



Original Article

# The Horizontal Effect: Conceptualisation and Application of Constitutional Rights in Private Law

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**Abstract:** Private law has traditionally followed a separate mindset of rights, which is not necessarily related to the constitution. With the rise of constitutionalism in the world, thinking about constitutionalism and fundamental rights has spilt over into private law. The constitutionalisation of private law (or the horizontal effect of constitutional rights on relations between private actors) is one of the important topics that attract scholarly attention around the world.

It can be seen that the modern history of the horizontal effect of constitutional rights has more than 60 years of development. However, in Vietnam, the topic of the effect of constitutional rights in private law has just been raised recently among legal scholars. This article serves as a development of the emerging discussion on the horizontal effect in Vietnam by providing a general conceptualisation and a brief history of the horizontal effect of constitutional rights in the world. The article also proposes the identification of horizontal effect paradigms in countries/jurisdictions and suggests implications of the horizontal effect for Vietnam.

**Keywords:** Horizontal effect, private law, civil law, constitutional rights, constitutionalism, Vietnamese law.

## 1. Introduction

According to the traditional approach in countries following the Civil Law tradition and even in the Common Law world [1], a legal

system is built and developed based on the taxonomy between public law and private law [2-4]. Private law regulates horizontal relations between individuals and legal entities in which "the only function of public authority is to

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recognise and enforce civil rights". Meanwhile, public law deals with vertical relations between the state and private individuals with the aim of "realising public interests". In relations governed by private law, the constitution, which is seen primarily as a document that limits state power to protect individuals against arbitrary state interferences in personal freedom, is often not directly applied or cited. On the contrary, the Civil Code plays a fundamental role in private relations and is deemed as the "constitution of private law".

However, in the current development trend of law, there are studies questioning the effect of constitutional rights and the impact of constitutional rights on relations between private subjects. Previously, classical constitutional theory emphasised that constitutional rights only had vertical effects between the State and individuals: that is, only the state - through carrying out activities of a state actions must be bound to enforce human rights recognised by the constitution. However, practice has shown that constitutional rights have an influence and impact to certain degrees on the regulation of private law on the relationships between subjects in this field of law. Legislative agencies and executive agencies, to some extent, must have positive obligations to implement the Constitution; and in the process of carrying out activities aimed at ensuring constitutional rights, certain limitations may be imposed on the freedom of other subjects.

In many jurisdictions, judicial agencies, in the process of adjudicating disputes between private parties, have integrated awareness of constitutional rights as constitutional values that need to be applied when explaining the rules of private law. As reflections on these realities, there have been many studies around the world on the impact of constitutional rights on private law under different names such as "horizontal effect of fundamental rights" [5-7], "constitutionalisation of private law" [8, 9]. This new trend requires the need to comprehensively and systematically identify, analyse, and evaluate basic legal issues about the validity of

constitutional rights in private law from both perspectives: vertical effect in the relationship between the State and citizens and horizontal effect in the relationship between private subjects.

The effect of constitutional rights and the impact of constitutional rights on relations between private actors are among important topics that attract scholarly attention around the world. Private law has traditionally followed a separate mindset of rights, which is not necessarily related to the constitution. And with the rise of constitutionalism in the world, thoughts on constitutionalism and fundamental rights have spilled over into private law. It can be seen that the modern history of the horizontal effect has more than 60 years of development, since the *Lüth* case [10] decided by the German Federal Constitutional Court in 1958. However, in Vietnam the topic of the constitutional rights effect in private law has just been raised recently among legal scholars [11]. This article serves as a development of the emerging discussion on horizontal effect in Vietnam. The authors aim to evaluate how the horizontal effect of fundamental rights [5] and the constitutionalisation of private law [8] could be conceptualised and applied in Vietnamese jurisprudence. The methods of this study include both traditional doctrinal research and empirical research (survey and interview). Following the Introduction, the article is structured in three main Parts (2, 3 and 4) and the Conclusion. In Part 2, the article provides the general conceptualisation and a brief history of the horizontal effect of constitutional rights in the world. Then, Part 3 proposes the identification of horizontal effect models and in countries/jurisdictions. Part 4 suggests implications of the horizontal effect for Vietnam.

## **2. Horizontal Effect: General Conceptualisation and a Brief History**

Horizontal effect could be recognised as a normative application of constitutional rights in private law, as Kai Moller explains: "a person's interests can be under threat from another private

party just as much as from the state” [12]. Moller further claims that “horizontal effect is structurally related to, or arguably indeed a subcategory of, positive obligations” [12]. The doctrine of positive obligations could be understood in Stephen Gardbaum’s conceptualisation as follows: “if a constitutional right provision mandates the government to protect individuals from their fellow citizens, then those regulated are directly subject to the resulting legislation or other government measure but are also in an obvious and meaningful sense indirectly regulated by the constitution” [13].

Horizontal effect has become part of a “global model of constitutional rights”. As Kai Moller summarises, “[from Germany, the concept travelled to other parts of the world. It has by now become a well-established feature of the global model of constitutional rights” [12]. The official confirmation of horizontal effect can be traced back to the influential case of *Liith*, decided by German Federal Constitutional Court in 1953. The case is summarised as follows:

“Veit Harlan was a film producer during the Nazi regime. One of his major works was the notoriously anti-Semitic film *Jud Süß*. After the Second World War, he was charged with, but then acquitted of aiding and abetting the persecution of Jewish persons. In 1950 he directed a new film, *Immortal Lover*. Prior to the film’s premiere, the applicant, then a Senator in Hamburg and Head of the Hamburg Press Office, gave a speech in a private capacity to an audience of film distributors and directors. He called for a boycott of the new film because he was convinced that it would harm Germany’s film industry, given Harlan’s history. Subsequently, the Hamburg Regional Court ordered him to refrain from such calls for boycotts on pain of a fine or imprisonment.

In his constitutional complaint, the applicant claimed that this judgment violated his fundamental right to freedom of expression.

... The Federal Constitutional Court held that the judgment by the Hamburg Regional Court constituted a violation of the applicant’s

fundamental right to freedom of expression. Therefore, the Federal Constitutional Court reversed the judgment and remanded it to the Hamburg Regional Court for a new decision.

The Federal Constitutional Court held that fundamental rights also have an impact on private law and thus entail indirect horizontal effects. The Court’s review was limited to the question of whether the Regional Court had correctly taken into consideration the scope and significance of the fundamental right to freedom of expression when applying the general clause of § 826 of the Civil Code and when balancing freedom of expression against the interests of Harlan and the film production companies. The Court held that under Article 1.3 of the Basic Law, fundamental rights are binding upon the judiciary as directly applicable law” [14].

In this case, the German Constitutional Court reasoned that:

“i) Fundamental rights are primarily defensive rights of the individual against the state. However, the fundamental rights of the Basic Law are also an expression of an objective order of constitutional values that amounts to a fundamental constitutional decision and therefore applies to all areas of law.

ii) Private law provisions indirectly reflect the legal content of fundamental rights, primarily through mandatory provisions, and judges can give effect to this content in particular by drawing on general clauses.

iii) Decisions of the civil courts may violate fundamental rights if they fail to consider the impact of fundamental rights on private law...” [14].

In recent times, the 1996 South African Constitution, among others, explicitly endorses horizontal effect in section 8(2): “A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right”. As another example, the Indian Constitution includes several articles that are the constitutional basis for the application of fundamental rights to private relations: Articles

15(2) on non-discrimination in specified public accommodations; Article 17 on untouchability; Article 23 on trafficking and forced labour; Article 24 on child labour in hazardous activities. In East Asia, South Korea, Taiwan and Japan have also recognised the horizontal effect [15]. The Chinese Civil Code 2020 is deemed to support the horizontal effect, too [16].

From the experiences of numerous countries, the horizontal effect has been often involved in several constitutional rights and principles such as: i) Human dignity (see a case in Israel) [17]; ii) Right to equality (racist, sex discrimination,...) (see a case of the European Court of Human Rights) [18]; iii) Right to privacy (landlord - tenant,...); iv) Free expression. It is observed that right to privacy and freedom of speech often conflict with other rights rather than with a public interest. A dispute regarding tort may be examined through the lens of a conflict between the right to privacy and the freedom of expression (see a case in the United Kingdom) [19].

### 3. Horizontal Effect: Theoretical Paradigms and Identification in the World

#### 3.1. Three Paradigms: Vertical Effect and Direct/Indirect Horizontal Effect of Constitutional Rights

Globally, it can be observed that there are three theoretical paradigms on the impact of constitutional rights in private law: i) Vertical effect; ii) Direct horizontal effect; iii) Indirect horizontal effect. It should be noted that the identification of models here is mostly for doctrinal conceptualisation. The delineation between paradigms is not always clear-cut. The reality may reflect the mixture of models.

##### 3.1.1. Classical Constitutionalist Paradigm - Vertical Effect of Constitutional Rights

The paradigm theorises that constitutional rights only have a vertical effect, and, therefore, does not allow the application of constitutional rights in relationships between private law subjects. This model only envisions the effect of human rights in the narrow sense of binding the

state in its actions. The relationship between the state and individuals is subject to regulation by public law. Therefore, the constitutionalisation of human rights has no effect on legal relations between private subjects, which are governed by traditional rules of private law. In the current development trend of modern constitutional doctrine, this model is very difficult to gain a foothold in because it is based on the classical concept of absolute separation of public law and private law and, therefore completely denies the value of constitutional law and the constitution in resolving private relations disputes.

The US has been traditionally deemed as an example of the classical model of constitutional rights, which only recognises the vertical effect of constitutional rights between the state and the individuals/legal entities. In other words, this model, in principle, does not recognise the horizontal effect between private parties. This only vertical effect (the Constitution binds only governmental actors and not private individuals) [5] is confirmed by the wording of the US Constitution (the Fourteenth Amendment) and some cases [20]. The state action doctrine only recognises the vertical effect of constitutional rights: “[m]ost of the protections for individual rights and liberties contained in the Constitution and its Amendments apply only to the actions of governmental entities” [21].

However, this model might be obsolete and may not reflect the current development of American law. Stephen Gardbaum argues that “all law-including private law statutes and court-made common law at issue in private litigation-is fully, equally and directly subject to constitutional rights scrutiny” [22]. It can be argued that, in modern American constitutional law, the developments of the state action doctrine and the Equal Protection Clause [5] have led to a kind of horizontal effect in the US [23]. Thus, the horizontality of constitutional rights is still under debate in the US [24].

##### 3.1.2. The Paradigm of Direct Horizontal Effect

The paradigm of direct horizontal effect reflects the idea of the direct impact/effect of constitutional rights in relations between private

law subjects. In other words, constitutional rights “directly bind[s] the conduct of private actors” [13]. This model is also called the absolute horizontal constitutional rights validity model because it allows the direct application of constitutional rights between private law subjects. As a result, certain constitutional rights will be binding not only on the state but also on private actors. In other words, an individual can sue another individual for violating their constitutional rights [25, 26].

It can be seen that the legal systems of South Africa, India and Ireland [27], as notable examples, have confirmed the direct horizontality of constitutional rights. Furthermore, interestingly, fourteen Latin American countries have included directly horizontal rights in their constitutions [28].

### 3.1.3. The Paradigm of Indirect Horizontal Effect

Arguably, the paradigm of indirect impact/effect of constitutional rights in relations between private law subjects has been most supported in the world, such as in Europe generally, South Korea, Japan,...). This is a relatively horizontal model of constitutional rights effect, it exists in the middle and reconciles the approaches of the two models above. According to this model, although constitutional rights have the horizontal effect, it is not a direct, but only an indirect effect through the interpretation of private law norms in the spirit of constitutional values. The law is reflected through those constitutional rights. This indirect effect model is considered more advantageous than the direct effect model because on the one hand, it still allows judges a “free space” to apply the spirit of constitutional values. To interpret norms, on the other hand, judges can still “balance” the specific conflicts of interest between the parties [25, 29].

The indirect horizontal effect is basically associated with the doctrines of positive obligations and the impact of constitutional rights and constitutional values on private law generally as well as on private litigation in particular.

#### - Positive obligations/duties

In modern constitutional law, the notion of “indirect horizontal effect” is a normative political-legal requirement as it is closely linked with the idea of positive obligations of the state/government. In Stephen Gardbaum’s argument, “the ‘indirect horizontal effect’ of constitutional rights on private actors resulting from the regulatory measures that governments are required to take in fulfillment of their positive duties to protect individuals from actions of their fellow citizens” [13]. The doctrine of positive obligations has been formulated and confirmed by numerous jurisdictions. Notably, the European Court of Human Rights affirmed the doctrine in *Storck v. Germany* in 2006 [30]. In Asia, The Indian Supreme Court rules that Article 15 of the Constitution, which ensures general equality, places a responsibility on the state to create and implement effective laws addressing workplace sexual harassment, extends to both public and private sectors, thereby indirectly holding private employers accountable under this constitutional provision [31].

#### - Impact of constitutional rights and constitutional values on private law and private litigation

As widely accepted in numerous countries, the “indirect horizontal effect” reflects the “impact of constitutional rights and constitutional values on private law and private litigation” [13]. Stephen Gardbaum argues that “[t]o the extent that constitutional rights modify pre-existing private law and thereby affect the outcome of private litigation, this gives them an indirect effect on private actors as compared with the ex ante position” [13].

Constitutional values may have great influence on private law-making (by the legislative and the executive) and private litigation (by the judiciary). In our conceptualisation for this article, constitutional values and constitutional principles may be used interchangeably, although these two notions may differ. The notion of “constitutional values” may be conceptualised in three aspects: i) constitutional

values as fundamental principles entrenched in the constitution; ii) constitutional values as umbrella, broad constitutional rights; iii) constitutional values as per se constitutional rights.

i) Constitutional values as fundamental principles entrenched in the constitution

Those constitutional values may include the notions of “socialist”, “democratic society”, “social morality” “justice”, “fairness”, “general welfare”, etc,... Stephen Gardbaum argues that “where possible, the general clauses of the civil code “good morals” become the preferred channel for incorporating constitutional values into private law”, but, “if private law cannot be interpreted in a way that properly incorporates constitutional values, it will be invalidated as unconstitutional” [13].

ii) Constitutional values as umbrella, broad constitutional rights

Some constitutional rights (such as human dignity, liberty...) can also be conceptualised as constitutional values. For example, in the case of *Kastenbaum* (Israel), the issue of human dignity in the law of contract was under discussion, specifically concerning the burial of a spouse. It was determined that the constitutional principle of human dignity should take precedence over the private law’s principle of freedom of contract. In this context, a term mandating the use of Hebrew letters and numerals on a gravestone, which contradicted the husband’s intent to honour his deceased wife’s wishes by using Latin/Arabic, was deemed void in terms of private law due to its conflict with public policy [17].

iii) Constitutional values as per se constitutional rights

The idea of constitutional values as per se constitutional rights was confirmed in the *Lüth* case (Germany, free expression, law of tort), when the right to free expression is also considered as a “value” [11]. It might not be objectionable that fundamental rights “reflect the values prized and protected in modern democratic society” [1].

### 3.2. Identification of Paradigms

The conceptualisation of three theoretical paradigms of constitutional rights effect also has practical influence. Arguably, the identification of a paradigm, which a country/jurisdiction follows, can be based on three main factors: i) The text of the Constitution and the Civil Code; ii) Judgment and interpretation of the court; iii) Legal doctrines explained by scholars.

#### 3.2.1. Text of the Constitution and the Civil Code

The cases of South Africa and India may be the best examples of the fact that the text of the constitution clearly states the horizontal effect of constitutional rights. In South Africa, the fundamental rights of the Constitution bind “the legislature, the executive, the judiciary and all organs of state” (section 8(1) of the South African Constitution), and also have effect on “a natural or a juristic person, if and to the extent that, it is applicable” (section 8(2) of the South African Constitution). In India, Articles 15(2), 17, 21, 23 and 24 of the Constitution accept the horizontal application of rights to non-state actors. Then, cases of the Indian Supreme Court confirmed the horizontal effect [33].

#### 3.2.2. Judgment and Interpretation of the Court

In countries that already have a horizontal effect foundation from the text of the Constitution, the horizontal effect often continues to be confirmed and explained by the Court. For example, in Japan, the case of *Nissan Motors* [35], Justice Masami Ito claims that “Article 90 of the Civil Code should be interpreted in conformity with the equality principle of the Constitution” [35]. By this decision, The Japanese Supreme Court invalidated a major corporation’s employment regulation that enforced separate retirement ages for male and female employees [34]. The indirect horizontal effect has also been clearly expressed in a case, when the privacy constitutional right to privacy is understood to apply indirectly through the tort clause in the Civil Code of an individual is infringed by a media company [36,37].

### 3.3.3. Legal Doctrines Explained by Scholars

Understandably, legal doctrines further confirm and support the idea of the horizontal effect, which is already affirmed by the text of the Constitution and the Civil Code as well as the judgment and interpretation of the court. But in case the horizontal effect recognition is not clear in the Constitution, the Civil Code and the court's interpretation, legal doctrines explained by scholars may take the lead. As in China, Wang Liming claims a quasi-constitutional status of the Chinese Civil Code 2021 and the indirect horizontal effect the the Chinese Constitution [16]. This could also be the case of Vietnam, which will be further explored in the following Part.

## 4. Horizontal Effect: Implications for Vietnam

### 4.1. What is the Paradigm of Constitutional Rights Effect that Vietnam Follows?

In terms of theory and practice, the issue of allowing/not allowing the application of constitutional rights in relationships between private law subjects seems to have not been raised in Vietnam. However, in Vietnamese legal theory and legal practice, it does not prohibit the application of constitutional rights in relationships between private law subjects (as confirmed by some scholars and judges, according to surveys and interview of the research project conducted by the research group).

Arguably, there are theoretical and legal foundations supporting the direct or at least the indirect impact/effect of constitutional rights in private relations in Vietnam, as analysed in the following six aspects.

#### 4.1.1. The Theory of the Socialist Constitutional Law Supports the "Total Constitution" and the "Totalising Effect" of Constitutional Rights

In a socialist legal system like Vietnam, it has been well recognised that the Constitution is the basic law of all legal documents and that Constitutional Law (State Law) is the basic branch of law and therefore, it influences all

branches of law [38]. They are the doctrinal foundation for the impact of constitutional rights and values on private laws such as Civil Law, Commercial Law, etc. [39]

Interestingly, this conceptualisation of the Constitution as the basic law may be comparable with the notion of "total constitution" in Germany. Matthias Kumm argues that Germany has a "total constitution" [9], which includes the proportionality principle, positive state duties and horizontal effect. Arguably, the notion of "total constitution" may be the foundation for the "totalising effect" of constitutional rights [1]. As in the *Lüth* case, the German Federal Constitutional Court declared that "constitutional rights are not just defensive rights of the individual against the state, but embody an objective order of values, which applies to all areas of the law... and which provides guidelines and impulses for the legislature, administration and judiciary" [10].

#### 4.1.2. A Legal Principle: Constitutional Rights are Applicable When the Court Examines and Judges Private Disputes

In Vietnamese jurisprudence, as a result of the notion of the Constitution as the basic law, constitutional provisions in principle can be cited in formulating and implementing laws. This means that the Constitution has an effect on all state organs, organisations and individuals. Accordingly, the National Assembly must ensure that every act in relation to public/private law does not contradict the fundamental rights specified in the Constitution. The Court can refer to or to cite constitutional rights when examining and judging a private dispute, even though it has rarely done so (as confirmed by some scholars and judges, according to surveys and interview of the research project conducted by the research group).

#### 4.1.3. International Human Rights Law Supports the Horizontal Effect

It can be seen that the development of human rights in the Constitution have been deeply influenced by international human rights law. Thus, international human rights law could be a

channel for the integration of the horizontal effect into Vietnamese law.

The horizontal effect seems to be explicitly recognised by the Universal Declaration of Human Rights (UDHR) and the International Covenant of Civil and Political Rights (ICCPR). Article 29(2) of UDHR provides: “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”. In the ICCPR Preamble, it is noted: “Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant”.

4.1.4. The 2013 Vietnamese Constitution and the Civil Code 2015 Provide Foundations for the Horizontal Effect Of Constitutional Rights

Article 15(2)(4)) of the 2013 Vietnamese Constitution may be good support for the horizontal effect of constitutional rights. Article 15(2) says that “Everyone is obliged to respect others’ rights” and Article 15(4) further confirms “The exercise of human rights and citizens’ rights may not infringe upon national interests and others’ rights and legitimate interests”. Interestingly, the “obligation to respect the rights of others” only exists in the 2013 Constitution. Previous Constitutions do not have it. Constitutions of many countries have no provision for “respecting the rights of others” because the regulation of civil rights is mainly to limit state power, only regulating public authority. Therefore, the provision “respecting the rights of others” has no role in a classic model of constitution. Those provisions of the 2013 Vietnamese Constitution, which to some extent are comparable with the horizontal effect provisions in the South African Constitution and the Indian Constitution (as referred in Part 3.2), could be the foundation of the direct

impact/effect of constitutional rights in private relations in Vietnam.

It is also important to note that Article 14 of the 2013 Constitution, for the first time, recognises the human-rights-limitation principle (proportionality principle) and Article 2 and Article 10 of the Civil Code 2015 echo with this constitutional spirit in the “recognition, respect for, protection and guarantee of civil rights” generally and in civil-rights limitation principle particularly. From international experiences, these developments can be foundations for the horizontal effect of constitutional rights in Vietnamese law.

4.1.5. Constitutional Values can be Applied in Private Law Adjudication

It can be seen that the 2013 Vietnamese Constitution embraces several important constitutional values serving as fundamental principles. Among those, there may be four essential ones: “fairness” (công bằng), “justice” (công lý), “social morality, national tradition” and “equality”. The term “fairness”/“equity” is prescribed in the 2013 Constitution (the Preamble and Article 3) as well as the Civil Code 2015 (Article 6). The role of the Court to protect “justice” is also affirmed in the Constitution. The Court has the “duty to safeguard justice, human rights, citizens’ rights, the socialist regime, the interests of the State, and the lawful rights and interests of organisations and individuals” while “adjudicat[ing] criminal, civil, marriage and family, business, commercial, labor and administrative cases and settle other matters as prescribed by law” (Article 2 of the Act on Organization of People’s Courts 2014). For the Vietnamese jurisprudence, it is reasonable to say that “justice makes demands on private law as well as public law” [12]. The phrases “social morality” and “national tradition” are also mentioned in the Constitution (Article 14 and Article 37). Moreover, constitutional values as umbrella, broad constitutional rights can be found in the Constitution. The most notable ones are “dignity” (Article 20) and “equality” (Article 16).



#### 4.1.6. Asian Constitutional Culture Supports the Horizontal Effect of Constitutional Rights

Asian constitutional cultures (like Chinese and Vietnamese ones,...) are considered to be in favour of a “good citizen” [40], who is willing to respect the rights of others. Chang and others argue that “certain duties may be imposed either ‘vertically’ by the state on behalf of society, or horizontally, with respect to the right of others” and these expressions of constitutional duties may “blur... the liberal public–private divide and extending the sphere of legitimate state concern”. They cited Article 64 of the 1992 Vietnamese Constitution: “Parents are duty bound to bring up and educate their children into useful citizens of society. Children have an obligation to respect and care for their grandparents and parents. The State and society do not admit any discrimination among children of the same family” [40].

#### 4.2. *Horizontal Effect in Vietnam: Some Proposed Approaches*

The horizontal effect of fundamental rights is an emerging issue and is expected to gain more attention in Vietnam. The effect of constitutional rights in private law can be expressed in a more comprehensible way as models of the impact of fundamental rights on private law. In this sense, it is important to identify the roles of legal actors, especially the legislature and the judiciary in providing legal effects to fundamental rights in private law. In the current development of Vietnamese law, approaches to the topic of horizontal effect should focus on the following three main aspects.

##### 4.2.1. Towards a System of Justified Law-Making Process - The Legislature’s Functions

It is well-established that a legislative ideology of distinction between public law and private law exists in the law-making process in Vietnam. Constitutional rights have vertical effects in the area of public law: the exercise of state power is directly bound by fundamental rights. According to the spirit of Clause 2, Article 14 of the 2013 Constitution, all laws may

only limit a fundamental right if they meet the constitutional requirement of “proportionality”. There seems to be a consensus among Vietnamese scholars that the principle of proportionality means that i) the statutory limitation to a fundamental right must serve a legitimate end, ii) it must be suitable to achieve the desired end, iii) it must be the least restrictive means of doing so and iv) it must be proportionate [41,42].

The more complicated issue arises when the making of norms is related to the area of private law - typically such as the Civil Code, or mixed legislation which bears the nature of both public law and private law - typically such as housing law. The question in this case is whether the legislature is bound by the provisions of Clause 2, Article 14, and must comply with the principle of proportionality when promulgating regulations limiting fundamental rights in the field of private law (for example, see the debate about the Bill on Housing’s provisions on the time limit for apartment ownership) [43].

Legislative practices in Vietnam in recent years illustrate a heterogeneous picture. On the one hand, the legislature has seriously considered the human-rights-limitation principle laid down in Clause 2, Article 14 of the 2013 Constitution, when making private law’s norms in numerous legislation. The most typical example can be found in the debate on personality rights in the drafting process of the Civil Code 2015. Notably, a provision of the drafted Civil Code expressly stipulated that an individual name must not exceed 25 characters. However, invoking Clause 2, Article 14 of the 2013 Constitution, the legislature finally disapproved this proposal because the Constitution does not provide any legitimate reasons for limiting such personality rights [44]. On the other hand, this approach has yet to be consistently taken in the making process of other legislation. In somewhere else, when assessing legal documents that have effects of limiting the right of freedom to conduct business in Vietnam, the authors argued that the legislature had not paid due attention to applying the principle of

proportionality and the spirit of Clause 2, Article 14 of the 2013 Constitution [45].

In the current context of Vietnam, it is of utmost importance that the legislature would consistently take into account fundamental rights when making private law's norms. The role of lawmakers is vital: once lawmakers consider the horizontal effects of fundamental rights when drafting new private law provisions, constitutional values will permeate the field of private law most effectively. In this sense, the fundamental rights function as instructions to the legislatures to realise constitutional values in private law legislation.

#### 4.2.2. Towards a Paradigm of Indirect Horizontal Effects in Judicial Activities of Resolving Disputes Between Private Parties in Vietnam

In order to realise this horizontal effect of fundamental rights, besides the legislatures, the judiciary also has an important role to play. Similar to the development of judicial practice in other countries worldwide, the Vietnamese courts will have to face the basic issue of how and to what extent should the fundamental rights be invoked to resolve the private law's disputes?

In recent judgments related to disputes about the validity of "non-competition clauses" in labour contracts, the plaintiff invoked the right to profession as stipulated under Article 35 of the 2013 Constitution to argue that such clauses would be invalid since it had the effects of depriving the plaintiff of her right to profession. Surprisingly, a Vietnamese court immediately accepted the plaintiff's position and ruled that the "non-competition clauses" violated the above constitutional rights and, therefore, were absolutely invalid [46]. Based on the above analysis of paradigms of constitutional rights in private law, it seems to signal that numerous Vietnamese courts, through these judgments, adhere to the paradigm of direct horizontal effect. In that sense, constitutional rights - specifically the right to profession - have a direct binding effect on private actors in labour relations. The Constitution thus directly secures the

employee's fundamental rights not only in a legal relationship with the State but also in its relationship with the employer - the other private party.

However, Vietnamese courts seem to have overlooked the fact that the employer also has the fundamental right - the right to freedom of contract - and has a legitimate reason to include "non-competition clauses" into their employment contracts with the employee. Indeed, declaring the "non-competition clauses" invalid through merely invoking the constitutional right of employees will undoubtedly face many criticisms from scholars who emphasised that it would unduly interfere with the parties' right to freedom of contract [47]. The reasoning of these judgments cannot be justified for the simple reason that both parties are entitled to invoke their fundamental rights equally, and thus, a balancing between conflicting equal interests would be required to find a proportionate result. Therefore, a fully direct application of fundamental rights without considering the principle of proportionality is unfeasible. In this context, although the Courts invoked the constitutional rights to interfere in the contractual relationship between parties, they failed to apply the techniques of constitutional interpretation to justify their verdict.

In the current context of Vietnam, it is argued that a more feasible paradigm of influences of fundamental rights on Vietnamese private law would be the paradigm of indirect horizontal effect. In this paradigm, fundamental rights such as the right to profession present themselves to the judiciary as guiding principles or as a source of inspiration for interpreting and applying private law. In resolving a "hard case" in which the private law has not provided a fair result, the judges, with their interpretative power, need to find a way to fill such normative gaps. The judges, thus, are under a duty to concretise constitutional values and thereby seek to provide proportionate outcomes in such disputes.

Accordingly, the paradigm of indirect horizontal effect implies that courts have a duty

to develop private law in a way that takes into account constitutional values. The most critical significance of the indirect horizontal effect paradigm is that, on the one hand, it provides a mechanism to allow constitutional values to penetrate into private law. On the other hand, it still leaves room for judges to strike a balance of interests between private parties and thus produce proportionate results in private law disputes.

#### 4.2.3. Towards a Feasible Mechanism to Evaluate the Constitutionality of Legal Documents in Terms of Violating Constitutional Rights Through Adjudicating Private Law Cases

The above suggestion, which advocates for the paradigm of indirect horizontal effect in the long term, will go hand in hand with a feasible judicial review mechanism. The paradigm of indirect horizontal effect suggests that private law norms are subject to fundamental rights, and thus, the constitutionality of private law norms may be challenged in private litigation. The private law's norms are unconstitutional and thus must be struck down, if they create legal effects that disproportionately violate fundamental rights. Accordingly, through examining private law cases by civil litigation, the judiciary should be empowered to invoke the fundamental rights to evaluate the constitutionality of legal documents related to the case. Once the Court finds that such legal documents are unconstitutional, it should have the power to annul them, or at least the Court should have a summary of the trial in which it recommends amending legal documents that show signs of violating constitutional rights.

## 5. Conclusion

The theoretical paradigm of the horizontal effect of constitutional rights in private law has its origin in Europe and migrated to other parts of the world such as countries/jurisdictions in Africa, Latin America and Asia. The horizontal effect has become an important topic of constitutional law and private law around the world in recent years. However, there is still a

lack of in-depth and comprehensive research on paradigms of constitutional rights effects in Vietnam.

Against this background, this paper argues that the conceptualisation and identification of the effects of constitutional rights in Vietnamese private law may offer new insights to the development of Vietnamese private law. It is not unrealistic to predict that constitutional rights will evolve as a vital source of Vietnamese private law: private litigants will invoke their rights enshrined by the Constitution to request the Court to assess the constitutionality of the private law's norms limiting their rights. Accordingly, it will trigger new dialogues between the judiciary and the legislature in the future.

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