

§ 7 The Essential-Matters Doctrine (*Wesentlichkeitsdoktrin*) in Private Law: A Constitutional Limit to Judicial Development of the Law?

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I.	Judicial Development of the Law as a Constitutional Problem – General Aspects	225
II.	Constitutional Principles Preserving the Primacy of the Legislature – Focus on the Essential-Matters Doctrine (<i>Wesentlichkeitsdoktrin</i>)	227
1.	Development of the requirement of a statutory provision (<i>Vorbehalt des Gesetzes</i>)	228
2.	Constitutional basis of the requirement of a statutory provision as developed under the Federal Constitutional Court’s essential-matters doctrine	230
3.	Characteristics of the Federal Constitutional Court’s essential-matters doctrine	231
4.	Institutional extension of the essential-matters doctrine – application to the judiciary	233
III.	Applicability of the Essential-Matters Doctrine to Private Law Adjudication?	234
1.	Ambiguous position of the Federal Constitutional Court	235
a.	Differentiation based on the parties to the dispute	236
b.	Change of position? – Application to constellations opposing private individuals	237
2.	Reservations regarding an application of the doctrine in private law in legal scholarship	238
a.	Judges duty to adjudicate in civil disputes	238
b.	The conciliatory character of private law	240
3.	Differentiating approach based on distinct functions of private law	241
a.	Different functions of private law	241
b.	Regulatory use of private law	242
aa.	Regulation and fundamental rights	243
bb.	Regulation and democratic legitimacy – who defines the common good?	244
c.	The functions of balancing interests and of providing infrastructure	246
IV.	Conclusion	248

* I am grateful to Philip M Bender, Stefan Schäferling and Isabella Sternecker for comments on earlier drafts of this article.

The boundaries of judicial development of the law¹ (*Richterliche Rechtsfortbildung*) in private law represent a classical field of discussion in legal scholarship and practice. The focus is mainly on methodological aspects,² especially on how to provide courts with clear criteria for the interpretation of existing statutes and techniques to detect and fill legislative gaps.³ This article approaches the problem from a slightly different angle by observing the relationship between legislature and judiciary primarily as a matter of competencies. A crucial question here is whether there are specific areas in which decision-making is reserved exclusively for the legislature. In these areas, other actors than the legislature would only be authorized to make decisions on an explicit statutory basis or not at all. With regard to the executive, there is a wide consensus that it needs statutory empowerments to act in certain areas, reserved for the legislature. However, with regard to the judiciary, which is traditionally perceived as the ‘least dangerous’⁴ branch of government,⁵ the question

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- 1 In this article, the term ‘judicial (further) development of the law’ is used in a broad sense to describe the scope of judicial decision-making going beyond statutory law’s wording or/and intention. In common law systems the terms ‘judicial law-making’ (action-oriented) or ‘judge-made law’ (result-oriented), which emphasize the quality as an independent source of law are more frequently used. For a common law perspective on judicial law-making, see Patrick Hodge, ‘The Scope of Judicial Law-Making in the Common Law Tradition’ (2020) 84 *RabelsZ* 211.
 - 2 For methodological approaches, see eg Josef Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung: Rationalitätsgrundlagen richterlicher Entscheidungspraxis* (Athenäum 1972) 177 ff; Claus-Wilhelm Canaris, *Die Feststellung von Lücken im Gesetz: Eine methodologische Studie über Voraussetzungen und Grenzen der richterlichen Rechtsfortbildung praeter legem* (2nd edn, Duncker & Humblot 1983) 172 ff; Karl Larenz, *Methodenlehre der Rechtswissenschaft* (6th edn, Springer 1991) chap 5; Franz Bydlinski, *Juristische Methodenlehre und Rechtsbegriff* (2nd edn, Springer 2011) 472 ff.
 - 3 A gap is usually defined as an unintended incompleteness in an individual provision, in a statute or in the whole legislation, cf BGH, NJW 2009, 427, 429. For details, see Canaris, *Feststellung* (n 2) 15 ff; Karl Larenz and Claus-Wilhelm Canaris, *Methodenlehre der Rechtswissenschaft* (3rd edn, Springer 1995) 191 ff.
 - 4 Alexander Hamilton, ‘Federalist No. 78’ [1788]: ‘Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them’.
 - 5 cf Georg Hermes, ‘Verfassungsrecht und einfaches Recht - Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit’ (2002) 61 *VVDStRL* 119, 136. For a detailed analysis of the role of judges in the 19th century, see Regina Ogorek, *Richterkönig oder Subsumtionsautomat? Zur Justiztheorie im 19. Jahrhundert* (Klostermann 1986).

was hardly raised for a long time. Particularly in the field of private law, the limits of judicial interpretation and development of the law are frequently drawn generously without considering whether there is an encroachment into the legislature's sphere of competence. The Federal Constitutional Court's (*Bundesverfassungsgericht*)⁶ essential-matters doctrine (*Wesentlichkeitsdoktrin*), which states that essential decisions, especially those concerning the realization of fundamental rights (*Grundrechte*), must be taken by the legislature itself, was not considered relevant here for a long time. More recently, however, the position of the Court has become vague and an extension of the essential-matters doctrine to the judiciary is increasingly being discussed by scholars. This article endeavors to contribute to the research discussion by focusing on specific aspects of private law. After some introductory remarks on the role of judicial development of the law in Germany (I.), the essential-matters doctrine will be presented and its extension to the judiciary in general will be discussed (II.). On this basis we will examine the doctrine's application to private law adjudication and elaborate a differentiating approach (III.).

I. Judicial Development of the Law as a Constitutional Problem – General Aspects

The current field of judicial action in civil law systems is far removed from the traditional picture of the judge as the 'mouth of the law'⁷ that *Montesquieu* once depicted in his theory of separation of powers.⁸ Nowadays, civil law judges aren't merely faithful servants of the legislature,⁹ deprived

6 Cited below as 'Federal Constitutional Court' or 'Court'. Decisions are mainly quoted from the anthology of Federal Constitutional Court decisions, 'BVerfGE'.

7 Montesquieu, Charles Louis de Secondat, *De L'Esprit des Loix* (Barrillot & Fils 1748) book 11, ch 6, 256: 'Mais les Juges de la Nation ne sont (...) que la bouche qui prononce les parôles de la Loi (...)'. For a similar description as 'viva vox legis', see Paul Laband, *Das Staatsrecht des Deutschen Reiches* (vol 2, 5th edn, J. C. B. Mohr 1911) 178.

8 For details regarding the role and development of the judiciary under the German Basic Law, see Andreas Voßkuhle, *Rechtsschutz gegen den Richter: Zur Integration der Dritten Gewalt in das verfassungsrechtliche Kontrollsystem vor dem Hintergrund des Art. 19 Abs. 4 GG* (Beck 1993) 50 ff.

9 An example for a quite restrictive understanding of the judiciary's role can also be found in §§ 46-54 of the Introduction to the Prussian Civil Code of 1794 (*Einführung zum Allgemeinen Preußisches Landrecht von 1794*). Here, the focus was on concentrating legislative power in the hands of the ruling monarch. To this end,

of discretionary and political power,¹⁰ but they actively participate in the process of shaping the law. Nevertheless, a large difference to common law systems remains, in which judge-made law is an independent source of law.¹¹ Civil law judges interpret codified legislation to develop the law whereas common law judges mainly develop the law which their predecessors have made.¹² For the former, statutes represent the necessary material basis for democratically legitimizing the exercise of state power.¹³ The statutory form is also meant to protect those subject to the law from arbitrary and unpredictable adjudication and thus realizes the principle of the rule of law.¹⁴ Therefore, the German Basic Law (*Grundgesetz* – GG)¹⁵ provides that the judiciary is ‘bound by legislation and law’ (art. 20 sec. 3 GG)¹⁶ and ‘subject to legislation’ (art. 97 sec. 1 GG)¹⁷. A closer look at these provisions reveals that they don’t clearly set the methods nor the scope and outer limits of statutory interpretation and judicial development

courts had to consult with a legislative commission in case of doubt about the interpretation of a legal provision. For further details, see Andreas Schwennicke, *Die Entstehung der Einleitung des Preußischen Allgemeinen Landrechts von 1794* (Klostermann 1993) 294–295. Reinhard Zimmermann, ‘Statuta Sunt Stricte Interpretanda – Statutes and the Common Law: A Continental Perspective’ (1997) 56 Cambridge LJ 315, 325 describes the Prussian Code as the ‘last great attempt of legislation designed to provide an exhaustive regulation, down to the most intimate detail and the finest differentiation’ in Germany.

- 10 cf Montesquieu (n 7) book 11, ch 6, 251: ‘Des trois puissance dont nous avons parlé, celle de juger est en quelque façon nulle.’
- 11 cf Hodge (n 1) 211. For a comparative view on judicial law-making in Germany and England, see Martin Brenncke, *Judicial law-making in English and German courts: Techniques and limits of statutory interpretation* (Intersentia 2018).
- 12 Hodge (n 1) 211.
- 13 cf BVerfGE 49, 304, 318; Andreas Voßkuhle and Gernot Sydow, ‘Die demokratische Legitimation des Richters’ (2002) 57 JZ 673, 678–679; Christian Hillgruber in Dürig/Herzog/Scholz (eds), *Grundgesetz-Kommentar* (95 suppl, CH Beck 2021) Art. 97 GG paras 27–30.
- 14 cf BVerfGE 49, 304, 318; Hillgruber (n 13), Art. 97 GG para 27.
- 15 Cited below as ‘GG’.
- 16 The interpretation of the term ‘law’ in art 20 sec 3 GG is highly controversial. For an overview of the discussion, see Bernd Grzeszick in Dürig/Herzog/Scholz (eds), *Grundgesetz-Kommentar* (95 suppl, CH Beck 2021) Art. 20 GG VI paras 63 ff.
- 17 Regarding the genesis of art 97 sec 3 GG, it is an interesting fact that the constitutional legislator deliberately refused a formulation binding judges not only to the law but also to their conscience, cf Christian Hillgruber, “Neue Methodik” – Ein Beitrag zur Geschichte der richterlichen Rechtsfortbildung in Deutschland’ (2008) 63 JZ 745, 746.

of the law.¹⁸ Yet, judicial law-making is an indispensable part of legal practice in Germany, recognized in the constitutional case law¹⁹ and referred to in several statutory provisions.²⁰ The relationship between legislature and judiciary, however, is constantly disputed in legal scholarship and practice. In general, it can be observed that constitutional arguments have gained in importance in the discussion, which focused on methodological aspects for a long time.²¹

II. *Constitutional Principles Preserving the Primacy of the Legislature – Focus on the Essential-Matters Doctrine (Wesentlichkeitsdoktrin)*

Two basic principles governing the relationship between the legislature and other branches of state power can be distinguished.²² The principle of priority of a statutory provision (*Vorrang des Gesetzes*) primarily determines a hierarchy of norms, placing statutory provisions above rules created by the judiciary or executive.²³ It prohibits the executive and judiciary from acting against existing statutes (*contra legem*).²⁴ Since that rule only applies if statutes actually exist, a further question is whether there are constellations in which statutes are an indispensable basis for state authorities

18 cf Hans-Peter Schneider, *Richterrecht, Gesetzesrecht und Verfassungsrecht: Bemerkungen zum Beruf der Rechtsprechung im demokratischen Gemeinwesen* (Klostermann 1969) 30f; Brenncke (n 11) 71. The line between ‘interpretation’ and ‘judicial development of the law’ cannot be clearly drawn, as both are only different scales in the same process of reasoning (cf Larenz and Canaris (n 3) 187).

19 See eg BVerfGE 34, 269, 286f; 49, 304, 318; 65, 182, 190; 132, 99, 127. For criticism, see Hillgruber (n 17) 746–748.

20 cf §§ 511 sec 4(1) nr 1, 543 sec 2(1) nr 2 ZPO, § 132 sec 4 GVG for private law judiciary.

21 For specifically constitutional approaches, see eg Jörn Ipsen, *Richterrecht und Verfassung* (Duncker & Humblot 1975); Rolf Wank, *Grenzen richterlicher Rechtsfortbildung* (Duncker & Humblot 1978); Christian Starck, ‘Die Bindung des Richters an Gesetz und Verfassung’ (1976) 34 VVDStRL 43, 64–88; Christian Hillgruber, ‘Richterliche Rechtsfortbildung als Verfassungsproblem’ (1996) 51 JZ 118.

22 The distinction between priority (*Vorrang*) and reservation (*Vorbehalt*) of the law was already emphasized by Otto Mayer, *Deutsches Verwaltungsrecht* (vol 1, Duncker & Humblot 1895) 72–76, who coined the term ‘*Vorbehalt des Gesetzes*’. See also, Andreas Voßkuhle, ‘Grundwissen - Öffentliches Recht: Der Grundsatz des Vorbehalts des Gesetzes’ JuS 2007, 118.

23 cf Mayer (n 22) 72; Josef Pietzcker, ‘Vorrang und Vorbehalt des Gesetzes’ JuS 1979, 710.

24 cf Grzeszick (n 16), Art. 20 GG VI para 73.

to act. This question is governed by the constitutional requirement of a statutory provision (*Vorbehalt des Gesetzes*).²⁵ From this long-established constitutional figure, the Federal Constitutional Court has derived its essential-matters doctrine (*Wesentlichkeitsdoktrin*). After a short look at the development of the constitutional requirement of a statutory bases (1.), we will examine the constitutional basis and characteristics of the principle as developed under the essential-matters doctrine (2./3.). We then turn to the problem of extending the doctrine to the judiciary (4.).

1. Development of the requirement of a statutory provision (*Vorbehalt des Gesetzes*)

The origins of the constitutional requirement of a statutory provision (*Vorbehalt des Gesetzes*) go back to the power struggles between parliaments and monarchs that arose in the period of German constitutionalism at the beginning of the 19th century.²⁶ At that time, the notion of statutory law described an area of state decision-making, which was open to civic participation and removed from the monarch's sole authority.²⁷ It limited the extent of the monarch's power by requiring parliamentary participation for specific decisions.²⁸ The requirement of a statutory provision aimed primarily at protecting citizens from state (i.e. monarchic) interference in their sphere of freedom and property (*Freiheits- und Eigentumsformel*).²⁹ It also had

25 cf Mayer (n 22) 74; Grzeszick (n 16), Art. 20 GG VI para 75. Other translations are also common, eg 'provisio of legality', 'legal reservation' or 'requirement of an explicit legal basis'.

26 cf Fritz Ossenbühl, '§ 101', *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (vol 5, 3rd edn Müller 2007) para 18. For historical details, see Dietrich Jesch, *Gesetz und Verwaltung: Eine Problemstudie zum Wandel des Gesetzmäßigkeitsprinzips* (2nd edn, Mohr 1968) 102–170; Peter Selmer, 'Der Vorbehalt des Gesetzes' *JuS* 1968, 489.

27 cf Ossenbühl (n 26) para 18. For a detailed historical analysis of the concept of statutory law and legislature, see Ernst-Wolfgang Böckenförde, *Gesetz und gesetzgebende Gewalt: Von den Anfängen der deutschen Staatsrechtslehre bis zur Höhe des staatsrechtlichen Positivismus* (2nd edn, Duncker & Humblot 1981).

28 cf Ossenbühl (n 26) para 18.

29 Jesch (n 26) 111 f; Böckenförde (n 27) 75 f. The philosophical basis of the idea that the preservation of freedom and property must be secured by the state goes back to John Locke, *Two Treatises of government* (Black Swan 1689 [1689]) book 2, chap 9, nr 124, 261: 'The great and chief end, therefore, of Mens uniting into Commonwealths, and putting themselves under Governments, is the Preservation of their Property. '; Locke (n 29) book 2, chap 11, nr 138, 273: 'The Supream Power

a democratic-political dimension,³⁰ since the battle for further civic participation in important societal questions was at stake. The call was for the parliament, as the organ of civic representation, to be involved in important issues. In the era of late constitutionalism, this democratic aspect was to some extent displaced by a rule of law component, aiming at the protection of individual rights from arbitrary state interference.³¹

Under the Basic Law, the dualism between state and civil society, which prevailed under the era of constitutionalism and stood at the origin of the requirement of a statutory provision, no longer exists.³² It gives way to a self-organization of society.³³ Parliament has a clear primacy in the new order, which is manifested in the fact that the other powers are bound by the statutes it passes (cf. art. 20 sec. 3 GG).³⁴ This has led some scholars to the assumption that an encompassing requirement of a statutory provision (*'Totalvorbehalt'*) is necessary, which applies not only to executive interventions in citizens' individual sphere, but to all state action.³⁵ However, the Federal Constitutional Court has rejected a 'comprehensive requirement

cannot take from any man any part of his property without his own consent. For the preservation of property being the end of government, and that for which men enter into society (...).'

- 30 cf Jürgen Staupe, *Parlamentarvorbehalt und Delegationsbefugnis: Zur "Wesentlichkeitstheorie" und zur Reichweite legislativer Regelungskompetenz, insbesondere im Schulrecht* (Duncker & Humblot 1986) 46; Ossenbühl (n 26) para 43.
- 31 cf Ossenbühl (n 26) para 43; Philipp Lassahn, *Rechtsprechung und Parlamentsgesetz: Überlegungen zu Anliegen und Reichweite eines allgemeinen Vorbehalts des Gesetzes* (Mohr Siebeck 2017) 61–67.
- 32 cf Jesch (n 26) 173; Walter Krebs, 'Zum aktuellen Stand der Lehre vom Vorbehalt des Gesetzes' *Jura* 1979, 304, 307. Among many important constitutional changes affecting the role of the requirement of a statutory provision only a few can be mentioned here. For an overview, see Selmer (n 26), 490–469; Krebs (n 32) 304–308; Ossenbühl (n 26) paras 20 ff.
- 33 cf Christoph Gusy, 'Der Vorrang des Gesetzes' *JuS* 1983, 189, 190; Böckenförde (n 27) 400 f. For a different concept of dualism in the modern industrialized societies, see Ernst Forsthooff, *Der Staat der Industriegesellschaft: Dargestellt am Beispiel der Bundesrepublik Deutschland* (Keip 1995) 21–29.
- 34 cf Jesch (n 26) 172.
- 35 cf *ibid* 171 ff. For criticism, see Ossenbühl (n 26) paras 23–28. In a similar way, a broader concept of liberty and fundamental rights protection led to the question whether *all* state activity affecting the realization of fundamental rights requires a legal basis. For such a comprehensive requirement of a statutory provision including 'positive' state actions with regard to fundamental rights, see Hans H Rupp, *Grundfragen der heutigen Verwaltungsrechtslehre: Verwaltungsnorm und Verwaltungsrechtsverhältnis* (Mohr 1965) 142 f; Peter Häberle, 'Grundrechte im Leistungsstaat' (1972) 30 *VVDStRL* 43, 81.

of a statutory provision' and held that the democratic principle is not to be understood as a monopoly of power and decision-making in favour of parliament.³⁶ It emphasized that the executive and judicial power, too, derive their institutional and functional legitimacy from a constitutional mandate (cf. art. 20 sec. 2(2) GG).³⁷

2. Constitutional basis of the requirement of a statutory provision as developed under the Federal Constitutional Court's essential-matters doctrine

The general constitutional requirement of a statutory provision (*allgemeiner Vorbehalt des Gesetzes*) is not explicitly mentioned in the Basic Law, but several manifestations of it can be found in specific provisions, namely in the fundamental rights provisions.³⁸ The Federal Constitutional Court bases the principle and the essential-matters doctrine on two pillars: the principle of democracy and the rule of law.³⁹ The rule of law component requires transparency and predictability of state activity and focuses on the protection of fundamental rights.⁴⁰ State power shall be bound in all its manifestations by a clear separation of competences and functions, in order to prevent abuse of power and preserve individual freedom.⁴¹ The democratic aspect emphasizes the decision-making power and responsibility of the legislature, which is directly legitimized by the people through elections and therefore considered to be the most appropriate body to

36 BVerfGE 49, 89, 124 f; 68, 1, 87 f.

37 BVerfGE 49, 89, 125.

38 See eg art 2 sec 2(3), art 5 sec 2, art 8 sec 2, art 12 sec 1(2) 2, art 14 sec 1(2) GG. For an overview of the explicit requirements of a statutory provision, see Grzeszick (n 16), Art. 20 GG VI paras 91 ff. For details regarding the relationship between the general and specific requirements of a statutory provision in the fundamental rights articles of the Basic Law, see Christian Bumke, *Der Grundrechtsvorbehalt: Untersuchungen über die Begrenzung und Ausgestaltung der Grundrechte* (Nomos 1998) 200–204; Ossenbühl (n 26) para 21.

39 cf BVerfGE 33, 125, 158; 41, 251, 259 f; 47, 46, 78 f; 49, 89, 126; 108, 282, 311 f; 134, 141, 184 (settled case-law). In some cases, the Federal Constitutional Court also refers to the principle of separation of powers (cf BVerfGE 34, 52, 59 f) and the social state principle (cf BVerfGE 45, 400, 418). See also Grzeszick (n 16), Art. 20 GG VI paras 97 ff; Ossenbühl (n 26) para 41. For criticism, see Staupé (n 30) 162–182.

40 BVerfGE 33, 125, 158; 49, 89, 126.

41 BVerfGE 33, 125, 158.

take essential decisions.⁴² In particular, it shall identify public interests to which individual liberties must give way to a certain extent.⁴³ Further, the legislative process guarantees public participation and debate, which is indispensable for deciding upon questions that greatly impact society.⁴⁴

3. *Characteristics of the Federal Constitutional Court's essential-matters doctrine*

The Federal Constitutional Court's essential-matters doctrine extends the traditional requirement of a statutory provision. The Court distances itself from the conception that a statutory basis is only necessary in cases of executive interventions in the individual sphere of liberty and property.⁴⁵ It states, more generally, that 'all essential decisions which directly affect citizens' shall be subject to legislative decision-making.⁴⁶ That includes provisions which are essential for the realization of fundamental rights.⁴⁷ From a fundamental rights dogmatic perspective, this means that not merely the defensive (*Abwehrfunktion*), but also positive, or more broadly, entitlement functions (*Anspruchs- bzw. Ausgestaltungsfunktion*) of such rights, can trigger the requirement of a statutory provision.⁴⁸

With regard to matters of competence, the essential-matters doctrine has two features: on the one hand, it states that no one other than the

42 BVerfGE 33, 125, 159. This decision is considered as the birth of the Federal Constitutional Court's essential-matters doctrine (cf Lassahn (n 31) 79).

43 cf BVerfGE 33, 125, 159; 41, 251, 263 f.

44 cf BVerfGE 33, 125, 158 f; 40, 237, 249; 41, 251, 263 f; 85, 386, 403 f; 108, 282, 312.

45 BVerfGE 40, 237, 249; 47, 46, 79.

46 BVerfGE 40, 237, 249.

47 The Court emphasizes that the concept of liberty has changed and that this affects the role of the state. See BVerfGE 33, 303, 331: 'the liberty right would be valueless without the factual preconditions for taking advantage of it'.

48 cf BVerfGE 40, 237, 248 f; 47, 46, 79; Böckenförde (n 27) 391 f. For details regarding the different functions of fundamental rights, especially their 'entitlement' function, see Robert Alexy, *Theorie der Grundrechte* (Suhrkamp 2006) 395 ff (for an English translation, see Robert Alexy and Julian Rivers, *A theory of constitutional rights* (Oxford Univ. Press 2004). Alexy gives the following short summary of the basic terms: 'Defensive rights of the citizen against the state are rights to *negative* actions (omissions) on the part of the state. They belong to the citizen's negative status in its wide sense. Their counterparts are rights to positive state action, which belong to the positive status in its narrow sense. If one adopts a wide understanding of the notion of entitlement, all rights to positive state action can be called entitlements in the wide sense.' (Alexy and Rivers (n 48) 288).

legislature shall make essential decisions, on the other hand, it obliges the legislature to make these decisions by *itself* and not delegate them to other actors, e.g. in the form of broad empowerments, general clauses or blanket norms.⁴⁹ The degree of necessary precision of a statute depends primarily on its impact on fundamental rights, but important implications for the community are also taken into account.⁵⁰

The essential-matters doctrine is vague and leaves room for interpretation, which has been abundantly criticized in the literature.⁵¹ However, a certain flexibility of the theory seems to be precisely what the Federal Constitutional Court intends.⁵² It enables the Court to argue teleologically in certain areas as to how detailed statutory regulation should be.⁵³ With regard to the democratic component of the doctrine, which stood at the origin of the requirement of a statutory provision, a certain openness seems inevitable anyway. For what is considered (politically) important or essential in a democratic society is subject to constant change. Despite these uncertainties, it should be noted here that the starting point for concretizing the criterion of essentiality is the relevance of a question for fundamental rights.⁵⁴ The *defensive* function of fundamental rights continues to play a predominant role: a limitation of fundamental rights by the state requires an explicit legal basis. If, in contrast, the *entitlement* function of fundamental rights is affected, the requirement of a statutory basis is only triggered in certain cases.⁵⁵ As was already mentioned, the Court rejects a ‘comprehensive’ requirement of a legal provision. It also holds that ‘the mere fact that a provision is politically controversial’ does not necessarily make it essential.⁵⁶

49 cf Lassahn (n 31) 82 f. The latter aspect is often referred to as ‘parliamentary reservation’ (*Parlamentsvorbehalt*). See BVerfGE 57, 295, 321; Ossenbühl (n 26) para 24.

50 See BVerfGE 108, 282, 312; Voßkuhle (n 22) 119.

51 cf Gunter Kisker, ‘Neue Aspekte im Streit um den Vorbehalt des Gesetzes’ NJW 1977, 1313, 1317–1320; Krebs (n 32) 308 f; Böckenförde (n 27) 391–401; Ossenbühl (n 26) paras 56–58.

52 For a practically orientated, flexible and teleological use of the essential-matters doctrine, see eg BVerfGE 49, 89, 127; 98, 218, 251; 105, 279, 304 f. For criticism, see Jan H Klement, ‘Der Vorbehalt für das Unvorhersehbare: Argumente gegen zu viel Rücksicht auf den Gesetzgeber’ DÖV 2005, 507; Lassahn (n 31) 87 f.

53 For criticism, see Lassahn (n 31) 87 f.

54 cf BVerfGE 108, 282, 311.

55 In particular, statutory provisions are required with regard to the granting and selective distribution of state services that constitute a necessary condition for the realization of fundamental rights. See BVerfGE 33, 303, 336 f.

56 See BVerfGE 98, 218, 251; 108, 282, 312.

4. *Institutional extension of the essential-matters doctrine – application to the judiciary*

As we have seen, the essential-matters doctrine derives from the constitutional requirement of a statutory provision and classically addresses the relationship between legislature and executive. With time, however, an application of the doctrine to the judiciary came to be intensively discussed.⁵⁷ The reasoning refers to the two pillars of the essential-matters doctrine (principle of democracy and rule of law). First, courts exercise state power (art. 20 sec. 2(2) GG) and thus are bound by the fundamental rights as directly applicable law (art. 1 sec. 3 GG); they therefore need a statutory basis to make *essential* decisions, which have an impact on fundamental rights.⁵⁸ Second, the judiciary's democratic legitimization is considered rather weak and not sufficient to create essential provisions relevant for fundamental rights by further developing the law.⁵⁹

Consequently, judicial development of the law, which creates an autonomous (i.e. dissociated from concrete statutory provisions) basis for intervention in fundamental rights, violates the requirement of a statutory provision and thus is unconstitutional. As regards criminal jurisdiction, a strict requirement of a statutory provision is enshrined in article 103 sec. 2 GG (*nullum crimen, nulla poena sine lege scripta*).⁶⁰ Administrative court decisions are also regularly reviewed by the Federal Constitutional Court

57 See eg Hillgruber (n 21) 123 f; Ralf Poscher, *Grundrechte als Abwehrrechte: Reflexive Regelung rechtlich geordneter Freiheit* (Mohr Siebeck 2003) 215, 322–325; Ossenbühl (n 26) para 60. Critical towards an extension, eg Bumke, *Grundrechtsvorbehalt* (n 38) 204–207; Ulrich R Haltern, Franz C Mayer and Christoph R Möllers, 'Wesentlichkeitstheorie und Gerichtsbarkeit: Zur institutionellen Kritik des Gesetzesvorbehalts' (1997) 30 DV 51. Both the discussion and this article focus on the jurisdiction of the specialized courts. With regard to the relationship between the legislature and the Federal Constitutional Court, see eg Rainer Wahl, 'Der Vorrang der Verfassung und die Selbstständigkeit des Gesetzesrechts' NVwZ 1984, 401; Gerd Morgenthaler, *Freiheit durch Gesetz: Der parlamentarische Gesetzgeber als Erstadressat der Freiheitsgrundrechte* (Mohr Siebeck 1999) 2–39.

58 cf Hillgruber (n 21) 123. For details on the intervening character of court decisions, see Rolf Eckhoff, *Der Grundrechtseingriff* (Heymann 1992) 126 f; Poscher (n 57) 215.

59 Claus D Classen, 'Gesetzesvorbehalt und Dritte Gewalt' (2003) 58 JZ 693, 695. For details regarding the democratic legitimization of judges, see Voßkuhle and Sydow (n 13).

60 cf BVerfGE 130, 1, 44 for details regarding the competence aspect of this provision. See also BVerfGE 122, 248, 282 – *Rügeverkümmung* (dissenting opinion of the judges Voßkuhle, Osterloh, Di Fabio), arguing for stricter limits to judicial

on the basis of the requirement of a statutory provision if they confirm or permit executive restrictions of individual rights by further developing the law.⁶¹ The boundaries of judicial development of the law are surpassed if a court itself creates an empowerment to interfere with fundamental rights.⁶² Such actions exceeding courts' competencies can be contested by the disadvantaged party to the dispute by means of a constitutional complaint based on art. 2 sec. 1 GG in conjunction with the of rule of law (art. 20 sec. 3 GG).⁶³

III. *Applicability of the Essential-Matters Doctrine to Private Law Adjudication?*

There is more reluctance to apply the essential-matters doctrine in private law.⁶⁴ Here, the judiciary, vested with state power, is the only potential addressee of the doctrine.⁶⁵ A strict application of the doctrine could severely restrict the civil courts' practice of further development of the law. For the judicial establishment of legal rules with fundamental rights relevance is quite common practice here. Think, for example, of various judge-made extensions of liability meant to compensate for the 'deficiencies' of German tort law which affect at least the right to property (art. 14 sec. 1 GG) and the general freedom of action (art. 2 sec. 1 GG).⁶⁶ In corporate law,

development of the law when individual rights are limited in the context of criminal procedure.

61 See eg BVerfGE 34, 293, 299–302; 98, 49, 69 ff; 111, 147, 158 f. In tax law, the requirement of a statutory provision is also quite strictly applied to the judiciary (cf BVerfGE 13, 318 328; 19, 38, 49). See also, Poscher (n 57) 215 f; Frauke Kruse, *Die verfassungsrechtlichen Grenzen richterlicher Rechtsfortbildung: Zur Gesetzmäßigkeit der Rechtsprechung unter dem Grundgesetz* (Mohr Siebeck 2019) 162 f.

62 cf BVerfGE 34, 293, 301 f; 111, 146, 158 f.

63 cf BVerfGE 87, 273, 279; 128, 193, 209; 138, 377, 390 (settled case-law).

64 See eg Hans C Grigoleit, 'Anforderungen des Privatrechts an die Rechtstheorie' in Matthias Jestaedt (ed), *Rechtswissenschaftstheorie* (Mohr Siebeck 2008) 52, 72 f; Jörg Neuner, 'Die Kontrolle zivilrechtlicher Entscheidungen durch das Bundesverfassungsgericht' (2016) 71 JZ 435, 436–438; Thomas M J Möllers, *Juristische Methodenlehre* (CH Beck 2017) 437.

65 However, the requirement of a statutory provision is also discussed in the context of private rule-making. See Wolfgang Hoffmann-Riehm, 'Gesetz und Gesetzesvorbehalt im Umbruch: Zur Qualitätsgewährleistung durch Normen' (2005) 130 AöR 5, 44 f.

66 Eg the extension of contractual protection to third parties (*Vertrag mit Schutzwirkung zugunsten Dritter*) (cf BGH NJW 1968, 885), the shifting of the

a general duty of legality (*Legalitätspflicht*) for the board of management towards the company has been developed by courts, which also entails important liability consequences.⁶⁷ The scope and permissibility of actions in industrial disputes (*Arbeitskampf*) are also mainly based on judge-made law, affecting the freedom of association (art. 9 sec. 3 GG).⁶⁸ There is also judge-made law creating or shaping institutions relevant to fundamental rights: for example, important forms of property such as equitable lien (*Sicherungseigentum*) and expectancy rights (*Anwartschaftsrecht*),⁶⁹ or legal entities like the German civil law partnership (*GbR-Außengesellschaft*)⁷⁰. It is therefore not surprising that the question of applying the doctrine in private law poses particular difficulties. The Federal Constitutional Court's position on this issue is rather ambiguous (1.). In legal scholarship, the applicability is often generally rejected (2.). However, a differentiating approach seems more appropriate (3.).

1. *Ambiguous position of the Federal Constitutional Court*

The Federal Constitutional Court's handling of the essential-matters doctrine in private law is vague. For a while, the Court seemed to apply the doctrine only in *bipolar* (state versus individual) constellations, but a recent decision deviates from this approach.

burden of proof in product liability cases (*Beweislastumkehr im Rahmen der Produzentenhaftung*) (cf BGH NJW 1969, 269) or damages for violations of the right of personality (*Schmerzensgeld für Verletzungen des Allgemeinen Persönlichkeitsrechts*) (cf BGHZ 26, 349; BVerfGE 34, 269 – *Soraya*).

67 See eg BGH NJW 2012, 3439, 3440. In this context, the essential-matters doctrine was recently mentioned by Hans C Grigoleit, 'Begründungslinien der Legalitätsverantwortung im Kapitalgesellschaftsrecht' in Katharina Boele-Woelki, Karsten Schmidt and Florian Faust (eds), *Festschrift für Karsten Schmidt zum 80. Geburtstag* (2019) 367, 374.

68 For details regarding the role of the essential-matters doctrine in this context, see eg Christian Ehrlich, 'Die Bedeutung der Wesentlichkeitstheorie im Arbeitskampfrecht' DB 1993, 1237; Roland Schwarze, 'Die verfassungsrechtliche Garantie des Arbeitskampfes - BVerfGE 84, 212' JuS 1994, 653, 659.

69 cf Larenz (n 2) 414 ff who classifies these cases as judicial development of the law *praeter legem*.

70 The *GbR* is a form of partnership which is partly regulated in the German Civil Code, cf §§ 705 ff BGB. For details, see Alexander Bruns, 'Zivilrichterliche Rechtsschöpfung und Gewaltenteilung' (2014) 69 JZ 162, 167 f; Karsten Schmidt, 'Gesetzgebung und Rechtsfortbildung im Recht der GmbH und der Personengesellschaften' (2009) 64 JZ 10, 13 f.

a. *Differentiation based on the parties to the dispute*

In two decisions from the 90's regarding industrial disputes, the Court tried to differentiate based on who was involved in the litigation.⁷¹ In the first decision, it held that the essential-matters doctrine only applied as a boundary for judicial development of the law when the case concerns a 'state versus individual'-relationship, but not when a dispute between two private individuals as 'equal fundamental right-holders' is at stake.⁷² The Court emphasized that in the latter constellation, judges must supplement the substantive law if statutory provisions are insufficient, in order to fulfil their constitutional duty to decide each legal dispute brought before them in an adequate manner.⁷³ It should be noted that such supplementation has a dual effect on the parties involved: further protection on the one side necessarily goes hand in hand with an impairment on the other side.⁷⁴

In the second decision, however, it came to the conclusion that the German Federal Labor Court's (*Bundesarbeitsgericht*) interference with the claimant's fundamental right of association (art. 9 sec. 3(1) GG) was not covered by a statutory basis and therefore unconstitutional.⁷⁵ Again, the Court examined who was involved in the concrete dispute.⁷⁶ Since on the employer's side, civil servants had been deployed as strikebreakers, it considered that the dispute was – 'at least also – about the relationship between the state and private legal entities'.⁷⁷

These decisions have been criticized in legal scholarship as inconsequent and result-orientated, for both constellations were equally *essential* and therefore in the same way either exclusively reserved to the legislator or not.⁷⁸ In fact, it is unfortunate that the Court emphasized in both decisions the legislature's responsibility for shaping the fundamental right of freedom of association,⁷⁹ but then left it to the court in one decision. Nevertheless, the distinction between bipolar (state versus individual) and multipolar (individual-state-individual) constellations seems to be useful,

71 cf BVerfGE 84, 212 – *Aussperrung*; BVerfGE 88, 103 – *Streikeinsatz von Beamten*.

72 BVerfGE 84, 212, 226 – *Aussperrung*.

73 BVerfGE 84, 212, 226 f – *Aussperrung*.

74 See eg BVerfGE 138, 377, 392 f.

75 BVerfGE 88, 212, 113-116 – *Streikeinsatz von Beamten*.

76 The dispute opposed the Federal Postal Union (*Deutsche Postgewerkschaft*) and the German Federal Post Office (*Deutsche Bundespost*).

77 BVerfGE 88, 103, 116 – *Streikeinsatz von Beamten*.

78 For further details and criticism, see Ehrlich (n 68); Schwarze (n 68).

79 cf BVerfGE 84, 212, 226 – *Aussperrung*; BVerfGE 88, 103, 116 – *Streikeinsatz von Beamten*.

as will be discussed further below, albeit with a slightly different approach focusing not primarily on *who* is involved in the dispute, but on the *function of law* pursued by the court in deciding the dispute.

b. Change of position? – Application to constellations opposing private individuals

In a more recent decision concerning family law, the Federal Constitutional Court seems to apply a more encompassing understanding of the requirement of a statutory provision in private law, albeit without expressly mentioning the essential-matters doctrine. In the civil dispute, a so-called apparent father⁸⁰ (*Scheinvater*) claimed disclosure of intimate information from the mother, to identify the biological father of the child in order to enforce his right to compensation.⁸¹ The civil court derived that information right from a general clause, § 242 of the German Civil Code (BGB). The Federal Constitutional Court, however, reversed the civil court's order, holding that 'a court ruling ordering the mother to disclose information on the identity of the child's presumptive father to facilitate enforcement of the apparent father's claim to compensation (§ 1607 sec. 3 BGB) exceeds the constitutional boundaries of judicial development of the law, *since such a development has no adequately specific basis in statutory law*'.⁸² The Court stressed that 'Action on the part of the legislature would be required to reinforce the apparent father's claim to compensation'.⁸³ In that decision, the Court also tries to provide general guidance for courts on how to handle judicial development of the law when they are to balance competing interests in civil disputes: 'the more severe the impairment under constitutional law and the weaker the constitutional content of the conflicting position thus asserting itself, the narrower the limits for judi-

80 That is a former legal father who has successfully challenged the paternity. As a result, the support claims of the child retroactively extinguish. To the extent that the apparent father has already made child-support payments, the child's support claims against the biological father are transferred to the apparent father (cf § 1607 sec 3 BGB).

81 The right to compensation itself is explicitly provided in § 1607 sec 3 BGB. Meanwhile, a statutory provision on the right to information of the apparent father was planned by the legislature, but it has not yet been implemented.

82 BVerfGE 138, 377, 390 para 35 – *Scheinvater* (emphasis added).

83 BVerfGE 138, 377, 396 para 52 – *Scheinvater*.

cial development of the law and the stricter the civil courts must adhere to the limits set by statutory law.⁸⁴

Yet, these requirements are unclear and confront civil courts with great difficulties.⁸⁵ They are required to ascertain an *abstract* hierarchy of the colliding legal positions of private actors in order to determine whether the one legal position can be enforced under the impairment of the other by judicial development of the law. Thus, a more detailed balancing of the concerned positions in individual cases is cut off.⁸⁶ It also remains uncertain what the Federal Constitutional Court's requirement of a 'specific basis in statutory law' exactly means. It is only clear that it demands more than a methodologically correct interpretation of statutes.⁸⁷

2. Reservations regarding an application of the doctrine in private law in legal scholarship

Besides the practical argument that judicial development of the law is indispensable in private law for adapting the legal system to rapidly changing circumstances of society and to avoid overloading the legislator, two more substantive arguments will be closer observed here.

a. Judges duty to adjudicate in civil disputes

Art. 92 GG stipulates that the judicial power shall be vested in the judges. A basic function of private law adjudication is its task of peacemaking.⁸⁸

84 BVerfGE 138, 377, 393 para 42 – *Scheinvaater*. cf also BVerfGE 122, 248, 301 – *Rügeverkümmern* (dissenting opinion of the judges *Vofßkühle*, *Osterlob* and *Di Fabio*).

85 For criticism, see Philipp Reuß, 'Anmerkung zu BVerfG: Auskunftsanspruch des Scheinvaaters gegen Mutter über sexuelle Beziehungen' NJW 2015, 1506, 1509–1510; Neuner (n 64).

86 cf Neuner (n 64) 438.

87 That is illustrated by the fact that the derivation of a right to information from a general clause like § 242 BGB to enable the enforcement of a material claim is a particularly typical methodical approach in private law. See Neuner (n 64) 438.

88 The peace-making function of the judiciary and its duty to adjudicate are necessary counterparts to the state monopoly on the use of force. For further details, see Christian Hillgruber in Dürig/Herzog/Scholz (eds), *Grundgesetz-Kommentar* (95 suppl, CH Beck 2021) Art. 92 GG paras 8 ff. See also, Locke, (29) book 2, chap 9, nr 124, 261: 'The great and chief end therefore, of Mens uniting into Common-

This function could be endangered if courts were hindered to further develop the law when it is necessary to decide a dispute fairly, albeit not on a concrete statutory basis. The constitutional duty to adjudicate⁸⁹ and the prohibition of denial of justice⁹⁰ thus conflict with a comprehensive requirement of a statutory provision applied to the judiciary.⁹¹ This argument is particularly justified in *multipolar* (individual-state-individual) constellations in which at least two legal positions of individuals must be balanced. In this respect, private law disputes often differ from administrative law disputes.⁹² In classical *bipolar* (state-individual) administrative disputes, courts can annul an administrative action if it has no legal basis and interferes with the claimant's rights.⁹³ Thus, there is no collision with the court's duty to decide or the legal protection guarantee enshrined in art. 19 sec. 4 GG. By contrast, in multipolar constellations, courts are concerned with at least two conflicting legal positions of individuals. That is characteristic for civil disputes,⁹⁴ but can also occur in administrative disputes, e.g. in public neighbour law (*öffentliches Nachbarrecht*) or third-party constellations in public construction law (*öffentliches Baurecht*).⁹⁵ In multipolar constellations, the strengthening of a legal position on one side regularly collides with the impairment of a legal position on the other.⁹⁶ If statutory provisions governing the balancing of interests are lacking, the court may need to further develop the law in order to avoid an arbitrary decision to the detriment of the party to the dispute whose legal position or claim has not yet been considered by the legislature.⁹⁷ One could argue, of course,

wealths, and putting themselves under Government, is the Preservation of their Property. To which in the state of Nature there are many things wanting'.

89 The constitutional duty to adjudicate derives from the rule of law in conjunction with the fundamental rights. See BVerfGE 107, 395, 401, 406 f.

90 For details regarding the basis of this principle and the objectives of private law adjudication, see Curt W Hergenröder, *Zivilprozessuale Grundlagen richterlicher Rechtsfortbildung* (Mohr 1995) 167 ff.

91 That is the main criticism against an application of the doctrine to private law adjudication. See BVerfGE 84, 212, 226 f.; Alfred Söllner, 'Der Richter als Ersatzgesetzgeber' (1995) 10 ZG 1, 7 f.; Grigoleit (n 64) 72 f.; Neuner (n 64) 437; Möllers (n 64) 437.

92 cf Starck (n 21), 86 f. See also, Classen (n 59), 696 f.

93 cf Starck (n 21), 83.

94 cf BVerfGE 138, 377, 390.

95 cf Alexander Hellgardt, *Regulierung und Privatrecht: Staatliche Verhaltenssteuerung mittels Privatrecht und ihre Bedeutung für Rechtswissenschaft Gesetzgebung und Rechtsanwendung* (Mohr Siebeck 2016) 279.

96 cf BVerfGE 138, 377, 392 f.

97 cf Grigoleit (n 64) 72 f.; Neuner (n 64) 437; Möllers (n 64) 437.

that the dismissal of a claim for lack of statutory basis is what the legislature intends by leaving a specific question undecided.⁹⁸ The legislature's omission could then only be challenged as unconstitutional in certain cases.⁹⁹ We know, however, that legislative 'gaps' are often not consciously set by the legislature, but are due to practical problems, namely the inertia of the legislative process and rapid changes of society. The judiciary then has the important task of creating interim rules that are necessary for the appropriate resolution of disputes.

b. The conciliatory character of private law

In contrast to administrative and criminal courts, the function of the civil courts is commonly understood as objective decision-making, serving private parties, rather than 'sanctioning' in the public interest.¹⁰⁰ Consequently, there should be more leeway for judicial further development of the law than in administrative or criminal law.¹⁰¹ The argument can be positioned with respect to both lines of reasoning of the essential-matters doctrine. First, the doctrine's function to protect fundamental rights from state interference would be less justified if civil court decisions did not have an intervening character, affecting the defensive dimension of fundamental rights. Second, it could be argued that court decisions that are not intended to implement political goals, but to balance private interests

98 cf Hillgruber, (n 21) 120; Bruns (n 70), 164.

99 cf Hillgruber, (n 21) 122. See also, Claus-Wilhelm Canaris, *Grundrechte und Privatrecht: Eine Zwischenbilanz* (De Gruyter 1999) 70. In this regard, two main options seem possible. First, the court could have the 'incomplete legislation' reviewed by the Federal Constitutional Court by means of a concrete judicial review (art 100 sec 1 GG). Yet, it is highly controversial whether and under which conditions legislative omission can be a subject of this procedure. Second, the party disadvantaged by a legislative omission could file a constitutional complaint against the legislature (art 93 sec 1 nr 4a GG). One could also think of state liability claims if a party suffers damages as a result of legislative omission. However, all these options are subject to uncertainties and do not lead to rapid satisfaction of the parties to the dispute.

100 cf Schneider (n 18) 36; Wolfgang Roth, *Faktische Eingriffe in Freiheit und Eigentum: Struktur und Dogmatik des Grundrechtstatbestandes und der Eingriffsrechtfertigung* (Duncker & Humblot 1994) 516. For criticism, see Matthias Ruffert, *Vorrang der Verfassung und Eigenständigkeit des Privatrechts: Eine verfassungsrechtliche Untersuchung zur Privatrechtsentwicklung des Grundgesetzes* (Mohr Siebeck 2001) 131 f, 229.

101 cf Schneider (n 18) 36.

are less *essential* in the meaning of the doctrine and thus require a lower degree of democratic legitimacy. Yet, the argument is only convincing if private interests actually take precedence over public interests in private law litigation. It might be different if civil courts assume the task of pursuing public interests beyond the interests of the parties to the dispute.

3. *Differentiating approach based on distinct functions of private law*

In view of the important constitutional implications and skepticism towards an application of the essential-matter doctrine in private law, a cautious approach is imperative. Otherwise, it runs the risk of being discarded as an imprecise, all-pervading and practically useless doctrine in this context.¹⁰² The following differentiation might indicate a viable approach, albeit not yet precise in detail. Its main concern is to consider both the basic functions of the essential-matters doctrine and the functions of private law and private law judiciary.¹⁰³

a. *Different functions of private law*

In the following, three main functions of private law will be addressed:¹⁰⁴ first, the regulatory function of private law (*Regulierungsfunktion*) will be examined, then the functions of balancing private interests (*Interessenausgleichsfunktion*) and providing infrastructure (*Infrastrukturfunktion*) will be observed.¹⁰⁵ The objective of this approach is to find out which function of private law is most likely to trigger the limiting role of the essential-matters doctrine, bearing in mind its democratic-political aspect as well as its rule of law component.

102 cf Haltern, Mayer and Möllers (n 57), who introduce their criticism regarding an application of the essential-matters doctrine to the judiciary with the following quote from Abraham Kaplan: ‘If the only tool in one’s possession is a hammer, everything in sight begins to resemble a nail.’

103 For details regarding the concept of functions of law, see Hellgardt, (n 95) 48–50.

104 cf *ibid* 50–64. See also Alexander Hellgardt, ‘Regelungsziele im Privatrecht’ in Florian Möslein (ed), *Regelsetzung im Privatrecht* (Mohr Siebeck 2019) 121, 124–130.

105 This is not intended to be an exhaustive enumeration of the functions of private law. Also, intersections of these three functions are frequent. However, it seems possible to distinguish the functions based on the primary focus of a legal rule.

b. *Regulatory use of private law*

For the purpose of this article, regulation shall be understood as the state's use of law as an instrument of behavioural steering designed to implement political goals of common interest.¹⁰⁶ From a regulatory perspective, the different subsystems of law (i.e. public, private and criminal law) are only different means for the state to pursue its regulatory purposes.¹⁰⁷ The same regulatory objective can also be pursued simultaneously by different means. For instance, the aim of combatting undeclared work (*Schwarzarbeit*) is not only pursued by means of regulatory offences law (*Ordnungswidrigkeitenrecht*)¹⁰⁸ but also by cutting off claims of the undeclared worker on account of unjust enrichment in civil disputes.¹⁰⁹ The German Federal Court of Justice (*BGH*) explicitly justified a change of its case-law in this context with the objective of general deterrence, aiming to contribute to the legislature's intention to fight undeclared work effectively.¹¹⁰ Several examples for regulatory purposes can also be found in the law of tenancy. For instance, a provision limiting the rent increase¹¹¹

106 cf Hellgardt (n 95) 50: 'Die Regulierungsfunktion, (...) bezeichnet den Einsatz von Recht als staatliches Instrument mit einer über den Einzelfall hinausreichenden Steuerungintention, die auf die Implementierung politischer Allgemeinwohlziele gerichtet ist.' For details regarding the features of that definition, see Hellgardt, (n 95) 50–55. Several examples of how private law is used as a means of prevention and behavioural steering in German law are given by Gerhard Wagner, 'Prävention und Verhaltenssteuerung durch Privatrecht – Anmaßung oder legitime Aufgabe' (2006) 206 AcP 352. For other understandings of regulation, see eg Robert Baldwin, Martin Cave and Martin Lodge, *Understanding regulation: Theory, strategy, and practice* (2nd edn, Oxford University Press 2012) 2 f.

107 cf Hellgardt (n 104) 131. For a broader understanding of regulation that includes other regulatory means and non-governmental regulatory actors, see Julia Black, 'Constitutionalising Regulatory Governance Systems' [2021] LSE Law, Society and Economy Working Papers 1, 4: 'Regulation (...) is understood here as a series of intentional, sustained and focused attempts to change the behavior of others in order to pursue a collective purpose, using a range of techniques which often, but not always, include a combination of rules or norms and some means for their implementation and enforcement.'

108 See § 8 of the Act on combatting undeclared work (*Schwarzarbeiterbekämpfungsgesetz - SchwarzArbG*).

109 cf *BGH NJW* 2014, 1805.

110 cf *BGH NJW* 2014, 1805, 1806 para 25. The *BGH* refers to the legislature's intentions expressed in § 1 sec 1 *SchwarzArbG* and legislative materials regarding the *SchwarzArbG*. See also Wagner (n 106), 442–445.

111 cf § 556d sec 1 *BGB*.

is intended to prevent gentrification;¹¹² a tenant's right to reduce rent on account of ongoing construction is excluded for a certain period of time if it takes place because of measures taken by the landlord, which serve the purpose of energy efficiency modernization.¹¹³ In such situations, state rule-making is not primarily aimed at establishing a fair balance of interests between private individuals. The weakening or strengthening of a private legal position is rather merely a reflex of the pursuit of an overarching regulatory goal.¹¹⁴

aa. Regulation and fundamental rights

From a fundamental rights perspective, regulation is realized in a *bipolar* (state versus citizen) relationship.¹¹⁵ Here, the *defensive* function of basic rights applies, which consists in securing individual liberty from state interference for the purpose of pursuing common interests, regardless of the regulatory technique (private or public law).¹¹⁶ By regulating, the state intervenes in individual positions protected by fundamental rights to realize public interests.¹¹⁷ For such interventions, however, a statutory empowerment is necessary. That is the case both under the traditional requirement of a statutory provision (limited to encroachments on freedom and property) and under the essential-matters doctrine.¹¹⁸ Consequently, it has to apply also to private law judiciary if it pursues regulatory objectives.¹¹⁹ Regulation by civil courts can occur, for example, by specifying regulatory objectives defined by the legislature, by expanding or changing legal regulatory requirements or by developing own regulatory norms. Now, the application of the essential-matters doctrine must not be under-

112 cf Begr. RegE, BT-Drucksache 18/3121, 11. See also Hellgardt (n 95) 158.

113 cf § 536 sec 1a BGB.

114 cf Hellgardt (n 95) 54, 280.

115 cf Hellgardt (n 95) 287; Hellgardt, 'Wer hat Angst vor der unmittelbaren Drittwirkung?' (2018) 73 JZ 901, 904.

116 cf Hellgardt (n 95) 286–288; Hellgardt, (n 115) 904.

117 cf Hellgardt (n 95) 286.

118 With regard to the private law legislature, this means that wide delegations of regulatory decisions to the courts, eg by way of broad general clauses, are not permitted. The legislature must take these decisions by itself. See Anne Röthel, *Normkonkretisierung im Privatrecht* (Mohr Siebeck 2004) 64–69.

119 For details about regulatory action of civil courts and resulting constitutional constraints, see Hellgardt (n 95) 674 ff. See also Wagner (n 107) 364 ff with several examples of regulatory action of civil courts.

stood in a way to generally ban all regulatory action of civil courts and strictly prohibit judicial development of the law in this field.¹²⁰ The idea is rather to sensitize courts for the fact that they are, in principle, not entitled to pursue own regulatory purposes by the means of private law. Yet, the methodological requirements arising from this cannot be explained further in this article.¹²¹

bb. Regulation and democratic legitimacy – who defines the common good?

The approach just described also finds support in the democratic-political foundation of the essential-matters doctrine, emphasizing that important decisions must be taken by the legislature. The definition of regulation used here includes the pursuit of political goals of common interest.¹²² It can hardly be denied that the determination of the common good is an *essential* question in terms of the doctrine.¹²³ In pluralistic societies, the concept of common good has an open, mutable character.¹²⁴ It has changed from a ‘question of truth’ to a ‘political question’, which is

120 For similar approaches, see Giovanni Biaggini, *Verfassung und Richterrecht: Verfassungsrechtliche Grenzen der Rechtsfortbildung im Wege der bundesgerichtlichen Rechtsprechung* (Helbing & Lichtenhahn 1991) 463; Kruse (n 61) 183. See also Larenz and Canaris (n 3) 246 f, asserting a ‘weak’ application of the requirement of a statutory provision.

121 Given the need to trace back the legislative intentions of regulation as precisely as possible, a subjective-historical method of interpretation might have priority over an objective-teleological one. On the merits of historical interpretation see Franz Bauer ‘Historical Arguments, Dynamic Interpretation, and Objectivity: Reconciling Three Conflicting Concepts in Legal Reasoning (§ 3). For details regarding the interplay between the requirement of a statutory provision (*Vorbehalt des Gesetzes*) and the principle of priority of a statutory provision (*Vorrang des Gesetzes*), see Biaggini (n 120) 333–338; Larenz and Canaris (n 3) 246 f.

122 For details regarding that criterion of the definition, see Hellgardt (n 95) 53–55.

123 Similarly Robert Uerpmann-Witzack, *Das öffentliche Interesse: Seine Bedeutung als Tatbestandsmerkmal und als dogmatischer Begriff* (Mohr Siebeck 1999) 182. For details regarding the determination of the ‘common good’ or ‘public interest’, see Hellgardt (n 95) 239–246.

124 By contrast, in absolutistic systems of the 17th century a closed *a priori* concept of *salus publica* was predominant, cf Gunnar F Schuppert, ‘Gemeinwohl, das’ in Gunnar F Schuppert and Friedhelm Neidhardt (eds), *Gemeinwohl - Auf der Suche nach Substanz* (Sigma 2002) 19, 23. For further details, see Christoph Engel, ‘Offene Gemeinwohldefinitionen’ (2001) 32 RTh 23, 25–33; Hellgardt (n 95) 241 f.

primarily answered through the democratic process.¹²⁵ The question of identifying and determining aspects of the common good thus has become a matter of procedure and competence.¹²⁶ Under the democratic constitution, it is primarily the legislature's competence and responsibility to define public interests¹²⁷ and weight them against particular interests.¹²⁸ Parliament has the most democratic legitimacy for these decisions, and its pluralistic composition and open legislative procedure make it particularly well suited for taking them.¹²⁹ Statutory law is thus to a certain extent an expression of society's 'self-regulation'.¹³⁰

Thus, a link between the concept of regulation and the requirement of a statutory basis can be made also on the democratic-political foundation of the principle.¹³¹ Defining regulatory goals (i.e. political goals of common good) is an *essential* matter and therefore, in principal, reserved for the legislature.¹³² Equally, the question of *how* to regulate (i.e. by means of private law or public law) is at the discretion of the legislature. Hence, private law courts lack the competence for these issues; they can only concretize regulatory goals provided by the legislature but cannot set their own.¹³³

125 cf Engel (n 124) 33, comparing closed and open concepts of common good.

126 cf Peter Häberle, *Öffentliches Interesse als juristisches Problem* (Athenäum 1970) 468–470; Schuppert (n 124) 25–27; Hellgardt (n 95) 242.

127 cf Wolfgang Martens, *Öffentlich als Rechtsbegriff* (Gehlen 1969) 186 f; Häberle (n 126) 469 f: 'So bedeutet Gestaltungsfreiheit des Gesetzgebers, öff. Interessen zu solchen zu machen („normativieren“) zu können – freilich im Rahmen des GG.' See also Schneider (n 18) 32.

128 cf BVerfGE 33, 125, 159; 40, 237, 249; 41, 251, 263 f; Schuppert (n 124) 49.

129 cf BVerfGE 33, 125, 159; 40, 237, 249; 41, 251, 263 f. Yet, the concretization of regulatory objectives will to a certain extent necessarily be left to the executive and judiciary, cf Schuppert (n 124) 49 f.

130 cf Jesch (n 26) 26 f, with details regarding a 'democratic concept' of legislation and its philosophical foundations.

131 The democratic legitimacy is also considered a criterion of 'good regulation' in broader definitions of regulation than the one used here. See eg Baldwin, Cave and Lodge (n 106) 25–31, who describe five criteria for good regulation: 'Is the action or regime supported by legislative authority? Is there an appropriate scheme of accountability? Are procedures fair, accessible, and open? Is the regulator acting with sufficient expertise? Is the action or regime efficient?'

132 Similarly Hellgardt (n 95) 242 f.

133 cf Schneider (n 18) 32 f.

c. *The functions of balancing interests and of providing infrastructure*

When it comes to the functions of balancing interests and providing infrastructure, not the *defensive* dimension of fundamental rights is affected, but their character as entitlements in a wide sense (*Grundrechtsausgestaltung im weiten Sinn*), granting rights to positive action by the state.¹³⁴ That is particularly plausible with regard to private law providing infrastructure, which corresponds to the fundamental rights entitlement function in a narrow sense (*Grundrechtsausgestaltung im engen Sinn*). Here, private law enables or expands certain forms of private activity, for example by shaping social institutions (e.g. marriage, property or legal entities) or providing optional sets of rules.¹³⁵ Thus, state action does not interfere with fundamental rights positions. A comprehensive requirement of statutory provisions for state actions enabling and shaping fundamental rights (*Ausgestaltungsvorbehalt*) is mostly rejected.¹³⁶ Yet, once private law institutions enabling or extending fundamental rights have been established, subsequent limitation by the state, including the judiciary, might be considered as interventions and consequently require a statutory basis.¹³⁷

The function of balancing private interests is traditionally considered as the main task of private law.¹³⁸ It is a feature of most private law constellations that the positions of at least two individuals, protected by fundamental rights, compete.¹³⁹ As mentioned above, one can describe such situations as *multipolar* (citizen-state-citizen) in contrast to *bipolar*

134 For details regarding the function of fundamental rights as entitlements in a wide sense, see Alexy (n 48) 395 ff. The notion of *shaping* fundamental rights (*Grundrechtsausgestaltung*) is highly discussed. For details, see Christian Bumke, *Ausgestaltung von Grundrechten: Grundlagen und Grundzüge einer Dogmatik der Grundrechtsausgestaltung unter besonderer Berücksichtigung der Vertragsfreiheit* (Mohr Siebeck 2009); Hellgardt (n 95) 274–277, 282–286.

135 cf Hellgardt (n 95) 124 f.

136 cf Bumke (n 38) 207; Bumke (n 134) 49 f. In the Basic Law, only a few provisions explicitly require the legislature to shape fundamental right entitlements (cf art 4 sec 3(2) GG, art 14 sec 1(2) GG).

137 One could interpret the decision BVerfGE 128, 193 – *Dreiteilungsmethode* in this way. It concerned a new method of calculating the level of maintenance of a divorced spouse developed by the Federal Court of Justice (BGH). That decision illustrates stricter limits of judicial interpretation of private law statutes (cf Brenncke (n 11) 96 f).

138 cf Hellgardt (n 104) 126.

139 cf BVerfGE 138, 377, 390; Hellgardt (n 115) 906.

(state-citizen) constellations.¹⁴⁰ The state is confronted with at least two private individuals whose ‘conflicting fundamental rights positions (...) are to be balanced in such a way that they are realized as effectively as possible for all concerned’.¹⁴¹ Here, the state – the legislature as well as courts – acts primarily as an ‘arbitrator’¹⁴² and has wide discretion in weighing the colliding interests.¹⁴³ It does not pursue public interests overriding the private interests involved.¹⁴⁴

The resolution of such *multipolar* conflicts by state actors surely affects the fundamental rights positions at stake – however, not in the form of an intervention.¹⁴⁵ Private individuals are *entitled* to an objective conflict-resolving state action; it results from the state monopoly on use of force.¹⁴⁶ Consistently, a court’s further development of the law aiming at objectively balancing the legal positions concerned does not trigger the *defensive* dimension of fundamental rights. If, in such multipolar constellations, statutory provisions specifying the balancing of interests are lacking, civil courts are both empowered and obliged to find a just balance themselves.¹⁴⁷

140 In BVerfGE 115, 205, 253 the Federal Constitutional Court emphasizes that the constitutional requirements applying to bipolar (state versus individual) situations are not identical with those applying to multipolar constellations. For criticism regarding this concept of differentiation, see Alexy (n 48) 424 f.

141 BVerfGE 134, 204, 223.

142 BVerfGE 31, 194, 210.

143 cf BVerfGE 97, 169, 176; 134, 204, 223 f. Civil courts confronted with the task to balance colliding fundamental rights must use that discretion and not give priority to one position from the outset (cf BVerfGE 96, 59, 62–65).

144 cf Hellgardt (n 95) 280.

145 cf BVerfGE 134, 204, 223; Martin Gellermann, *Grundrechte in einfachgesetzlichem Gewande: Untersuchung zur normativen Ausgestaltung der Freiheitsrechte* (Mohr Siebeck 2000) 217–219; Hellgardt (n 95) 282 f. Note that in fundamental rights theory the balancing of two colliding positions by a civil court is frequently, unlike here, subdivided in two acts: an intervention in one party’s rights and the fulfillment of an obligation to protect (*Schutzpflicht*) towards the other party. See eg BVerfGE 81, 242, 255 f; 96, 59, 64 f; Canaris, *Grundrechte* (n 99) 37–51. For an overview of the controversial discussion about how fundamental rights apply to private law, see Hellgardt (n 95) 265–277.

146 Hellgardt (n 115) 907. See also, Alexy, (n 48) 414 f, in the context of protective rights.

147 cf Hellgardt (n 115) 908. However, the Federal Constitutional Court held, for example in BVerfGE 108, 282, 311 – *Kopftuch*, that the legislature does have ‘an obligation (to determine itself the guidelines) if conflicting fundamental civil rights collide with each other and the limits of each are fluid and can be determined only with difficulty’ (content in brackets added). Yet, it seems that

Furthermore, the democratic-political dimension of the essential-matters doctrine appears to have less validity here. Court decisions designed to balance individual interests on a case-by-case basis are made within a sort of framework delimited by the ‘core contents’ of the colliding fundamental rights positions, which are absolutely protected under the Basic Law (cf. art. 19 sec. 2 GG).¹⁴⁸ In the absence of statutory provisions, it is the court’s task to carefully trace the contours and boundary lines of the conflicting fundamental rights positions in question and, as far as possible, to seek to optimize both positions.¹⁴⁹ Thus, when balancing individual interests, judicial decision-making and further development of the law is a priori less undetermined and requires less strict legislative guiding than when it comes to concretizing the open concept of common good by defining regulatory goals.¹⁵⁰

IV. Conclusion

We have shown that a differentiation by functions of private law can be useful in determining the scope of application of the essential-matters doctrine. Regulatory use of private law is likely to trigger the main functions of the doctrine, i.e. to attribute important questions to the democratic

such cases are exceptional. They are politically controversial, get great public attention and often also involve public interests. Also, the Court’s requirement of ‘guidelines’ might be less restrictive than the one of a ‘concrete statutory basis’.

148 For details regarding art 19 sec 2 GG, see eg Barbara Remmert in Dürig/Herzog/Scholz (eds), Grundgesetz-Kommentar (95 suppl, CH Beck 2021) Art. 19 Abs. 2 GG paras 36 ff. If courts disregard basic principles and limits of the weighing process, their decisions can be challenged as unconstitutional. For details regarding the specific constitutional requirements for the process of balancing colliding interests, see Hellgardt, (n 95) 282–286.

149 For a similar approach, see eg BVerfGE 134, 204, 224; 141, 74, 101. See also Gellermann (n 145) 212–226, with a concept of ‘normative contouring’ in constellations of colliding fundamental rights positions. For details regarding the understanding of fundamental rights as principles in a sense of optimization requirements, see Alexy (n 48) 71 ff.

150 This is not meant to hide the fact that determining the *right* balance between colliding private interests might be politically controversial and have important societal effects. In certain controversial constellations which get great public attention and might involve public interests parallel to the reconciliation of interest, the legislature will be well advised to provide the courts with clear statutory guidelines.

legislature, particularly such interfering with fundamental rights. Here, the requirement of a statutory basis seems justified. Furthermore, courts do not come into conflict with their duty to adjudicate if they refrain from pursuing own regulatory objectives, for the pursuit of public interests is regularly not indispensable to decide a private dispute objectively.

By contrast, if private law adjudication aims primarily at balancing colliding individual interests, the application of the doctrine seems less justified. The need for a high level of democratic legitimacy and the protection of fundamental rights through statutory provisions is of minor relevance here. Courts need wider discretion to find a just balance of private interests, if necessary, by further developing the law; broader legislative guidelines are sufficient. This discretion is also necessary in order to enable judges to comply with their duty to adjudicate if concrete provisions are lacking. However, in the above-mentioned *Scheinwater* decision,¹⁵¹ the Federal Constitutional Court seems to apply the essential-matters doctrine precisely to a constellation of balancing interests, namely the apparent father's right to compensation and the mother's general personality right. In granting the apparent father an information right against the mother on the basis of a general clause (§ 242 BGB), the civil court dealing with the dispute supplemented the legislative guidelines provided for the balancing of interests between the individuals concerned. It did not aim to achieve regulatory objectives beyond the 'framework' set by the colliding interests. Thus, the Federal Constitutional Court should have refrained from a general restriction of the civil court's competence to further develop the law. The review of the judicial weighing procedure itself would have been adequate and sufficient.¹⁵²

151 BVerfGE 138, 377 – *Scheinwater*.

152 In the first part of the decision (BVerfGE 138, 377 paras 26 ff), the Court reviews the civil court's balancing of interests and concludes that 'the court incorrectly assessed the importance attached to the complainant's general right of personality'. In the second part of the decision (BVerfGE 138, 377 paras 35 ff), however, the Court considers it necessary to emphasize that judicial development of the law in such constellations in principle exceeds the constitutional boundaries if a specific basis in statutory law is lacking.

