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# Dimensions of Fundamental Rights – Duty to Respect versus Duty to Protect

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CHRISTIAN CALLIESS

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### I. INTRODUCTION

**G**ENERALLY SPEAKING, GERMAN theory distinguishes between three objective and three subjective dimensions or functions of fundamental rights.<sup>1</sup> Objectively, they contain decisions on values,<sup>2</sup> for instance for human dignity or freedom,<sup>3</sup> which are fundamental constitutional decisions, applying to all areas of law, eg to statutory interpretations of private law.<sup>4</sup> Furthermore, one distinguishes between *Institutions* of public law, such as the professional civil service in Article 33(5) of the German Constitution (the 'Basic

<sup>1</sup> An introduction: B Pieroth and B Schlink, *Staatsrecht II*, 26th edn (Heidelberg, CF Müller, 2010) paras 75ff; K Stern, 'Idee und Elemente eines Systems der Grundrechte' in J Isensee and P Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol V (Heidelberg, CF Müller, 1992) § 109, para 27; W Cremer, *Freiheitsgrundrechte* (Tübingen, Mohr Siebeck, 2003) 8ff, who speak of functions.

<sup>2</sup> K Hesse, *Verfassungsrecht*, 20th edn (Heidelberg, CF Müller, 1995) paras 290ff.

<sup>3</sup> *Lüth* BVerfGE 7, 198, 205.

<sup>4</sup> *ibid*; C-W Canaris, 'Grundrechte und Privatrecht' (1984) 184 *Archiv für die civilistische Praxis* 201, 210ff.

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Law<sup>5</sup>) and *Institutes* of private law, such as private property or the law of succession in accordance with Article 14(1), sentence 1 of the Basic Law.<sup>6</sup>

The subjective dimensions of fundamental rights that are of special interest with regard to the subject of this chapter are referred to as *status negativus*, *status positivus* and *status activus*, notions introduced by Georg Jellinek.<sup>7</sup> *Status negativus* describes the fundamental rights in their 'classical' function as an individual's rights of defence (*grundrechtliches Abwehrrecht*) against interferences from state authorities, which in turn have a corresponding duty to respect these fundamental rights. On this basis, citizens can demand an omission by the state.<sup>8</sup> Contrary to this, the *status positivus* considers the fundamental rights as the individual's right to demand an action from state authorities. This action can consist in a single benefit (eg of the mother, Article 6(4) of the Basic Law), the granting of participation in a benefit (deriving for example from Article 12(1) of the Basic Law, eg the entrance into a public university)<sup>9</sup> or in the protection against private third parties (duty to protect, for instance from Article 2(2), sentence 1 of the Basic Law for the *nasciturus*,<sup>10</sup> ie an unborn child, against abortion).<sup>11</sup> Finally, the *status activus* signifies participatory rights, eg the right to vote set down in Article 38(1), sentence 1 of the Basic Law and the right of access to public offices pursuant to Article 33(1–3) and (5) of the Basic Law.<sup>12</sup>

On the basis of these dimensions, which correspond to the doctrine of Georg Jellinek and are generally accepted nowadays (yet still controversial), multipolar conditions of constitutional law emerge.<sup>13</sup> The latter can usually be found in the area of subjective dimensions of fundamental rights, especially in the constitutionally guaranteed *status negativus* and *status positivus*.

The *status negativus*, guaranteed by the fundamental right of defence, considers the individual's freedom as a limit to the actions of state authorities. They have a *duty to respect* the freedom guaranteed by this fundamental right. The *duty to respect* aims at protecting fundamental rights from unjustified interferences committed by the state. State authorities unilaterally act as a 'counterpart to the fundamental rights'. Their actions become relevant when they depreciate the freedom's potential contained within the scope of protection of a fundamental right.<sup>14</sup>

<sup>5</sup> Pieroth and Schlink, *Staatsrecht II* (n 1) para 76.

<sup>6</sup> On property: *Hamburgisches Deichordnungsgesetz* BVerfGE 24, 367, 389; on groundwater *Naßauskiesung* BVerfGE 58, 300, 339; on the right to inherit: BVerfGE 19, 202, 206.

<sup>7</sup> G Jellinek, *System der subjektiven öffentlichen Rechte*, 2nd edn (Tübingen, Mohr, 1905) 86ff; more detailed and critical: R Alexy, *Theorie der Grundrechte* (Frankfurt am Main, Suhrkamp, 1986) 229ff; differentiating Cremer, *Freiheitsgrundrechte* (n 1) 8ff.

<sup>8</sup> cf *Lüth* BVerfGE 7, 198, 204–05.

<sup>9</sup> BVerfGE 66, 155, 182ff.

<sup>10</sup> *Schwangerschaftsabbruch I* BVerfGE 39, 1, 41.

<sup>11</sup> On the terminology: Stern, 'Idee und Elemente eines Systems der Grundrechte' (n 1) paras 41ff.

<sup>12</sup> *ibid* para 48.

<sup>13</sup> C Calliess, *Rechtsstaat und Umweltstaat: Zugleich ein Beitrag zur Grundrechtsdogmatik im Rahmen mehrpoliger Verfassungsrechtsverhältnisse* (Tübingen, Mohr Siebeck, 2001) 256ff.

<sup>14</sup> J Isensee, 'Das Grundrecht als Abwehrrecht und staatliche Schutzpflicht' in Isensee and Kirchhof, *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (n 1) § 111, para 2; more detailed: B Schlink, 'Freiheit durch Eingriffsabwehr: Rekonstruktion der klassischen Grundrechtsfunktion' [1984] *Europäische Grundrechte-Zeitschrift* 457; Alexy, *Theorie der Grundrechte* (n 7) 272ff.



In contrast, owing to the *status positivus*, state authorities have the duty to guarantee the integrity of goods that are protected by the fundamental rights from interferences from other individuals. Instead of being repressed, like in the case of the duty to respect, the authority is called into action by a duty to protect.<sup>15</sup> It becomes clear that the duty to respect and the duty to protect as the basic dimensions of every fundamental right can safeguard the same good, but represent directly opposed functions of a freedom right.<sup>16</sup> The interferences have different origins; in the case of the duty to respect they derive from state authorities, whereas the duty to protect applies in the case of actions deriving from private persons, ie other individuals. Nevertheless, the duty to respect and the duty to protect share the same addressee: the state and its authorities.

Owing to this conflict of interests the respective state authority is pushed into a contradictory position. It must fulfil its duty to protect and meet the interests of defence at the same time.

The *status negativus*, the *status positivus* as well as the multipolar constitutional condition that they create find their principal foundation in the 'Basis Fundamental Right' of Article 1 of the Basic Law, which reads:

Article 1

- (1) Human dignity shall be inviolable. To *respect and protect* it shall be the duty of all state authority.
- (2) ...
- (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law

According to its wording, Article 1(1), sentence 2 of the Basic Law contains a dimension of defence ('*achten*', ie to respect) and a dimension of protection ('*schützen*', ie to protect). These dimensions draw a scope of protection around each fundamental right which protects it from any interference, regardless of whether it derives its origin from an act undertaken by state authorities or from an act of other private persons. Since all fundamental rights have a core, which is related to human dignity, the double dimension of defence and protection forms a fully-fledged 'ring of freedom' around every good or interest protected by fundamental rights. Hence, the duties to respect and to protect derive from the core of every fundamental right.

Via human dignity, which forms the core of every basic right (cf Article 79(3) of the Basic Law), the state authorities' duty to respect and to protect is transferred to all basic rights. Thus, the scope of every right's dimension of defence and of protection has its starting point in a common objective rule<sup>17</sup> which is expressed by every fundamental right. This objective rule – one might also call it the guarantee of the

<sup>15</sup> Isensee, 'Das Grundrecht als Abwehrrecht und staatliche Schutzpflicht' (n 14) para 3; more detailed: Alexy (n 7) 410ff.

<sup>16</sup> Calliess, *Rechtsstaat und Umweltstaat* (n 13) 307ff; Cremer (n 1) 504ff.

<sup>17</sup> cf BVerfGE 6, 32, 40; 35, 79, 114.

fundamental right<sup>18</sup> – is defined by the interest or object that is to be protected by the right.<sup>19</sup>

On the basis of Article 1, paragraph 3 of the Basic Law, the fundamental rights have a protective effect not only towards legislation, but also towards the application of rules and their interpretation.<sup>20</sup>

## II. THE DIMENSION OF DEFENCE OF FUNDAMENTAL RIGHTS (DIE GRUNDRECHTLICHE ABWEHRDIMENSION)

In a state governed by the rule of law, the fundamental rights serve as a benchmark for the assessment of all public action that interferes with individual freedom.<sup>21</sup> They create a duty to justify every interference from state authorities. As a consequence, the burden of proof lies with the state authorities with respect to the legitimacy of their action in the light of individual freedom.

Within this context, a particular dogmatic scheme (the so-called *Eingriffsschema*) was developed in a process involving jurisdiction and legal scholars.<sup>22</sup> This scheme distinguishes between three constituent elements:

First, there is a distinction between the scope of protection and the possibility to restrain the fundamental right.<sup>23</sup> In most rights guaranteed by the Basic Law, this latter element is laid down by the consecutiveness of the guarantee and the possibilities of limitation expressed. This distinction is already expressed in the wording of most basic rights:

### Article 5

- (1) Everyone has the right to freely express and disseminate his opinion . . .
- (2) These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons and in the right to personal honour.

### Another example:

### Article 14

- (1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.

<sup>18</sup> cf Alexy (n 7) 224ff.

<sup>19</sup> cf Isensee (n 14) paras 40–41; Hesse, *Verfassungsrecht* (n 2), para 310 who talks about ‘Normbereich’.

<sup>20</sup> G Lütke-Wolff, *Grundrechte als Eingriffsabwehrrechte* (Baden-Baden, Nomos, 1988) 28–29; Alexy (n 7) 100ff and 300ff; P Lerche, ‘Grundrechtsschranken’ in Isensee and Kirchhof (n 1) § 122, paras 3ff.

<sup>21</sup> BVerfGE 7, 198, 204; M Sachs, ‘Abwehrrechte’ in D Merten and H-J Papier (eds), *Handbuch der Grundrechte in Deutschland und Europa*, vol II (Heidelberg, CF Müller, 2006) § 39, paras 6ff; Cremer (n 1) 74ff; the approach of R Poscher is too far-reaching: R Poscher, *Grundrechte als Abwehrrechte* (Tübingen, Mohr Siebeck, 2003) 167ff.

<sup>22</sup> More detailed: Lütke-Wolff, *Grundrechte als Eingriffsabwehrrechte* (n 20) 25ff; Alexy (n 7) 249ff; Isensee (n 14) paras 37ff; P Lerche, ‘Grundrechtlicher Schutzbereich, Grundrechtsprägung und Grundrechtseingriff’ in Isensee and Kirchhof (n 1) § 121, paras 11ff and Lerche (n 20) paras 1ff.

<sup>23</sup> cf Alexy (n 7) 272ff; Cremer (n 1) 74 and 136ff.



This also demonstrates that an interference in a right does not automatically constitute a violation of the right, insofar as a distinction is made between the scope of protection of the fundamental rights and their effective scope of guarantee.<sup>24</sup>

It is this scope of guarantee to which the second element of the scheme refers, the distinction between the fundamental rights' formal and substantial function of protection. From a formal point of view, this function requires that any interfering measure must either be a law/statute or – in the case of an individual act – be based on a law/statute.

The substantive function of protection results from the interplay between the fundamental right and the limiting statute, which finds its concrete shape in the test of proportionality.<sup>25</sup> In the light of this principle (following from the idea of fundamental rights and their limits as well as from the rule of law) every state action has to pass a three-level test:<sup>26</sup> first, state action needs to be suitable for reaching the intended aim. Secondly, state action has to prove to be necessary, in order to reach the intended aim. This means that no other available measure can reach the intended aim in a similarly effective but less freedom-limiting way. Thirdly, state action has to be appropriate. To that end, a fair balance between the intended aim and the protected interest enshrined in the fundamental right in question has to be proven by state authorities.

The third element in the dogmatic scheme is the notion of interference.<sup>27</sup> It is the connection between the aforementioned formal and substantive functions to protect.<sup>28</sup> With regard to a changing environment and the new challenges to the protection of individual rights, the notion of interference has been extended over the years. Today it does not matter anymore if the interference of state authorities is made intentionally (*finaler Eingriff*) or merely de facto (*faktischer Eingriff*).

These elements of the 'interference scheme' constitute the conditions for the legitimation, the lawfulness or unlawfulness of interferences in fundamental rights and thereby of any action taken by state authorities. Hence, any action taken by state authorities is considered as an intervention in individual freedom and, as such, faces the pressure of legitimation.

In this relation of rule and exception, which works in combination with the guarantee of each fundamental right, the citizen's freedom and the state authorities' corresponding responsibility are expressed. As a consequence, any measure taken by state authorities constitutes an interference in a fundamental right which must then be legitimated from a formal perspective by statutory law and from a substantive perspective with regard to the citizen's constitutional rights.<sup>29</sup>

<sup>24</sup> Lütke-Wolff (n 20), 25–26; Alexy (n 7) 251ff.

<sup>25</sup> BVerfGE 7, 198, 205 and 208–09; BVerfGE 19, 342, 348ff49.

<sup>26</sup> BVerfGE 7, 198, 205 and 208–09; Lütke-Wolff (n 20) 29; Alexy (n 7), 267ff.

<sup>27</sup> cf U Di Fabio, *Risikoentscheidungen im Rechtsstaat* (Tübingen, Mohr, 1994) 425ff; Lütke-Wolff (n 20) 42ff; Cremer (n 1) 162ff with more references.

<sup>28</sup> Lütke-Wolff (n 20) 30ff.

<sup>29</sup> Isensee (n 14) para 47; Lütke-Wolff (n 20) 125ff; Schlink, 'Freiheit durch Eingriffsabwehr' (n 14) 457, 467–68.

To that end, the fundamental rights dimension of defence and the state authorities' corresponding duty to respect work in favour of the maintenance of the status quo. However, the status quo is not conserved forever by the fundamental rights, but is preconditioned as legitimate. As a consequence, state authorities in general – and especially the legislator – must balance every attempted reform with the citizen's protected rights and prove its 'better right'.<sup>30</sup> Thus, the burden of legitimation is not on the state authorities because they want to change the status quo, but because they want to defy the citizen's fundamental rights. This is where the fundamental rights' dimension of protection comes into play: when state authorities want to interfere in the scope of protection of a fundamental right, they are obliged to legitimize their action, whereas the beneficiary of that right does not need to justify his acts or omissions, as long as he acts within the limits of his right.<sup>31</sup>

### III. THE DIMENSION OF PROTECTION BY FUNDAMENTAL RIGHTS (DIE GRUNDRECHTLICHE SCHUTZDIMENSION)

#### A. The Jurisdiction of the Federal Constitutional Court ('BVerfG')

Threats to and interferences in fundamental rights are not merely caused by state acts but also by acts of private persons.<sup>32</sup> Based on the objective dimension of fundamental rights, the doctrine of values contained in fundamental rights (the so-called *objektive Wertordnungslehre*),<sup>33</sup> the Federal Constitutional Court developed in 1958 the objective duty of the judiciary to interpret private law in the light of the values enshrined in the Constitution. With the first judgment of the Federal Constitutional Court on the punishability of abortion in 1973,<sup>34</sup> a duty of the legislator to protect fundamental rights (in this case it was the life of the unborn child) was introduced into German constitutional law. According to the case law<sup>35</sup> of the Federal Constitutional Court, the duties to protect derive on the one hand from the objective values contained in the affected fundamental right, the aforementioned *objektive Wertordnungslehre*.<sup>36</sup> On the other hand, the state authorities' duty to protect stems from human dignity as enshrined in Article 1(1) and 1(3) of

<sup>30</sup> Isensee (n 14) para 47.

<sup>31</sup> With reference to Isensee (n 14) para 47.

<sup>32</sup> More detailed: D Murswiek, 'Freiheit und Freiwilligkeit im Umweltrecht' [1998] *JuristenZeitung* 985, 987ff; Isensee (n 14) paras 83ff; Calliess (n 13) 307ff.

<sup>33</sup> See *Lüth* BVerfGE 7, 198, 205; U Di Fabio, 'Zur Theorie eines grundrechtlichen Wertesystems' in Merten and Papier, *Handbuch der Grundrechte in Deutschland und Europa* (n 21) § 46, paras 4ff; critical Cremer (n 1) 191ff.

<sup>34</sup> *Schwangerschaftsabbruch I* BVerfGE 39, 1, 41.

<sup>35</sup> *Schleyer* BVerfGE 46, 160, 164; *Kalkar I* BVerfGE 49, 89, 140–41; *Mülheim-Kärlich* BVerfGE 53, 30, 57; *Fluglärm* BVerfGE 56, 54, 73; *Schwangerschaftsabbruch II* 88, 203, 251; BVerfG [1998] *Neue Juristische Wochenschrift* 3264 and BGHZ 102, 350, 365 – on damages to forests.

<sup>36</sup> *Schwangerschaftsabbruch I* BVerfGE 39, 1, 42; *Schleyer* 46, 160, 164; *Kalkar I* 49, 89, 141; *Mülheim-Kärlich* 53, 30, 57; *Fluglärm* 56, 54, 73.



the Basic Law. This has been explicitly confirmed by the Federal Constitutional Court in its second judgment concerning the punishability of abortion:

The reason for the duty to protect lies in Article 1, paragraph 1 of the Basic Law, which explicitly obliges the State to respect and to protect human dignity; its object – and, through this, its extent – are specified by Article 2, paragraph 2 of the Basic Law.<sup>37</sup>

These two lines of dogmatic reasoning are obviously linked by the idea that Article 1(1), sentence 2 ('and protect') and Article 1(3) of the Basic Law oblige state authorities to ensure the implementation of the value-decision contained in the objective contents of the fundamental right in question. On this basis, the Federal Constitutional Court acknowledged a duty to protect not only with regard to unborn life from abortion,<sup>38</sup> but also with regard to the threats of peaceful use of nuclear energy,<sup>39</sup> chemical weapons,<sup>40</sup> road traffic noise and aircraft noise<sup>41</sup> and other aspects of environmental pollution. The central point of these decisions is the basic right to life and physical integrity enshrined in Article 2(2) of the Basic Law. Even so, it is also accepted that – like in the cases of damage to the environment (forests) by air pollution – duties to protect can derive from the right to property in Article 14(1) of the Basic Law.<sup>42</sup>

Naturally, not every duty to protect acknowledged by the Court has led to concrete consequences. When examining whether a duty to protect has been fulfilled, the Federal Constitutional Court<sup>43</sup> stresses the legislator's margin of appreciation to weigh up and to balance the different protected interests that may conflict with each other. However, the jurisprudence is inconsistent with regard to the criteria of examination. The Court distinguishes between a control of obvious interference (test of evidence), of tenability and of content.<sup>44</sup> Usually, it only carries out a 'control of evidence', which means that it examines whether there is an 'obvious' violation of the basic right in question.<sup>45</sup> In recent times, the Court has on occasions referred to the benchmark of the prohibition of insufficient means (*Untermaßverbot*).<sup>46</sup> According to this principle, a sufficient and appropriate protection is necessary when taking conflicting interests into account; the crucial point is that the protection is effective. The provisions made by the legislator must be sufficient for an appropriate and effective protection and must be based on a

<sup>37</sup> BVerfGE 88, 203, 251–52.

<sup>38</sup> *Schwangerschaftsabbruch I* BVerfGE 39, 1, 41–42; *Schwangerschaftsabbruch II* 88, 203, 251.

<sup>39</sup> *Kalkar I* BVerfGE 49, 89, 140ff; *Mülheim-Kärlich* BVerfGE 53, 30, 57ff.

<sup>40</sup> BVerfGE 77, 170, 214–15; more precisely: *Straßenverkehrslärm* 79, 174, 201–02.

<sup>41</sup> *Straßenverkehrslärm* BVerfGE 79, 174, 201–02; *Fluglärm* 56, 54, 73–4.

<sup>42</sup> BVerfG [1998] *Neue Juristische Wochenschrift* 3264, 3265–66.

<sup>43</sup> *Fluglärm* BVerfGE 56, 54, 81.

<sup>44</sup> BVerfGE 50, 290, 332–33.

<sup>45</sup> BVerfG [1996] *Neue Juristische Wochenschrift* 651 and [1996] *Europäische Grundrechte-Zeitschrift* 120.

<sup>46</sup> *Schwangerschaftsabbruch II* BVerfGE 80, 203, 254; on the *Untermaßverbot* debate in detail, see C Calliess, 'Die Leistungsfähigkeit des Untermaßverbots als Kontrollmaßstab grundrechtlicher Schutzpflichten' in R Grote and others (eds), *Festschrift für Christian Starck* (Tübingen, Mohr Siebeck, 2007) 201ff.

careful investigation of the facts as well as on an acceptable appraisal.<sup>47</sup> Unlike the control of evidence, the control based on the prohibition on insufficient means enables a more precise extent of control. Whether the minimum standard of protection is guaranteed is examined by the Federal Constitutional Court in a check on justifiability, which requires a careful investigation of the facts.<sup>48</sup>

Since the Federal Constitutional Court's decision on chemical weapons<sup>49</sup> it has generally been accepted that the violation of the duty to protect constitutes a violation of the fundamental right. Only from then on has it been explicitly clear that the state authorities' duty to protect corresponds to a subjective right to remedy through protection,<sup>50</sup> which can be claimed by a constitutional complaint if state authorities should omit to protect.<sup>51</sup>

## B. The Debate in German Doctrine

A large part of the German doctrine has agreed to the Court's jurisprudence on the duty to protect;<sup>52</sup> only some authors reject any constitutional duty to protect based on fundamental rights. One major argument is the principle of separation of powers and the fear of too much influence of the constitutional judiciary to the detriment of the Parliament.<sup>53</sup> However, predominantly the Court's dogmatic reasoning – not the duty to protect in itself – has been criticized.<sup>54</sup> First, the Federal Constitutional Court's theory of an objective order of constitutional values as well as the objective content of fundamental rights that is based on this dogmatic argument is criticized.<sup>55</sup> Moreover, the Federal Constitutional Court is criticized for the fact that it has not sufficiently clarified how a subjective duty to protect can derive from the fundamental rights' objective content.<sup>56</sup>

<sup>47</sup> *Schwangerschaftsabbruch II* BVerfGE 88, 203, 254.

<sup>48</sup> See the dissenting opinions of Mahrenholz and Sommer JJ BVerfGE 88, 203, 355.

<sup>49</sup> BVerfGE 77, 170, 214–15; more precisely: *Straßenverkehrslärm* 79, 174, 201–02.

<sup>50</sup> *ibid.*

<sup>51</sup> Cremer (n 1) 326ff and 355.

<sup>52</sup> J Dietlein, *Die Lehre von den grundrechtlichen Schutzpflichten* (Berlin, Duncker & Humblot, 1992) 51ff, especially 64ff; Hesse (n 2) para 350; Alexy (n 7) 410ff; Stern (n 1) para 59; Isensee (n 14) para 82; E Klein 'Grundrechtliche Schutzpflicht des Staates' [1989] *Neue Juristische Wochenschrift* 1633; HH Klein, 'Die grundrechtliche Schutzpflicht' [1994] *Deutsches Verwaltungsblatt* 489; G Hermes, *Das Grundrecht auf Schutz von Leben und Gesundheit* (Heidelberg, CF Müller, 1987) 58ff; M Ruffert, *Vorrang der Verfassung und Eigenständigkeit des Privatrechts* (Tübingen, Mohr Siebeck, 2001) 141, 152ff; Calliess (n 13) 437ff; Cremer (n 1) 228ff; E-W Böckenförde, *Staat, Verfassung, Demokratie* (Frankfurt am Main, Suhrkamp, 1991) 159ff.

<sup>53</sup> Schlink (n 14); Poscher (n 21) 167ff.

<sup>54</sup> Cremer (n 1) 229ff; M Jestaedt, *Grundrechtsentfaltung im Gesetz* (Tübingen, Mohr Siebeck, 1999) 42ff; Böckenförde, *Staat, Verfassung, Demokratie* (n 52) 159ff, 190 with more references.

<sup>55</sup> K Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, vol III 1 (Munich, CH Beck 1988) 945ff; Isensee (n 14) para 81; Cremer (n 1) 191ff, 217.

<sup>56</sup> See the dissenting opinion to BVerfGE 39, 1, 68, 73ff; Stern (n 55) 945; Klein, 'Grundrechtliche Schutzpflicht des Staates' (n 52) 1635; C Starck, 'Grundrechtliche Schutzpflichten' in C Stark (ed), *Praxis der Verfassungsauslegung* (Baden Baden, Nomos, 1994) 46, 72.



Against this background, a part of German doctrine explains the duty to protect by the responsibility of state authorities to ensure security. Referring to Thomas Hobbes' philosophy of a contract between state (King) and citizens, which forms the basis of the state's monopoly on the use of force and its corresponding duty to ensure the peace of its citizens, state authorities are obliged to guarantee protection among the citizens themselves. Citizens have a fundamental right to be protected (*Grundrecht auf Sicherheit*).<sup>57</sup> Other authors<sup>58</sup> suggest on the basis of these arguments an approach that puts the duty to protect on a level with the dimension of defence of fundamental rights, the state authorities' duty to respect, by extending the notion of interference. If state authorities allow, by statute, certain acts or behaviour to the citizens, they interfere at the same time with fundamental rights of other citizens. The aforementioned obligation to the peaceful settlement of conflicts forces citizens to tolerate these lawful interferences. As a consequence, the non-prohibition of these (originally private) interferences can be treated as an action by state authorities. Thus, what state authorities do authorize is in their responsibility and therefore – in a wider sense – a public interference. By extending the understanding of public interference, an attribution of private behaviour to state authorities should be attained in order to activate the fundamental rights in their dimension of defence.

The attempts to extend the notion of interference primarily result from the convincing analysis that the efficiency of the fundamental right's dimension of protection (duty to protect) remains weak compared to the fundamental right's dimension of defence (duty to respect).<sup>59</sup> In that sense, the extended notion of interference constitutes a possible reaction to the new threats to positions protected by the fundamental rights. But this can only be convincing to a certain extent.<sup>60</sup> Faced with the fact that a wide scope of protection in conjunction with a wide notion of interferences leads to a precondition that every interference committed by the state must be based on a law (so-called *Totalvorbehalt*), an unlimited widening of the understanding of public interference would undermine the administration's efficiency and flexibility and considerably decrease the legislator's freedom of scope. Ultimately, such an unlimited extension of the dimension of defence would lead to a shift of power to the judiciary, which would not only

<sup>57</sup> cf J Isensee, *Grundrecht auf Sicherheit* (Berlin, de Gruyter, 1983) 34ff; Isensee (n 14) paras 83ff; Stern, *Das Staatsrecht der Bundesrepublik Deutschland* (n 55) 932ff; E Klein (n 52) 1635–36; Klein, 'Die grundrechtliche Schutzpflicht' (n 52) 492–93; fundamental critic: C Möllers, *Staat als Argument* (Munich, CH Beck, 2000) 207ff.

<sup>58</sup> cf J Schwabe, *Probleme der Grundrechtsdogmatik* (PhD thesis, University of Darmstadt, 1977) 19, 40, 213ff; D Murswiek, *Die staatliche Verantwortung für die Risiken der Technik* (Berlin, Duncker & Humblot, 1985) 61ff, 88ff, 102ff; T Koch, *Der Grundrechtsschutz des Drittbetroffenen* (Tübingen, Mohr Siebeck, 2000) 72ff; Poscher (n 21) 156, 167ff.

<sup>59</sup> In that sense: A Roth, *Verwaltungshandeln mit Drittbetroffenheit und Gesetzesvorbehalt* (Berlin, Duncker & Humblot, 1991) 132–33; B Weber-Dürler 'Der Grundrechtseingriff' (1998) 57 *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer* 78.

<sup>60</sup> See W Roth, *Faktische Eingriffe in Freiheit und Eigentum* (Berlin, Duncker & Humblot, 1994) 261ff; Weber-Dürler, 'Der Grundrechtseingriff' (n 59) 75–76; A Roth, *Verwaltungshandeln mit Drittbetroffenheit und Gesetzesvorbehalt* (n 59) 141–42, 210ff; Calliess (n 13) 410ff; Cremer (n 1) 99, 162ff.



threaten the separation of powers, but also the legal security.<sup>61</sup> However, in order to avoid an excessive extension of the dimension of defence, the potential of the dimension of protection needs to be further examined dogmatically.

### C. Conclusions

For the abovementioned reasons it is necessary to understand the state authorities' duty to protect as a dogmatic dimension of protection of human rights of its own. Of course the state's monopoly on the use of force and the corresponding private duty to peace cannot be the dogmatic basis for a fundamental right to be protected; this argument can only explain their origin in a historical sense.<sup>62</sup> Constitutionally the derivation and reasoning of the duty to protect from human dignity, as enshrined in Article 1 of the Basic Law, is of importance. In accordance with Article 1(1), sentence 2 of the Basic Law, every fundamental right contains a dimension of defence (*achten*, ie to respect) and a dimension of protection (*schützen*, ie to protect).<sup>63</sup>

According to the constitutional conception that fundamental rights are rules conferring subjective rights,<sup>64</sup> the state's duty to protect must correlate with a claim of the right holder to demand omission or protection. As a consequence, the state is obliged to ward off any private interference in a third party's goods or interests protected by fundamental rights or to prevent the threat or risk of any such interference.

The concrete determination of the legal consequences of the duty to protect depends on the quality of the good or interest protected by the Constitution. Concerning the goods protected by Article 2(2), sentence 1 of the Basic Law, the situation is unproblematic. Life is the precondition for the exercise of all fundamental rights, the physical integrity for some of them. Therefore, both of them have a superior rank within the Basic Law.<sup>65</sup> Compared to this, the right of property in Article 14(1) of the Basic Law ranks lower.<sup>66</sup> Furthermore, the quality of the existing rules needs to be taken into account.

In the event that there is no statutory law, or that the statutory law does not provide efficient protection for the affected goods and interests, a duty of state authorities, especially the legislature, emerges to protect these from private inter-

<sup>61</sup> Roth (n 59) 163ff; A Scherzberg, "Objektiver Grundrechtsschutz und subjektives Grundrecht" [1989] *Deutsches Verwaltungsblatt* 1128, 1130; Weber-Dürler (n 59) 76–77; H-U Gallwas, *Faktische Beeinträchtigungen im Bereich der Grundrechte* (Berlin, Duncker & Humblot, 1970) 75, 94–95; Stern (n 55) 1207; differentiating Lübke-Wolff (n 20) 72ff, 228ff, 308ff; Cremer (n 1) 86, 99, 162ff with more references.

<sup>62</sup> Möllers, *Staat als Argument* (n 57) 207ff; Calliess (n 13) 88ff; in detail Cremer (n 1) 258ff.

<sup>63</sup> Calliess (n 13) 437ff; in detail Cremer (n 1) 234ff.

<sup>64</sup> See Alexy (n 7) 159ff; U Ramsauer, 'Die Rolle der Grundrechte im System der subjektiven öffentlichen Rechte' (1986) 111 *Archiv des öffentlichen Rechts* 502, 513ff.

<sup>65</sup> cf Isensee (n 14) para 98.

<sup>66</sup> H-H Trute, *Vorsorgestrukturen und Luftreinhalteplanung im Bundesimmissionsschutzgesetz* (Heidelberg, v Decker, 1989) 239; Isensee (n 14) para 141.



ferences.<sup>67</sup> When private persons interfere in goods or interests protected by fundamental rights, the affected person can claim a sufficient protection against risks by state authorities.<sup>68</sup> However, the content of this claim cannot be easily determined in an abstract way, since duties to protect – unlike the duties to respect which aim at a particular action by state authorities – cannot be fulfilled by only one action. As a consequence, the duty to protect leaves to the state authorities, especially the primarily responsible legislator, a margin of appreciation concerning the way of fulfilling the duty. However, the aim of the state authorities' discretionary power is always the efficient accomplishment of the duty to protect, so that a minimum standard of protection must be guaranteed. The benchmark for this minimum standard is the prohibition of insufficient means (the so-called *Untermaßverbot*). Thus, the effective extent of the duty to protect must be determined by the prohibition of insufficient means, which corresponds to the principle of proportionality, but is not identical with the latter.<sup>69</sup> Both have different concepts corresponding to their respective dogmatic origin and their different dogmatic functions (on the one hand, an omission or the limitation of a state action is desired, on the other hand, an action from the state is demanded), but there are similarities in their structure.

Just as it is the case with the principle of proportionality, the prohibition of insufficient means can be examined with the help of a three-step test:<sup>70</sup>

preliminary question: is there a concept of protection by the state with regard to the good or interest protected by the respective fundamental right that is affected by private action?

if yes, is this concept of protection able to protect the good or interest effectively? (first step)

if yes, is there a concept of protection that ensures a more effective protection than the concept that is in use without interfering in a stronger way in the rights of third parties or having an impact on public interests? In other words: is there a more efficient concept that is (just) as mild (second step)? In this way, parts of the concept of protection can also be examined on their effectiveness and possibly be considered as violating the prohibition of insufficient means due to their lack of effectiveness.

if yes, is the protection appropriate with regard to the conflicting goods or interests (third step)? It has to be examined whether it is just and reasonable to have the affected person consent to the remaining threats and risks for the protected good or interest with regard to the conflicting private and public interests with

<sup>67</sup> cf BVerfGE 53, 30, 57–58, 65ff.

<sup>68</sup> cf *ibid.*

<sup>69</sup> J Dietlein, 'Das Untermaßverbot' [1995] *Zeitschrift für Gesetzgebung* 131, 134ff; Calliess, 'Die Leistungsfähigkeit des Untermaßverbots als Kontrollmaßstab grundrechtlicher Schutzpflichten' (n 46) 201ff; different opinion K-E Hain, 'Der Gesetzgeber in der Klemme zwischen Übermaß- und Untermaßverbot' [1993] *Deutsches Verwaltungsblatt* 982, 983.

<sup>70</sup> See Calliess (n 13) 577ff with further references.

which it needs to be brought in balance. Here, at the third step, the relevant aspects of the principle of proportionality and the relevant aspects of the prohibition of insufficient means come together.<sup>71</sup>

However, state authorities do not comply with their duty to protect just by an act of legislation. With regard to the rule of law, a statute is a necessary step, but pursuant to Article 1(3) of the Basic Law they also have to ensure the law's effective implementation and acceptance. To this end, the duty to protect is a benchmark for the executive and judiciary for the application and interpretation of statutes to the effect that in cases of doubt, they must be interpreted in such a way that they provide effective protection. Indeed, according to the dynamic character of the duty to protect, the legal provisions must be adapted to the technical and social changes.

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#### IV. FUNDAMENTAL RIGHTS AND PROCEDURE (DUE PROCESS)

The procedural guarantee of fundamental rights complements the rights' dimensions of defence and of protection.<sup>72</sup> Since German understanding of public law generally follows in general a rather substantive approach, procedural elements are understood rather as a supplement. Against this background, procedural aspects of law primarily possess a compensatory function. Therefore, the procedural supplement is more mandatory, the weaker the substantial power of control of the fundamental right is in the individual case. From that point of view, the procedural protection of fundamental rights has a particular significance in the field of duties to protect, which – as mentioned above – necessarily leave a relatively wide margin of appreciation to the legislator.<sup>73</sup>

The procedural protection of fundamental rights can be achieved via information, participation and legal protection.<sup>74</sup>

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This procedural *triad* is not only reflected in German environmental and technical law, but is also defined by European and public international law. As the European Court of Human Rights in Strasbourg declared in *Guerra*,<sup>75</sup> the effective accomplishment of the duty to protect deriving from Article 8 of the European Convention on Human Rights confers a right to information to the concerned person. Such a right to information can also derive from the fundamental rights:

<sup>71</sup> Critical with regard to this third step Cremer (n 1) 314ff.

<sup>72</sup> See K Hesse, 'Bestand und Bedeutung der Grundrechte in der Bundesrepublik Deutschland' [1978] *Europäische Grundrechte-Zeitschrift* 427, 434; P Lerche, 'Vorbereitung grundrechtlichen Ausgleichs durch gesetzgeberisches Verfahren' in P Lerche and others (eds), *Verfahren als staats- und verwaltungsrechtliche Kategorie* (Heidelberg, CF Müller, 1984) 97, 101ff; E Schmidt-Aßmann, 'Grundrechte als Organisations- und Verfahrensgarantien' in Merten and Papier (n 21) § 45, paras 5ff; Cremer (n 1) 394ff; see as well BVerfGE 24, 367, 401; 53, 60, 65; 88, 203, 281ff.

<sup>73</sup> Schmidt-Aßmann, 'Grundrechte als Organisations- und Verfahrensgarantien' (n 72) paras 12, 20–21.

<sup>74</sup> See Calliess (n 13) 467 ff.

<sup>75</sup> *Guerra and others v. Italy*, App no 14967/89 (ECtHR, 19 February 1998) paras 58ff.

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without information, the persons concerned cannot assess the consequences or risks that are caused by a state authority's action. However, this is an indispensable condition for an action taken by the person concerned, so that any protection of the affected interests remains ineffective without the necessary information. The right to information is therefore a necessary precondition for the protection of fundamental rights.

In the same way, participation of concerned persons (eg in the authorization procedure of an industrial or infrastructure project) belongs to the minimum of procedural protection of fundamental rights.<sup>76</sup> Participation is recompense for the lack of influence on the decisions within the administration and for the limited protection of individual rights owing to the usually low degree of control,<sup>77</sup> which is almost typical for the fundamental rights' duties to protect. This applies particularly in fields where the legislator leaves a wide margin of appreciation to the executive and administration by the use of undefined notions. In this case, the decisive definition of the fundamental rights of the person concerned is not made by the legislator, but during the administrative procedure. The effective participation is a necessary compensation for the indefiniteness of legal rules and the low control by courts that is caused by it.<sup>78</sup>

The access to justice is an important element of the procedural protection of fundamental rights. Corresponding to a tendency in European law, a widening of individual legal protection which lowers the exigencies on the claimant to be affected in its own rights becomes important. Different from German law which entitles claimants access to court only when they can prove to have been potentially violated in an individual right, European law entitles claimants to take action when individual interests are infringed, interests that belong to those protected by the applicable law.<sup>79</sup>

#### V. DUTY TO RESPECT VERSUS DUTY TO PROTECT – ONLY A GERMAN DEBATE?

Apart from merely bipolar relations, the fundamental rights' dimensions of defence and of protection and the corresponding state authorities' duty to respect and to protect are inseparably connected. With the duty to protect, state authorities become a guarantor of fundamental rights with regard to private interferences. But when they execute their duty, state authorities have to intervene in the fundamental rights of third parties. Against this background, the extent of individual freedom is reflected in the double dimension of fundamental rights,

<sup>76</sup> BVerfGE 53, 30, 66.

<sup>77</sup> cf BVerfGE 61, 82, 115; BVerwG [1985] *Neue Zeitschrift für Verwaltungsrecht* 745.

<sup>78</sup> The Federal Constitutional Court is not that explicit. But in that sense, see the dissenting opinion of Heußner and Simon JJ BVerfGE 53, 69, 75, 77ff; as well as D Grimm, 'Verfahrensfehler als Grundrechtsverstöße' [1985] *Neue Zeitschrift für Verwaltungsrecht* 865, 871.

<sup>79</sup> On the specifications of European Law: BW Wegener, *Rechte des Einzelnen* (Baden-Baden, Nomos, 1998) 295–96.

between the duty to respect and the duty to protect. From this point of view, the scope of protection of a fundamental right can be determined only in a multipolar context by passing a multipolar test of proportionality including a balance of interest.<sup>80</sup> The principle of proportionality on the one hand (duty to respect, dimension of defence) and the prohibition of insufficient means of the duty to protect (dimension of protection) on the other, form a kind of corridor<sup>81</sup> within which the legislator has a margin of appreciation, how to weigh up the conflicting interests and to bring them into balance. This margin of appreciation ensures the separation of powers, especially between legislature and judiciary. Concerning the Court's extent of control, it must be congruent with regard to the state authorities' measures in question, in order to ensure the necessary symmetry between the conflicting dimensions of fundamental rights in multipolar constitutional relations – in concrete terms, the duty to respect and the duty to protect.

Is that concept of a multipolar perspective on fundamental rights including a state authority's duty to protect only a 'German affair'? To a certain extent it is, because the debate has its origin and strongest supporters in German jurisdiction and doctrine. On the other hand, a state authority's duty to protect that derives from fundamental rights can not only be found in Germany but also in Austria<sup>82</sup> and – at least partially – in France<sup>83</sup> and Ireland.<sup>84</sup> Moreover, the European Court of Human Rights in Strasbourg has acknowledged a state authority's duty to protect under the term of 'positive obligations'.<sup>85</sup> In the case of *López Ostra*, the Court developed a duty to protect with regard to the right to respect for private and family life guaranteed by Article 8 of the Convention.<sup>86</sup> However, the Strasbourg Court repeated its remarks made in the case of *Powell and Rayner*<sup>87</sup> which – from

<sup>80</sup> Calliess (n 13) 566ff.

<sup>81</sup> Critical: Hain, 'Der Gesetzgeber in der Klemme zwischen Übermaß- und Untermaßverbot' (n 69) 984; such a model is indicated by the opinions of C-W Canaris, 'Grundrechtswirkungen und Verhältnismäßigkeitsprinzip in der richterlichen Anwendung und Fortbildung des Rechts' [1989] *Juristische Schulung* 161, 163–64; HD Jarass, 'Grundrechte als Wertentscheidungen' (1985) 110 *Archiv des öffentlichen Rechts* 363, 382ff; A Scherzberg, *Grundrechtsschutz und Eingriffsintensität* (Berlin, Duncker & Humblot 1989) 221–22; Isensee (n 14) paras 165–66; explicitly on such a corridor: W Hoffmann-Riem, 'Reform des Allgemeinen Verwaltungsrechts: Vorüberlegungen' [1994] *Deutsches Verwaltungsblatt* 1381, 1384–85; Cremer (n 1) 310.

<sup>82</sup> cf R Feik, 'Staatliche Gewährleistungspflichten und Nachbarrechte im gewerblichen Betriebsanlagenrecht' in C Grabenwarter and R Thienel (eds), *Kontinuität und Wandel der EMRK: Studien zur Europäischen Menschenrechtskonvention* (Kehl, Engel, 1998) 205ff with more references.

<sup>83</sup> CD Classen, 'Die Ableitung von Schutzpflichten des Gesetzgebers aus Freiheitsrechten – ein Vergleich von deutschem und französischem Verfassungsrecht sowie der Europäischen Menschenrechtskonvention' (1987) 36 *Jahrbuch des öffentlichen Rechts* 29, 30ff; M Ruffert, *Subjektive Rechte im Umweltrecht der Europäischen Gemeinschaft – unter besonderer Berücksichtigung ihrer prozessualen Durchsetzung* (Heidelberg, v Decker, 1996) 52ff; Peter Szczekalla, *Die sogenannten grundrechtlichen Schutzpflichten im deutschen und europäischen Recht* (Berlin, Duncker & Humblot 2002) 919ff.

<sup>84</sup> Szczekalla, *Die sogenannten grundrechtlichen Schutzpflichten im deutschen und europäischen Recht* (n 83) 917ff.

<sup>85</sup> cf R Schmidt-Radefeldt, *Ökologische Menschenrechte: Ökologische Menschenrechtsinterpretation der EMRK und ihre Bedeutung für die umweltschützenden Grundrechte des Grundgesetzes* (Baden-Baden, Nomos, 2000) 66ff; Szczekalla (n 83) 712ff.

<sup>86</sup> *López Ostra v Spain*, App no 16798/90 (ECtHR, 9 December 1994) para 51.

<sup>87</sup> *Powell and Rayner v UK*, App no 9310/81 (ECtHR, 21 February 1990) para 41.



a dogmatic point of view – blur the distinction between dimension of defence and of protection:

Whether the question is analysed in terms of a positive duty on the State – to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8 (art. 8-1) – as the applicant wishes in his or her case, or in terms of an 'interference by a public authority' to be justified in accordance with paragraph 2 (art. 8-2), the applicable principles are broadly similar. In both contexts attention must be paid to the fair balance that has to be obtained between the competing interests of the individual and of the community as a whole – however in any case the State enjoys a certain margin of appreciation.<sup>88</sup>

In *Guerra*,<sup>89</sup> on the other hand, the Strasbourg Court explicitly stressed that an effective protection of the right to private and family life also covers positive obligations (in that case an obligation to information). According to this, duties to protect deriving from the European Convention of Human Rights are acknowledged, even without a clear dogmatic foundation.<sup>90</sup>

Finally, with regard to EU law, the European Court of Justice acknowledged that intra-Community trade is as likely to be obstructed by a positive act as by

the fact that a Member State abstains from taking action or, as the case may be, fails to adopt adequate measures to prevent obstacles to the free movement of goods that are created, in particular, by actions by private individuals on its territory aimed at products originating in other Member States.<sup>91</sup>

Thus, Article 34 TFEU in combination with Article 4(3) TEU obliges Member States to take all necessary and adequate measures in order to ensure the respect of this fundamental freedom. On this ground, Member States have a duty to protect with regard to the fundamental freedom of trade. The judicial control was restricted by the European Court of Justice on a control of obvious infringement.<sup>92</sup> Now that the EU has obtained a comprehensive catalogue of fundamental rights by the Charter of Fundamental Rights, it is likely that the duty to protect deriving from fundamental rights will become an element of European protection of fundamental rights as well. Article 1 of the Charter, which is influenced by the wording of Article 1(1) of the Basic Law, contains a sound dogmatic foundation in the formulation 'Human dignity is inviolable. It must be respected *and protected*'.

Against this background, the dogmatic approach of the German judiciary and the doctrine to attribute a fundamental right a dimension of defence and a dimension of protection with a corresponding duty to respect and duty to protect by state authorities<sup>93</sup> does not just seem to be another sophisticated German debate. Instead it might offer an important perspective for a fundamental protection of

<sup>88</sup> *López Ostra v Spain*, App no 16798/90 (ECtHR, 9 December 1994) para 51.

<sup>89</sup> *Guerra and others v Italy*, App no 14967/89 (ECtHR, 19 February 1998) paras 58ff.

<sup>90</sup> R Desgagné, 'Integrating Environmental Values into the European Convention on Human Rights' (1995) 85 *American Journal of International Law* 263, 265ff, 293–94.

<sup>91</sup> Case C-265/95 *Commission v France* [1997] ECR I-6959, para 31.

<sup>92</sup> See also Szczekalla (n 83) 223.

<sup>93</sup> Cremer (n 1) 501ff proved correctly, that these both are the only functions (dimensions) of fundamental rights.

rights that increases the possibilities of establishing a fair balance between different interests of freedom in complex decision-making processes. This might become of some importance in a time where society is longing for additional legitimization beside the democratic process in parliaments.

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