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Fundamental Rights, Private Law, and Societal Constitution: On the Logic of the So-Called Horizontal Effect

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ABSTRACT

The paper raises the issue of a normative justification of the horizontal effect of fundamental rights in private law. Justification in this sense means that the reasons given are neither functional nor instrumental, but that the reasons are supposed to be subject to the intrinsic logic of private law. In traditional doctrine, the reason usually given to confer horizontal effect to fundamental rights is a deferral to the constitution: The constitutional text decides whether and how fundamental rights apply to private legal relationships. This answer implies that fundamental rights are either logically or normatively alien to private law, that they are located in a logical or normative room beyond the logical room of private law. In contrast to this prevailing opinion, the paper argues that, first, private law is logically prior to fundamental rights, and that, second, fundamental rights are part of private law's intrinsic normative logic. This is developed for the class of democratic rights that includes all rights besides anti-discrimination rights and classical civil rights. If the argument is cogent, then it can also explain why fundamental rights also apply, including horizontal effect, in the sphere of transnational legal regimes, subject to the transnational jurisdiction of state courts and international tribunals.

INTRODUCTION

In Gunther Teubner's concept and vision of "transnational societal constitutionalism," fundamental rights play an essential role.¹ The sociological function of their effectuation is to confront a transnational


system, organized according to a transnational legal regime, with functional imperatives of its environments. Fundamental rights serve to restrain the relevant system's dynamics; they force it to cope with and to adapt to the functional needs of its environments; they block the regime's unlimited expansionism. Moreover, given that societal constitutions are not public, but either private or, at the most, hybrid in character, fundamental rights must be binding not only for public actors, but for private actors as well. But this traditional concept of horizontal effect is only the starting point for Teubner's more demanding idea of a—let us say—general societal effect of fundamental rights. In this sense, the further elaboration of horizontal effect of fundamental rights in private law is a cornerstone of Teubner's normative hopes and expectations in "transnational constitutionalism."

The horizontal effect of fundamental rights in private law is also the subject of this paper. This paper will try to illuminate the logical role of fundamental rights in private law. But before developing this subject further, it seems helpful to start with a preliminary remark. The problem identified in this paper does not play a major role in Teubner's work. This is not due to a simple shortcoming that could be improved. Rather, it is due to Teubner's general choice of his theoretical approach to law. This needs further elaboration, at least in brief.

I. A "DISPUTE BETWEEN THE FACULTIES" IN LEGAL THEORY

Gunther Teubner's work is based on the view, which is shared by many other legal scholars, that law fulfills an essentially societal function. The basic idea is that we can understand and shape law best if we describe and interpret its principles from a sociological perspective and use sociological vocabulary. Although Teubner also claims that law and its basic concepts do have an intrinsic meaning, this meaning is not the last line of understanding. Full understanding of the law requires translating the law's concepts into sociological constellations and imperatives. For this reason, law cannot guide its own development in normative terms. Instead, law must adopt orientations gained (with sociological means) from areas outside the law and only then translate them into its own vocabulary.

The following quotation by Teubner on the topic of this paper, the horizontal effect of fundamental rights, can illustrate this point:

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2. See id. at 132-34.
3. See id. at 131-32.
ON THE LOGIC OF THE SO-CALLED HORIZONTAL EFFECT

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?

Translating normative sociology into legal doctrine is, of course, a difficult task, not least because today's legal vocabulary is usually obsolete, as it is the product of a bygone societal context.

This paper is based on the opposite hypothesis: law does not fulfill a function, but has an intrinsic meaning. Law is a moral category; it represents a fundamental, human relationship, be it between equals (as in private law) or between the individual and a community (as in public law). Law cannot be explained first and foremost by sociological means. It must be illuminated using conceptual means. An elaboration of the basic legal concepts can itself be a source and a reason for developing law further. Legal theory, inasmuch as it deals with the basic concepts of the law, is therefore, first and foremost, a subspecies of philosophy.

Of course, this argument does not mean to declare sociology of law to be uninteresting, and not from the perspective of jurisprudence, either. It only means to dispute the claim by legal sociology that it is the true basis of (understanding) law. The situation is like that of legal history. It, too, is not the true basis of law, but rather a subdiscipline of history. Accordingly, legal sociology is not the true basis of law, either, but a subdiscipline of sociology.

There is a "dispute between the faculties" lying dormant here that concerns the fundamental approach to law. It will not be pursued here.

5. Teubner, supra note 1, at 146.
6. Teubner seems to reject an idea of translation, but speaks about "irritation" of the doctrinal perspective, e.g. Gunther Teubner, Das Projekt der Verfassungssoziologie: Irritationen des nationalstaatlichen Konstitutionalismus [The Project of Constitutional Sociology: Irritating Nation State Constitutionalism], 32 Zeitschrift für Rechtssoziologie 189 (2011) (Ger.). But it is supposed that the result of such "irritation" is not meant to be random.
in substance. But it is worth noting the contrast between Teubner’s approach and the one presupposed in this paper: legal theory as sociology with legal doctrine as the medium for transposing the sociology’s normative orientations on the one hand, and, on the other hand, legal theory as philosophy, which can directly guide legal doctrine because it builds a conceptual continuum to it.

The methodological opposition between the sociological approach, which is also Teubner’s, and the philosophical approach, which is followed in this paper, leads to the effect, that this paper asks a question that does not seem to need an answer in Teubner’s view. As stated above, this paper uses as a starting point Teubner’s claim for an advanced elaboration of the horizontal effect of fundamental rights to bring them to bear within autonomous transnational civil constitutions. In this context, the jurisdiction of courts and tribunals, which represents unity and autonomy of the transnational constitutional subject, has a salient role to play. Their achievement is usually to bring fundamental rights to bear in the relevant societal sphere. Against this backdrop, one particular question needs to be answered from a legal point of view: How can the effectuation of horizontal effect be justified, and this means justified in legal terms, in the logic of the law? Teubner apparently asks these questions: “How . . . can fundamental rights claim validity in transnational regimes . . . ? Do fundamental rights within such regimes oblige also private actors . . . ?”9 His answer is not given from the internal perspective of the law, but from an outside, legal realist perspective: “It is the decision practice of transnational regimes themselves that enacts fundamental rights within their borders.”10 This claim is certainly true, but it is not an answer to the question whether the decisions of those courts or tribunals are correct from the viewpoint of the law.

Nothing is wrong with this from Teubner’s methodological perspective. But from the philosophical approach’s perspective, a justification for the horizontal effect is indeed required. It becomes even more urgent, if the jurisdiction on transnational disputes, especially by arbitration tribunals, comes into focus because, as will be explained later, the horizontal effect of fundamental rights is much less developed in this context than it is in the context of state court jurisdiction on domestic disputes. And the project of justification will bring about an idea of private law as societal constitution, an idea that has some connections with Teubner’s idea of societal constitutionalism, but, as will turn out later, is not identical.

9. TEUBNER, supra note 1, at 125.
10. Id. at 129.
So, the rest of the paper will argue for a justification of the horizontal effect of fundamental rights in private law, which can also justify its effectuation in the sphere of transnational private legal regimes. In this justificatory sense, it is about the logic of fundamental rights in private law. However, the whole argument cannot start with an established justification of the well-known effect of fundamental rights in a state's domestic private law. No doubt, clear responses to the doctrinal construction of the effect of basic rights are available in private law. But their normative justification is seldom discussed (see Section II). From a philosophical perspective, the question as to a justification certainly does pose a challenge. The historical circumstance that private law is older than direct fundamental rights derived from a state constitution initially suggests that the substance of fundamental rights is alien to private law in and of itself. In the following, it will be argued for the opposite position: the effect of fundamental rights can be explained employing the logic of private law itself. The horizontal effect of fundamental rights is inherent to private law, which constitutes the character of private law as a societal constitution (see Section III). And this allows new conclusions for the problem of the horizontal effect of fundamental rights in the area of transnational legal relationships (see Section IV).

II. STARTING OVER: FUNDAMENTAL RIGHTS AND PRIVATE LAW

In this section, it will be discussed once more the problem of the effect of fundamental rights in private law as it is encountered in domestic law, in the framework of the state, and under the (counterfactual) assumption of a national society at home in that framework. Three aspects are to be discussed in this context: First, the aspect of the logical relationship between fundamental rights and private law (see Section II.A.), then the aspect of the doctrinal construction of the effects of fundamental rights in private law (see Section II.B.), and finally the aspect of the justification of the effect of fundamental rights (see Section II.C.).

A. On the Logical Relationship Between Fundamental Rights and Private Law

The way in which the discussion about the horizontal effect of fundamental rights was originally framed has made that debate prone to misunderstandings to this day. Because the question about the horizontal effect is raised, one must get the impression that fundamental rights and private law constitute two orders that are
logically independent of one another. Logically independent means that each order can be understood without the other. The impression of logical independence came about because of the open question about a horizontal effect. This implied a clear dividing line: on one side are the fundamental rights; they apply to the relationship of the citizen to the state. On the other side is private law; it applies to the relationship between citizens. In principle, each is independent of the other. So the question necessarily arises whether the dividing line between the orders of fundamental rights and private law is to be transcended nonetheless by the horizontal effect, and consequently, only constitutional law can answer this question.

1. Logical Primacy of the Fundamental Rights?

Of course, the notion that the orders of fundamental rights and private law are logically independent is wrong. Instead, there is a logical dependence between the two; one rests on the other. There are two possibilities: Either the order of fundamental rights is basic to the order of private law, or the order of private law is basic to the order of fundamental rights. According to the first position, fundamental rights seem fundamental if one reads private law as applied constitutional law and, therefore, analyzes private-law legislation as a practice of balancing fundamental rights.12

The disadvantage of this view is that, at the least, it enters into a somewhat uncomfortable tension with the conceptual work performed in the past and the present on providing conceptual foundations for private-law norms, in particular the norms concerning fundamental institutions such as property, contract, and tort. For example, the question why a contract presupposes offer and acceptance, consideration, and substantive fairness can be answered by drawing on theories of property as instantiating external freedom which must lead to the right to alienation through contract.13 The claim of logical

11. GUNTER DÜRING, Grundrechte und Zivilrechtsprechung [Fundamental Rights and Adjudication], in FESTSCHRIFT FÜR HANS NAWIAFSKY 183 (1956) ("Es geht bei der Drittwirkung, F.R.] um die Erhaltung der privatrechtlichen Eigenständigkeit").

12. See, e.g., ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 363 (2002); KONRAD HESSE, VERFASSUNGSRECHT UND PRIVATRECHT (1998); Matthias Kumm, Who is Afraid of the Total Constitution, 7 GERMAN L.J. 341, 359 (2006) ("Conceptually then, private law, like any law in Germany, qualifies as a branch of applied constitutional law.").

13. PETER BENSON, The Unity of Contract Law, in THE THEORY OF CONTRACT LAW 118 (Peter Benson ed., 2001). See also the rich philosophical work on tort law: PHILOSOPHICAL FOUNDATIONS OF THE LAW OF UNJUST ENRICHMENT (Robert Chambers et al. eds., 2009);
primacy of fundamental rights implying that the private law norms are products of balancing fundamental rights declares that any work of this kind on conceptual foundations is obsolete.

Now, one may try to rescue the claim of logical primacy of fundamental rights by stating that it is only a meta-commentary that in turn only illuminates what is actually happening in such work on fundamental concepts. It is indeed true that, as a meta-commentary, it need not imply that expressing what is actually happening in terms of balancing fundamental rights could replace such conceptual work. Unfortunately, the claim, read as a meta-commentary, is evidently wrong. Balancing includes precisely a characteristic aspect of subjective valuation, an aspect of something conceptually underdetermined. Precisely such an aspect, however, has no place in a conceptual foundation. Otherwise, that foundation fails to be conceptual.

2. Logical Primacy of Private Law

From the alternative perspective, private law is basic to fundamental rights. This results even from the fact that fundamental rights are occasionally about private law: the guarantees of property rights and inheritance law, for example, or of marriage and family. But “corporation” and “association” also belong in this category. For these cases, it seems clear that fundamental right would not be understandable without the articulations in private law. For instance, we would not be able to understand what “property rights” are if we did not already know that according to private law, property grants its owner the right to dispose of the property as he pleases and to exclude everyone else from using it. The relevant provision in private law is not a definition of property rights, but rather their constitution. This constitutive achievement in private law is taken up by the fundamental right; so logically speaking, the fundamental right presupposes its constitution in private law.

The same structure is also to be found in other cases. For instance, obtaining a material livelihood by practicing a profession (Article 12 German Basic Law) takes place through contracts, at least contracts in which the efforts of the person practicing the profession, whether freelancer or employee, are purchased and remunerated. Freedom of

14. Cf. Art. 14 of the German Basic Law (GBL). In the following, the paper occasionally refers to German law. This is done just for the purpose of illustration. Any particularities of the German version of the law do not play a systematic role in the argument.
15. Cf. Sec. 903 of the German Civil Code.
occupation, as a negative right directed against the state, must therefore presuppose contractual freedom under private law, for a legal order without contractual freedom under private law would not be able to guarantee the fundamental right of freedom of occupation. In this respect, private law makes a constitutive contribution to the substance of the fundamental right. This contribution by private law must already be understood if one is to understand the substance of the fundamental right.

Finally, however, logical primacy must be affirmed in the case of all other fundamental rights that do not concern or presuppose private-law institutions. This primacy lies in the fact that the fundamental rights in question always presuppose the individual's freedom to act, including the right to property as its objective aspect. For example, the freedom of expression directed against the state\textsuperscript{16} presupposes that freedom of expression exists in societal space as well. In societal space, however, freedom of expression is in fact made possible first of all via private law: equality of rights and the protection of physical integrity prohibit anyone from hindering the individual from expressing his or her opinion or requiring him or her to have a particular opinion.\textsuperscript{17}

In other words, fundamental rights presuppose private law. At least the general freedom to act, but beyond that, the more specific institutions of private law, such as property or contract, must already be in place for the substance of the individual fundamental rights to become comprehensible.

3. No Normative Primacy of Private Law

This finding can also be expressed in another way: If fundamental rights presuppose constitutive achievements of private law for the societal sphere, then this implies that fundamental rights presuppose their horizontal effect by means of private law in the societal realm. At first glance, it seems a logical consequence of this observation that the horizontal effect of fundamental rights must be negated as a matter of principle. For if the substance of the fundamental rights is itself represented in private law and is realized by means of private law, then it seems that no room remains for any horizontal effect. This conclusion has in fact been drawn, albeit in a weakened form.\textsuperscript{18}

\textsuperscript{16. Cf. Art. 5 (1) 1 GBL.}
\textsuperscript{17. This was already observed by Immanuel Kant. See IMMANUEL KANT, METAPHYSICS OF MORALS (Mary Gregor ed., 1996) (remarking on the implications of innate right, including (horizontal) freedom of expression).}
\textsuperscript{18. Uwe Diederichsen, Die Rangverhältnisse zwischen den Grundrechten und dem Privatrecht [The Hierarchy Between Fundamental Rights and Private Law], in
The logical primacy of private law, however, does not imply its normative primacy. It would be wrong to assume that the traditional functioning of private law had always realized, quasi automatically and without further reflection, the content of fundamental rights in the societal sphere. Otherwise, the whole debate on horizontal effect would seem rather awkward, because there would have been and could have been no cases which raise the question of correcting the usual operation of private law by horizontal effect. The reason why private law is to be submitted to horizontal effect is that private law itself provides the means to deprive individuals of their fundamental rights. These means are contract, on the one hand, and tort claims on the other. With contract, one can voluntarily accept restrictions of action that fall under the description of fundamental rights. The same applies for tort claims: One can restrict another's action if that person interferes with property rights or protected financial interests. The question that the discussion about horizontal effect is actually about is whether and to what extent a normative horizontal effect contradicts such restrictions.

**B. The Doctrinal Construction of the Effect of Fundamental Rights**

Recently, several authors have conducted comparative-law studies on the doctrine of the effect of fundamental rights in private law. The findings suggest that there are a limited number of basic types in which the effect of fundamental rights is to be constructed in doctrinal terms. In synthesis, there are only two relevant types: the doctrine of direct horizontal effect and the doctrine of an indirect horizontal effect of

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fundamental rights by way of "radiation" (Ausstrahlung) into private law.

The doctrine of a direct effect assumes that fundamental rights also have effects in situations between private parties. However, it assumes that the effect is modified compared with the effect toward the state, because even when a private party is accused of interfering with the fundamental rights of another party, that party may mobilize opposing fundamental rights of his or her own. That is why, this doctrine states, the content of guaranteeing fundamental rights between private parties is different from guaranteeing fundamental rights vis-à-vis the state.

The alternative view denies any effects of fundamental rights as rights in private law. Nonetheless, there is a dimension of the effect of fundamental rights. Fundamental rights have effects as values and, as such, provide orientation for the formation of concepts in private law. For example, fundamental rights provide orientation as to what is considered unconscionable, in bad faith, and inequitable. They offer a guiding principle as to what are legitimate interests worthy of protection. They can be a point of reference for determining which rights are protected from violations by any third parties and which justifications can be put forward for interventions in the rights of third parties. This effect of forming concepts of private law by providing orientation is often expressed with the vivid term "radiation" (Ausstrahlung).

23. Lorraine E. Weinrib & Ernest J. Weinrib, Constitutional Values and Private Law in Canada, in HUMAN RIGHTS IN PRIVATE LAW 43 (Daniel Friedmann & Daphne Barak-Erez eds., 2001) (reflecting the position of the Supreme Court of Canada in Dolphin Delivery and Hill v. Church of Scientology and of the German Federal Constitutional Court in the famous Lüth-decision). See also, the path-breaking German article for Lüth, DÜRIG, supra note 11.
24. It is argued that there is a doctrinal alternative to horizontal effect, namely the (state-)court's duty to protect against violations of fundamental rights by third parties. Path-breaking was Claus-Wilhelm Canaris, Grundrechte und Privatrecht [Fundamental Rights and Private Rights], 184 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 201 (1984) (Ger.). But although this has become the prevailing opinion in legal academia, see MATTHIAS RUFFERT, VORRANG DER VERFASSUNG UND EIGENSTÄNDIGKEIT DES PRIVATRECHTS: EINE VERFASSUNGSRECHTLICHE ÜBERSICHT ZUR PRIVATRECHTSWIRKUNG DES GRUNDGESETZES [PRIORITY OF THE CONSTITUTION AND THE INDEPENDENCE OF PRIVATE LAW: A CONSTITUTIONAL ANALYSIS OF THE EFFECTS OF THE BASIC LAW' IN PRIVATE LAW] (2001) (Ger.). It actually provides no alternative at all: the court fulfills its duty to protect
C. The Normative Justification of the Effect of Fundamental Rights

How can the horizontal effect of fundamental rights be justified, once it has been construed doctrinally in one way or the other? One type of justification is particularly important to legal scholars, namely the positivist justification. In this regard, the question about justification is why the law requires that fundamental rights have an effect in private law. But that is not the point to be discussed here; the question is, rather, whether the effect of fundamental rights in private law can be understood as reasonable.

It is remarkable that this question is examined only rarely, at least in Germany. Observations from a previous layer of discussion following the discovery of the effect of fundamental rights via court decisions provide the closest thing to an answer. They are roughly as follows: in the twentieth century, threats to fundamental rights no longer emanated from the state alone, but precisely from powerful private parties or bearers of societal power, which usually means incorporated companies and associations. More recently, Teubner has argued that even “structural violence,” though not a legal person, but an “anonymous matrix” that is threatening the individual’s freedom, could and must be tamed by horizontal effect. In order to protect the individual from these forms of power and violence, fundamental rights must be brought into a position, which, the argument goes, justifies that the binding of fundamental rights basically also applies to private parties.

From a philosophical perspective in legal theory, the question about the justification of the effect of fundamental rights has even more specific significance. The question is not about any nonpositivist justification at all. Such a justification could simply amount to the claim that fundamental rights are very important and even more important by articulating the radiation of fundamental rights in private law. However, the doctrine based on the state’s duty to protect may add some methodological guidance to determine the content of radiation.


26. See generally Gunther Teubner, The Anonymous Matrix: Human Rights Violations by ‘Private’ Transnational Actors, 69 MOD. L. REV. 327 (2006) (arguing that since their violations of fundamental rights stem from totalizing tendencies of partial rationalities, there is no longer any point in seeing the horizontal effect as if rights of private actors have to be weighed up against each other).
than private law. The philosophical question is whether the effect of fundamental rights can be justified with the same conceptual means that form the basis of the provisions of private law. In other words, it is about whether the horizontal effect of fundamental rights is inherent to private law, or whether the effect is a mandate that affects private law from the outside. In the latter case, the effect of fundamental rights would in fact require a basis in constitutional law. In the former case, private law would actually have to develop the results of the effect of fundamental rights from within itself, even without a constitutional basis.

III. THE LOGICAL FUNCTION OF DEMOCRATIC FUNDAMENTAL RIGHTS

A. Three Types of Fundamental Rights

Due to restricted space, the following section will not provide an exhaustive account of a justification of the effect of all fundamental rights. It will be restricted to the effect of democratic rights. Democratic rights form one among three classes of rights that must be distinguished in this context of horizontal effect in private law. The two other classes are anti-discrimination rights regarding categories such as race or gender and classical civil rights, which are constituted by private law, including the right to physical integrity, occupational freedom, the freedom to form corporations and collective bargaining, property rights, contractual freedom, and the protection of marriage and the family.

The application of nondiscrimination rights in private law is subject to extensive and contentious debate, which this paper cannot add to in substance. It must suffice, for the current context, to acknowledge that there are voices that claim that anti-discrimination law can be illuminated as an internal characteristic of private law.

Civil rights, it has already been observed above, are constituted by private law rules. They are not treated here in substance either, because it is doubtful whether they indeed have a role to play in private law. It is most likely that the problems that courts have answered or may answer in the future by way of application of civil fundamental rights


28. See Ripstein, supra note 27; Reichman, supra note 27.
dissolve when one accepts that the doctrine of contract includes the ideas of contractual fairness and a fair price.

All the other fundamental rights, besides nondiscrimination rights and civil rights, shall be subsumed in the rubric of democratic fundamental rights. Of course, this is a conceptual gambit, which would actually require a more extensive justification for which there is no room here. This group includes the general freedoms of speech and communication)²⁹, including the privacy of communications,³⁰ freedom of assembly,³¹ and the freedom to form noncommercial associations.³² This category also includes the nonpersonal rights of freedom of the press and of reporting by means of broadcasts and films,³³ as well as the freedom of sciences and the arts.³⁴ After all, science and art are special forms of thought and action that are part of democratic communication, but the intrinsic logic of each justifies a special position in the catalogue of fundamental rights. Finally, freedom of faith and conscience³⁵ can be categorized in this group, although, historically, these rights are certainly older than the constitutional democracy. However, democratic statehood is also normatively linked to a plurality of worldviews. A constitutional democracy without freedom of faith and conscience would be considered defective as a democracy, and not defective as something else. In this sense, it is suggested that all of these fundamental rights—and that is the decisive thesis for the following—can be described in terms of a theory of democracy.³⁶

B. Justification of the Effect of Democratic Fundamental Rights

In the case of democratic fundamental rights, it is not the behavior protected by fundamental rights, but the corresponding potentiality for action that is constituted by private law. In this respect, the fundamental right does not take up an institution of private law, but rather specifies a particular action enabled by means of private law and

²⁹. Cf. Art. 5 Sec. 1 GBL.
³⁰. Cf. Art. 10 GBL.
³¹. Cf. Art. 8 Sec. 1 GBL.
³². Cf. Art. 9 Sec. 1 GBL.
³³. Cf. Art. 5 Sec. 1 GBL.
³⁴. Cf. Art. 5 Sec. 3 GBL.
³⁵. Cf. Art. 4 Sec. 1 GBL.
³⁶. Such an analysis does not imply to curtail the relevant rights in substance. See Ernst-Wolfgang Böckenförde, Grundrechtstheorie und Grundrechtsinterpretation [Basic Theory of Law and Fundamental Rights Interpretation], in NEUE JURISTISCHE WOCHENSCHRIFT 1529 (1974) (Ger.) (describing the problem of a democratic theory of fundamental rights if it takes individual rights merely as a function of a democratic order).
grants precisely this action special protection on the basis of fundamental rights. In contrast to civil rights, democratic rights put particular emphasis on certain potentialities for action which is apparently not reflected in private law. The point of democratic fundamental rights is precisely to grant special status to a particular type of actions, namely those which may have special significance in a democratic setting: for example, freedom of speech or assembly.

In other words, a justification of the effect of these fundamental rights that is internal to private law must indicate why it is precisely the democratic potentialities for action that are granted a special status by being guaranteed in the form of democratic fundamental rights. Now, in this context, one could simply point to the fact that democracy is important and that, therefore, private law should do its part to protect and promote it. That would not be a justification based on the logic of private law. Instead, it would mean utilizing the freedom based on civil rights to advance the concerns of democracy. Conversely, one could just as well postulate that the concerns of democracy come into their own only within the confines of freedom based on civil rights, such as when one considers democracy to be not quite as important as private autonomy. The question of how important democracy really is would then, again, be up to constitutional law to answer.

In fact, the justification of the effect of democratic fundamental rights lies in the fact that the democratic order is a condition for legitimizing private law. The requirement for legitimation does not stem from the fact that private law, just as any other law, is also law that involves coercion. More specifically, private law is dependent on being embedded in a democratic order. This stems from the fact that private law demands the public authority of its rules. After all, one constitutive of private law as the law constitutive to freedom lies in property. Its original emergence is by means of first occupancy. The first occupancy of an object, however, is a unilateral real act, which at the same time, imposes obligations on everyone else. This one-sided obligation by means of a one-sided act can endure only if it is authorized by a general will. The state represents this general will. Ideally, the state must generate the general will by means of the democratic process.

37. See RIPSTEIN, supra note 27, at 182 (noting in the absence of a “united and lawgiving will,” conclusive private rights are impossible).
38. See RIPSTEIN, supra note 27, at 86 ff.
The formal democratic process in the form of free elections and parliamentary lawmaking, however, rests upon a democratically structured society, which is characterized by a societal realization of the democratic rights, such as freedom of speech and communication, the press, and academic freedom. Political democracy requires “democratic sociality” (demokratischeGesellschaftlichkeit). Private law would undermine its own basis of legitimation if it were to permit private-law means to undermine this democratic sociality. Democratic fundamental rights characterize those structures that are relevant for the legitimation of private law. Precisely for this reason, democratic fundamental rights must become effective in private law based on the logic of private law itself.

Of course, an opponent will ask why a punctual intrusion by private-law means into the democratic structure and process should endanger private law’s legitimation as a whole. If, to use a suggestive example, one person sells his right to free speech for a good price, why should this single instance of distortion put private law’s legitimacy into question? The answer is that the democratic structure is a whole whose parts and aspects are not at an individual’s disposal. Democracy includes and might partly even consist of individual rights. But the individual rights are not the individual person’s means to be used for his or her individual purposes which would, for example, allow selling them in contract. The legitimizing power of democracy comes from the holistic structure and not from the sum of multiple exercises of individual rights. It comes from the holistic structure because it is not possible to draw the line: How many single instances of distortion are acceptable? How many people may sell their right to free speech so that we nevertheless see democracy in place? That we cannot answer these questions is the logical proof that legitimacy comes from the holistic structure and not from the democratic rights of a multitude of individuals.

C. Private Law as Societal Constitution

From a pure private law perspective, the effect of fundamental rights in private law cannot be readily elaborated. The effect of fundamental rights seems to be disrupting private law’s conceptual harmony.\textsuperscript{40} This disruption can, of course, always be justified by referring to the will of the democratic creator of laws or the constitution. But that would mean that reflecting on private law according to reason cannot catch up to the effect of fundamental rights. The effect of

\textsuperscript{40} See supra note 18.
fundamental rights in turn would not be described as reasonable, but only as politically driven. This consequence could be avoided if fundamental rights could be brought into the conceptual framework of private law as residing in reason.

In their traditional function, fundamental rights secure institutions and potentialities for action constituted according to private law against state interventions.\(^4\) Within private law, in contrast, they do not develop a constitutive function, but an expressive one: Fundamental rights explain democratic freedom, which serves as the basis for legitimizing private law. Legitimation comes into play not only when fundamental rights are actually part of valid law. Via fundamental rights, legitimation is only brought to bear expressively. In this respect, the discovery of the effect of fundamental rights in private law does not imply a "constitutionalization" of private law. Rather, fundamental rights express the constitutional character always inherent to private law. Private law itself has a constitutional character. Private law is a free and democratic societal constitution.

This character as a societal constitution, however, pertains only to that part of private law valid as law and not, for example, to complex contractual agreements, even if they may have developed an "auto-constitutional" character.\(^4\) Such complex contractual agreements are not different versions of societal constitution, but rather potentialities below the level of a private law societal constitution.

IV. TRANSNATIONAL SOCIETAL CONSTITUTION

Now, what are the effects of the understanding of private law as societal constitution as developed here in the arena of transnational civil constitutions? Viewed only from the outside, this is either about complex contracts—as in the case of the Internet Corporation for Assigned Names and Numbers (ICANN)—or—as in the case of *lex mercatoria*—a contractual practice condensed to become a coherent regime.\(^4\) According to the concept of the civil constitution, courts or court-like benches have a key position as they integrate fundamental rights into their own order or are tasked with doing so.

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\(^4\) This understanding is made explicit in Art. 1 Sec. 3 GG: "The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law."


\(^4\) For an overview of different transnational legal regimes and a systems theoretical analysis, see *id.*
However, many of these benches still follow traditional legal doctrine in their decision-making. That is the reason for some of the pitfalls in this context.44 The understanding of private law based on the law of societal constitution as developed here might be of help. In order to provide evidence for such potential, the effect of fundamental rights in transnational private legal relationships as represented by prevailing doctrine will serve for illustrative purpose. In the case of transnational legal relationships between private parties, the judicial function can be fulfilled by state courts or by arbitration tribunals. In the case of arbitration tribunals, the doctrinal construct is somewhat more difficult than in the case of state courts, for which reason the latter will be treated first.

A. Transnational Legal Relationships Before State Courts

The decision about rights and obligations arising from transnational contracts routinely opens up a context pertaining to a conflict of laws. Provided that the state court considers a contract on the basis of the private law of its own country, there are no particular difficulties at first glance. For its own private law has been tasked with the horizontal effect of fundamental rights by the constitution. Whenever the own state's private law is applied, the effect of fundamental rights and the constitution also come into play. However, the reach of fundamental rights is not necessarily the same as that of legal norms under private law. If, for example, the applicability of the law of one's own country is based on the freedom to choose which country's law is to apply, but there is otherwise no connection to a country's legal order, fundamental rights do not apply. The case is not sufficiently connected to the state to justify application of fundamental rights.

If, on the other hand, foreign private law applies, then the fundamental rights of the country's own legal system routinely apply in the framework of the international *ordre public*. But then, it is again necessary that the case in question displays a sufficient connection to the country's own legal order. Here, too, the country's own fundamental rights apply only if the matter or the individuals involved are sufficiently close to the territorial or personal purview of the state's constitution and, therefore, to their fundamental rights. In the absence of a genuine link, the effect of fundamental rights in private law will be lacking as well. Alternatively, one could consider the fundamental rights of the legal order applied. But mirroring the limited reach of the

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44. See TEUBNER, *supra* note 1, at 124 (detailing extensively the reasons for some of the pitfalls).
fundamental rights belonging to the court's own legal order, the fundamental rights of the legal order applied have a limited reach, requiring a sufficient connection. Against this background, only the fundamental rights of a legal order could be applied, which has sufficient connection to the case but whose private law does not govern the case. Such reference to a foreign ordre public has always found little support. In accordance with Article 21 Rome I Regulation, this is even prohibited by law in courts in the EU.45

According to the concept developed here, all these difficulties, which are linked to the highly technical functioning of conflict of laws, which in turn is hardly transparent to most scholars of fundamental rights and private law, can be avoided. Whenever state private law is applied, it must bring to bear the substance of the fundamental rights inherent to it. It does not matter whether it is the private law of one's own country or of a foreign one.

Admittedly, this implies a universalization of the substance of fundamental rights.46 Their basis is no longer the specific version of a particular fundamental right in the legal order of state A, B, or C. The orientation for the applicability of fundamental rights in transnational private law must therefore be provided by a universal concept of democratic order. Elaborating such a concept is the task of all state courts dealing with disputes of this kind. The guarantees of fundamental rights in national and international documents may serve as points of orientation for them. But they are not to search for the minimum shared by those documents. Instead, it is about the correct articulation of private law as a free and democratic societal constitution.

B. Transnational Legal Relationships Before Arbitration Tribunals

In the case of arbitration tribunals, the question as to where a possible connection to fundamental rights could originate arises as well. In the case of state courts, according to the traditional doctrine, the state's constitution requires from the courts as organs of that state that


fundamental rights are given horizontal effect in private law. Application of fundamental rights is hence based on the court being an organ of the state and being located in a particular constitution. An international arbitration tribunal lacks both: It is not a state arbitration tribunal, and its verdict is not located within a particular constitutional order. So, on the basis of the traditional doctrinal construct of the effect of fundamental rights, it is unclear which fundamental rights could be given horizontal effect in the private law that is to be applied, and why it should.

Consequently, a practice of sentencing in reference to fundamental rights on the part of international arbitration tribunals cannot be documented in a relevant manner to date. The discussion about an *ordre public transnational* that would be binding for arbitration tribunals has produced little of substance apart from a reference to the *ius cogens* according to international law.\(^4\) In the practice of arbitration rulings, where the aspect of an *ordre public transnational* has at best identified a ban on corruption, civil and democratic fundamental rights do not play any relevant role to date.

The argument developed in this paper why fundamental rights are to apply in private law closes this gap between fundamental rights on the one hand and private law administered by arbitration on the other. The positive fundamental rights express the constitutional substance of private law without providing the basis for it. Private law must preserve civil and democratic rights, which both constitute it and render it possible. Private law must preserve these rights by employing private law's own resources and means. Therefore, this claim can be sustained with regard to any system of private law, whether it is situated in a constitution that guarantees fundamental rights or not.

Accordingly, the function as a state court on the basis of the constitutional character of private law is not decisive for the effect of fundamental rights. Every functionally equivalent institution whose task it is to come to a binding decision about the private rights and obligations of two conflicting parties on the basis of state private law must interpret the civil and democratic substance of fundamental rights accordingly. This holds first of all for arbitration tribunals inasmuch as they base their decisions on a national system of private law. But it also applies to the international arbitration tribunals that believe they are applying an autonomous system of private law, *lex mercatoria*, for the lack of a state source does not change anything about the significance of

this autonomous private law, and the purpose is to realize civil liberties. After all, this is the only basis for its institutions and their norms. The norms of autonomous private law can be understood only if they are conceived of as the institutionalization of legal freedom.

The lack of a state source does not change the need for private law to be created by democratic process under the condition of democratic sociality, if it is to be legitimate. It is true that the requirement of it being created by a democratic process, for example as an internationally agreed system of private law or even a system of universal private law passed by a world government, is yet to come and will presumably never become reality. But that does not justify relinquishing the condition of democratic sociality as well. It is the legitimizing minimum of any application of private law.

CONCLUSION

This paper has raised the issue of a normative justification of the horizontal effect of fundamental rights in private law. Justification in this sense means that the reasons given are supposed to be subject to the intrinsic logic of the law. In traditional doctrine, the reason usually given to confer horizontal effect to fundamental rights is a deferral to the constitutional text. This answer implies that fundamental rights are logically alien to private law, that they are coming from outside in logical terms. In contrast to this prevailing opinion, this paper argues that, first, private law is logically prior to fundamental rights and that fundamental rights are part of private law's intrinsic logic. This is developed for the class of democratic rights. If the argument can indeed be made, then it can also explain why fundamental rights also apply, including horizontal effect, in the sphere of transnational legal regimes, subject to the transnational jurisdiction of state courts and international tribunals.