

ARTICLE

Transnational Fundamental Rights: Horizontal Effect?

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1 Fundamental Rights Beyond the Nation State

As regards fundamental rights, transnational constitutionalism is completely plausible. Who could deny the worldwide validity, higher right and constitutional rank of universal human rights? The alternative would be the hard-to-swallow opposing view of comprehending fundamental rights in nation-state law as higher-ranking constitutional law 'in accordance with their nature', but qualifying the same fundamental rights in the various agreements on transnational human rights as ordinary law, with no priority over other legal rules. It would be equally difficult to make the validity of fundamental rights in the various transnational regimes dependant on the contingencies of agreements under public international law.¹ Their claim to universality also demands worldwide validity in legal terms. Finally (and particularly interesting in our case), it will be difficult to deny the effects of fundamental rights in non-state areas of the global against private transnational actors. The numerous scandals involving breaches of human rights by transnational corporations that have been brought before national or international courts, have frequently – despite considerable – uncertainty regarding the basis of their validity – seen the courts ruling in favour of protecting fundamental rights against private actors.²

Does this mark a renewed return of natural law? An argumentation based on natural law can quite successfully hold its ground, at any rate in terms of the worldwide validity of fundamental and human rights.³ Legal positivism clearly has little chance against the pathos of human rights, even where this does not involve the technical question of their legal validity. But given the incontestable pluralism of

- 1 The major differences between guarantees of human rights under international law are documented by Brigitte Hamm, *Menschenrechte: Das internationale Normensystem des 21. Jahrhunderts*, (Opladen: Leske & Budrich, 2003).
- 2 For detailed analyses: Dawn Oliver and Jorg Fedtke (eds.), *Human Rights and the Private Sphere: A Comparative Study* (New York: Routledge, 2007); Olivier De Schutter (ed.), *Transnational Corporations and Human Rights* (Oxford: Hart, 2006); Sarah Joseph, *Corporations and Transnational Human Rights Litigation* (Oxford: Hart, 2004).
- 3 A sophisticated neo-natural law conception of transnational human rights can be found in Otfried Höffe, *Demokratie im Zeitalter der Globalisierung* (München: Beck, 2002); a different human rights theory, based on Chomsky's universal moral grammar, is to be found in Matthias Mahlmann, 'Varieties of Transnational Law and the Universalistic Stance', *German Law Journal*, 10 (2009): 1325-1336.

world cultures, particularly in view of interreligious conflicts, constructing universally valid human rights under natural law will always lead to a swift collapse.⁴ If however natural law and positive law are equally doubtful, what is the basis for the claim of the global validity of human rights? It cannot depend on the outcome of the philosophical controversy between universalists and relativists. Is it simply the *'colère publique'* at work here as the source of global law, producing human rights by means of scandalisation?⁵ But how then would such social standards become legally valid? In our context, namely the constitutionalisation of global private law regimes, legal validity can be questioned in two different dimensions: (1) How, starting from the catalogue of nation states' fundamental rights and the positivisation of human rights in public international law agreements, can fundamental rights be enforced in transnational regimes, whether these are public, hybrid or private? (2) Are fundamental rights also valid within such regimes with regard to private actors, i.e. do fundamental rights also have a third-party or a horizontal effect in the transnational sphere?

1.1 Do Nation States' Fundamental Rights Have Any Extraterritorial Effect?

Ladeur and Viellechner give a decided answer to the question of the validity of fundamental rights in transnational 'private' regimes.⁶ They are as sceptical of the view that transnational fundamental rights will spontaneously emerge as they are of a general constitutionalisation of public international law that would also apply to such regimes. Their solution, by contrast, is to expand nation states' fundamental rights into transnational 'private' regimes. They give three reasons for this: the intensified reciprocal porosity of national and international legal orders, the communicative networking of national constitutional courts and the increasing exchangeability of private and public law.

This construction is suggestive, as it can straightforwardly attribute the problematic transnational validity of fundamental rights to secure nation-state sources of law, while at the same time productively applying the highly developed doctrine of nation states' basic rights to transnational regimes. But, despite this suggestiveness, their category error cannot be ignored. 'Expansion' is an ambivalent term, covering the difference between two fundamentally different processes. In the language of the theory of the source of law, the authors equate the sources of the content of transnational fundamental rights with the sources of their validity.⁷ Or, in other words, the authors do not take account of the fact that decisions and

4 On this and on ways to escape the alternatives of universalism and relativism, see the subtle argumentation of Christoph Menke and Arnd Pollmann *Philosophie der Menschenrechte* (Hamburg: Junius, 2007), 71 ff.

5 Thus apparently Niklas Luhmann *Law as a Social System* (Oxford: Oxford University Press, 2004), 469 ff. and Andreas Fischer-Lescano *Globalverfassung: Die Geltungsbegründung der Menschenrechte* (Weilerswist: Velbrück, 2005), 67 ff.

6 Karl-Heinz Ladeur and Lars Viellechner, "Die transnationale Expansion staatlicher Grundrechte: Zur Konstitutionalisierung globaler Privatrechtsregimes", *Archiv des Völkerrechts*, 46 (2008): 42-73, 46 ff.

7 On the doctrine of the sources of law today, see for instance Klaus F. Röhl and Hans C. Röhl, *Allgemeine Rechtslehre: Ein Lehrbuch* (Köln: Heymann, 2008), 519 ff.

argumentations in the legal system form closed cycles, which may well be reciprocally irritating but do not merge one another.⁸ There is no doubt that nation states' fundamental rights provide the model for the content of their transnational equivalents; nor is there any doubt that the content of the standards, principles and doctrines of basic rights is transferred in a transnational argument cycle. This however tells us nothing about whether – and if so how – fundamental rights actually achieve normative validity in transnational regimes. This requires a decision, an act of validation as part of a legally institutionalised legislation process, the need for which cannot be concealed by transferring the content of the standards of fundamental rights.⁹ Nor, in view of the fundamentally different forms of nation-states' standards of fundamental rights, is it possible to speak of an 'expansion' of these standards: at best we can speak of a choice between them. Nor do the reciprocal porosity of national and international law or the exchangeability of public and private law help here. A legally structured and constitutionally(!) legitimised process must be identified to positivise fundamental rights as valid and binding within a transnational regime. Here, however, the authors simply lead us into the mysterious darkness of 'interlegality'.¹⁰ In sum, 'expansion' might simply be a form of transitional semantics that does indeed realise the horizontal effect of fundamental rights in transnational regimes, but cannot yet admit the regime's own constitutional contribution. Such transitional semantics forms part of the debate about the lawgiving role of case law in democratic nation states.¹¹ As an effective palliative, this semantics uses the indisputable validity of national constitutional law, the 'expansion' of which over two borders would not seem to cause any great uneasiness.

The same objection applies to similar attempts to base the validity of transnational fundamental rights upon the universal validity of general legal principles (of the civilised peoples?). A transnational validity of general constitutional prin-

8 Luhmann, note 5, 338 ff.

9 Daniel Klösel, *Prozedurale Unternehmensverfassung: Zur Rekonstruktion der privatrechtlichen Kontrollvorbehalte für eine private Regelung im Fall von Compliance-Richtlinien multinationaler Konzerne* (Baden-Baden: Nomos, 2011), Manuscript 62. This once more moves the positivisation decision in the regime to the forefront.

10 Ladeur and Viellechner, note 6, 45. The term, introduced by Santos, marks the problem of the difficult relationship between plural legal orders rather than its solution: 'different legal spaces superimposed, interpenetrated and mixed in our minds, as much as in our actions, either on occasions of qualitative leaps or sweeping crises in our life trajectories, or in the dull routine of eventless everyday life', Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation* (Evanston: Northwestern University Press, 2003), 437. See on this Marc Amstutz and Vagios Karavas, "Rechtsmutation: Zu Genese und Evolution des Rechts im transnationalen Raum", *Rechtsgeschichte* 8 (2006): 14-32; Marc Amstutz, "In-Between Worlds: Marleasing and the Emergence of Interlegality in Legal Reasoning", *European Law Journal*, 11 (2005): 766-784.

11 Despite the pioneering work of Josef Esser, here too the transitional semantics (*Rechtserkenntnis*, case law as *Gewohnheitsrecht*) are not yet dead, even if they lie on their deathbed. See the undetermined formulations in Röhl and Röhl, note 7, 571 ff., Josef Esser, *Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts: Rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre* (Tübingen: Mohr Siebeck, 1956).

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ciples is assumed by Kumm but he is not at all clear on the question of which law-making processes carry its positivisation. Nor does he distinguish clearly between argumentation and decisions.¹² The comparative law method, loved by all, also exposes itself to this objection when used to support the validity of transnational standards.¹³ Neither differentiates clearly enough between the incontestable exemplary function of principles or the differing content of legal orders on the one hand, and the legal decision-making process regarding their validity on the other.

1.2 *Global Colère Publique*

Does this then mean that the *colère publique*, defined by Emile Durkheim as a source of law, directly validates fundamental rights?¹⁴ Luhmann calls it the 'contemporary' paradox that globally, given the turbulent world situation and the vanishing relevance of state actions, fundamental rights are not, as is usually the case, first set as standards that may subsequently be breached, but are rather validated by their very violation and the subsequent outcry.¹⁵ The actual existence of this paradox is confirmed by the following familiar sequence of events: a scandal develops as protest movements and NGOs uncover dubious practices by multinational corporations; these practices are then decried as violations of human rights in the media; they are finally punished by the courts.¹⁶ Ladeur and Viellechner are of course right in objecting to the making of laws purely on the basis of scandal, beyond statist international law, in that the 'normative expectations of global society' cannot alone justify lawmaking: to do this, institutionalisation is required to anchor such expectations, and this cannot solely be attributed to the *colère publique*.¹⁷ But Luhmann expressly calls this practice a paradox. And paradoxes cannot of themselves constitute legal validity. Only a solution to the paradox will permit law to arise from scandalisation. And here we must closely observe how

- 12 Mattias Kumm, "The Best of Times and the Worst of Times: Between Constitutional Triumphalism and Nostalgia", in *The Twilight of Constitutionalism?*, eds. Petra Dobner and Martin Loughlin (Oxford: Oxford University Press, 2010), 201-219. On the application of general legal principles in the *lex mercatoria*, see Ursula Stein, *Lex mercatoria: Realität und Theorie* (Frankfurt: Klostermann, 1995), 171 ff.
- 13 It is intended to prove the universal validity of an *ordre public transnational* in which fundamental rights play an important role, but says nothing about the lawgiving role of the conflict resolution body which, having compared various legal orders, implements a concrete norm: see for example Pierre Lalive, "Transnational (or Truly International) Public Policy and International Arbitration", in *Comparative Arbitration Practice and Public Policy in Arbitration*, ed. Pieter Sanders (Antwerpen: Kluwer, 1987), 257-318, 295.
- 14 Emile Durkheim, *The Division of Labor in Society* (New York: Free Press, 1933), 77 ff.
- 15 Luhmann, note 5, 581. For a detailed analysis of the paradoxes in fundamental rights, Gert Verschraegen, 'Systems Theory and the Paradox of Human Rights', in *Luhmann on Law and Politics: Critical Appraisals and Applications*, ed. Michael King (Oxford: Hart, 2006), 223-245.
- 16 See for example the case study of the Argentine Madres by Fischer-Lescano, note 5, 31 ff. Further detailed studies in Fn. 2.
- 17 Ladeur and Viellechner, note 6. Their argument works against their own solution of the nation-state expansion of fundamental rights, as they cannot substantiate the 'institutionalisation that will ensure expectations' in the expansion, but only in the norm-giving act of the transnational regime.

today's developing legal practice solves this paradox, and which institutionalised distinctions it draws on to validate fundamental rights in the face of such scandalisation. And here too, valid law can only arise where the condemnation of dubious practices as human rights violations under the legal code is for its part reflexively observed by operations governed by the legal code and incorporated into the recursiveness of legal operations.¹⁸

1.3 Regime-Specific Standards of Fundamental Rights

Rather than assuming an expansion of national fundamental rights or designating social norms as legal rules, it is far more plausible to rely on the concrete decisions regarding the validity of such rights in regime-specific institutions, as Renner does in his detailed analysis of private global regimes.¹⁹ Taking as examples the judicial sequence of the transnational arbitral tribunals under the *lex mercatoria*, the investment tribunals and the internet panels of the ICANN, he shows in detail how these instances, step by step, positivise concrete standards of fundamental rights for their respective regimes within a legally regulated procedure that is, for its part, structured by private ordering. He also makes clear that neither national fundamental rights, nor the rules of international private law, nor mere social norms form a suitable basis for the validity of fundamental rights in these regimes. Nor is the increasing communicative networking of national courts, cited by Ladeur and Viellechner, capable of ensuring that fundamental rights have validity in transnational regimes. This networking is quite correctly understood as underpinning a worldwide juridical system. But strict internal borders of legal validity exist within world law, and these can only be crossed by an explicit validity decision – in this case, private arbitration.

It thus cannot be emphasised strongly enough that it is the decision-making practice of transnational regimes themselves that is sufficient to validate fundamental rights within their borders. Thus, above and beyond state positivism, the

18 Social norms then become law when they are integrated into the legal system of world society in such a way that operations guided by the binary legal code are in turn observed by operations guided by the binary legal code and incorporated into the legal system. More details in Gunther Teubner, "Global Bukovina: Legal Pluralism in the World Society", in *Global Law Without A State*, ed. Gunther Teubner (Aldershot: Dartmouth Gower, 1997), 3-28, 11 ff. In the same way, although with different nuances Johannes Köndgen "Privatisierung des Rechts: Private Governance zwischen Deregulierung und Rekonstitutionalisierung", *Archiv für die civilistische Praxis*, 206 (2006): 477-525, 508 ff.; Graf-Peter Calliess, *Grenzüberschreitende Verbraucherverträge: Rechtssicherheit und Gerechtigkeit auf dem elektronischen Weltmarktplatz* (Tübingen: Mohr Siebeck, 2006), 182 ff.; Erich Schanze, "International Standards: Functions and Links to Law", in *International Standards and the Law*, ed. Peter Nobe (Bern: Staempfli, 2005), 83-103. Nor does Fischer-Lescano, note 5, 67 ff. simply equate the expectations raised by the *colère publique* with legal norms, but only allows legal validity to come into being via the lawmaking process of different global actors that is guided by secondary norms. Hart's concept of secondary rules is open to the interpretation that a rule of recognition can develop as a legal custom and thus serve as the basis for genuine law. See Hugh Collins, "Flipping Wreck: Lex Mercatoria on the Shoals of Ius Cogens", in *Contract Governance*, eds. Stefan Grundmann *et al.*, (Amsterdam: Kluwer, 2012), forthcoming.

19 Moritz Renner, *Zwingendes transnationales Recht: Zur Struktur einer Wirtschaftsverfassung jenseits des Staates* (Baden-Baden: Nomos, 2010), 91 ff., 199 ff.

'social' positivisation of fundamental rights is the driving force behind their universalisation. The transnational validity of fundamental rights occurs as a matter of course in established public international law regimes, if, as happens in the various human rights conventions, international agreements themselves guarantee the protection of fundamental rights. A more difficult situation arises where, as in the World Trade Organization, a process of judicial self-determination commences on the basis of an international law agreement, with genuine court institutions developing from simple panels designed for conflict resolution which, in the Appellate Body, even have a second instance. If fundamental rights are recognised here, it is these conflict resolution bodies themselves which, in a process similar to common law, positivise the standards of fundamental rights that are valid within the World Trade Organization.²⁰ The same can be said of the private arbitral tribunals of the ICC, the ICSD and the ICANN when they positivise fundamental rights. They of course inform themselves from different nation-state orders of fundamental rights, general legal principles, doctrinal models of fundamental rights and even philosophical arguments. But the actual validity decision is made by the arbitral tribunals themselves when they select between different standards of fundamental rights in their individual rulings and specify which fundamental rights are bindingly valid in the particular regime. And scandalisation by means of protest movements, NGOs and the media are indeed involved in such lawmaking processes for fundamental rights where the scandalised norms are, via secondary standardisations, integrated into the world legal system that goes far beyond national law and comprehends even social law.

National courts are nevertheless also considerably involved in the lawmaking processes of transnational regimes, as they are often called upon to recognise and enforce arbitral decisions. They then become particularly relevant for the regime constitutions if they refuse to enforce transnational arbitral rulings on the grounds of the *ordre public*, because they violate fundamental rights.²¹ Such individual decisions mean that they are also participating in the gradual and utterly self-contradictory development of a transnational common law of fundamental rights. We should not succumb here to the state-positivistic temptation to interpret the fact that national courts co-operate in transnational legislation as meaning that 'in the last instance' national law nevertheless becomes the source of law of the fundamental rights in transnational regimes. This argument has already been demonstrated as false in the debate about the *lex mercatoria*, when an attempt was made to anchor the *lex mercatoria* in national law on the basis of the

20 See for example Joel P. Trachtman, "The Constitutions of the WTO", *European Journal of International Law*, 17 (2006): 623-646, 640 ff.

21 Paul Schiff Berman, "Global Legal Pluralism", *Southern California Law Review* 80 (2007): 1155-1238, 1271. There are of course limits on the enforcement of foreign legal rulings, but national courts co-operate towards the development of transnational law via *ordre public* reviews. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, art. 5, 2(b), 21 U.S.T. 2517, 2520, 330 U.N.T.S. 38, 42 (permits review by national courts in cases 'contrary to the public policy of the enforcing state').

exequatur decisions of national courts.²² This is based on an incorrect demarcation of the national and the transnational that cannot comprehend the entwining of the two.²³ The role of nation-state courts can only be adequately understood if we recognise that their legal acts have dual membership in two different chains of validity decisions by autonomous legal orders. These court decisions are and remain operations of the relevant national law, promoting the development of its standards, but they are at the same time members of the judicial sequences of the autonomous regime law in whose lawmaking they also participate. This dual membership of decisions in different chains of operations is not unusual.²⁴ It is practically the rule where autonomous systems develop structural and operational linkages. This leads to an entwinement – but not a fusion – of national and transnational legal orders. This is because the judicial sequences only ‘meet’ for a moment in the individual judicial ruling; their common validity operations otherwise have very different pasts and futures in their respective legal orders.

The term ‘common law constitution’ appropriately describes how fundamental rights are positivised in transnational public and private regimes by means of an iterative decision-making process that occurs between the decisions of arbitral tribunals, national courts, contracts between private actors, social standardisations and the scandalisation actions of protest movements and NGOs.²⁵ Klabbers aptly formulates the answer to the choice posed here:

‘is constitutionalization a spontaneous process, a bric-à-brac of decisions taken by actors in a position of authority responding to the exigencies of the moment, or is it rather the result of a top-down process, in which a constituent authority designs a constitution? The latter is unlikely to occur on the global level; the former, almost by default, might be more likely. This is not to suggest that the global constitution will be the aggregate of a number of sector constitutions; it is rather to suggest that the global constitution will be a patchwork quilt, and will most likely be identified rather than written in any meaningful sense: a material rather than a formal constitution. In Hurrell’s

22 See for example Stein, note 12, 99, 163.

23 Subtler ideas on the entwining of the two spheres are developed by Saskia Sassen, *Territory-Authority-Rights - From Medieval to Global Assemblages* (Princeton: Princeton University Press, 2006).

24 Luhmann, note 5, 440; see also in other theory contexts Jean-Francois Lyotard, *Le différend* (Paris: Les Editions de Minuit, 1983), 51.

25 The following also argue towards a common-law-like development of transnational fundamental rights: Kumm, note 12; Vagios Karavas, “Grundrechtsschutz im Web 2.0: Ein Beitrag zur Verankerung des Grundrechtsschutzes in einer Epistemologie hybrider Assoziationen zwischen Mensch und Computer”, in *Soziale Netze in der digitalen Welt: Das Internet zwischen egalitärer Teilhabe und ökonomischer Macht*, eds. Christoph Bieber *et al.*, (Frankfurt: Campus, 2010), 301-326; Christian Walter, “Constitutionalizing (Inter)national Governance: Possibilities for and Limits to the Development of an International Constitutional Law”, *German Yearbook of International Law* 44 (2001): 170-201.

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term, it will be a ‘common law constitution’ rather than a more continental type of constitution.’²⁶

2 The Obligation of Private Transnational Actors to Abide by Fundamental Rights

2.1 *Beyond State Action*

Even if transnational regimes, public and private, positivise their respective standards of fundamental rights in this way, the question nevertheless remains whether these fundamental rights bind only state actors or whether they also apply to private actors.²⁷ The question of whether fundamental rights are binding on private persons is much more acute in the transnational than in the national sphere. This is because multinational corporations regulate whole areas of life here, so that we can no longer avoid the question of the validity of fundamental rights in respect of such corporations. It is however extraordinarily difficult to invoke the state action doctrine here as probably the best-known model solution of the constitutional law of the nation state.²⁸ According to this doctrine, private actors can only violate the fundamental rights of others if an element of state action can be identified in their actions, whether organs of the state are involved in their actions or they are exercising public functions.²⁹ In the transnational sphere, however, there is none of the general ubiquity of state action that can be

- 26 Jan Klabbbers, “Setting the Scene”, in *The Constitutionalization of International Law*, eds. Jan Klabbbers *et al.*, (Oxford: Oxford University Press, 2009), 1-44 23 with reference to Andrew Hurrell *On Global Order* (Oxford: Oxford University Press, 2007), 53. For the avoidance of any misunderstanding: contrary to Klabbbers, the position here is that a global constitution will dissolve into in a myriad of mutually colliding sector-based constitutions.
- 27 On the third-party effect of transnational fundamental rights see Stephen Gardbaum, “Human Rights and International Constitutionalism”, in *Ruling the World? Constitutionalism, International Law and Global Government*, eds. Jeffrey L. Dunoff and Joel Trachtman, (Cambridge: Cambridge University Press, 2008), 233-257; Stephen Gardbaum, “The ‘Horizontal Effect’ of Constitutional Rights”, *Michigan Law Review* 102 (2003): 387-459; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006); Gavin W. Anderson, *Constitutional Rights after Globalization* (Oxford: Hart, 2005); Andrew Clapham, *Human Rights in the Private Sphere* (Oxford: Oxford University Press, 1996); on the European-American discussion see Andrés Sajó and Renáta Uitz (eds.), *The Constitution in Private Relations: Expanding Constitutionalism* (Utrecht: Eleven International, 2005).
- 28 See from the viewpoint of comparative law Daniel Friedman and Daphne Barak-Erez (eds.), *Human Rights in Private Law* (Oxford: Hart, 2001); from the international discussion on the third-party effect of human rights in the UK: Adam Tomkins, “On Being Sceptical about Human Rights”, in *Sceptical Essays on Human Rights*, eds. Tom Campbell *et al.*, (Oxford: Oxford University, 2001): 1-11, 4; for Israel, see Aharon Barak, “Constitutional Human Rights and Private Law”, *Review on Constitutional Studies* 3 (1996): 218-281; for South Africa, see Halton Cheadle and Dennis Davis, “The Application of the 1996 Constitution in the Private Sphere”, *South African Journal of Human Rights* 44 (1997): 39-60, 44 ff.; for Canada, see Lorraine Weinrib and Ernest J. Weinrib, “Constitutional Values and Private Law in Canada”, in *Human Rights in Private Law*, eds. Daphne Barak-Erez and Daniel Friedmann, (Oxford: Hart, 2001), 43-72.
- 29 On the simple effect on state private law rules and the freedom of fundamental rights of relations under private law see Claus-Wilhelm Canaris, *Grundrechte und Privatrecht: Eine Zwischenbilanz* (Berlin: De Gruyter, 1999).

found in the nation state, so that state action is only possible in relatively few situations.

We should consider the concept of generalisation and respecification and use it to horizontalise fundamental rights.³⁰ The first stage is to generalise the narrowing of fundamental rights – only understandable in the historical context – to the protection of the individual against the state and to relate this to a general principle that considers their overall social significance. The second stage must carefully orient the concrete content of fundamental rights as well as their addressees and beneficiaries, their legal structures and their implementation, to the independent logic and independent normativity of their respective social contexts.

The other currently widespread doctrine, which is called structural effects of human rights, has become generally established in differing variants in Germany, South Africa, Israel and Canada in particular. This doctrine makes use of the concept of generalisation and respecification.³¹ It too only generalises the traditional fundamental rights applicable against the state in the direction of general values, or even towards objective value systems that are also intended to ‘radiate’ into non-state areas. It then respecifies these general values by adapting them to the particular qualities of private law, either via the general clauses of private law or by interpreting the institutions and individual norms of private law in a way that is sensitive to fundamental rights.

From a constitutional and sociological viewpoint, however, both the generalisation and the respecification are oriented differently. If the nature of the problem is to assist in realising fundamental rights beyond the state constitution, not just throughout society, but in different world society domains with their own social structures, we can hardly expect any guidance from a generalisation drawn on the humanities and value theory. And it is just as inadequate to orient their respecification only towards the peculiarities of the doctrine of private law. Neither value theory nor the doctrine of private law offer sufficient guidance for this task.

2.2 *Generalisation: Communicative Media Instead of Value Systems*

The starting point for generalisation should instead be the specific social structure responsible for the particular qualities of fundamental rights in the political system. *This is not the state as such, but rather the system-specific medium of political*

30 For generalisation and respecification (as opposed to a simple analogy which works either with vague relations of similarity or generalises without respecifying sufficiently), see Talcott Parsons and Charles Ackerman, “The Concept of ‘Social System’ as a Theoretical Device”, in *Concepts, Theory and Explanation in the Behavioral Sciences*, ed. Gordon J. DiRenzo (New York: Random House, 1996), 19-40. For a respecification of political rights in economic organizations, see Jens Schierbeck, “Operational Measures for Identifying and Implementing Human Rights Issues in Corporate Operations”, in *Human Rights and the Oil Industry*, eds. Asbjorn Eide et al., (Antwerpen: Intersentia, 2000), 161-177, 168.

31 For a detailed comparative law analysis of the horizontal effect of fundamental rights, see Gardbaum, note 27. On the prevailing doctrine on the third-party effect in Germany, see Herdegen in: Maunz/Dürig, *Grundgesetz* 58. Supplementary set 2010 Art. 1 GG, note 59-65. For an analysis of the paradoxes of human rights, see Verschraegen, note 15.

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power from whose obligations fundamental rights are to be freed and generalised towards other communicative media that actually function in society. For this purpose it is helpful to link to the functions of fundamental rights as related to the medium of power, elaborated in particular by Luhmann and Thornhill.³² The formalising of politics' 'own' power medium is the independent contribution of political constitutions where these ensure the long-term survival of the autonomy of politics that has in modern times been wrung from 'external' religious, familial, economic or military power sources. Constitutional law plays a supporting role in this autonomisation process, in which the communicative medium of power gains its own forms that dissolve the general medium into concrete operations of the political system. 'Fragmented' juridified power positions develop as the medium takes on form: competences, subjective rights and, as normatively well-anchored forms of the power medium, fundamental rights. The power medium finds its decentralised forms in these three structural components. Power communication is staged in politics, now autonomous, as a game of power positions in the form of legal positions. Power acts, as the operational elements of the political process, are practised in the form of rights, the structural components of power. The compact medium of power is dissolved into rights as its individual components, which are then each again collectively aggregated during the power formation process.

As legal forms of the power medium, fundamental rights take on a double role in politics. It is not sufficient only to emphasise the protection of the individual against the might of the state. Fundamental rights rather exercise a simultaneous inclusionary and exclusionary function.³³ They permit the inclusion of the overall population in the political process, taking the form of the right to political involvement. These are the fundamental active civic rights, above all the right to vote, but also the fundamental political rights in the narrower sense of freedom of opinion, assembly and association.³⁴ At the same time, however, fundamental rights have the effect of excluding non-political social autonomy spheres from the political field, marking the borders between politics and society and guaranteeing social institutions, in the same way as individuals, protection against their politicisation. Such exclusion on the part of fundamental rights simultaneously ensures the operability of politics itself, by removing certain themes that would otherwise overtax it. De-politicisation thus not only serves to protect non-political areas of autonomy but also the integrity of politics itself. This makes it clear that both the inclusionary and exclusionary dimensions of fundamental rights

32 Chris Thornhill, "Towards a Historical Sociology of Constitutional Legitimacy", *Theory and Society*, 37 (2008): 161-197 169 ff.; Niklas Luhmann, 'Verfassung als evolutionäre Errungenschaft', *Rechtshistorisches Journal*, 9 (1990): 176-220; Niklas Luhmann, "Politische Verfassungen im Kontext des Gesellschaftssystems", *Der Staat*, 12 (1973): 1-22, 165-182; Niklas Luhmann, *Grundrechte als Institution: Ein Beitrag zur politischen Soziologie* (Berlin: Duncker & Humblot, 1965).

33 Chris Thornhill, "The Future of the State", in *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation*, eds. Poul F. Kjaer et al., (Oxford: Hart, 2011), 381-418, 390; Luhmann (1965), note 32, 138.

34 Remarkably, that touchstone of modern political systems, the right to vote, does not have the status of a fundamental right in Germany, but rather that of a right equivalent to a fundamental right, Klein in: Maunz/Dürig, *Grundgesetz* 58. Supplementary set 2010 Art. 38 GG, note 135 f.

contribute to maintaining the functional differentiation of society as regards politics:

“The semantic fusion of sovereignty and rights might be seen as the dialectical centre of the modern state and of modern society more widely. On the one hand, these concepts allowed the state to consolidate a distinct sphere of political power and to employ political power as an abstracted and inclusive resource. Yet, these concepts also allowed the state restrictively to preserve and to delineate a functional realm of political power, and to diminish the political relevance of most social themes, most exchanges, and most social agents.”³⁵

It is crucial for further argumentation that, if the horizontal effect of fundamental rights is to develop its full significance in social areas outside politics, this dual role of fundamental rights must be retained in their generalisation and respecification. By contrast, discussion of the third-party effect has so far concentrated excessively on the defensive function of fundamental rights.³⁶ *Both the inclusion of the overall population in the function systems of world society and the exclusion of individual and institutional areas of autonomy from these function systems* – this would be the appropriate generalisation from rights directed against the state to fundamental rights in society. On the one hand, the guarantee provided by fundamental rights supports the inclusion of the overall population in the relevant social sphere. In this case, fundamental rights contribute to the constitutive function of civil constitutions when they support the autonomisation of social sub-areas. On the other, fundamental rights are also significantly involved in the limitative function of social constitutions when it is a matter of creating self-limitations on the relevant system dynamics. Fundamental rights then serve to set the boundaries of the respective social spheres with regard to their environments, giving individuals and institutions outside of the social sphere guarantees of autonomy in regard to the latter’s expansionist tendencies.

2.3 Respecification in Different Social Contexts

The respecification of a state’s fundamental rights however cannot mean, as is repeatedly asserted, simply adapting them to the particular qualities of private law.³⁷ A procedure based purely on legal doctrine that simply concretises the ‘objective value system’ in the system of private law norms will omit the particular qualities of the various social contexts for which private law provides general norms. It refers only to the legal side of the constitution and neglects its social side. This, however, requires considerably greater modification of the fundamental rights directed against the state. Therefore the requirement to ‘adhere to the

35 Thornhill, note 33, 392.

36 See the analyses in Fn. 27 and 28 that formulate a fundamental right, in principle directed against third parties, as merely defensive rights.

37 And then for the most part placing drastic restrictions on them that conform to private law. See for example Herdegen, note 31, footnote 65 ff.

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fundamental independent nature and independent legality of civil law in relation to the constitutional system of fundamental rights³⁸ is indeed correct, but not sufficient. Instead, fundamental rights for the respective social independent logic and independent normativity of different sub-areas must be readjusted and of course simultaneously adapted to the prevailing legal norms (usually, but not always, the norms of private law).³⁹

An example will help clarify the difference: if, as in the recent anti-discrimination legislation, the question relates to whether constitutional equality is valid in non-state contexts, it is absolutely insufficient simply to make the modifications arising from the norms of the 'principle of equality in private law', i.e. in essence from a reduction of its validity to group contexts.⁴⁰ Rather, the non-discrimination criteria for private schools and universities must be developed from their educational mission: these are clearly different from the criteria of equal treatment applying in commercial businesses or religious communities. The recent anti-discrimination legislation only tendentially addresses these differences and could now be appropriately corrected by current practice.⁴¹ More generally, if the other partial constitutions in society, i.e. the economy, science, the mass media and the health system, now legally formalise their respective autonomous communicative media on a global basis, social fundamental rights must begin with exactly the forms that will be used to communicate in the respective medium. The uniform communicative medium in each partial constitution – money, law, knowledge – must then be dissolved into decentralised distributed positions of fundamental rights.

Direct or indirect third-party effect? This difference is by no means as irrelevant as some authors would have us believe.⁴² A constitutional-sociological oriented reformulation would be decidedly in favour of an *indirect* third-party effect of fundamental rights – even if in a sense other than the conventional. A direct third-party effect of fundamental rights appears, by contrast, mistaken. This correctly

38 Günter Dürig, "Grundrechte und Zivilrechtsprechung", in *Vom Bonner Grundgesetz zur gesamt-deutschen Verfassung: Festschrift Hans Nawiasky*, ed. Theodor Maunz (München: Isar, 1956), 157-210, 164.

39 The difference becomes clear if we recognise how far sociologically oriented respecifications of the fundamental rights for trade regulatory organisations have extended in corporate law via a purely private-law oriented third-party effect of fundamental rights. See the classic study by Philip Selznick, *Law, Society and Industrial Justice* (New York: Russell Sage, 1969), 75 ff., 259 ff.; more recently Jens Schierbeck, "Operational Measures for Identifying and Implementing Human Rights Issues in Corporate Operations", in *Human Rights and the Oil Industry*, eds. Asbjorn Eide et al., (Antwerpen: Intersentia, 2000), 161-177, 168.

40 On the principle of equality in private law see the classic essays by Ludwig Raiser, "Der Gleichheitsgrundsatz im Privatrecht", *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* 111 (1948): 75-101; also Hueck Götz Hueck, *Der Grundsatz der gleichmäßigen Behandlung im Privatrecht* (München: C.H. Beck, 1958).

41 On the problems thereby arising see Peter Badura, "Gleiche Freiheit im Verhältnis zwischen Privaten: Die verfassungsrechtliche Problematik der Umsetzung der EG-Diskriminierungsrichtlinien in Deutschland", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 68 (2008): 347-358.

42 See especially Robert Alexy, *Theorie der Grundrechte* (Frankfurt: Suhrkamp, 1994), 473 ff.

stresses that the society-wide effectiveness of fundamental rights may not thereby be weakened, that these should not be watered down into highly abstract values nor undermined by the norms of private law.⁴³ But in the long run it nevertheless produces a short-circuit between politics and social fields.⁴⁴ Instead of homogenising the effects of fundamental rights as regards state and society, it is in fact their ‘indirect’ effect that is important, but now in the sense of their context-specific transformation.

Ultimately, variants of third-party effect that limit their social validity to phenomena of economic and social power lead to error, because they bind fundamental rights too closely to the power medium.⁴⁵ This error also marks the constitutional-sociological approach of Thornhill, which will accept constitutionalisation in society if – and only if – communication in the various subsystems is via the power medium. This is related to the fact that Thornhill ultimately presents his constitutional theory as a power theory and then understands the third-party effect of fundamental rights as ‘transformations in constitutional rule as correlated with internal transformations in the substance of power and as adjusted to new conditions of society’s power’.⁴⁶ That however only addresses part of the problem: while the role of fundamental rights is addressed in relation to phenomena of social power, it ignores the subtler workings of fundamental rights, i.e. guaranteeing actual possibilities of communication in various social fields and protecting against the dangers to integrity posed by other communicative media.

3 Inclusionary Effect of Fundamental Rights: Right to Access

The discussion on third-party effect has, as mentioned, so far concentrated on the protective function of fundamental rights against social power phenomena while seriously neglecting their inclusion function.⁴⁷ But this is exactly where a structural problem of late-modern societies appears, whose socially harmful

43 This is the thrust of the committed plea for a direct third party effect in Gert Brügge-meier, *et al.* (eds.), *Fundamental Rights and Private Law in the European Union* (Cambridge: Cambridge University Press, 2008); Gert Brügge-meier, “Constitutionalisation of Private Law: The German Perspective”, in *Constitutionalisation of Private Law*, eds. Tom Barkhuysen and Siewert Lindenbergh, (Leiden: Brill, 2008), 59-82.

44 This is the tenor of the criticism made by Marc Amstutz, *et al.*, “Civil Society Constitutionalism: the Power of Contract Law”, *Indiana Journal of Global Legal Studies*, 14 (2007): 235-258, 249 ff.

45 The reduction of the third-party effect of fundamental rights to phenomena of ‘social power’ as an analogy to political power is widespread in labour law. This seems obvious in view of the phenomenon of organisational power, but reduces the third-party question to a mere phenomenon of power balancing. See for instance Franz Gamillscheg, “Die Grundrechte im Arbeitsrecht”, *Archiv für die civilistische Praxis*, 164 (1964): 385-445. Similar reductions can be found in explicitly political concepts of the horizontal effect of fundamental rights, e.g. in Anderson, note 27, 33 ff. and in Kaarlo Tuori, “The Many Constitutions of Europe”, in *The Many Constitutions of Europe*, eds. Kaarlo Tuori and Sankari Suvi (Farnham: Ashgate, 2010), 3-30, 11 f.

46 Chris Thornhill, “Constitutional Law from the Perspective of Power: A Response to Gunther Teubner”, *Social and Legal Studies*, 19 (2011): 244-247, 247.

47 This is not once mentioned in the leading commentary by Herdegen, note 31 above, note 65 ff.

effects have only become visible in the most recent phases of globalisation. The problem lies in the inclusion paradox of functional differentiation. On the one hand, members of function systems are not strictly delineated population groups, as is the case in stratified societies (class, stratum, caste); instead, each function system includes the entire population, albeit limited to its function. This inclusion of the entire population in each function system represents the basic law of functional differentiation. On the other hand, the very internal dynamics of function systems cause entire population groups to be excluded. These function-specific exclusions moreover reciprocally reinforce each other 'if extensive exclusion from the function system (e.g. extreme poverty) leads to exclusion from other function systems (e.g. schooling, legal protection, a stable family situation)'.⁴⁸ Exclusions of whole segments of the population, as for instance in the ghettos of major American cities, are thus not the legacy of traditional social structures, but rather products of modernity. This poses the disturbing question of whether it is inherent to the development logic of functional differentiation that the difference of inclusion/exclusion sets itself above the binary codes of global function systems.⁴⁹ Will inclusion/exclusion become the meta-code of the 21st century, mediating all other codes, yet at the same time itself undermining functional differentiation, with the shattering effect of the exclusion of whole population groups dominating other socio-political problems?

Here, social constitutionalism begins directly with the goal of constructing constitutionally guaranteed counter-institutions in social sub-areas, i.e. positivising the positions of fundamental rights that not only act as boundaries to the function systems in relation to the autonomy of individuals, but also as elementary structures of the function systems themselves that must be considered inviolable. It can now be seen more clearly what it means to orient the generalisation and respecification of fundamental political rights towards function-system specific media instead of abstract values. In politics the general right to vote and political rights of an active civic nature are intended to permit the entire population access to the political power medium. This principle of political inclusion must then be generalised in such a way that access to the communicative media in all function systems is not only permitted, but is actually guaranteed by means of fundamental rights.⁵⁰ That cannot however be socially implemented in this generality, for

48 Niklas Luhmann, *Die Politik der Gesellschaft* (Frankfurt: Suhrkamp, 2000), 427.

49 See on this, in the context of a theory of world society, Luhmann, note 5, 582 ff. On exclusion/inclusion in systems theoretical and poststructuralist perspectives see Urs Stäheli and Rudolf Stichweh (eds.), *Exclusion and Socio-Cultural Identities: Systems Theoretical and Poststructuralist Perspectives* (Stuttgart: Lucius & Lucius, 2002). In a policy perspective, Amartya Sen, *Social Exclusion: Concept, Application, and Scrutiny* (Manila: Asian Development Bank, 2000).

50 First steps in this direction, Pablo Holmes, "The Rhetoric of Legal Fragmentation and its Discontents: Evolutionary Dilemmas in the Constitutional Semantics of Global Law", *Utrecht Law Review* 7 (2011): 113-140, 132 ff.; for a *status positivus* in the constitution of the internet, Lars Viellechner, "The Constitution of Transnational Governance Arrangements: Karl Polanyi's Double Movement in the Transformation of Law", in *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets*, eds. Christian Joerges and Josef Falke (Oxford: Hart, 2011), 436-464, 453 ff.

instance by means of an access guarantee to society that is expressed and implemented through politics. 'With the functional differentiation of the societal system, the regulation of the relationship of inclusion and exclusion is transferred to function systems and there is no longer any central authority (even if politics would gladly take on this role) to supervise the subsystems in this regard'.⁵¹ It is rather the task of respecification to formulate the function-system specific conditions in such a way as to permit access to social institutions. Essential services in the economic system, compulsory insurance in the health system and guaranteed access to the internet are cases where the third-party effect of fundamental rights must compel access to social institutions.

An informative example of such a fundamental right to inclusion in social sub-areas is offered by the current discussion on so-called internet neutrality.⁵² The technical structuring of the internet initially guarantees that no obstacles exist to accessing the markets for internet applications. The fundamental right to free and equal access to the internet as an artificial community asset is thus in principle technologically guaranteed and requires no additional normative strengthening. In the meantime, however, this principle has become endangered through newer digital tools that group different applications into classes, to which internet services are then offered at varying conditions. Network neutrality will be violated if network operators then differentiate between various classes and grant highest priority to the highest-paying users (access tiering). This would be a clear case of access discrimination. Other cases are the manipulation of the search algorithm via Google or blocking actions by network operators.⁵³ Here, the technologically based neutrality of the internet requires the additional norm-based protection afforded by fundamental rights of inclusion. The third-party effect of fundamental rights in the form of a right of access to non-political institutions would lead to obligations of tolerance or to the conclusion of agreements being superimposed on a network asset governed by private law. 'Access rules should ensure that all users of the medium in principle possess the same freedoms (possibilities of action)'.⁵⁴ Internet operators would thus be forbidden to discriminate between comparable applications. Guarantees of fundamental rights make it practically impossible for them to dispose of access to the social institution of the internet by the overall population.

51 Luhmann, note 48, 427.

52 See Dan Wielsch, *Zugangsregeln: Die Rechtsverfassung der Wissensteilung* (Tübingen: Mohr Siebeck, 2008), 249 ff.

53 See Karavas, note 25; *ibid*, Vagios Karavas, *Digitale Grundrechte: Zur Drittwirkung der Grundrechte im Internet* (Baden-Baden: Nomos, 2006), 164ff.; Vagios Karavas and Gunther Teubner, "www.CompanyNameSucks.com: The Horizontal Effect of Fundamental Rights on 'Private Parties' within Autonomous Internet Law", *Constellations* 12 (2005): 262-282.

54 Wielsch, n. 52, 254; for detailed proposals on the effect of fundamental rights in the internet see Karavas, n. 53, 179 ff.; a similar approach to the principles of the common carrier is used by J.B. Speta, "Common Carrier Approach to Internet Interconnection", 54 *Federal Communications Law Journal*, 54 (2002): 225-279.

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Finally, such fundamental rights of inclusion might also act as the trigger for greater socio-political aspirations. Brunkhorst has correctly pointed out on numerous occasions that the project of constitutionalising sub-areas of world society will remain only partially realised if it is not accompanied by a strengthening of democratic structures. Nevertheless, such ideas for stronger democratic legitimisation regularly tend to mean simply that social processes remain ever more closely bound to institutionalised politics. Brunkhorst himself demands stronger adherence to the political processes of the European Union. Others look for a solution in an appeal to the democratically legitimised politics of nation states.⁵⁵ Still others give primacy to a partial constitution of global politics above all other partial constitutions, with the consequence that democratic legitimacy can only be delivered from there.⁵⁶

The considerations presented here, however, tend rather in the opposite direction. The politics of social constitutionalism stipulates the strengthening of democratic potential in social sub-areas themselves. As Wiethölter stresses, this concerns the political in the 'society as a society'. This is formed 'not just from the "democratic" unified sum of such citizens, but it also "organises" institutionalisations for decision-making, communication and education processes'. And the normative consequence is the horizontal effect of fundamental rights as participation rights: 'The social part of the human being is his or her "citizen's right", which lies at a tangent to the time-honoured private law/public law dichotomy.'⁵⁷ The socio-normative guideline would be to transform rights of inclusion into social active citizen's rights within the social sub-areas. In nation state contexts, for instance, the co-determination movement was successful in institutionalising social active citizen's rights in enterprises as well as in other social organisations. It is currently an open question whether, in transnational contexts, the stakeholder movement can construct equivalent institutions in the context of corporate social responsibility.

4 Exclusionary Effect of Fundamental Rights⁵⁸

While such rights of inclusion into diverse social spheres are still only beginning to be institutionalised, the third-party effect of fundamental rights in their protective function is already considerably further advanced. In the transnational

55 E.g. Renner, n. 19, 244 f.

56 C. Joerges and F. Rödl, "Zum Funktionswandel des Kollisionsrechts II: Die Kollisionsrechtliche Form einer Legitimen Verfassung der Postnationalen Konstellation", in: G.P. Callies et al. (eds.), *Soziologische Jurisprudenz: Festschrift für Gunther Teubner zum 65. Geburtstag*, Berlin: De Gruyter, 2009, 765-778, 777 ('not otherwise conceivable').

57 R. Wiethölter, "Zur Regelbildung in der Dogmatik des Zivilrechts", *Archiv für Rechts- und Sozialphilosophie* 78 (1992): Beiheft 45, 222-240, 238.

58 This section contains considerations that are presented in greater detail elsewhere: G. Teubner, "The Anonymous Matrix: Human Rights Violations by 'Private' Transnational Actors", *Modern Law Review* 69 (2006): 327-346.

context this concerns in particular the violations of fundamental rights by multinational corporations that are brought before the courts.

In their exclusionary role, fundamental rights react in the same way as in their inclusionary role to problems raised by the differentiation of autonomous function systems and the autonomisation of their communicative media. But these rights perceive inclusion that exceeds its function-specific boundaries as their problem, seeking guarantees to exclude areas of autonomy. First, and visible everywhere, politics becomes autonomous and asserts excessive inclusion claims. It frees itself from the diffuse moral-religious-economic obligations of the old society and increases the usurpation potential of its special medium, power, without any immanent restraints. Its operative closure and its structural autonomy let it create new environments for itself, vis-à-vis which it develops expansive, indeed downright imperialistic tendencies. Absolute power liberates unsuspected destructive forces. Centralised power for legitimate collective decisions, which develops a special language of its own, indeed a high-flown rationality of the political, has an inherent tendency to totalise them beyond any limit.⁵⁹

Its expansion goes in two divergent directions. First, it crosses the boundaries to other social areas of action. Their response in the resulting conflicts is to invoke their autonomous communicative spheres free from intervention by politics, whether as institutional or as personal fundamental rights. Fundamental rights demarcate from politics communicative areas of autonomy allotted either to social institutions or to persons as social constructs.⁶⁰ Here, it is the exclusionary rather than the inclusionary function of fundamental rights that becomes effective. In both cases fundamental rights set boundaries within society to the totalising tendencies of the political power medium by depoliticising society's spheres of autonomy. Second, in its endeavours to control the human mind and body, politics expands with particular verve across the boundaries of society. Their defences become effective only once they can be communicated as protest in the forms of complaints and violence. These protests are translated socially into political struggles of the oppressed against their oppressors, and finally end up, through historic compromises, in political guarantees of the self-limitation of politics vis-à-vis people as psycho-physical entities.

This model of fundamental rights oriented towards protection against the state works only so long as the state can be identified with society, or at least the state can be regarded as society's organisational form, and politics as its hierarchical co-ordination. Only in this context did it become clear that the individual/community dualism is an insufficient description of modern society and, as other highly specialised communicative media (money, knowledge, law, medicine, technology) appear to gain in autonomy, this model loses its plausibility. It is exactly at this point that the problem of the third-party effect of exclusionary fundamen-

59 The work of Luhmann (1965), n. 32, 24 is again seminal here.

60 On the relationship between individual and institutional fundamental rights see K.-H. Ladeur, *Kritik der Abwägung in der Grundrechtsdogmatik*, Tübingen: Mohr Siebeck, 2004, 77.

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tal rights arises, i.e. the rights of protection against the expansive tendencies of social institutions. The fragmentation of society multiplies the boundary areas between autonomised communicative media and the individual and institutional areas of autonomy.⁶¹

Thus the problem of human rights cannot simply be limited to the relation between state and individual, or to the area of institutionalised politics, or even solely to power phenomena in the broadest (Foucault's) sense. Specific endangerment by an autonomised communicative medium comes not just from politics, but in principle from all autonomised subsystems that have developed an expansive self-dynamics. For the economy, Marx clarified this particularly through such concepts as alienation, fetishism, autonomy of capital, commodification of the world, exploitation of man by man. Today we see – most clearly in the writings of Foucault, Agamben and Legendre⁶² – similar threats to integrity from the matrix of the natural sciences, of psychology and the social sciences, of technologies, of medicine, the press, radio and television (keywords: Dr. Mengele,⁶³ reproductive medicine, extending life in intensive care units, the Lost Honour of Katharina Blum⁶⁴).

Accordingly, it is the fragmentation of society that is today central to the question of fundamental rights as protective rights. There is not just a single boundary concerning political communication and the individual, guarded by human rights. Instead, the problems arise in numerous social institutions, each forming their own boundaries with their human environments: politics/individual, economy/individual, law/individual, science/individual. Everything then comes down to the identification of the various frontier posts, so as to recognise the violations that endanger human integrity by their specific characteristics. Where are the frontier posts? In the various constructs of persons in the subsystems: *homo politicus*, *oeconomicus*, *juridicus*, *organisatoricus*, *retalis*, etc. These may only be constructs within communication that permit attribution, but they are at the same

61 The institutional aspect is emphasised by Ladeur, n. 60, 64: 'Fundamental rights are then a contribution to the self-reflection of the private law, when – as with the third-party effect of communicative freedom – it is about the protection of non-economical interests and goods.'

62 G. Agamben, *Homo Sacer: Die Souveräne Macht und das Nackte Leben*, Frankfurt: Suhrkamp, 2002; M. Foucault, *Surveiller et Punir: La Naissance de la Prison*, Paris: Gallimard, 1975, 200 f.; P. Legendre, *La Fabrique de l'Homme Occidental*, Paris: Mille et Une Nuits, 1969, 31 ff.

63 The experiments carried out on people by Dr Mengele were once regarded as an expression of a sadistic personality or as an enslavement of science through totalitarian Nazi policy. More recent research reveals that the experiments are better regarded as the product of the expansionistic tendencies of science, propelled by its intrinsic dynamics, to seize absolutely every opportunity to accumulate knowledge, especially as a result of the pressure of international competition, unless it is restrained by external controls. See H.- W. Schmuhl, *Grenzüberschreitungen: Das Kaiser-Wilhelm-Institut für Anthropologie, Menschliche Erblehre und Eugenik 1927 bis 1945*, Göttingen: Wallstein, 2005.

64 H. Böll, *Die Verlorene Ehre der Katharina Blum Oder: Wie Gewalt Entstehen und Wohin sie Führen Kann*, Köln: Kiepenheuer und Witsch, 1992.

time real points of contact with people 'out there'.⁶⁵ It is through the mask of the 'person' that the social systems make contact with people; while they cannot communicate with them, they can massively irritate them and in turn be irritated by them. In tight perturbation cycles, communication irritates consciousness with its selective 'enquiries', conditioned by assumptions about rational actors, and is irritated by the 'answers', in turn highly selectively conditioned. It is in this recursive dynamics that the 'exploitation' of man by the social systems (not by the man!) comes about. The social system as a highly specialised communicative process concentrates its irritations of human beings on the social person-constructs. It 'sucks' mental and physical energies from them for the self-preservation of its environmental difference. It is only in this highly specific way that Foucault's disciplinary mechanisms develop their particular effects.⁶⁶

5 The Anonymous Matrix

If violations of fundamental rights stem from the totalising tendencies of societal partial rationalities, there is clearly no longer any point in seeing the horizontal effect of fundamental rights as if the rights of private actors have to be weighed up against each other.⁶⁷ The origin of the infringement of fundamental rights needs to be examined more closely. The imagery of 'horizontality' unacceptably takes the sting out of the whole human-rights issue, as if the sole point of the protection of human rights was that certain individuals in society threaten the rights of other individuals. Violation of the integrity of individuals by other individuals, whether through communication, simple perception or direct physical action, is, however, a completely different set of issues that arose long before the radical fragmentation of society in our days. It must systematically be separated from the fundamental-rights question as such.⁶⁸ In the European tradition it was formulated by attributing to persons, as communicative representatives of actual human beings, 'subjective rights' against each other. This was philosophically expanded by the theory of subjective rights in the Kantian tradition, according to which ideally the citizens' spheres of arbitrary freedom are demarcated from each other in such a way that the law can take a generalisable form. Legally, this idea

65 For details see P. Fuchs, *Der Eigen-Sinn des Bewußtseins: Die Person - die Psyche - die Signatur*, Bielefeld: transcript, 2003, 16f., 28f., 30f., 33ff.

66 For details on the personal constructs as junction between communication and mind see Michael Hutter and Gunther Teubner, "Homo Oeconomicus and Homo Juridicus: Communicative Fictions?", in *Corporations, Capital Markets and Business in the Law: Liber Amicorum Richard M. Buxbaum*, eds. Theodor Baums et al. (Den Haag: Kluwer, 2000), 569-584.

67 This is still the prevailing doctrine in German constitutional law, Bundesverfassungsgericht BVerfG 89, 214ff. (Bürgerschaft); Robert Alexy, note 42, 484.

68 Certainly people can do far worse to each other by violating rights of the most fundamental kind (life, dignity). But this is not (yet) a fundamental-rights question in this sense, but a question of the Ten Commandments, the fundamental norms of criminal law and the law of tort. Fundamental rights in the modern sense are not opposed to perils emanating from people, but to perils emanating from the matrix of social systems.

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has been most clearly developed in the classical law of tort, in which not merely damnification, but the violation of subjective rights are central.

Now, 'fundamental rights', as here proposed, differ from 'subjective rights' in private law as they are not about mutual endangerment of individuals by individuals, i.e. intersubjective relations, but rather about the *dangers to the integrity of institutions, persons and individuals that are created by anonymous communicative matrices (institutions, discourses, systems)*. Fundamental rights are not defined by the fundamentality of the affected legal interest or of its privileged status in the constitutional texts, but rather as social and legal counter-institutions to the expansionist tendencies of social systems. The Anglo-American tradition speaks in both cases indifferently about 'rights', thereby overlooking from the outset the fundamental distinction between subjective rights and fundamental rights, while in turn being able to deal with them together. By contrast, criminal law concepts of macro-criminality and criminal responsibility of formal organisations come closer to the pertinent issues being considered here.⁶⁹ These concepts affect violations of norms that emanate not from human beings but from impersonal social processes that require human beings as their functionaries.⁷⁰ But they are confined to the dangers stemming from 'collective actors' (states, political parties, business firms, groups of companies, associations) and miss the dangers stemming from the anonymous 'matrix', from autonomised communicative processes (institutions, function systems, networks) that are not personified as collectives. Even human rights that are directed against the state should not be seen as relations between political actors (state versus citizen), i.e. as an expression of person-to-person relations. Instead, such human rights are relations between anonymous power processes, on the one hand, and tortured bodies and hurt souls on the other. This notion is expressed in communication only very imperfectly, not to say misleadingly, as the relation between the state as 'person' and the 'persons' of the individuals.

It would be repeating the infamous category error of the tradition were one to treat the horizontal effect of fundamental rights in terms of the weighing up of subjective rights between individual persons.⁷¹ That would just end up in the law of tort, with its focus on interpersonal relations. And we would be forced to apply the concrete fundamental rights directed against the state wholesale to the most varied interpersonal relations, with disastrous consequences for elective freedoms in intersubjectivity. Here lies the rational core of the excessive protests of

69 See for instance Herbert Jäger, *Makrokriminalität: Studien zur Kriminologie kollektiver Gewalt* (Frankfurt: Suhrkamp, 1989); Carlos Gómez-Jara Díez, *La culpabilidad penal de la empresa* (Madrid: Marcial Pons, 2005) 109 ff.

70 For the sake of clarity, it should be emphasised that here the individual responsibility does not disappear behind the collective responsibility, but rather that both exist in parallel, although subject to different conditions.

71 Very critical towards the consideration of subjective rights in the range of the horizontal effect, Ladeur, note 60, 58 ff.

private lawyers against the intrusion of fundamental rights into private law, though these complaints are in turn exaggerated and overlook the real issues.⁷²

The category error can be avoided. Both the 'old' political and the 'new' poly-contextural human-rights question should be understood as people being threatened not by their fellows, but by anonymous communicative processes. These processes must in the first place be identified. Foucault has seen them most clearly, radically depersonalising the phenomenon of power and identifying today's micro-power relations in society's capillaries in the discourses/practices of 'disciplines'.⁷³

The human-rights question in the strictest sense must today be seen as endangerment of individuals' integrity of body and mind by a multiplicity of anonymous, autonomised and today globalised communicative processes. The fragmentation of world society into autonomous subsystems creates not only new boundaries outside society between subsystem and human being, but also new boundaries between the various subsystems inside society, on which the expansionist tendencies of the subsystems work in their specific ways.⁷⁴ It now becomes clear how a new 'equation' replaces the old 'equation' of the horizontal effect. The old one was based on a relation between two private actors – a private perpetrator and a private victim of the infringement. On one side of the new equation is no longer a private actor as the violator of fundamental rights, but the *anonymous matrix of an autonomised communicative medium*. On the other side is no longer simply the compact individual. Instead, owing to the presence of new boundaries, the protection of the individual, hitherto seen in unitary terms, splits up into several dimensions. On this other side of the equation, the fundamental rights have to be systematically divided into three or even four dimensions:

- *institutional rights* that protect the autonomy of social processes against their subjugation by the totalising tendencies of the communicative matrix. By protecting, for instance, the integrity of art, family or religion against totali-

72 Uwe Diederichsen, "Das Bundesverfassungsgericht als oberstes Zivilgericht", *Archiv für die civilistische Praxis* 198 (1998): 171-260; Uwe Diederichsen, "Die Selbstbehauptung des Privatrechts gegenüber dem Grundgesetz", *Archiv für die civilistische Praxis* 197 (1997): 57-64; Wolfgang Zöllner, "Regelungsspielräume im Schuldvertragsrecht: Bemerkungen zur Grundrechtsanwendung im Privatrecht und zu den sogenannten Ungleichgewichtslagen", *Archiv für die civilistische Praxis* 196 (1996): 1-36; Dieter Medicus, "Der Grundsatz der Verhältnismäßigkeit im Privatrecht", *Archiv für die civilistische Praxis* 192 (1992): 35-70, 35.

73 Foucault's problem is however his obsessive fixation on the phenomenon of power, which leads him to inflate the concept of power meaninglessly, and as a consequence he cannot discern the more subtle effects of other communication media.

74 In more detail see Andreas Fischer-Lescano and Gunther Teubner, "Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law", *Michigan Law Journal of International Law*, 25 (2004): 999-1045, 1004 ff. Although not the therapy, the diagnosis is followed by Martti Koskeniemi, *Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought* (2005). See: <www.valt.helsinki.fi/blogs/eci/PluralismHarvard.pdf>.

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tarian tendencies of science, media or economy, fundamental rights take effect as ‘conflict of law rules’ between partial rationalities in society.⁷⁵

- *personal rights* that protect the autonomous spaces of communications within society, attributed not to institutions, but to the social artefacts called ‘persons’.
- *human rights* as negative bounds on societal communication where the integrity of individuals’ body and mind is endangered by a communicative matrix that crosses boundaries.

It should be stressed that specific fundamental rights are to be allocated to these dimensions not on the basis of one-to-one, but with a multiplicity of overlaps. Some fundamental rights are mainly to be attributed to one dimension or the other (e.g. freedom of art and property primarily to the institutional rights dimension, freedom of speech primarily to the personal rights dimension, and freedom of conscience primarily to the human-rights dimension). It is all the more important, therefore, to distinguish the three dimensions carefully within the various fundamental rights, and to pay attention to their various legal forms and conditions of realisation.

6 Justiciability?

The ensuing question for lawyers is this: can the issue of the ‘horizontal’ effects of fundamental rights be reformulated from a focus of conflicts within society (person versus person) to conflicts between society and its ecologies (communication versus body/mind)? In other words, can horizontal effects be transplanted from the paradigm of interpersonal conflicts between individual bearers of fundamental rights to that of conflicts between anonymous communicative processes, on the one hand, and concrete people on the other?

The difficulties are enormous. To name but a few:

How can a system/environment conflict ‘between’ the universes of Communication and Consciousness be addressed at all by communication as a conflict, as social conflict or indeed as legal conflict? A real Lyotard style of problem: if not as *litige*, then at least as *différend*?⁷⁶ Failing a Supreme Court for meaning, all that can happen is that mental experience endures the infringement and then fades away unheard. Or else it gets ‘translated’ into communication, but then the paradoxical and highly unlikely demand will be for the infringer of the right (society, communication) to punish its own crime! That means expecting poachers to turn

75 Ladeur, note 60, 60, 69f., 71f.; Gunther Teubner, “Ein Fall von struktureller Korruption? Die Familienbürgerschaft in der Kollision unverträglicher Handlungslogiken”, *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaften*, 83 (2000): 388-404; Christoph Graber and Gunther Teubner, “Art and Money: Constitutional Rights in the Private Sphere”, *Oxford Journal of Legal Studies* 18 (1998): 61-74.

76 Lyotard, note 24.

into gamekeepers. But bear in mind that by institutionalising political fundamental rights, several nation states have managed, however imperfectly, precisely this gamekeeper-poacher self-limitation.

How can the law describe the boundary conflict, when after all it has only the language of 'rights' of 'persons' available?⁷⁷ Can it, in this impoverished rights talk, in any way construct the difference between conflicts of fundamental rights that are internal to society (person-related) and external to society (human-related)? Here we reach the limits not only of what is conceivable in legal doctrine, but also the limits of court proceedings, too. In litigation there must always be a claimant suing a defendant for infringing his rights. In this framework of mandatory binarisation as person/person-conflicts, can human rights ever be asserted against the structural violence of anonymous communicative processes? The only way this can happen – at any rate in litigation – is simply to re-use the category error so harshly criticised above, but immanently correcting it, in an awareness of its falsehood, by introducing where possible a difference. That means individual suits against private actors, whereby human rights are asserted: not the rights of persons against persons but of flesh-and-blood human beings against the structural violence of the matrix. In traditional terms, the conflict with institutional problems that is really meant has to take place within individual forms of action. We are already familiar with something similar from existing institutional theories of fundamental rights, which recognise as their bearers not only persons, but also institutions.⁷⁸ Whoever enforces political freedom of expression is simultaneously protecting the integrity of political will-formation. But the point here is not about rights of impersonal institutions against the state but, in a multiple inversion of the relation, about rights of individuals outside of society against social institutions outside of the state.

Is this distinction, plausible in principle, so clear that it is in fact justiciable? Can person/person-conflicts be separated from individual/individual-conflicts, on the one hand, and these separated in turn from communication/individual-conflicts on the other, if after all communication is enabled only via persons? Translated into the languages of society and the law, this becomes a problem of attribution. Whodunnit? Under what conditions can the concrete endangerment of integrity be attributed not to persons or individuals, but to anonymous communication processes? If this attribution could be achieved, a genuine human-rights problem would have been formulated even in the impoverished rights talk of the law.⁷⁹

77 For a insightful criticism of rights talk see Ann Glendon, "Rights Talk: The Impoverishment of Political Discourse", in *The Essential Civil Society Reader*, ed. Don E. Eberly (Oxford: Rowman Littlefield, 2000), 305-316.

78 Clearest in the impersonal fundamental rights conception of Helmut Ridder, *Die soziale Ordnung des Grundgesetzes* (Opladen: Westdeutscher Verlag, 1975), 85ff. See Karl-Heinz Ladeur, "Helmut Ridders Konzeption der Meinungs- und Pressefreiheit in der Demokratie", *Kritische Justiz* 32 (1999): 281-300.

79 This problem is comparable to the demarcation of sovereign and fiscal actions in public law or of actions of agents and personal actions in private law.

In an extreme, almost irresponsible simplification, the 'horizontal' human-rights problem can perhaps be described in familiar legal categories as follows. The problem of human rights in societal contexts governed by private law arises only where the endangerment of body/mind integrity comes from social 'institutions' (and not just from individual actors, where the traditional norms of private law then apply). In principle, institutions include private formal organisations and private regulatory systems. The most important examples here would be national and international business firms and other private associations; and private standardisation and similar private rule-setting mechanisms as private regulatory systems.⁸⁰ We must of course be clear that 'institution' represents only imperfectly those chains of communicative acts, representing a danger to integrity, that are really intended through their characterisation as a special medium: the term does not fully grasp the expansive dynamics which is the whole sense of the metaphor of the anonymous 'matrix'. But for lawyers, who are oriented toward rules and persons, 'institution' has the priceless advantage of being defined as a bundle of norms that can at the same time be personified. The concept of the institution could accordingly provide a signpost for the respecification of fundamental rights in social sectors (much as it can be employed for the state as institution and as person in the field of politics). The outcome would then be a formula of 'third-party effect' that would also seem plausible to a black-letter lawyer. It would not regard the horizontal effect as a balancing between the individual bearers' fundamental rights, but instead as the protection of human rights, personal rights and rights of discourse vis-à-vis social institutions.

These difficulties with justiciability show how inappropriate the optimism is that the human-rights problem can be solved using the resources of legal doctrine. Even institutional rights confront the law with the boundaries between other social subsystems. Can one discourse do justice to the other? This dilemma has been analysed by Lyotard.⁸¹ But it is at least a problem within society, one Luhmann sought to respond to with the concept of justice as socially adequate complexity.⁸² The situation is still more dramatic with human rights in the strict sense, located at the boundary between communication and the individual human being. All the groping attempts to juridify human rights cannot hide the fact that this is, in the strict sense, impossible. How can society ever 'do justice' to real people if people are not its parts but stand outside communication, if society cannot communicate with them but at most about them, indeed not even reach them but merely either irritate or destroy them? In the light of grossly inhuman social practices, the justice of human rights is a burning issue – but one which has no prospect of resolution. This has to be said in all rigour.

80 The renaissance of the concept of the institution in the various disciplines is no coincidence. Its relevance to jurisprudence is discussed by Julia Black, "New Institutionalism and Naturalism in Socio-Legal Analysis Institutional Approaches to Regulatory Decision Making", *Law & Policy*, 19 (1997): 51-93.

81 Lyotard, note 24, 9 ff.

82 Luhmann, note 5, 214 ff.; Niklas Luhmann, *Ausdifferenzierung des Rechts: Beiträge zur Rechtssoziologie und Rechtstheorie* (Frankfurt: Suhrkamp, 1981), 374 ff.

If the positive construction of justice in the relation between communication and human being is definitively impossible, then what is left – if we are not to succumb to post-structuralist quietism – is only second best. In legal communication, we have to accept that the problem of system/environment can only be experienced through the inadequate sensors of irritation, reconstruction and re-entry. The deep dimension of conflicts between communication on the one hand and human beings on the other can at best be surmised at by law. And the only signpost left is the legal prohibition through which a self-limitation of communication seems possible.⁸³ But even this prohibition can describe the transcendence of the other only allegorically. This programme of justice is ultimately doomed to fail, and cannot, with Derrida, console itself that it is ‘to come (*à venir*)’;⁸⁴ but has instead to face up to its being in principle impossible. The justice of human rights can, then, at best be formulated negatively. It is aimed at removing unjust situations, not creating just ones. It is only the counter-principle to communicative violations of body and soul, a protest against inhumanities of communication, without it ever being possible to say positively what the conditions of ‘humanly just’ communication might be.

83 This may explain the high value that is ascribed to the prohibition in law by authors with such different theoretical backgrounds as Rudolf Wiethölter and Pierre Legendre: Rudolf Wiethölter, “Recht-Fertigungen eines Gesellschafts-Rechts”, in *Rechtsverfassungsrecht: Recht-Fertigung zwischen Privatrechtsdogmatik und Gesellschaftstheorie*, eds. Christian Joerges and Gunther Teubner (Baden-Baden: Nomos, 2003), 1-21, 20f.; Pierre Legendre, *Le crime du caporal Lortie* (Paris: Fayard, 1994), 145 ff.

84 Jacques Derrida, “Force of Law: The Mystical Foundation of Authority”, *Cardozo Law Review* 11 (1990): 919-1046, 969.