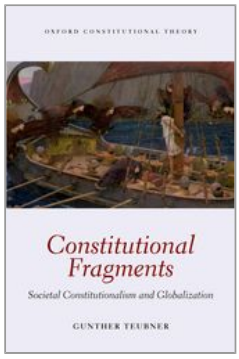

Constitutional Fragments: Societal Constitutionalism and Globalization
Gunther Teubner

Print publication date: 2012
Print ISBN-13: 9780199644674
Published to Oxford Scholarship Online: May 2012
DOI: 10.1093/acprof:oso/9780199644674.001.0001

Transnational Fundamental Rights: Horizontal Effect

Gunther Teubner

DOI:10.1093/acprof:oso/9780199644674.003.0005

Abstract and Keywords

This chapter discusses the following: fundamental rights beyond the nation state, fundamental rights binding ‘private’ transnational actors, inclusionary effect of fundamental rights, exclusionary effect of fundamental rights, the anonymous matrix, and whether the ‘horizontal’ effects of human rights can be reformulated from a focus of conflicts within society (person versus person) to conflicts between society and its ecologies (communication versus body/mind).

Keywords: fundamental rights, nation state, transnational actors, anonymous matrix

I. 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, denying them priority over other legal rules. Therefore it is plausible to attribute international human rights *ex ovo* constitutional status.[1] It would be equally difficult to make the validity of fundamental rights in the various transnational regimes dependent on the contingencies of agreements under public international law.[2] Their claim to universality demands worldwide legal validity. Finally, it will be difficult to deny the effects of fundamental rights in non-state areas 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 as to their legal source—seen the courts protecting fundamental rights against private actors.[3] (p.125)

Does this mark another return of natural law? Natural law arguments are quite successful in justifying the worldwide validity of fundamental rights.[4] Sober legal positivism has little chance against the pathos of human rights, even where this involves the technical question of their legal validity. But given the incontestable pluralism of world cultures, particularly interreligious conflicts, constructing universally valid human rights under natural law will always lead to a swift collapse.[5] If then natural law and positive law are equally doubtful, what is the basis for the global validity claim? It cannot depend on the outcome of the philosophical controversy between universalists and relativists. Is simply '*colère publique*' at work here as a source of global law, producing human rights via scandalization?[6] But how then would such social norms be transformed into positive law? Constitutional rights in transnational regimes raise two questions: (1) How, starting from the nation states' fundamental rights and the positivization of human rights in public international law agreements, can fundamental rights claim validity in transnational regimes, whether these are public, hybrid, or private? (2) Do fundamental rights within such regimes oblige

also private actors, ie do fundamental rights also have a horizontal effect in the transnational sphere?

1. Extraterritorial effect of national constitutional rights?

Ladeur and Viellechner extend the validity of fundamental rights to transnational 'private' regimes.[7] They are sceptical of the view that they will spontaneously emerge via scandalization; they are equally sceptical of a general constitutionalization of public international law. Their solution in contrast is: nation states' fundamental rights 'expand' into transnational 'private' regimes. They give three reasons: intensified porosity of national and international law, networking of national constitutional courts, and increasing exchangeability of private and public law.

The construction is suggestive, as it straightforwardly founds transnational validity of fundamental rights on secure nation-state sources (p.126) of law. At the same time it transfers well-developed constitutional doctrines from nation states to transnational regimes. But their category error cannot be ignored. 'Expansion' is an ambivalent term, concealing the distinction between two fundamentally different processes. In the language of sources of law, the authors equate the sources of the content of fundamental rights with the sources of their validity.[8] Or, in another language, the authors do not take into account that decisions and argumentations in law form closed cycles, which may well be reciprocally irritating but do not merge into one another.[9] There is no doubt that national fundamental rights provide the model for the content of their transnational equivalents; nor is there any doubt that the content of the national standards, principles, and doctrines of basic rights is transferred in a transnational argumentation 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 within an institutionalized law production, the need for which cannot be concealed by referring to substantive similarities in national and transnational contexts. It is only a detailed analysis of their sources of validity, as Gardbaum does, that can clarify their validity, scope, and enforcement. A bold general assertion of human rights expansion beyond

national boundaries cannot achieve that. Nor, in view of numerous differences between nation states in their fundamental rights catalogues, is it possible to speak of an 'expansion' of these standards: at best we can speak of a choice between them.[10] Nor do the porosity of national and international law or the exchangeability of public and private law help here. A legally structured and constitutionally(!) legitimized process must be identified that positivizes fundamental rights as valid and binding within a transnational regime. Here, however, the authors simply lead us into the mysteries of 'interlegality'.[11] In sum, 'expansion' might simply be a transitional semantics. It realizes the (p.127) horizontal effect of fundamental rights in transnational regimes, but cannot yet admit the regime's own constitutional contribution. Such transitional semantics are well known from the debate on judge-made law in nation states.[12] As an effective palliative, this semantics exploits the validity of national constitutional law, whose 'expansion' over two borders (national/transnational, public/private) would not seem to cause any great uneasiness.

The same objection applies to authors who base transnational fundamental rights upon universal legal principles (of the 'civilized peoples'?). Kumm, for instance, argues that general constitutional principles are governing the transnational space, but he does not clarify which lawmaking processes carry their positivization. Nor does he distinguish clearly between argumentation and decisions.[13] Similarly, the comparative law method, loved by all, is exposed to this objection when it is supposed to found the validity of transnational standards.[14] Neither differentiates clearly enough between the incontestable exemplary function of principles, the differing content of legal orders, and the legal decision-making process regarding their validity.

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?[15] Luhmann calls it the 'contemporary paradox' that globally, given the turbulent world situation and the vanishing relevance of nation states, fundamental rights are not, as is

usually the case, first set as norms of law that may subsequently be breached, but are rather validated by their very violation and the subsequent outcry.[16] The actual existence of this paradox is confirmed by a familiar sequence of events: protest movements and NGOs uncover (p.128) dubious practices by multinational corporations; a scandal develops; the media decry these practices as violations of human rights; the courts finally recognize a human rights violation.[17] Ladeur and Viellechner are of course right when they object to the jurisgenerative force of scandals and argue that 'normative expectations of global society' cannot alone create law. Institutionalization is required to anchor such expectations, and this cannot solely be attributed to the *colère publique*.[18] But Luhmann expressly calls this practice a paradox, and paradoxes cannot of themselves constitute legal validity. Only a de-paradoxification will permit law to arise from scandalization. And here we need to observe closely how today's legal practice will cope with this paradox, and which distinctions it will draw on to validate fundamental rights in the face of such scandalization. And here again, valid law can only arise where the condemnation of dubious practices is for its part reflexively observed by operations governed by the legal code and incorporated into the recursiveness of legal operations.[19]

3. Regime-specific standards of fundamental rights

Rather than assuming an expansion of national rights or designating social norms as legal rules, it is far more plausible to rely on the concrete decisions which establish validity in regime-specific institutions. Renner follows this line in detailed analyses of private global regimes.[20] Taking as examples transnational arbitration under the *lex mercatoria*, the tribunals on international investments, and the Internet panels of the ICANN, he shows in detail how these instances, step by step, positivize concrete standards of fundamental rights and do so within a legal procedure that (p.129) is, for its part, enacted by private ordering. Neither national fundamental rights, nor rules of international private law, nor mere social norms form the legal source for fundamental rights in these regimes. Nor is the increasing networking of national courts, cited by Ladeur and Viellechner, capable of

creating their validity in transnational regimes. While this networking strengthens the existing global legal system, strict internal borders of legal validity exist within global law, and these can only be crossed by an explicit validity decision—in these cases, private arbitration.

It is the decision practice of transnational regimes themselves that enacts fundamental rights within their borders. Thus, beyond state positivization, a 'social' positivization of fundamental rights is the driving force behind their gradual universalization. In public international law regimes, it is a matter of course, that fundamental rights gain validity, but only when human rights conventions positivize them. Otherwise, for example, they cannot claim validity against international organizations or transnational regimes.[21] A more difficult situation arises where, as in the World Trade Organization, judge-made law creates human rights. Genuine court institutions have developed from simple panels designed for conflict resolution, which, in the Appellate Body, even have a second instance. If fundamental rights are recognized here, it is these conflict resolution bodies and not the international agreements which, in a process similar to common law, positivize the standards of fundamental rights that are valid within the World Trade Organization.[22] The same can be said of the private arbitration tribunals of the International Chamber of Commerce (ICC), the International Center for the Settlement of Investment Disputes (ICSD) and the ICANN when they positivize fundamental rights. They of course are influenced by different nation-state orders, general legal principles, doctrinal models, and even philosophical arguments. But the actual validity decision is made by the arbitration tribunals themselves when they select between different standards of fundamental rights and specify which fundamental rights are binding in the particular regime. And scandalization by protest movements, NGOs, and the media are indeed involved in such lawmaking processes where the scandalized norms are, via secondary rules, integrated into global law.

National courts are considerably involved. In the lawmaking processes of transnational regimes, they are often called upon to recognize and enforce arbitral decisions. They influence

regime constitutions when (p.130) they invoke *ordre public* and refuse to enforce transnational arbitral rulings because they violate fundamental rights.[23] Thus, national courts participate in the gradual development of a common law of transnational fundamental rights.We should not succumb here to the positivistic temptation and argue that 'in the last instance' national law becomes the source of the fundamental rights in transnational regimes.This argument has already been demonstrated as false in the debate about the *lex mercatoria*, when exequatur decisions of national courts were supposed to anchor the *lex mercatoria* in national law.[24] The whole argument is based on an incorrect demarcation of the national and the transnational and cannot comprehend the entwining of the two.[25] These courts' decisions have dual membership; they participate in the decision chains of two autonomous legal orders. The court decisions are and remain operations of the relevant national law, but they participate at the same time in the lawmaking of the autonomous regime. This dual membership in different chains of operations is not unusual.[26] 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. The judicial sequences only 'meet' for a moment in the concrete judicial ruling; their validity operations otherwise have very different pasts and futures in their respective legal orders.

'Common law constitution' appropriately describes how fundamental rights are positivized in transnational (public and private) regimes: an iterative decision-making process occurs between the rulings of arbitration tribunals, decisions of national courts, contracts of private actors, social standardizations, and the scandalization actions of protest movements and NGOs.[27] 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 (p.131) 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 term, it will be a 'common law constitution' rather than a more continental type of constitution.[28]

II. Fundamental Rights Binding 'Private' Transnational Actors

1. Beyond state action

Even if transnational regimes, public and private, positivize their respective standards of fundamental rights, the question nevertheless remains of whether these fundamental rights bind only state actors or whether they also apply to private actors.[29] Their effect on private actors is much more acute in the transnational than in the national sphere. This is because multinational corporations regulate whole areas of life so that we can no longer avoid the question. It is however extraordinarily difficult to invoke the state action doctrine here which is probably the best-known solution in the nation states.[30] According to this doctrine, private actors can only violate fundamental rights if an element of state action can be identified in their activities. It may be discovered either because state bodies are somehow involved or because the private actors perform some public functions.[31] In the transnational sphere, however, there is none of the (p.132) general ubiquity of state action that can be found in the nation state, so that state action is only discernible in relatively few situations.

We should again consider the concept of generalization and respecification and now use it to horizontalize fundamental rights. The first step is to generalize the narrow application of fundamental rights in state contexts—only understandable in the historical context—and to transform it into a general

principle with society-wide validity. In a second step the concrete content of fundamental rights, their addressees and beneficiaries, their legal structures and their implementation, must be carefully tailored to the independent logic and independent normativity of different 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. Implicitly, this doctrine uses the concept of generalization and respecification.[32] It generalizes fundamental rights, from state-centred rules into general values, which are ‘radiating’ into non-state areas. It then respecifies these general values by adapting them to the particularities of private law.

From a sociological viewpoint, however, both generalization and respecification need to be re-oriented. If fundamental rights will be effective in different global domains with their peculiar social structures, hardly any guidance can be expected from a generalization drawn on the philosophy of values. And it is just as inadequate to orient their respecification only towards the peculiarities of private law. Neither value philosophy nor private law doctrine offer sufficient guidance for this task.

2. Generalization: communicative media instead of general values

The generalization should instead first identify what is the addressee of fundamental rights in the political system. This is not the state, but rather political power. Fundamental rights are directed against power, against the system-specific medium of political communication.They need to be freed from this narrow focus and to be generalized towards other communicative media that actually function in society. Luhmann and (p.133) Thornhill have clarified the relations between fundamental rights and the medium of power.[33] Formalizing the power medium is, as already discussed in the previous chapter, the main function of political constitutions. They ensure the long-term survival of political autonomy that has been wrung from ‘external’ religious, familial, economic, or military power sources. Law supports this autonomization, in which the medium of power gains its own forms.

‘Fragmented’ power positions are juridified: competences, subjective rights, and human rights. In these three structural components the power medium finds its decentralized forms. Power communication is staged in modern politics as a power game in the form of legal positions. The operations of the political process are carried out 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 used as building blocks in the power formation process.

Fundamental rights, as legal forms of the power medium, take on a double role in politics. It is not sufficient only to emphasize the protection of the individual against the might of the state. Fundamental rights rather exercise simultaneously inclusionary and exclusionary functions.[34] They permit the inclusion of the overall population in the political process, taking the form of the right to political participation. These are the active civic rights, above all the right to vote, but also the political rights in the narrower sense of freedom of opinion, assembly, and association.[35] At the same time, however, fundamental rights have the effect of excluding non-political social spheres from the political field, marking the borders between politics and society and guaranteeing social institutions protection against their politicization. Such exclusion simultaneously ensures the operability of politics itself, by removing certain themes that would otherwise overtax it. This de-politicization thus not only serves to protect areas of autonomy within society but also the integrity of politics itself. Both the inclusionary and exclusionary dimensions of fundamental rights contribute to maintaining the functional differentiation of society: (p.134)

> 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.[36]

This dual role of fundamental rights must be retained in their generalization and respecification. In contrast, discussion of their horizontal effect has so far concentrated excessively on 'negative rights', on the defensive role of fundamental rights.[37] *Both the inclusion of the entire population in all function systems and the exclusion of individual and institutional areas of autonomy from these function systems*—this would be the appropriate generalization from rights directed against the state to fundamental rights in society. On the one hand, fundamental rights support the inclusion of the overall population in the relevant social sphere. They perform the constitutive function of constitutions when they support the autonomization of social sub-areas. On the other, fundamental rights perform the limitative function of social constitutions when they restrain the relevant system dynamics. Fundamental rights then serve to secure boundaries, giving individuals and institutions guarantees of autonomy against expansionist tendencies.

3. Respecification in different social contexts

Respecification cannot mean simply adapting human rights to the particularities of private law.[38] Simply concretizing the 'objective value system' in terms of private law will ignore the particular qualities of the various social contexts. This does not do justice to the double reflexivity of law and social system, because it refers only to the legal side of the constitution and neglects its social side. Considerably greater modification of the fundamental rights is required. To 'adhere to the independent nature of private law in relation to the constitutional system of fundamental (p.135) rights'[39] is correct, but not sufficient. Instead fundamental rights must be readjusted to the rationality and normativity of different sub-areas.[40]

An example will clarify the difference. If, as in the recent anti-discrimination legislation, the question arises whether the constitutional principle of equality is applicable in non-state contexts, it is absolutely insufficient simply to make recourse to the traditional equality principle in private law, because it reduces its applicability to group contexts.[41] Rather, the non-discrimination criteria for private schools and universities, for

example, must be developed from their mission of education and research. These are clearly different from the criteria of equal treatment applying in commercial businesses or religious communities. The recent anti-discrimination legislation only tentatively addresses these differences and needs to be appropriately corrected by the courts.[42] More generally, if the constitutions of the economy, science, the mass media, and the health system now legally formalize their communicative media on a global basis, fundamental rights must be redirected to them.

Direct or indirect third-party effect? This difference is by no means as irrelevant as some authors would have us believe.[43] A sociologically 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 in contrast mistaken. While the direct effect makes sure that fundamental rights should not be watered down into highly abstract values nor undermined by the norms of private law,[44] in the long run it nevertheless produces a short-circuit between politics and social fields.[45] Instead of falsely 'homogenizing' fundamental rights in the state and in society, it is in fact (p.136) their 'indirect' effect that is important, but now in the sense that state-directed human rights need a context-specific transformation.

Finally, it is not sufficient to direct fundamental rights exclusively to phenomena of economic and social power as some authors indeed suggest. They bind fundamental rights too closely to the power medium and ignore the dangers that arise from other communicative media.[46] Similarly, Thornhill accepts constitutionalization in society if—and only if—communication in the various subsystems occurs via the power medium. He ultimately presents 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'.[47] That however ignores the subtler workings of fundamental rights in society. If they are supposed to guarantee

possibilities of communication in various social fields, then they need to protect against the dangers to individual and institutional integrity posed by numerous communicative media, not only by power.

III. 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 neglecting their inclusion function.[48] But this is exactly where a major problem of late-modern societies appears, whose socially harmful effects have only become visible in the most recent phases of globalization. The problem lies in the inclusion paradox of functional differentiation. On the one hand, function systems have as their members not strictly delineated population groups, as is the case in stratified societies (class, stratum, caste); each function system rather includes the entire population, but strictly limited to its function. The inclusion of the entire population in each function system represents (p.137) the basic law of functional differentiation. On the other hand, it is the very internal dynamics of function systems that cause entire population groups to be excluded. Such function-specific exclusions moreover reciprocally reinforce each other ‘if extensive exclusion from the function system (eg extreme poverty) leads to exclusion from other function systems (eg schooling, legal protection, a stable family situation)’.[49] 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 logic of functional differentiation that the various binary codes of the world systems are subordinate to the one difference of inclusion/exclusion.[50] Will inclusion/exclusion become the meta-code of the 21st century, mediating all other codes, but at the same time undermining functional differentiation itself and dominating other social-political problems through the exclusion of entire population groups?

Here, societal constitutionalism aims at constructing constitutionally guaranteed counter-institutions in different social areas. Then, fundamental rights act not only as spaces of individual autonomy, but also as guarantees to include the entire population into the function systems.[51] Now it becomes clear what it means to orient the generalization and respecification of fundamental political rights towards function-system specific media instead of abstract values. In politics the right to vote and political rights of an active civic nature are intended to permit the entire population access to the political power medium. If this principle of political inclusion is generalized then access to the communicative media in all function systems is not only permitted, but is actually guaranteed by fundamental rights. However, this cannot be implemented in such general terms, for instance via a political access right to society. 'With functional differentiation, 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 (p.138) subsystems in this regard.'[52] It is rather the task of a careful respecification to formulate the function-system specific conditions in order to permit access to diverse social institutions. Essential services in the economic system, compulsory insurance in the health system, and guaranteed access to the Internet for the whole population are cases where the third-party effect of fundamental rights would guarantee undistorted access to social institutions.

'Internet neutrality' is an informative example of a right to inclusion.[53] The technology of the Internet initially guarantees that no obstacles exist to freely accessing the markets for Internet applications. The right to free and equal access to the Internet as an artificial community asset is in principle guaranteed by technology and requires no additional legal support. In the meantime, however, this principle has become endangered through new 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 differentiate between various classes and grant highest priority to the highest-paying users

('access tiering'). This is a clear case of access discrimination. Other cases are the manipulation of the search algorithm via Google or blocking actions by network operators.[54] Here, the technology-based neutrality of the Internet requires the additional acprof-based protection afforded by fundamental rights of inclusion. In its horizontal effect the fundamental right of non-discrimination—right of access to non-political institutions—would be respecified in the Internet as an obligation to enter into a contract: 'Access rules should ensure that all users of the medium in principle possess the same freedoms (possibilities of action).'[55] Internet operators would thus be forbidden to discriminate between comparable applications. Guarantees of fundamental rights would guaranteel free access to the social institutions within the Internet by the overall population.

Finally, such rights of inclusion might also realize greater socio-political aspirations. Brunkhorst correctly argues that the project of constitutionalizing global civil society will remain only partial if it is not accompanied (p.139) by a strengthening of democracy. However, often stronger democratic legitimization tends to mean simply that social processes should be more closely bound to institutionalized politics. Brunkhorst himself demands that sub-constitutions should be legitimized by the political processes of the European Union. Others put their hopes for democratic legitimacy in a recourse to the politics of nation states.[56] Still others give primacy to a constitution of global politics above all other partial constitutions, with the consequence that democratic legitimacy can only be delivered from there.[57]

The arguments presented here tend in the opposite direction. Societal constitutionalism aims to strengthen the democratic potential in civil society itself. Wiethölter engages for the political in 'society as society'. The political is realized 'not just from the "democratic" unified will-formation of citizens in politics, but it also "organises" institutions for decision-making, communication and education processes' within civil society. Normative consequence is to translate the horizontal effects of fundamental rights into participation rights outside the political system, in different areas of society: 'The societal

part of the human being is his or her “citizen’s right”, which overcomes the traditional private law/public law dichotomy.’[58] The normative guideline would be to transform rights of inclusion into active citizen’s rights within the social sub-areas. In nation-state contexts, for instance, the co-determination movement was successful in institutionalizing active citizen’s rights in enterprises as well as in other social organizations. It is currently an open question whether, in transnational contexts, the stakeholder movement will construct equivalent institutions in the context of Corporate Social Responsibility.

IV. Exclusionary Effect of Fundamental Rights

While such rights of inclusion into diverse social spheres are still only rudimentary, the horizontal effect of fundamental rights in their protective function is already considerably further advanced. In the transnational context this concerns in particular the violations of fundamental rights by multinational corporations that are brought before the courts.[59] (p.140)

In their exclusionary role, fundamental rights react as well to the differentiation of function systems and the autonomization of their communicative media. But now the problem is the expansion of function-specific boundaries and guarantees to exclude from the function system areas of autonomy are looked for. First, and visible everywhere since Macchiavelli, politics becomes autonomous. It becomes detached from the diffuse moral-religious-economic ties of the old European society, and extends to infinity 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 imperialist tendencies. Absolute power liberates unsuspected destructive forces. Centralized 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 totalize them beyond any limit.[60]

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.[61] Here, it is the exclusionary rather than the inclusionary function of fundamental rights that becomes effective. Fundamental rights set boundaries to the totalizing tendencies of the political power medium by depoliticizing 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 individual protests are translated 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.

Orienting fundamental rights towards protection against the state worked only so long as the state could be identified with society, or at least the state could be regarded as society's organizational form, and politics as its hierarchical co-ordination. As other highly specialized (p.141) communicative media (money, knowledge, law, medicine, technology) gained in autonomy it became clear that the individual/state dualism is an insufficient description of modern society. It is exactly at this point that the third-party effect of exclusionary fundamental rights becomes relevant, as protection against the expansive tendencies of social institutions. The fragmentation of society multiplies the boundary areas between autonomized communicative media and individual and institutional spheres of autonomy.[62]

Thus the problem of human rights cannot simply be limited to the relation between state and individual, or the area of institutionalized politics, or even solely to power phenomena in the broadest (Foucault's) sense. Specific endangerment by a communicative medium comes not just from politics, but in principle from all autonomized 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 Legendre[63]—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,[64] reproductive medicine, extending life in intensive care units, the 'Lost Honour of Katharina Blum'[65]).

Accordingly, the fragmentation of society is today central to 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. (p.142) Everything then comes down to the identification of the various frontier posts, so as to recognize the violations that endanger human integrity by their specific characteristics. Where are the frontier posts? In the various semantic artifacts of 'persons' in the subsystems: *homo politicus, oeconomicus, juridicus, organisatoricus, retalis*, etc. While they are indeed only constructs within communication that permit attribution of action, they are at the same time real points of contact with individual human beings 'out there'.[66] It is through the mask of the 'person' that the social systems make contact with flesh-and-blood 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 specialized 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 in this specific way that Foucault's disciplinary mechanisms develop their particular effects.[67]

V. The Anonymous Matrix

If violations of fundamental rights stem from the totalizing tendencies of sectorial rationalities, there is clearly no longer any point in seeing their horizontal effect as if rights of private actors have to be balanced against each other. But this is still the dominant opinion in constitutional law.[68] 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 time. It must (p.143) systematically be separated from the fundamental-rights question.[69] 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 generalizable form. Legally, this idea has been most clearly developed in the classical law of tort, in which not merely damages, 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, ie 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 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 organizations come closer to the pertinent issues being considered here.[70] These concepts affect violations of norms that emanate not from human beings but from impersonal social processes that require human beings as their functionaries.[71] But these concepts conceive only the dangers stemming from 'collective actors' (states, political parties, business firms, groups of companies, associations) and ignore the dangers stemming from the anonymous 'matrix', from autonomized communicative processes (institutions, function systems, networks) that are not personified as collectives. Even human rights that are directed against the state should not be (p.144) seen as relations between political actors (state versus citizen), ie 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.[72] 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 private lawyers against the intrusion of fundamental rights into private law, though these complaints are in turn exaggerated and overlook the real issues.[73]

The category error can be avoided. Both the 'old' state-centred 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 de-personalizing power phenomena and identifying today's micro-power relations in society's capillaries in the discourses/practices of 'disciplines'.[74]

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, autonomized, and today globalized 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 (p.145) work in their specific ways.[75] 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. Now, on one side of the new equation there is no longer a private actor as the violator of fundamental rights, but the *anonymous matrix of an autonomized communicative medium*. On the other side there 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 dimensions:

— *institutional rights* that protect the autonomy of social processes against their subjugation by the totalizing tendencies of the communicative matrix. By protecting, for instance, the integrity of art, family, or religion against totalitarian tendencies of science, media, or economy, fundamental rights take effect as 'conflict of law rules' between partial rationalities in society.[76]

— *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 single 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 (eg freedom of art and property primarily to the institutional dimension, freedom of speech primarily to the personal dimension, and freedom of conscience primarily to the human 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 realization. **(p.146)**

VI. Justiciability?

The ensuing question for lawyers is: Can 'horizontal' effects of human 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*?[77] Failing a supreme court for meaning, all that can happen is that the individual experience endures the infringement and then fades away unheard. Or else it gets 'translated' into communication, but then the paradoxical demand will be for the infringer of the right (society, communication) to punish its own crime! That means expecting poachers to turn into gamekeepers. But bear in mind that by institutionalizing political fundamental rights, 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?[78] Can it, in this impoverished rights talk, in any way reconstruct 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. In litigation there must always be a claimant suing a defendant for infringing his rights. In this framework of mandatory binarization 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 criticized 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 (p.147) 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 recognize as their bearers not only persons, but also institutions.[79] Whoever enforces political freedom of expression is simultaneously protecting the integrity of the forming of the political will. 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 society against social institutions outside the state.

Is this distinction, plausible in principle, so precise 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.[80]

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 organizations and private regulatory systems. The most important examples here would be national and international business firms and other private associations; and private standardization and similar private rule-setting mechanisms as private regulatory systems.[81] 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 characterization (p.148) 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.[82] But it is at least a

problem within society, one Luhmann sought to respond to with the concept of justice as socially adequate complexity.[83] 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.

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 problem 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 (p.149) on the other can at best be surmised by law. And the only signpost left is the legal prohibition through which a self-limitation of communication seems possible.[84] 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*)',[85] 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.

Notes:

(1) Gardbaum (2008) 'Human Rights and International Constitutionalism', 238 ff.

(2) The major differences between guarantees of human rights under international law are documented by Hamm (2003) *Menschenrechte*.

(3) For detailed analyses: Oliver and Fedtke (2007) *Human Rights and the Private Sphere*; De Schutter (2006) *Transnational Corporations and Human Rights*; Joseph (2004) *Corporations and Transnational Human Rights Litigation*.

(4) A sophisticated neo-natural law conception of transnational human rights can be found in Höffe (2007) *Democracy in an Age of Globalisation*, 38 ff.; for a different human rights theory, based on Chomsky's universal moral grammar, Mahlmann (2009) 'Varieties of Transnational Law'.

(5) On ways to escape the alternatives of universalism and relativism, see the subtle argumentation of Menke and Pollmann (2007) *Philosophie der Menschenrechte*, 71 ff.

(6) Thus apparently Luhmann (2004) *Law as a Social System*, 469 ff. and Fischer-Lescano (2005) *Globalverfassung*, 67 ff.

(7) Ladeur and Viellechner (2008) 'Transnationale Expansion staatlicher Grundrechte', 46 ff.

(8) On the sources of law, for instance Röhl and Röhl (2008) *Allgemeine Rechtslehre*, 519 ff.

(9) Luhmann (2004) *Law as a Social System*, 338 ff.

(10) Klösel (2012) *Prozedurale Unternehmensverfassung* (manuscript), 62. This moves the positivization decision within the regime to the forefront.

(11) Ladeur and Viellechner (2008) 'Transnationale Expansion staatlicher Grundrechte', 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', Santos (2003) *Toward a New Legal*

Common Sense, 437. See on this Amstutz and Karavas (2006) ‘Rechtsmutationen’; Amstutz (2005) ‘In-Between Worlds’.

(12) Despite the pioneering work of Josef Esser (1956) *Grundsatz und Norm*, here too the transitional semantics (*Rechtserkenntnis*, case law as *Gewohnheitsrecht*) are not yet dead, even if they are on their deathbed, see the amiguities in Röhl and Röhl (2008) *Allgemeine Rechtslehre*, 571 f.

(13) Kumm (2010) ‘The Best of Times and the Worst of Times’. On the application of general legal principles in the *lex mercatoria*, see Stein (1995) *Lex mercatoria*, 171 ff.

(14) It is intended to prove the universal validity of an *ordre public transnational* in which fundamental rights play an important role, but it says nothing about the lawgiving role of the conflict resolution body which, having compared various legal orders, implements a concrete norm: see for example Lalive (1987) ‘Transnational (or Truly International) Public Policy’, 295.

(15) Durkheim (1933) *The Division of Labor in Society.*

(16) Luhmann (2004) *Law as a Social System*, 487. For a detailed analysis of the paradoxes in fundamental rights, Verschraegen (2006) ‘Systems Theory and the Paradox’.

(17) See for example the case study of the Argentine Madres by Fischer-Lescano (2005) *Globalverfassung*, 31 ff. Further detailed studies in Fn. 2.

(18) Ladeur and Viellechner (2008) ‘Transnationale Expansion staatlicher Grundrechte’. Their argument works, however, against their own solution of the nation-state expansion of fundamental rights, as they cannot substantiate the ‘institutionalization that will ensure expectations’ in the expansion as such.

(19) Social norms become law when they are integrated into the global legal system 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 Teubner (1997) ‘Global Bukowina’, 11

ff. Similarly Köndgen (2006) ‘Privatisierung des Rechts’, 508 ff.; Calliess (2006) *Grenzüberschreitende Verbraucherverträge*, 182 ff.; Schanze (2005) ‘International Standards’. Nor does Fischer-Lescano (2005) *Globalverfassung*, 67 ff. simply equate the expectations raised by the *colère publique* with legal 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 Collins (2012) ‘Flipping Wreck’.

(20) Renner (2011) *Zwingendes transnationales Recht*, 91 ff., 199 ff.

(21) Gardbaum (2008) ‘Human Rights and International Constitutionalism’, 257.

(22) See for example Trachtman (2006) ‘The Constitutions of the WTO’, 640 ff.

(23) Berman (2007) ‘Global Legal Pluralism’. 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’.

(24) See for example Stein (1995) *Lex mercatoria*, 99, 163.

(25) Subtler ideas on the entwining of the two spheres are developed by Sassen (2006) *Territory-Authority-Rights—From Medieval to Global Assemblages*.

(26) Luhmann (2004) *Law as a Social System*, 381; see also in other theory contexts Lyotard (1983) *Le différend*, 51.

(27) Several authors argue towards a common-acprof-like development of transnational fundamental rights: Kumm (2010) ‘The Best of Times and the Worst of Times’; Karavas (2010) ‘Grundrechtsschutz im Web 2.0.’; Walter (2001) ‘Constitutionalizing (Inter)national Governance’.

(28) Klabbers (2009) ‘Setting the Scene’, 23 with reference to Hurrell (2007) *Global Order*, 53. To avoid misunderstanding, contrary to Klabbers, the position here is that a global

constitution will indeed dissolve into numerous sector constitutions.

(29) On the third-party effect of transnational fundamental rights see Gardbaum (2008) ‘Human Rights and International Constitutionalism’; Gardbaum (2003) ‘ “Horizontal Effect” of Constitutional Rights’; Clapham (2006) *Human Rights Obligations of Non-State Actors*; Anderson (2005) *Constitutional Rights*; Clapham (1996) *Human Rights in the Private Sphere*; on the European-American discussion see Sajó and Uitz (2005) *Constitution in Private Relations*.

(30) See from the viewpoint of comparative law, Friedman and Barak-Erez (2001) *Human Rights in Private Law*; for the UK: Tomkins (2001) ‘On Being Sceptical about Human Rights’, 4; for Israel: Barak (1996) ‘Constitutional Human Rights’; for South Africa: Cheadle and Davis (1997) ‘Application of the 1996 Constitution’, 44 ff.; for Canada: Weinrib and Weinrib (2001) ‘Constitutional Values and Private Law in Canada’.

(31) On fundamental rights under private law see Canaris (1999) *Grundrechte und Privatrecht*.

(32) For a detailed comparative analysis of the horizontal effect of fundamental rights, see Gardbaum (2008) ‘Human Rights and International Constitutionalism’. On the prevailing doctrine in Germany, see Herdegen in: Maunz/Dürig, Grundgesetz (2010) Art. 1 GG, paras. 59–65. For an analysis of the paradoxes of human rights, Verschraegen (2006) ‘Systems Theory and the Paradox’.

(33) Thornhill (2008) ‘Towards a Historical Sociology’, 169 ff.; Luhmann (1990) ‘Verfassung als evolutionäre Errungenschaft’; Luhmann (1973) ‘Politische Verfassungen im Kontext’; Luhmann (1965) *Grundrechte als Institution*.

(34) Thornhill (2011) ‘The Future of the State’, 390; Luhmann (1965) *Grundrechte als Institution*, 138.

(35) Remarkably, that touchstone of modern political systems, the right to vote, does not have the status of a full-fledged fundamental right in Germany, Klein in: Maunz/Dürig, Grundgesetz Art. 38 GG, para. 135 f.

(36) Thornhill (2011) ‘The Future of the State’, 392.

(37) All the authors in Fns. 30 and 31 formulate human rights, directed against third parties, as merely negative rights.

(38) And then placing restrictions on them that conform to private law. See for example Herdegen in:Maunz/Dürig, Grundgesetz (2010), Art. 1 GG, paras. 65 ff.

(39) Dürig (1956) ‘Grundrechte und Zivilrechtsprechung’, 164.

(40) Sociologically oriented respecifications of the fundamental rights in corporations exceed by far their purely private-law oriented third-party effect. See the classic study by Selznick (1969) *Law, Society and Industrial Justice*, 75 ff., 259 ff.; more recently Schierbeck (2000) ‘Operational Measures’, 168.

(41) On the traditional equality principle in private law, Raiser (1948) ‘Gleichheitsgrundsatz im Privatrecht’ and Hueck (1958) *Grundsatz der gleichmäßigen Behandlung*.

(42) On the problems, Badura (2008) ‘Gleiche Freiheit im Verhältnis zwischen Privaten’.

(43) See especially Alexy (1994) *Theorie der Grundrechte*, 473 ff.

(44) This is why Brüggemeier pleads for a direct third party effect, Brüggemeier et al. (2008) *Fundamental Rights*; Brüggemeier (2006) ‘Constitutionalisation of Private Law’.

(45) This is the tenor of the criticism made by Amstutz et al. (2007) ‘Civil Society Constitutionalism’, 249 ff.

(46) Reducing fundamental rights to phenomena of ‘social power’ as an analogy to political power is widespread in labour law. This is understandable in view of organizational power, but reduces the third-party question to a mere phenomenon of power and ignores more subtle violations of human rights. See for instance Gamillscheg (1964) ‘Grundrechte im Arbeitsrecht’. Similar reductions can be found in explicitly political concepts of the horizontal effect of fundamental rights, eg in Anderson (2005) *Constitutional*

Rights, 33 ff. and in Tuori (2010) 'Many Constitutions of Europe', 11 f.

(47) Thornhill (2011) 'Constitutional Law from the Perspective of Power', 247.

(48) This function is not once mentioned in the leading German commentary, Herdegen in: Maunz/Dürig, Grundgesetz (2010), Art. 1 GG, paras. 65 ff.

(49) Luhmann (2000) *Politik der Gesellschaft*, 427.

(50) Luhmann (2004) Law as a Social System, 488 ff. On exclusion/inclusion in systems theoretical and poststructuralist perspectives see Stäheli and Stichweh (2002) *Exclusion and Socio-Cultural Identities*. For inclusion/exclusion in a policy perspective, Sen (2000) *Social Exclusion*.

(51) First steps in this direction, Verschraegen (2012) 'Differentiation and Inclusion: A Neglected Sociological Approach to Fundamental Rights' ; Holmes (2011) 'Rhetoric of Legal Fragmentation', 132 ff.; on a constitutionally guaranteed *status positivus* for participants in the Internet, Viellechner (2011) 'Constitution of Transnational Governance Arrangements', 453 ff.

(52) Luhmann (1997) *Gesellschaft der Gesellschaft*, 630.

(53) See Wielsch (2008) *Zugangsregeln*, 249 ff.

(54) See Karavas (2010) 'Grundrechtsschutz im Web 2.0.'; Karavas (2006) *Digitale Grundrechte*, 164 ff.; Karavas and Teubner (2005) 'The Horizontal Effect of Fundamental Rights on "Private Parties" within Autonomous Internet Law'.

(55) Wielsch (2008) *Zugangsregeln,* 254; for detailed proposals on the effect of fundamental rights in the Internet see Karavas (2006) *Digitale Grundrechte*, 179 ff.; a similar approach, Speta (2002) 'Common Carrier Approach to Internet Interconnection'.

(56) eg Renner (2011) *Zwingendes transnationales Recht*, 244 f.

(57) Joerges and Rödl (2009) ‘Funktionswandel des Kollisionsrechts II’, 777 (‘not otherwise conceivable’).

(58) Wiethölter (1992) ‘Regelbildung in der Dogmatik’, 238.

(59) In greater detail, Teubner (2006) ‘The Anonymous Matrix: Human Rights Violations by “Private” Transnational Actors’.

(60) The work of Luhmann (1965) *Grundrechte als Institution*, 24 ff., is again seminal here.

(61) On the relationship between individual and institutional fundamental rights see Ladeur (2004) *Kritik der Abwägung in der Grundrechtsdogmatik*, 77.

(62) The institutional side of rights is emphasized by Ladeur (2004) *Kritik der Abwägung in der Grundrechtsdogmatik*, 64: ‘Fundamental rights contribute to the self-reflection of the private law, when—as with the horizontal effect of communicative freedom—it is about the protection of non-economical interests and goods.’

(63) Agamben (2002) *Homo Sacer*; Foucault (1975) *Surveiller et punir: La naissance de la prison*, 200 f.; Legendre (1996) *La fabrique de l’homme occidental*, 31 ff.

(64) 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. They are 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 Schmuhl (2005) *Grenzüberschreitungen*.

(65) Böll (1992) *Verlorene Ehre der Katharina Blum*.

(66) For details see Fuchs (2003) *Eigen-Sinn des Bewußtseins,* 16f., 28f., 30f., 33ff.

(67) For details on the personal constructs as junction between communication and mind see Hutter and Teubner

(2000) ‘Homo Oeconomicus and Homo Juridicus: Communicative Fictions?’.

(68) Influential Bundesverfassungsgericht BVerfG 89, 214 ff. (*Bürgschaft*); Alexy (1994) *Theorie der Grundrechte*, 484.

(69) 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.

(70) See for instance Jäger (1989) *Makrokriminalität*; Gómez-Jara Díez (2005) *La culpabilidad penal de la empresa*, 109 ff.

(71) For clarification it has to be emphasized that here the individual responsibility does not disappear behind the collective responsibility, but rather that both exist in parallel, although subject to different conditions.

(72) Very critical towards the consideration of subjective rights in the range of the horizontal effect, Ladeur (2004) *Kritik der Abwägung in der Grundrechtsdogmatik*, 58 ff.

(73) Diederichsen (1998) ‘Bundesverfassungsgericht als oberstes Zivilgericht’; Diederichsen (1997) ‘Selbstbehauptung des Privatrechts’; Zöllner (1996) ‘Regelungsspielräume im Schuldvertragsrecht’; Medicus (1992) ‘Grundsatz der Verhältnismäßigkeit’, 35.

(74) Foucault’s problem is however that he is obsessed with the phenomenon of power, which leads him to inflate the concept of power meaninglessly. As a consequence he cannot discern the more subtle effects of other communication media.

(75) In more detail see Fischer-Lescano and Teubner (2004) ‘Regime-Collisions’, 1004 ff. Not the therapy, but the diagnosis is followed by Koskenniemi (2005) *Global Legal Pluralism*, 〈http://www.valt.helsinki.fi/blogs/eci/PluralismHarvard.pdf〉.

(76) Ladeur (2004) *Kritik der Abwägung in der Grundrechtsdogmatik*, 60, 69f., 71f.; Teubner (2000) 'Ein Fall von struktureller Korruption? Die Familienbürgschaft in der Kollision unverträglicher Handlungslogiken'; Graber and Teubner (1998) 'Art and Money'.

(77) Lyotard (1983) *Le différend*.

(78) For a good criticism of rights talk, see Glendon (2000) 'Rights Talk'.

(79) Clearest in the impersonal fundamental rights conception of Ridder (1975) *Soziale Ordnung des Grundgesetzes*, 85ff. See Ladeur (1999) 'Helmut Ridders Konzeption der Meinungs- und Pressefreiheit in der Demokratie'.

(80) 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.

(81) The renaissance of the concept of the institution in the various disciplines is no coincidence. Its relevance to jurisprudence is discussed by Black (1997) 'New Institutionalism and Naturalism'.

(82) Lyotard (1983) *Le différend*, 9 ff.

(83) Luhmann (2004) *Law as a Social System*, 211 ff.; Luhmann (1981) *Ausdifferenzierung des Rechts: Beiträge zur Rechtssoziologie und Rechtstheorie*, 374 ff.

(84) 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: Wiethölter (2005) 'Just-ifications of a Law of Society'; Legendre (1994) *Le crime du caporal Lortie*, 145 ff.

(85) Derrida (1990) 'Force of Law: The Mystical Foundation of Authority', 969.