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**THE ROLE OF THE HORIZONTAL APPLICATION OF FUNDAMENTAL RIGHTS
IN THE PROTECTION OF FUNDAMENTAL RIGHTS OF PEOPLE WITH DISABILITIES,
WITH SPECIAL REGARD TO DISCRIMINATION IN EMPLOYMENT**

Summary of Doctoral Thesis

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1. THE TOPIC OF THE RESEARCH

The so-called ‘invisible group’ of society consists of a significant number of persons since, according to a survey conducted by the World Health Organization (‘WHO’), more than one thousand million persons, that is, approximately 16% of the world’s population experienced some sort of disability at the beginning of 2023.¹ In Hungary, based on the microcensus of 2016, 408.000 persons, that is, 4,3% of the population experienced some sort of disability.² In the United States, every fourth adult, that is, 26% of the population belongs in this category.³

Although technological and social changes facilitate the inclusion of persons with disabilities in the labour market, they still face numerous obstacles arising from dismissive attitudes or from deeply rooted stigmatisation. Persons with disabilities are often considered to be unfit for work since it is thought that they are incapable of performing tasks in the quality required in the open labour market; they are considered to be dependent on others and in need of help. In addition, they may not always be employed long-term even if they are considered fit for work because their disabilities may result in conduct amounting to a violation of the rules of conduct at the workplace. Due to these factors, the employment of persons with disabilities in protected work environments is supported. In addition, these factors led to persons with disabilities being excluded from society, becoming outcasts, or remaining outcasts.⁴

It should also be noted that not only the persons with disabilities are vulnerable, but, in the vast majority of cases, also those persons who live with them: the family members of persons with disabilities may spend their entire lives caring for these persons, not to mention the special expenses incurred due to the nature of and the extent of the impairment, and the limited possibilities of participating in the labour market. Furthermore, prejudice against persons with disabilities usually extends to the relatives of these persons as well.⁵ The Hungarian census of 2011 showed that while there was a working person in 62% of the households in the total population, this was only 58% in the households of persons with

¹ WHO: *Disability*. 7 March 2023. <https://www.who.int/news-room/fact-sheets/detail/disability-and-health> (Downloaded: 2 February 2023)

² *Mikrocenzus 2016* (KSH, Budapest, 2018) 5.

³ National Center on Birth Defects and Developmental Disabilities – Centers for Disease Control and Prevention: *Disability Impacts all of us*. 5 January 2023. <https://www.cdc.gov/ncbddd/disabilityandhealth/infographic-disability-impacts-all.html#:~:text=Up%20to%201%20in%204,have%20some%20type%20of%20disability> (Downloaded: 2 February 2023)

⁴ International Labour Organization, Employment Policy Department: *Employment for Social Justice and a Fair Globalization: Overview of ILO Programmes* (ILO, Geneva, 2012).

⁵ GREEN, Sara E: “What do you mean ‘what’s wrong with her?’”: stigma and the lives of families of children with disabilities. *Social Science & Medicine* 57 (2003) 1361–1374. [https://doi.org/10.1016/S0277-9536\(02\)00511-7](https://doi.org/10.1016/S0277-9536(02)00511-7)

disabilities.⁶ This census also showed that the psychological burdens of and the challenges of raising a child with a congenital or an acquired disability often lead to the dissolution of families.⁷

As a part of the paradigm shift in disability studies,⁸ the United Nations Convention on the Rights of Persons with Disabilities ('CRPD', 2006) takes the human rights based approach to disability, which approach recognises the social issue mentioned above and provides legal solutions for addressing this issue. The purpose of the CRPD 'is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'.⁹ In addition, the CRPD supersedes the traditional models of equality and imposes obligations both on the state and on private actors via the model of inclusive equality.

In order to facilitate the unrestricted participation of persons with disabilities in society, it is necessary to eliminate the obstacles of their participation in the primary labour market since the inclusion of persons with disabilities in the world of work would catalyse the process of their integration into society. This integration would improve not only their physical and mental health but also their quality of life, would reduce the burden on their families, would decrease the amount of the state expenditure allocated to their support, and would contribute to economic growth.¹⁰ There are continued attempts to achieve this integration. The newest product of legislation, that is, Directive (EU) 2019/1158 of the European Parliament and of the Council of 20 June 2019 on work-life balance for parents and carers and repealing Council Directive 2010/18/EU addresses, among others, the issue of promoting the employment of persons raising children with disabilities.

There are various legal solutions for improving the working conditions of and for widening the employment opportunities of persons with disabilities. These solutions include the obligation of equal treatment, the obligation of reasonable accommodation, and positive action. In this regard, the research topic of the thesis is what role, taking the paradigm shift in

⁶ 2011. évi népszámlálás. 17. A fogyatékossggal élők helyzete és szociális ellátásuk (KSH, Budapest, 2015) 16.

⁷ *Id at 15.*

⁸ Regarding the detailed definition of disability studies, see ANTAL Zsuzsanna – HERNÁDI Ilona – HOFFMAN István – HORVÁTH Péter László – JAKAB Nóra – KATONA Vanda – KOLONICS Krisztián – KÖNCZEI György – KUNT Zsuzsanna – SÁNDOR Anikó – SZÜCS Marianna: A fogyatékossggtudomány - részletes meghatározás. In: KÖNCZEI György – HERNÁDI Ilona – SÁNDOR Anikó (szerk.): *Esély? Egyenlőség? Tárgetosz?: Egy fogyatékossggtudományi kutatás tapasztalatai* (ELTE Bárczi Gusztáv Gyógypedagógiai Kar, Budapest, 2019) 19-25.

⁹ Article 1 of the CRPD.

¹⁰ KREKÓ Judit - SCHARLE Ágota: A megváltozott munkaképességű népesség foglalkoztatása és a kereslet oldali szakpolitikai eszközök. In: FAZEKAS Károly – ELEK Péter – HAJDU Tamás (szerk.): *Munkaerőpiaci Tükör 2019* (Közgazdaság- és Regionális Tudományi Kutatóközpont, Budapest, 2020) 178.

disability studies and the technological and social changes into consideration, the horizontal application (as an academic concept in constitutional law) of fundamental rights plays in legal disputes concerning the employment of persons with disabilities in the primary labour market.

My starting point in this regard is that at constitutional level, horizontal application is a constitutional law concept developed in connection with the application of the constitution. This concept affects the entire legal system, including statutory solutions, irrespective of whether these solutions are in the field of employment law or of equality law. Thus, horizontal application is such a comprehensive academic concept in constitutional law which has already affected the development of employment law and equality law and the application of which has already been analysed in academic literature.¹¹

Even though the horizontal application of fundamental rights is a complex academic concept involving several constitutional law issues, it basically addresses two questions, with the first being whether fundamental rights are necessary in private law relationships and if yes, under what circumstances these rights can be exercised, and the second being how the conflict between competing fundamental rights and other constitutional principles and values in private law relationships can be resolved.

In addition to the human rights based approach, the horizontal application of fundamental rights emphasises that the possibility to exercise the fundamental rights (human rights) enshrined in the constitution must be granted by the state in private law relationships as well, and, in case of a legal dispute, it must be possible to assert such rights before court. However, this approach is conceptually different from the approach taken by the legislation and manifested in the CRPD.

It must be emphasized that unlike classical civil law relationships, employment law relationships are characterised by inequality between the parties, which inequality is aggravated in case of persons with disabilities. This means that in those legal relationships which are governed by employment law (as a part of the system of private law in a broad sense), the interests of the employer in the private sector are usually determined by their position as an entrepreneur and these employers exercise their fundamental economic rights during their activity. The other party to an employment relationship, that is, the employee, is interested in having opportunities equal with those of others in order to earn a living. Thus, employment law is a special field of law since the attempts to protect the weaker party from the detrimental consequences of the inherent inequality between the parties and the attempts of the state to

¹¹ See GÁRDOS-OROSZ Fruzsina: *Alkotmányos polgári jog?* (Dialóg Campus Kiadó, Budapest–Pécs, 2011); KISS György: *Alapjogok kollíziója a munkajogban* (Justis, Pécs, 2010).

protect the private autonomy of employers are present simultaneously. According to the relevant academic literature, the horizontal application of fundamental rights is crucial in employment law.¹²

However, the issue of the horizontal application of fundamental rights is controversial both at domestic and at international level. With regard to the application of fundamental rights to private relationships, the academic literature on horizontal application analyses state practices of significant scientific importance, distinguishing between approaches based on vertical application, on the state action doctrine, on indirect horizontal application, and on direct horizontal application.¹³

The goal I intend to achieve is to review and to reinterpret the concept of horizontal application in order to promote the comprehensive and efficient protection of the fundamental rights of the vulnerable, ‘invisible’ group in society, that is, of the group of persons with disabilities. My analysis encompasses the state action doctrine developed in the United States of America and the Hungarian legal concepts related to horizontal application, with special emphasis on the Americans with Disabilities Act of 1990 (‘ADA’), which act played a crucial role in the development of the human rights model, and on the Hungarian legislation applicable to the employment of persons with disabilities.

With regard to the review of the concept of horizontal application, I consider it useful to analyse the relevant elements of a fundamentally different legal culture, constitutional approach, and regulatory policy. Even though these elements are rarely taken into consideration due to the differences listed below, they are of great use for the development of the relevant practice under Hungarian law. With regard to the role of the state, to the status of fundamental rights, and to equality, the approach developed in the United States differs fundamentally from the approach in Hungary (which latter approach is similar to that in Germany).

In addition to the constitutional framework, academic literature identifies a so-called ‘American model’ of specialised policies for supporting the employment of persons with disabilities, which model relies on anti-discrimination measures and freedoms based on private autonomy. However, similarly to the situation in numerous other European countries, the situation in Hungary is characterised by high expectations towards the state with regard to

¹² KISS György: *Alapjogok kollíziója a munkajogban* (Justis, Pécs, 2010) 562.

¹³ SAJÓ, András – UITZ, Renáta (eds.): *The Constitution in Private Relations: Expanding Constitutionalism* (Eleven International Publishing, The Hague, 2005); BARAK, Aharon: Constitutional Human Rights and Private Law. In: FRIEDMAN, Dan – BARAK-EREZ, Daphne (eds.): *Human Rights in Private Law* (Bloomsbury Publishing, 2001) 13-42; KUMM, Mattias: Who's Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law. *7 German Law Journal* 4 (2006) 341; GÁRDOS-OROSZ Fruzsina: *Alkotmányos polgári jog?* (Dialóg Campus Kiadó, Budapest–Pécs, 2011).

achieving a balance in the field of employment, which may result in employment quotas or other forms of state intervention concerning persons with disabilities.¹⁴

2. THE METHODOLOGY OF THE RESEARCH

The methodology of the research was strongly influenced by the conclusion that the academic dispute over the concept of horizontal application is still about whether the indirect model (that is, expecting to have the judge apply the constitutional norms in the course of interpreting legal provisions), the direct model (that is, expecting to have the judge apply the constitutional norms directly), or the American model of the state action doctrine (that is, minimising the role of the state) is to be preferred when a legal dispute over fundamental rights arises between private individuals, for example, when an employee is discriminated against because of their disability. In my opinion, the above approach is unlikely to yield practical results, and therefore I intend to examine the usefulness of the academic concept from a fundamentally different aspect.

First, I present the concept of horizontal application via a descriptive method based on academic literature. Then, I illustrate and examine the related issues via analysing relevant cases. The analysis includes the presentation of American discourses on the issues examined and the examination of the applicable Hungarian legal provisions and the practice related to them. The thesis examines the relevant American academic discourse and practice for the purposes of the reflexive interpretation of, the assessment of, and the development of the relevant Hungarian legislation and only to the extent necessary regarding these purposes. In the analysis, I consider the American practice to be the best practice and emphasise the importance of the conclusions which may be drawn from the differences between the American and the Hungarian practice.

In addition to the descriptive parts of the thesis, I include analyses as well, especially in the third chapter, in which I analyse the essential elements of the various solutions in employment law. The aim of my analysis is to discover how and to what extent arguments based on fundamental rights appear in the current practice focused on discrimination, what effects and academic expectations influenced the development of these arguments, how these

¹⁴ GOSS, David – GOSS, Fiona - ADAM-SMITH, Derek: Disability and employment: A Comparative Critique of UK Legislation *International Journal of Human Resource Management* 11 (2000) 807. <https://doi.org/10.1080/09585190050075132>

arguments are applied in practice, and which approaches may be adapted to the Hungarian practice.

3. THE SUMMARY OF THE RESULTS

In the twenty-first century, it is obvious that the fundamental rights affect not only the relationship between individual and state but also the relationships between private persons. The discussion of the horizontal application of fundamental rights is becoming more and more intense and divisive not only in the Hungarian jurisprudence but also at international level. The aim of the thesis is to examine the horizontal application as a concept in constitutional law (with special regard to the application of this concept in Hungary and in the United States of America) in order to facilitate a more efficient legal solution of a pressing social issue, namely the discrimination of persons with disabilities in the world of work.

The analysis of the American and the Hungarian practice related to horizontal application shows that approaching horizontal application as a model does not ensure the efficient application of all fundamental rights. The practice of the Constitutional Court of Hungary is confined to the limits of the model of indirect horizontal application and defines the concept of horizontal application in an abstract manner, which approach results in the Constitutional Court of Hungary imposing, via defining exceptions, different expectations on the courts with regard to the application of different fundamental rights. For example, there are fundamental rights with regard to which the Constitutional Court of Hungary only expects the courts to take the fundamental right into consideration in some manner; however, there are also fundamental rights with regard to which the assessment of necessity and proportionality is expected from the courts. In addition, another disadvantage of the model-based approach is that it shifts the emphasis from the efficient application of fundamental rights to issues related to legal concepts in constitutional law. While the main question in the American practice is ‘whether the private individual or private organisation violating the right performs a public function’, the main question in the Hungarian practice has changed from the issue of horizontal application to a debate about the relationship between the Hungarian courts and the Constitutional Court of Hungary.

After having examined the relevant American and Hungarian practice, I wish to emphasise the following as guidance on the analysis of the practice related to discrimination.

In order to ensure the efficient protection of rights, it is essential to have the prohibition of discrimination apply in a more direct manner. When resolving legal disputes, the direct

application of fundamental rights may be promoted by considering the circumstances of the adoption of the relevant legislation, the aim of the relevant legislation, and the fact that if it is not declared that the right was violated, the discriminatory practice may continue.

Simultaneously with the development of constitutional law, the paradigm shift in disability studies and the resulting changes in the relevant legislation also aim to improve the application of the fundamental rights (human rights) of persons with disabilities. International law addresses the issue of the discrimination of persons with disabilities by taking the human rights model and the concepts of fundamental rights into consideration and, based on these, provides various legal solutions and imposes, via the model of inclusive equality, obligations both on states and on private actors in order to eliminate the obstacles faced by persons with disabilities.

A development similar to that in international law may be perceived both in the American and in the Hungarian policies regarding disability, namely the aim to provide the highest possible level of protection for the rights of persons with disabilities. We have seen that although the human rights model is outstanding, it poses challenges both to legislation and to the application of law. In the relevant legislation and in practice, the medical model of disability, the social model of disability, and the human rights model of disability are present simultaneously, which does not promote the efficient protection of rights.

The efficiency of the legal solutions aimed to increase the participation of persons with disabilities in the labour market depends on the proper definition of the category of those persons to whom the rights are granted, that is, those persons with disabilities who are entitled to protection in the world of work, and also on whether the given legal solution actually fulfils its intended purpose. In order to promote the efficient protection of rights, In order to promote the efficient protection of rights, I use the broad definition of ‘persons with disabilities’ in employment law, which definition is applicable to as many persons in similar situations as possible. Based on the CRPD, I recommend avoiding both derogatory terminology and the paternalistic approach. In addition, concepts must be defined and used in such a manner that they are clearly distinguished from each other, for example, the concept of ‘persons with disabilities’ and the concept of ‘persons with reduced capacity to work’ not being interchangeable.

In addition, I consider it important to have the definition based on the interpretation of disability in such a social context which takes the concept of ‘socially created barriers’ into consideration. In this regard, a category introduced by the ADA, namely the category of persons ‘regarded as having such an impairment’, is of special importance since, instead of focusing on

the characteristics of disability, this category focuses on exposure to any social or physical discrimination. In order to comply with the relevant aspects of constitutional law and to achieve the efficient protection of rights, it is important to take those opinions in academic literature into account as well which wish to regulate the concept of ‘disability’ in the world of work by considering the capacity to be employed and other factors in connection with the possibility of employment, such as the element of the ‘hindrance to the exercise of a professional activity’ under the Employment Equality Directive or the requirement of qualification in the ADA.

Both in Hungary and in the United States of America, the prohibition of the discrimination of persons with disabilities with regard to their participation in the labour market is regulated not only at constitutional level but also at statutory level, and therefore the prohibition of discrimination is directly applicable in certain private law relationships, including employment. With regard to the requirement of reasonable accommodation, it can be established that the academic approach to this concept and the extent to which this concept is regulated by law differ at international level, including differences between the American and the Hungarian approach and regulation.

The cases analysed in Chapter III indicate that despite the relevant legal regulation, the above concepts are not applied efficiently to persons with disabilities in the world of work. The efficiency of the relevant legal regulation is hindered by the fact that the purposes of the legal regulation are often interpreted without taking the relevant fundamental rights into consideration, by the fact of imposing the obligation of reasonable accommodation via employment law principles and general legal provisions, and by the shortcomings of the set of criteria associated with the obligation of reasonable accommodation.

Based on the circumstances mentioned above, it can be established that the legal regulation is not enough by itself for the creation of an open, inclusive, and accessible labour market: it is also necessary to have the relevant legal provisions applied in such a manner that the protection of the fundamental rights of persons with disabilities and the inclusion of these persons in society are prioritised as well. The determination of measures suitable for the promotion of the rights of persons with disabilities and for the prevention of the violation of these rights is necessary but not sufficient.

In order to remedy the issues related to the approach described above and to the conceptual shortcomings, I would recommend, instead of the model-based approach to the horizontal application of fundamental rights, the implementation of an independent approach which provides more coherent answers to the challenges of the fight against disability-based discrimination in the world of work. In order to promote the more efficient protection of rights,

I consider it important to emphasise that the complex and holistic approach I recommend makes it necessary to recognise the role of courts in the protection of fundamental rights. Based on these, I define the holistic approach to the horizontal application and the related role of courts in the following way:

A key feature of the holistic approach to horizontal application is the relevance of fundamental rights in private law relationships. In this regard, it is necessary to have the judge identify how the fundamental rights of the person with disability are affected in the case heard. In addition, when interpreting the law, the judge must pay attention not only to the relevance of fundamental rights with regard to the legal provision examined but also to the purpose of the protection granted by law. This means that an obligation to protect fundamental rights is imposed on the judge, which obligation includes that the judge must interpret the aims and/or purposes of the legal provisions prohibiting discrimination in accordance with the fundamental rights concerned and with the legal developments based on the results of disability studies. By applying the holistic approach to horizontal application, it may be possible to prevent the judge from interpreting the purpose of the legal provisions at issue without considering the fundamental rights concerned.

In addition, the holistic approach to horizontal application provides guidance on applying the (academic) results of constitutional law when assessing individual cases and deciding individual disputes in the field of employment law. In this regard, the holistic approach to horizontal application would ensure that the obligation of reasonable accommodation (as a concept specific to the given field of law) is interpreted in accordance with the applicable fundamental rights, which would render this concept a link between the dignity of persons with disabilities and their right to work at an inclusive workplace.

The holistic approach to horizontal application would also render the results of the academic studies of fundamental rights applicable to the issue of the discrimination of persons with disabilities. In order to ensure the efficient application of the right of persons with disabilities to work at an inclusive workplace, it is necessary to carefully assess the relevant circumstances when determining whether something constitutes a disproportionate burden. In this regard, it may be convenient to apply the proportionality part of the test of necessity and proportionality. In addition, when determining whether something constitutes a disproportionate burden, one of the circumstances to be assessed is the related positive effect, that is, what advantages employing the person with disability would give with regard to the attitude of the other employees, to the promotion of diversity, and to the other candidates with disabilities.

By applying the holistic approach to horizontal application, the judge would react to social, economic, and political changes, would interpret the legal provisions in such a manner that the underlying constitutional goals and values would be taken into consideration as well, and would endeavour to take such a proportionate and balanced approach which would ensure the application of the relevant fundamental rights and constitutional values.

Thus, in accordance with the original purpose of the concept, the holistic approach to the horizontal application would mean such a ‘complex’ approach – especially when the law is applied based on understanding and with a human rights based approach – which would render the application of fundamental rights efficient in private law relationships as well. In addition, the concept I recommend has been designed in such a manner which would neither make private law claims become disputes on human rights nor make private law legislation redundant. Finally, by acknowledging the relevance of fundamental rights in private law relationships as well, the holistic approach to horizontal application would make it even more accepted – in the society as a whole – that fundamental rights may be violated by private actors, by private individuals, by business associations, and by organisations as well, and that fundamental rights may be asserted not only against the state but also against private actors.

4. LIST OF PUBLICATIONS

- BEDŐ Renáta: The Notion of “Person with Disability” in Employment Discrimination Law - An Analysis of Laws in Hungary and the United States. *Romanian Journal of Comparative Law* 12 (2021) 66-102.
- BEDŐ Renáta: Legal Concepts to Increase Participation of People with Disabilities in the Workplace: An Analysis of Laws in Hungary and the United States through Lens of Inclusive Equality. *MTA Law Working Papers* 11 (2021) 1-15.
- BEDŐ Renáta: The Notion of “Person with Disability” in Hungary with Special Regard to Employment. *MTA Law Working Papers* 39 (2020) 1-26.
- GÁRDOS-OROSZ Fruzsina – BEDŐ Renáta: Az alapvető jogok érvényesítése a magánjogi jogviták során – az újabb alkotmánybírósági gyakorlat (2014–2018). *Alkotmánybírósági Szemle* 1 (2018) 3-15.
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