required to amend their domestic legislation “so as to oblige [multinational enterprises] whose headquarters are located in the territory of the state concerned to adopt the code” (ENGELS, 2000, p. 215), they are expected to make the code known in their countries and to give support to any discussion forum on the issues raised by the code (OECD, OECD ANNUAL REPORT 2007, p. 69). In order to co-operate with the OECD Member States in their task to make the OECD rules domestically effective, multinational enterprises should adopt a neutral attitude and not oppose the exercise of employees’ right to freedom of association. A similar approach should be taken concerning the activities of trade unions. Multinational enterprises should have “an open attitude towards organizational activities within the framework of national rules and practices” (ENGELS, 2000, p. 217). Likewise, they must not obstruct the “participation of employees in international meetings for consultations and exchange of views among themselves” (Ibid.). However, such meetings should not harm the functioning of the enterprises and their relationship with the representatives of trade unions.

2. The ILO Code

The ILO Code was jointly elaborated by governments, labour organizations, employer groups and multinational enterprises. The principles contain a great number of regulations in the field of social policy that multinational enterprises are to follow in order to contribute to global economic and social progress and to reduce or eliminate any difficulties that workers might have with their activities.

With respect to industrial relations, the declaration deals with the following issues: freedom of association and the right to organize, collective bargaining, consultation, examination of grievances and settlement of industrial disputes.

Concerning freedom of association and the right to organize, for example, the ILO Code stipulates that multinational enterprises must not intervene in their workers' right to establish and to join organizations of their own choosing. Workers do not need a previous authorization to exercise the right to freedom of association. They are likewise protected against any act of discrimination (At para. 42 ILO Code).

Another relevant rule of the ILO Code that relates to third-party effect of human rights provides that

[o]rganisations representing multinational enterprises or the workers in their employment should enjoy adequate protection against any acts of interference by each other or each other's agents or members in their establishment, functioning or administration (At para. 43 ILO Code; see also Art. 2 (1) ILO Convention of 1949 concerning the Application of the Principles of the Right to Organize and Collective Bargaining ("ILO Convention No 98") which contains the same rule).

Concerning this provision, governments are supposed to protect and support workers' rights to freedom of association against any interference or obstruction of such rights committed by multinational enterprises (employers or employers' organizations). They should also be encouraged to exercise "the right to have representative organisations of their own choosing recognised for the purpose of collective bargaining" (At para. 49 ILO Code) or voluntary negotiations.

In order to protect workers' rights to freedom of association and their right to representation, governments can also supply employees' organizations with information on the industries in which corporations exert their activities. In this context, multinationals are expected to respond "constructively to requests by governments" (At para. 56 ILO Code).

3. The OECD-ILO Conference of 23-24 June 2008

On 23-24 June 2008, the OECD, in co-operation with the ILO, organized a conference in Paris. Its objectives were to increase responsibility in business conduct as well as to improve employment conditions and industrial relations; to engage OECD and non-member governments in the assessment of the results of different public policies to promote responsible business conduct in this respect; and to join forces between the OECD and the ILO to promote awareness all over the world and implementation of the OECD Code and the ILO Code.

The pronouncements of both organizations illustrate the fact that business practices and the management of multinationals can directly or indirectly affect human rights related to work. In this context, States should be engaged in solving the deadlock of finding a balance between, on the one hand, the obligation and responsibility to intervene and to protect the rights of individuals (employees' rights) in case of violations by international corporations (third-party effect of human rights) and, on the other hand, the requirement to foster domestic economic growth by providing international enterprises conditions to invest and to operate in and from their territories.

III. INTERNATIONAL DECISIONS

The European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR) confronted several judicial claims alleging abuses of human rights by private actors in private relations that led to international human rights violations. These courts usually recall in their decisions that the State has the positive obligation to protect a private person against human rights abuses committed by any private violator through, for example, legislation, preventive measures or the provision of remedies.

1. Violence against Women and Children

(a) *X and Y v. The Netherlands* (1985)

In *X and Y v. The Netherlands* (1985), Mr. X and his daughter Y, a mentally handicapped 16-year-old young woman, submitted a claim to the ECtHR. They alleged that Y, who had been living since 1970 in a privately run home for mentally handicapped children, was the victim of rape. Mr. X filed a complaint and asked for criminal proceedings to be instituted. However, according to Dutch Criminal Law, criminal proceedings could only be instituted in such a case if Mr. X's daughter herself asked for it.

Mr. X applied to the European Commission of Human Rights (ECommHR). He claimed, *inter alia*, that his and his daughter's right to private and family life was violated under Art. 8 ECHR. The ECommHR declared the application admissible.

The ECtHR decided that although Art. 8 ECHR deals with the protection of the individual against an arbitrary interference of the State (negative obligation), it does not "compel the State to abstain from such interference" (At para. 23). The State can also have a positive obligation to provide measures "to secure respect for private life even in the sphere of the relations of individuals between themselves" (*Ibid.*).

Furthermore, the ECtHR argued that the State's duty to protect in such cases in which the victim undergoes severe violation of her fundamental rights through a third person's action demands "effective deterrence [which] can only be achieved by criminal-law provisions" (At para. 27). As a consequence, the individual right to private life requires the protection of State through criminal sanctions (DRÖGE, 2003, p. 14).

(b) *A v. The United Kingdom* (1998)

In *A v. The United Kingdom* (1998), a British applicant A, born in 1984, submitted a claim to the ECtHR based on child abuse, i.e., severe physical punishment committed against him and his brother by their stepfather which, under Art. 3 ECHR, violated their right to be free from torture and cruel treatment (See also *Y v. The United Kingdom* (1992) and *Costello-Roberts v. The United Kingdom* (1993) on the use of corporal punishment in British independent schools).

The domestic court found the applicant's stepfather not guilty. A applied to the ECommHR in 1994. In 1996 the ECommHR declared the application admissible. The applicant asked the ECtHR

to find a violation of Art. 3 ECHR. The court then decided that Art. 3 was infringed because “treatment of this kind reaches level of severity prohibited by Article 3” (At para. 21).

With regard to the third-party effect of human rights, the ECtHR also found that the United Kingdom (UK) was responsible for the conduct of the applicant’s stepfather under Art. 1 ECHR in connection with Art. 3 ECHR. Art. 1 ECHR guarantees all persons within the Member States’ jurisdiction – especially children, due to their vulnerability – the rights and freedoms defined in the ECHR. Based on a systematic interpretation of Art. 1, together with Art. 3 ECHR, State interference in the private sphere is justifiable in order to protect child’s rights against any violations. Accordingly, the ECtHR concluded that children “are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity” committed by a private perpetrator (At para. 22).

2. Extradition

The *Soering Case* (1989) concerned the imminent extradition of the applicant from the UK to the Commonwealth of Virginia in the United States (US) to face charges related to the murder of his girlfriend’s parents. The applicant and his girlfriend fled to the UK where they were arrested in 1986 in connection with cheque fraud. Soering feared extradition to the US because he would be charged with capital murder and could be sentenced to the death penalty and subjected to the so-called “death row phenomenon”, which is characterized by a long waiting period between the imposition of the sentence and its execution and by the stressful psychological conditions to which the applicant is submitted.

The UK replied to the US’s request for extradition in the following terms:

Should it not be possible on constitutional grounds for the United States Government to give such an assurance [that the death penalty, if imposed, would not be carried out], the United Kingdom authorities ask that the United States Government undertake to recommend to the appropriate authorities that the death penalty should not be imposed or, if imposed, should not be executed (At para. 15).

With regard to the third-party effect of human rights, the UK’s reply made evident that the US would have the positive obligation to protect the right to life of a national of a third country by not imposing him the sentence of capital punishment.

However, the ECtHR held that extradition of a person to a third country where he would be submitted to the death penalty could not raise any issue under Arts. 2 and 3 ECHR. The court considered that Art. 3 ECHR could not “have been intended by the drafters of the Convention to include a general prohibition of the death penalty since that would nullify the clear wording of Article 2 §1” (At para. 103; see also DIJK; GODEFRIDUS; HOOF, 1998, p. 304-305). Nevertheless, the manner in which the death penalty would be imposed or executed by the US and the condition of the detention must not be such that leads to an inhuman treatment under Art. 3 ECHR (At para. 104).

3. Forced Disappearance

In *Velásquez Rodríguez* (1988), the IACtHR dealt with a case concerning the forced disappearance of a Honduran student activist. The student was abducted, arrested, tortured and murdered by agents of Honduran State. However, Honduran authorities denied both knowledge of this detention and the fact that agents of the Honduran State or private persons acting with its consent or acquiescence could have perpetrated those violations. The Inter-American Commission's (IACCommHR) complaint, submitted to the court in April 1986, alleged the breach of Arts. 4 (right to life), 5 (right to humane treatment) and 7 (right to personal liberty) ACHR (At paras. 1-2).

The IACtHR found that the Honduran government breached the above ACHR norms based on the evidence presented by the IACCommHR, which attested that the Honduran government committed or tolerated 'political' disappearances between 1981 and 1984 (At paras. 124, 147-148; see also ROTH-ARRIAZA, 1990, p. 78).

Furthermore, the IACtHR referred to the fact that the ACHR States Parties are bound to Art. 1 (1) ACHR; in other words, the obligation to respect – a negative obligation not to interfere in the right of the individual – and to guarantee – a positive obligation to protect the right of the individual – the rights enumerated in the convention (At paras. 160-167, 182; see also KOKOTT, 2000, p. 246). On this account, the State is not only obliged to prevent, investigate and punish any violation of the rights recognized by the ACHR, but also to compensate the damages caused by it through its agents or private persons (ROTH-ARRIAZA, 1990, p. 469-471).

IV. NATIONAL APPROACHES (GENERAL TENDENCIES)

1. Germany

The debate on the third-party effect of human rights has its origins in Germany. The “*mittelbare Drittwirkung* theory” was originally developed by Dürig in his seminal essay *Grundrechte und Zivilrechtsprechung* of 1956 (DÜRIG, 1956, p. 157-190). It became the dominant conception in German Law and has since been adopted by the *Bundesverfassungsgericht* (BVerfG; German Federal Constitutional Court).

According to that theory, a bridge must be constructed between private law and the Constitution, which means submitting private law to the constitutional values and general concepts related to the principle of human dignity and fundamental rights. The theory of the third-party effect does not, however, suggest that constitutional law prevails over private law, but that fundamental constitutional rights are to be protected in the private sphere through mechanisms of private law. Only indirectly, and via legislation in private matters, can constitutional rights infiltrate relations between private persons'. As a result, the legislator undertakes the task of protecting fundamental rights in the private sphere without neglecting the defence of autonomous will.

The first opportunity to apply the third-party effect theory was presented to the BVerfG in the *Lüth Case* of 1958, which involved freedom of expression. In the case, Eric Lüth, a Hamburg press official, called for a boycott of a new film by Veit Harlan, who had also produced anti-Semitic films

during the Nazi period. Suing in the civil courts, the producer and distributor of Harlan's film obtained an injunction against Lüth under Section 826 German Civil Code, which provides that a person who, contrary to "good morals" (*gute Sitten*), intentionally causes harm to another person shall pay damages to the other person. Lüth appealed to the BVerfG. The constitutional tribunal decided that general clauses of private law are to be interpreted in accordance with the set of constitutional values, which are grounded on the principle of human dignity and fundamental rights. According to the court, this system of values

must be regarded as the basic constitutional decision for all spheres of law ... Accordingly, it also manifestly influences the civil law: no provision of civil law may be in contradiction with it; each one must be interpreted in its spirit (*Lüth* 7 BVerfGE 198; translation by German Federal Constitutional Court).

2. United States

In contrast to the Basic Law, in the US, the Constitution is only applied when a government acts. In the absence of an official action, the Constitution has no application. Under the State action doctrine, some private actors who act as "public" officials are subjected to the application of the US Constitution (EBERLE, 2002, p. 29). A private actor can also be subject to constitutional provisions "(a) because the state has become entangled with a private entity or (b) because it has approved, encouraged, or facilitated private conduct" (STONE *et. al.* 2001, p. 1507; see, e.g., *New York Times v. Sullivan* (1964); *Columbia Broadcasting System [CBS] v. Democratic National Committee* [1973]).

3. France

In France, the influence of the third-party effect theory is not as evident, because the French judiciary tradition is strictly bound to the principles of legality and separation of powers. However, its application can be discerned in the preventive control of constitutionality exercised by the *Conseil Constitutionnel*. The essence of its judgments shows how private legislation should be interpreted in accordance with the constitutional order.

4. Spain and Portugal

In other countries, such as Spain and Portugal, fundamental rights have direct effect upon private relations. However, not every fundamental right has this kind of effect. It is necessary to verify whether the fundamental right is directed to the State, or to the State and private persons, or even only to a private person, such as those rights referring to the protection of workers that are union members. The inequality presented in these relations is a core element of direct and immediate effect. The greater the inequality, the greater should be the protection of the weakest part of those relations. The direct incidence of fundamental rights is admitted in order to rebalance them. Therefore, fundamental rights can be invoked without any legislator's interference and can be opposed *erga omnes* (BILBAO UBILLOS, 1997, p. 349).

5. Brazil

Brazil also adopts the conception that fundamental rights have direct and immediate effect upon fundamental rights in the private sphere, which implies that the individual cannot renounce a fundamental right when it is violated in the private sphere (SARLET, 2000, p. 147). Some punctual decisions demonstrate that Brazil adheres to this conception.

(a) The Exclusion of a Member of a Cooperative and the Breach of the Due Process of Law

In the judgment of the *extraordinary appeal (recurso extraordinário) 158.215* (1996), the Brazilian Supreme Court decided that the exclusion of a member of a cooperative must occur in accordance with the fundamental right of the due process law, which justifies the exercise of individual defence (art. 5, LIV Brazilian Constitution). The due process of law directs any examination of the ordinary legislation that evokes this fundamental right. The cooperative should have then observed the statute of the cooperative and provided the respective member with appropriate defence (*Recurso Extraordinário 158.215*, Rapporteur Min. MARCO AURÉLIO, SECOND SECTION, judged on 30 April 1996, DJ 07-06-1996 PP-19830 EMENTVOL-01831-02 PP-00307 RTJ VOL-00164-02 PP-00757).

(b) The Inspection of Women's Underwear in a Lingerie Factory

The female workers of a garment fabric were submitted to an underwear inspection under the menace of being dismissed. In the first judicial instance, the sentence condemned this practice. But, in the second judicial instance, the sentence was absolutory. According to this sentence, the existing constraint was a result of the female workers adherence to the labour contract.

Although assuming the constitutional relevance of the content of the *extraordinary appeal 160.222* (1995), which involved several violations of fundamental rights, the Brazilian Supreme Court declared, however, the prescription of the process and consequently did not deliver a final decision (*Recurso Extraordinário 160.222*, Rapporteur Min. SEPÚLVEDA PERTENCE, FIRST SECTION, judged on 11 April 1995, DJ 01-09-1995 PP-27402 EMENTVOL-01798-07 PP-01443).

(c) The Discrimination of a Brazilian Worker employed in a Foreign Aviation Company

The Brazilian national appellant worked for Air France, which did not apply the company staff regulations with regard to him. According to these regulations, benefits were granted to French employees only. As the company's practice offended the constitutional principle of equality, laid down in the head of art. 5 of the Brazilian Constitution of 1988, which opens the catalogue of fundamental rights, the Brazilian Supreme Court decided that the principle of equality was violated and discrimination was generated in this case. The Supreme Court pondered that discrimination is forbidden by constitutional order when it results *inter alia* from differences established between individuals due to their origin or nationality. This prohibition also generates effects upon the interpretation and application of labour legislation by labour courts. (*Recurso Extraordinário 161.243*, Rapporteur Min. CARLOS VELLOSO, SECOND SECTION, judged on 29 October 1996, DJ 19-12-1997 PP-00057 EMENT VOL-01896-04 PP-00756).

V. ASSESSMENT

The theory of the third-party effect of human rights has strongly penetrated both domestic legislation (e.g. Germany, US, France, Spain and Portugal, and Brazil) and international human rights treaties, as well as regional conventions since World War II. The State has the positive obligation to protect individuals against violations committed by private actors.

Innumerable examples illustrate the fact that violations committed by private persons or organizations require State intervention. They can refer to the violence in the family against women and children, the interference or obstruction of workers' rights to exert their right to representation and extradition to a third country where the alien could be submitted to inhuman and degrading treatment.

However, the State itself can also violate human rights when, instead of protecting the individual, it perpetrates the crime itself. It can occur, for instance, when a private person or a private organization acts under the auspices or toleration of the State and abducts, arrests, tortures and murders opponents of the government.

Last but not least, the victim, and, depending on the gravity and urgency of the case, the family and relatives can in all cases submit a complaint to international committees and courts when remedies are not effective at the national level, in order to make States Parties of human rights conventions implement international legal obligations through legislative and other administrative or judicial measures and subsequently punish private perpetrators.

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