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CONTEMPORARY CONSTITUTIONALISM AND THE ANTHROPOCENTRIC VALUE ORDER – ON THE MODERNITY OF THE 1921 CONSTITUTION OF GEORGIA

ABSTRACT

Modern constitutionalism is based on a fundamental order of values centered on the human being: human dignity, freedom and equality. These anthropocentric values are functionally interrelated. The rule of law transfers these values to the sphere of the institutions, which must embody these values themselves and realize them in relation to individuals. A genuine constitution contains this order of basic values, whether in the written text or implicitly. These values are universal, at least in their functional core. Accordingly, modern constitutionalism is characterized by three essential tendencies: individualization, constitutionalization and internationalization.

The 1921 Constitution of the Republic of Georgia can be considered modern and in line with the essential standards of contemporary constitutionalism, especially with regard to its system of fundamental values.

I. CONSTITUTION AND CONSTITUTIONALISM

1. WHAT IS A CONSTITUTION?

In order to analyze the basic tendencies of contemporary constitutionalism, an attempt must first be made to define the essential relevant terms. This must begin with the term 'constitution', which forms the core of the legally non-fixed word 'constitutionalism', which only emerged in recent times. In other languages, such as German, the term 'constitution' is not semantically directly connected with that of 'constitutionalism', but it is obviously related in concept. Therefore, we must first try to clarify what is meant by 'constitution'.

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1.1. The Functional Concept of a Constitution and its Institutional-Organizational and Substantive Dimensions

There is no generally valid definition of the term 'constitution'. Linguistically, the terms for it vary in different languages. The term constitution, derived from the Latin '*constitutio*', is very widespread, i.e. the 'establishment' of a state, an order, the transformation of a free, basically unregulated society into an ordered, limited, precisely regulated state. Describing this with the considerations of *Jean-Jacques Rousseau*[1], this is the transition from a society, a group, a multitude of people into an ordered community. At the origin the 'free-born human being'[2] limits freedom through an agreement with the other human beings in order to establish an institutionalized community that functions for the benefit of all members. This agreed transition takes place through the 'social contract', the '*contrat social*'[3], in other words, through a 'constitution'. Its finality is thus, on the one hand, the establishment of an organized community with the aim of efficiently realizing the common good. This institutional-organizational aspect, however, is complemented by another objective that already exists from the outset: the restriction of the free-born human being should not result in unfreedom, it should maintain freedom instead, which is realized precisely in a restriction in favor of legitimate common good interests. Translated into modern constitutional language, the principle of freedom flowing from human dignity is, as interpreted by the German Federal Constitutional Court,[4] a 'community-related and community-bound' freedom and not that of an isolated, sovereign individual. Freedom is the principle and its restriction in favor of the common good is the necessary exception, which must be justified. The principle of proportionality is today's generally accepted instrument for determining the limit between freedom and the legitimate restriction of freedom.

Thus, if we define the term 'constitution' functionally, we can derive the two basic elements of a constitution from *Jean-Jacques Rousseau's* picture: the institutional-organizational dimension, the 'formal constitutionality', and the ideal, value-based dimension, the 'material, substantive constitutionality'. Both are an inseparable unity; the constitution is not only a formal organizational statute, but it is ideally purposeful. This *substantive dimension* of the constitution is a necessary consequence of the will of

[1] *Rousseau J. J.,* Du Contrat Social ou Principes du Droit Politique, 1762; Digital version by *Jean-Marie Tremblay* available at: <http://classiques.uqac.ca/classiques/Rousseau_jj/contrat_social/Contrat_social.pdf> (accessed 15.7.2021).

[2] *Rousseau J. J.,* Du Contrat Social ou Principes du Droit Politique, 1762, Livre I, Chapitre 1.1. Digital version by *Jean-Marie Tremblay* available at: <http://classiques.uqac.ca/classiques/Rousseau_jj/contrat_social/Contrat_social.pdf> (accessed 15.7.2021).

[3] *Rousseau J. J.,* Du Contrat Social ou Principes du Droit Politique, 1762, Livre I, Chapitre 6; See also Livre II, Chapitre 3. Digital version by *Jean-Marie Tremblay* available at: <http://classiques.uqac.ca/classiques/Rousseau_jj/contrat_social/Contrat_social.pdf> (accessed 15.7.2021).

[4] Judgment of the German Federal Constitutional Court of 20 July 1954 - BVerfGE 4, 7, 15-16, available at: <https://www.servat.unibe.ch/dfr/bv004007.html> (accessed 15.7.2021).

the free human being to form a community, in other words a consequence of the basic axiom of human dignity. The basic orientation of the constitution towards the human being is essential for today's concept of the constitution. This will be explained in detail later.

1.2. The Function-Related Real Definition of the Constitution and the Question of its Legal Definition

The definition of the concept of constitution, as it has been undertaken here, is based on the *function* of the constitution, i.e. it is a *functional reality-oriented definition*, not a mere *nominal definition*; the latter type, based purely on terminology, would not be appropriate, especially since, as already mentioned, the denominations for constitution show clear differences in the various legal systems. It should be remembered that terms are fundamentally created by a convention, i.e. by an 'agreement' between the person using them and those to whom they are communicated. The latter associate a certain understanding with the term which they have acquired through tradition and cultural environment as belonging to this term.[5]

The nominal designation of *constitution* or *basic law*[6] has no definitional meaning of its own, it merely makes clear that it is intended to create a set of norms traditionally associated with the term 'constitution'. Whether this is actually constitutional, depends on its functional structure. The constitutionality of these norms is only given if they satisfy the functions of a state basic order: the establishment of an institutional system and the determination of the anthropocentric value order, which consists of human dignity, freedom and equality, that is made binding for the institutions by the *Rule of law* concept.

In the view of this, it must be stated that there can be no *legal* definition of constitution, as the constitution is necessarily anthropocentric, i.e. it is linked to the anthropological

[5] For the concepts of the nominal and real (reality-based) definition, as well as to the communicative functions of terms see *Rüthers B., Fischer C., Birk A.*, Rechtstheorie mit Juristischer Methodenlehre, 11. Auflage, 2020, paras. 196-200, pp. 134-136.

[6] Moreover, the diversity of terms used in state practice (Constitution, Basic Law, Charter of Fundamental Rights, etc.) makes it difficult in any case to derive a clear definition from this, see e.g. Article 44 of the Federal Constitutional Law (B-VG) of Austria and *M. Pöschl*, Die Verfassung und ihre Funktionen, available at: <https://staatsrecht.univie.ac.at/fileadmin/user_upload/i_staatsrecht/Poeschl/Publikationen/Die_Verfassung_und_Ihre_Funktionen_-_onlinedatei.pdf> (accessed 15.7.2021); See also the Charter of Fundamental Rights and Freedoms of the Czech Republic, available at: <https://www.psp.cz/docs/laws/listina.html> (accessed 15.7.2021). The definitional usefulness of the designation as a constitution fails in a system such as Great Britain, where no formal constitution, as opposed to the European continent, exists and fundamental provisions of the state order are found in ordinary Acts of Parliament, that are in equal rank with all other pieces of legislation due to the principle of Parliamentary sovereignty, see *Greene A.*, Parliamentary sovereignty and the locus of constituent power in the United Kingdom, International Journal of Constitutional Law 18, 2020, pp. 1166-1200.

axiom of man; this fact cannot be changed normatively. Therefore, the legal norm cannot constitutively define the concept of constitution, at most it can confirm it declaratively. The legal norm can certainly not change this concept. Furthermore, it must be pointed out that the legal order is based on the constitution and is only constituted by it. The legal order, i.e. the constitution and the ordinary laws, cannot define something that is first created by what needs to be defined. The constitution-making power creates the constitution, it transforms factuality into normativity. In doing so, however, it is bound to the anthropological axiom, since it is the basis of facticity. The process of constitution-making is meaningful, it is meant to create a community of people (the organizational-ordering element) and is meant to realize the only adequacy of the human being, which lies in the anthropocentric order of values (the value-determining element).

As pointed out above, the definition of what a constitution is cannot be found in the legal order of the state, which cannot define its own basis. The international law and EU law cannot do this either, because they lack the competence to do so. However, they can make certain determinations for the constituent power of the states, since they are binding for the states. These binding determinations result from the international community for international law and, for the EU member states, they are derived from the EU.

As far as the values of a constitution, such as human and fundamental rights, are concerned, the observance of them is certainly prescribed by international, as well as by supranational law, that is clearly shown in Article 2 of the Treaty on the European Union. This results in a commitment on the part of the constitution-maker. In this way, extra-state law determines the value part of the national constitutions of the states. Nevertheless, the institutional part of the national constitution is not pre-determined by extra-national norms, except to the extent that the values also shape the structure and functioning of the institutions themselves.

2. THE CONCEPT OF CONSTITUTIONALISM AND CONSTITUTIONALIZATION

Constitutionalism denotes a state, a situation and *constitutionalization* is a process. Constitutionalism can express the commonalities and differences of the totality of constitutions globally or regionally. It indicates a legal-political state of 'constitutionality' of one or more systems. Constitutionalization refers to a process, the process of creating or expanding a constitution or the transfer of typical constitutional elements to certain areas of law (civil law, criminal law, procedural law, etc.) or to other legal systems. The term 'constitutionalism' can also be used to indicate the degree of constitutionalization of a legal system; this concerns, for example, the further

development of constitutional law through case law by the functional extension of the fundamental rights protection beyond the wording of the constitution, by differentiation of the *Rule of law* principle, by making unwritten parts of the constitution manifest in decisions or by integrating international influences, especially in the field of human rights, into the internal constitutional order. Constitutionalization can also mean that the written constitution in a system is expanded by constitutional amendments (for example, by introducing institutional constitutional jurisdiction, such as in Luxembourg[7]) beside the jurisprudential differentiation and perfection through case law.

3. CONSTITUTIONALIZATION OUTSIDE THE STATE - EU, ECHR AND THE INTERNATIONAL LEGAL ORDER

3.1. EU Law as a Functional Constitutional Order

Constitutionalism and constitutionalization are phenomena that also take place outside the state. Constitutionalization is even taking place primarily in extra-state processes, for example, with particular clarity in the development of the legal order of the EU into a functional constitutional order. In contrast to the domestic sphere, forms of international law predominate outside the state, treaties instead of the vertical exercise of power through norms, limited possibilities for sanctions, intergovernmental cooperation as decision-making structures, etc. The constitutionalization process consists of the creation, expansion and refinement of elements that are familiar from the national constitutional order, yet gain an autonomous character when adapted to the extra-state order. A significant example for this process is the development of the judicial fundamental rights in the form of general legal principles of Community law as early as the late 1960s by the European Court of Justice, which later found written expression in the EU Charter of Fundamental Rights.[8] Something similar can be said for the development of the elements of the *Rule of law* principle that was first established in national law, and later transformed into the supranational legal order as the principle of the *community of law*.[9]

If we continue to look at the European Union, significant constitutional structures are recognizable there. The European Court of Justice considered the primary law of the

[7] Constitution of Luxembourg and the Law on the Organization of the Constitutional Court of Luxembourg, Article 95 - La Loi du 27 juillet 1997 portant organisation de la Cour Constitutionnelle, available at: <http://legilux.public.lu/eli/etat/leg/loi/1997/07/27/n6/jo> (accessed 15.7.2021).

[8] *Williams A.*, Human Rights in the EU, in: *Arnull A., Chalmers D.* (eds.), The Oxford Handbook of European Union Law, 2015, pp. 249-270.

[9] *Skouris V.*, Demokratie und Rechtsstaat, Europäische Union in der Krise?, 2018, pp. 25-27; *Klamert M., Kochenov D.*, A Commentary on Art. 2 TEU, in: *Kellerbauer M., Klamert M., Tomkin J.* (eds.), The EU Treaties and the Charter of Fundamental Rights, 2019, para. 14.

Communities as constitutional law at an early stage[10]. It exercises, indeed, the same or at least comparable functions as a national constitution in the autonomous community order, which has been created by the transfer of national sovereign rights: it organizes a community composed of member states and individuals by means of institutions, instruments of action and cooperation mechanisms, and it determines the values common to this community, primarily in Article 2 of the Treaty on the European Union and in the EU Charter of Fundamental Rights. Fundamental rights protect individuals and are thus an essential feature of a constitutional order in the international sphere as well, since they have an essential normative reference to individuals, not to states. This is a consequence of the direct validity of supranational law in the internal legal order of the member states and thus of its legal effect also vis-à-vis individuals.

The constitutionalization of the supranational order was done by substantial recourse to the national constitutional systems and the ECHR, so that the concept of a *'European unit of fundamental rights'*[11] has come into being, as for instance the German Federal Constitutional Court has repeatedly referred to in its most recent case law, which shows a strong tendency towards convergence. This aspect of a functional connection with other European constitutional instruments also underlines the constitutional character of these supranational norms. In the area of fundamental rights, a transition from the international coordination structure to the vertical-individual conception of constitutional law is becoming increasingly apparent. The functional concepts of constitutional law and international law are converging significantly in this area and are to a large extent losing their own delimited meaning.

The fundamental structures of the supranational order, which have constitutional character in the functional sense, are either explicitly laid down in primary law or have been developed by case law. Early on, the European Court of Justice characterized the core elements of the special structure of the Community through its *Costa v. E.N.E.L.* decision of the European Court of Justice[12] in 1964: the autonomy of the Community legal order, created by the transfer of national sovereign rights, the direct validity and (if the conditions are met) direct applicability of this law in the member states and its primacy in the event of a conflict with national norms. These are the elements of the so-called 'supranational legal order', which is functionally, in a broader sense, also a

[10] Judgment of the European Court of Justice of 23 April 1986 - *Les Verts v. Parliament*, (294/83, ECLI:EU:C:1986:166), para. 23, available at: <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=92818&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=27907876> (accessed 15.7.2021).

[11] Order of the German Federal Constitutional Court of 6 November 2019 - 1 BvR 16/13 - BVerfGE 152, 152-215, English version available at: <https://www.bundesverfassungsgericht.de/e/rs20191106_1bvr001613en.html> (accessed 15.7.2021).

[12] Judgment of the European Court of Justice of 15 July 1964 - *Costa v. E.N.E.L.* (6/64, ECLI:EU:C:1964:66), available at: <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=87399&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=27907181> (accessed 15.7.2021).

constitutional order. Not without reason, the German Federal Constitutional Court has already spoken on the constitutional character of this legal order in early times; today, however, especially since the Lisbon decision in 2009, the court does not hesitate to use the term 'supranational' for the law of the EU,[13] but without explicitly equating it with the tem 'constitutional'. Instead, supranationality is equated with the new term 'association of states',[14] which is supposed to characterize the European Union as an 'intergovernmental' association founded by states that have remained sovereign, far removed from a European statehood. Basically, this sovereignty-oriented perspective of the German Federal Constitutional Court expresses its distance to the assumption of the EU legal order as being a functional constitutional order. The divergence of the German Federal Constitutional Court position from important supranational concepts of the EU, as developed and confirmed by the European Court of Justice, becomes visible: by claiming national competence to define the content of supranational law and its compliance with primary law, by limiting the primacy of EU law through (nationally defined) constitutional identity and by limiting the decision-making power of the EUCJ in preliminary ruling procedures[15] in this respect. However, this does not prevent the EU primary law, at least its fundamental principles and rules, from being characterized as 'functionally constitutional'.

The fact that the EU law itself avoids the term 'constitution' in order not to evoke associations with the failed Constitutional Treaty for Europe does no harm; what matters is the functional meaning of a normative structure and not its designation. For these reasons, the Treaty on the European Union, as the fundamental definition of the institutions and values of the Union, should therefore be clearly understood as a constitution. This also applies to the EU Charter of Fundamental Rights, which specifies in more detail the values fundamentally determined by Article 2 of the Treaty on the European Union. The fundamental normative provisions in the Treaty on the Functioning of the EU must also be assigned a functional constitutional character.

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[13] Judgment of the German Federal Constitutional Court of 30 June 2009 - BVerfGE 123, 267 (347-349, 356, 357, 361, 366), English version available at: <http://www.bverfg.de/e/es20090630_2bve000208en.html> (accessed 15.7.2021). The term 'Supranationality' has been repeatedly used by the German Federal Constitutional Court already in the Order of 18 October 1967 - BVerfGE 22, 293 (296-298), available at: <https://www.servat.unibe.ch/dfr/bv022293.html> (accessed 15.7.2021).

[14] For the concept of 'association of states' („Staatenverbund') see the Judgment of the German Federal Constitutional Court of 30 June 2009 - BVerfGE 123, 267 (348, 350, 379), English version available at: <http://www.bverfg.de/e/es20090630_2bve000208en.html> (accessed 15.7.2021). The concept was originally discussed in the Judgment of the German Federal Constitutional Court of 12 October 1993 - BVerfGE 89, 155 (181, 183-185, 188, 190, 207, 212), English version available at: <https://iow.eui.eu/wp-content/uploads/sites/18/2013/04/06-Von-Bogdandy-German-Federal-Constitutional-Court.pdf> (accessed 15.7.2021).

[15] Judgments of the German Federal Constitutional Court: BVerfGE 89, 155 (188), available at: <https://www.servat.unibe.ch/dfr/bv089155.html> (accessed 15.7.2021); and BVerfGE 123, 267 (398, 399), English version available at: <https://www.bundesverfassungsgericht.de/entscheidungen/es20090630_2bve000208.html> (accessed 15.7.2021).

3.2. The ECHR as a 'Constitutional Instrument of the European Public Order'

Let us take another look at the European Convention on Human Rights (ECHR); it too is described by the Strasbourg Court as 'constitutional law'. This is to be agreed with, especially because the fundamental rights in the constitutions of the signatory states are interpreted in the light of the rights of the Convention, i.e. they represent parallel guarantees at the constitutional level.

More specifically, the ECHR has to be classified in the category of constitutional law in the broader, functional sense for several reasons. These are substantive and institutional reasons: In terms of content, the rights contained in the Convention – similar to the rights of other international treaties - are typologically of a constitutional nature, since they concern the foundations of human existence and seek to protect them from encroachment by public authority. In this context, it cannot functionally matter that these encroachments, against which it is intended to protect, lie in state law, i.e. outside of international law as the legal order, to which the Convention belongs as regional international law. This is not the decisive aspect; rather, it is essential that the guarantees of the ECHR functionally reinforce and supplement the national constitution and substantially influence its content. This is connected with the guarantee character of the Convention.

The most recent case law of the German Federal Constitutional Court clearly indicates that the ECHR plays a special role in the 'European constitutionality bloc'[16] and decisively shapes both the Charter of Fundamental Rights of the EU and the constitutions of the member states.[17] Its influence on the development of fundamental rights within the framework of the EU was particularly significant and even under the existence of the written Charter of Fundamental Rights, it is an essential point of reference for the interpretation of a large number of EU fundamental rights.[18] The adaptation to the ECHR is also taking place for the fundamental rights of the German Basic Law and the other constitutions of the signatory states. In various constitutions, the obligation of the state organs to orient their understanding to those of the international instruments,

[16] The expression is based on the French term 'bloc de constitutionnalité'. *Favoreu L.,* Le principe de constitutionnalité: essai de définition d'après la jurisprudence du Conseil constitutionnel, in: 'Recueil d'études en hommage à Charles Eisenmann', 1975, pp. 33-48, reprinted in: *Favoreu L.,* La Constitution et son juge, 2014, pp. 539-554. See also the key decision of the Conseil constitutionnel of 16 July 1971 (71-44 DC), available at: <https://www.conseil-constitutionnel.fr/en/decision/1971/7144DC.htm> (accessed 15.7.2021). It shall be mentioned that the French term refers only to the legal sources of French law, different in time of origin and type of norm. Here the term is applied to sources of constitutional law from different legal systems. However, their interconnectivity is so close that they form a transnational functional 'bloc'.

[17] Decision of the German Federal Constitutional Court of 6 November 2019 - BVerfGE 152, 152-215, paras. 57 et seq., English version available at: <http://www.bverfg.de/e/rs20191106_1bvr001613.html> (accessed 15.7.2021).

[18] Charter of the Fundamental Rights of the European Union, Article 52.3, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT> (accessed 15.7.2021).

in particular the ECHR, is expressly laid down, as for example in Article 10 para. 2 of the Spanish Constitution[19]; if such a clause is not contained in a constitution, there is still a tendency to adapt national fundamental rights by means of interpretation to the international standards, primarily to the instruments that belong to one's own closer legal cultural circle. As a result, it can be stated that the embedding of the ECHR in the European constitutionality bloc clearly underlines its functional constitutional character.

Another argument is certainly the individualization of access to court, which is atypical for the international system. This appears to be a consequence of the guarantee of human rights; thus, it is obvious to place the judicial assertion of rights that concern the individual in his or her own hands. But the very fact that in the (regional) international sphere disputes are not solved by political communication but by jurisdiction is, as *Jochen Frowein* has already pointed out,[20] a constitutional element. Certainly, the Court's self-assessment of the Convention as *'instrument constitutionnel de l'ordre public européen'*[21] is also important. Taken as a whole, the ECHR can be regarded as the decisive document for the protection of human rights and fundamental freedoms in Europe, which can undoubtedly be classified as functional constitutional law because of the close connection between national constitutional law and Convention law.

However, the designation as constitutional law must not lead to drawing legal consequences from this terminology alone. Formally, also from the perspective of German law, the Convention is an international treaty that has been transformed into the German legal order in accordance with Article 59 (2) of the Basic Law; according to this conception, which is characterized by the dualism of international law and national law, the ECHR in Germany only has the rank of ordinary federal law. However, it is in keeping with the importance of the Convention to place it on an equal footing with constitutional law and to base the interpretation of national fundamental rights on it. Even if Germany's fundamental commitment to international human rights expressed in Article 1 (2) of the Basic Law is an essential argument for the interpretative constitutionalization of the Convention[22], it is basically its constitutional significance that justifies such a step.

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[19] *Cámara G.V.*, La interpretación de los derechos y libertades fundamentales, in: *Balaguer F.C., Cámara G. V., López J.F.A., Balaguer M.L.C., Montilla, J.A.M.,* Manual de Derecho Constitucional, Volumen II, 15a edición, 2020, Cap. XVI, pp. 70-73.

[20] *Kaufmann A., Mestmäcker E. J., Zacher H. F.* (eds.), Rechtsstaat und Menschenwürde: Festschrift für Werner Maihofer zum 70. Geburtstag, 1988, p. 149.

[21] Judgment of the European Court of Human Rights of 18 December 1996 - *Loizidou v. Turkey* (15318/89), available at: para. 75, < https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58007%22]}> (accessed 15.7.2021).

[22] Decision of the German Federal Constitutional Court of 14 October 2004 (*Görgülü* case), paras. 32, 62, English version available at: <http://www.bverfg.de/e/rs20041014_2bvr148104en.html> (accessed 15.7.2021).

3.3. Constitutional Elements in the International Legal Order

Let us also take a look at international law, which, as is well known, traditionally only recognizes sovereign states as subjects and is therefore, by its nature, fundamentally a law of coordination. But here, too, various constitutional structures have been developed, which are related in particular to the fact that the human being has increasingly moved to the center of international law. Significant for this is the multitude of human rights protection instruments that have emerged in the meantime at the universal and also at the regional level. According to the conventional understanding, the individual is 'mediatized' by his or her home state; only to a very limited extent has the exceptional subjectivity of the individual under international law been recognized so far. Nevertheless, the basic idea of law, the relatedness of law to the human being, is increasingly gaining acceptance in international law. This is expressed in the strengthening of the position of human rights, namely in the fact that their violation does not only mean an offence under international law against the home state of the violated individual, but it also a violation of international law against the community of states. This *erga omnes* effect corresponds to the fact that the human rights guarantee constitutes mandatory international law, *ius cogens*, which cannot be waived by treaty, even with the will of all parties involved,[23] and is thus an objective-law requirement that must be observed by all, in other words, it has a 'constitutional' nature. The increasingly important position of the individual becomes even clearer in regional human rights covenants, such as the ECHR, whose violation by individuals can be complained of directly before the Strasbourg Court after the exhaustion of domestic legal remedies.[24]

In addition to the human rights obligations under international law, there are other very important obligations, such as the prohibition of the use of force - a prohibition that applies by treaty to the members of the United Nations and also as general customary law[25], as well as general principles of conduct such as the principle of good faith[26], the prohibition of the abuse of rights[27] and the principle of estoppel.[28] These are fundamental requirements that are part of the value-based constitution of the international legal order. All in all, we can conclude that even in the international legal order, which is fundamentally structured horizontally in terms of coordination law, more and more vertical-hierarchical elements are emerging that are constitutive of the structure and value of this order. These are functionally constitutional elements.[29]

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[23] *Wet E., Jus cogens* and Obligations *Erga Omnes,* in: *Shelton D.* (ed.), The Oxford Handbook of International Human Rights Law, 2013, pp. 541-561.

[24] European Convention on Human Rights, Articles 34-35, available at: <https://www.echr.coe.int/documents/convention_eng.pdf> (accessed 15.7.2021).

[25] *Krajewski M.*, Völkerrecht, 2017, § 9, paras. 18,19.

[26] *Arnauld A.,* Völkerrecht, 4. Auflage, 2019, para. 267.

[27] *Hobe S.*, Einführung in das Völkerrecht, 10. Auflage, 2014, p. 217.

[28] *Arnault A.,* Völkerrecht, 4. Auflage, 2019, para. 267.

[29] *Krajewski M.*, Völkerrecht, 2017, § 3, paras. 12-13.

4. SUMMARY OF THE TERMINOLOGY

After this terminological and conceptual analysis with reference to the national, supranational and international levels, the terms *constitution, constitutionalism and constitutionalization* shall be referred to again in a summary:

(a) *Constitution* is the basic legal order of a state, according to the traditional perspective, and consists of an organizational-institutional part and a value part, the fundamental rights. Formal constitutions are those that are formalized, written (even if they also have unwritten parts, often in important points), and often, but not always, integrated, codified in a single document (exceptionally in more documents). From the character of a constitution, as a basic order, results, on the one hand, that the fundamental institutional and ideal structures of the state are conjoined in the constitution (which, however, must be concretized and effected by laws) and, on the other hand, that this basic order forms the foundation of the legal order and is therefore necessarily hierarchically superior to the other norms. In addition, a basic order by its very nature should be permanent and can only be changed under difficult conditions.

(b) The term *constitutionalism*, which is frequently used today, is not clearly fixed. It can express various phenomena: firstly, the fundamental objective, the endeavor to create a constitution or to expand an existing constitution in its text (for example, new fundamental rights are inserted, such as the fundamental right to data protection or a fundamental right to environmental protection), or to intensify its function. Secondly, this term can express that a certain constitutional standard exists in a state or a group of states or in other systems (supranational legal order, international law). Often this term is used for comparative purposes with the aim of determining whether an advanced or still deficient constitutional standard exists in the area of comparison. This can be a historical retrospective or an analysis of current circumstances.

(c) The term *constitutionalization* refers to the process that leads to constitutionalism, be it through a transfer of elements known from the state constitutional order to extra-state areas, i.e. to supranational law or international law, or to other areas of the state legal order, such as private law, administrative law, etc. Generally speaking, it is a matter of adapting non-constitutional areas to constitutional structures, either organizationally-instrumentally or with a reference to values.

II. THE FOUNDATIONS OF CONSTITUTIONALISM

1.THE ANTHROPOCENTRIC BASIC APPROACH

What are the characteristics of contemporary constitutionalism? The answer to this question firstly requires a reflection on the anthropocentric basic approach of law. The reference point of law is and can only be: the human being. This human-centeredness

of law is axiomatic. The human being is an end in itself, it 'exists as an end in itself'.[30] Connected with the human being is its dignity that needs to be respected and protected by law.

The dignity of the human being, the recognition of the human being as a subject and the negation of its instrumentalization, is the supreme value in a legal order, regardless of whether it is written normatively or not; in any case, it is immanent to the legal order and thus also to the constitutional order. All partial purposes of the legal order must subordinate themselves to this supreme value and align themselves with it. Thus, the subject quality of the human being is determined as a central value; the human being shall not be made into an object and it must be granted the level of respect which is due to every human being for its own sake, by the mere virtue of being a person.[31] This is based on the idea that it is part of the essence of being human to determine oneself in freedom and to develop freely, and that the individual can demand to be recognized in the community as a member with equal rights and intrinsic value.[32]

Inseparably linked to the dignity of the human being is the principle of freedom. Without fundamental freedom, human dignity would not exist, just as human freedom presupposes human dignity. While human dignity is inviolable, i.e. cannot be restricted or weighed against other values, freedom, which is necessarily linked to equality, only exists to the extent that it does not call the equal freedom of other members of the community into question and recognizes legitimate community interests, which are basically a consequence of freedom and equality. The restriction of freedom in favor of the community is therefore inherently linked to the concept of freedom, insofar as this restriction is legitimate, necessary and proportionate. The supremely important principle of proportionality is the constitutional instrument for delimiting and linking freedom and equality. Man, born free (*Jean-Jacques Rousseau*[33]) is not an 'isolated sovereign individual', but a 'community-related and community-bound' personality.[34] This is the

[30] *Kant I.,* Kritik der praktischen Vernunft, 1788, first published by *Johann Friedrich Hartknoch* in Riga; later published by *Joachim Kopper*, Reclams Universal-Bibliothek no. 1111 (1961) - newly printed in 2019, p. 192.
[31] Decision of the German Federal Constitutional Court of 1 December 2020 - 2 BvR 1845/18, para. 61, English version available at: <https://www.bundesverfassungsgericht.de/e/rs20201201_2bvr184518en.html> (accessed 15.7.2021).
[32] Decision of the German Federal Constitutional Court of 1 December 2020 - 2 BvR 1845/18, para. 61, English version available at: <https://www.bundesverfassungsgericht.de/e/rs20201201_2bvr184518en.html> (accessed 15.7.2021), with reference to the Decision of the German Federal Constitutional Court of 21 June 1977 - 1 BvL 14/76 - BVerfGE 45, 187 (< 227 et seq. >), available at: <https://www.servat.unibe.ch/dfr/bv045187.html> (accessed 15.7.2021).
[33] *Rousseau J. J.,* Du Contrat Social ou Principes du Droit Politique, 1762, Livre I, Chapitre 1.1. Digital version by *Jean-Marie Tremblay* available at:
<http://classiques.uqac.ca/classiques/Rousseau_jj/contrat_social/Contrat_social.pdf> (accessed 15.7.2021).
[34] Judgment of the German Federal Constitutional Court of 20 July 1954 - BVerfGe 4, 7 (15, 16), available at: <https://www.servat.unibe.ch/dfr/bv004007.html> (accessed 15.7.2021); *Arnold R.* (dir.), La structure des droits fondamentaux - aspects choisis. La estructura de los Derechos fundamentales - cuestiones seleccionadas, Comparative Law Studies 12, 2021, p. 10.

conception of man that underlies the German Basic Law and corresponds in general to the essence of liberal-democratic constitutionalism, as the only true constitutionalism. The fundamental rights, whether written or unwritten, are specifications of the principle of freedom, which has substantial and functional efficiency.[35]

The principle of freedom implies a comprehensive protection of man against present and future dangers to his freedom; the protection of freedom, regardless of the written text of the constitution, is always comprehensive. In some constitutions, similarly to Article 2 (1) of the German Basic Law (GG), the general right to freedom is enshrined; in constitutions where this is not explicitly included in the text, this comprehensive right to freedom exists nevertheless as an inherent constitutional principle that is necessarily linked to human dignity. However, comprehensive protection of freedom does not mean the absence of restrictions at all; these are still permissible and necessary insofar as they also comply with the principle of proportionality. On the one hand, substantial efficiency of the fundamental right to freedom means that the fundamental rights, as mentioned, are objectively complete, and this regardless of their concrete written fixation. Securing the freedom of the individual is the inherent objective of every constitution, which must be guaranteed efficiently, i.e. comprehensively. This also means that the interpretation of fundamental rights must be as freedom-enhancing as possible, i.e. an interpretation oriented towards *effet utile*;[36] if a balance needs to be achieved between conflicting fundamental rights or constitutional values, then an optimal solution must be sought for all involved fundamental rights holders in the sense of practical concordance (as formulated by *Konrad Hesse*[37]). On the other hand, functional efficiency means that the restrictions on freedom are declared permissible by the constitution or formal law and they correspond to the necessary, legitimate interests of the community, i.e. fulfil the requirements of the principle of proportionality.[38] An important part of freedom is democracy, political freedom, which is encompassed by the above-mentioned principle. Without political self-determination, there is no freedom. The principle of democracy is part of the basic principle of freedom, thus it is also an outflow of human dignity. This was rightly stated by the German Federal Constitutional Court recently.[39]

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[35] *Arnold R.,* Substanzielle und funktionelle Effizienz des Grundrechtsschutzes im europäischen Konstitutionalismus, in: *Geis M. E., Winkler M., Bickenbach C.* (eds.), Von der Kultur der Verfassung, Festschrift für Friedhelm Hufen zum 70. Geburtstag, 2015, pp. 3-10.

[36] *Sudre F.*, Droit européen et international des droits de l'homme, 14e édition, 2019, pp. 245-248; *Potacs M.*, Effet utile als Auslegungsgrundsatz, in: 'Europarecht', 2009, pp. 465-487, available at: <https://www.europarecht.nomos.de/fileadmin/eur/doc/Aufsatz_EuR_09_04.pdf> (accessed 15.7.2021).

[37] *Hesse K.*, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 18. Auflage, 1991, paras. 317 et seq.

[38] *Arnold R.,* El principio de proporcionalidad en la jurisprudencia del Tribunal Constitucional, together with *Martinez Estay J.I., Zuniga Urbina F.,* in: 'Estudios Constitucionales', 2012, pp. 65-116.

[39] Decision of the German Federal Constitutional Court of 30 June 2009 - 2 BvE 2/08, para. 211, English version available at: <http://www.bverfg.de/e/es20090630_2bve000208en.html> (accessed 15.7.2021).

Freedom is necessarily linked to equality; this has already been emphasized above. Prohibitions of discrimination on the basis of skin color, gender, origin and other characteristics, i.e. special manifestations of the principle of equality that are connected with being human as such, are a direct outflow of human dignity.[40] We can thus state that human dignity, freedom and equality are at the core of constitutionalism in general. They are essential elements of a totality called 'constitution' and are necessarily attributes of being human; they are to be called *basic anthropological value order*.

2. SECURING FREEDOM THROUGH ACTIVE PROTECTION - BENEFIT RIGHTS, FUNDAMENTAL SOCIAL RIGHTS AND THE RIGHT TO A MINIMUM SUBSISTENCE LEVEL

The principle of freedom, that we have talked about so far, does not only include securing freedom by refraining from an illegitimate interference with freedom by public power, but it also means securing freedom by *actively exercising protection*; this is where the concept of the state's duty to protect becomes relevant, i.e. the state's obligation to actively protect the values enshrined in fundamental rights, especially through legislation.[41]

The further question is whether benefit rights in the sense of *fundamental social rights* also fall under the principle of freedom. In any case, the protection of human dignity includes guaranteeing the minimum subsistence level of human beings.[42] Freedom must be understood more broadly than simply non-intervention. Elementary human needs must be secured insofar as the state is responsible for them. In a broader sense, fundamental social rights as rights to benefits, also belong to the concept of freedom. However, a constitutional order is free to either formulate basic social rights in the constitution[43] by prescribing a (often only vague) program to the legislature for the realization of these fundamental social rights, or, as in the case of the German Basic Law, assign

[40] *Arnold R.,* Human Dignity and Minority Protection. Some Reflections on a Theory of Minority Rights, in: *Elósegui M., Hermida C.* (eds.), Racial Justice, Policies and Courts' Legal Reasoning in Europe, 2017, pp. 3-14.

[41] See the most recent decision of the German Federal Constitutional Court on the Climate Protection Act, dealing with the state's duty to protect the fundamental rights values (among other issues) – Order of the German Federal Constitutional Court of 24 March 2021 - 1 BvR 2656/18, paras. 1-270, English text available at: <http://www.bverfg.de/e/rs20210324_1bvr265618en.html> (accessed 15.7.2021). As to 'positive obligations' resulting from the rights embodied in the European Convention on Human Rights see *Sudre F.*, Droit européen et international des droits de l'homme, 14e édition, 2019, p. 247.

[42] For this idea, which can be generalized, see the Judgment of German Federal Constitutional Court of 9 February 2010 - BVerfGE 125, 175-260, available at: <https://www.servat.unibe.ch/dfr/bv125175.html> (accessed 15.7.2021).

[43] *Iliopoulos-Strangas J.* (ed.), Soziale Grundrechte in den „neuen' Mitgliedstaaten der Europäischen Union, 2019.

the same function to a state provision of an objective character,[44] not to fundamental rights. Functionally, both are largely equivalent. Ultimately, it is an expression of good politics, i.e. good governance, to ensure that these needs are adequately met.

3. THE RULE OF LAW AS THE VALUE TRANSFER TO THE INSTITUTIONS

The question arises about the role of the *Rule of law* as a fundamental constitutional concept. The basic anthropological value order, as mentioned above, is a value orientation that is transferred to the organizational-institutional sphere of the state within the framework of the *Rule of law*. Institutions and procedures are the expression and realization of this value orientation. The assignment of legislative competences to the parliament is the realization of political freedom, which is made possible by a democratic electoral law. The definiteness of a law, especially insofar as it allows encroachments on freedom, is a necessary prerequisite for these restrictions and secures freedom.[45] The protection of legitimate expectations, the prohibition of retroactivity and proportionality[46] are also institutionalized safeguards of freedom. We can thus recognize the function of the *Rule of law* principle as a hinge between the fundamental constitutional values and the institutional realization of these values.

4. THE CONCEPT OF OPEN STATEHOOD

A further view must be taken of the concept of open statehood, which has meanwhile become entrenched in constitutionalism. Is it part of the basic anthropocentric relationship? As far as the rights of the individual are concerned, the answer is in the affirmative. National fundamental rights must be interpreted in the light of the international human rights guarantees. They can only be understood as a functional unit. The common point of reference is the human being; therefore, the interpretation of the national human rights is also shaped by the universal idea of human rights, which has concretizations in different legal systems. The protection of the human being is

[44] For example, Basic Law for the Federal Republic of Germany (GG), Article 20.1, available at: <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf> (accessed 15.8.2021).

[45] See as an example the very detailed provisions of the German Code of Criminal Procedure (StPO) on specific investigation measures with high relevance for privacy, e.g. para. 100b on 'covert remote search of information technology systems' and para. 100c on 'acoustic surveillance of private premises', English version available at: <https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p0649> (accessed 15.7.2021).

[46] For these elements in German law see *Leisner W.G.*, in: *Sodan H.*, Grundgesetz, Artikel 20, 2018, paras. 58 et seq., 65 et seq. These elements can be found, in substance, also in other legal orders, due to their general character.

always comprehensive, since the finality of law is the protection of the human being. This finality cannot only comprise fragments, but should always be directed towards comprehensive protection and the totality of the purpose. In the field of values, open statehood means openness to the insights and objectives of the international community. Article 1 (2) of the German Basic Law expresses the modern idea of human rights that are not bound to territorial borders.[47] This results in an open understanding of human rights that is not bound to national perceptions.

5. THE FUNCTIONAL UNITY OF THE FUNDAMENTAL VALUES

The constitutional principles of human dignity, freedom, equality and the *Rule of law* form a 'functional unity'[48]; these values are inseparable. If only some of these values are written in the constitutional text, the others are implicit. This results from the common reference to the human being. Therefore, all of these fundamental values are essential components of a constitutional order, and this with universal validity. Since these values are intrinsically part of a constitutional order, this can only apply generally, i.e. universally.

6. DIFFERENT FORMS AND FUNCTIONAL CORE

It should be emphasized that these values, which are essential to a constitutional order, can also be structured differently in the various constitutional orders, as long as their functional core remains intact. This functional core, for example in the case of the protection of fundamental rights, is an efficient safeguard of the freedom of the individual, irrespective of whether the fundamental rights are conceived as subjective rights in a legal order or as objective principles to be implemented by the legislature first, similar to the program principles, as long as they protect freedom comprehensively and effectively. Political freedom can be realized through representative or (at least partially) direct democracy; what is essential, is that there is efficient political self-determination, which is reflected in the specific constitutional system.

7. THE NORMATIVE REALITY AND PERCEPTION

Since this basic relationship is linked to the human being and is intrinsically connected to it, it has general, universal validity. This human-oriented basic relationship as a

[47] Order of the German Federal Constitutional Court of 14 October 2004 - *Görgülü* case, para. 62, English version available at: <https://www.bundesverfassungsgericht.de/e/rs20041014_2bvr148104en.html> (accessed 15.7.2021).

[48] *Arnold R.,* L'État de droit comme fondement du constitutionnalisme européen, Revue française de droit constitutionnel, numéro spécial, 25 ans de droit constitutionnel, no. 100, 2014, pp. 769-776.

normative reality does not vary from region to region and is also not historically variable. This normative reality is not always observed, sometimes consciously disregarded, sometimes misunderstood, but sometimes correctly recognized. The perception must therefore be distinguished from this normative reality, i.e. the subjective understanding and the concrete normative or political implementation at a particular time and in a particular place. Indeed, normative reality and perception often fall apart, and this appears in minor points, but not seldom it also occurs in essential dimensions, especially with regard to the political evasion of the constitutional precepts.

8. THE COMPARISON OF LAWS AND SYSTEMS

Comparison of law is the comparison of legal orders, as they have been concretized in accordance with the (generally fixed) anthropocentric basic value order (above all the institutional concretizations, as well as value concretizations and non-value-related concretizations). Comparison of law is also the study of whether or not and to what extent the perceptions in the individual legal systems (i.e. the constitutional and statutory provisions, the judicial interpretations, the political implementations) correspond to the normative reality of the basic value order (i.e. to what extent the necessary elements of the value order, insofar as they are written, have been interpreted correctly and are in accordance with the normative reality, or, insofar as they are not written, whether they have been revealed correctly by the courts).

The examination of whether the perception (i.e. the written, jurisprudentially developed, legislatively shaped and politically implemented legal state) corresponds to the normative reality in the individual legal systems, is only an 'unreal' law comparison, because the object of comparison in its core, i.e. the anthropocentric basic order of values, is always the same, has universal validity and only the perception varies. The result of this comparison can be different: consistent, deficient (but worthy of improvement) or negating the basic order of values in one or more elements. In the latter case, there is no real constitution, but a mere statute of organization; in such a case, there would be no real constitutionalism.

9. THE SYSTEM-NECESSARY AND VARIABLE NORMS IN THE CONSTITUTION

It can be stated at this point that a concrete constitutional order contains two types of norms (principles, rules) that are essential, system-necessary, for a genuine constitution, i.e. for a liberal-democratic constitution, and those that are not, and therefore variable. For example, a determined form of territorial organization, federal statehood, regio-

nal statehood or (relativized) central statehood, is not directly relevant for the anthropocentric basic value order, not system-necessary, even if federal statehood means vertical separation of powers and therefore (among other aspects) represents an important guarantee for the Rule of law. A distinction can also be made between those norms that flesh out the essential values, but are variable in terms of content and form, using a margin of maneuver (within the framework of an efficient realization of the essential value), and those that have no relation at all to these essential values.

10. THE BASIC ANTHROPOCENTRIC VALUE ORDER AND ITS GENERAL SIGNIFICANCE FOR SYSTEMS WITH EXERCISE OF POWER ON INDIVIDUALS

The anthropocentric basic value order of human dignity, freedom and equality is not only relevant in the state, but whenever public authority can exercise power over human beings (directly or indirectly) or when the living conditions of human beings are essentially determined by one or more decision-makers, even if there is no such exercise of power. This can undoubtedly be stated for the area of the supranational order of the EU. However, the question of the relevance of the anthropocentric basic value order also arises for international legal relationships, such as the international legal order, in which the direct norm addressees are not individuals, but states as primary subjects of international law. Apart from the development of certain constitutional structures at this level already discussed above, the relevant safeguard lies here in the constitutional order of the states themselves which must implement international law norms. The national constitutions provide the guarantee for compliance with the values of the basic value order and are barriers against violations on the part of international actors. Anchoring these values in the national constitutions provides essential protection and also shows that the necessary orientation towards the basic value order also applies to the international legal order, at least indirectly via the national constitution which is binding for the states when they are implementing international norms.

III. TENDENCIES OF CONTEMPORARY CONSTITUTIONALISM - SOME BASIC ASPECTS

1. TENDENCY TOWARDS INDIVIDUALIZATION

1.1. The Connection of the Basic Tendencies

The contemporary constitutionalism is clearly characterized by its tendency towards individualization. Other main tendencies - constitutionalization and internationali-

zation[49] - cannot be distinguished in isolation from this, but are interconnected in many ways and are functionally related; they can, however, be described separately according to their emphases.

1.2. Conceptual and Institutional Dimension

The tendency towards individualization can be divided into a conceptual-material and an institutional-formal area. It corresponds to the anthropocentric foundation of constitutionalism when the human being, its dignity and freedom, are placed conceptually at the center of law, especially constitutional law. The main aspects of this basic anthropocentric value order belong to the area of individualization and are the central starting points for the entire understanding of contemporary constitutional thinking. The image of the human being as an individual related to the community, whose intrinsic value and thus subject status claims full recognition, is pivotal. The protection of the individual's freedom is intended by the constitution to be complete, be it in written or in unwritten form, and is a clear postulate of the constitutional order. Substantively and functionally, the efficiency of protection must be guaranteed. This means in particular: a comprehensive protection of freedom against present and future dangers; an interpretation oriented towards optimal effectiveness of protection, a functional safeguard especially against disproportionate encroachments and also the open orientation towards value developments at the international level, insofar as they mean reinforcement and further differentiation.

The conceptual emphasis on the fundamental rights of the individual also leads to the functional strengthening of the protection of an individual in numerous legal systems. The example of German law may explain this: the fundamental rights conceived as subjective rights of defense against state intervention have also been recognized as objective values that have significance for the entire legal order, i.e. for all areas of law including civil law (private law).[50] The radiating effect[51] attributed to the constitution is explained by the increasingly recognized primacy of the constitution as the supreme source of law in the state and is ultimately a consequence of the recognition of the special position of the individual. In addition, there is a further functional expansion step which has been already mentioned: the defensive, 'negating' function of the fundamental right, which is connected with the concept of the subjective right, becomes

[49] *Arnold R.,* Interdependenz im Europäischen Verfassungsrecht, Essays in Honour of Georgios I. Kassimatis, 2004, pp. 733-751.

[50] Judgment of the German Federal Constitutional Court of 15 January 1958 - 1 BvR 400/51 - BVerfGE 7, 198 (205-206), available at: <https://www.bundesverfassungsgericht.de/e/rs19580115_1bvr040051.html> (accessed 15.7.2021).

[51] Judgment of the German Federal Constitutional Court of 15 January 1958 - 1 BvR 400/51 - BVerfGE 7, 198 (205-206), see the term „*Ausstrahlungswirkung*', available at: <https://www.bundesverfassungsgericht.de/e/rs19580115_1bvr040051.html> (accessed 15.7.2021).

a constitutive structural feature of the entire legal order through the recognition of the value character of fundamental rights and then expands - as additional step - into a claim to performance for active, increased protection of the individual by the state. The entitlement to benefit is not the entitlement to financial support, at least not as a rule, but entitlement to state support through protection, on the one hand, vis-à-vis other private individuals (thus the horizontal duty to protect)[52] and, on the other hand, vis-à-vis the state itself, in that the fundamental right is unfolded, implemented and thereby promoted and protected through legislation.[53] This functional expansion of the fundamental rights was realized through case law and not through formal constitutional amendment or supplementation by constitutional reform, and it has demonstrated steadily progressing development over time.

International case law is often particularly significant for the individualization. For example, the case-law of the Strasbourg Court has initiated an extraordinarily important quantitative and qualitative advancement of the protection of fundamental rights in the member states of the Council of Europe and has widely disseminated the method of interpretation aimed at optimizing protection (and has also contributed to adapting the existing formal and thus restrictive interpretation for competences and the content of fundamental rights in Austria, thus modernizing it and making it adequate to the importance of the protection of fundamental rights).[54] The concept of duties to protect fundamental rights has also been strengthened and disseminated through Strasbourg case law.[55] The Charter of Fundamental Rights of the European Union has further strengthened the national protection of fundamental rights from outside the state. The international fundamental and human rights instruments are growing closer and closer together to form a common overall instrument with converging contents. This does not mean a fragmentation of the protection of fundamental rights at all, but rather it constitutes a strengthening. It also becomes clear to what extent the tendencies towards individualization and internationalization, both inherent tendencies of contemporary constitutionalism, are functionally linked to each other, mutually influence each other and, as a result, also strengthen each other. The international guarantee instruments also receive impulses from the national texts, as can be seen clearly from the genesis and also from the text version of the EU Charter of Fundamental Rights; the case-law

[52] *Arnold R.* (dir.), La structure des droits fondamentaux - aspects choisis. La estructura de los Derechos fundamentales - cuestiones seleccionadas, Comparative Law Studies 12, 2021, pp. 12-13.

[53] As to the „*Untermaßverbot*‘ - the expression for the state’s duty to protect the freedom in a way that is not insufficient, not less than to an adequate extent, see the Judgment of the German Federal Constitutional Court of 28 May 1993 - BVerfGE 88, 203 (254), English version available at: <https://www.bundesverfassungsgericht.de/e/fs19930528_2bvf000290en.html> (accessed 15.7.2021).

[54] *Pöschl M.*, Die Verfassung und ihre Funktionen, p. 4, available at: <https://staatsrecht.univie.ac.at/fileadmin/user_upload/i_staatsrecht/Poeschl/Publikationen/Die_Verfassung_und_Ihre_Funktionen_-_onlinedatei.pdf> (accessed 15.7.2021).

[55] *Sudre F.*, Droit européen et international des droits de l’homme, 14e édition, 2019, p. 247.

of the national constitutional courts on the interpretation of state constitutions has to be considered as an interpretation aid for the interpretation of the supranational EU Charter as well.[56] The mutual influence seems to have led to an optimization, not a reduction of the protection of fundamental rights.

In the institutional-formal sphere there are also tendencies towards subjectification, which can also be interpreted as a reflection of the trend towards individualization. It is significant that the idea of individual protection is strengthening, especially in constitutional jurisdiction. The introduction of the individual complaint to a constitutional court is spreading, with few exceptions, in the European area.[57] The structures are similar in approach: access to the constitutional court is only open after going through the regular legal process. This also corresponds to the concept at the international level, insofar as individual access is realized there, as in the model of the Strasbourg Court. This is a departure from the traditional international concept and shows a particularly clear example of individualization, especially in the international sphere, which is characterized by states. As far as the national constitutional complaint is concerned, the detailed structures are then different. On the one hand there is the type of system that follows the German concept and allows a complaint against any act of public authority,[58] and on the other hand there is another type of system, widespread mainly in Eastern Europe, that only allows an individual challenge against laws.[59] Where the individual complaint in the true sense is not permitted, the violation of fundamental rights of executive public power acts is regularly reviewed by the administrative courts or even the ordinary courts.

2. THE TENDENCY OF CONSTITUTIONALIZATION

2.1. The Rule of Law Principle and the Development of Constitutionalism

The *Rule of law* principle is the bridge from the constitutional order of values to the institutions of the state, which have to respect and realize these values. This duty of realization primarily concerns the activities (or omissions) of the institutions, but their structure and functioning must also reflect these values and must also be designed in such a way that they are able to implement them efficiently. Institutional efficiency is a constitutionally intended and implicit part of the structural and functional rules of the

[56] Charter of the Fundamental Rights of the European Union, Article 52.4, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT> (accessed 15.7.2021).

[57] For Lithuania, as the most recent case of introducing the individual constitutional complaint, see *Daneliene I.,* Individual Access to Constitutional Justice in Lithuania: The Potential within the Newly Established Model of the Individual Constitutional Complaint, Revista de Derecho Político, 2021, pp. 281-312.

[58] Basic Law for the Federal Republic of Germany (GG), Article 93.1 no. 4a, available at: <https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf> (accessed 15.8.2021).

[59] *Haase G., Struger K.,* Verfassungsgerichtsbarkeit in Europa, 2009, pp. 126 et seq., 133, 139/140, 153 etc.

institutions. This constitutionally precludes the weakening of institutional efficiency through ordinary laws.

The principle of the *Rule of law* participates in the further development of constitutionalism, which is essentially based on anthropocentric fundamental values, because of its bridging function, which has been pointed out above. The strengthening of the idea of fundamental rights, i.e. the tendency towards individualization, has also been reflected in the development of the principle of the *Rule of law*. Since the latter is value-oriented, the strengthening of values, especially that of the principle of freedom, has also resulted in a functional advancement of the *Rule of law*.

2.2. The Rule of Law as a Universal Principle

The *Rule of law* is a universal fundamental principle of constitutionalism. It is a principle of state organization that implies the obligation of state institutions to act in accordance with the law. Law, i.e. the legislation and the constitution, are the sole standards for the activities of the state, i.e. of all state organs and other state institutions. The law, and not force or, insofar as law is opposed, political power has to be applied.

2.2.1. The Relationship between Law and Politics

The orientation towards law does not exclude politics. In the course of the development, a change of perspective has taken place - from a pronounced reluctance towards judicial control of political processes especially that of highly political acts, to increased awareness of the primacy of law, above all the supremacy of the constitution, over all state action. The modern concept of the *Rule of law* no longer accepts *a priori* lawless spaces.[60] The law applies exhaustively, there are no longer any 'white spaces' on the 'map of the law'. The only difference is that the distinction between constitutional obligation and political leeway is more sharply focused now.

It is more clearly recognized today that politics is by its very nature shaping, choosing between options, planning for the future, and is thus an essential element of democracy. Politics is expressed by the majority decision in parliament (or in some systems by referendum); politics is transformed into law, into legislation, by the decision of the institutional majority. Politics is thus bound to the law, it takes place within the framework established by the law. The binding of politics to the legislation is relative; it can be changed or abolished by a new majority decision that is different in content. The only requirement that is essential, is that the political decision is made in the institution intended for this purpose, the parliament, and according to the procedure intended for this purpose. Parallels apply in some systems to direct majority decision-making by the

[60] *Drigo C.*, Le corti costituzionali tra politica e giurisdizione, 2016.

people, insofar as it complies with the rules for plebiscitary legislation. Through the institutionalization and organization, the framework for politics is created to acquire the ability to create law by majority vote.

2.2.2. Legality and Constitutionality

Legality, however, and this is the modern aspect of the *Rule of law*, must be legitimized by constitutionality, i.e. by the conformity with the constitution. The constitution expresses the general will of the people, it is an agreement of the society, in the sense of *Jean-Jacques Rousseau* a '*contrat social*'. Only to the extent that the legislation conforms to the constitution, does it express the will of the people, i.e. it is the rule of the will of the people, therefore a democracy. The creation of the constitution is the fundamental legislation, the basic expression of democracy. Both areas, constitution and law, have to be distinguished from each other; they depend on each other, but they are complementary areas. Unconstitutionality of a law therefore means an impermissible transgression of the legislature into the realm of the constitution[61].

2.2.3. The Rule of Law and Anthropocentric Fundamental Values

Since law, and constitutional law in particular, have the protection and promotion of human beings as their primary objective, i.e. they are 'anthropocentric', it is also the objective of the *Rule of law* to make the observance of anthropocentric fundamental values - human dignity, freedom and equality as the core of the constitutional state - binding guidelines for state institutions. The *Rule of law* is thus value-based. This is an essential expression of contemporary constitutional thinking.

The primacy of the constitution thus transposes the anthropocentric value order into the realm of institutions. While the fundamental rights part of the constitution defines the values related to human beings, the *Rule of law* establishes the bridge to the institutional part of the constitution and is therefore essential for the realization of these values.

2.2.4. The Aspects of the Rule of Law

The individual elements of the *Rule of law* can be divided into the following broad groups: the law in formal terms and the law in functional terms. The latter can be subdivided into institutional functioning and substantive functioning.

(1) The *Rule of law* concerning law in *formal* respects is concretized by the formal requirements of the law: it must be clear and definite (*legal clarity*, *legal certainty*); it

[61] *Arnold R.,* Bundesverfassungsgericht e la politica, in: *Scaccia G.* (ed.), Corti dei diritti e processo politico, Edizioni Scientifiche Italiane, 2019, pp. 41-50.

must also be secure (which means *legal certainty*, i.e. the law must guarantee the legal position promised by the norm; *prohibition of retroactivity*, i.e. the position obtained in accordance with the law must not be subsequently devalued; protection of confidence, i.e. the norms generate confidence, on which the addressee must be able to rely).

(2) *Rule of law* in *functional* terms includes the institutional mode of operation: Principle of *legality* (*legality of the administration*, i.e. the formal law must be observed by the administration); *reservation of the law*, i.e. an intervention of the administration into freedom and property requires a legal basis of authorization (this also applies to benefit administration in some systems); principle of *constitutionality* (primacy of the constitution over the law; binding of the legislature to the constitution; binding of the executive and judiciary to the law in conformity with the constitution and to the constitution directly); principle of *separation of powers* (or separation of functions; principle of checks and balances; separation into three powers, i.e. horizontal separation of powers; partial interlocking of functions, i.e. cooperation of powers, partial overlapping of functions, functional core of one power must not be affected); principle of *effective legal protection* (control of executive activity by courts, i.e. independent institutions committed only to the law; in addition, review of court decisions themselves by at least one further instance; *incidental or principal judicial control* of legislation; constitutional jurisdiction as 'perfection of the *Rule of law*').

(3) *Content-related* mode of action: *Value orientation* of the *Rule of law* (transfer of anthropocentric basic values into the realm of institutions, i.e. all state institutions must observe and realize these values - human dignity, principle of freedom, equality - explicitly or implicitly laid down in the constitution; *principle of proportionality* as an instrument for demarcating freedom as a principle and the restriction of freedom as an exception necessary for reasons of equality).[62]

2.2.5. The Rule of Law as an Extra-State Model of Securing Freedom

Securing freedom in relation to the individual is always necessary where public power affects the individual, either interfering with its freedom or essentially determining his or her life situation, even without directly interfering with its freedom. Through the

[62] For these various elements of the *Rule of law*, with reference to the German perspective as embodied in Article 20 of the German Basic Law and specified by a rich case-law of the Federal Constitutional Court, see *Mangoldt H., Klein F., Starck C.* (eds.), Kommentar zum Grundgesetz: GG, Band 2, 7. Auflage, 2018, Commentary on Article 20 GG, specifically: paras. 197-225 (separation of powers); paras. 249-260 (constitutionality, primacy of the constitution, paras. 253-260); paras. 270-284 (legality related to the executive), paras. 285-286 (legality related to the judiciary); paras. 289-291 (legal certainty); paras. 292-297 (protection of confidence in law); paras. 308-320 (proportionality); para. 311 (impact of the case-law of the Strasbourg and Luxembourg courts). The case-law of the Federal Constitutional Court clearly shows that the elements of the *Rule of law* are derived from the essence of the law. This also explains why parallel aspects have developed in other legal systems.

transfer of public power from the state to organizational units outside the state, this situation also arises, and with particular clarity, in the supranational community of the EU and, in a weakened form, also in the international community. Since the anthropological reference point of law is always the same, the human-related fundamental values must also be observed and realized there. As a transfer mechanism, the *Rule of law* (outside the state called community of law, union of law or with a neutral term – the *Rule of law*) is indispensable. This has already led to the formation of this idea outside the state. One only has to look at Article 2 of the Treaty on European Union, at the Statute of the Council of Europe, under whose aegis the ECHR came into being, and at the Charter of the United Nations, to see the importance that the international community attaches to law and the need to respect it. One can therefore certainly speak of the transnational and even universal validity of the *Rule of law*.

2.2.6. Constitutional Justice as 'Perfection of the Rule of Law'

The *Rule of law* means efficient observance of the law by the public power. It is only efficient if it is also subject to judicial control. This is important for compliance with ordinary laws by the administration and the judiciary, but also for compliance with the supreme source of law in the state, the constitution, which is required by the *Rule of law*. The judicial protection of the constitution is constitutional justice, which can be carried out in two basic forms: by the ordinary courts or special courts, such as administrative courts, or by separate constitutional courts, according to the model of *Hans Kelsen*, under whose influence the first constitutional court was created in Austria in 1920, which could declare laws unconstitutional and null and void.[63] Both models have also asserted themselves in contemporary constitutionalism, although, at least in Europe, constitutional justice as a special jurisdiction has predominantly found favor. A European model of special constitutional justice has developed from the Austrian model,[64] while the American model, the constitutional review by the ordinary courts in a specific legal dispute, has become particularly widespread in the Common law countries.[65] The constitutional review, independent of a concrete legal dispute in another matter, which can lead to an *erga omnes* declaration of invalidity of a law, is specific to independent constitutional justice. The guardianship role in favor of the constitution emerges here with clarity.

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[63] *Schambeck H.,* Hans Kelsen und die Verfassungsgerichtsbarkeit, in: *Arnold R., Roth H.* (eds.), Constitutional Courts and Ordinary Courts: Cooperation or Conflict?, 2017, pp. 10-21.

[64] Also in 1920, the Constitutional Court of Czechoslovakia was established under the influence of the ideas of *Hans Kelsen* and *Adolf Julius Merkl*, but it saw little action. *Osterkamp J.,* Verfassungsgerichtsbarkeit in der Tschechoslowakei, 2009.

[65] *Haase G., Struger K.,* Verfassungsgerichtsbarkeit in Europa, 2009, pp. 22-24; *Dickson B.* (ed.), Judicial Activism in Common Law Supreme Courts, 2007.

However, it must also be emphasized that every court that applies the laws must also review their constitutionality, thus, due to the hierarchy of norms in a state, every court also has a constitutional function. Only those laws that are in accordance with the constitution, may be applied by the court. The primacy of the constitution entails the duty of the court to carry out this review. What the court's reaction is, if it finds that the applicable norms are incompatible with the constitution, varies. In some systems it is the courts themselves that in such cases do not apply this law (compare for example Greece[66], Portugal[67]), in other systems a referral must be made to a central court, in particular a constitutional court, which then decides on the nullity of the law. Only in such a case the law can be annulled; in the case of decentralized review and decision-making competence shifted to the individual courts, the typical reaction is non-application, but not a formal annulment of the law. In systems, where special constitutional courts are lacking, the ordinary courts have often assumed their competence to carry out the review of the law and, in the case of unconstitutionality, to allow a law to be set aside. This is also historically the beginning of constitutional justice in a decentralized sense, a development that began even before the creation of special constitutional courts. The US Supreme Court practiced this as early as 1803 in the famous *Marbury v. Madison* decision[68], much later also the German *Reichsgericht* in 1925,[69] but also courts in Portugal, Norway, Denmark and other states.[70] Another way of giving effect to the constitution, is to oblige courts to interpret laws in conformity with the constitution in order to ensure their applicability by harmonizing them with the highest-ranking source of law in the state.[71] These are also manifestations that have developed in numerous countries.

2.2.7. Constitutional Justice and Politics

Politics is also bound by the constitution. Constitutional justice can review the constitutionality of policies. In no way does this turn constitutional courts into political actors. Constitutional courts react, they do not act as politics does. Since the constitution

[66] Constitution of Greece, Article 93.4, available at: <https://www.hellenicparliament.gr/UserFiles/f3c70a23-7696-49db-9148-f24dce6a27c8/001-156%20aggliko.pdf> (accessed 15.8.2021).

[67] Constitution of Portugal, Article 204, see also Article 280, which provides the possibility to appeal to the Constitutional Court, if a court does not apply a law because it considers the law unconstitutional, available at: <https://www.parlamento.pt/sites/EN/Parliament/Documents/Constitution7th.pdf> (accessed 15.8.2021).

[68] *Marbury v. Madison*, 5 U.S. 137 (1803), available at: <https://supreme.justia.com/cases/federal/us/5/137/> (accessed 15.7.2021).

[69] Judgment of the German *Reichsgericht* (the supreme court of the German Reich) - RGZ 111, 320, original text available at: <https://www.saarheim.de/Entscheidungen/RGundStGH/RGZ%20111,%20320.pdf> (accessed 15.7.2021).

[70] *Haase G., Struger K.,* Verfassungsgerichtsbarkeit in Europa, 2009, pp. 229 et seq.

[71] See for the German legal situation *Schlaich K., Korioth S.,* Das Bundesverfassungsgericht, 11. Auflage, 2018, paras. 440-451.

establishes rules about values and institutions, it necessarily determines the limits of the political process. The *Rule of law* requires the constitutional control of political actors. This means, on the one hand, that there are no control-free political questions areas.[72] Such a limitation of judicial control, as exists in some systems, is not compatible with the primacy of the constitution and therefore does not correspond to the modern understanding - and the only correct understanding - of effective *Rule of law*.

However, constitutional justice may not interfere with the political process as such; it can only examine whether the framework drawn by the constitution has been observed or exceeded by politics. This applies to the entire field of politics and also especially to the transformation of politics into law via majority decision-making in parliament (or in the process of plebiscitary legislation) already mentioned above.

Constitution and legislation (the latter as a result of majority political decision-making) are, as it has already been pointed out, two different spaces to be separated from each other. If politics, i.e. legislation, crosses the border to the constitutional space, it acts unconstitutionally. Constitutional justice determines such transgressions and restores the intended hierarchical order of norms by declaring the law invalid or unconstitutional.[73] The constitutional court corrects the policy's violation of the constitution, it does not prevent the policy's content. Politics is coping with actual problems through planning and goal-adequate action, choice between different options of orientation and expediency, planning for the future, and so on. Constitutional determination is an abstract agreement by society on values and rules of action that claim general binding force.

The difference is clear; the functional spheres are clearly separated. Political action is formative, but limited by constitutional bindings. Certainly, it is difficult for the courts to always clearly separate the specific constitutional reference from the political action in complex factual situations. Therefore, a frequent pragmatic tool is to limit the intensity of control, the so-called control density, to obvious unconstitutionality. The German Federal Constitutional Court gives examples of this, but also indicates that the standard of review is in turn stricter in the case of facts that belong to the person as such. A certain gradation according to spheres, related to the intimate, private or social sphere,[74] comes into play, which makes the special relationship of constitutional justice to individuals clear.[75] A similar flexible concept is the doctrine of justifiability.[76]

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[72] *Arnold R.,* Bundesverfassungsgericht e la politica, in: *Scaccia G.* (ed.), Corti dei diritti e processo politico, Edizioni Scientifiche Italiane, 2019, pp. 41-50, 47; *Drigo C.*, Le corti costituzionali tra politica e giurisdizione, 2016.

[73] *Arnold R.,* Justice constitutionnelle: contre-pouvoir politique ou juridique? in: *Ben Achour, R.* (dir.), Constitution et contre-pouvoirs, Colloque 19 et 20 février, 2015, pp. 53 et seq.

[74] As to the theory of spheres see *Kingreen T., Poscher R.,* Grundrechte. Staatsrecht II, 32. Auflage, 2016, para. 413, pp. 100-101; *Hufen F.,* Staatsrecht II. Grundrechte, 3. Auflage, 2011, p. 126.

[75] *Schlaich K., Korioth S.,* Das Bundesverfassungsgericht, 11. Auflage, 2018, paras. 532 et seq.

[76] *Schlaich K., Korioth S.,* Das Bundesverfassungsgericht, 11. Auflage, 2018, paras. 532-533.

2.2.8. Constitutional Justice and the Separation of Powers

If constitutional justice respects the difference between the constitutional and legislative branches, the principle of separation of powers, which is fundamental to the *Rule of law*, is not violated. The legislature's scope of discretion must be adequately respected; what has just been said for political decision-making, applies here too. The legislature's scope for design, and especially its scope for prognosis, are wide. As long as the design does not constitute a specific violation of the constitution, it cannot be objected to by the courts. Insofar as the legislature's prognosis[77] is based on sound research, there is no unconstitutionality, even if the prognosis does not materialize. Here, however, a claim arises from the constitution, which the legislature must fulfil without delay.[78] In order to spare the genuine function of the legislature, the figure of the so-called 'appeal decision' has developed in the practice of the German Federal Constitutional Court, to cite this example here, according to which, the law is not declared null and void and invalid, but only unconstitutional, and this is combined with the obligatory appeal to the legislature, often specified by a concrete deadline, to establish the constitutionally compliant state by amending the law.[79]

In connection with the principle of separation of powers, it should also be mentioned that politicians often refer to the constitutional courts as *'gouvernements des juges'* or similar and call for 'political self-restraint'.[80] Consciousness of the *Rule of law* is thereby repeatedly and wrongly denounced as constitutional court actionism. It seems that in the Federal Republic of Germany rather the opposite tendency is becoming visible: if politics fails to find a solution to a controversial problem, there is a call for 'going to Karlsruhe'. Since almost all political problems also have constitutional components, the judicial solution, which after all relates to legal issues, is also envisaged as a political solution path. Moreover, there are a number of other points of contact between constitutional jurisdiction and the separation of powers: the dynamic interpretation of the constitution, which - rightly - is seen as a 'living instrument',[81] the - due to the function and authority of the Constitutional Court necessary - special binding effect vis-à-vis the public powers, etc.[82]

[77] *Schlaich K., Korioth S.,* Das Bundesverfassungsgericht, 11. Auflage, 2018, paras. 532 et seq.
[78] *Schlaich K., Korioth S.,* Das Bundesverfassungsgericht, 11. Auflage, 2018, paras. 435-436.
[79] *Hillgruber C., Goos C.,* Verfassungsprozessrecht, 4. Auflage, 2015, paras. 538 et seq., 544a.
[80] *Hillgruber C., Goos C.,* Verfassungsprozessrecht, 4. Auflage, 2015, paras. 40, 42.
[81] See Juge constitutionnel et interprétation des normes, XXXIIIe Table ronde internationale des 8 et 9 septembre 2017, Aix-en-Provence, in: 'Annuaire international de justice constitutionnelle', 2017, pp. 79-526.
[82] *Schlaich K., Korioth S.,* Das Bundesverfassungsgericht, 11. Auflage, 2018, paras. 474, 501.

3. THE TENDENCY TOWARDS INTERNATIONALIZATION

An important tendency in contemporary constitutionalism is towards internationalization. The state of today is not a closed, but rather an open state.[83] The vehement advancement of globalization makes it impossible for the state to solve its most important tasks alone, only nationally. The economy, security, science and technological progress are only promising in an international context. Tasks of the state that used to be performed nationally are now internationalized, i.e. in a division of labor with cooperation partners in other countries or also through participation in international bodies and organizations. Even if the main focus of the tasks remains in the state, there are still numerous influences from international law, often also from soft law. A special form of internationalization is *supranationalization,* which only takes place in this form in the area of the European Union. Here, large parts of national decision-making powers are functionally detached from the state and institutionally Europeanized. Functionally, this happens with state-like instruments and mechanisms.[84]

While national constitutional law formally retains its superior role to state law in conventional areas of international law, nevertheless adapting to extra-state law to a considerable extent through interpretation in conformity with international law, the creation of the supranational legal order has opened up state sovereignty to a much greater extent. This opened legal order is flooded with supranational norms, so that, as already mentioned, the national legal order is a hybrid set of norms, integrated from national and supranational norms. For the member states of the EU, the opening of their statehood is manifest. Constitutional law is also internationalized, above all because EU law claims precedence over national constitutional law. This is accepted in principle by most, but not all, member states (for example, not by Poland[85]), but reservations are raised against undermining the constitutional core, often called constitutional identity. In German constitutional law, the reservation of the constitutional identity defined in the Lisbon Decision is relevant, indispensable part of which is seen in the so-called 'eternity clause' *(Ewigkeitsklausel)* of Article 79 (3) of the Basic Law, to which the integration norm of Article 23 (1) of the Basic Law refers.[86] However, this is also relativized by the case-law of the Constitutional Court, as the concretizations of the

[83] *Geiger R.,* Grundgesetz und Völkerrecht, 6. Auflage, 2013, p. 1 et seq.

[84] For the explanation of the transfer of national sovereign rights, i.e. of national competences to the supranational bodies, as the opening of the formerly closed legal order of the state, see the Order of the German Federal Constitutional Court of 29 May 1974 - BVerfGE 37, 271 (280) - BvL 52/71, available at: <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=588> (accessed 15.7.2021).

[85] Judgment of the Constitutional Tribunal of Poland of 11 May 2005 - *Poland's Membership in the European Union (the Accession Treaty)* (K18/04), available at: <https://trybunal.gov.pl/fileadmin/content/omowienia/K_18_04_GB.pdf> (accessed 15.7.2021).

[86] Judgment of the German Federal Constitutional Court of 30 June 2009 - BVerfGE 123, 267 - 2 BvE 2/08, English version available at: <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html> (accessed 15.7.2021).

values in the EU Charter of Fundamental Rights, even beyond Article 79 (3) of the Basic Law, are seen as part of a common set of values of the member states, the EU and the ECHR.[87] The idea of a functional substitution of one legal order by the other is seen as decisive here, provided only that the goal, the efficient protection of human beings, is adequately achieved. The complexity of the relationship between national fundamental rights catalogues and the EU Charter of Fundamental Rights, which is seen in important nuances in the case-law of the Court of Justice of the EU on the one hand and, to cite the example of Germany, the Federal Constitutional Court on the other, is resolved by referring to the common anchoring in European guarantee instruments in favor of a European convergence of values.[88]

As far as the relationship of international treaties to the national legal order is concerned, there are two systems, the dualistic and the monistic system. The former system is based on the idea that the international legal order and the national legal order are two separate spheres that cannot be mutually normatively penetrated; this is the traditional conception, also prevalent in Germany, which results in international treaties (including those guaranteeing human rights) being transformed into German law in accordance with Article 59 (2) of the Basic Law. The other, more modern conception, which is realized in the vast majority of states, assumes a possible unity of both legal systems, so that international treaties are integrated into the domestic legal system as a source of international law. The practical consequence of this more modern conception, which is also predominantly followed in state practice (compare the further development in Italy[89]), is that the courts apply international law and not national law in the event of a conflict. The general rules of international law are also integrated into the national order in dualistic systems and are not transformed (not even generally).

The concept of open statehood shows a more 'familiar' relationship to international law and demonstrates how the general developments in the legal thinking of the international community also make it binding for internal law. The fact that this process continues through the dissolution of the strict schemes, formally prescribed by the constitution, can be seen especially in the area of the interpretation of internal law, including constitutional law, which is friendly to international law. This tendency has also prevailed in traditional systems such as Germany's. It has already been mentioned that the human rights guarantees under international law also apply as internal guidelines for national law and its interpretation, which the constitution expresses in a prominent place, in Article 1 (2) of the Basic Law, from the very beginning and which was later

[87] Order of the German Federal Constitutional Court of 1 December 2020 - 2 BvR 1845/18, para 68, English version available at: <http://www.bverfg.de/e/rs20201201_2bvr184518en.html> (accessed 15.7.2021).
[88] Order of the German Federal Constitutional Court of 6 November 2019 - 1 BvR 16/13 - BVerfGE 152, 152-215, paras. 56 et seq., English text available at: <http://www.bverfg.de/e/rs20191106_1bvr001613en.html> (accessed 15.7.2021).
[89] *De Vergottini G.*, Diritto costituzionale, 9th edition, 2017, p. 50.

translated into concrete practice; for the area of the ECHR, this is particularly visible in the case-law of the Federal Constitutional Court since 2004.[90] The explicit statement in constitutional case-law that internal law, including constitutional law, is to be interpreted in a way that is friendly to international law (and European law) is another milestone on the way towards the internationalization of internal law. The pragmatic guarantee of the primacy of international law through interpretation has also taken its course in other legal systems and appears to be an adequate instrument for harmonizing both areas of law. This harmonization through interpretation is, as already mentioned, also strikingly visible in the interaction of the ECHR, the EU Charter of Fundamental Rights and the national protection of fundamental rights in the constitution. The filling of general legal terms, used in the constitutional text, with the help of international law, has also already become practice, for example with regard to the environmental protection obligations under Article 20a of the Basic Law, as in the most recent decision by the German Federal Constitutional Court.[91]

To take another example from German constitutional law, it is a further step towards internationalization when the Federal Constitutional Court not only reviews the correct application of German constitutional law by the German courts, but it recently also examines the correct application of the EU Charter of Fundamental Rights by them. This is done by pointing out that the Federal Constitutional Court is the 'guardian of the efficient protection of fundamental rights' of the individual, irrespective of whether this protection is granted by German or EU law. In this decision, the idea of the substantive and functional convergence of national, international and supranational protection also comes into play.[92]

IV. THE MODERNITY OF THE CONSTITUTION OF THE REPUBLIC OF GEORGIA OF 1921 – THE ANTHROPOCENTRIC FUNDAMENTAL VALUES ORDER

On the basis of an analysis and reflection on the basic structure of modern constitutionalism, the Constitution of Georgia of 1921, which celebrates its 100th anniversary this year, will be examined in terms of its constitutional 'modernity'. The detailed analysis of this constitution has already been carried out in an excellent

[90] Order of the German Federal Constitutional Court of 14 October 2004 - *Görgülü* case, English version available at: <http://www.bverfg.de/e/rs20041014_2bvr148104en.html> (accessed 15.7.2021).
[91] Order of German Federal Constitutional Court of 24 March 2021 - 1 BvR 2656/18, para. 203, English text available at: <http://www.bverfg.de/e/rs20210324_1bvr265618en.html> (accessed 15.7.2021).
[92] Order of the German Federal Constitutional Court of 6 November 2019 - 1 BvR 276/17- BVerfGE 152, 216-274, English version available at: <http://www.bverfg.de/e/rs20191106_1bvr027617en.html> (accessed 15.7.2021).

manner[93] and will not be repeated here. In terms of time, the Georgian constitution ranks with the 1919 Constitution of Germany, the Weimar Constitution, which came into being in Europe after the First World War, and the Austrian Constitution of 1920.

As it was explained in the previous study, the foundation of any true constitution is its anthropocentric purpose. The law, and thus the constitution in particular, places the human being at the center and has as its ultimate and highest objective to protect and promote the human being. The ideal starting point is the human dignity as an anthropological axiom. Three basic elements, which are intrinsically linked to each other, make up this system of fundamental values: the *dignity* of the human being, his fundamental *freedom* (to which democracy, i.e. political freedom, belongs, as an essential element) and *equality* as a postulate linked to being human as such. Added to this is the principle of the *Rule of law,* which transfers these values into the institutions.

These fundamental values are anchored in a constitution insofar as it is oriented towards the sovereignty of the people and the respect for fundamental and human rights. These values are necessarily co-existent, they exist normatively in their entirety in a constitutional order, regardless of whether they are written or implicit in the overall structure of the constitution.

The commitment of the Georgian Constitution of 1921 in the introductory norm to a 'democratic republic' (Article 1) expresses a basic principle that may not be changed even by constitutional amendment (Article 148). Democracy is the political self-determination of the people, but at the same time also it is the self-determination of each part of the people, the individual. This self-determination, however, is not a numerical matter alone, but precisely a value-based, substantive decision. Democracy, as self-determination by majority, would run empty if decisions could be made in a way that would be directed against the dignity and freedom of the human being. Democracy can only legitimize decisions, if they correspond to the basic values of human beings and realize them.

A purely 'formal' democracy is not a real, 'substantial' democracy. Detached from these values, it would be a democracy against man and thus a contradiction: self-determination of man can only be for, not against man. Democracy and human rights are therefore necessarily linked. Democracy is, as another aspect of constitutional connectivity, necessarily a constitutional democracy. The product of democratic decision-making in the institution of parliament (or also via a referendum) only fulfils its function of expressing the will of the people, if it respects the constitution. As already stated above, only the law that conforms to the constitution, expresses the will of the people. This is clearly recognized by the Georgian Constitution of 1921.

[93] *Papuashvili G.,* The 1921 Constitution of the Democratic Republic of Georgia: Looking Back after Ninety Years, European Public Law, 2012, pp. 323-349.

Article 52 declared that the sovereignty resides in the nation, i.e. in the people and the Parliament exercises this sovereignty, but only within the limits of the constitution. The parliament is bound not only by the formal requirements for legislation, but also by the substantive limits set by the constitution. This is a clear shift towards the 'constitutional state'. Also corresponding to this, is the fact that Article 8 postulates the primacy of the constitution. This also expresses the important aspect that legislation may only interfere with constitutional rights, i.e. fundamental rights, insofar as this is constitutionally compatible, since otherwise the constitutional postulate of freedom would be disregarded. On closer examination, this also gives rise to the need to observe the principle of proportionality, which is part of modern constitutionalism, since it presupposes freedom - which democracy demands - but also the community demands restrictions in favor of the other members of the community, in other words restrictions in favor of the general interest.

Democracy therefore means the recognition of the freedom of the individual, so that the basic rights and the self-determination of the individual are recognized for the sake of the free, but community-bound human being. This means that freedom is recognized as a principle, which, however, is subject to restrictions due to the fact that freedom is bound to the community, ultimately due to the principle of equality, but which may not exceed the level intended by the constitution. Democracy, however, can only be genuine if it is based on a democratic right to vote. Article 46 establishes the principles of electoral law (universal, equal and direct elections, secret ballot, proportional representation). Particularly modern at that time is the equal voting right for men and women in the Georgian Constitution of 1921, which was only introduced in Germany, for example, in 1918.

The fundamental rights are specifications of freedom and ultimately an outflow of human dignity. In accordance with the principle of freedom, fundamental rights are comprehensive. There can be no gap, since the constitutional goal is always directed towards the effective protection of the human being. This is the normative-ideal basis of the constitution, even if the written fundamental rights do not cover all threats to freedom. These are nevertheless implicitly present. Article 45 of the Georgian Constitution of 1921 clearly expresses this. This is a very insightful provision with proper content. It clearly confirms the comprehensive aim of protection. This also applies to the interpretation of seeking the effective protection of the individual and, in accordance with the principles of the Constitution, also deriving new, i.e. not yet formulated, rights.

The basis of the anthropocentric constitutional order, human dignity as the supreme constitutional value, is not explicitly mentioned, as in many current constitutions. Nevertheless, the obligation to protect and promote human dignity is implicit in the constitutional order; as already emphasized, the fundamental rights explicitly enshrined

in the constitution, as an expression of the basic principle of the freedom of the human being, necessarily presuppose the normative, albeit implicit, existence of the guarantee of its dignity. Moreover, Article 113 enshrines a goal of the state to strive for a 'dignified existence' for all citizens. This introductory provision of Chapter XIII of the 1921 Constitution on *Social and Economic Rights* is a target provision that is similar to a program standard and concerns the part of human dignity that comprises the material minimum of human existence. In addition, however, human dignity in its entire spectrum is present in unwritten form as a normative guarantee.

The Georgian Constitution of 1921 contains the classic catalogue of fundamental rights, with some emphasis on *habeas corpus*, which was considered to be in particular need of protection at the time, personal inviolability being the starting point (Article 22; detailed provisions continue on the area of *habeas corpus*, Articles 23-27). Emphasis is also placed on the protection of privacy in so far as these are traditional fundamental rights, the guarantee of the inviolability of the home (Article 28) and the protection (subject to judicial review) of private correspondence (Article 29). In addition, there is the right to freedom of movement (Article 30). Freedom of religion and conscience are protected (Article 31), as is freedom of expression, including the prohibition of censorship. The only limit is the commission of a criminal offence, which must be determined by a judge (Article 32). Freedom of assembly and association are also explicitly protected (Articles 33-35). Freedom of occupation and enterprise (Article 36 with a rather broad formulation) and the right to strike for workers (Article 38) are also recognized in the Georgian Constitution of 1921.

Equality is particularly respected by the 1921 Constitution, for example in the fundamental norm of Article 16 and in the specific norms of Articles 17 and 18, which prohibit distinctions of class and on the basis of titles (with the exception of university degrees) and exclude the awarding of decorations (but retain war awards). In addition, there are Articles 39 and 40, which emphasize the equality of rights with regard to political, civil, economic and family rights. In addition, equality within marriage between man and woman and also that of the children born within or outside marriage is established, a constitutional guarantee far ahead of its times. The right to vote, extended indiscriminately to men and women, is also guaranteed in Article 46, as already mentioned above. The right to asylum is anchored in Article 41 for political persecution. It should also be mentioned that the death penalty was abolished already at that time (Article 19).

The chapter on *Social and economic rights* sets out a series of social rights and programs. It is noteworthy that Article 113, which heads this chapter, expresses the basic idea of a state's duty to provide a 'dignified existence'. Derived from this are the partly classical fundamental rights, such as the right to property and its limitations (on social commitment and expropriation, Article 114), partly programmatic objectives:

protection of labor (Article 117), unemployment benefits (Article 119), incapacity to work (Article 120), limitation of working hours (Article 123), minimum wage (Article 125) and others. The establishment of the maternity protection and the protection of motherhood and children in the 1921 Constitution (cf. Article 126) should be also emphasized. It should be noted at this point that those fundamental social rights are generally implemented by politics, i.e. the legislature. But the constitutional norms, which are only programs, are normative guidelines for politics, which, however, leave the legislature a wide scope for action. It should also be mentioned that the constitution contains important rights for the protection of ethnic minorities (Article 129 and 130 as basic norms with further specifications in particular concerning non-discrimination and legal protection).

The other pillar of constitutionalism, the *Rule of law*, is also anchored in the Constitution of 1921, even if this concept is not explicitly mentioned there, in keeping with the times. However, the *Rule of law* is present even in the modern sense, since not only the binding of the executive and the judiciary to the laws, i.e. legality, but also the binding of the legislature to the constitution, i.e. constitutionality, is explicitly laid down; Article 8 (also Article 9 concerning pre-constitutional law) and Article 52 are the key norms for this. Article 10, which establishes the unlimited validity of the constitution in principle, also underlines the position of the constitution as a fundamental order. This is also reinforced by Article 76 (a), according to which the Senate, Georgia's highest court, supervises the strict enforcement of the law. According to the constitution, the *Rule of law* is to be implemented efficiently.

At the same time, the constitutional order is value-oriented, as has just been explained in detail in the analysis of the fundamental rights. If the *Rule of law* requires a commitment to the constitution, it also requires a commitment to fundamental rights, i.e. to values. The idea of the *Rule of law* underlying the 1921 Constitution is therefore value-oriented. Effective legal protection, which is only given if the independence of the courts is guaranteed, is of particular importance within the *Rule of law* principle. This is enshrined in Article 78 (orientation of jurisdiction to the law), Article 79 (functional independence of the courts) and Article 83 (personal independence of judges). As far as the numerous individual characteristics of the *Rule of law* derived from the concept of law (clarity, definiteness of the law, legal certainty and legal stability, principle of legality) and resulting from the function of law (protection of legitimate expectations, prohibition of retroactivity, proportionality, etc.) are concerned, these are concretizations developed by the case-law.

In conclusion, it can be said that the text and the overall structure of the Constitution of Georgia of 1921 meets the requirements of a modern liberal-democratic, i.e. an anthropocentric constitution. It even contains elements that were particularly progressive compared to the other constitutions of that time, the German Weimar Constitution of

1919 and the Austrian Constitution of 1920 (which, however, implemented the concept of a specific constitutional jurisdiction as its own special feature).

Modern constitutionalism, however, also means that the implementation of the constitutional text by the legislature, the judiciary and the politicians confirm and advances the modern image of the constitutional text. A constitutional culture based on the ideals of human dignity, freedom and equality must develop further. This is only possible if there is a consolidated democracy whose significance for human freedom is rooted in the commitment of society and the political forces, and which is also practiced according to this commitment.