

DIRECT AND INDIRECT EFFECTS OF FUNDAMENTAL RIGHTS

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Introduction

- I. Premises of the Argument
 - A. *Protective Entitlements*
 - B. *Fundamental Rights as Principles*
 - C. *Kelsenian Model of Constitutional Justice*
- II. The Direct Effect of Fundamental Rights
 - A. *The Original Sin*
 - B. *Libertarian Anxiety*
 - C. *'Interpositio Legislatoris'*
- III. The Indirect Effect of Fundamental Rights
 - A. *The Thesis of Outcome-Neutrality*
 - B. *The Doctrine of Triple Effect*
 - C. *Exceptions to the General Principle*

Conclusion

INTRODUCTION

Are fundamental rights, the sort of rights entrenched in written constitutions and human rights instruments, binding on individuals or other private actors? With few exceptions, most legal systems of the constitutional democratic type answer this question in the negative. The German Basic Law, for example, provides in article 1(3) that 'constitutional rights bind the legislature, the executive, and the judiciary', which means that they bind all the three standard state powers but not private actors such as individuals,

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Direct and Indirect Effects of Fundamental Rights

corporations, labor unions and the like. Similarly, the Fourteenth Amendment to the United States Constitution provides that ‘no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States’. The U.S. Supreme Court built a notoriously large and obscure body of case law on top of this seemingly harmless provision — the basis of the so-called ‘state action doctrine’ — the gist of it being that constitutional rights do not bind private actors unless they are acting as surrogates of the state or are placed under privileged protection from it. What it all comes down to is rejection of the view that fundamental rights normally bind private as well as public actors or that such rights produce not only ‘vertical’ but ‘horizontal’ effect as well.

But this is hardly the end of the story. Even if fundamental rights cannot be invoked in private relations — meaning, for instance, that the plaintiff cannot base her complaint on the defendant’s violation of a constitutional entitlement or that the defendant cannot invoke a constitutional liberty to evade liability — they are fully operative against the state in its capacity as law-maker, law-executor and law-enforcer. Imagine the standard hypothetical of a landlord that sues the tenant for breach of a term in the lease that placed the latter under an obligation to go to church every weekend and to decorate the premises with religious paraphernalia. While the doctrine of vertical effect bars the tenant from invoking freedom of religion against the landlord, he may do so against the court itself *qua* enforcer of the lease and against the legislature *qua* author of the laws which empower private parties to create legal obligations inconsistent with freedom of religion. If the laws in question are indeed unconstitutional, they must be regarded as void. At the end of the day, the tenant will win the case precisely as she would if she was allowed to invoke the constitutional right directly against the landlord. The only difference is procedural: the rejection of ‘horizontal’ effect implies that she must obtain a judicial decision striking down the law deemed unconstitutional in order to win the dispute against the landlord. One way or another, the outcome is exactly the same. That is why, properly understood, the doctrine of vertical effect appears to *entail* an *indirect* horizontal effect. And that is why some of the leading voices in the field of constitutional theory stress that the choice between the doctrines of

vertical and horizontal efficacy is *outcome-neutral*,¹ and thus practically futile — unworthy of the gallons of ink that have been spilled by their partisans.

The core claims of this Essay are twofold. First, it contains a fresh critique of the doctrine of direct horizontal effect. The attack on the doctrine has usually proceeded from one or several of the following grounds: (i) the conceptual argument that the function of fundamental rights is to limit state power or to endow individuals with defensive weapons against the government; (ii) the legalist argument that most constitutions and other fundamental rights instruments explicitly or implicitly restrict the scope of such rights to citizen/state relations; and (iii) the normative argument that the application of fundamental rights norms to private relations undermines liberty interests and thereby embodies an implicit statist bias. These arguments are unconvincing; the first and the third are mistaken, while the second is irrelevant to the normative justification of the scope of fundamental rights. In their place, I suggest that the real reason to reject horizontal efficacy is that the application of fundamental rights requires the mediation of complex balancing judgments that ought to be entrusted to the legislature and its administrative (regulation) or judicial (precedent) surrogates. In other words, fundamental rights are as a norm directly effective only against law-making agencies instead of private actors bound by ordinary law.

The second core claim of this Essay is that the thesis of outcome-neutrality is unsound. According to the doctrine of indirect effect, either the relevant ordinary law is, or can be construed to be, consistent with the constitution, thus being fully applicable to the case at hand, or it violates the constitution and is thereby void and inapplicable. I believe that this construction is flawed. It does not follow from the fact that a law is unconstitutional because it violates A's fundamental right that it has no purchase in a dispute between A and B concerning facts that occurred before the law was struck down. If B relied on the law in question to plan her conduct, surely her reliance interest weighs against the importance of giving full effect to A's fundamental right. The larger and more irreversible the investment made by B, the greater the weight of her interest vis-à-vis the fundamental right of A. Reliance is a reason to apply a norm quite independent from its formal validity. What this means is that, contrary to the

¹ See, e.g., Robert Alexy, *A Theory of Constitutional Rights*, 354-65; Mattias Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law', 352-59.

thesis of outcome-neutrality, a judgment of unconstitutionality is not a definitive but only a *prima facie* reason not to apply the ordinary law deemed unconstitutional; that reason has to be balanced against the reliance-based reasons that support its application. The story does not end here though. If A ends up losing the case, he may sue the state in its law-making capacity for infringing his fundamental rights and be awarded damages. If, on the contrary, B loses the case, she may sue as well and be compensated for the investment she made in reliance of ordinary law. All of this comes down to the proposition that there are outcome-related differences between direct and indirect effect: the latter is weaker than the former.

The rest of this Essay is organized as follows. Part I states three premises of the core argument: the notion that fundamental rights are not merely defensive weapons against state power but entitlements to state protection as well, the idea of fundamental rights as principles, and the so-called Kelsenian model of constitutional justice administered by a specialized court. These premises are not *assumptions* of the core argument. I shall devote some space to defending each of them, although not with as much depth as their fundamental and contentious status in constitutional theory merits. The little that I will say in their favor is merely meant to evade the criticism that the argument about the effects of fundamental rights assumes too much or begs too many basic questions.

Part II articulates the first core claim of the Essay. It begins by examining the implications of the doctrine of vertical effect, rejecting the view, sponsored by the German Federal Constitutional Court in the leading *Lüth* case, that whereas fundamental rights are directly operative within public law, their role in private law is based on a ‘radiating effect’ of the constitutional norms embodying them. That is followed by a critique of a popular argument against horizontal efficacy: that the application of fundamental rights to private relations undermines individual freedom because it subjects private actors to the duties that burden the state and other public agencies. After dismissing such concerns, the focus turns to the actual grounds to reject direct efficacy, namely that for reasons of legal certainty, deliberative idleness, and political legitimacy — essential to constitutional democratic governance — legislatures and their law-making surrogates ought to be in charge of conducting the complex balancing judgments that fundamental rights reasoning involves. In sum, the legislature is invested with both the power and the duty to fix to a reasonable extent the circumstances under which competing rights and collective goods

take precedence over one another. The application of fundamental rights is hence mediated by ordinary law, with the implication that they bind *directly* only law-making agencies.

Part III deals with the indirect effect of fundamental rights, namely the duty of ordinary courts to ‘construe’ the law in light of the constitution and the consequences of a decision by the constitutional court that ordinary law as construed infringes a fundamental right. I sketch out a novel account of indirect effect with a tripartite structure. In the first degree, the constitutional court makes the balancing judgment required to determine whether the law as it stands violates the constitution. In the second degree, the ordinary court makes the balancing judgment required to decide the case *sub judice* (a decision that carries the force of precedent for other cases preexisting the decision to strike down the relevant law). In the third degree, the losing party may have a case against the state for a damages award either for interfering with the enjoyment of a fundamental right or for an investment in reliance of ordinary law.

Finally, the conclusion sums up the argument.

I. PREMISES OF THE ARGUMENT

A. *Protective Entitlements*

The first premise of the argument is that fundamental rights do not merely play a defensive function but a protective one as well. They are not just rights against the state but entitlements to state protection. To have a fundamental right to privacy, for example, is not just to have a claim against the state that it refrains from interfering with one’s privacy interests — say through searches and seizures — but also an entitlement to positive state action directed towards the protection of one’s privacy interests against the interference of third parties, namely through the law of defamation, data security legislation, the inviolability of correspondence, protection against third party appropriation of one’s identity, and so forth.

In their defensive role, fundamental rights characteristically operate either as privileges or as claims that the state refrains from pursuing certain (harmful) courses of action. To illustrate the first type, consider the case of free speech. Although free speech is often characterized as a right, this trades

on the sheer ambiguity of the term ‘right’ exposed by Hohfeld.² In a narrow, technical, sense, a right implies a command or a prohibition addressed to the person(s) against whom one has the right while privileges such as free speech correspond to a permission to engage in a particular activity. In the jargon of Hohfeld, ‘rights’ correlate with ‘duties’ while ‘privileges’ correlate with ‘no rights’. One’s freedom of speech does not imply a universal duty to listen to what one has to say, but the permission to express one’s opinions whether others like it or not. That is why it makes no sense, except in particular circumstances in which free speech might entail a genuine right, to say that the government has ‘violated’ freedom of speech — free speech is, *qua* privilege, logically inviolable. What one might say, quite sensibly, is that once freedom of speech is entrenched in the constitution, understood as the supreme law of the land, the state is disabled from the power to burden individuals with the legal duty to refrain from expressing their opinions.

The second type of defensive right is illustrated by the right to bodily integrity. That is a genuine right — a ‘claim-right’, in Hohfeldian language — because it implies a duty of the state to refrain from injuring the body of natural persons, namely through torture, cruel and unusual punishment, police beatings, and the like.

There is an important structural difference between rights of the first and the second type, that is, constitutional privileges and claim rights. Imagine that A sues B for expressing publicly the view that he is a bigot and the civil court sentences the latter to pay him damages on the basis of some provision in the civil code or some other body of private law. In reaction, B files a constitutional complaint with the constitutional court invoking her freedom of speech. Who is she invoking the privilege of free speech against? Not A, since there is nothing that A could have done to interfere with her freedom of speech; quite the opposite, it was B’s exercise of her privilege to speak her mind that caused A the harm that drove him to court. B’s complaint is directed against the state both for enacting legal norms that burden her exercise of free speech and for applying those norms to the dispute between hers and A. Her claim, in other words, is that the state is disabled from the power to impose such legal burdens on her. Free speech operates in this context in its strictly defensive role.

² W. N. Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’, 28-58.

Direct and Indirect Effects of Fundamental Rights

Imagine now that B sues A for battering her and the civil court dismisses the case *ex hypothesi* on the grounds that there is no cause of action in private law for intentional infliction of bodily injury. Can we say that this decision violates A's right to bodily injury conceived as a defensive right against the state? According to a fringe view among German constitutional theorists — a view often derided by its critics with the shabby label of 'theory of statist convergence' (*etatistischen Konvergenztheorie*) — the answer is in the affirmative.³ Through its dismissal of the lawsuit, the civil court judge is affirming that ordinary law permits the defendant's conduct and that implicates the state's sponsorship to it. In a nutshell, the state participates in A's interference with B's bodily integrity simply because it tolerates A's conduct.

This is an ingenious construction but it is marred by a conceptual mistake. If A is battering B and C, who is close by and could prevent further harm, stays quiet, it is absurd to say that C participated in the beating and violated his duty to abstain from injuring B's body. What we may say, of course, is that C bears some responsibility for B's injuries because he had the *duty* to rescue her. What is at stake here, however, is no longer a negative but a positive duty, which correlates not with the victim's defensive right but with a protective entitlement. Likewise, constitutional claim-rights entail not just negative duties of the state to abstain from engaging in harmful activities but positive duties to afford the right-bearer a reasonable level of protection against harm caused by third-parties or proceeding from natural causes. To put the point simply, the state has the duty to protect the right-bearer against predictable threats to the enjoyment of her constitutionally sheltered interests. It follows that ordinary law may infringe fundamental rights both through action and omission or inaction, even when the rights in question are classic 'civil rights' as opposed to welfare or socio-economic rights.

It is ironic that the idea of protective entitlements is looked upon with a measure of suspicion by many constitutional theorists. They insist that the primary, and perhaps the exclusive, function of fundamental rights is to endow individuals with defensive weapons against state power, not to place the latter under positive duties to protect the former. The suspicion is ironic

³ On this theory, whose leading proponent is Jürgen Schwabe, see Robert Alexy, *A Theory of Constitutional Rights*, 304-08, 356-57; Josef Isensee, *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, V, § 111; Claus-Wilhelm Canaris, *Grundrechte und Privatrecht*, 39-43.

Direct and Indirect Effects of Fundamental Rights

because it is based on an idea which, in spite of its vaguely 'liberal' overtones, is in fact quite alien to the liberal conception of the state where the deepest roots of modern constitutionalism lie. In the tradition of liberal political theory, the reason to create a state in the first place — what justifies the state and sets the limits of its rightful activity — is precisely the need to *secure* individual rights against third-party harms. The point was stressed with elegant simplicity in article 2 of the Declaration of the Rights of Man and Citizen of 1789: 'The aim of all political association is the preservation of the natural and imprescriptible rights of man.' The normative fiction of a social contract through which individuals in a hypothetical state of nature relinquish their 'natural', 'lawless' or 'wild' freedom, including the unrestricted privilege of self-defense, in exchange for 'civil', 'juridical' or 'secure' freedom embodies the basis of liberalism as a political philosophy. As Kant put it:

The act by which a People forms itself into a state is the original contract. Properly speaking, the original contract is only the idea of this act, in terms of which alone we can think of the legitimacy of a state. In accordance with the original contract, everyone...within a people gives up his external freedom in order to take it up again as a member of a commonwealth, that is, of a people considered as a state.⁴

It is true that in the liberal tradition the state is as much a solution to a problem as it is the source of a fresh one. For once all power is concentrated in a single, centralized, site — the mighty being suited to the Hobbesian image of the Leviathan — the fear is that it will abuse its power and thus betray its task as a custodian of individual rights. This is where the idea of defensive rights, rights which insulate individuals from the reach of state power, comes into the picture. It is perfectly understandable, of course, why the defensive features of fundamental rights ended up taking the front seat in the development of modern constitutionalism. The liberal worldview that emerged from the French Revolution inherited from the *Ancien Régime* an absolutist state that needed more taming than strengthening; the urgent task was hence to limit instead of expanding the reach of government. But that should not distract us from the *raison d'être* of the state itself within the tradition of liberal constitutionalism, which is as much a positive theory of the normative foundations of government as it is a negative theory of limited

⁴ Immanuel Kant, *The Metaphysics of Morals*, 92.93 (Ak. 6:315-316) [emphasis removed].

government. Defensive and protective entitlements are thus co-original features of the concept of fundamental rights.

B. *Fundamental Rights as Principles*

The second premise of the argument is that fundamental rights norms are typically principles instead of rules. The distinction between rules and principles is a structural and qualitative distinction between two types of norm. It is a structural distinction because it concerns the logical rather than the substantive properties of norms; it is a qualitative distinction because it reflects a difference not of degree but of kind. According to Robert Alexy's well-known account, principles are 'optimization requirements' subject to factual and legal constraints while rules are 'either fulfilled or not' and contain 'fixed points in the field of the factually and legally possible.'⁵

These definitions are easier to grasp when one compares conflicts of rules with competition among principles. If two rules conflict, meaning that their antecedent clauses overlap, either one is an exception to the other or one of the two must be declared invalid. There are meta-rules that apply in the event that two rules conflict — e.g., *lex posterior derogate legi priori* — and characteristically dictate the exclusion of one at the expense of the other. If two principles compete, on the other hand, meaning that they entail opposite consequences in the same factual domain, the resolution is not to declare one of them invalid but to determine which of the two prevails in the circumstances. Since each of the principles furnishes a *prima facie* reason to decide an overlapping class of cases, a judgment is required to determine which of the competing principles is the all-things-considered winner. When two principles compete, moreover, it is usually the case that one outweighs the other in a subset, and is itself outweighed in another subset, of the full set of circumstances to which both apply *prima facie*.

The different features of rules and principles that emerge from the contrast between conflicts of rules and competing principles shed light on Ronald Dworkin's statement that while principles have a 'dimension of weight' rules apply in an 'all-or-nothing-fashion'.⁶ Thus, the application of a rule involves a *deductive* argument: if the case is subsumable under the antecedent clause of the rule and no exception covering the case is built into

⁵ Robert Alexy, *A Theory of Constitutional Rights*, 47-48.

⁶ Ronald Dworkin, *Taking Rights Seriously*, 25-27.

it, the rule provides the decision of the case. The application of a principle, on the contrary, involves a *balancing* judgment: if the case is subsumable under the principle, the principle is a factor to be weighted in the decision of the case. In sum, while rules furnish definitive reasons, principles operate as *prima facie* reasons. Furthermore, principles come into legal argument only in those cases to which no rule applies, i.e. deduction preempts balancing judgments.

The problem with this account is that it distorts the nature of legal rules. Contrary to what Dworkin suggests, rules do not furnish absolute or definitive reasons to decide a case. They can be exceptionally set aside, in two different senses of the term ‘exception’. First, even if a given case is not covered by an exception built into the rule, it is possible to incorporate an exception *ex post* based on one or more principles that dictate the opposite consequence from that of the rule.⁷ Second, a rule that is exceptionally or grossly unjust because it violates one or more principles that have immense weight in the circumstances of its application ought to be declared substantively invalid. These points correspond respectively to the doctrines of teleological reduction and *lex injusta*.

Yet neither of them dissolves the dichotomy between rules and principles.⁸ For while the procedure of setting aside a principle in order to give priority to a competing principle is a matter of routine, the sacrifice of a rule for the sake of an opposing principle is an ‘exceptional’ device in legal argument, either because it plays out on the edges (teleological reduction) or because it is a rare event (*lex injusta*). The reason for this difference is that whereas the choice between two principles is strictly a matter of substance — of determining which substantive value outweighs the other in the circumstances —, in favor of a rule’s application counts not only the substantive principle(s) it reflects but also the formal principles of legitimacy, reliance, competence, and the like that are intrinsic to legal rules.⁹ It counts, for example, in favor a hypothetical statutory provision that drivers are strictly liable for the accidents caused by their vehicles not only the substantive principle of unreciprocated risk — or *ubi commoda, ibi*

⁷ Alexy, *A Theory of Constitutional Rights*, 57-58.

⁸ *Id.*

⁹ To be fair, in his reply to Joseph Raz’s critique of his seemingly absolutist conception of rules, Dworkin makes, without ever conceding either the error or the carelessness of his previous formulation, pretty much the point stressed in the text above. See *Taking Rights Seriously*, 77-78.

incommoda — but also, among others, the legitimacy argument that the rule was enacted by an electorally accountable legislature, the reliance argument that pedestrians and other beneficiaries of the rule made important decisions (such as that of not buying insurance) on its basis, and the competence argument that the legislature is in a better position to examine the aggregate effects of the alternative regimes of strict liability and negligence and hence to determine which of the two is on balance the more fair or efficient or both. That is why the burden of argument to set aside a rule grounded in a given principle is by definition greater than that to set aside the same principle in the event that it is not embodied in a rule. That marks the key difference — qualitative rather than quantitative — between rules and principles.

Now why should fundamental rights norms be more often than not regarded as principles instead of rules? I shall briefly stress two reasons vindicating the conception of rights as principles. First, the language typical of bills or declarations of rights makes it virtually inevitable. No one denies that occasionally fundamental rights provisions embody rules, such as article 3 of the European Convention of Human Rights, which provides that ‘no one shall be subjected to torture or to inhuman or degrading treatment or punishment’ or the prohibition against the quartering of soldiers in private homes during peacetime established by the Third Amendment to the United States Constitution. Most fundamental rights provisions, however, are drafted in such general and unconditional terms that regarding the norms embodied in them as rules would yield unpalatable outcomes. That is the case both with norms such as ‘art is free’ (article 5(3) Basic Law) or ‘no abridgement of freedom of speech’ (First Amendment to the U.S. Constitution), which would be vastly over-inclusive if construed as rules, or with norms such as ‘every person has the right to life and bodily integrity’ qualified by the *carte blanche* reservation that ‘these rights may...be interfered with on a statutory basis’ (article 2(2) Basic Law), which would be next to empty if they were regarded as rules. The straightforward way to circumvent problems of this type is to explicitly or implicitly read a reasonableness clause into the norms, i.e. ‘no *unreasonable* abridgement of freedom of speech’ or ‘these rights may...be interfered with by statute to a *reasonable extent*’. But of course that is tantamount to converting them from rules to principles, since the only way to determine whether it is reasonable to apply the norm in a given case is to balance the value it instantiates — free speech or the principle underlying the limiting statute — against the value(s) sacrificed by its application.

Direct and Indirect Effects of Fundamental Rights

The second reason for the conception of rights as principles is that it places the controversial practice of judicial review of democratic legislation under the best possible light.¹⁰ When rights are conceived as principles, understood as optimization requirements, both their scope of application and the margin of appreciation of the legislature in balancing them against competing principles are liberally construed. This is reflected, for instance, in the Federal Constitutional Court's decision to interpret the provision of the Basic Law concerning the right to the free development of personality as entailing a general right to freedom of action, i.e. the privilege to do as one pleases, such as to feed pigeons in the park¹¹ or to ride a horse in the woods.¹² Thus, any law restricting individual liberty is *prima facie* unconstitutional. Such law might nonetheless be constitutionally justified if it safeguards a principle that has greater weight in the circumstances of its application. Moreover, the constitutional court allows considerable room to the legislature to make the required balancing judgment — it holds the law *definitely* unconstitutional only in the event that it is not reasonably proportional.

In order to determine that, the court subjects the law to the four-prong proportionality test entailed by the definition of principles as optimization requirements. First, it considers whether the reasons underlying the law are *legitimate* or not; a reason is constitutionally illegitimate, or polluted, when it is categorically excluded by the constitution, such as most perfectionist considerations or restrictive measures rule out by qualified reservation clauses. Second, the court assesses whether the means selected by the legislature to accomplish the goals it invokes to justify the law are effective or *suitable*; if the means are unfit for purpose, the burden imposed by the law is pointless. Third, the court considers whether the measures chosen are *necessary*, meaning that they are the least intrusive among the class of effective means to attain the desired goal. Finally, if the law overcomes all the previous hurdles, the court *balances* the principles that apply in the circumstances covered by the law to determine whether the latter is reasonable. In this last and decisive step, the task of the judge is not the

¹⁰ This view has been championed in contemporary constitutional theory primarily by Mattias Kumm. See Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice', 597-95; *Id.*, 'Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement'; and especially *Id.*, 'Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review'.

¹¹ BVerfGE 54, 143 (Pigeon-feeding case).

¹² BVerfGE 80, 137 (Horse case).

assess whether the legislature balanced the relevant interests as he himself would if he were in its position, but to examine whether there are respectable reasons to support the latter's decision; if the disagreement between the judge and the legislature is reasonable, the former's duty is to defer to the latter's judgment. Therefore, while the model of fundamental rights as principles implies a very wide scope for the practice of judicial review, since it encourages the court to construe rights provisions liberally, it places that practice in a subordinate position vis-à-vis the democratic legislature. The role of judicial review is to control the reasonableness of legislative action, as opposed to second-guessing the decisions of electorally accountable officials.

Whether or not this principled form of constitutional justice justifies the practice of judicial review, it is certainly superior as a basic model than the rule-based alternative. The latter is illustrated by the case law of the U.S. Supreme Court concerning the constitutional protection of liberty, summarized as follows by Mattias Kumm.

The U.S. Supreme Court insists that only particularly qualified liberty interests, liberty interests that are deemed to be sufficiently fundamental, enjoy meaningful protection under the Due Process Clause. When an interest is deemed to be sufficiently fundamental, the limitations that apply are narrow too. [...] Only 'compelling interests' are sufficient to justify infringements of the right. The 'compelling interest' test loads the dice in favor of the protected right and raises the bar for justifying infringements when compared to the requirements of proportionality. A measure may be proportional, but not meet the 'compelling interest' test.¹³

The problems with this approach are twofold and intertwined. The first is that a narrow definition of the scope of constitutional rights insulates vast areas of liberty-restricting ordinary law from constitutional scrutiny structured by proportionality analysis. That cannot be right, at least for someone who believes in the virtues of judicial review, since it opens the legal system to unsuitable, unnecessary and unreasonably disproportionate laws. The second problem is that the 'compelling interest' test operative within the narrowly defined scope of fundamental rights is either irrational or inappropriate. It is irrational if it implies that fundamental interests ought to be disproportionately or more-than-proportionately protected, for the concept of proportionality is contained in the very concept of justice, and is hence an imperative of practical reasoning within the realm of justice-apt decision-

¹³ Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law', 347.

Direct and Indirect Effects of Fundamental Rights

making. It is inappropriate if it involves the court in more than controlling the reasonableness of legislative action — that is, in second-guessing the democratic legislature. For the idea that legislatures are incompetent at reasoning about rights or too corrupt to take rights seriously is hard to square with the basic constitutional commitment to democratic governance. Perhaps particular types of *prima facie* infringement of fundamental rights should be subject to some form of strict scrutiny, on account of the stained historical record that majorities have in respect of them; that is notoriously the case when a law relies on ‘suspect classifications’ of race, gender, religion, class and the like to determine who shall receive certain benefits or be exempted from certain burdens. In such instances, there is something to be said for the fear of majoritarian tyranny. Yet the rule in any well-order democratic polity should be to recognize a margin of appreciation to legislatures in the task of fixing the conditional relations of priority among competing interests. The conception of fundamental rights as principles is fully aligned with such understanding of constitutional democracy.

C. Kelsenian Model of Constitutional Justice

The third and final premise of the argument is simpler to state and to defend: I shall assume a system of constitutional justice of the type illustrated by Germany — the so-called model of ‘concentrated’ control inspired in the work of Hans Kelsen — instead of the American-style model of ‘diffuse’ control that originated in the 1803 U.S. Supreme Court’s case of *Marbury v. Madison*.

The basic difference between the two models is the following. In the model of ‘diffuse’ control, all judges are custodians of the constitution and are thereby both empowered and obligated to refuse the application of ordinary law they deem unconstitutional. In theory, the effects of a decision of unconstitutionality are strictly bound to the case at hand, meaning that they are only felt *inter-partes*, although when they are issued by the supreme court in the jurisdiction they bound all inferior courts through the vehicle of *stare decisis*, thereby acquiring a universal effect. In the model of ‘concentrated’ control, on the other hand, the competence to issue judgments of unconstitutionality lies exclusively with a specialized constitutional court. If the ordinary court judge believes, after a preliminary inquiry conducted on his own initiative or upon the request of the parties, that the ordinary law applicable to the case is unconstitutional, he declares a stay in the

Direct and Indirect Effects of Fundamental Rights

proceedings while the constitutional court addresses the issue. Individuals may also file constitutional complaints against public authority for the infringement of their constitutional rights, including final judicial decisions oblivious to the constitutional issues raised during the proceedings. If the constitutional court finds a law unconstitutional and strikes it down, the decision is binding on all legal actors (*erga omnes* effect).

There are conceptual, empirical and normative reasons to assume a model of the latter type in the development of the argument. The conceptual reasons are that in a concentrated system the division of labor between ordinary courts — civil, criminal, labor, administrative, tax, and so forth — and the constitutional court enables a clear distinction, crucial for my argument, between issues of ordinary and constitutional justice. The prerogative of ordinary courts is to determine the content of ordinary law as it bears on a particular case, while the task of a constitutional court is to determine whether ordinary law as construed by the ordinary courts is constitutionally justified. The empirical reasons are that most legal systems which adhered to constitutional justice in the last few decades have adopted the German archetype instead of American-style judicial review. Accordingly, it is reasonable to suppose that the former embodies the standard case while the latter constitutes a special case to which the argument might have to be adapted. The normative reasons are that the institutional segregation of constitutional from ordinary justice is grounded both in the separation of powers and in sound considerations of technical performance. Although this is not the place to expand on the point, there is something deeply problematic about courts having both the duty to decide cases under the law and the power to strike down laws under an open-textured constitutional document; it is not an accident that Kelsen, the leading sponsor of the concentrated model, characterized the constitutional court as a ‘negative legislator’ — a hybrid actor between the legislature and the judiciary. Moreover, the reasoning techniques required to apply legal norms to particular cases, on the one hand, and to assess the constitutional justification of legal norms, on the other, are sufficiently diverse to support the view that the institution of a specialized constitutional court is likely to improve the deliberative quality of constitutional justice.

II. THE DIRECT EFFECT OF FUNDAMENTAL RIGHTS

A. *The Original Sin*

The debate about the indirect horizontal effect of fundamental rights goes back to a 1958 decision by the German FCC — the *Lüth* case.¹⁴ Erich Lüth was a film director and Head of the State Press Office in Hamburg who called for a boycott of the 1950 movie *Immortal Beloved* directed by Veit Harlan, whose career was stained by a past of anti-Semitism and close ties with the Nazi regime. The distributor of Harlan's movie successfully sued Lüth in the District Court for an injunction to call the boycott off, although the decision was ultimately overturned by the FCC on freedom of speech grounds. The way in which the Court construed the decision has had a lasting influence on the judicial and scholarly understanding of the effect of fundamental rights in private disputes. The doctrinal legacy of *Lüth* is nonetheless ambiguous: on the one hand, it paved the way for the full recognition of the role of fundamental rights in private law; on the other, it nailed such recognition to a circuitous and superfluous argument, an argument largely responsible for the widespread misunderstanding of the German position in other jurisdictions which claim allegiance to it.

What the FCC said in *Lüth* was that while fundamental rights as such only bind public actors, the constitutional norms in which they are vindicated also establish an 'objective order of values' that 'radiates' to all corners of the legal system, including private law. In other words, fundamental rights norms have a double character: they embody individual rights operative in the context of public law and objective values that simultaneously pervade and constrain private law. Freedom of expression, according to this view, is both a constitutional privilege of private actors in their relations with public actors and a value that shapes and limits the content of various fields of private law such as property, contracts, torts, family, inheritance, and so forth. It was in this latter capacity — as an 'objective' value instead of a 'subjective' right¹⁵ — that freedom of speech played out in the context of the dispute between Lüth and Harlan. The FCC held that civil court judges have the duties (i) to seek guidance from the constitution in the interpretation of private law provisions, (ii) to make use of constitutional values to fill in the

¹⁴ BVerfGE 7, 198.

¹⁵ Notice that the terms in quotation marks, albeit often used in this context, are utterly redundant. There are no 'subjective' values or 'objective' rights!

Direct and Indirect Effects of Fundamental Rights

blanks left by vague general clauses such as ‘good morals’ or ‘good faith’, and (iii) to refer ordinary law to the FCC if they regard it as unconstitutional in spite of the effort to construe it in the most favorable constitutional light. As the Court put it:

[F]ar from being a value-free system the Constitution erects an objective system of values in its section on basic rights.... This system of values, centring on the freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration, and judicial decision. It naturally influences private law as well; no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.¹⁶

On the view sponsored by the FCC in *Lüth*, the indirect effect of fundamental rights is not a logical implication of their character as rights addressed to the state — that is, a necessary feature of vertical effect — but an independent effect grounded in an additional ‘objective’ dimension of fundamental rights norms. It follows that the adherence of a legal system to the doctrine of indirect horizontal effect depends on the constitutional court’s willingness to read such an ‘objective’ element into fundamental rights provisions.

This view is mistaken.¹⁷ In the context of private law disputes, fundamental rights operate either in their ‘classic’ defensive role or as entitlements to state protection — in both types of case, therefore, as ‘subjective’ rights rather than ‘objective’ values. *Lüth* is illustrative of the first type of case. The real issue there was whether the provision of the German Civil Code which the civil court interpreted as vindicating the injunction did not impose a disproportionate burden on the defendant’s exercise of free speech. Since the constitutional entrenchment of a privilege to speak freely disables the legislature from the power to enact laws that unreasonably restrict freedom of speech, what *Lüth* claimed was that calling the boycott on Harlan’s movie could not justify any of the adverse legal consequences triggered by the refusal to comply with the injunction. In other words, given the privileged status of *Lüth*’s behavior, the criminal and civil sanctions attached to the injunction did not fulfill the justificatory reasons for the restriction of fundamental rights to freedom of action and to property from which such sanctions generally benefit.

¹⁶ BVerfGE 7, 198 (205).

¹⁷ Here I follow Claus-Wilhelm Canaris, *Grundrechte und Privatrecht*, 31-32. See also Robert Alexy, *A Theory of Constitutional Rights*, 360-61.

The famous *Blinkfüer* judgment exemplifies the second type of case, involving not fundamental privileges but genuine rights (or ‘claim-rights’).¹⁸ In that case, the giant distributor of periodicals *Springer-Verlag* instructed newspaper stands to boycott the pro-socialist magazine *Blinkfüer* shortly after the construction of the Berlin Wall because the latter advertised East German television and radio programs. *Blinkfüer* sued *Springer-Verlag* for damages. The Federal High Court of Justice decided for the defendant on the grounds that its conduct represented a privileged exercise of freedom of speech and of the press. In reaction, the chief editor and the publisher of *Blinkfüer* filed a complaint with the FCC invoking a protective entitlement entailed by freedom of the press, namely the right of media agents to receive state protection against restraints of trade sponsored by powerful conglomerates. The issue was whether the state’s failure to protect private actors in *Blinkfüer*’s position was an infringement of a fundamental claim-right. The FCC answered affirmatively and overturned the civil court’s decision.

What the analysis of the two standard case-types shows is that fundamental rights operate in their normal ‘subjective’ role in the context of private law disputes. Allusions to vague notions such as a ‘radiating effect’ and an ‘objective order of values’ are thus entirely superfluous.¹⁹ The indirect horizontal effect yielded by the decisions of unconstitutionality in both *Lüth* and *Blinkfüer* is not a consequence of the FCC’s willingness to construe the list of fundamental rights in the Basic Law as an ‘objective order of values’ but a logical implication of the vertical effect of such rights. This is not to say that the idea of fundamental rights as values is erroneous; as Robert Alexy showed persuasively, statements of principle can be reformulated into statements of value and vice-versa.²⁰ The mistake lies in thinking that rights

¹⁸ BVerfGE 25, 256. See also Alexy, *Id.*

¹⁹ To be entirely fair, the FCC nearly endorses the view articulated in the text when it writes that ‘[i]f [the civil judge] issues a judgment which ignores this constitutional influence on the rules of private law, he contravenes not only objective constitutional law by misconceiving the content of the objective norm underlying the basic law, but also, by his judgment, in his capacity as a public official, contravenes the Constitution itself, which the citizen is constitutionally entitled to have respected by the judiciary.’ BVerfGE 7, 198 (206). As Alexy, *Id.* at 359, notices, the mere fact that the FCC took up the case in the context of a constitutional complaint, which presupposes a breach of fundamental rights as such, implies a subjective element. In the end, that only reinforces the point about the redundancy of the ‘radiating effect’ doctrine.

²⁰ *Id.* at 86-87.

and values are different realities, so that speaking of fundamental rights norms in terms of values adds something of practical significance to the system of fundamental rights. In truth, right-statements and value-statements are different ways of describing a single reality.

The practically-minded reader might be annoyed that there is apparently nothing of consequence in the critique of the ‘radiating effect’ doctrine. After all, whatever demerits plague its conceptualization, the *Lüth* formula did lead the FCC to extend the enforcement of fundamental rights to the realm of private law. The same, however, cannot be said of other jurisdictions which bought the German doctrine of indirect horizontal effect but as a matter of fact got something quite different.²¹ Canada is the prime example. In the leading case of *Dolphin Delivery*,²² decided in 1986, the Canadian Supreme Court argued that fundamental rights do not apply directly to the common law because the judiciary is not, unlike the legislature or the executive, part of the ‘government’. The relevance of the Charter of Fundamental Rights and Freedoms manifests itself in this area only *indirectly*, as a system of ‘values’ that should guide the courts in the application and development of the common law. What this means is that a common law norm cannot be struck down on the grounds that its application involves a definitive infringement of a fundamental right.

I find this construction utterly puzzling. It states that the same norm Φ is subject to rights-based scrutiny if it is embodied in a piece of legislation but not if it happens to belong to the common law; and that in turn implies that if norm Φ infringes a fundamental right, its validity or invalidity hangs on the utterly accidental quality of its legislative or common law source. Perhaps what impressed the mind of the *Dolphin* judges was that subjecting the common law to constitutional scrutiny would place ordinary courts, in a diffuse system such as the Canadian, in the twofold position of law-applying officials bound by the law they themselves made and of law-policing officials sworn to protect the constitutional order against all of ordinary law. There is indeed something disturbingly schizophrenic in that conception of the judicial role. But I think that what it teaches us is not that the common law should be exempt from constitutional scrutiny, but that it is inappropriate to place the tasks of constitutional justice in the hands of ordinary courts.

²¹ For a reliable comparative exercise in this area, see Stephen Gardbaum, ‘The ‘Horizontal Effect’ of Fundamental Rights’, 398-411.

²² *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

Direct and Indirect Effects of Fundamental Rights

If the idea of an ‘indirect’ application of fundamental rights is difficult to sort out in a common law system, its advocacy in a civil law context in which the leading source of private law is legislation and constitutional justice is typically administered by a specialized court is truly baffling. Take, for example, the following suggestion by Jan Smits:

...[T]he doctrine of indirect effect means that fundamental rights can only be of importance *through* the rules of private law. This means in essence that the rules designed for relationships between private parties have priority over fundamental rights. Private law can be interpreted in the light of fundamental rights, but can in the end not be absorbed by these rights: the private law rules remain decisive for deciding the case.²³

Smits is right to stress that the rules of private law have ‘priority’ over fundamental rights in one possible sense of that term: constitutional scrutiny should only begin where the interpretive labors of the ordinary judge, including the effort to construe the law in a constitutionally favorable light, have been exhausted. Constitutional reasoning is thus subsidiary to ordinary legal reasoning. That is, however, very different from asserting that ‘fundamental rights can only be of importance *through* the rules of private law’. That is surely wrong. One might suggest that the types of human relation governed by private law pose — ‘on average’, so to speak — less threats to the enjoyment of the interests protected by fundamental rights than those governed by, say, administrative or criminal law. But it does not follow that private law cannot infringe upon fundamental rights, as the scores of cases in this area illustrate, or that in spite of that it should be exempted from constitutional scrutiny.

B. Libertarian Anxiety

Perhaps what concerns Smits, and others who embrace similar views, is the perception that bringing fundamental rights to bear on private law on the same terms that apply to public law is tantamount to giving them direct effect. That is, as we have seen, what the thesis of outcome-neutrality asserts and what the case law of the FCC entails. If that is indeed the case, the discomfort with the rights-based scrutiny of private law is merely a reflex of a deeper uneasiness about the idea of fundamental rights as rights that can be

²³ Smits, ‘Private law and Fundamental Rights: A Sceptical View’, 4 [emphasis in the original].

invoked in so-called ‘horizontal’ settings — in other words, of such rights as directly effective in private as well as public relations. That — Smits and others are quick stress — cannot be the case, for it is of major substantive importance that fundamental rights are deprived of horizontal effect. The reason is that ‘[a]ny other view would be a violation of the autonomy of the private person.’²⁴ His worries are liberally expressed in this passage:

The subjects in the private sphere (private persons) have other interests than the State. Only by separating these two spheres, a free sphere for private persons can emerge. The consequence of this is that private persons do not need to pursue the public interest: they are autonomous and can make their own choices about what they consider to be just. It is private law that makes this possible. In the public sphere, these private persons can be forced to respect decisions they do not like, but this is justified as these decisions are democratically legitimised.²⁵

I call this view ‘libertarian anxiety’. It consists in the fear that the horizontal effect of fundamental rights jeopardizes individual freedom because it subjects private persons to the duties that bind public actors. The textbook example involves the right to be treated equally or not to be discriminated against. Consider the prohibition against differences based on ‘suspect classifications’ stipulated in article 3(3) of the Basic Law: ‘No person may be disadvantaged or advantaged on account of their sex, birth, race, language, national or social origins, faith or religious or political opinions.’ Now imagine the following case. Joseph K throws a party in his garden every summer and invites all the neighboring families with only two exceptions, an Asian family that he despises because he would like his predominantly Caucasian neighborhood to be racially homogenous and a Muslim family that he both fears and loathes because he identifies Islam with terrorism. Suppose that the two families happen to acquire solid evidence of Joseph K’s motivation to exclude them from the yearly parties, and decide to sue him under a provision similar to article 3(3) of the Basic Law; specifically, they seek an injunction against Joseph K to let them attend the party. What the opponents of direct horizontal effect claim is that if Joseph K is bound by the duty not to discriminate persons on grounds of race and religion, the plaintiffs will win the case, and that involves a wildly excessive burden on Joseph K’s liberty, including the liberty to embrace bigotry in the privacy of his home.

²⁴ *Id.* at 6.

²⁵ *Id.*

This argument would have some bite if fundamental rights norms were normally conceived as rules. But if we take rights as principles as the standard case, in relation to which the rule-like character of fundamental rights norms stands as a special case, the argument is downright unpersuasive.²⁶ Provisions such as article 3(3) of the Basic Law are particularly interesting because, as I indicated earlier,²⁷ there are good reasons to construe them as rules vis-à-vis public actors, meaning that there may be sufficient grounds to rebut in that domain the presumption of their principled character, while they play their normal function as principles in the private law context. Within the framework of rights as principles, of course, the libertarian anxiety is unwarranted, since the right of the excluded individuals to be treated equally furnishes only a *prima facie* claim that has to be weighted against the counter-claim of the owner that his privacy and liberty interests possess constitutional dignity as well. The task of the court is to balance the fundamental interests involved, taking into account that the harm caused by the exclusion from the party is relatively neglectable while the decision about who to invite for a party at home lies right at the core of one's personal intimacy. If, on the other hand, one alters the facts of the hypothetical, so that the plaintiffs are now job applicants and Joseph K is an employer, the relative weight of the competing rights is obviously different, and that may well affect the correct outcome. The important point to stress, however, is that liberty interests are fully incorporated into rights-based reasoning. As Robert Alexy writes, 'the principle or value-based theory of constitutional rights is neutral as far as legal liberty is concerned'.²⁸ In fact, when jurists such as Smits complain against direct horizontal effect in the name of individual autonomy, they are implicitly making balancing judgments of the type just described; the only difference is that within the framework of rights-as-principles these judgments are made explicitly and articulately, as all legal reasoning *qua* public reasoning should be in a well-ordered democratic polity.

A more sophisticated form of libertarian anxiety with echoes in the Smits passage quoted above derides the doctrine of direct effect not on substantive but on procedural grounds. It manifests itself in the claim that

²⁶ The argument has often been run by those who subscribe to the principled conception of fundamental rights. See, e.g., Mattias Kumm, 'Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law', 361-64.

²⁷ See *supra* I.2.

²⁸ Alexy, *A Theory of Constitutional Rights*, 109.

subjecting all private conduct, even the decision about who to marry or who to invite for dinner, to at least potential constitutional scrutiny, involves a preposterous politicization of personal life. The language of ‘public reason’, to use John Rawls’ familiar phrase,²⁹ is entirely appropriate in the ‘public sphere’ but should be kept at bay from the ‘private sphere’; as Smits puts it, while the former is governed by democratic processes of decision-making, the latter is the realm of personal autonomy. Any other view is tantamount to a form of constitutional totalitarianism that uses the armory of fundamental rights to police the very individual freedom that their constitutional entrenchment was designed to insulate from the public eye.

This argument trades on confusion between the *point* of fundamental rights, which, at least in their classic ‘civil’ incarnation, is indeed to insulate individuals from public scrutiny, and the *discourse* of fundamental rights, which is unavoidably public, and thus accountable before the court of public reason.³⁰ It is one thing to say that the individual exercise of definitive rights should not be subject to public control, and quite another to add that the decision about what rights individuals have is equally exempted from public scrutiny. The latter proposition mischaracterizes the liberal tradition of individual rights, as even the most perfunctory examination shows. John Stuart Mill, for example, argued that the scope of the political realm — the realm of decision-making concerning ‘We’ rather than ‘I’ — is specified by the ‘harm principle’, which holds that only conduct that harms other individuals, conduct that is other- instead of self-regarding, is a legitimate object of legal regulation.³¹ Similarly, Immanuel Kant stressed that what makes law necessary, and sets the proper limits of its reach, is the fact that human beings live in mutual proximity and dispute limited resources, thereby needing a common framework of interaction.³² It follows that when two

²⁹ Rawls, *Political Liberalism*, 212-54, 440-90.

³⁰ See Mattias Kumm, ‘Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law’, 362-63.

³¹ Mill, *On Liberty*, 13-17: ‘The object of this essay is to assert one very simple principle...that the sole end for which mankind are warranted...in interfering with the liberty of action of any of their number, is self protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.’ [13-14]

³² Kant, ‘On the Common Saying: This May be True in Theory but it Does not Hold in Practice’, 45: ‘[A]ll right consists merely in the limitation of the freedom of others to the condition that it is consistent with mine in accordance with a general law...by virtue of which all...are subjects in a juridical condition (*status iuridicus*) in general, that is to say, are in a condition of equality

individuals lay conflicting claims over the same object, as it is by definition the case in any fundamental rights dispute, they are not acting within the private realm of what belongs to them but within the public realm of deciding what is it that they are definitively entitled to call theirs. It follows that private law — the law governing primarily the relations among individuals — is thoroughly subject to the scrutiny of public reason, and what the litigants do when they invoke fundamental rights against one another is to deploy the resources of the highest form of public reason in a constitutional democracy — the constitution itself — to determine their private legal entitlements. A bigot might not have to justify publicly any particular *decision* not to contract with a member of a racial minority, but he might be called upon to justify his *claim* to be free to contract with whoever he wishes.

C. *‘Interpositio Legislatoris’*

I tried to show in the preceding section that the libertarian anxiety about the doctrine of direct horizontal effect is misguided. There is nothing ‘statist’ about a system that enables private litigants to bring fundamental rights to bear on the dispute. In this section, I will run a different argument against direct effect — that there are overwhelming reasons to conceive fundamental rights as directly binding only on the legislature and other law-making agencies. According to that argument, the proper targets of fundamental rights claims are statutes, regulations, and precedents, more precisely the legal norms which ordinary courts understand to be embodied in, or implied by, such sources. (For ease of exposition, I shall assume legislation as the standard source of ordinary law, including private law). What this means is that fundamental rights do not bind directly either private actors or the judiciary, and in all likelihood they do not bind the executive either (although I shall not try to argue that specific point in this Essay³³). In normal

of action and reaction of a mutually limiting choice in accordance with the general law of freedom....’ See *Id.*, ‘Perpetual Peace’, 78; *Id.*, *The Metaphysics of Morals*, 89.

³³ In part because it presupposes a reasonably developed account of a (material) distinction between making law and executing or administering it (through ordinances and acts), a complex topic that would distract us from the main course of argumentation. I believe such a distinction can indeed be made, although obviously not along classic public law lines of describing one activity as discretionary and the other as constrained. In a modern constitutional democracy, it plainly is neither the case that (standard) legislation is free from legal constraints nor that (standard) executive decision-making is, in all non-trivial respects, legally determined. On the other hand, I do not buy Kelsen’s sweeping conversion of the

circumstances, those actors are exclusively bound by ordinary law, and it is the duty of the agencies in charge of making the law,³⁴ and primarily of the legislature as the highest law-making institution, to make sure that it respects fundamental rights. These are thus operative in private relations not directly but through the *mediation* of ordinary law, i.e. via *interpositio legislatoris*.

What reasons support this position? Consider the predicament of individuals if we hold them directly accountable before fundamental rights. Given the conception of such rights as principles, individuals cannot hope to determine their definitive legal entitlements and/or liabilities in any particular case by means of deductive judgment. That type of reasoning is normally adequate, at least as a heuristic device, when the governing law is to some considerable extent cast in the form of rules, as it is the case with ordinary law. But fundamental rights are almost entirely cast in the form of principles, which means that their application to any particular case requires a judgment balancing the competing interests involved, a judgment expressed in a rule fixing the conditions under which one interest takes precedence over the other.

Now clearly the contrast between ordinary and fundamental rights law in this respect should not be painted too starkly, both because not all of ordinary law is a matter of rules and because rules are not absolute or definitive norms. But the contrast cannot be obliterated either. First, there are scores of highly determinate rules in ordinary law reducing quite drastically the scope of application of norms that have the character of principles. Second, while it is true that the balancing problem underlying a rule may be re-opened if some argument of principle militates strongly in its favor, that is, as we have seen before, an ‘exceptional’ device in ordinary legal

distinction into one of degree. See his ‘dynamic’ representation of law in *Pure Theory of Law*, 221-78.

³⁴ This claim must undergo substantial modification in the case of precedent, which is not ‘enacted’ law — law made intentionally — but implied or latent law. On the doctrine of precedent, see the classic account supplied by Karl N. Llewellyn, *The Bramble Bush*, 55-71; for a textbook exposition, see Michael Zander, *The Law-Making Process*, 265-305. In a nutshell, the argument here is that since courts cannot ‘enact’ precedents and cannot appeal directly to the constitution to decide the cases which contain implicitly or latently precedent-based norms, they cannot be held accountable on the same terms as the legislature for the constitutional adequacy of the law they make. But that implies neither that precedent is immune from rights-based scrutiny nor that we cannot hold the legislature accountable for whatever constitutional defects afflict judge-made law, since the legislative branch, *qua* supreme ordinary-law-making authority, has the power to change judge-made law.

reasoning in the twofold sense that it is either rare (*lex injusta*) or that it plays out on the edges (teleological reduction). Thirdly, and finally, the standard non-deductive forms of ordinary legal reasoning, such as analogical extension and teleological reduction, are still quite distinct from pure balancing in that they are constrained by the requirement of analogy. Contrariwise, the field of fundamental rights is predominantly filled by principles that require relatively unconstrained balancing judgments. The burdens of reasoning of agents subject to fundamental rights norms are hence far greater than those born by the addressees of ordinary law.

If we want to have individuals appeal directly to fundamental rights norms, then, we must be ready to transfer that burden to their shoulders. And I believe that we have at least three overwhelming reasons not to do so. The first is that it creates a good deal of legal uncertainty or unpredictability in social life. The second is that it destroys a large measure of the deliberative idleness that the beneficiaries of representative institutions are entitled to enjoy. The third is that eventually it requires far more involvement of the judiciary in the task of balancing competing interests than a well-functioning democracy can afford to have. I turn at once to the task of briefly fleshing out each of these reasons.

(1) *Legal Certainty*. The first worry about the direct effect of fundamental rights is that it increases the unpredictability of legal outcomes. If individuals cannot rely on ordinary law to fix the conditional relations of priority among conflicting fundamental rights and collective goods, they will have to conduct the required balancing judgments on a case-by-case basis — e.g., when they contract, when they engage in harmful activity, when they exclude third-parties from their property, when they make decisions about the education of their children. Given the complexity and controversy inherent to such judgments, added to the fact that the average person has a tendency to fall short of impartiality when weighting her own interests, it is reasonable to suppose that individuals will disagree about the implications of fundamental rights on each occasion. One might argue that what ultimately matters is that such disagreements are authoritatively settled by the courts. Yet judges are human beings like the litigants, equally prone to disagreement on complex and controversial normative issues, and the fact that they intervene *ex post* makes their authoritative pronouncements on the issue irrelevant to the conduct-planning efforts of the parties. In sum, the point is that the law is

unreasonably uncertain when fundamental rights are directly operative in private relations.

I am not arguing that balancing is uncertain because it is irrational or non-truth-apt. What is critical is not the meta-ethical status of values and norms but the fact that we lack the epistemic resources to deal with conflicting *opinions* about what they require from us.³⁵ Unlike what happens in science, in which there is a broad consensus about the proper way to settle disputes between competing theories, ethics is both substantively and methodologically controversial. Balancing judgments are unpredictable because we hold different opinions about the correct outcome, not because there is no right answer to be found. In fact, there seems to be no obvious connection between the extent of normative disagreement and the philosophical quarrel between emotivism and realism (with a variety of intermediate positions). Even if values are grounded in emotions, so that the statement ‘scorning the religious beliefs of others is wrong’ means something like ‘I *feel* repelled by religious insult’, we may have a substantial degree of certainty if identifiable groups of people share the same moral feelings. On the other hand, even if we argue for the existence of moral facts, we may have radical disagreement if we lack the perceptual apparatus to reliably recognize such facts and a consensual moral epistemology to assist us in remedying such perceptual flaws.³⁶

(2) *Deliberative Idleness*. A second worry about the direct effect of fundamental rights is that it requires too much deliberative effort from individuals. Part of the reason why we have representative instead of direct democracy is that while we want political decision-making to be democratically accountable, we do not want to be called upon on every instance to participate in the labors of public life. Our representatives engage in public reasoning on our behalf, and our basic responsibility as citizens is to keep a watchful eye on them and judge them on Election Day. We might have an exceptional interest in some area of public policy, so that we spend a portion of our time participating in a variety of civil society venues specifically devoted to discussing, examining, critiquing, and providing counsel to public officials in that area, but even such an engaged citizenship is quite different from having to participate in political decision-making

³⁵ See Jeremy Waldron, ‘The Irrelevance of Moral Objectivity’, 171-76.

³⁶ *Id.* at 178-79.

across the board. The fact that we are served by representatives relieves us from that burden. If we hold fundamental rights effective in private relations, however, we must be ready to acknowledge that individuals are regularly required to engage in public reasoning, in the particularly complex form of balancing interests, in the course of their ordinary life. That necessarily deprives them of a great deal of the deliberative idleness afforded by representative government.

There is, of course, a rich tradition of political thinking that sees nothing to lament in that. The practice of deploying the full resources of reason on all occasions is simply a consequence of the growth of a society from intellectual immaturity and political despotism to enlightened self-determination. Autonomous selves do not delegate reasoning on others. The opening paragraph of Kant's *Essay on the Enlightenment* expresses that view with maximum eloquence:

Enlightenment is man's emergence from his self-incurred immaturity. Immaturity is the inability to use one's own understanding without the guidance of another. This immaturity is self-incurred if its cause is not lack of understanding, but lack of resolution and courage to use it without the guidance of another. The motto of enlightenment is therefore: *Sapere aude!* Have courage to use your own understanding!³⁷

Kant charges those who enjoy what I called 'deliberative idleness' with laziness and cowardice. That is certainly the case in a society in which individuals conform to the condition of subjects, blindly accepting the claim of political rulers to have legitimate authority.³⁸ But that is a far cry from the predicament of the citizenry in a representative democracy in which the rulers are politically accountable before the ruled and the latter have the right to resist grossly unjust directives issued by the former. To complain about the self-incurred immaturity of citizens even in such conditions, as philosophical anarchists intoxicated by the concept of autonomy do,³⁹ is to subscribe to a psychologically untenable and morally hideous conception of practical reasoning and the requirements of responsible citizenship.

³⁷ Kant, 'What is Enlightenment?', 17.

³⁸ On the concept of 'legitimate authority', see Joseph Raz, *The Authority of Law*, 3-27.

³⁹ The most famous statement along these lines is Robert Paul Wolff, *In Defense of Anarchism*, 13-20.

(3) *Political Legitimacy*. The final worry concerns the democratic legitimacy of dispensing with *interpositio legislatoris*. If fundamental rights are directly effective in private relations, ordinary courts serve a double function: on the one hand, they must determine what ordinary law provides in the case *sub judice*; on the other, they must subject ordinary law to rights-based scrutiny governed by proportionality analysis. This means that the allegiance owed by the courts to ordinary law is conditional upon the latter's conformity with fundamental rights, that is, with the courts' understanding of what kinds of normative judgments underlying ordinary law satisfy the requirement of proportionality.

This argument is unlikely to impress common lawyers accustomed to the American model of 'diffuse' control, but I hope that it leaves the advocates of 'concentrated' constitutional justice uneasy. It is one thing to have a specialized court for constitutional issues, and particularly fundamental rights issues, and quite another to have ordinary courts both deciding cases under the law and operating as some sort of 'negative legislator' *à la* Kelsen. That is hard to square with the principle of the separation of powers, which assumes that judicial power is particularly harmless because it is bound to the case *and* constrained by law,⁴⁰ and with the democratic principle, which requires that decision-making affecting all and involving controversial judgments be endowed with some form of democratic pedigree. That is all the more so in legal systems — such as those belonging to the civil law tradition — in which the judicial office is conceived as a professional career legitimated by expertise and training instead of a public function subject to at least indirect democratic scrutiny.

III. THE INDIRECT EFFECT OF FUNDAMENTAL RIGHTS

A. *The Thesis of Outcome-Neutrality*

I argued in the preceding section that fundamental rights do not bind private actors but only law-making agencies, and particularly the legislature. There are overwhelming reasons of legal certainty, deliberative idleness, and political legitimacy to require *interpositio legislatoris*.

⁴⁰ For a classic account, see François Gény, *Méthode d'Interprétation et Sources en Droit Privé Positif: Essai Critique*, II, 74-92.

How relevant is that argument, however, given the doctrine of *indirect* horizontal effect? To hold that legislation, regulation, and precedents — or the legal norms embodied in such sources — are the proper targets of rights-based scrutiny appears to entail a formalist attitude, since it does not change anything in practice. Even if the parties to a lawsuit cannot invoke fundamental rights against one another, they can challenge the ordinary law relevant to the dispute and obtain a judgment of unconstitutionality that declares it void. One way or another, fundamental rights are vindicated in private litigation; the debate between the advocates and opponents of direct effect is hence completely sterile. That is the thesis of *outcome-neutrality*, crisply summarized by Mattias Kumm as follows:

The practical difference between indirect and direct effect is...negligible. [...] If, in a surprise move, the constitutional legislator were to amend the Constitution and explicitly determine that constitutional rights are also applicable to the relationship between individuals, *it would change practically nothing*. There would be a difference in the way complaints could be framed: instead of naming the public authorities, which are currently the addressees of the complaints, the complainant could simply name the other private party as the defendant in the case. [...] But this change in the construction of the issue would have no implications whatsoever either substantively with regard to outcomes or institutionally with regard to the jurisdiction of the FCC.⁴¹

I want to challenge this thesis all the way to its core, but before I do so it is worth pointing to a rectification that its advocates are likely to welcome. The thesis of outcome-neutrality might be true with respect to active violations of fundamental rights but cannot be right on the same terms when what is at stake is the failure of the state to protect a fundamental interest. The reason is what Robert Alexy calls a ‘fundamental structural distinction’ between prohibitions and commands.⁴² Typically, a prohibition against destroying or injuring Ψ implies that *every* act which destroys or injures Ψ is forbidden, while the command to secure or protect Ψ implies the obligation to adopt *one* of a potentially plural class of acts which secure or protect Ψ . Alexy’s own example is the contrast between the prohibition against homicide and the duty to rescue a drowning person.⁴³ Whereas the duty not to commit homicide

⁴¹ Kumm, ‘Who is Afraid of the Total Constitution? Constitutional Rights as Principles and the Constitutionalization of Private Law’, 352 [emphasis in the original]. See also Robert Alexy, *A Theory of Constitutional Rights*, 354-65.

⁴² *Id.* at 308, 396.

⁴³ *Id.*

is a duty to abstain from engaging in any course of action that knowingly causes the death of other persons, the duty to rescue a drowning person is a duty to perform one of a possible variety of acts — swimming to her, throwing a life-ring, or sending out a boat — of rescuing. Thus, protective duties entail *structural discretion* in the selection of means.

It follows that the consequences of a judgment that the state has insufficiently protected a fundamental interest *may* well be different from that of a judgment according to which the state has violated a defensive right.⁴⁴ In the latter case, it leads the constitutional court to strike down a legal norm; in the former, it leads the court to instruct the state to adopt an effective means of protecting the relevant interest. If there is more than one means available — e.g., the physical integrity of pedestrians may be protected either by the private law of accidents or by a system of fines for the breach of traffic rules, or some conjunction of both — it is fallacious to derive from the court's decision the proposition that the legal system ought to contain the particular norm(s) — e.g., strict accidents liability — that the complainant would like to see vindicated for the purposes of the lawsuit which originated the complaint. If fundamental rights are directly effective in private relations, on the other hand, they operate as defensive rights against third-parties, and hence the issue of structural discretion, which presupposes positive duties, disappears from sight.

What this means is that the thesis of outcome-neutrality cannot apply indiscriminately to active and passive violations of fundamental rights. For it to be even conceptually coherent, it must be enriched by a special thesis for the case of protective entitlements, a thesis that entails a practical difference between the doctrines of direct and indirect effect. But is outcome-neutrality true at least with respect to defensive rights? In the next section I will argue that it is not, and propose a different account of indirect effect.

B. The Doctrine of Triple-Effect

Consider the following hypothetical.⁴⁵ An emigrant from a foreign country wants to install a parabolic antenna in the building where he owns an apartment and lives with his family. The antenna is necessary for him to be able to watch the television channels of his country. The bylaws of the

⁴⁴ This point is stressed by Claus-Wilhelm Canaris, *Grundrechte und Privatrecht*, 81-90.

⁴⁵ Inspired by BVerfGE 90, 27 (Parabolic Antenna I case).

condominium establish that homeowners cannot install in the building any of the devices in a list of ‘banned items’, including parabolic antennas. The homeowners association adopted the prohibition in order to preserve the aesthetic integrity of the building, a restored jewel of Victorian architecture. Furthermore, parabolic antennas interfere with the operation of other devices installed in the building, such as the central heating system, the air conditioning system, and cable television. Although the building could have been engineered to avoid such interferences, that would have been costly and, given the desire of an overwhelming majority of homeowners to ban parabolic antennas for aesthetic reasons, futile. Moreover, to introduce the necessary modifications at this point would require changes in the structure of the building that are enormously expensive and imply vacating the premises for a minimum of three months.

Imagine now that the emigrant sues the homeowners association, seeking a declaration that the ban is invalid and an injunction to let him install the antenna. He invokes a variety of private law arguments, including a general clause of ‘good morals’ not unlike the one provided in § 138(1) of the German Civil Code. The case drags in the civil courts until the High Court of Justice decides that the provision in the bylaws is valid, and, accordingly, that the plaintiff has no legal right to install the parabolic antenna. In reaction, the plaintiff files a constitutional complaint on the grounds that ordinary law as construed by the High Court violates his ‘freedom to acquire information from generally accessible sources without hindrance’ (freedom of information), identical to the right provided by Article 5(1)(1) of the Basic Law.

The first issue that constitutional courts usually address when they are confronted with cases of this type is whether the ordinary courts ‘interpreted the law in conformity with the constitution’. There are institutional and substantive difficulties with this vague formula. The institutional difficulties are that it is entirely inappropriate for constitutional courts to review the construction of ordinary law endorsed by the ordinary courts, for reasons that are symmetric to those that militate against the ‘diffuse’ model of judicial review. Just as it is illegitimate for ordinary courts to meddle in the affairs of constitutional justice, it is illegitimate for constitutional courts to operate as normal appellate courts in charge of reviewing the decisions of ordinary courts. The competence of constitutional courts is *specialized*, and it is oriented towards the constitutional scrutiny of

ordinary law as construed by the ordinary courts, not to the review of the latter's interpretive judgments.

That does not imply that *ordinary* courts should not construe the law in light of the constitution. Of course they should, and in that regard it is appropriate to speak of a 'weak' indirect effect of fundamental rights.⁴⁶ But that cannot mean that ordinary courts should disregard the standards of ordinary legal reasoning — that is, the considerations of legal certainty, democratic deference, and of treating like cases alike which underlie them — in order to force the law into the 'Procrustean bed' of the constitution.⁴⁷ That is true as well in the field of general clauses or vague standards, such as 'good morals' or 'good faith'; taken literally, these provisions are nearly blank slates that can be filled with whatever content the court is inclined to embrace, but the ordinary law of 'good morals' and 'good faith' also includes a rich body of case law of a much more determinate character. The only plausible sense in which ordinary courts might be placed under a duty to construe the law in accordance with the constitution is that they should let constitutional principle guide their judgments as to the relative importance of competing canons of interpretation, of following or distinguishing precedent, of analogical or *a contrario* reasoning, of teleological reduction or strict application, and the like. In that sense, the duty of a judge to seek constitutional guidance is structurally similar to his duty to construe the law in light of the requirements of substantive justice.

In our hypothetical, the plaintiff complains that ordinary law as construed by the civil courts infringes upon his freedom of information. The question for the constitutional court, therefore, is whether the private law regime empowering homeowners associations to ban parabolic antennas is proportional or not, that is, whether the autonomy of the homeowners to adopt the internal regulations of the condominium, including restrictions dictated by aesthetic concerns, is an interest sufficiently weighty to justify the *prima facie* interference with the freedom of information of foreign citizens. The constitutional court deploys the four-prong proportionality test

⁴⁶ Stephen Gardbaum, 'The 'Horizontal Effect' of Fundamental Rights', 401-02, 409.

⁴⁷ As Julian Rivers, 'Translator's Introduction: *A Theory of Constitutional Rights* and the British Constitution', xl, writes: '[T]he principles of legal clarity, democratic legitimacy, and legislative intent constrain the extent to which statute law can be interpreted to give effect to Convention rights. Likewise, the development of the common law is constrained above all by the requirement of legal certainty. Even if private law needs reworking to express better the balance of constitutional principles, that reworking may be too far removed from the existing state of private law to count as 'interpretation' or legitimate development.'

to address the issue. First, it examines whether the reasons underlying the law are legitimate or not; since Article 5(1) does not contain a reservation clause, the law is legitimate insofar as it restricts the rights conferred in that provision for the sake of other interests of fundamental status, and private autonomy is certainly one such interest. In the second stage, the court considers whether the restrictive means are suitable to accomplish the ends of the law or not; that is clearly the case here, since private autonomy is primarily realized through the conferral of legal powers, such as the capacity to contract, the right to vote in communal affairs, or the prerogative of relinquishing a right. In the third stage, the court assesses whether the burdens imposed by ordinary law are *necessary*, in the sense of the least intrusive among the class of suitable means; in this case, there is no other way to uphold the autonomy of the homeowners but to grant them the power of self-regulation. In the fourth, and final, stage, the court balances private autonomy against freedom of information. In a German case similar to our hypothetical,⁴⁸ the Federal Constitutional Court decided that private autonomy should in principle give way to freedom of information if the only way for the emigrant to have access to his countries' television is to install a parabolic antenna. In other words, the conclusion is that the private law regime which enables homeowners associations to ban parabolic antennas unconditionally is disproportional; the law should hence contain an exception for the type of case which originated the complaint. It is irrelevant for our purposes whether this decision is correct. What is of concern is what legal *consequences* it yields.

The answer assumed by those who endorse the thesis of outcome-neutrality is that since the legal norm(s) judged unconstitutional are void, the ordinary court to which the case is remanded must find for the author of the complaint, except on the rare occasions in which the constitutional court itself 'manipulates' or restricts the effects of its judgment. In our hypothetical, the normal effect of the decision of the constitutional court is that the High Court must read an exception into the law for the case of foreign citizens installing parabolic antennas, and decide for the plaintiff. It is true that in this case what is at stake is legislative *inaction* — the failure of the legislature to create an exception to the general regime — but this is the sort of case in which the issue of structural discretion does not arise, since the only way to safeguard the interest of the plaintiff is to let him install the antenna. It is one of those

⁴⁸ BVerfGE 90, 27.

cases in which the constitution, as construed by the constitutional court, requires the adoption of a specific norm. In our working example, the decision in the constitutional case entails the plaintiff's victory in the civil case.

Yet that is normatively unsound. What the constitutional court decided was that a given norm — or the absence of a norm — is inconsistent with the constitution, and that means both that it should not be in the statute books and that it was never formally valid. In other words, since the norm is void (or an absent norm is required), what appeared to be binding law was actually invalid. But surely the fact that it *appeared* to be valid, and that the appearance is grounded in the presumption, entirely adequate and indeed required in a constitutional democratic order, that ordinary law is valid, must count for something. Reliance is a fundamental interest, no less important in the abstract than freedom of speech, privacy, bodily integrity, and other fundamental interests; it is recognized as such in virtually all democratic constitutions, either explicitly or as a corollary of the rule of law.

What this means is that the private law dispute is not at all substantively decided when the constitutional court issues its decision. The judgment of unconstitutionality merely deprives the targeted norm of its formal title of validity; it does nothing to undermine its alternative reliance-based title. To decide the case *sub judice*, the civil court must now balance the interest of the party whose fundamental right was vindicated by the constitutional court's judgment against the reliance interest of the party who benefited from ordinary law as it stood. In our hypothetical, the interest of the plaintiff in information matches up against the investment made by the homeowners association in reliance of ordinary law. Given the facts of our hypothetical, namely the enormous financial and personal cost involved in introducing the necessary modifications to make the installation of the antenna viable, it may well be that the correct outcome is to decide again for the defendant. What changes is the appropriate justification for the decision.

My argument is that we should keep the questions of constitutionality and of the correct resolution of the underlying dispute separate. The first question, addressed to the constitutional court, is whether the law as construed by the ordinary court is consistent with the constitution or not; if the answer is negative, the law is struck down on grounds of invalidity. The second question, addressed to the ordinary court *a quo*, is whether the primary protection of the fundamental right breached by ordinary law is sufficiently important to justify the infringement of the other party's reliance interest. Of course, since this decision is a precedent for future litigation

involving similar facts predating the judgment of unconstitutionality, as well as for any cases currently pending in the civil courts, it is itself subject to constitutional scrutiny. But the norm to be scrutinized is not the one previously judged unconstitutional, but a precedent-based provision, made in accordance with the canons of ordinary legal reasoning, which provides a solution for the *new* legal problem created by the decision of unconstitutionality. In terms of the effects of fundamental rights, the argument is that there is *no* indirect *horizontal* effect, along the lines suggested by the thesis of outcome-neutrality, because the constitutional judgment furnishes not a definitive but merely a *prima facie* reason for the decision of the dispute. In other words, we should carefully distinguish between the direct effect of the constitutional court's judgment, which is (so to speak) to strike a law out of the statute book, and the weaker indirect effect of that decision, which is to modify the set of *prima facie* reasons relevant to decide the private law dispute. We may call these the primary and the secondary effects of fundamental rights.

There is yet another — tertiary — effect. Imagine that in our working example the civil court finds for the defendant, in spite of the fundamental right of the plaintiff to freedom of information. Is that the end of the story, as far as the latter is concerned? I do not think so. The other side of the coin of law-making authority, which warrants the requirement of *interpositio legislatoris* for fundamental rights to play out in private disputes, is that the state ought to be held accountable for breaching its duty to make reasonably proportional laws — i.e., laws above the threshold of unconstitutionality in a system in which the constitutional court recognizes a significant 'margin of appreciation' to the legislature. It follows that the bearer of the fundamental right left unprotected, either because it was outweighed by the principle of reliance or because issues of structural discretion render the right unenforceable before the legislature steps in, may sue the state for damages. In our hypothetical, the plaintiff is in principle entitled to be compensated for the under-enforcement of his fundamental right to freedom of information. If we reverse the facts and it is the defendant that ended up losing the dispute, meaning that her reliance interest was sacrificed for the sake of primary protection of the plaintiff's fundamental right, she needs not be left empty-handed either. If she can show to have incurred certain costs in reliance of ordinary law, she may also sue the state *qua* law-maker for damages, on the grounds that it undermined her reliance interest.

Direct and Indirect Effects of Fundamental Rights

Clearly, a lot more needs to be said about the precise set of sufficient conditions for each of these forms of state liability. I merely meant to establish the general principle that the state should be held accountable in its law-making capacity both for breaching fundamental rights and for undermining the reliance of the citizenry in the constitutional adequacy of ordinary law.

I hope that the differences between my account and the thesis of outcome-neutrality are now apparent. I call the view articulated in this section the *doctrine of triple-effect* in order to stress the three distinct effects of a constitutional court's decision about the definitive fundamental rights of an individual. The primary effect is to strike out the norm deemed unconstitutional, and it flows from the direct subjection of law-making agencies to the constitution. The secondary effect is to modify the set of *prima facie* reasons relevant to decide the private law dispute that originated the constitutional issue (and similar cases); this is quite different from the doctrine of indirect horizontal effect, according to which the judgment of unconstitutionality entails a definitive resolution of the former issue. The tertiary effect is to furnish the losing party with a title to sue the state for breach of the duty to make reasonably proportional laws.

C. Exceptions to the General Principle [To be Written]

- Cases where FRs norms are rules
- Cases of gross infringement of FRs.

CONCLUSION

My agenda in this Essay was to argue two intertwined points about the effects of fundamental rights in private relations. The first is that there are good reasons to repudiate the doctrine of direct horizontal effect, namely that *interpositio legislatoris* instantiates values of legal certainty, deliberative idleness, and political legitimacy cherished in a constitutional democracy. The second point is that, contrary to what the thesis of outcome-neutrality implies, the quarrel concerning the horizontal effect of fundamental rights is not substantively sterile. The fact that such rights bind directly only law-making agencies has vast normative consequences both in terms of their

Direct and Indirect Effects of Fundamental Rights

influence on private litigation and in terms of the responsibilities of the state *qua* law-maker.