That the recent turn in European Constitutional Review has effectively brought about a revolution in European law has been observed before. At issue are two major developments in European judicial review. On the one hand, the European Court of Human Rights have been collapsing traditional boundaries between constitutional law and private law with a series of decisions that effectively recognized the "horizontal" effect of Convention rights in the private sphere. On the other hand, the European Court of Justice has also given horizontal effect to fundamental liberties embodied in the Treaty on the Function of the European Union in a number of recent cases in a way that puts "established" boundaries between Member State and Union competences in question. This book takes issue with these developments by bringing to the fore a key issue that the horizontality effect debate has hitherto largely overlooked, namely, the question of sovereignty. It shows with detailed references to especially the American debate on state action and the German debate on *Drittwirkung* that horizontal effect cannot be understood consistently without coming to grips with the conceptions of state sovereignty that inform different approaches to horizontal effect.

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For Frank Michelman, Joe Singer and André van der Walt

It is habitually assumed, from a contemporary perspective, that the concept of statehood as territorial sovereignty was first devised to consolidate the form of the state against external forces. It is, therefore, widely argued that the early idea of territorial sovereignty coincided with the intensification of an exclusionary/international dimension in politics: that is, that states claimed sovereignty to defend and assert themselves against other states. In fact, however, the converse is the case. The territorialisation of political power was, in the first instance, a process in which power was linked (or projected itself as being linked) to one place and to one geographically-localised group of institutional actors in order to reduce the privatistic transaction of political power within a particular society, which typified the political dimensions of feudalism: that is, to prevent the alienation of lands, cross-boundary ownership of land, indiscriminate fusion of private and public resources, and the private seigneurial disposition over political goods. In this respect, the principle of statehood as territorial sovereignty was inextricably bound to the articulation of power as a resource that was detached from private or particular status or control, that was abstractly constructed as applicable to an entire society, and that effectively included society and all its members in relatively uniform fashion. The consistent fusion of territory and statehood, in other words, was an expression of a formatively underlying process of *political inclusion* ... In this process, power broke through the super-imposed private/public forms of later feudalism, and it identified *territory* as the primary unit of socio-political inclusion."

Chris Thornhill "The Future of the State" 358.

Preface

The American state action doctrine and the German and European concept of the horizontal effect of fundamental rights would appear to be *opposing* principles. The state action doctrine basically negates the horizontal effect of fundamental rights and the principle of the horizontal effect of fundamental rights basically dispenses with the requirement that some specific instance of state action be identified for fundamental rights to have effect in the relations between private persons. However, there is a significant body of German scholarly and judicial opinion that also understands horizontal effect as ultimately a reflection of either the *factual reality* of some or other state involvement in the relations between private citizens, or the *normative principle* that such state involvement should be assumed whenever claims to fundamental rights violations are at stake. German scholars and judges refer in this regard to the constitutional duty of the state to protect the fundamental rights of its citizens and residents. American scholars on the other side of the Atlantic who are critical of the use of the state action doctrine as a procedural device with recourse to which state involvement in and responsibility for in some or other alleged fundamental rights violation can be denied so as to deny the violation of the rights as such, basically do so on the same grounds on which German scholars base the principle of horizontal effect. These critical American scholars also believe fundamental rights violations in relations between private individuals turn on either the empirical recognition of real state involvement in the violation, or the normative recognition that the state should be considered involved in that violation. On a number of rare occasions, American judicial opinion, even if only by implication, also reflected this view.

All the arguments in this book pivot on an unequivocal endorsement of this critical American and standard German understanding of the state action and horizontal effect doctrines, hence the connection between horizontal effect and state sovereignty that it posits as its fundamental point of departure. This is the first key structural point that will be stressed in this regard: Horizontal effect of fundamental rights is indeed *an effect* of state sovereignty and state sovereignty is likewise *an effect* of the horizontal effect of fundamental rights between the citizens and/or residents of a state. The latter part of this statement suggests intentionally that states cannot truly call themselves "sovereign" when their judiciaries do not recognise the horizontal effect of fundamental rights. A properly sovereign state, this book argues, unflinchingly owns up to its factual or normatively assumed involvement in all fundamental rights violations that come to pass within its territorial boundaries. The historical genesis of

this principle is masterfully captured by Chris Thornhill in the epigraph to this book: historically, the internal sovereignty of states *that resulted from* the inclusionary protection of the fundamental rights of all citizens and residents present *within* the territorial boundaries of the state, precedes their sovereignty vis-à-vis other states. This is the first leg on which this book stands.

The second leg stands as a response to the question regarding the kind of sovereignty modern or postmodern states can claim when they move to comply with their sovereign constitutional duty to protect the fundamental rights of their citizens. States who move to protect the kind of rights that are generally contemplated when the concept of fundamental rights is at issue, should want to call themselves liberal democratic states. And liberal democratic states, argues the second half of this book, cannot embody monolithic or monistic conceptions of sovereignty. Liberal democratic states only remain *liberal* democratic states for as long as their sovereignty remains a register of the social divisions and cultural pluralisms that characterise modern societies. The sovereignty of liberal democratic states must thus always consist in the sustenance of constitutionally sound relations between democratic majorities and minorities. The one thing that the sovereign sustenance of democratic majority-minority relations demands from liberal democratic states, is to *generally* avoid expansive invocations of objective value orders that demand endorsement from all citizens and residents. Modern societies would not have been socially and culturally as deeply divided as they are, if they could be said to generally endorse the same set of values that for reasons of this general endorsement constitute an objective value order. And this, unfortunately, is exactly where the German horizontal effect jurisprudence articulated in the famous *Lüth* decision of the GFCC went astray and also led many other jurisdictions of the world astray.

With its invocation of an objective constitutional value order that radiates through all spheres of law, the court in *Lüth* engaged in a kind of judicial review that American legal theorists call substantive due process review. American judges have in theory but not always in practice become consciously wary of substantive due process judicial review ever since the notorious decision of the United States Supreme Court (hereafter USSC) in *Lochner v New York* in 1905. Horizontal effect jurisprudence can and should learn from this wariness. There are always exceptional cases in which the judicial assertion of certain minimum substantive constitutional protections is unavoidable and indeed required if the principle of sovereignty is to remain meaningful. One crucial part of the endeavour of this book is to explain why and when this is sometimes necessary, but another equally crucial part of this endeavour is to explain why and when this kind of judicial review must be avoided if a judiciary means to remain the judiciary of a liberal

democratic state that respects the deep social, cultural and political differences that prevail between its citizens and/or residents.

The substantive due process horizontal effect judicial review articulated in *Lüth* is today ironically threatening the very future of *Lüth* in Germany, because of the way the European Court of Justice (hereafter ECJ) has basically taken on a horizontal effect jurisprudence of the kind articulated in *Lüth* to assert a de facto sovereignty in Europe that is arguably not quite contemplated de jure by the European Union Treaties. This has come to pass in four judgments that are generally known now as the *Laval* quartet, the *Laval* and *Viking* judgments of 2007~~, the *Rüffert* judgment of 2008 and the *Luxembourg* judgment of 2008~~. What these judgments announced unequivocally, as especially the *Rüffert* judgment makes clear, is the relegation of *Lüth* to secondary of marginal significance in Germany. The sovereignty that *Lüth* used to effect de jure and de facto in Germany, has now been assumed de facto by a different court, notwithstanding the de jure insistence of the German constitutional judiciary that the sovereign protection of German fundamental rights in Germany is still its untouched prerogative.

Problematic in this development is not the de facto assumption of sovereignty by the ECJ in the *Laval* quartet as such. Transfers of sovereignty are always de facto transfers before they eventually become de jure transfers. We learn this from both Schmitt and Kelsen. Transfers of sovereignty are usually first precipitated by factual and historical revolutionary progressions, the process of which is generally completed with the eventual sedimentation of de jure sovereignty. In this regard, one can talk about a veritable horizontal~~ity~~ effect revolution in the jurisprudence of the ECJ. At issue in this revolution is not just the culmination of the jurisprudential revolution that expanded the effect of fundamental rights from state-subject to subject-subject relations in the course of the twentieth century (the semantic revolution that is firstly contemplated by the title of this book), but also a veritable judicial-political revolution that effectively transfers sovereignty from the Member States to the Union. Perhaps this is just the way the eventual federalisation of Europe has to proceed if it is to proceed at all.

Bothersome, however, is the kind of sovereignty that might ensue from this development, for it is doubtful at this stage whether the kind of sovereignty that is asserted in the jurisprudence of the ECJ aims to comply with the liberal democratic demand regarding the respect for social, cultural and political divisions. Not all revolutions are progressive revolutions, as the conservative revolutionary movement in the time of Weimar Germany showed clearly. For the moment, the jurisprudence of the ECJ would seem to espouse a substantive due process conception of judicial review that is, both in form and substance, conspicuously similar to the Herbert Spencer substantive due process articulated by the USSC in *Lochner v New York* in 1905. There would seem to be a clear connecting line

running from *Lochner* to *Lüth* to *Laval*. And as far as continental European history is concerned, this substantive due process judicial review of the ECJ – assuming for now that it is informed by ordo-liberal principles, as many observers believe it is – would also seem not to be that unrelated to the conservative revolutionary movement of Weimar.

The aim of this book is firstly to articulate a coherent understanding of the relation between horizontal effect jurisprudence and sovereignty that might contribute to an advancement of legal theory that could be globally useful and interesting. But its second aim is to also invite careful thought and circumspection regarding the substantive due process conception of horizontal effect that ultimately links *Lüth* and *Laval* to *Lochner*. And in doing so, it also hopes to point out a different direction – *another heading* – that especially Europe and Europeans might want to consider *today* as far as the future of their sovereignty is concerned.

The first step towards a regard for this other heading would consist in a horizontal effect jurisprudence that rehabilitates for horizontal effect cases the classical three-step proportionality test that generally applies in the judicial review of legislation. The evaluative judicial balancing processes that became the hallmark of horizontal effect ever since *Lüth* is an aberration of this classical proportionality test and the root of the substantive due process problems to which it gives rise. This step may well appear to represent a simple plea for a return to orthodoxy in judicial review procedures. In some respects it surely is that. But appearances may well also be deceptive in this case. For the arguments that will be forwarded in this regard are the outcome of jurisprudential moves that many orthodox constitutional scholars would consider unorthodox.

These moves, moreover, rely heavily on dissenting judicial opinions that have never become "good law" anywhere. And if one adds to this that these dissenting opinions come from cases that no orthodox constitutional scholar would consider as horizontal effect cases – namely the dissenting opinion of Justices Rupp-v. Brünneck and Simon in the *Erste Abtreibung* case that the GFCC decided in 1975 and the dissenting opinion of Justice Grimm in the *Reiten im Walde* case that the same court decided in 1989 – it should become clear that this book is in many respects an experiment. It takes liberties with hegemonic legal doctrine that a constitutional lawyer would be less inclined to take. The aim of doing so is to offer a different perspective on the meaning and significance of contemporary constitutional review that may help it deal better with the deep social, cultural and political divisions that inform constitutional conflicts today. Liberal constitutional theory all too often still conceives of constitutionalism as essentially a safeguard against the abuse of political power and the concomitant abuse of state machinery. It has not yet come round to appreciate the state as

an essential safeguard for constitutionalism. This is what liberal constitutional theory can learn from the questions with which the horizontal effect of fundamental rights confronts it. And what it can learn in this regard is crucial for an age in which constitutional jurisdictions are marked by deep social, cultural and political differences.

This book evidently pays homage to liberal democracy and the liberal democratic state. Its hope is to make a contribution to a consistent theory of liberal democratic constitutional review. Having worked on it from 2009, I finally finished this book (assuming just for the moment that a book like this can ever be "finished") with intensive work between September 2013 and January 2014. These were months during which the Edward Snowden revelations confronted many of us who believed that we lived in exemplary liberal democracies with the sobering if not disheartening reality that this is far from true. We live in a time during which arcane reasons of state again seem to draw the limits of liberty in no uncertain terms. A book that extolls the liberal democratic state under these circumstances – especially one that understands liberal democratic states as states in which popular democracy has divested the state of all separate reasons of state that are not reducible to reasons of citizens – exposes itself to accusations of serious naivety. Assuming that *critical inquiry* is a defining element of significant social, political and legal science, it would appear more apposite right now to concentrate one's efforts on studies that engage more realistically with the dark reality of the "deep state." There is much merit in this observation.

And yet, it is not with naivety that the pages of this book hold on for life to the ideal of liberal democracy. Liberal democracy may well be little more than an ideal. It may well have little purchase in hard reality. It nevertheless remains an ideal of which modern *legal* theory cannot afford to let go without forfeiting one of its defining conditions. Theories of law that would dismiss the constitutional ideals of the Enlightenment – individual liberty, equality, inviolable dignity of the person – as myths, would turn legal studies into historical reflections on contingent power relations. Such reflections may well be worthy and interesting undertakings in their own right. But they would no longer constitute theories of *law* if we understand under "law" the modern endeavour to arrange and organise societies on the basis of Enlightenment ideals of moral autonomy, liberty and equality. The idea that contemporary legal theory can again come to seriously conceive of personal power relations as "law" in the way pre-modern (feudal) legal theory could still do with some plausibility, is unthinkable, notwithstanding disconcerting flirtations with such conceptions of law evident in current conceptions of private governance and societal constitutionalism. There is a point where legal theory must take leave of some of its claims to social science for the sake of remaining theory of law.

Seen from this perspective, evidence of deep states or the deep state (perhaps there is only one) with which the Snowden revelations confront legal theory so starkly is only relevant to the way we think about law to the extent that this evidence threatens and undermines the courage to hang on to the concept of law. It cannot affect the concept of law as such. It can only undermine the courage, hope and trust required to presuppose its validity, in the way Kelsen instructed us to do. Evidence of the deep state that ultimately operates below or above or beside the law surely makes it difficult to believe in the concept of law in the way this book evidently still does. Perhaps one should concede that this book can right now be little more than a reminder of the promise contained in the modern concept of law and an expression of hope that it will become easier to believe in this concept again than it is at the moment. But if legal theorists were to lose faith completely in the promise of law or at least the promise of the concept of law, they would evidently have to give up the business of legal theory and turn to theology (or redeeming literature) for the sake of sustaining what faith might still be sustainable in the idea that the heavens, at least, still regard all mortals as equal and free. It is remarkable that the concept of liberal democratic law – so modest and non-utopian in its aspirations, so fatally compromising with regard to demands of substantive justice – has attained an almost utopian quality at the beginning of the twenty first century.

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