FRONTIERS OF LAW IN CHINA
VOL. 13 SEPTEMBER 2018 NO. 3
DOI 10.3868/s050-007-018-0033-1

SPECIAL ISSUE

PARADIGMS OF INTERNET REGULATION IN THE EUROPEAN UNION AND CHINA

FUNDAMENTAL RIGHTS IN THE DIGITAL ERA, HORIZONTAL EFFECT AND THE DISTINCTION BETWEEN "STATE" AND "SOCIETY" IN GERMAN AND EUROPEAN CONSTITUTIONAL THEORY

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Abstract The article discusses the proposal for a "Charter of Digital Fundamental Rights of the European Union," whose central element is a binding effect of its fundamental rights not only to state authorities, but also to powerful private internet companies, which have a potential similar to that of the state to infringe on fundamental rights in the digital era. The article outlines the traditional German approach to fundamental rights and its underlying distinction between state and society, which makes it difficult for German scholars to handle a so-called horizontal effect of fundamental rights. Finally, the article discusses the main objections to such a horizontal effect and shows some practical problems it has the potential to cause in German and European constitutional law.

Keywords fundamental rights, horizontal effect, distinction between state and society

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INTRODUCTION

The article focuses on a specific set of constitutional requirements which regulation in general — whether in the European Union or in Germany — and therefore also internet regulation must fulfil: fundamental rights. Particularly the German legal system is based on, governed by and aligned with basic rights, as they are called in Germany.

From a German perspective, the central codifications of individual rights are the Basic Law (*Grundgesetz*) and its inherent guarantees of basic rights, the European Convention of Human Rights and the Charter of Fundamental Rights of the European Union (CFREU). Common to all of them is that they were drafted well before the ground-breaking digitalization of the last 15 years. While the CFREU at least contains provisions concerning the protection of personal data (Article 8 CFREU), the other two legal frameworks do not address issues of the digital sphere at all.

Against this backdrop, the respective courts and especially the German Federal Constitutional Court (FCC) have tried to interpret the existing provisions in the light of the changed situation concerning digitalization and internationalization.[1] Nevertheless, a large number of legal scholars all across Europe believe that there is a need to "update" existing codifications of fundamental rights to take our increasingly digital life into account.[2] This update would affect at least the most burning issues of digitalization related to individual rights, which are "data protection" (concerning the right of privacy) and the new potential of companies like Facebook or Google to limit individual rights in a similar way as state authorities are able to.

A German group of around 60 people, drawn from politics, media, academia and civil society, has taken up this idea and started an initiative to reshape the EU's fundamental principles to incorporate the challenges of the digital age.[3] Among the initiators of this

[1] The FCC developed new basic rights by interpreting the provisions concerning the so-called "general right to personality" (Art. 2(1) in conjunction with Art. 1(1) of the Basic Law) and the European Court of Justice developed a "right to be forgotten" in its Google Spain decision.

[2] For example, the issues of big data, artificial intelligence and machine learning or of whether individuals have a right to encryption are not tackled by the existing codifications.

[3] The challenges of the "digital age" were addressed in the first draft of the Charter in Art. 1(2), which stated: "The digital age is bringing with it new threats to human dignity in the form, in particular, of big data, artificial intelligence, the prediction and steering of human behaviour, mass surveillance, the use of algorithms, robotics and the concentration of power in the hands of private corporations."

group are the former President of the European Parliament, former Federal Ministers, a former Justice of the FCC, as well as well-known legal scholars. The output of the group's efforts is the draft of a "Charter of Digital Fundamental Rights of the European Union." It was published online and by full-page advertisements in all important German newspapers in December 2016, presented in and to the European Parliament, and updated after controversial on- and offline debates in 2018.[4] The Charter was also dealt with in the coalition agreement of the newly elected German government, which expressed support of the Charter project in order to ensure the protection of fundamental rights also in the digital age.[5] The Charter consists of 18 Articles, which cover classic fundamental rights' areas as well as specific themes of the digital era. Its provisions can be grouped in four different subcategories. The first category can be named "civil liberties" and covers provisions concerning freedom of information and freedom of expression (Articles 2 and 4)[6] as well as human dignity (Article 1). The second set of rules concerns "equal participation," which includes a general equality provision (Article 3) and a right to free and equal access to communication services (Article 10). Another group of provisions tackles the field of data protection (Articles 7 and 8) and a fourth category can be labelled "internet-specific rights and principles." It contains *inter alia* provisions concerning transparency (Article 6) and net neutrality (Article 11).

The Charter's publication gave rise to a heated, controversial and still ongoing debate in Germany. Critics — prominent voices of the digital community and legal experts — believe that the text is a legislatory disaster, poorly drafted and to a certain degree contradictory. Other general criticisms concern the fact that the Charter duplicates existing individual rights (*e.g.* freedom of expression) and proclaims a scope of its fundamental rights for which the EU has no competence. However, I consider it worthwhile to have a closer look at the proposal, as the Charter has triggered an important public debate about internet regulation in the EU. However, as the Charter is still discussed in a consultation process and as it is far from certain that it will really become

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[4] An English translation of the European Digital Charter, available at https://digitalcharta.eu/wp-content/uploads/Digital_Charter_english_2018.pdf (last visited Jun. 14, 2018).

There were other "Charters" concerning fundamental rights in the digital era before the German initiative. Already in 2006, the Italian government started advocating for a Bill of Rights for the Internet. On an international level, the Internet Governance Forum has a so-called "Dynamic Coalition on Internet Rights and Principles" which has formulated its own Charter of Human Rights and Principles for the Internet. Outside Europe, the enactment of the Marco Civil da Internet in Brazil, a civil rights framework for the internet is especially noteworthy.

[5] Koalitionsvertrag zwischen CDU, CSU und SPD, 19. Legislaturperiode, Ein neuer Aufbruch für Europa. Eine neue Dynamik für Deutschland. Ein neuer Zusammenhalt für unser Land, at 49, available at https://www.bundesregierung.de/Content/DE/_Anlagen/2018/03/2018-03-14-koalitionsvertrag.html (last visited Jun. 14, 2018).

[6] All references to articles of the Charter of Digital Fundamental Rights of the European Union refer to the updated 2018 version.

"hard law," I will not examine the whole Charter in a comprehensive manner.[7] My analysis of the Charter will focus solely on Article 17(2), a provision which forms the very core of the proposal.[8] It states:

> *The rights and principles of this Charter shall apply also to non-state actors. The fundamental rights of these actors must be brought into balance with the rights and principles of the Charter.*

I want to concentrate on this single paragraph, as it raises fundamental questions of internet regulation on the one hand and constitutional theory on the other hand, which will play a major role in all future steps of internet regulation in Germany and in the EU.

I. THE PROBLEM IDENTIFIED, THE AIM OF THE INITIATORS AND THE CENTRAL INSTRUMENT TO ACHIEVE IT

From the initiators' perspective, the key problem in the "age of communication" is the accumulation of power of private internet companies such as Apple, Google, Amazon or Facebook, as their power and potential to infringe individual rights partially even exceed the power of the state. The problem of power accumulation is particularly pressing on the internet as a kind of public space whose infrastructure is not constituted and controlled by the state, but by private internet companies. This concentration of power in the hands of private companies has the potential to restrict personal liberties concerning *inter alia* the freedom of information, the freedom of speech and the right to data protection.

Therefore, the central objective of the initiators is to limit the power of private internet companies to safeguard the rights of the individuals in the digital era. The idea is to shift power from businesses towards citizens. This is supposed to help establishing "Europe's third way in the digital world." The underlying presumption is that, broadly speaking, there are two dominant paradigms of internet regulation. On the one hand, the American one, which is characterized by a laissez-faire approach of the state, with a strong belief that the market forces will sort things out and which in practice leads to very powerful private internet companies. This approach is said to result in a kind of "internet for companies." On the other hand, the Chinese solution of the regulatory issue, which is diametrically opposed to the first one and which is sometimes referred to as "internet of the state," as in this regulatory practice, governmental gatekeepers intervene in business and civic activities. From the perspective of the Charter-supporters, a new European regulatory approach, based on the Charter, has the potential to offer a new solution, a third paradigm of internet regulation. The ambitious target is to establish some sort of an

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[7] See for a comprehensive account of the Charter, Hans-Peter Bull, *Digitale Grundrechte für Europa* (*Digital Fundamental Rights for Europe*), 53(1) Recht und Politik (Law and Politics), 9 (2017).

[8] The first version of the Charter stated in Art. 1(3): "The rights under this Charter shall be enforceable *vis-à-vis* State agencies and private individuals." An interim amendment added the following: "depending on the extent of their horizontal effect. The extent of their horizontal effect is determined in accordance with their influence on private individuals and their rights."

"internet of the people."[9]

The most important instrument for achieving these regulatory goals is the implementation of the so-called "horizontal" or "third-party effect" of fundamental rights, included in Article 17(2) of the Charter proposal.

II. THE CURRENT APPROACH TO FUNDAMENTAL RIGHTS PROTECTION IN GERMANY: DOCTRINE AND THEORETICAL BACKGROUND

To understand the strong criticisms on the proposal of a fundamental rights charter that binds private individuals (too), one has to understand the current approach to fundamental rights in Germany and its rejection of direct horizontal effect. In a second step, I want to present the doctrinal reason for rejecting horizontal effect, namely the distinction of state and society in the text of the constitution. Finally, I will explain how this textual differentiation is itself firmly anchored in a constitutional theory, which became a structural feature of German constitutional thinking.

A. The Classical Liberal Conception of Fundamental Rights, the Debate on Horizontal Effect and the Duty to Protect

The classical, liberal conception of fundamental rights[10] both in law and political philosophy understands fundamental rights as "human rights," which are rights of the individual against the intrusive power of the state.[11] Historically, fundamental rights were designed to compel the state to respect spheres of individual and social autonomy.[12] Therefore, it is not surprising that totalitarian regimes of the 20th century — as, for example, in Germany between 1933 and 1945 — dismissed such rights as outdated liberal institutions that hindered the political mobilization of all sectors of society. This notion of

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[9] Franz von Weizäcker & Norman Schräpel, *Why We Should Support the "European Charter of Digital Fundamental Rights,"* Internet Policy Review, Dec. 14, 2016, available at https://policyreview.info/articles/news/why-we-should-support-european-charter-digital-fundamental-rights/437 (last visited Jun. 14, 2018).

[10] Hereafter, the article focuses on fundamental rights understood as fundamental freedoms and does not address the question of horizontal effect of equality rights. Concerning the right to equality of the German Basic Law, the German Federal Constitutional Court has most recently clarified the indirect horizontal effects of the right to equality in private law relations. See FCC, judgement of April 11, 2018 – 1 BvR 3080/09, available at http://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2018/bvg18-029.html (last visited Jun. 14, 2018).

[11] See Christoph Beat Graber & Gunther Teubner, *Art and Money: Constitutional Rights in the Private Sphere*, 18(1) Oxford Journal of Legal Studies, 63 (1998); see also FCC, judgement of January 15, 1958 – 1 BvR 400/51 – BVerfGE 7, 198, 204–205 and Udo Di Fabio, *The Present and the Future Meaning of the State and the Role of the Federal Constitutional Court: Interview*, 2(9) German Law Journal, para. 4 (2001); rather critical towards this understanding of the historical function of fundamental rights, Ernst-Wolfgang Böckenförde, *Grundrechtsgeltung Gegenüber Trägern Gesellschaftlicher Macht?* (*Validity of Fundamental Rights towards Bearers of Social Power?*), in D. Posser & R. Wassermann eds. *Freiheit in der sozialen Demokratie* (*Freedom in Social Democracy*), C. F. Müller (Heidelberg), at 80 (1975).

[12] See FCC, judgement of July 8, 1982 – 2 BvR 1187/80 – BVerfGE 61, 82 (100–101).

fundamental rights denies any protection against "private" infringements of basic rights, particularly against economic organizations. Subsequently, although most liberal states protect fundamental rights against abuse of power by agencies of the state, their individual rights' catalogs generally do not address the question of fundamental rights' protection against private entities.[13]

However, in Germany this classical conception has been modified over the years.[14] Although the prevailing opinion of the FCC[15] and of the legal literature[16] continues to be that fundamental rights are principally so-called defensive rights (*Abwehrrechte*) against the state, the question of whether and, if so, how constitutional fundamental rights have any kind of binding effect on private entities, has been an issue since soon after the German Basic Law came into force. In a nutshell, the term "horizontal effect" (*Drittwirkung*) means that not only the three branches of government are bound by fundamental rights, but also private individuals. However, the debate on fundamental rights has developed in essence two different understandings of horizontal effect.[17] The first is the doctrine of direct horizontal effect (*unmittelbare Drittwirkung*), which was developed by legal scholars and prominent figures of the judiciary, but which was and is predominantly rejected by academia and the judiciary.[18] It argues that fundamental rights directly apply to all legal relationships, public and private, between citizens as well as between the individual and the state. One variety of this theory stresses "economic and social power" which threatens individual autonomy. Their protagonists argue that wherever in society organized centers of power exist, individuals should enjoy the protection of fundamental rights. Therefore, this doctrine binds to fundamental rights only those private companies which have such power.[19] It seems as though this understanding of the term "direct horizontal effect" has been the theoretical background of the charter proposal.

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[13] See Graber & Teubner, fn. 11 at 68–69.

[14] In this article, I concentrate on the German debate, yet there is a similar debate on the European level, too. The European Court of Justice acknowledges some kind of third-party effect, without naming it that way. See inter alia Carsten Herresthal, *Grundrechtecharta und Privatrecht* (*Charter of Fundamental Rights and Private Law*), 2 Zeitschrift für Europäisches Privatrecht (Journal of European Private Law), 254 (2014); Jan Henrik Klement, *Öffentliches Interesse an Privatheit* (*Public Interest in Privacy*), 72(4) JuristenZeitung (Lawyer's Newspaper), 166 (2017).

[15] See FCC, judgement of January 15, 1958 – 1 BvR 400/51 – BVerfGE 7, 198 (205) and judgement of April 14, 1984 – 1 BvR 775/84 – BVerfGE 75, 192 (195–196).

[16] See inter alia Wolfgang Kahl, *Art. 1 Abs. 3 GG*, in W. Kahl, C. Waldhoff & C. Walter eds. *Bonner Kommentar zum Grundgesetz* (*The Bonn Commentary of the Basic Law*), C. F. Müller (Heidelberg), at 206 (2014).

[17] For an in-depth discussion of the doctrines see Graber & Teubner, fn. 11 at 69–70.

[18] Wolfgang Cremer, *Freiheitsgrundrechte* (*Liberty Right*), Mohr Siebeck (Tübingen), at 415–416 (2004), for an account of the textual reasons in the current Basic Law to reject the doctrine.

[19] See *inter alia* Franz Gamillscheg, *Die Grundrechte im Arbeitsrecht* (*The Fundamental Rights in Labor Law*), 164(5–6) Archiv für die civilistische Praxis (Archive for Civilian Practice), 407–408 (1964).

The second notion of third-party effect is the theory of an "indirect" horizontal effect of fundamental rights. According to this theory, which was incorporated into the case law of the FCC in its famous Lüth judgement,[20] fundamental rights only have an indirect effect in private law, meaning that private law provisions must be interpreted in the light of the values inherent in the fundamental rights.

Besides the described indirect horizontal effect, the FCC established a duty of the legislator to protect fundamental rights of private entities against other private individuals in its first abortion decision in 1973. Therefore it is primarily up to the legislator to challenge an imbalance of power between two private entities.[21] In contrast to the classical liberal notion of fundamental rights as (subjective) defensive rights, this doctrinal tool adds a new (objective) dimension, which is supposed to ensure the effectiveness of fundamental rights,[22] as not only the state, but also private entities have the potential to endanger the legal interests underlying fundamental rights.[23] When examining whether a duty to protect has been fulfilled, the Court stresses the legislator's margin of appreciation to weigh up and to balance the different protected interests that may conflict with each other. However, the FCC does at least control whether there is an obvious violation of the duty to protect.[24]

B. The Doctrinal Reasons against Direct Horizontal Effect of Fundamental Rights

Article 1(3) of the Basic Law states that the "following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law." Therefore, the text of the Basic Law only binds the three branches of government, but not private entities to fundamental rights, which is clearly an argument against direct horizontal effect,[25] especially as we can assume that the founding fathers and mothers of the Basic Law had the classical fundamental rights conception on their minds when they drafted the constitution.[26] Other textual arguments refer to Article 1(1) Sentence 2 of the Basic Law, which imposes a duty of all state authority to respect and protect human dignity, but not

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[20] FCC, judgement of January 15, 1958 – 1 BvR 400/51 – BVerfGE 7, 198 (205); see for an analysis Justin Collins, *Democracy's Guardians*, Oxford University Press (Oxford), at 58 (2015).

[21] Elke Gurlit, *Grundrechtsbindung von Unternehmen* (*Basic Rights of Companies*), 7 Neue Zeitschrift für Gesellschaftsrecht (New Journal of Corporate Law), 251 (2012).

[22] Dieter Grimm, *Die Zukunft der Verfassung* (*The Future of the Constitution*), Suhrkamp (Frankfurt am Main), at 234 (1991).

[23] Dieter Grimm, *Der Datenschutz vor einer Neuorientierung* (*Data Protection in the Light of a Reorientation*), 68(12) JuristenZeitung (Lawyer's Newspaper), 587 (2013).

[24] Christian Calliess, *Dimensions of Fundamental Rights — Duty to Respect v. Duty to Protect*, in H. Pünder & C. Waldhoff eds. *Debates in German Public Law*, Hart Publishing (Oxford), at 32–33 (2014).

[25] See Kahl, fn. 16 at 206–207. However, some scholars argue that if the state is bound by the fundamental rights, private individuals are bound by these rights *a fortiori*; see Gamillscheg, fn. 19 at 406–407; in turn criticising this *argumentum a fortiori*, see Cremer, fn. 18 at 417–418.

[26] See Gurlit, fn. 21 at 249.

on private individuals,[27] and to Article 19(4).[28] Finally, it is noted in legal literature that the Basic Law contains in Article 9(3) a provision of direct horizontal effect in the context of restrictions to the right to form associations. An *e contrario* reading of this provision leads to a negation of direct horizontal effect concerning all other fundamental rights.[29]

C. The Underlying Distinction between State and Society

The German Basic Law presupposes the distinction between state and society, as Article 1(3) and the classical conception of fundamental rights as "defensive rights" against the state require an entity "state," which is bound by fundamental rights, and an entity "society," understood as the sum of all private entities, which bear fundamental rights.[30] Thus, the German legal order technically needs to constitute the "state" as an entity for attribution and distinguish it from other entities.[31] Therefore, it is widely agreed that constitutional doctrine in this respect requires the state-society distinction.[32]

Furthermore and apart from this doctrinal assessment, the distinction between state and society also lies at the heart of traditional German constitutional thinking[33], which, in turn, has implications for the understanding of the constitution.[34] The analytical separation of the state from (private) society is not merely an abstract one, but the product of historical development,[35] which has been recognized by constitutional theorists since

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[27] Claus-Wilhelm Canaris, *Grundrechte und Privatrecht* (*Fundamental Rights and Private Rights*), 184(3) Archiv für die civilistische Praxis (Archive for Civilian Practice), 203–204 (1984).

[28] See for a critical assessment of this argument Walter Leisner, *Grundrechte und Privatrecht* (*Fundamental Rights and Private Rights*), C.H. Beck (München), at 314–315 (1960).

[29] See Kahl, fn. 16 at 208.

[30] Josef Isensee, *Der Dualismus von Staat und Gesellschaft* (*The Dualism of State and Society*), in E.-W. Böckenförde ed. *Staat und Gesellschaft* (*State and Society*), Wissenschaftliche Buchgesellschaft (Darmstadt), at 323, 328–329 (1976); see also Wolfgang Kahl, *Die rechtliche Bedeutung der Unterscheidung von Staat und Gesellschaft* (*The Legal Significance of the Distinction between State and Society*), 24(11) Juristische Ausbildung (Legal Training), 723 (2002), who points to further provisions of the Basic Law in which the distinction between state and society is implied.

[31] Ralf Poscher, *Grundrechte als Abwehrrechte* (*Fundamental Rights as Defensive Rights*), Mohr Siebeck (Tübingen), at 144 (2003); Christoph Möllers, *Staat als Argument* (*The State as an Argument*) (2nd edition), Mohr Siebeck (Tübingen), at 297 (2011).

[32] Christoph Möllers, *Braucht das öffentliche Recht einen neuen Methoden- und Richtungsstreit?* (*Does the Public Law Need a New Method and Direction Dispute?*), 90(2) Verwaltungsarchiv (The Administrative Archive), 195 (1999).

[33] Ulrich K. Preuß, *Zum staatsrechtlichen Begriff des Öffentlichen* (*Constitutional Concept of the Public*), Ernst Klett Verlag (Stuttgart), at 83 (1969).

[34] Jo Eric Khushal Murkens, *From Empire to Union*, Oxford University Press (Oxford), at 74 (2013).

[35] See for a detailed account of the German (and European) history related to the distinction between state and society, Ernst-Wolfgang Böckenförde, *Die Bedeutung der Unterscheidung von Staat und Gesellschaft im demokratischen Sozialstaat der Gegenwart* (*The Significance of the Distinction between State and Society in the Present Democratic Welfare State*), in E.-W. Böckenförde ed. *Staat und Gesellschaft* (*State and Society*), Wissenschaftliche Buchgesellschaft (Darmstadt), at 398–401 (1976).

the second half of the 18th century. In the 19th century the process of industrialization meant that the state was forced to regulate social welfare in order to intervene in the economic area and, in this way, to link itself up with society.[36] In a series of influential articles, Ernst-Wolfgang Böckenförde, a famous legal scholar and later Justice of the FCC, argued that state and society should be conceptually distinguished (rather than separated):[37] He argued that left to its own devices, society tended towards social injustice, self-destruction and totalitarianism. Therefore, the role of the state is to create order and freedom by intervening in society and by trying to counteract social injustice. In turn, society affects the democratic state, especially via elections. His central claim was that although the conceptual differentiation (as opposed to separation) between state and society is crucial to prevent totalitarianism, in a liberal democratic order the entities society and state rely on one another: From his point of view, the legal order and, in more general terms, the state cannot survive unless supported by society and, in turn, a liberal society requires rights and liberties that are secured by state institutions.[38]

III. QUESTIONING THE TRADITIONAL APPROACH: UNJUSTIFIED OBJECTIONS TO AND ACTUAL PROBLEMS OF DIRECT HORIZONTAL EFFECT

It is my impression that the shown textual, doctrinal and theoretical backgrounds make it difficult for German jurists to imagine a direct horizontal effect, which is the main reason for many of the critics to reject the charter proposal. In the following, I want to first critically examine whether the demonstrated traditional German approach to fundamental rights is convincing or not. I shall attempt to show that there are several blind spots in the classical German fundamental rights conception and problems of its underlying distinction between state and society, so that a modification of it is worth considering. In a second step, I will scrutinize the proposed third-party effect more closely and discuss the fundamental objections to binding bearers of societal power to individual rights in the same way that the state is bound, specifically the questions whether there is any need for the groundbreaking modification of the system of fundamental rights protection, whether it is constitutionally permissible and whether it would blur the distinction between state and society. Finally, and after contesting these objections, I will discuss the practical problems of direct horizontal effect, showing that there are indeed some challenges, which have not yet been met by the charter initiators or legal scholars.

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[36] See Murkens, fn. 34.

[37] The most important article is Böckenförde, fn. 35 at 405.

[38] See for a summary of Böckenförde writings, Miriam Künkler & Tine Stein, *Introduction*, in M. Künkler & T. Stein eds. *Constitutional and Political Theory*, Oxford University Press (Oxford), at 12 (2017).

A. Challenging the Distinction between State and Society and Problems of the Liberal Conception of Fundamental Rights

First of all, Böckenförde's distinction between state and society was challenged on different levels, as it was agreed that the complete fusion of state and society was and is the analytical pre-condition for totalitarianism.[39] From a sociological perspective, it is today widely, even in the legal world, accepted that the spheres of state and society actually constitute a unity.[40] The state does not stand next to or even above society,[41] but needs to be understood as a subsystem of it.[42] Therefore, state and society are (at least) in part the same entity.[43] Historically it is argued that the idea of a kind of dualism of state and society stems from a pre-democratic era in which members of society were largely excluded from political participation.[44] In the Federal Republic of Germany as a democratic state, there cannot be any state authority detached from society.[45] Böckenförde himself acknowledged that his theory causes if not a repeal, then at least a "certain limitation" to the democratic principle, however for the benefit of civil liberty.[46]

Secondly, the liberal fundamental rights theory itself has some weaknesses. Its fundamental problem is its relative "blindness" to the social prerequisites for realizing the liberty enshrined in the fundamental rights. It does not take the empirical fact of societal power into account, which arises out of the different realizations of liberty by the individual bearers of fundamental rights, and can cast into question the possibility of realizing the freedoms enshrined in the fundamental rights for many others.[47]

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[39] Konrad Hesse, *Bemerkungen zur heutigen Problematik und Tragweite der Unterscheidung von Staat und Gesellschaft* (*Remarks on the Current Problems and Scope of the Distinction between State and Society*), in E.-W. Böckenförde ed. *Staat und Gesellschaft* (*State and Society*), Wissenschaftliche Buchgesellschaft (Darmstadt), at 491 (1976); see for an account of the debate Murkens, fn. 34 at 88.

[40] Hans H. Klein, *Die Grundrechte im demokratischen Staat* (*The Fundamental Rights in the Democratic State*), Kohlhammer (Stuttgart et al.), at 34 (1972).

[41] See Poscher, fn. 31 at 145–146.

[42] See on this Kenneth H. F. Dyson, *The State Tradition in Western Europe*, Oxford University Press (New York), at 228–229 (1980).

[43] Horst Ehmke, *"Staat" und "Gesellschaft"als verfassungstheoretisches Problem* (*"State"and "Society" as Constitutional Theory Problems*), in E.-W. Böckenförde ed. *Staat und Gesellschaft* (*State and Society*), Wissenschaftliche Buchgesellschaft (Darmstadt), at 243 (1976).

[44] See *inter alia* Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland* (*Fundamentals of the Constitutional Law of the Federal Republic of Germany*) (20th edition), C. F. Müller (Heidelberg), at 8 (1999).

[45] Horst Dreier, *Hierarchische Verwaltung im demokratischen Staat* (*Hierarchical Administration in the Democratic State*), Mohr Siebeck (Tübingen), at 26 (1991).

[46] See Böckenförde, fn. 35 at 412. By contrast, Horst Ehmke argues that the distinction between state and society does only guarantee civil, but not political liberty, see Ehmke, fn. 43 at 244.

[47] Ernst-Wolfgang Böckenförde, *Fundamental Rights*, in M. Künkler & T. Stein eds. *Constitutional and Political Theory*, Oxford University Press (Oxford), at 273, 282–283 (2017); see also Gamillscheg, fn. 19.

This blind spot of the classical conception of fundamental rights stems from the state-society-distinction, as this theory does not consider the internal structure of society and can therefore not distinguish between powerful and less powerful members of it.[48] However, it can hardly be relevant who infringes freedom, as freedom can only be effectively guaranteed in a consistent manner.[49]

The problem of societal and therefore private power has become a pressing issue in the past few decades, especially in the world of the internet. One reason for this is that the internet is controlled by a relatively small number of internet companies, which have (worldwide) superior market power and which to a large extent can determine the conditions of use of the internet on their own.[50] In the light of substantial power asymmetries between these companies and ordinary internet users, which can reach proportions comparable to the ones between individuals and state authorities,[51] fundamental rights such as the freedom of information, the freedom of speech and the right to data protection are at particular risk in the World Wide Web.[52] In these situations, the individual needs protection by the state, as any kind of self-protection is only possible in very narrow limits.[53]

Against this background, it seems to be at least not completely unreasonable for the charter initiators to take the same path, to protect freedom against societal power by proposing direct horizontal effect, which society has already chosen to safeguard fundamental rights against violations by the state. This proposal could be the necessary evolution of the traditional conception of fundamental rights, which has itself a historical contingent background.[54] Therefore, the implementation of direct horizontal effect could be the response to the internet-specific problems fundamental rights face in the 21st

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[48] Walter Schmidt, *Die Entscheidungsfreiheit des einzelnen zwischen staatlicher Herrschaft und gesellschaftlicher Macht* (*The Individual Freedom of Decision between State Rule and Social Power*), 101(1) Archiv des öffentlichen Rechts (Archive of Public Law), 35–36 (1976).

[49] See Hesse, fn. 39 at 500–501.

[50] See Bull, fn. 7 at 21–22.

[51] This view is challenged by several legal scholars. Some only doubt that there are any comparably mighty private institutions, others argue that the potential to infringe fundamental rights is not comparable, as it is of different type, especially as the risks in a private law situation arise in a situation of autonomy whereas in public law the situation is one of external determination (see Canaris, fn. 27 at 205–206). The main objection however, concerns the power of the state to command unilaterally and to enforce its commands, which private entities do not have (see Grimm, fn. 23).

[52] Matthias Bäcker, *Grundrechtlicher Informationsschutz gegen Private* (*The Constitutional Information Protection against Private Individuals*), 51(1) Der Staat (The State) 91, 101–105 (2012); Franz C. Meyer, *Recht und Cyberspace* (*Law and Cyberspace*), 49(28) Neue Juristische Wochenschrift (New Legal Weekly Journal), 1788 (1996).

[53] Wolfgang Hoffmann-Riem, *Modernisierung von Recht und Justiz* (*Modernisation of Law and Justice*), Suhrkamp (Frankfurt am Main), at 180–181 (2001).

[54] See Graber & Teubner, fn. 11 at 69.

century.[55]

B. Fundamental Objections to Direct Horizontal Effect

Fundamental objections to direct horizontal effect concern two issues in particular, which can be refuted or at least relativized.

The first concern regards the question whether there is any need for direct horizontal effect considering the doctrine of the duty to protect. Some legal scholars like Dieter Grimm argue that legal doctrine already addresses the problem of societal power with the duty to protect.[56] The duty to protect has the further advantage to shift responsibility to safeguarding fundamental rights to the legislator, in contrast to the concept of direct horizontal effect, and thereby avoids the otherwise increasing involvement of judicial interpreters.[57] However, the "duty to protect" doctrine has several disadvantages, which make it a "blunt sword" in the attempt to limit and control societal power on the internet. The first disadvantage of this doctrine is due to its low level of protection. As mentioned before, the legislator does not fulfil its duty only if there is an obvious fundamental rights violation. Furthermore, it must be considered that powerful private entities themselves bear fundamental rights, making it more difficult to control these companies via legislative acts, which the duty to protect requires.[58] Finally, one has to consider that especially in internet related fields it is very difficult for the legislator to foresee all important developments and a detailed regulation would often overstrain parliament.[59] Therefore, the charter initiators are right in claiming that the duty to protect does not offer a high level of protection and that a direct horizontal effect of fundamental rights could be preferable in this respect.

The second objection relates to the constitutional permissibility of direct horizontal effect. In view of the German Basic Law it is noteworthy that Article 79(3) forbids any constitutional amendments, which *inter alia* affect "the principles laid down in Article 1," therefore also those which are included in Article 1(3). In consequence, some commentators of the debate on the Digital Rights Charter have argued that a horizontal effect would be unconstitutional. However, this claim is based on a misunderstanding of the proposal. In fact, what is demanded under the heading "binding the bearers of societal power to the fundamental rights" is not to set aside the binding effect on state authorities (which would obviously be unconstitutional) or to strip those with societal power of their

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[55] Gunther Teubner & Vaios Karavas, *Drittwirkung der Grundrechte gegenüber "Privaten" im autonomen Recht des Internet* (*The Third-Party Effect of Fundamental Rights towards "Private" Individuals in the Autonomous Internet Law*), in K.-H. Ladeur ed. *Innovationsoffene Regulierung des Internet* (*Innovative Regulation of the Internet*), Nomos (Baden-Baden), at 249–272 (2003).

[56] See Grimm, fn. 23.

[57] See Böckenförde, fn. 11 at 83.

[58] See Hoffmann-Riem, fn. 53 at 181–182.

[59] See Bäcker, fn. 52 at 100.

ownership of fundamental rights. Rather, the goal is to ensure that those powerful within society are not able to employ their position of power to obstruct other citizens, especially the socially powerless, from realizing their own freedom, or to constrain it in an unacceptable way.[60]

C. Some Unsolved Practical Problems of Direct Horizontal Effect

Apart from those fundamental objections, there are indeed some serious practical problems of direct horizontal effect which have not yet been mastered.

The first problem concerns the addressee of the binding effect. The initial draft of the Charter proposal bound all private individuals equally to fundamental rights, the second makes the "degree" of direct horizontal effect conditional on the "influence" of the private entity on other private individuals and their rights. The idea is that the Charter should only apply if the private entity systematically endangers the exercise of basic rights of other individuals. In this situation and only then, the private entity is comparable to state authorities. This is particularly the case for (internet-)companies in a (more or less) monopoly situation, as for example companies like Google or Facebook. However, the comparability to the state only exists where there is something like "societal power" which has the potential to compel other individuals.[61] Nonetheless, as a practical matter it will often be very difficult to decide whether there is such societal power. A mere asymmetry of power does not constitute a predicament for the individual, as long as there is fairly functioning competition,[62] especially as the gathering of economic power in itself is not illegitimate. Therefore, the qualification of a private company as a bearer of societal power must be made very cautiously.[63] The abstract nature of the criterion "societal power" will, however, make it difficult to avoid delimitation problems in this area.

Another problem concerns the question which fundamental rights are suitable for direct horizontal effect. There are, for example, rights which apply just and only between the state and a private entity, such as the right to due process and a fair hearing.[64] Conversely, other rights, for instance the right to data protection, seem to also work in horizontal situations. Finally, there are also some rights which would lose much of their sense in private law constellations.[65] For example, the freedom of speech includes

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[60] Ernst-Wolfgang Böckenförde, *Protection of Liberty against Societal Power*, in M. Künkler & T. Stein eds. *Constitutional and Political Theory*, Oxford University Press (Oxford), at 295–296 (2017).

[61] See Gamillscheg, fn. 19 at 407.

[62] See Canaris, fn. 27 at 206–207.

[63] See Klein, fn. 40 at 67.

[64] Jörg Lücke, *Die Drittwirkung der Grundrechte an Hand des Art. 19 Abs. 3 GG* (*The Third-Party Effect of Fundamental Rights on the Basis of Art. 19(3) Basic Law*), 54(8) JuristenZeitung (Lawyer's Newspaper), 379–380 (1999).

[65] It is even claimed that all fundamental rights, as tools to safeguard self-determination, would turn into instruments to restrict freedom; see Kahl, fn. 16 at 206–207.

particularly the right to be partial. In contrast to this, binding a private entity to freedom of speech would mean that the private entity has to stay neutral, staying out of the public debate.[66]

However, the main problem of direct horizontal effect is that it would bind private entities to the proportionality principle and that it must be doubted whether this principle can have a positive function applied to actions of private entities.[67] To satisfy the proportionality requirement, the act under scrutiny must be suitable and necessary to promote a legitimate objective, as well as adequate, *i.e.* the prejudice to the right in question must not be inadequate in comparison with the weight of the interest supposed to justify the intervention.[68] Therefore, a problem arises due to the fact that private entities are (in principle) free to act in accordance with their subjective (arbitrary) preferences, but the state must pursue "legitimate" objectives.[69] This leads to the question as to how one has to understand the principle of proportionality applied to private acts. One option would be to further allow private entities with societal power to follow their subjective preferences. As a consequence, the principle of proportionality would partially lose its pertinence, as a reasonable balancing of an arbitrary subjective preference on the one hand to a fundamental right on the other is hard to imagine. This leaves us with the second option, being that the principle of proportionality must be based not on subjective preferences, but on objective (public) purposes. For example, in a case concerning freedom of speech, applying the proportionality principle would mean to require that a certain private statement promotes the free societal discourse.[70] This would leave little of the basic private law principle of "*stat pro ratione voluntas*," meaning that the will is decisive, not its reasonableness, which includes the possibility to bind oneself to unreasonable or unproportionate contracts.[71]

CONCLUSION

The proposal of direct horizontal effect of internet-specific fundamental rights has caused an intensive public debate in Germany. The reason for the severe criticisms lies in the opposing traditional German fundamental rights concept and its theoretical background, the distinction between state and society. However, it has been demonstrated that there are good reasons for such a proposal and that direct horizontal effect of fundamental rights is constitutionally permissible. However, it would cause some

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[66] See Böckenförde, fn. 11 at 81–82.

[67] See also Poscher, fn. 31 at 224.

[68] Gertrude Lübbe-Wolff, *The Principle of Proportionality in the Case-Law of the Federal Constitutional Court*, 34(1–6) Human Rights Law Journal, 12 (2014).

[69] See FCC, judgement of February 22, 2011 – 1 BvR 699/06 – BVerfGE, 226 (244–245); see also Grimm, fn. 23.

[70] See Poscher, fn. 31 at 224–225.

[71] See Canaris, fn. 27 at 209–210.

unsolved practical problems, especially with respect to the principle of proportionality, which does not fit the theory of direct horizontal effect. To solve these problems and to make the concept of direct horizontal effect of internet-specific rights implementable, the supporters of the proposal must develop a new or at least adjusted doctrinal framework, as a simple transfer of the rules governing "vertical effect" of fundamental rights will not work.