

## Third Party Effect of Fundamental Rights (*Drittwirkung*)

*Eric Engle*\*

The questions whether fundamental rights in the EC Treaty and ECHR rights are self-executing and given direct effect to or by individuals against the state or in their relations with each other is sometimes analysed using a concept from German constitutional law, *Drittwirkung* (third party effect). The doctrine of third party effect (*Drittwirkung*) instantiates the idea that the (economic) constitution entails legal obligations on private law interactions of private persons in their relationships *inter se*. The functional questions are: whether a right exists, who may enforce the right, against whom, and what remedy obtains. Those questions are distinct, but related. *Drittwirkung* (third party effect) may be direct or indirect. We examine third party effect to see its limits as a tool for determining the existence and enforceability of human rights in the EC Treaty and the ECHR.

### 1. What is Third Party Effect (*Drittwirkung*)?

Third party effect may be vertical (between the governing public law body and another individual, whether public or private) or horizontal (between individuals). Horizontal affect may be direct or indirect.

#### a) Vertical Direct Effect

Vertical direct effect and *vertikale unmittelbare Anwendbarkeit* are synonyms. Vertical direct effect refers to the applicability of human rights norms to the state to protect the individual against the state. Vertical direct effect binds EU Member States to EU laws such that individual citizens will have rights against the Member State.<sup>1</sup> The vertical effect of the EC treaty on the Member States is no longer questioned. The EC Treaty is considered self executing, at least since *Van Gend and Loos*.

#### b) Horizontal Direct Effect

Horizontal direct effect is the application of public law rules to directly effect legal relations between private individuals in their relations with other private law persons. Horizontal direct effect and *horizontale Anwendbarkeit* are synonyms;<sup>2</sup> Horizontal direct effect and *unmittelbare Drittwirkung* are also synonyms.<sup>3</sup> Norms given horizontal direct effect bind the citizens of the Member States in their mutual relations, i.e. *inter se*.<sup>4</sup> For example, a direct third-party effect (*unmittelbare Drittwirkung*) exists in German domestic law when the legal rule is applied against the individual citizen.<sup>5</sup> So, for example, in a conflict between the right to contract (a general principle of law) and the free movement of

\* Dr. Jur. Eric Engle, LL.M. Eur, D.E.A., D.E.A., J.D., B.A. is currently research aid to Prof. Duncan Kennedy (Harvard Law School).

<sup>1</sup> Ted Oliver Ganten, *Die Drittwirkung der Grundfreiheiten*, page 23. Duncker & Humblot: Berlin (2000).

<sup>2</sup> *Id.* at 26-28.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Ted Oliver Ganten, *Die Drittwirkung der Grundfreiheiten*, page 26-27. Duncker & Humblot: Berlin (2000).

persons (one of the four freedoms, a *Grundfreiheit*), horizontal direct effect would say that the community law binds the individuals *inter se*. Thus, if a basic freedom (*Grundfreiheit*) has horizontal direct effect (*unmittelbare Drittwirkung*) then the general principle of freedom of contract would probably have to give way. Third party effect and proportionality coexist as methods of determining, relativising, and applying fundamental rights.

### c) Indirect Horizontal Affect

Horizontal effect may also be indirect.<sup>6</sup> Indirect horizontal effect is synonymous with *mittelbare Drittwirkung* and *mittelbare horizontale Wirkung*.<sup>7</sup> When a public law right is used as an interpretative guide to determining private law relations among individuals *inter se* the public law rule is said to be given indirect horizontal effect.<sup>8</sup> That is, indirect third party effect (*Drittwirkung*) exists when private law obligations are interpreted with regard to public law fundamental rights – the private law is interpreted in light of a public right found, e.g., in the ECHR or the EC Treaty.<sup>9</sup>

### d) The Economic Constitution

*Drittwirkung* instantiates the (implicit) principles of the economic constitution (*Wirtschaftsverfassung*). Rights which are given *Drittwirkung* are constitutive of the general legal order (i.e., the economic constitution); they are rights which must be generally observed and may be used by the judge as interpretative guides to the private rights and duties of individuals.<sup>10</sup> History has shown that the doctrine of third party effect of basic rights has allowed the ECHR and ECT to evolve over time and act as constitutional treaties. *Drittwirkung* applies the economic constitution's general principles to individuals in order

<sup>6</sup> *Id.* at p. 28.

<sup>7</sup> *Id.*

<sup>8</sup> „Wenn Private Adressaten der Grundfreiheiten sind, besitzen diese Normen unmittelbare horizontale Anwendbarkeit. Das entspricht der unmittelbaren Drittwirkung, weil der Gebrauch der Handlungsfreiheit an den Grundfreiheiten gemessen wird. Sind die Marktfreiheiten ausschließlich an die Mitgliedstaaten gerichtet, aber entfalten Wirkungen zwischen Privaten, muss von mittelbarer horizontaler Wirkung gesprochen werden. Sie ist ein Reflex der unmittelbaren vertikalen Anwendbarkeit. Wenn beispielsweise Privatrechtsnormen als staatliche Maßnahmen wegen Grundfreiheitswidrigkeit unanwendbar sind, beeinflusst dem durchaus Private in ihrem Verhältnis zueinander. Die Grundfreiheiten entfalten dann eine mittelbare horizontale Wirkung.“ Ted Oliver Ganten, *Die Drittwirkung der Grundfreiheiten*, page 27-28. Duncker & Humblot: Berlin (2000).

<sup>9</sup> „Überwiegend dahingehend verstanden, daß eine unmittelbare Drittwirkung vorliegt, wenn der einzelne Bürger neben dem Staat als Normadressat der Grundrechte verwendet wird. Die sehr unterschiedlichen Theorien zur mittelbaren Drittwirkung gehen übereinstimmend davon aus, daß die Grundrechte selbst nicht den einzelnen Verpflichten. Sie entfalten aber dennoch zwischen Privaten Wirkung, beispielsweise weil sie eine objektive Werteordnung konstituieren, die im Recht generell zu beachten [26] sei, oder weil der Richter die Grundrechte wegen ihrer Schutzfunktion bei der Auslegung des Privatrechts zu beachten hat. Durch die Konstruktion einer mittelbaren Drittwirkung soll dabei meist eine abgeschwächte Bindung Privater an die Grundrechte erreicht werden.“ *Id.* at 26-27. (“The dominant view is, that a direct third party effect obtains when the individual citizen, in addition to the state, is the addressee of the basic rights. The very different theories of indirect third party effect all proceed from the position that the basic rights themselves do not obligate individuals. They imply however effects between private persons for example because they constitute an objective order of values which is to be generally observed in law, or because the judge must consider them because of their protective functions in the interpretation of private law. Through the construction of an indirect third party effect, a weakened linkage of private persons to the basic rights should most often, obtain.” - Author's translation).

<sup>10</sup> *Id.*

to guarantee that constitution. Thus, where an immanent element of the economic constitution creates an interpretative rule that applies to individual relations inter se, one speaks of indirect third party effect - *mittelbare Drittwirkung*.

*Drittwirkung* is one of the methods liberalism uses to channel political struggles, class conflict, hatred, and jealousy into constructive economic competition in order to forestall political extremes and social violence. The entire liberal order is predicated on profitably channelling democratic impulses to avoid political extremes at least since Hamilton, if not Aristotle. The economic constitution is positive, not natural, a view held by Aristotle and the *ordo-liberals* and the German Constitutional Court (*Bundesverfassungsgericht*). In keeping with the global post-war trend, the focal point of the post-war constitutional structure of Germany is the protection of human dignity<sup>11</sup> (i.e. human rights). The German constitution seeks to prevent the rise of a strong, central, absolutist government. *Drittwirkung* thus protects fundamental rights, limits the strength of government, and embodies the ideas of a (liberal) economic constitution. However, *Drittwirkung* and the idea of the economic constitution, well adapted for the creation of a common market, may be inapt guides for the construction of the European Union because the European Union is following a teleology beyond that of a simple customs union like the NAFTA. The finality of Europe is not merely a market without a state.<sup>12</sup> Rather, European market integration is and has always been intended as a necessary first step toward political and social integration. The ultimate contours of Europe - federal state, confederation, or even a variable geometry of concentric associations of states spanning continents - may not be clear to us today. However, it is clear that while the concept of an economic constitution helped Europe to achieve the initial goal of a single market it cannot direct European policy toward any goal other than a mere customs union. The idea of Europe as only having an economic constitution makes too many economies of thought to guide Europe to its ultimate development as it completely ignores the cultural and foreign policy aspects of European integration.

## 2. Third Party Effect of the ECT

### a) Individual Rights in the EU

This augmentation of human rights protection within the EU over time is not only a theoretical possibility it is also a practical fact resulting from the contemporary trend to constitutionalisation in law. The legal protection of private persons in the EC Treaty

*has been gradually enlarged thanks to the broad interpretation of the relevant Treaty provisions by the Court of Justice. This interpretation has mainly been carried out in two respects. First, through the doctrine of direct effect of Treaty provisions and Community acts, whereby the legal protection of private parties before national courts has been considerably broadened, and, secondly, through the doctrine of tort liability of the Community in respect of wrongful normative acts of its institutions, whereby the legal*

<sup>11</sup> "Die Menschenwuerde ist unantastbar." Art. I, GG. "Human dignity is inviolable." German Basic Law, Art. I.

<sup>12</sup> See, Christian Joerges, *The Market without the State? The 'Economic Constitution' of the European Community and the Rebirth of Regulatory Politics*, European Integration online Papers (EIoP), Vol. 1, No. 19, November 24, 1997.

*protection of private parties before the Court of Justice has been equally enlarged.*<sup>13</sup>

In EU law, it is clear that individuals have directly enforceable rights and duties, even against other individuals. This is because

*The Community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.*<sup>14</sup>

Thus, the vertical direct effect (rights directly enforceable by individuals versus states) and the horizontal direct effect (rights directly enforceable by individuals against each other) of EC treaty provisions is clearly possible within the EC.<sup>15</sup> In short, the Court has declared that the Treaty addresses itself to the individuals beyond the heads of the Member States.<sup>16</sup>

### **b) Third party effect (*Drittwirkung*) and Basic Freedoms (*Grundfreiheiten*)**

Direct third-party effect of the four basic freedoms of the treaty (free movement of labour, capital, goods and services) only exists when the private person is also an immediate subject of the legal command. This is because these basic economic rights are not fundamental and inalienable rights inherent to all persons. They are alienable market rights, merely the means to the end of creation of a single market. They are not inalienable personal rights. Of course, the single market serves as a means to the end of political life, enabling all to enjoy a good life and in this sense is the apotheosis of Aristotle. The logic of the Union is that a single economic market will reduce transaction costs, favour economies of scale, and will result in economic prosperity with a resulting improvement in the protection of human life and human rights thereby, to say nothing of de-linking territory and trade, a linkage which twice in the last century led to global war. The applicability of the rights of free movement of capital, labour, services, and goods and the freedom of establishment to individuals *inter se* is to be determined by legal interpretation.<sup>17</sup> Thus, we now turn our attention to an analysis of the fundamental rights more generally within community law to see what rights go beyond the relativised protections of the four basic market freedoms.

<sup>13</sup> Walter Van Gerven, *The Legal Protection of Private Parties in the Law of the European Economic Community* in F.G. Jacobs (ed.), *European Law and the Individual*, page 1. North-Holland Publishing Company: Amsterdam - New York - Oxford (1976).

<sup>14</sup> Van Gend & Loos 5 February 1963 cited in: Walter Van Gerven, *The Legal Protection of Private Parties in the Law of the European Economic Community* in F.G. Jacobs (ed.), *European Law and the Individual*, page 5. North-Holland Publishing Company: Amsterdam - New York - Oxford (1976).

<sup>15</sup> Walter Van Gerven, *The Legal Protection of Private Parties in the Law of the European Economic Community* in F.G. Jacobs (ed.), *European Law and the Individual*, page 5. North-Holland Publishing Company: Amsterdam - New York - Oxford (1976).

<sup>16</sup> *Id.* at 7.

<sup>17</sup> „Eine unmittelbare Drittwirkung der Grundfreiheiten ist nur dann gegeben, wenn auch Privatpersonen Adressaten ihrer Verbote sind. Ob die Warenverkehrs, Niederlassungs- und Dienstleistungsfreiheit sowie die Arbeitnehmerfreizügigkeit sich an Private achten, ist durch Auslegung zu klären.“  
Ted Oliver Ganten, *Die Drittwirkung der Grundfreiheiten*, page 56. Duncker & Humblot: Berlin (2000).

### 3. Third Party Effect of the ECHR

*it is unfortunate that the questions have been cloaked with the mystique of the Drittwirkung doctrine ... Without detailing all the competing theories of Drittwirkung, it is suggested that Drittwirkung is not helpful at the international level. The European Court of Human Rights is not seeking to harmonise constitutional traditions but to ensure international protection for the rights contained in the Convention. Key questions in Drittwirkung doctrine are the weight to be given to different rights such as: the right to free development of the personality, the right to work, the right to strike, the right to property, freedom of conscience, the right to equality, the right to free enterprise, and the right to freedom of contract. Drittwirkung theories which are based on the presence of social power or the sanctity of freedom of contract (protected under Article 2 of the German Basic Law) cannot really help to solve the international protection of the rights found in the European Convention on Human Rights.<sup>18</sup>*

The possibility of third party effect, whether direct or indirect, of the human rights provisions of the ECHR was not even considered when the European Convention of Human Rights was created.<sup>19</sup> The vertical direct effect of the ECHR to individuals did not arise from legislative intent: the ECHR was not intended by its signatories to be self executing. Further, direct third-party effect is impossible under the ECHR because complaints about violations of the convention can only be made against one of the contracting states. Complaints against individuals are inadmissible as they are incompatible with the Convention *rationae Personae*.<sup>20</sup> The legislative history reveals that the provisions of the ECHR were generally not written with a view to relations between individuals.<sup>21</sup> While it might be desirable to apply the ECHR principles directly to individuals in their relations with other individuals, that is not the case. Despite this, certain provisions of the ECHR do in fact seem to address individuals directly. That explains part of the confusion as to the exact meaning of *Drittwirkung* which arises out of the distinction between enjoying a right and being able to enforce it. The best argument in favour of vertical direct effect of the ECHR is that the ECHR as a living instrument evolving over time<sup>22</sup> whose protections were *intended* to increase with economic and social progress. The object and purpose of the ECHR, to encourage a higher standard of human rights for persons,<sup>23</sup> also argue for direct effect of the ECHR principles as to individuals. Thus, though the transposition of the *Drittwirkung* doctrine into European law is awkward the fact is, the ECHR guarantees could indirectly protect the rights of individuals *inter se*. Whether we call that horizontal direct effect (*mittelbare horizontale Anwendbarkeit*), indirect third party effect (*mittelbare Drittwirkung*) or simply direct effect (*unmittelbare Wirkung*) is in fact secondary to the practical questions: 1. Who enjoys the right? 2. Against whom may the right be enforced? 3. Who enforces the right? Certain rights can be held by individuals and even be enforced

<sup>18</sup> Andrew Clapham, *Human Rights in the Private Sphere*, Oxford : Clarendon (1993) at 181-182.

<sup>19</sup> P. van Dijk, C.J.H. van Hoof, *Theory and Practice Of the European Convention on Human Rights*, page 17. Kluwer Law and Taxation Publishers: Deventer - Boston (1990).

<sup>20</sup> *Id.* at 15. (Citing: Articles 19, 24, 25, 31, 32 and 50 ECHR).

<sup>21</sup> *Id.* at 17.

<sup>22</sup> Andrew Clapham, *Human Rights in the Private Sphere*, Oxford : Clarendon (1993), page 178.

<sup>23</sup> But see: P. van Dijk, C.J.H. van Hoof, *Theory and Practice Of the European Convention on Human Rights*, page 17. Kluwer Law and Taxation Publishers: Deventer - Boston (1990). ("Neither do the separate provisions of the Convention constitute any clear arguments for or against *Drittwirkung*.")

against other individuals. That is the essence of the issue the concepts of horizontal effect, vertical effect, direct effect, and indirect effect attempt to address and resolve.

#### 4. Third Party Effect and Fundamental Rights

The problem of third party effect implies a question: what is the relationship between basic freedoms (*Grundfreiheiten*), fundamental rights (*droits fondamentaux*), human rights (*droits de l'homme*) and the general principles of law (which may be national, international or European...) in the hierarchy of norms? My view is that the (inductive) common law fundamental rights and (deductive) civilianist general principles of law are converging towards each other in a globalising amalgam of common law and civilian law which I call *ius commune*. To my view, though constitutive, the basic rights (four freedoms – *Grundfreiheiten*) are positive, not natural; they are alienable economic rights. They are therefore hierarchically inferior to procedural general principles of law, which, in turn, are inferior to the inalienable and inherent substantive fundamental human rights/general principles of law. This hierarchisation is my own opinion based on the general principle that the law is a logical internally consistent system,<sup>24</sup> a coherent rational structured hierarchical system. Teubner is right that the legal system is recursive, but Gessner is right that legal certainty is an emergent property. This leads to my conclusion that legal recursion is terminative and terminates in closure and legal certainty due to an emergent property of the legal system: normative convergence.

#### 5. Why Third Party Effect?

Because the concept of an economic constitution, of which *Drittwirkung* is a part, coheres well with a minimal state, it was easily and compellingly subsumed into European Union law. The community was weak, and an object of the post-war economic constitution was to accommodate competing interests precisely so that the central governments could absolve themselves from totalising goals. Further, the process of European integration has always been driven by economic arguments of increased efficiency through free trade, reduced transaction costs, and improved competitiveness overseas. All those goals mesh well with the liberal market assumptions underlying the idea of a (purely) economic constitution (*Wirtschaftsverfassung*). In any federal legal order there will be the question whether federal rights are applicable by or to individuals as was shown in the comparison of *Marbury v. Madison* to *Van Gend and Loos*. In U.S. law the idea of the invocation of state action, i.e. the colour of federal law, is the basis for the imputation of what is, to all intents and purposes, the direct horizontal effect of constitutional provisions. There seems however to be little comparison of third party effect in EU and German law with the notions of state action and the colour of state authority doctrine in U.S. law,<sup>25</sup> an exception to the observed general tendency to normative convergence, at least to present.

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<sup>24</sup> Law has been known as “right reason in accord with nature” since at least Cicero. Cicero, *Commonwealth* (51 BC). Lord Justice Coke also argued that the common law was nothing but logic in action. “Reason is the life of the law; nay, the common law itself is nothing else but reason . . . . The law, which is perfection of reason.” Coke, *First Institute* (1628). Also see: *Coggs vs. Bernard*, 2 *Ld. Raym. Rep. p. 911. (K.B., 1803)*.

<sup>25</sup> Stephen Ratner is aware of the parallels. See, Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, *Yale Law Journal*, December, 2001.

Third party effect attempts to answer the question of when fundamental constitutional principles are applicable to private parties *inter se*. That is a vital question because the constitutionalisation of private rights is a key feature of contemporary legal thought. The concept of the economic constitution, whose effects are measured by third party effect, was perfectly appropriate for the first phase of the EU, the creation of a single market for labour, capital, and goods. Thus, the corollary to the economic constitution, third party effect, was also almost inevitably taken up, even though the concept of third party effect is controverted in German law. The idea of third party effect as a way to resolve the issue whether a given fundamental right has direct horizontal effect also occurred because there was no competing concept existing in any of the other Member States' legal orders, a case of a legal default, so to speak. However, EU laws are independent and autonomous of the Member States' laws. Thus, there is no reason to stay locked into the limits of the *Drittwirkung* analysis. Indeed, after *Van Gend* why couldn't the ECJ merely *presume* all Treaty Provisions have direct horizontal effect until proven otherwise? Or, alternatively, why couldn't the ECJ analyse each provision on a case-by-case basis requiring whichever party argues for the direct effect to bear the burden of proof that in fact the provision was intended to have direct horizontal effect? Third party effect is one of the means to the constitutionalisation of private rights. The constitutionalisation of private rights occurs increasingly and is a trend in contemporary legal thought.

## 6. Critique of Third Party Effect

There are several problems with the idea of third party effect. Third party effect embodies and protects a purely *economic* constitution. Fundamental human rights are universal values that are *inalienable* and in that sense prior and superior to economic rights. Using market mechanisms to govern or determine the nature and extent of universal and inalienable fundamental rights is a theoretical contradiction. While third party effect may be an appropriate standard for the four freedoms (free movement of goods, persons, capital, and businesses), the four freedoms are *economic* rights governing *alienable* transactions, relative rights, not absolute or inalienable ones. It is logically inapt to determine the existence or extent of *inalienable human* rights in economic terms. Further, appealing to private ownership as the key determinant of human rights ignores the fact that the mechanisms to enforce property rights are created by the state.<sup>26</sup> Moreover, at times it might be socially desirable to ignore the public/private distinction.<sup>27</sup> Some values have greater importance than money or are not able to be evaluated monetarily. Furthermore, third party effect is predicated on a strict distinction between public law and private law.<sup>28</sup> However, the public/private distinction has been incisively questioned since decades<sup>29</sup> as a

<sup>26</sup> Andrew Clapham, *Human Rights in the Private Sphere*, Oxford: Clarendon (1993), page 137.

<sup>27</sup> See, Andrew Clapham, *Human Rights in the Private Sphere*, Oxford: Clarendon (1993), page 136 ("even if we could find completely private bodies, there may still be a case for making them comply with public standards. For example, private television companies may be obliged to screen the party political broadcasts of all major parties, and American privately owned corporate towns and private shopping precincts have been forced to allow their premises to be used as a market place not only for goods, but also for the market of ideas.").

<sup>28</sup> *Id.* at p. 29.

<sup>29</sup> See, Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. Pa. L. Rev. 1349 (June, 1982); See, Andrew Clapham, *Human Rights in the Private Sphere*, Oxford: Clarendon (1993), page 28.

false dichotomy and may be untenable.<sup>30</sup> Furthermore, third party effect is a complicated phenomenon about which there are widely divergent views.<sup>31</sup> Divergent theories of the meaning of third party effect<sup>32</sup> create problematic uncertainty.<sup>33</sup> For all these reasons *Drittwirkung* may be conceptually inapt.

Beyond theoretical problems, third party effect is an ambiguous term in practice.<sup>34</sup> The term has several meanings.<sup>35</sup> *Drittwirkung* appears to be interpreted differently before German courts and the ECtHR.<sup>36</sup>

*Two views in particular must be distinguished. According to the first view it [Drittwirkung] means that the provisions concerning human rights also apply in mutual legal relation between private individuals, and not only in legal relations between an individual and the public authorities. According to the second view, Drittwirkung is defined as the possibility for an individual to enforce his fundamental rights against another individual. Advocates of the latter view therefore consider that Drittwirkung of human rights is present only if an individual in his legal relation with other individuals is able to enforce the observance of the law concerning human rights via some procedure or other.*<sup>37</sup>

The distinction turns on whether there is a *right* to be enforced by the state, or whether there is a *remedy* which can be enforced by an individual. Third party effect is polysemic because it can focus on *who holds the right against whom* (private parties, inter se) or, instead, on *how may the right be enforced* (must the state intervene to enforce the right or may the private parties themselves somehow enforce it?). So, indirect effect may mean that the public law is of only *persuasive* value as to the interpretation of the private rights (in my opinion the better view); But it may instead mean that *the state* enforces the right, not the private party. Likewise "direct effect" sometimes means the right is expressly guaranteed; at other times, that the right vests in an individual (having a right) - as opposed to their state; and at other times, that the right is immediately enforceable in national law (having a remedy). Speaking in concrete terms about the facts in individual cases obviates the risk of confusion of those separate issues. Functionally, third party effect merely addresses 1) whether a right exists 2) who can enforce that right and 3) against whom.

<sup>30</sup> "it is often unclear how 'private' private property really is: when the Government reduces the tax payable on petrol, is this a subsidy to the oil companies? Is a state-regulated private monopoly 'private'? When a company relies entirely on tax incentives and government patronage, is it still 'private'? Why should it be different from a company where the State owns 51 per cent of the shares or from a company where the Government has a 'golden share'? Is a self-regulating occupational organisation, such as the Law Society, private?" Andrew Clapham, *Human Rights in the Private Sphere*, Oxford: Clarendon (1993), page 136.

<sup>31</sup> P. van Dijk, C.J.H. van Hoof, *Theory and Practice Of the European Convention on Human Rights*, page 15. Kluwer Law and Taxation Publishers: Deventer - Boston (1990).

<sup>32</sup> There are very different theories as to indirect third party effect ("sehr unterschiedlichen Theorien zur mittelbaren Drittwirkung"). Ted Oliver Ganten, *Die Drittwirkung der Grundfreiheiten*, at 26.

<sup>33</sup> „Auch bei der Untersuchung der Drittwirkung in eine mittelbare und eine unmittelbare entstehen wieder begriffliche Unschärfen, die geklärt werden müssen." (In the inquiry into third party direct and indirect effects as well, conceptual inexactitudes arise which must be clarified – author's translation). *Id.* at 26.

<sup>34</sup> Ted Oliver Ganten, *Die Drittwirkung der Grundfreiheiten*, page 26-27. Duncker & Humblot: Berlin (2000).

<sup>35</sup> *Id.* at p. 24.

<sup>36</sup> *Id.* at p. 26-27; Andrew Clapham, *Human Rights in the Private Sphere*, Oxford : Clarendon (1993), page 181.

<sup>37</sup> P. van Dijk, C.J.H. van Hoof, *Theory and Practice Of the European Convention on Human Rights*, page 15. Kluwer Law and Taxation Publishers: Deventer - Boston (1990).

## 7. Conclusion

The most logical understanding of the third party effect of public law rules to private law relations is as an expression of the economic constitution (*Wirtschaftsverfassung*) – public law rules constitute the private law order. However, though the idea of a purely economic constitution meshed perfectly with the *raison d'être* of a customs union, a purely economic constitution is inapt to the final logic of the Union. The advantages of the Union go beyond free trade and include the benefits of a single currency, common foreign and agricultural policy, and common cultural policies and ultimately even a common foreign and security policy: political goals which go beyond those of “merely” constituting a single integrated market. The idea of an economic constitution served Europe well in its first phase of economic integration but cannot by definition go beyond economic integration to political integration. So, aside from terminological problems, Third party effect may be conceptually inapt to Europe’s future. Further, in practice, third party effect is ambiguous and doctrinally contested. Rather than focus on the divergent meanings and theories of *Drittwirkung* the better inquiry would simply ask who has a right, how is the right enforced, against whom is it enforceable, and who enforces the right. That functional inquiry would obviate much theoretical and doctrinal confusion.