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CONSTITUTIONAL JUSTICE AND THE REALIZATION OF THE KEY VALUES OF CONSTITUTIONALISM

1. About the organization of the community order

Human beings need for their existence and further development an organized order in community with other human beings.

This community order must be endowed with institutions and instruments suitable for the efficient attainment of its objectives. This is the *institutional-functional dimension* of this order.

And furthermore, this order must have a basic value orientation, namely that its goal is to secure the existence of man in such a way that the basic attributes of the human being are maintained and realized: dignity, which includes freedom and to which everyone is equally entitled by virtue of being human. These three basic attributes of dignity, freedom and equality are necessarily the foundation of this community to be secured. The primary orientation to these three values is the *value dimension* of this order. [1]

This order must be a *legal* one, since only law, through its obligatory character, contains the necessary stability and can thus sufficiently fulfill the securing function.

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[1] See the reflections on this process by Jean-Jacques Rousseau, *Du Contract social ou Principes du Droit Politique* (Amsterdam: Marc Michel Rey, 1762), chapter 1.1; 1.6; 2.3.

Moreover, the law, by its general and universal character, corresponds to the idea of equality, and finally, the law is a rational construct that is sense-oriented, gives a perceptible reason for its arrangement, and can convey consistency in behaviors.

A system of order such as a legal order thus contains principles of *structure* and principles of *value.* The *structure* of the legal order refers to its institutional system (in a broader sense, so that also in the case of the legal order of a state the various forms of the territorial organization are included), but contains also functional structural principles, in particular the requirement of functional efficiency, transparency, organ loyalty, functional contradiction freedom, etc. In this context, it can already be stated that the institutional structures cannot ultimately be separated from the value dimension. The values such as freedom (democracy being political freedom) affect the institutions, institutionally mediate self-determination and freedom for the people, the members of the community, through parliament or other basic decision-making mechanisms.

Since the freedom of the individual is realized through the *law* that binds the community of individuals, all other institutions of this system of order, in addition to the institution that directly represents the individuals – the parliament in the state – also mediate freedom, since they realize the law as the freedom creating instrument through application, by the executive, and control, by the judiciary.

2. About the value system of the organized community

The appearance of the organized community is traditionally the state. However, there is a tendency to shift state functions to plurinational bodies; the main example is the European Union as a supranational community, based on an autonomous legal order created by the transfer of national sovereign rights.[2] Functionally, it takes over significant areas of responsibility from the member states, with which it forms a unit that is, however, superior to them. The European Union is a consolidated system in its functional areas, even if the majority of its competences are those it shares with the

[2] See in particular *Flaminio Costa v E.N.E.L.*, case 6/64 (ECJ, 15 July 1964), 585, 587 et seq.

Member States.[3] Like the state, the supranational community is characterized by the fact that in numerous areas it is able to exercise public power over individuals or, even without this, to substantially shape areas relevant to the lives of individuals. The reference to the individual in this way, both in the state and in the supranational community and in (possibly in the future emerging) comparable community forms, is the reason for considering, in addition to the institutional-organizational structure dimension, also and especially the above-mentioned value dimension as necessary for this community.

Already at this point we can state that whenever public power can be exercised against individuals, be it in the state or in another community form, the validity also of the value dimension, which includes human dignity, the principle of freedom and equality as basic elements, must be assumed.[4]

If we look at yet another, but considerably less consolidated form of community, the relations between states under international law – whether these are grouped in international organizations or not, and whether they are universal or regional – the aforementioned value order is relevant here as well.

Even if, according to the traditional view, the subjects of international law are the sovereign states and the individual is "mediatized" by the state, there are, as is often emphasized, tendencies toward individualization. Evident examples are the individual's right to sue before the European Court of Human Rights or the criminal liability of individuals before the International Criminal Court. The traditional disponibility of international law, which corresponds to the state-centeredness of this legal system, is contrasted by the emergence of objectively binding norms of international law, especially those with reference to the individual. It is not uncommon to speak of the constitutionalization of international law[5] in this respect.

In the area of human rights, international law has an indirect guarantee function insofar as it obliges states to respect human rights as standardized in international law.

[3] See Conference of the Representatives of the Governments of the Member States, *Consolidated version of the Treaty on the Functioning of the European Union* 2008/C 115/01, European Union, 13 December 2007, art. 4.
[4] See also Rainer Arnold, "Contemporary Constitutionalism and the Anthropocentric Value Order – On the Modernity of the 1921 Constitution of Georgia," *Journal of Constitutional Law* 1 (2021): 15, 21.
[5] See Markus Krajewski, *Völkerrecht*, (Nomos 2017), 11–13.

Moreover, essential areas of state life today are predetermined by the working results of multinational organizations, which are an expression of globalization; without international expertise, no knowledge can be gained in many areas that would be sufficiently well-founded in today's transnational world.

So we see: indirect, but significant individual reference and co-determination of essential areas of life by international law, which makes it necessary to assume the value-relatedness with regard to the individual as necessary also in international law.

3. Constitutions in a formal and functional sense

Constitutions are the basic legal order of a state, or in a broader sense of a consolidated social system such as the European Union in which public power is exercised over individuals.

Even if, after the failed attempt to create a constitution for Europe, the word constitution is avoided in the new documents that have formed the basis of the new European Union since 2009, they are more than international or supranational integration treaties, but functionally constitutions. This is true at least for the Basic Treaty on European Union and for the Charter of Fundamental Rights of the EU. The fundamental provisions of the Treaty on the Functioning of the European Union could also be functionally qualified as constitutional law. The European Court of Justice has always used this terminology.[6]

It should also be mentioned here that even the European Convention on Human Rights, which does not have a consolidated institutional underpinning comparable to that of the European Union, is nevertheless referred to as constitutional law because it created a European public order. The European Court of Human Rights itself has made this qualification.[7] In view of the above criteria, this can certainly be affirmed. In addition, the European Convention on Human Rights is a kind of supplementary

[6] *Parti écologiste 'Les Verts' v European Parliament*, case 294/83 (ECJ, 23 April 1986). See paragraph 23 – I the treaty as the "basic constitutional Charter." *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, cases C-402/05 P and C-415/05 P (ECJ, 3 September 2008), paragraph 202.

[7] *Loizidou v Turkey* (Preliminary Objections) (23 March 1995) Series A no. 15318/89, paragraph 75.

constitution to the national constitutions of the 46 member states, since the interpretation of the Convention made by the Court of Justice is (at least to a large extent) taken up by the national constitutional courts or supreme courts and considered authoritative for the interpretation of their own constitutional norms.

We can therefore refer to national constitutions as formal constitutions and to the basic treaty provisions on the European Union and the European Convention on Human Rights as constitutions in the functional sense. However, this conceptual qualification also applies to the other multinational human rights treaties, the American Convention on Human Rights[8] and the African Charter on Human and Peoples' Rights.[9] By their form, they are treaties under international law; by their function, they are constitutions.

However, it should be noted that the term "formal constitution" is used here for the result of the traditional process of constitution-making in the state, but that constitutions in the functional sense, as they are called here, are also formalized in the way that they are contained in a written document that is considered fundamental. There is no constitutionalization as in the state, since the member states have ratified these treaties.

Constitutions are the basic legal order of a state and also have this function outside the state, as a constitution in the functional sense. As can be seen from the above, they have two basic functions, they determine the organization of the community of people through the establishment of institutions and functional mechanisms and they determine the ideal orientation through values.

Constitutions are created in a certain historical moment, usually by fixing them in writing, without being able to be perfect at the moment of creation nor during the duration of the existence of the constitution. A constitution is a living instrument[10] that has both a regulative character, determining the basic conditions of the social community in question, and an adaptive character, allowing the constitution to adapt

[8] See Thomas M. Antkowiak, "The Americas," in *International Human Rights Law*, 3rd edition, ed. Daniel Moeckli, Sangeeta Shah & Sandesh Sivakumaran, (Oxford OUP, 2018).
[9] See Rafaa Ben Achour, "Inter-fertilisation jurisprudentielle: Quand le juge de la Cour africaine dialogue avec ses homologues européen et interaméricain," *Ordine internazionale e diritti umani* 5 (2021).
[10] Rainer Arnold, "Le dynamisme de la Constitution – quelques réflexions," in *Mélanges en l'honneur de Bertrand Mathieu*, eds. Anne-Laure Cassard-Valembois, Charles Fortier et Marie-Odile Peyroux-Sissoko (Paris: Lextenso, 2023).

to the changing basic conditions of society during its existence. While the basic value order of a constitution oriented to man must always be preserved in its functional core, the constitution not only aims to create stability in its foundations, but also possesses the dynamics of adaptation, due to which the regulative functional goal is preserved even in the case of fundamental changes in the target object.

The text of constitutions is necessarily imperfect owing to its dynamics. It is written and at the same time unwritten and must be supplemented by judicial interpretation. Formal constitutional amendments are not always possible and purposeful; judicial interpretation has an important function in the continuous adaptation of the constitution to changed basic conditions.

As a rule, a constitution also has a codifying effect; however, it does not have to be exhausted in one document, but, as some examples show, can manifest itself in several basic documents[11] or, as in Austria, consist of a series of constitutional laws in addition to the main text.[12]

It also follows from the quality of a constitution as a basic order that it takes precedence over all other normative acts, i.e., laws, ordinances, etc. The supremacy of the constitution in a legal order is a characteristic of a formal constitution and results from its quality as a basic order.[13] There are only a few exceptions to this, for example in Great Britain, where the supreme source of law is the parliamentary act, not a constitution in the continental sense.[14]

4. The basic value system as an anthropological prerequisite for a constitution

[11] For example in *Czech Republic: Constitution of the Czech Republic*, accessed February, 10, 2024, https://www.refworld.org/legal/legislation/natlegbod/1992/en/14515. and *Charter of Fundamental Rights and Freedoms: Listina základních práv a svobod*, accessed February, 10, 2024, https://www.psp.cz/docs/laws/listina.html.

[12] See *Verfassungsgesetze in Österreich*, accessed February, 10, 2024, https://www.parlament.gv.at/verstehen/politisches-system/bundesverfassung/verfassung/.

[13] See Rainer Arnold, "Constitutional Jurisdiction and Primacy of the Constitution," in *Constitutionality of Law without a Constitutional Court*, ed. Miroslaw Granat (Routledge, 2023).

[14] Marc Johnson, *"The models of Parliamentary Sovereignty,"* last modified December 2017, https://legalresearch.blogs.bris.ac.uk/2017/12/the-models-of-parliamentary-sovereignty/.

A constitution is oriented toward the human being. Its aim is to protect and promote human beings. This anthropocentric basic orientation of a constitution is the characteristic of every genuine constitution and is intended by the constitution-maker.

At the center of the constitution is the human being, its dignity, which necessarily includes the principle of freedom. Without fundamental freedom, human dignity is not possible. Human dignity cannot be restricted and cannot be weighed against other constitutional values; it is absolute. Freedom, on the other hand, must be shared with other members of the community; it is restrictable for legitimate purposes of that community. The guarantee of human dignity requires that human freedom is a fundamental principle that can be restricted by legitimate interests of the community, as an exceptional case. The principle of proportionality is the adequate criterion for the demarcation between freedom and restriction of freedom.

The three basic values human dignity, principle of freedom and equality are consequences of the anthropological basic conditions of man. They form the foundation for the further basic rights of man; these are substantive specifications of these three values. Since these values are connected with the essence of man, they are universal in their "normative reality", independent of culture and time.

That the subjective perception of these values can, and not infrequently does, deviate from this reality is a sociological fact. Perception is the realization of these values in the particular perspective of the legislator, the norm-interpreting user of the law in the executive and judicial branches, the political decision-makers, the individual, and even the constitution-making and constitution-amending powers. The ideal case is that perception and normative reality coincide. If there is divergence, it is up to the judge to bring the wrong perception back into line with normative reality.[15]

The constitution is based on the goal of comprehensively protecting the freedom of the individual. This idea of protection, which does not allow any gaps in protection, is ultimately rooted in human dignity. This is necessarily linked to the principle of freedom, as already emphasized. If freedom is to be understood as a principle, it must

[15] See for these considerations recently Rainer Arnold, "Struttura ed interpretazione della Costituzone – Alcune riflessioni," in *Scritti in onore die Fulco Lanchester, vol. I,* eds. G. Caravale, S. Cecanti, L. Frosina, P. Picciacchia, A. Zei (Napoli: Jovene, 2022).

be comprehensive freedom, which can be restricted only by legitimate community interests. Freedom means not only respect of the state for the self-responsible, own actions of humans, but also protection against not justified interferences of the state and also of other individuals. This also shows that the protective concept of the constitution is not limited from the outset to the only written guarantees, but that there are also unwritten fundamental rights, aspects of protection not expressed in the constitutional text. Constitutional law, including in the area of fundamental rights, is not only the law written at the time of the constitution's creation, but also the constitutional law not covered by the text, but nevertheless in force, since it was either incompletely written down at the historical moment of the constitution's creation or became incomplete as a result of the further development of the constitutional order. The constitution is, as already underlined, a living instrument, which aims to develop its normativity throughout the period of the constitution's existence. Further, new needs for protection may arise as a result of changes in the situation, such as technological development; the fundamental protective finality of the constitution covers these as well. This will be discussed later in the context of judicial functions.

Furthermore, it should also be emphasized that the protection of the freedom of the individual is not only always comprehensive in terms of content, but that the functional effectiveness of the protection of fundamental rights is also intended by the Constitution in the broadest possible form. One can therefore speak of substantial and functional efficiency of the protection of fundamental rights.[16] This applies not only to the national level, but also to the supranational level, and the idea is also relevant, as far as possible, in the less integrated area of international legal relations.

Functional efficiency means that fundamental rights are fully effective, that their interpretation aims at optimal realization of protection,[17] that the protection intended by fundamental rights may only be restricted in a limited way, and that the essence of a fundamental right may never be touched.

[16] See Rainer Arnold, "Substanzielle und funktionelle Effizienz des Grundrechtsschutzes im europäischen Konstitutionalismus," in *Von der Kultur der Verfassung, Festschrift für Friedhelm Hufen zum 70. Geburtstag,* eds. Max-Emanuel Geis, Markus Winkler, Christian Bickenbach (Germany: C.H. Beck, 2015).
[17] See Robert Alexy, *Theorie der Grundrechte*, 8th ed. (Germany: Suhrkamp, 2018), 75.

The state of today is fundamentally an open state, which respects international law and which has also integrated itself into supranational integration communities. Fundamental rights are also covered by this transnational perspective. They are to be interpreted in the sense of international law.[18]

5.The role of judiciary in modern constitutionalism

The judiciary has an essential task within the framework of the constitutional order. It is through the interpretation of constitutional norms that it brings the constitutional order to fruition. This will be discussed below.

Jurisdiction is limited to applying the law in force. This presupposes interpretation, which in the area of the constitution, i.e. generally speaking in the area of constitutionalism, has various peculiarities compared to the interpretation of simple statutory law.

First of all, it is necessary to point out that the interpretation of a law tries to find out the objective will of the law at the moment of interpretation. It is not the subjective will of the legislator as a person or institution, but the will abstracted from it, i.e. the objective will, which results from the law as a norm. The subjective will of the legislator, as manifested in the genesis of the norm, can to a certain extent also provide clues to the objectified will of the law. But the subjective-historical interpretation is rightly admitted only as a subsidiary means of knowledge. Essential is the idea that a norm has a specific goal of realizing the norm. As a rule, this goal exists during the entire time of the norm's existence. Thus, a criminal law norm naturally applies during the entire period of its duration. Since the object of the norm is subject to change in the course of time, the goal of the norm must be adapted in such a way that the realization of the goal is guaranteed during the existence of the norm without the regulative concern of the norm being lost. It should be preserved and have the intended effect even in altered situations. Since the relationship between the normative goal and the object of the goal can change at a later point in time than the time when the norm

[18] See *ibid.*, chap. 6.

was created, the interpretation can only be concerned with the objective intention of the norm at the respective point in time of the interpretation.[19]

This basic consideration also applies, and in a special way, to the interpretation of the constitution, which is, after all, a constantly evolving instrument, as above mentioned, a "living instrument".

The interpretation of constitutional law starts with written law, but also has the task of making unwritten constitutional law manifest. Constitutional law is unwritten if it cannot be made recognizable through a written norm by way of broad interpretation oriented to the optimal realization of objectives, i.e. to the so-called "*effet utile*".[20] The dynamic development of the Constitution makes written norms appear in a new light, which the interpretation must take up. In this case, the interpretation is an interpretation of the *written* norm that takes account of the new development, not a visualization of unwritten constitutional law.

In the context of these considerations, we can distinguish:

(1) Principles or rules not written from the time of the constitution's creation, but which are to be regarded as mandatory for an authentic constitution, i.e. which exist normatively from the beginning without appearing in the written text,

(2) norms resulting from the further development of the Constitution, which are now mandatory due to this development,

3) normative elements of the Constitution that can be recognized from the moment of their creation only through (*effet utile* oriented) judicial interpretation of a written norm, and

(4) normative understandings resulting from the further development of the constitution, which are only made visible by the interpretation of a written norm.

Regarding the first category, an example can be given of the non-explicit mention of the principle of the rule of law in the Belgian[21] and Luxembourg[22] constitutions; this

[19] See Rainer Arnold, "Le dynamisme de la Constitution".
[20] See Michael Potacs, "Effet utile als Auslegungsgrundsatz," *Europace* 44 (2009).
[21] See André Alen & Willem Verrijdt, "L'Etat de Droit dans la Jurisprudence de la Cour Constitutionnelle Belge: Histoire et Défis," in *The Concept of the Rule of Law in Constitutional Jurisprudence.* Comparative Law Studies, vol. 16, ed. Rainer Arnold (forthcoming).
[22] See "L'Etat de droit et la justice constitutionnelle dans le monde moderne", *Rapport de la Cour constitutionnelle du Grand-Duché de Luxembourg, 4ième Congrès de la Conférence mondiale sur la justice constitutionnelle,* (Vilnius,

was recognized as a principle implicit in constitutional law and thus made manifest as a component of the constitutional legal order. A similar example can be found in Polish constitutional law shortly after the end of the communist era. In the so-called Small Constitution, the principle of the rule of law was explicitly inserted into the text, but the text of the Constitution lacked, for example, the fundamental right to life. This was then derived from the principle of the rule of law.[23] A similar process can be found in the law of the European Communities from the 1960s onwards. In the treaty text, which functionally, at least in its fundamental parts, has and had also at that time a constitutional character, no fundamental rights were explicitly concealed. However, the jurisprudence of the European Court of Justice, in a long series of decisions, developed general principles of Community law, which had the function of fundamental rights.[24]

An example of the second category in the German constitutional order is the constitutional principle of open statehood in its current developments. It is true that this principle was basically already laid down in the text of the Basic Law of 1949, for example in Article 24, which allows the transfer of sovereign rights to intergovernmental bodies. It was the basis for the creation of the supranational Coal and Steel Community and the European Economic Community, and was then supplemented, with the creation of the (first) European Union, by the new Article 23 of the Basic Law. While these developments still took place within the framework of the text of the Basic Law, the further development of constitutional integration law in Germany can in part be understood as a further development of the law that clearly goes beyond the text of the Basic Law: the adoption of the primacy principle, the establishment of the existence of a German constitutional identity defined by the so-called eternity clause of Article 79(3) of the Basic Law,[25] the principle of responsibility

Lituanie, Septembre 2017), accessed February, 10, 2024, *https*://lrkt.lt/data/public/uploads/2021/10/luxembourg-constitutional-court-fr.pdf.

[23] Maria Kruk, "Progrès et limites de l'état de droit," *Pouvoirs* 3, no. 118 (2006).

[24] See Frédéric Sudre, Laure Milano, Hélène Surrel, *Droit européen et international des droits de l'homme*, 14e édition, (Paris: Puf, 2014), 138–46.

[25] "Decisions published in the Official Digest (BVerfGE)," BVerfG, accessed February, 10, 2024, https://www.bundesverfassungsgericht.de/EN/Entscheidungen/Amtliche%20Sammlung%20BVerfGE/Amtliche%20Sammlung%20BVerfGE.html, vol. 123, 267, 344, 353 et seq., 397.

for integration[26] developed by case law, and finally the expansion not long ago by case law of the competence of the Federal Constitutional Court to review not only the violation of German fundamental rights but also the misinterpretation and misapplication of fundamental rights of the EU Charter of Fundamental Rights.[27] A similar process is the obligation, not contained in the text of the Basic Law but elaborated by case law in the course of the strengthening of open statehood in Germany, to interpret the fundamental rights contained in the Basic Law in the light of the European Convention on Human Rights.[28] These new, concise processes of solidification and expansion of the general principle of open statehood are not developments provided for in the text of the Constitution, but they have received impetus from political and social reality to the point where they have been singled out by judicial interpretation as new principles of constitutional law.

However, it must be emphasized that in both the first and the second category, the judicial interpretation in the above-mentioned manner took place because these newly recognized constitutional norms (be they rules or principles) were considered constitutionally necessary. In this regard, it should be noted that the Constitution, if it is an authentic Constitution, contains necessary parts. Since the constitution is anthropocentric, that is, it exists for the sake of man, the basic value system: human dignity principle of freedom and equality is a compulsory part of a constitution be it written or unwritten. The principle of the rule of law also exists in every authentic constitution as a compulsory component, since only the orientation to the law does justice to the anthropological basic factors of human dignity. This orientation to the law means that the constitutional values are also made binding for the institutions of the state, for their structuring and function and above all for their activity.

Changes in actual life, in the social conditions of a society, may also lead to the need for new constitutional norms or concepts, or to the need for certain reinterpretations of existing constitutional provisions. The reaction may consist of a textual amendment as part of a constitutional reform- which is difficult to achieve politically -, or, to the

[26] BVerfG, "Decisions published," vol. 123, 267, 351 et seq.
[27] BVerfG, "Decisions published," vol. 152, 216 et seq.
[28] BVerfG, "Decisions published," vol. 111, 307 et seq.

extent that this does not exceed judicial discretion, it may take the form of judicial interpretation.

There are also constitutional norms that are not necessary and can be incorporated into the text of a constitution by the constitution-maker or constitutional reformer. However, care should be taken to ensure that these non-necessary constitutional norms have a fundamental character, so that there is sufficient justification to include them in the constitutional text. Judicial interpretation itself cannot, as a rule, create such non-essential constitutional norms, since otherwise the function of constitution-making or constitutional amendment would be interfered with.

The above-mentioned fourth category includes judicial interpretations of norms written in the text, which, however, appear in a (usually only partially) new light due to changes in the circumstances of the time.

An example, again, from German constitutional law: the fundamental rights of the Basic Law were initially interpreted only in the traditional way as subjective defensive rights against encroachments by the state on the fundamental rights of the individual. Only some time, albeit a short time later, were the fundamental rights qualified as objective values, which also report a binding for private.[29] Much later, the so-called objective duty to protect was derived from the nature of fundamental rights, which today plays an enormously important role in the argumentation of constitutional jurisprudence.[30] Finally, and this only in 2021, the so-called intertemporal dimension of fundamental rights was established, i.e. that a current, i.e. today's, violation of a fundamental right can already occur if it only has a restrictive effect on fundamental rights in the future.[31]

Summarizing what has been said so far, we can describe the functional task of jurisprudence in the development of contemporary constitutionalism as follows: judges (especially constitutional judges) have the task, on the one hand, of ensuring the efficiency of the constitution. This means that they interpret the constitutional norms in such a way that they fully achieve the normative goal pursued by them and, in doing

[29] BVerfG, "Decisions published," vol. 7, 198, 204/205.
[30] BVerfG, "Decisions published," vol. 49, 89. et seq. See also vol. 125, 39, 78.
[31] See BVerfG, "Decisions published," vol. 157, 30 et seq.

so, find an optimal balancing solution, especially when balancing between constitutional principles.

Ensuring efficiency also means that judges always develop, perfect the function of a constitutional norm. One example is the aforementioned expansion of the function of the protection of fundamental rights in German constitutional law, from the subjective right of defense to the assumption of the objective value of fundamental rights, further to the elaboration of an objective duty to protect, and finally the new recognition of the intertemporal, future dimension of fundamental rights.

This also includes the identification of new aspects of fundamental rights, such as new fields of personality protection or, to take another significant example from German constitutional law, the assumption of a right to "guarantee the confidentiality and integrity of information technology systems", in short: a fundamental computer right.[32]

Another example is the task of the constitutional judge to declare unconstitutional ordinary laws that weaken or even eliminate the efficiency of institutions enshrined in the constitution. If an institution, for example, the Constitutional Court, is enshrined in the Constitution, a simple law may not reduce its efficiency. The Constitution guarantees the full functioning of an institution by enshrining it in the Constitution. Ordinary legislation that does not respect this would not be in conformity with the Constitution. This is another aspect of ensuring the efficiency of constitutional norms.

The second important function of the judiciary in contemporary constitutionalism is to make the unwritten parts of the constitution visible and to include them in the overall interpretation. This has already been explained in detail above.

In addition, it should be noted that a distinction must be made between an expanding interpretation of a written constitutional norm and making unwritten constitutional law visible. In the former case, it is often a matter of concretization of written constitutional norms of a general nature. An example is the exceedingly numerous personality rights that the German Federal Constitutional Court developed in its jurisprudence on the basis of Article 2(1) of the Basic Law, which guarantees the free development of

[32] BVerfG, "Decisions published," vol. 120, 274 et seq.

personality in its text, but which was expanded in early jurisprudence into a general fundamental right of freedom of action, in conjunction with the guarantee of human dignity of Article 1(1) of the Basic Law. While these two constitutional norms are combined under the name of general personal rights, the numerous individual aspects are specific personal rights.

6. Open statehood

The task of the judiciary is to do justice to the increasingly important and intensive principle of so-called *open statehood*. This principle is partly contained in explicit norms, the overall view of which makes it appear as a constitutional obligation to duly observe inter- and supranational law and to harmonize it with the internal legal order. Open statehood requires a judicial interpretation of the national constitution that must meet the requirements of these extra-state legal systems and, on the other hand, also take into account the legitimate concerns of the state constitution. In Germany, for example, case law has developed the principles of interpretation that is friendly to international law and to European law.[33]

Accordingly, it is the task of the judge to derive the solution sought in the national law not only from the national perspective but also from the international perspective, i.e. in this sense to develop a comprehensive, internationalized perspective. This appears to be particularly important in the area of fundamental values.

Open statehood requires, first of all, that judges interpret the norms contained in the Constitution that concern the relationship with inter- and supranational law in a way that meets the requirements of the modern state oriented toward precisely this open statehood. Such an interpretation often shows a tendency to relativize the traditional rules of the Constitution, which are more oriented toward the state, and to adapt them to modern developments. German constitutional law can again be taken as an example:

[33] See BVerfG, Order of the Second Senate of 15 December 2015 – 2 BvL 1/12, paras. 1–26, accessed February, 10, 2024, https://www.bverfg.de/e/ls20151215_2bvl000112.html and BVerfG, Judgment of the Second Senate of 30 June 2009 – 2 BvE 2/08, paras. 1–421, https://www.bverfg.de/e/es20090630_2bve000208en.html, paras. 225.

the European Convention on Human Rights, regional international law, is, according to the traditional transformation rule of Article 59(2) of the Basic Law, an international treaty transformed into German federal law, occupying only the rank of an ordinary federal law in the internal German legal order. Nevertheless, judicial interpretation, in keeping with the significance of the Convention, has ultimately placed the guarantees of this Convention on an equal footing with the Constitution by imposing the unwritten constitutional obligation to interpret German fundamental rights in the light of the Convention in each case, at least to the extent that this is interpretatively possible.[34] This has also brought about a paradigm shift in German constitutional law in that the European Convention on Human Rights is frequently referred to by constitutional jurisprudence, whereas this was hardly the case before the relevant Görgülü decision in 2004[35]. The constitutional jurisprudence also makes use of the fundamental idea expressed by article 1(2) of the Basic Law, namely that the international human rights are "the basis of every human community, of peace and justice in the world". This rather general clause is ultimately considered decisive for the fact that human rights have a universal character and must therefore also permeate the rights formulated in the national constitution.

If we look at the supranational law of the European Union, it is true that the national constitutions of the member states are the basis for the transfer of national competences to the supranational bodies, but an autonomous legal order has emerged there which now draws its functional existence from itself. Certainly, there is a certain theoretical divergence here between the legal thinking in the member states and the view of the European Union on the question of where the ground of validity for supranational law lies in the national constitutions or in the supranational legal order itself. This question is answered by the national constitutional courts in the former sense, but is seen differently on the side of the European Union, based on the case law of the European Court of Justice.[36] The German Federal Constitutional Court, similarly to other

[34] BVerfG, "Decisions published," vol. 111, 307,317, 329.
[35] *Ibid.*
[36] *Flaminio Costa v E.N.E.L.,* case 6/64 (ECJ, 15 July 1964), 585, 587 et seq.

constitutional courts of the EU Member States, conceives them as "masters of the Treaties."[37] It is true that the European Union cannot unilaterally change the treaties on which it is based, but this cannot be done by one Member State alone, but only by the Member States as a whole. However, no argument can be seen here against the assumption that the ground of validity of supranational law lies with the supranational legal order itself.

Even if one assumes that the ground of validity of supranational law lies with the EU and not with the Member States, the latter are, however, responsible for interpreting and applying the constitutional norms of integration. In German constitutional law, these are Article 24 of the Basic Law and, since the emergence of the first European Union, i.e. in 1993, Article 23 of the Basic Law. Two jurisdictions are active on the same subject – the European Court of Justice in Luxembourg and the national constitutional courts or, in the Member States without a constitutional court of their own, the supreme or higher courts. Thus, divergences may well arise, as is the case in Germany.

It is now the task of the constitutional judge or the judge at the higher or supreme courts responsible here to avoid, as far as possible, an irreconcilable conflict between the two jurisdictions. The judges have the task of achieving, as far as possible, a balance that is acceptable to both sides. This conflict comes to a head in the fundamental question of the relationship between two autonomous legal systems, namely the question of which of the two legal systems is to be given preference, i.e. which takes precedence over the other legal system. As is well known, the European Court of Justice has already developed the concept of supremacy of supranational law in its previous case law,[38] which states that in the event of a conflict between EU law and national law, even constitutional law is not to be applied.[39] It has priority, but not in the way that the national law contradicting the supranational law is null and void, but that it remains in force, but is not applied.

[37] BVerfG, "Decisions published," vol. 89, 155, 190, 199; vol. 123, 267, 349.
[38] *Flaminio Costa v E.N.E.L.*, case 6/64 (ECJ, 15 July 1964), 585, 587 et seq.
[39] *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, case 11–70 (ECJ, 17 December 1970).

To return to German law, the German Federal Constitutional Court accepts the primacy of supranational law from its own point of view, but it has made three important restrictions: first, in the famous "Solange" case law (Solange I 1974[40] and Solange II 1986),[41] the reservation that the European Community (now the European Union) must have effective protection of fundamental rights comparable to the Basic Law. If this is not the case, the fundamental rights of the German constitution apply. The Solange II decision already assumed that, at the time of this decision, judicial protection of fundamental rights comparable to the Basic Law already existed on the part of the Community, so that recourse to German fundamental rights was no longer necessary. If effective protection of fundamental rights continues to exist on the supranational side, the European Court of Justice and no longer the national constitutional court is responsible for this. The latter only exercises a general watchdog function in the sense that it observes whether this effective protection of fundamental rights still exists at the time of a decision. If this is no longer the case, the Constitutional Court can return to the situation of the Solange I decision.[42] At the latest with the entry into force of the EU Charter of Fundamental Rights in 2009, supranational protection of fundamental rights has been consolidated in written form, so that there is no longer any danger that the general level of protection on the part of the European Union will be decisively lowered.

Thus, we see here that the national constitutional judge assumes a protective function by describing the protection of fundamental rights as an identifying feature of the national constitutional order, which must necessarily be maintained. At the same time, however, the Solange jurisprudence emphasizes an important element of the Europeanization of the protection of fundamental rights. The act of a German institution, which is bound to German fundamental rights according to Article 1(3) of the Basic Law, is subject to supranational and not in German fundamental rights protection if the legal act applied by the German institution is of Community law origin.

[40] BVerfG, "Decisions published," vol. 37, 271, 285.
[41] BVerfG, "Decisions published," vol. 73,339
[42] Confirmed by BVerfG, "Decisions published," vol. 89, 155, 174,175; vol. 102, 147, 164.

In order to understand this constellation, it is necessary to realize that the application of supranational legal norms falls for the most part within the competence of national institutions. The integration system is built on the participation of both the supranational central power and that of the member states. There is then a competition of fundamental rights, namely the supranational fundamental rights regime with regard to the enactment of the legal norm and the national fundamental rights regime with regard to the execution of the legal norm. The national institution is obliged to execute the supranational legal act. This is a supranational obligation, which is covered by the national integration norm that allows the transfer of sovereign rights. The protective function of the judge lies, as stated, in the maintenance of the protection of the individual, in the recognition of the subsidiary validity of the (in 1974, the year of the Solange I decision) existing national fundamental rights. Ultimately, this also means that it is not a matter of which legal system guarantees protection, but rather that the protection as such is ensured in a functionally adequate way.

There is a parallel here to the (more than 30 years later) process whereby the FCC case law has extended the standard of review of the constitutional complaint, i.e. the constitutional court's primary instrument of fundamental rights protection, to the application of the fundamental rights of the EU Charter.[43] The Federal Constitutional Court examines not only the correct application of German fundamental rights, as under the traditional understanding, but also that of EU fundamental rights. The court sees the primary reference in the function of fundamental rights protection, which should not have any gaps.

The second reservation that the case law of the German Federal Constitutional Court assumes is that of the prohibition of acts of supranational institutions that are not covered by competence, i.e. the prohibition of ultra vires acts. Here, the judge performs a control function, since supranational acts may be performed only within the scope of the sovereign rights conferred under the national constitution.[44] This control function flows into the concept of responsibility for integration, which was later coined by case

[43] BVerfG, "Decisions published," vol. 152, 216, 236 et seq.
[44] BVerfG, "Decisions published," vol. 89, 155,188

law:[45] integration must take place as required by the Basic Law in accordance with its text and the detailed constitutional case law. The guardianship is entrusted to national institutions, but ultimately to the Constitutional Court.

In the area of this second integration reservation, another important function of the judges' manifesto also becomes clear: the function of balancing supranational and national positions by adopting an interpretative perspective that is friendly to European law. In 2010, the Federal Constitutional Court clarified the concept of a prohibited ultra vires act to the effect that not every, even minor, transgression of competences already falls under this verdict, but only those that are obvious and shift the system of competences between the EU and the Member States.[46]

It is also in the spirit of an EU-friendly attitude of the Member States that the national constitutional courts conduct a dialogue with the European Court of Justice, i.e. in case of doubt as to whether the EU institutions have kept within the scope of their competences or exceeded them, they refer the matter to the European Court of Justice for clarification via a preliminary ruling procedure. This is laid down in Article 267 TFEU and, in more general terms, in Article 19(3)(b) TEU. The obligation, also recognized by German constitutional jurisprudence, to become acquainted with the position of the European Court of Justice via such proceedings is in itself an expression of this European law-friendly behavior.[47] However, it is substantially limited by the fact that the German Federal Constitutional Court reserves the last word for itself, i.e. in the event of a divergence of opinion between the ECJ and the Federal Constitutional Court that cannot be eliminated, the latter grants itself the last decisive word. The case law upholds the final decision for all three reservations, the fundamental rights reservation, the ultra vires reservation and, in particular, the (especially important) reservation of constitutional identity, which will be discussed in more detail below. The essential justification is that this right to a definitive decision flows from state sovereignty and cannot be transferred to the supranational community.[48]

[45] BVerfG, "Decisions published," vol. 123, 267, 351 et seq.
[46] BVerfG, "Decisions published," vol. 126, 286, 304 et seq.
[47] BVerfG, "Decisions published," vol. 126, 286, 304.
[48] Thus, the argumentation in BVerfG, "Decisions published," vol. 123, 267, 350.

The reservation of national constitutional identity, which cannot be affected by EU law, was developed by the case law of the Federal Constitutional Court in its decision on the constitutionality of the Lisbon Treaty in 2009.[49] According to this ruling, the guarantees contained in the so-called eternity clause of Article 79(3) of the Basic Law are not only to be exempt from constitutional amendment, but also cannot be relativized or eliminated by supranational law. In the opinion of the Federal Constitutional Court, these guarantees constitute the so-called constitutional identity of the German constitution. By adopting this concept of identity, the judiciary has exercised a function that protects the constitution and preserves its essence. This is to be understood as a restriction of the principle of open statehood.

The reason for this case law is probably the fact that the integration norm of the Basic Law, Article 23 (1) 3, also refers to Article 79 (2) and (3) (although a definition of constitutional identity cannot be derived from this provision alone). In addition, however, Germany's integration into the supranational community, while not formal, implies a constitutional change in many respects in terms of content. It is therefore not far-fetched to locate the limit of the so-called integration power in the perpetuity (or: eternity) clause of Article 79(3) of the Basic Law.

However, the definition of constitutional identity as given by case law is not without problems. According to the case law of the Federal Constitutional Court, the eternity clause is interpreted narrowly and referred to the time of its creation.[50] This is doubtful, however, since a constitution, as noted above, is a "living instrument" that evolves over time and acquires new characteristics. What is not mentioned in the text of Article 79(3) of the Basic Law, but is very relevant for the identification of the German constitutional system, is the pronounced constitutional jurisdiction and is also the increasingly developed open statehood. This includes integration into the European Union and also acceptance of its basic conditions. These comprise the primacy of supranational law over national law and also the principle of mutual solidarity, as concretized in Article 4 TEU. This provision imposes on the EU institutions the

[49] BVerfG, "Decisions published," vol. 123, 267, 344, 353, 354,397, 399.
[50] BVerfG, "Decisions published," vol. 109, 279,310.

obligation to respect national identity, which includes the narrower concept of constitutional identity. While the Federal Constitutional Court considers constitutional identity from a national perspective, Article 4 TEU expresses it from a supranational perspective. It is also part of a constitutional identity defined from the national perspective to take this supranational perspective into account and to include it in itself. This means that a conception of identity encompassing both perspectives must be found.

The issue of constitutional identity raises a special question in integration spaces: Does this conception mean that supranational law, which after all, according to the EU, enjoys priority over all national law, may not restrict concepts mentioned in Article 79(3) of the Basic Law and shaped by the German legal tradition as such, or that the validity of the values mentioned there must remain guaranteed only functionally, regardless of whether this function is guaranteed via national or supranational law. To give an example: the guarantee of human dignity is enshrined in Article 1(1) of the Basic Law, as well as, precisely with the same wording, in Article 1 of the EU Charter of Fundamental Rights.

Is German constitutional identity preserved if Article 1 of the EU Charter is applied in a specific case and its mode of operation corresponds to that of Article 1 of the German Basic Law? In principle, the functional, if not the substantive, constitutional identity of the German constitutional order would then be preserved.

Such an approach, however, could only be assumed if the national and supranational concepts of protection were essentially functionally equivalent.

Within the framework of open statehood in integration areas such as the EU, the judiciary has a certain function in adapting to integration. This is also evident in the case law of the German Federal Constitutional Court, but it also applies, in each case with graduated intensity, to the other member states. If cooperation is intensified at the political and ordinary legislation level in integration areas as the European Union, there is an interweaving of politics and legislation, and also a need for a basic order of this integration area that is as uniform as possible. For politics and legislation are carried out within the framework of their respective basic order. Integration also means the

absence of significant divergences in the ideological foundations. Therefore, integration can succeed only if the basic ideas of the constitutional foundations coincide among all members of the integration community. This also opens up the task of judges to harmonize these foundations by way of interpretation. This is done, as mentioned above, by means of an interpretation that takes due account of the constitutional systems involved in their mutual influence and thus in the steadily progressing process of constitutional convergence in the area of values. The interpretation of German fundamental rights in the light of the European Convention on Human Rights and also in the light of the EU Charter of Fundamental Rights, as carried out by the Federal Constitutional Court, shows the process of convergence of the value bases. Article 52(3) and (4) of the EU Charter of Fundamental Rights, which provides guidelines for the interpretation of the Charter rights, namely those of the European Convention on Human Rights on the one hand and the common constitutional tradition of the Member States on the other, is virtually a mechanism that presupposes this convergence and also promotes it itself. From the perspective of the German Federal Constitutional Court, we can also observe an increasing convergence in this respect. Thus, the European Convention on Human Rights has clearly been established as the common value basis for both the Member States of the Council of Europe and the European Union, as well as for the European Union itself.

Certainly, this pro-integration interpretation has not prevented the Federal Constitutional Court from erecting a barrier against it by assuming national constitutional identity, which cannot be touched by integration processes. However, it is apparent from recent case law that functionally similar guarantees at the national and supranational levels are regarded as common guarantees, without regard to the reservation of constitutional identity.

Significant is the statement of the Federal Constitutional Court in its decision of December 1, 2020, in which it characterizes the relationship between the German identity clause (which includes Article 1(1) of the Basic Law, the guarantee of human dignity), and the EU Charter of Fundamental Rights: “However, an identity check can only be considered if the requirements following from the Charter of Fundamental

Rights of the European Union, as expressed in the case law of the Court of Justice of the European Union, do not satisfy the indispensable level of protection of fundamental rights in Article 1(1) of the Basic Law."[51]

This means that the EU fundamental rights apply without regard to the German concept of identity if they are functionally essentially the same.

Also in the decision of the Federal Constitutional Court of 6 November 2019 (decision "Right to be Forgotten I") important statements are made on the overall topic of the convergence of values in the integration area.

On the "European dimension" of the protection of fundamental rights in the Member States, the Federal Constitutional Court establishes the principle that the level of protection of the EU Charter of Fundamental Rights is co-guaranteed by the national fundamental rights (in this specific case, the German fundamental rights). The case law thus assumes a functional congruence of the levels of protection of both legal systems. It says: what is it now.

"If, thereafter, it is to be regularly assumed that the specialized law, insofar as it opens up scope for the Member States, is also oriented towards diversity for the shaping of the protection of fundamental rights, the Federal Constitutional Court can rely on the presumption that, as a rule, the level of protection of the Charter, as interpreted by the European Court of Justice, is *co-guaranteed* by an examination by the yardstick of the fundamental rights of the Basic Law." (Italics by the author).

"This presumption is supported by *an overarching connectedness of the Basic Law and the Charter in a common European tradition of fundamental rights* (italics by the author). Like the general principles of law equivalent to fundamental rights, which the European Court of Justice had initially developed in judicial law ..., the Charter is also based on the various constitutional traditions of the Member States (cf. Preamble para. 5 sentence 1, Art. 52 (4) EU Fundamental Rights Charter). It brings them together, develops them and unfolds them as a standard for Union law.

[51] BVerfG, Order of the Second Senate of 1 December 2020 – 2 BvR 1845/18, paras. 1–85, accessed February, 10, 2024, https://www.bverfg.de/e/rs20201201_2bvr184518en.html.

In this context, it is significant that the various fundamental rights systems of the Member States today have a *common foundation in the European Convention on Human Rights* (italics by the author), on which the treaty foundations of the Union itself and the Charter of Fundamental Rights are based....".[52]

"Both Article 6 (3) TEU and the preamble to the Charter make explicit reference to them. Via Art. 52 (3) and Art. 53 of the Charter, their guarantees are largely incorporated into the Charter of Fundamental Rights. For the Member States, it provides an overarching common foundation for the protection of fundamental rights. The Convention is a binding treaty under international law, which not only all Member States have implemented with domestic effect, but which is also given special effectiveness by the Council of Europe and, in particular, the European Court of Human Rights. The European Union itself has not yet acceded to the Convention, as provided for by the treaty in Article 6 (2) TEU. However, it constitutes a decisive guideline for the interpretation of the Charter and is used by the European Court of Justice for the interpretation of the Charter in accordance with Art. 52 (3) sentence 1 CFR and with recourse to the case law of the Court of Human Rights ....

Just as the interpretation of the Charter has a decisive basis in the Human Rights Convention, the fundamental rights of the Basic Law are also interpreted in light of the Human Rights Convention. According to settled case law, it follows from Articles 1(2) and 59(2) of the Basic Law that there is a duty to use the Human Rights Convention and its interpretation by the Human Rights Court as an aid to interpretation when applying the fundamental rights of the Basic Law…"

We thus see an interweaving of European legal systems at the national, supranational and regional international law levels into a common European standard of values. Article 2 TEU makes precisely the congruence of values of the European Union and all Member States a central obligation. The judicial interpretation of individual cases on the basis of a common standard of values contributes significantly to the consolidation of convergent value concepts in the integration area. We see a central role of the judiciary for the formation of a European community of values.

[52] *Ibid.*, paras. 56,57.

This conception specifically concerns the area of the European Union and the Council of Europe. However, we can say in general, and this also with a view to other existing or developing value-based integration areas, that transnational cooperation and especially plurinational legislation have an inherent tendency to transnational judicial dialogue and also to interpretational convergence of value concepts. This also has special significance for the role of the judiciary in contemporary constitutionalism.

Conclusion

In a brief conclusion, it should be emphasized that the function of the judiciary plays a very important role in the development and consolidation of contemporary constitutionalism. Constitutionalism is the totality of normative sources of constitutional law, their interpretation by the judge, their observance in state practice, their acceptance by the society, and their anchoring in the legal culture.

The famous phrase of Charles Evans Hughes, the constitution is what the judge says,[53] on the one hand underlines the importance of the judicial interpretation of the basic state order, but does not sufficiently express that the judge is bound to the normative specifications. Certainly, these are sometimes very broad in the case of a constitution and leave a great deal of room for judicial interpretation, but the constitutional text is the basis of interpretation. However, this is where the judge's task begins: the constitutional text, which is supposed to express the will of the constitutional legislator, is not static but dynamic. The meaning of a constitutional norm can change. Judicial interpretation must reveal this further development of the constitution.

The task of the judge is also, and above all, to grasp the normative goal of the constitutional provision in an effective approach. This is the judicial function of effectuation.

[53] Charles Evans Hughes, "Speech before the Elmira Chamber of Commerce, May 3, 1907," in *Addresses and Papers of Charles Evans Hughes Governor of New York 1906-1908* (New York: The Knickerbocker Press, 1908).

A constitution that has come into being at a concrete historical moment is never textually perfect. The judge has to recognize the unwritten parts of a constitution and make them manifest. In doing so, as in his interpretive task in general, he must be guided by the basic value order of a constitution, which includes the three values of human dignity, the principle of freedom and equality. This is the completion function of the judge.

In addition, there is the important task of adequately incorporating the ever-growing importance of so-called open statehood into his interpretation. The interpretation must be "friendly" to international law and, for the Member States of the European Union, to supranational law. The international constitutional values must be understood in this context. They are not to be grasped from the perspective of a single legal order alone but must be interpreted in their functional context with the international understanding of these values. This is especially true for integration areas such as that of the European Union.

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Райнер Арнольд. Конституційне правосуддя та реалізація ключових цінностей конституціоналізму

Анотація. Судді відіграють значну роль у сучасному конституціоналізмі. Вони тлумачать звичайний закон, але також і Конституцію. Вони мають завдання довести Конституцію до її повного вираження та захистити її судовими засобами.

Вони повинні розуміти конституцію як живий інструмент, динаміку якого вони повинні враховувати у своїй юриспруденції. Щоб зробити це, вони повинні застосувати телеологічний метод тлумачення, тобто вони повинні досліджувати зміст Конституції в об'єктивованому сенсі під час тлумачення, відокремленого від точки зору історичних творців конституції. Суддя, особливо конституційний суддя, повинен включити до свого розгляду основні цінності Конституції, що складаються з гарантії людської гідності, принципу свободи та рівності, і взяти це до уваги для тлумачення. Конституція також містить неписаний закон; зробити це видимим - це функція завершення судді. Суддя повинен вирішувати колізії різних конституційних цінностей з адекватним урахуванням у сенсі так званої практичної узгодженості. Важливо, щоб у разі обмеження свободи належним чином застосовувався принцип пропорційності та поважалася суть фундаментального права. Суддя також виконує функцію інтернаціоналізації, оскільки він/вона належним чином враховує вплив між- та наднаціонального права, як це передбачено конституцією. Зокрема, національні фундаментальні права повинні тлумачитися у світлі регіональних і універсальних гарантій прав людини.

Ключові слова: динамічне тлумачення; об'єктивна воля Конституції; неписане конституційне право; тлумачення на користь між- та наднаціонального права.

Rainer Arnold. Constitutional justice and the realization of the key values of constitutionalism

Abstract. Judges play a pivotal role in contemporary constitutionalism, interpreting both ordinary laws and the Constitution. Their role involves fully realizing the Constitution's intent and safeguarding it through judicial mechanisms. Judges must approach the Constitution as a living document, integrating its evolving dynamics into their jurisprudence. This requires employing a teleological approach, seeking the Constitution's objective intent as understood at the time of interpretation, independent of the framers' historical perspectives.

Judges, particularly constitutional judges, must consider the Constitution's core value system—human dignity, freedom, and equality—and integrate these principles into their interpretations. The Constitution encompasses unwritten laws, and revealing these is essential to judicial interpretation. Conflicts between constitutional values should be resolved through the principle of practical concordance.

Judges also serve an internationalization function, considering the influence of inter- and supranational law as envisioned by the Constitution. National fundamental rights should be interpreted in alignment with regional and universal human rights frameworks.

Keywords: dynamic interpretation; objective will of the Constitution; unwritten constitutional law; interpretation in favor of inter- and supranational law.

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