

CONSTITUTIONAL RIGHTS AS VALUES. ON THE ORIGINS AND CRITIQUES OF *DRITTWIRKUNG*

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ABSTRACT

This article examines the axiological conception of constitutional rights and its implications for the doctrine of *Drittwirkung*, or the horizontal effect of rights. It traces the origins of this approach to Rudolf Smend's *Integrationlehre* and its later development in the German Federal Constitutional Court's *Lüth* decision, where rights were understood as an "objective order of values" permeating the entire legal system. The article also discusses the transformation of rights from defensive guarantees against the State into principles with effects in private law. Finally, it addresses major critiques of this value-oriented approach – including concerns about judicial activism, private autonomy, and the "jurisprudence of values" – while presenting Robert Alexy's principled theory as an attempt to reconcile constitutional rights, democratic legitimacy, and legal rationality.

Keywords: Constitutional rights, *Drittwirkung*, horizontal effect of rights, Rudolf Smend, *Lüth* decision, constitutional interpretation, objective order of values, Robert Alexy, constitutional theory, rule of law

I. Introduction

In contemporary constitutional discourse, increasing emphasis is placed on the 'ideal dimension' that constitutional rights are understood to imprint upon the legal system. It is now a commonplace, both in legal scholarship and in constitutional adjudication, to face the claim that constitutional rights constitute an "objective order of values", embody the "higher values of the legal order", or possess an "axiological character". This conceptual shift has given rise to two interrelated themes that are the subject of this paper.

First, the work revisits Rudolf Smend's *Integrationlehre* [theory of integration] as a frequently overlooked precursor to the interpretative approach adopted by the German Federal Constitutional Court in its seminal *Lüth* decision – a judgement often regarded as the origin of the axiological theory of constitutional rights². Second, it explores the implication of this theoretical development for the doctrine of the horizontal effect of rights (*Drittwirkung der Grundrechte*) and considers the principal critiques it has attracted, many of which are rooted in broader concerns about the so-called 'jurisprudence of values'.

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² Böckenförde notes that the axiological theory of rights has its point of departure in Rudolf Smend's theory of integration, "even though this is not consciously recognized today." See E-W Böckenförde, "Teoría e interpretación de los derechos fundamentales" in JL Requejo & I Villaverde (trs) *Escritos sobre derechos fundamentales* (Baden-Baden: Nomos 1993) 57.

My central thesis advanced here is twofold. First, that a robust defence of the third-party or horizontal effect of rights entails the articulation of an alternative conception of the Rule of Law, and a structural theory of constitutional rights to reconstruct their role within the post-war constitutional State. Not without criticism, Robert Alexy's principled theory (*Prinzipientheorie*) provides a particularly compelling response posed by this axiological turn. The analysis that follows is also a concise and preliminary treatment of those issues.

II. Rudolf Smend and the *Integrationlehre*

Characterization of constitutional rights as “objective principles” or “axiological decisions” – now commonplace in both European and Latin American³ constitutional theory – only emerged with the enactment of the 1949 Basic Law of Bonn (*Grundgesetz*). This conceptualization developed in the mid-twentieth century and, as may scholars have pointed out, should not be regarded as “a fact that predated” the *Grundgesetz* itself⁴. This interpretative shift is closely linked “with the inevitable discussion that followed the collapse of the National-Socialist regime in Germany” and the perceived “failure of legal positivism”⁵. The historical context is crucial here, as the *Grundgesetz* and its emphasis on values may be understood as a deliberate reaction to the collapse of the Weimar Republic. That collapse, as is well known, involved not only the annulment of the regime by the occupying Allied powers but also the creation of a second German State by the Soviet Union⁶ – the *Deutsche Demokratische Republik*. Alongside this historical dimension, a methodological point must be underscored.

Reliance upon values has been employed to prioritise ‘substantive’ or ‘moral’ dimensions over any formalist approach to the law (and the State). In this sense, it may be seen as a critique of legal positivism – here, perhaps, closer to naturalism in a philosophical sense – for its radically sceptical or non-cognitivist stance. It is no coincidence, therefore, that many authors refer to a *revival*, a “new wave,” of natural law doctrines⁷. But such a critique of legal positivism and formalism can be clearly discerned in Rudolf Smend's theory of integration – a doctrinal that predates the Second World War.

In his seminal 1928 work *Verfassung und Verfassungsrecht* [Constitution and Constitutional Law], Smend criticizes Hans Kelsen's approach for “emptying of substance” the concrete insights achieved by general theory of the state. In Smend's view, Kelsen's methodological project yielded no tangible outcomes within

³ See, for instance, M Borowski, ‘Drittwirkung’ in *Max Planck Encyclopedia of Comparative Law* (2018) (from the European perspective); and J Mijangos y González, ‘The Doctrine of the Drittwirkung der Grundrechte in the Case Law of the Inter-American Court of Human Rights’ (2008) 9 *Indret* (from the Latin American perspective).

⁴ Similarly, G Peces-Barba points out that in the Basic Law of Bonn “it was the constitutional court interpretation that deduced, from the system as a whole, the values that inform it. In this case there will be no prior datum, but only a consequence.” See G Peces-Barba, *Los valores superiores* (Tecnos 1984) 386.

⁵ E-W Böckenförde, ‘Teoría e interpretación de los derechos fundamentales’ in JL Requejo & I Villaverde (trs) *Escritos sobre derechos fundamentales* (Baden-Baden: Nomos 1993) 105.

⁶ On the formation of a second German state, see K Loewenstein, ‘Alemania desde 1945 a 1960. (Una relación de hechos)’ in Cándido Perea (tr) (1960) 110 *Revista de Estudios Políticos*, 115.

⁷ G Dietze, ‘Natural Law in Modern European Constitutions’ (1956) 1 *Natural Law Forum* 91. According to G Peces-Barba, the reliance to values in the German system is constructed by doctrine and by jurisprudence, within a legal culture “imbued of Natural Law approaches derived in part from the accusation leveled against legal positivism for its responsibility in the rise of the Nazi regime.” G Peces-Barba, *Los valores superiores* (Tecnos 1984) 23 & 49.

its own field – namely, a ‘pure’ theory of positive law applied to the juridification of the State⁸. This debate unfolded within the well-known *Methoden- und Richtungsstreit* [debate on methods and orientations] of Weimar constitutional law⁹. For Smend, all legal formalism presupposes an underlying substantive position regarding material content, which constitutes the premise and foundation of positive norms. In opposition to such formalism, he unambiguously asserted that what the doctrine of the State requires is “a material theory of the State”¹⁰.

Two observations must be made at this point. Why, if Smend’s work was part of the *Methoden- und Richtungsstreit* of Weimar’s *Staatsrechtslehre*, is it said that the ‘evaluative turn’ only began with the German Basic Law? In my view, there is a degree of ambivalence here. On the one hand, the apparent “forgetting” of Smend’s work may stem from the dazzling success of the case-law of the German Constitutional Court and the “value-oriented” interpretation of constitutional rights – a doctrine that has since influenced numerous jurisdictions. So much so that it is often frequently regarded as an *ex-novo* creation of the Karlsruhe Court¹¹. On the other hand, it would also seem that the reference to, or association with, Smend’s work is deliberately avoided due to the problematic aspects of his doctrine. By “problematic”, I refer to the subjectivism inherent in value philosophy and the antiliberal anatomy of his theory – elements which today might be characterized, to some extent, as “nationalist” or “communitarian”¹².

Both considerations lead us directly into Smend’s intellectual project, which seeks to intertwine the realms of the State and the legal order through a methodology grounded in the humanities. His work draws upon the writings of Theodor Litt, a Hegelian philosopher with a strong phenomenological orientation. In following this path, Smend distances himself from the dominant trends of his time. He aims to understand both the State and the Constitution as “spiritual and dynamic realities in ceaseless change”, rejecting any form of methodological reductionism that would lead ultimately to a “lack of awareness of one’s actions”¹³. From this anti-positivist methodological foundation, he constructs his theory.

⁸ The problems of the *Integrationlehre* are documented in the early critique that H Kelsen himself formulated against Smend. See: H Kelsen, *El Estado como integración. Una controversia de principio*. (Juan Antonio García Amado tr, Tecnos 1997). I cannot dwell on this at length here. But it is worth noting that the reduction of the State to the law carried out by Kelsen was the object of harsh criticism. See JA García Amado, ‘Sobre el neoconstitucionalismo y sus precursores’ in *El Derecho y sus circunstancias* (Universidad Externado de Colombia 2010) 385. It has also been argued that one of the differences between the constitutional cultures of Austria and Germany lies precisely in the former’s proximity to Kelsen and the latter’s to Smend in certain respects – above all, in the evaluative interpretation of rights. See A Jakab, ‘Dos paradigmas encontrados del pensamiento constitucional en Europa: Austria y Alemania’ in Leonardo Álvarez (tr) (2010) 88 *Revista Española de Derecho Constitucional* 131–162.

⁹ On this issue, see O Lepsius, ‘El redescubrimiento de Weimar por parte de la doctrina del Derecho político de la República Federal alemana’ in I Gutiérrez Gutiérrez (tr) (2008) 9 *Historia constitucional. Revista Electrónica de Historia Constitucional* 259–295; in more detail, see: M La Torre, *La crisis del noveciento. Giuristi e filosofi nel crepuscolo di Weimar*. (Bari: Edizione Dedalo 2006), *passim*.

¹⁰ R Smend, *Verfassung und Verfassungsrecht* (Berlin: Dunker & Humblot 1928). Hereinafter all the references and the quotations of this work are taking of the Spanish translation published as: *Constitución y Derecho constitucional*, J.M. Beneyto (trans.), Madrid, Centro de Estudios Constitucionales, 1985.

¹¹ In this vein, see J Brague Camazano, “La doctrina de Smend como punto de inflexión de la hermenéutica y concepción de los derechos fundamentales por los tribunales constitucionales a partir de la posguerra” (2009) 11 *Revista Iberoamericana de Derecho Procesal Constitucional* 96.

¹² “Smend’s political stance,” Kelsen affirms, “is opposed to liberalism.” H Kelsen, *El Estado como integración. Una controversia de principio*. (Juan Antonio García Amado tr, Tecnos 1997) 49. On Smend’s nationalism, see M La Torre, *La crisis del noveciento. Giuristi e filosofi nel crepuscolo di Weimar*. (Bari: Edizione Dedalo 2006) 131–201.

¹³ R Smend, *Verfassung und Verfassungsrecht* (Berlin: Dunker & Humblot 1928) 39.

For Smend, the key to the reality of the State lies in a “pre-legal” dominant and manifests itself in a “sense of union” – a “genuine voluntary association” among members of a collective. In one of the central passages of his work he writes:

“If the State exists, it is only thanks to those diverse manifestations, expressions of a spiritual framework, and, more decisively, through the transformations and renewals whose immediate object is that intelligible framework. The State exists and develops exclusively in this process of continuous renewal and permanent reviviscence; to use Renan’s famous characterization, the State lives from a plebiscite renewed each day. For this process, which is the core of the State’s dynamics, I have already proposed elsewhere the denomination of ‘integration’”¹⁴.

The core process underpinning the dynamics of the State is, according to Smend, *integration*. This may be understood as a form of spiritual connection or union arising from various elements present in mutual social interactions. In his theory, Smend identifies three forms of integration: (i) personal, (ii) functional, and (iii) material.

(i) *Personal integration* encompasses political phenomena such as leadership and *caudillaje* [autocracy], and corresponds, within continental *Staatslehre*, to the theory of organs and the head of State. Smend asserts that “the political leader does not have a merely technical role, but, through his concrete achievements – regardless of whether he resolves issues well or poorly – he must consolidate himself as the leader of those he directs.” He adds: “the substantive content of his function lies fundamentally in achieving this cohesion among the political group that sustains him,” initially, and subsequently “among the people as a whole”¹⁵.

(ii) *Functional integration* consists of “forms of life that tend to create collective meaning,” aimed to producing “social synthesis”¹⁶. Elections and voting processes fall within this category, as they foster and cultivate the “spiritual substance of the community.” These are processes of will-formation within the political community – not in a strictly legal sense but in terms of renewing the political community as one grounded in shared values. From this perspective, the pluralist understanding of democracy and parliament is reconfigured. What matters is not whether parliament reaches agreements, nor even whether those agreements are sound; rather, it is whether parliamentary deliberation can engender – both within and beyond parliament – “an authentic political community, a union of wills, a general political disposition”¹⁷.

Reading Smend’s *magnum opus*, one is left to wonder whether this “community in values” is the product of rational deliberation, or whether, on the contrary, it is not an outcome at all, but rather a presupposition of his theory.

(iii) *Material integration* refers to the ensemble of values lived collectively, a “sociality of substantive experiences”¹⁸. Political symbols, flags, coats of arms, monarchs, and civic ceremonies are all manifestations of such integration. This process bears important consequences for the prevailing theory of the

¹⁴ R Smend, *Verfassung und Verfassungsrecht* (Berlin: Dunker & Humblot 1928) 62–63. In these phrases, the author seems to go so far as to “substantialize” the State. However, Smend later points out: “The State is not a reality *in itself* that can be used for the purpose of achieving objectives external to itself.”

¹⁵ R Smend, *Verfassung und Verfassungsrecht* (Berlin: Dunker & Humblot 1928) 72.

¹⁶ *Ibid.* 78.

¹⁷ *Ibid.* 86.

¹⁸ *Ibid.* 93.

constitution of his time, namely, “the characteristic of positivism and legal formalism,” which considers it “a norm – not necessarily a legal one – that regulates and orders the political life of the State”. The most radical expression of this view is found in Ferdinand Lassalle, for whom the true constitution of a country is nothing more than the factual relations of power that prevail within it, rather than the written document, “a piece of paper”, referred to as “the constitution”¹⁹. At this juncture, Smend opposes both the *normativist* conception of H. Kelsen and the *realist* conception of F. Lassalle. In his view, both are problematic insofar as they are reductive: the former reduces the constitution to positive law; the latter, to empirical power relations.

Smend observes that understanding the constitution solely in sociological or pure normative terms neglects the fact that, in addition to constituting the legal order of the State, the constitution is also “the order of the vital dynamics in which the life of the State develops, the process of integration, whose aim is the perpetual reimplantation of the State’s total reality”. “The constitution,” he writes, “is the legal or normative expression of the defining features of this process”²⁰. For Smend, the community of values, the process of integration, as well as its normative articulation within the constitution mediate between factual reality and normativity. The constitution does not aim to regulate “concrete situations, but rather to encompass the totality of the State and of the integrative process.” This objective not only permits but “requires of the constitutional interpreter an extensive and flexible interpretation, which differs to a great extent from any other form of legal interpretation”²¹.

This characteristic of the constitution as an integrative order stems from the “integrative efficacy of its own material values,” and among these material values constitutional rights hold a particular prominence. This is where, in my view, the impact of Smend’s work becomes most apparent: rights as conceived as an “order of values”. Smend notes that one of the main consequences of the process of material integration for positive law is “a new paradigm for the interpretation of fundamental rights within the constitution”. Contrary to the prevailing view that regards such rights merely as the “principle of legality governing the actions of the public administration”, Rudolf Smend emphasizes that fundamental rights do not belong to administrative law, to police law, to private law, etc., but rather that “fundamental rights are part of constitutional law”²².

Smend further contends that constitutional rights seek to regulate, on the one hand, an autonomous material series – a “system of values”, of “goods”, a “cultural system” – and, on the other, to regulate it as a national system, that is, as a system for all Germans, thereby affirming the national character of those values. From the standpoint of *special technical law*, constitutional rights may affect legislature, administrative agencies, individuals, all of those actors collectively, or none at all. Even when they do not confer validity directly, they nevertheless require, to be interpreted by specialised law, grounding in the cultural system from which they emerge. In this sense, constitutional rights represent the “norm that governs the Constitution, legislation, and the administration”²³.

Beyond this immediate or mediate significance for each technical legal domain, constitutional rights possess a deeper foundation: they represent a concrete value system – a cultural system that encapsulates the meaning of state life as expressed in the constitution. Politically, this translates into a will to material

¹⁹ R Smend, *Verfassung und Verfassungsrecht* (Berlin: Dunker & Humblot 1928) 129.

²⁰ Cf. *Ibid.* 132.

²¹ Cf. *Ibid.* 133.

²² Cf. R Smend, *Verfassung und Verfassungsrecht* (Berlin: Dunker & Humblot 1928) 230.

²³ *Ibid.* (italics mine).

integration; legally, it implies the legitimation of both the State and positive legal order. This legal order is valid only insofar as it reflects the value system and, by virtue of that reflection, acquires legitimacy²⁴.

Even so, it cannot go unnoticed that this development of such a “material constitution” entails a significant deficit in pluralism. Insofar as the kind of integration is framed as a phenomenon “prior” and “superior” to legal order and governmental structure – or even where pluralism is viewed as an evil to be eliminated – there is a real risk of undermining the very function of rights as safeguards of individual autonomy. Smend’s critique of liberalism risks falling into precisely this pitfall.

That being said, I wish to highlight three core contributions of Smend’s *Verfassung und Verfassungsrecht* that are central to my analysis.

First, Smend conceives of rights as “technical (constitutional) law”, marking a departure from the nineteenth-century German constitutions, in which the primary function of such rights was to subordinate administrative action to legislative acts. He also moves beyond the Weimar Constitution of 1919, where the main issue was the binding force of constitutional rights upon the legislature – something that failed to take root either in the constitutional text or its interpretation, due to the highly programmatic nature of its provisions²⁵. As noted, Smend already advocated for the binding force of fundamental rights upon all branches of power, notably the legislature, and even supported their applicability within the private sphere.

The second point concerns his systematic conception of rights, which implies a *holistic and pervasive* understanding: as values, fundamental rights permeate the entire legal order and must be considered in all legal acts or decisions, for they form part of a system that legitimizes both the State and the constitution. In this respect, they possess a strong “ideal-normative” component.

Finally, to render this material content operational, Smend advocates for a method of constitutional interpretation distinct from all other forms of legal interpretation. This is the third point: he affirms the specificity of constitutional interpretation within the broader legal domain, insisting that it requires an “extensive and flexible” hermeneutic approach to adjudication.

III. The Basic Law of Bonn, the *Lüth* Decision, and the Horizontal Effect of Constitutional Rights

The German Basic Law of Bonn (1949) represented, both in form and substance, a qualitative advancement over the 1919 Weimar Constitution. In the face of political parties’ failure to defend the latter – despite its progressive provisions –, the drafters of the Basic Law did not rely solely on advances in constitutional theory. Crucially, they also drew on Germany’s tragic interwar experience, which had effectively dismantled the rule of law, separation of powers and human rights protections²⁶.

This qualitative leap is especially evident in provisions such as the inviolability of human dignity (Article 1, §§ 1-2 of the Basic Law); the direct and immediate binding force of constitutional rights upon all public authorities (Article 1, § 3), including, of course, the legislature (Article 20, § 3); the guarantee of the “essential

²⁴ Cf. R Smend, *Verfassung und Verfassungsrecht* (Berlin: Dunker & Humblot 1928) 231.

²⁵ See for instance J Polakiewicz, ‘El proceso histórico de la implantación de los derechos fundamentales en Alemania’ (1993) 81 *Revista de Estudios Políticos* 28.

²⁶ See for instance J Polakiewicz, ‘El proceso histórico de la implantación de los derechos fundamentales en Alemania’ (1993) 81 *Revista de Estudios Políticos* 37 ff.

content of rights” [*Wesengehaltsgarantie*] (Article 19, § 2); and above all, judicial protection entrusted first to ordinary courts (Article 19, § 4), culminating in the establishment of Constitutional Court with explicit rights-protection jurisdiction (Article 93, § 1, no. 4a of the Basic Law). To be sure, it may be said that many of the political problems – i.e. the external – that plagued the Weimar Constitution became dilemmas of legal interpretation – i.e. the internal – within the German Basic Law of 1949.

This strong institutional and normative design – and the binding force of constitutional rights – was given decisive impetus by case-law from the Karlsruhe Court, the supreme interpreter of the Basic Law. Notably, the efficacy of constitutional rights upon private parties lacks a broad textual foundation in the Basic Law itself. It is therefore significant that the *Lüth* judgement (BVerfGE 7, 198) is among the paradigmatic rulings that conceive constitutional rights as embodying an objective, value-based order.

On 15 January 1958, in resolving this case, the Court addressed central questions in modern rights theory. Although arising in a private-law context²⁷, the Constitutional Court held that rights constitute an “objective order of values” (*objektive Wertordnung*), that permeates the entire legal system (*Ausstrahlungswirkung*), creating interpretative standards well beyond the immediate dispute. It declares:

“Undoubtedly, fundamental rights are intended primarily to safeguard the sphere of individual freedom against interventions by public authorities; they are defensive rights of citizens against the State. This follows from the spiritual evolution of the idea of fundamental rights, as well as from the historical events that led to their incorporation into the constitutions of each State. Such is also the meaning of the fundamental rights enshrined in the Basic Law, which – by placing the chapter on fundamental rights at the beginning of the Constitution – intended to highlight the primacy of the human being and of human dignity vis-à-vis state power. This conception also corresponds to the fact that the legislator established a special legal remedy for the protection of these rights – the constitutional complaint – exclusively against acts of public authority.”

“On the other hand, it is equally true that the Basic Law does not aspire to be a value-neutral legal order; rather, it has established – in its chapter on fundamental rights – an objective order of values, through which the fundamental decision to strengthen the scope of application of fundamental rights is manifested. The dignity of the human person and the free development of personality (which unfolds within a social community) form the nucleus of this system of values, which constitutes, in turn, a fundamental legal-constitutional decision valid for all spheres of law. This system of values provides directives and impulses for the legislature, the administration, and the judiciary. It also influences, of course, private law; no provision of private law may contradict it, all must be interpreted in its spirit. The legal content of fundamental rights as objective norms develops in private law through the provisions that predominate directly within that field of law. Just as new law must conform to the fundamental system of values,

²⁷ The president of a private press club in Hamburg, Erich Lüth, called for a boycott of the film *Unsterbliche Geliebte* (*Immortal Beloved*) in a speech before film distributors, arguing that the film’s director, Veit Harlan, had produced the antisemitic film *Jud Süß* (*Jew Süss*) along with other films in the service of National Socialist ideology during the Hitler era. Harlan filed a civil tort action in which his counterpart was convicted. Lüth appealed before the Constitutional Court, arguing that the constitutional right to freedom of expression required that his actions be considered legitimate. See: M Borowski, ‘La Drittwirkung ante el trasfondo de la transformación de los derechos morales en derechos fundamentales’ (2020) in AD Mateos Durán (tr) 45 *Revista Derecho del Estado* 13.

the old law [enacted prior to the Constitution] must orient itself – in terms of its content – toward that system of values. From now on, it derives a specific constitutional content that determines its interpretation. *A dispute between private parties regarding rights and duties in the case of civil law norms influenced by fundamental rights remains substantively and procedurally a civil law dispute. Civil law will be interpreted and applied, even if its interpretation must adhere to public law, i.e., to the Constitution.*”

“[...] The judge must examine, by virtue of the constitutional mandate, whether the substantive provisions of civil law applied have been influenced by fundamental rights in the manner described; if so, then he must take into account in their interpretation and application the modifications to private law that arise therefrom. This is also the meaning of the binding force of civil law to fundamental rights (Article 1, para. 3 of the Basic Law). If he omits such criteria, and his judgment disregards this constitutional influence upon civil law norms, then he not only violates objective constitutional law – by ignoring the content of the norm that encompasses the fundamental right (as an objective norm) – but also, as a bearer of public power, violates through his judgment the fundamental right that the citizen is constitutionally entitled to, even with respect to judicial power. Against such a judgment – regardless of appeals available within the civil courts – a constitutional complaint may be lodged before the Federal Constitutional Court.”²⁸

In a nutshell, constitutional rights are not only ‘negative rights’ (*Abwehrrechte*) of the individuals against the State; they also possess an ‘objective dimension’; that is, they simultaneously constitute elements of a “value order” (*Objektive Wertordnung*)²⁹. Because of their binding force upon public authority, it is considered that the legislative branch may not enact a statute, the executive issue an administrative decision, nor the judiciary branch render a judgment incompatible with constitutional rights. Rights thus serve as parameters of “legal validity” – even among private parties’ relations. This deep transformation of the legal implies a deep transformation of the legal system, since all law becomes impregnated with principles and values. It is the so-called “materialization of law”, whereby the negative dimension of rights is complemented by a positive dimension, action-oriented, entrusted to public authorities, closer with the paradigm of the social State³⁰.

Critic Ernst Forsthoﬀ observed what a transformative shift this was: “to transform into positive rights those that had been formulated as defensive, and therefore negatively.” That is, to make state action compatible with rights – the so-called “duties of protection” – it was necessary to understand them as “positive principles,” something that was possible “by conceiving rights as the positivization of values, and the totality of fundamental rights as a system of values inherent to the Constitution”³¹.

²⁸ BVerfGE 7, 198, 204. In R Huber, *Jurisprudencia del Tribunal Constitucional Federal alemán. Extractos de las sentencias más relevantes compiladas por Jürgen Schwabe*, M Anzola Gil & E Maus (tr) (Mexico: Konrad Adenauer-Stiftung 2009) 204–205 (italics mine). The decision is translated in part into English in: DP Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed. (Durham NC: Duke University Press 1997).

²⁹ K Stern, ‘El sistema de los derechos fundamentales en la República Federal de Alemania’ (1988) in J. Nicolás Muñiz (tr) 1 *Revista del Centro de Estudios Constitucionales* 261–277. In the same vein, see HP Schneider, ‘Peculiaridad y funciones de los derechos fundamentales en el Estado constitucional democrático’ (1979) in Joaquín Abellán (tr) 7 *Revista de Estudios Políticos* 7–35.

³⁰ See J Habermas, *Facticidad y validez. Sobre el derecho y el Estado democrático de derecho en términos de teoría del discurso*, M Jiménez (tr) 5th ed. (Madrid: Trotta 2000) ch 9.

³¹ See E Forsthoﬀ, *El Estado social en la sociedad industrial*, L López Guerra & J Nicolás Muñiz (tr) (Madrid: Instituto de Estudios Políticos 1975) 252.

Consequently, the third-party effect of constitutional rights is thus one of the “legitimate descendants” of their objective dimension³². The *Drittwirkung der Grundrechte* doctrine has been hailed as “one of the most interesting legal discoveries of modern times”, having originated in German constitutional doctrine and which subsequently “has become an article of legal export”³³. Addressing this doctrinal development calls for careful analysis of two main issues: the manner in which constitutional rights operate in private relations (the *substantive problem*) and the mechanism for their enforcement (the *procedural problem*), as identified by Robert Alexy.

Substantively, two supposedly distinct approaches have been articulated: the theory of “indirect effect” (*mittelbare Drittwirkung*) and that of “direct effect” (*unmittelbare Drittwirkung*). I say “supposedly distinct” because it is questioned whether the two are in fact opposed or contradictory. That is, the difference between them is relativized by recognizing the objective dimension of rights as “optimization requirements”³⁴. In any case, what are the positions on indirect effect vis-à-vis direct effect in a nutshell?

According to the indirect effect (*mittelbare Drittwirkung*), constitutional rights act in private relations not as directly enforceable subjective rights, but as “principles” which, in their objective character, must be “filled in”³⁵ to introduce their content into Private Law norms. They bind immediately only the acts of public authorities, and in some cases private parties³⁶. Their main proponent was Gunter Dürig³⁷. For him, the guarantee of human dignity contained in the Basic Law does not merely impose a negative obligation upon the State but also establishes a duty of protection against any interference that may harm a person’s human dignity, regardless of its origin. From the fact that the Constitution contemplates fundamental rights as the most effective realization of such protection of values within positive law, it follows that values protected against the State through rights must also be protected when violated by private actors, companies or firms³⁸. Thus, the horizontal projection of rights must be realized through the mediation of the legislator and, in its absence, through the judge³⁹. This construction prevailed in Germany after the *Lüth* ruling. In this way of seeing things, the violation of fundamental rights is not attributable to the private party, nor does it originate

³² The expression is from E-W Böckenförde, ‘Teoría e interpretación de los derechos fundamentales’ in JL Requejo & I Villaverde (trs) *Escritos sobre derechos fundamentales* (Baden-Baden: Nomos 1993) 112.

³³ I von Münch, ‘Drittwirkung de derechos fundamentales en Alemania’ in P Salvador Coderch et. al. *Asociaciones, derechos fundamentales y autonomía privada* (Madrid: Civitas 1997) 28–30; see also footnote no. 6 on p. 28.

³⁴ This is Böckenförde’s opinion, for whom the effect vis-à-vis third parties, as a limitation on individual autonomy of will, “makes no difference whether it is done directly or indirectly.” E-W Böckenförde, ‘Teoría e interpretación de los derechos fundamentales’ in JL Requejo & I Villaverde (trs) *Escritos sobre derechos fundamentales* (Baden-Baden: Nomos 1993) 114.

³⁵ The expression is from C Starck, ‘Derechos fundamentales y derecho privado’ (2002) 66 *Revista Española de Derecho Constitucional* 67.

³⁶ M Venegas Grau, *Derechos fundamentales y derecho privado*. Prólogo de Rafael de Asís (Madrid: Marcial Pons 2004) 114

³⁷ G Dürig, ‘Grundrechte und Zivilrechtsprechung’ in Th. Maunz, *Frschr. f. H. Nawiasky*, (Munich, 1956), 67.

³⁸ Quoted by M Venegas Grau, *Derechos fundamentales y derecho privado*. Prólogo de Rafael de Asís (Madrid: Marcial Pons 2004) 116. On the centrality of G. Dürig’s figure and his *Kommentar* for the value-oriented understanding of fundamental rights, in a critical mood, see: JA García Amado, ‘Sobre el neoconstitucionalismo y sus precursores’ in G Amado, JA Antonio, *El Derecho y sus circunstancias* (Bogotá: Universidad Externado de Colombia 2010) 145.

³⁹ M Venegas Grau, *Derechos fundamentales y derecho privado*. Prólogo de Rafael de Asís (Madrid: Marcial Pons 2004) 116. See also JM Bilbao Ubillas, *La eficacia de los derechos fundamentales frente a particulares. Análisis de la jurisprudencia del Tribunal Constitucional*. (Madrid: CEPC 1997) 283 ff; A Julio Estrada, *Los derechos fundamentales frente a particulares* (Bogotá: Universidad Externado de Colombia 2000) 109; and LM Cruz, *La constitución como orden de valores. Problemas jurídicos y políticos* (Granada: Comares 2005) 21 ff.

in an *inter-privatos* relationship, but rather it is caused by the judge when, in applying ordinary law to resolve a dispute among individuals, he infringes constitutional rights⁴⁰.

By contrast, the direct effect (*unmittelbare Drittwirkung*) posits that certain constitutional rights retain a direct binding effect on private parties as reinforced subjective rights – albeit with qualifications and in a differentiated manner. This thesis of their direct binding force was formulated by H.C. Nipperdey, relying on the provision establishing equal rights for man and woman and, on this basis, dealing with the gender pay gap⁴¹. According to Nipperdey, certain rights apply directly within private legal relations. Note that what was claimed was not the absolute and undifferentiated validity of the entire catalogue of constitutional rights in private relations, but rather a horizontal effect of those rights wherever admissible⁴².

Notably, the paradigm of the social State and the notion of the “materialization of law” suggests that *Drittwirkung der Grundrechte* logically follows from the transformations of the democratic and social State model, where the general interest acquires more centrality and equality must be upheld in practice⁴³. In doing so, the “constitutionalization of private law” occurs, blurring the traditional legal borders between the public and the private spheres. The Basic Law thus reflects the notion of a ‘total constitution’, providing normative guidance to public actors and facilitating the juridification of politics.

As Matthias Kumm argues, against Carl Schmitt, the Basic Law may be understood as a “total constitution”, “a constitution which is committed to the realization of constitutional justice”, because it:

- 1) Protects certain structural features from change.
- 2) Does not function as a neutral procedural order.
- 3) Constitutes a framework for the constitutionalization of political conflicts.
- 4) Grants the Constitutional Court the competence to adjudicate when constitutional rights are implicated.

From Kumm, a “Total Constitution” “not only establish a comprehensive system of defences of the individual against the potential excesses of the state: Instead, a key function of constitutional rights is to provide the basis for claims against public authorities to intervene on behalf of rights-claimants in response to threats from third parties⁴⁴. In emphasizing this evaluative dimension, the constitution emerges as a “material fundamental order” – close to the idea of *Ein juristisches Weltenei*⁴⁵ that governs *ab initio* state and social actions, albeit with attendant risks.

⁴⁰ Cf. A Julio Estrada, *Los derechos fundamentales frente a particulares* (Bogotá: Universidad Externado de Colombia 2000) 172–173.

⁴¹ HC Nipperdey, *Allgemeiner Teil des Bürgerlichen Rechts*, (I vol., Tubinga, 1959), 91 ff.

⁴² I von Münch, ‘Drittwirkung de derechos fundamentales en Alemania’ in P Salvador Coderch et. al. *Asociaciones, derechos fundamentales y autonomía privada* (Madrid: Civitas 1997) 35.

⁴³ Cf. A Julio Estrada, *Los derechos fundamentales frente a particulares* (Bogotá: Universidad Externado de Colombia 2000) 104–105.

⁴⁴ Cf. M Kumm, ‘Who Is Afraid to the Total Constitution? Constitutional Rigths as Principles and the Constitutionalization of Private Law’ (2010) 7 (4) *German Law Journal* 344.

⁴⁵ The famous expression in E Forsthoff, *El Estado social en la sociedad industrial*, L López Guerra & J Nicolás Muñiz (tr) (Madrid: Instituto de Estudios Políticos 1975) 242.

IV. Critiques to *Drittwirkung der Grundrechte*

The German Basic Law of Bonn – its provisions and, above all, its interpretation by the Federal Constitutional Court – embodies what has been described as an “invasive constitution”, insofar as its rights are conceived as constitutive of the entire legal system. It is precisely this conceptualization of the constitution as a *Wertsystem* – as its very foundation – that has attracted significant criticism. Among the most frequent objections, three stand out⁴⁶.

First, critics argue that this conception alters the very nature of the Constitution. According to the traditional doctrine, the constitution’s exclusive functions are to establish a catalogue of competencies of political power. This understanding is grounded in the classical theory of the limitation of governmental authority, which materialised historically in two central mechanisms: a set of rights that public power could not infringe, and the division of governmental functions through the separations of powers, to avoid concentration and abuse. From this perspective, the constitution is intended to limit public authority, not to regulate, evidenced by characteristics such as the difficulty of amendment, its fragmentary and generalized drafting to allow for political flexibility, and its normative superiority over ordinary legislation⁴⁷.

From this angle, the Constitution is said to have a “thin” scope: it does not primarily aim to regulate relations among private parties, as just a cursory read of any constitutional text confirms. Protection of rights is assigned to a special branch, i.e. Private Law (through the Civil Code), or even Public Law (through the Penal Code, and others). Among other reasons, this is due to the fact that constitutional law itself is not suited to regulate changing and conflictive social relations, both because of its ‘nature’ as special law and because of the additional difficulties of its amendment. On the contrary, ordinary law, unlike constitutional law, is naturally open to change, responsive to the demands of each moment, and susceptible to reform by contingent political majorities. The Constitution, it could be said, asserts itself against this political dynamic. Thus, a distinction has been established between a public sphere directly subject to constitutional regulation and a private sphere not directly subject to it⁴⁸.

Among other reasons, this is because constitutional law is not well-suited to the regulation of dynamic, often conflict-laden social relationships. It is special law, and its entrenchment precludes the responsiveness required to address societal change. By contrast, ordinary legislation is by nature open to amendment and reform by democratically elected majorities. In this sense, the constitution asserts itself against political fluctuation. This view draws a line between a public sphere, which is directly subject to constitutional scrutiny, and a private sphere, which is not. Such a division reflects the classic liberal separation between civil society and governmental authority: the less interference the State exercises, the freer the individual.

The second critique concerns the threat posed to private autonomy by the conception of rights as values – particularly through the development of duties of protection and the horizontal effect (*Drittwirkung*) of constitutional rights. It is argued that this endangers the very foundation of Private Law: individual freedom. Private agreements would, in this view, be subject to the permanent oversight of public authorities, rendering Private Law almost redundant.

⁴⁶ In general, on the critiques of *Drittwirkung*, see V Ferreres Comella, ‘La eficacia de los derechos constitucionales frente a particulares’ in AA.VV. *Estudios sobre la Constitución Española. Homenaje al profesor Jordi Solé y Tura* (Madrid: CEPC 2008) 1173–1187.

⁴⁷ I closely follow in this section the account given by R Kay, ‘The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law’ (1993) 10 *Constitutional Commentary* 329–360.

⁴⁸ Cf. R Kay, ‘The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law’ (1993) 335.

By virtue of private autonomy, individuals are regarded as free and equal legal actors, empowered to determine: (i) whether to enter into a contract (ii) with whom: (iii) the legal regime governing their agreement; and (iv) the specific clauses under which they bind themselves. Contractual freedom is thus an expression of this broader autonomy – the individuals’ capacity to create legal rights and obligations by mutual consent. This presupposes confidence in the individuals’ ability to pursue and defend their interests within a framework of formal equality.

Accordingly, the principle of private autonomy establishes a zone of individual liberty. Indeed, from this perspective, constitutional rights themselves may be seen as expressions of the recognition of human freedom and moral agency. One could argue that ‘will’ is the foundation of rights. As one formulation states: rights “belong to that branch of morality which is specifically concerned with determining when one person’s freedom may be limited by another’s”. From this perspective emerge two types of rights tied to individual choice: *special rights*, arising from voluntary agreements (i.e. promises) and binding only between the parties; and *general rights*, which operate and are asserted defensively against all other persons, and including the State⁴⁹. This understanding could be associated with rationalist natural law, which regarded rights as vestiges of pre-political liberty – prior to and unavailable to the State⁵⁰. The character of rights as “shields” or “trumps” over any aggregative or state-based claim constituted their core identity.

The third and perhaps the most profound critique concerns the very conceptualization of rights as values. This, it is argued, poses risks to both the legal domain and constitutional rights themselves, for values belong to a wholly different sphere. A value, it is said, “is valid” but does not “exist”, and its validity generates a “strong drive for realization”. The problem is this: to call something a value is, ultimately, to seek its imposition. As Carl Schmitt famously wrote: “Virtues are exercised, norms are applied, commands are obeyed, but values are posited and imposed”⁵¹. Values, therefore, exhibit a combative character, as they claim validity for someone and against someone else. This arises from their fundamentally subjective nature. They are immersed in pure perspectivism, despite attempts to claim their objectivity to overcome late-19th-century nihilism. Not even this presumed objectivity can mitigate the risk they pose: every “valorization” implies a “devalorization”. Values thus invite conflict – until, ultimately, the “valueless” is eliminated.

This is the essence of Schmitt’s critique in *Die Tyrannei der Werte* [The Tyranny of Values]⁵², which transposes his Friend-Enemy distinction also into the realm of axiology. Once values are imported into law, they trigger an internal struggle to realise competing convictions and interests.

Furthermore, values are said to belong to a teleological, not deontological, domain. This implies that understanding constitutional rights as values compromises their status as legal norms. Instead of being rules that impose duties with universal validity, they become a “model of desirable goods”, subject to contestation and re-evaluation. Their function as protective “firewalls” against majoritarian decision-making is thereby eroded, to use Habermas’s metaphor⁵³. Critics also highlight the indeterminacy introduced by

⁴⁹ See HLA Hart, ‘Are There Any Natural Rights’ (1955) 64 (2) *The Philosophical Review* 173 ff.

⁵⁰ Cf. C Schmitt, *Teoría de la Constitución*, F Ayala (tr) (Madrid: Alianza 1928) 169 ff. There is something paradoxical here: if we regard fundamental rights as natural rights, then – contrary to what is usually thought – this should lead to conceiving of them as absolute *by definition* and, therefore, as binding above all vis-à-vis private parties.

⁵¹ C Schmitt, ‘La tiranía de los valores’ in Á Schmitt (tr) (1961) 115 *Revista de Estudios Políticos* 67 ff.

⁵² *Ibid.* 68 ff.

⁵³ J Habermas, *Facticidad y validez. Sobre el derecho y el Estado democrático de derecho en términos de teoría del discurso*, M Jiménez (tr) 5th ed. (Madrid: Trotta 2000) 332.

axiological interpretation, undermining legal certainty and the stability of legal concepts and interpretative methods. Interpretation becomes an elusive “ascertainment of constitutional reality”, a highly discretionary practice in judges’ hands. As Ernst-Wolfgang Böckenförde, following Forsthoff, observed: it is no longer legal categories, but an overarching, often politically inflected vision of constitutional meaning that governs interpretation.

In such a setting, legal interpretation loses its rational character. Every application of a right risks becoming a mutation of the Constitution itself. The key to giving meaning to fundamental rights provisions according to the system of values at any given time, in a rapidly changing context, cannot be the traditional legal method⁵⁴. Interpretation of rights, therefore, becomes irrational in this perspective.

This trend threatens both the separation of powers and the rule of law, understood as the subjection of all public authority – including judges – to the law. An open-ended and axiological conception of the constitution may encourage a form of judicial omnipotence, effectively displacing parliamentary democracy. The danger of juristocracy – government by judges – becomes tangible when the *radiating effect* of constitutional rights brings about the omnipotence of courts alongside the omnipresence of the constitution. Whether the constitution says too little (thus empowering judges) or too much (thus weakening legislators), treating rights as values renders them vulnerable to aggregative or collectivist strategies and dismisses their counter-majoritarian strength as negative rights⁵⁵.

Thus, criticisms of *Drittwirkung der Grundrechte* may be traced to the conflation of values and constitutional rights. In my view, the central debate does not lie in the distinction between *mittelbare* and *unmittelbare Drittwirkung*, since both theories ultimately lead to balancing rights in conflict and therefore yield functionally equivalent outcomes, as Alexy argues⁵⁶. The real controversy lies between those who reject altogether the application of rights to private relations and those who defend such extension.

For this reason, the construction of *Drittwirkung* – that is, the framework through which rights throughout the legal system, especially via the constitutionalization of Private Law, have led some scholars to propose a return to the classical, defensive understanding of rights⁵⁷. The aim is to avoid both the over-moralization of law (which undermines legal certainty) and the re-materialization brought about by the Social State, which turns law into an instrument for enforcing egalitarian ideals.

This strategy involves adopting a substantive liberal theory of rights and viewing the constitution as a limit on public power exclusively⁵⁸. Only by reasserting this model, it is argued, can we prevent one of the most problematic features of the post-war constitutional paradigm: the interpretative omnipotence of judges, fostered by an understanding of rights as values.

⁵⁴ E-W Böckenförde, ‘Teoría e interpretación de los derechos fundamentales’ in JL Requejo & I Villaverde (trs) *Escritos sobre derechos fundamentales* (Baden-Baden: Nomos 1993) 27 ff.

⁵⁵ See R Alexy, *Teoría de los derechos fundamentales*, C Bernal (tr), 2nd ed (Madrid: CEPC 2009) 511 ff.

⁵⁶ See R Alexy, *Teoría de los derechos fundamentales*, C Bernal (tr), 2nd ed (Madrid: CEPC 2009) 471–472.

⁵⁷ E-W Böckenförde, ‘Grundrechte als Grundsatznormen. Zur gegenwärtigen Lage der Grunderchtsdogmatik’ in *Staat, Verfassung, Demokratie: Studien zur Verfassungstheorie und zum Verfassungsrecht* (Frankfurt am Main: Suhrkamp 1991) 196 ff.

⁵⁸ E Forsthoff, *El Estado social en la sociedad industrial*, L López Guerra & J Nicolás Muñoz (tr) (Madrid: Instituto de Estudios Políticos 1975) 262–263.

V. Responses to Critiques

I have long maintained that any serious engagement with the critiques of *Drittwirkung der Grundrechte* ultimately entails the defence of an alternative conception of the Rule of Law. This conception is none other than the model inherited from the post-war constitutional settlement in Europe, characterized by a commitment to the subjection of all public power – including, most significantly, the legislative branch – to juridical control. This is particularly evident in the German constitutional tradition, and it is no coincidence that the doctrine of *Drittwirkung* emerged precisely in that temporal and historical context. While drawing on the number of doctrinal antecedents, its normative core is undoubtedly rooted in the Basic Law (*Grundgesetz*) of 1949, which inaugurated an ambitious constitutional project wherein the binding force of constitutional rights upon Parliament assumed a pivotal role.

In my view, the defence of the horizontal effect of constitutional rights presupposes, first, a robust affirmation of the *normative binding force* of the constitutional text, and, more radically, the extension of this force into the social sphere. Secondly, it requires a reconceptualization of the principle of the autonomy of the will, placing it within the broader framework of the Social and democratic State, and challenging the traditional strict dichotomy between the State and civil society. This reconceptualization recalls an alternative foundation of rights: that they are not merely expressions of “protected individual choices” but also constitute “interests to be protected”. Finally, the defence of *Drittwirkung* necessitates the continued affirmation of the deontological character of constitutional rights, as opposed to their mere reduction to axiological decisions or values, and a commitment to the rationality of justifiability of their interpretation.

If the constitution may be said to possess any intrinsic “nature”, it lies in its function as an instrument for the limitation and control of power – *any* power – regardless of its origin. Conceived in this way, such a nature is not distorted by the horizontal effect of constitutional rights, rather affirmed. Indeed, the normative force of the Constitution is strengthened when it is understood as applying across the entire legal order, including the domain of Private Law. From a systematic perspective – where law and rights form an integrate normative order – the constitution, as the supreme legal norm, must necessarily regulate even relations among private actors. Under the *Grundgesetz*, constitutional rights constitute *positive law* in the fullest sense: directly applicable norms that do not depend upon legislative transposition. This implies a radicalization of their normative reach. No sphere of power – public or private – can remain beyond the purview of the constitution. Even the ostensibly private sphere is subject to constitutional scrutiny, albeit to a lesser extent⁵⁹.

This is central to a further argument in support of *Drittwirkung*: the proliferation of *factual powers* in contemporary society and the growing assumption of public functions by private actors. Private power must be recognized for its potential to infringe rights and, crucially, must not be left uncontrolled⁶⁰.

Regarding the objection that *Drittwirkung der Grundrechte* undermines the principle of the autonomy of the will, it must be noted that this principle – foundational as it is to classical Private Law – has never been absolute. Even within the liberal State of the nineteenth century and its accompanying codifications, autonomy

⁵⁹ Cf. M La Torre, ‘Constitucionalismo de los antiguos y de los modernos: Constitución y estado de excepción’ (2011) 24 *Derechos y libertades* 45–65.

⁶⁰ In this vein, G Peces-Barba, *Curso de derechos fundamentales* (Madrid: BOE, 1999) 624–626.

of the will was subject to legal, moral and public interest limitations⁶¹. The error, in my view, lies in treating it as the *paramount* principle to be safeguarded by the legal order, rather than as one principle among many, necessarily balanced against others⁶².

This point is rendered even more salient within the paradigm of the Social and democratic State, wherein liberty is no longer conceived solely as non-interference⁶³. While the liberal State grounded liberty in pre-political terms, the Social and democratic State demands a ‘relational’ understanding, one that gives substantive content to equality and non-discrimination. Such paradigm presupposes a more active, interventionist State that “assists, distributes, adjudicates; it does not abandon the individual to his social situation but rather comes to his aid”⁶⁴.

In this context, the rigid separation between State and society is attenuated, and the ideal of democratic participation is strengthened. As Konrad Hesse aptly described, this is the “actualization of liberty” – a framework in which social rights are viewed as preconditions for meaningful participation in the political process⁶⁵. Within this normative structure, rights are not grounded in individual choice alone, but in the objective interest they seek to protect⁶⁶.

Criticism of the conceptualization of rights as values has been addressed through multiple strategies. A preliminary response is simply to acknowledge a constitutional fact: post-war constitutions explicitly enshrine not only rights and freedoms but also principles and values, thereby shaping the “constitutional discipline of rights”⁶⁷. This necessitates what may be termed a “flexible deontology”, capable of mediating the value pluralism inherent in post-metaphysical societies⁶⁸. Once values have been deduced (as in the German *Grundgesetz*) or incorporated (as in the Spanish Constitution of 1978), a conceptual link is forged between axiological and normative domains. The key lies in rationalizing the interpretative application of these rights-related contents, and in understanding the constitution as not merely a *fundamental order* but also a *framework order*.

Robert Alexy’s principled theory of constitutional rights (*Prinzipientheorie*) offers a particularly compelling response to this challenge. Rights conceived as ‘principles’ – or more precisely, as ‘optimization requirements’ – retain their deontological core while preserving their aspirational dimension. They entail a form of legal reasoning that is inherently a practical reasoning, oriented toward the balancing of conflicting rights and interests⁶⁹. Such reasoning necessarily incorporates substantive moral considerations. Indeed, the very

⁶¹ See M Venegas Grau, *Derechos fundamentales y derecho privado*. Prólogo de Rafael de Asís (Madrid: Marcial Pons 2004) 33 ff.

⁶² Cf. R Alexy, *Teoría de los derechos fundamentales*, C Bernal (tr), 2nd ed (Madrid: CEPC 2009) 479.

⁶³ I have dealt with this argument in: FM Mora-Sifuentes, ‘Ideas de libertad y modelos de derechos fundamentales. Una aproximación’ (2013) 28 *Cuestiones Constitucionales* 174 ff.

⁶⁴ E Forsthoft, *El Estado social en la sociedad industrial*, L López Guerra & J Nicolás Muñoz (tr) (Madrid: Instituto de Estudios Políticos 1975).

⁶⁵ K Hesse, ‘Significado de los derechos fundamentales’ in E Benda et al. *Manual de derecho constitucional*, A López Pina (tr) (Madrid: Marcial Pons 2001) 90 ff.

⁶⁶ See ND MacCormick ‘Children’s Rights: a Test Case for Theories of Right’ (1976) LXII *Archiv für Rechts und Sozialphilosophie* 305–316.

⁶⁷ See B Celano ‘¿Cómo debería ser la disciplina constitucional de los derechos?’ in A Greppi & FJ Laporta (tr) *Derecho, justicia razones* (Madrid: CEPC 2009) 195–234.

⁶⁸ For a development of this argument, see G Zagrebelsky *El derecho dúctil. Ley, derechos, justicia* (M Gascón (tr), Madrid: Trotta 1995); and, more recently, A García-Figueroa *Criaturas de la moralidad. Una aproximación neoconstitucionalista al Derecho a través de los derechos* (Madrid: Trotta 2009).

⁶⁹ For an overview with some critiques to Alexy’s *Theorie der Grundrechte*, see the contributions contained in: AJ Menéndez & EO Eriksen (eds) *Fundamental Rights through Discourse* (Oslo, ARENA) 2004 *passim*.

notion of ‘value’ may be dispensed with, some scholars (e.g. B. Schlink) have argued, and reconceptualized as ‘principle’ – a shift already evident in both jurisprudence and doctrine⁷⁰.

Ultimately, the *Prinzipientheorie* offers a structural account of constitutional rights that enables the articulation of their various functions in the modern constitutional State: as negative liberties, as having an objective dimension, as grounds of protective duties, as capable of third-party effect, and as encompassing socio-economics entitlements. Crucially, it seeks to bind the legislative branch to constitutional rights, while preserving the democratic leeway essential to legitimate governance⁷¹.

VI. Conclusion

In this work, I have provided a brief account of the axiological dimension of constitutional rights and its significance for the doctrine of third-party effect or *Drittwirkung*. Also known as the horizontal effect of rights, it derives that the Constitution (and rights specifically) constitutes a system of values enshrined in the Basic Law – values which impose positive duties of protection upon all branches of public authority. In this conception, rights acquire the status of objective norms that radiate throughout the entire legal order (*Ausstrahlungswirkung*), extending their normative reach into private legal relationships as well⁷².

A theoretical antecedent to this formulation may be found in the work of Rudolf Smend. His *Integrationslehre* [theory of integration] is often regarded as a foundational influence on the value-based interpretative approach later adopted by the Federal Constitutional Court in the *Lüth* case (BVerfGE 7, 198)⁷³. Indeed, Smend advanced a vision of constitutional rights as embodying a system of values that permeates all branches of law – including private law – requiring a flexible and dynamic hermeneutics on the part of the interpreter, appropriate to the character of such norms.

Nevertheless, the limitation of Smend’s approach should not be overlooked. These include his pronounced nationalist orientation, his understanding of integration as antithetical to social pluralism, and a tendency towards irrationalism – not to mention the evident antiliberal orientation of his theory of the State. Within this framework, the individual and subjective dimension of rights – specifically, their negative and defensive character against the State and individuals – could be subordinate to their function as a constitutional value. It is not surprising, then, that critics have called for a return to a liberal conception of rights as primarily negative entitlements. Yet the question remains: is such a return viable, given the ambitious normative architecture of the German Basic Law of 1949?

⁷⁰ Schlink has argued that Habermas’s critique contained in *Faktizität und Geltung*, regarding the value-oriented approach of the jurisprudence of the German Constitutional Court, is not only mistaken (because it conflates values with norms) but, above all, anachronistic (because the Federal Constitutional Court has no longer employed such a category since the 1970s). Cf. B. Schlink, ‘The Dynamics of Constitutional Adjudication’ (1995) 17 *Cardozo Law Review* 1234.

⁷¹ This has been problematized within *Prinzipientheorie* through the development of the concept, structure, and content of ‘formal principles’ that seek to provide a response to the problem between the democratic legitimation of the legislative branch and to the authoritative character of the law with constitutional adjudication by judges. See R. Alexy, ‘Principios formales’, MC Quimbayo (tr) (2014) 37 *Doxa* 15–29.

⁷² I have dealt in greater detail with the objective dimension of rights in FM Mora-Sifuentes, ‘La influencia de los derechos fundamentales en el ordenamiento: su dimensión objetiva’ (2017) 150 *Boletín Mexicano de Derecho Comparado* 1216 ff.

⁷³ See, again, R. Smend, *Verfassung und Verfassungsrecht*.

A theory of constitutional rights must seek to adequately reconstruct their role within the post-Second World War constitutional state (*Verfassungstaat*). This entails the development of a structural theory of rights capable of systematically articulating their diverse functions – as negative rights, positive State actions, and to organization and procedure – without allowing judicial interpretation to undermine either the authoritative nature of law or the principle of democratic self-government, especially in judicial review of legislation. Crucially, such a theory must preserve the deontological character of negative rights. The key, in my opinion, lies in resisting their reduction to moral values *stricto sensu*, while still recognizing their ideal dimension within the constitutional framework.

Rights, in this view, are not values, and should not be assimilated to them. Their normative structure is not properly teleological, but deontological: they function as a negative of individual rights, as shields, not as policy-objectives oriented. Paradoxically, defending this position does not preclude the articulation of rights as principles, or optimization requirements, which may be balanced in the case of rights conflicts. This balancing, however, can be conducted without recourse to the vocabulary of values.

It is, indeed, one of the undeniable merits of Robert Alexy's theory of constitutional rights, that it aspires to such reconstruction. His work has not only rationalized the German Federal Constitutional Court's case-law but has also furnished a sophisticated theoretical framework for understanding constitutional rights as optimization requirements, supported by a complete theory of legal argumentation and a non-positivistic concept of law. This is both its strength and – arguably – its point of vulnerability: the jurisprudence of values that originally shaped the Court's methodology continues to cast a shadow over the balancing model that Alexy refined over the years. For this reason, the theoretical tensions inherent in the axiological conception of rights remain a focal point of critical engagement⁷⁴.

⁷⁴ With some changes, this is an English version of a previous book chapter: FM Mora-Sifuentes 'Derechos fundamentales como valores. Sobre los orígenes y críticas a la *Drittwirkung*' in A.D. Mateos Durán (ed) *El efecto horizontal de los derechos fundamentales* (Bogotá: Universidad Externado de Colombia 2022) 71–116. The author is in debt to Osmar Fernando Camacho Vizcaya (LL. M. Student of the University of Guanajuato), for assistance in the process of translation. Finally, I would like to thank Professor Massimo La Torre, Chief Editor of East-West Studies, for his support and leadership.