Does the Federal Constitution only have a vertical effect, having regard to Beatrice A/P AT Fernandez v Sistem Penerbangan Malaysia & Ors [2005] 3 MLJ 681?

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WHAT WAS HELD IN BEATRICE FERNANDEZ

I.

"Constitutional law, as a branch of public law, deals with the contravention of individual rights by the Legislature or the Executive or its agencies. Constitutional law does not extend its substantive or procedural provisions to infringements of an individual's legal right by another individual."

APPLICATION OF BEATRICE FERNANDEZ IN SUBSEQUENT CASES

"[26] The interpretation accorded by Beatrice's case on the constitutional effect is called 'vertical effect' which essentially stipulates that constitutional law, as a branch of public law, only addresses the contravention of an individual's rights by a public authority."

AirAsia Bhd v Rafizah Shima bt Mohamed Aris [2014] 5 MLJ 318 (CA)

USE OF 'FUNDAMENTAL RIGHTS' & 'FUNDAMENTAL LIBERTIES' INTERCHANGEABLY

Nik Elin Zurina bt Nik Abdul Rashid & Anor v Kerajaan Negeri Kelantan [2024] 2 MLJ 150 (FC)

"[70] Our FC forms the basis of the existence of all three arms of our Federal Government and all the State Governments. There are portions within it which govern Malaysian territory, the Yang di-Pertuan Agong, the Executive, the Legislatures (Federal and State), the Judiciary, various important public commissions, fundamental rights, citizenship and so on."

“On 31 August 1957, we inherited a dynamic Federal Constitution (’the Constitution’) which conferred upon our citizens some of the most cherished and valuable rights that any human being can aspire for. Among these are the fundamental liberties enshrined in Part II.”

SIVARASA RASIAH V BADAN PEGUAM MALAYSIA & ANOR [2002] 2 MLJ 413 (CA)

The Reid Commission Report 1957

"A Federal constitution defines and guarantees the rights of the Federation and the States: it is usual and in our opinion right that it should also define and guarantee certain fundamental individual rights which are generally regarded as essential conditions for a free and democratic way of life … The guarantee afforded by the Constitution is the supremacy of the law and the power and duty of the Courts to enforce these rights and to annul any attempt to subvert any of them whether by legislative or administrative action or otherwise."

DIRECT VS INDIRECT HORIZONTALITY

DIRECT

Individual is able to plead before the courts that fundamental constitutional rights be applied directly to a private relationship

INDIRECT

Fundamental constitutional right attaches to a different right or obligation found in common law

IRELAND

I. Meskell v Córas Iompair Éireann [1973] IR 121
(Supreme Court of Ireland)

II. Lovett v Gogan [1995] 3 IR 132
(Supreme Court of Ireland)

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Hanrahan v Merck Sharp & Dohme [1988] IESC 1, [1988] ILRM 629 (Supreme Court of Ireland)

"24. ... The implementation of those constitutional rights is primarily a matter for the State and the courts are entitled to intervene only when there has been a failure to implement or, where the implementation relied on is plainly inadequate, to effectuate the constitutional guarantee in question. In many torts - for example, negligence, defamation, trespass to person or property - a plaintiff may give evidence of what he claims to be a breach of a constitutional right, but he may fail in the action because of what is usually a matter of onus of proof or because of some other legal or technical defence. A person may of course in the absence of a common law or statutory cause of action, sue directly for breach of a constitutional right (see *Meskell v C.I.E.* IR 121); but when he founds his action on an existing tort he is normally confined to the limitations of that tort. It might be different if it could be shown that the tort in question is basically ineffective to protect his constitutional right."

GERMANY

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Lüth 1 BvR 400/51
(Federal Constitutional Court of Germany)

INDIA

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Kaushal Kishor v. State of Uttar Pradesh & Ors (Supreme Court of India)

"77. All the above decisions show that on a casetocase basis, this Court applied horizontal effect, considering the nature of the right violated and the extent of obligation on the part of the violator."

"78. … The original thinking of this Court that these rights can be enforced only against the State, changed over a period of time … Therefore, we would answer Question No. 2 as follows:

"A fundamental right under Article 19/21 can be enforced even against persons other than the State or its instrumentalities""