Law and Interdisciplinarity

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The publication has been supported by a grant from the Faculty of Law and Administration under the Strategic Programme Excellence Initiative at Jagiellonian University.

ISBN 978-3-16-163881-7 / eISBN 978-3-16-163882-4
DOI 10.1628/978-3-16-163882-4

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliographie; detailed bibliographic data are available at *https://dnb.dnb.de.*

Published by Mohr Siebeck Tübingen, Germany, 2024. www.mohrsiebeck.com

The book was printed by Laupp & Göbel in Gomaringen on non-aging paper and bound by Buchbinderei Nädele in Nehren.

Printed in Germany.

Inalienable Human Rights

An Interdisciplinary Challenge to the Discipline of Law

Thilo Rensmann

I. Introduction

In the first article of Germany's federal constitution (the *Grundgesetz* – Basic Law), the German people profess their faith in inviolable human dignity and inalienable human rights.[1] This solemn pledge is explicitly protected against

[1] Art. 1(1) and (2) Basic Law. English translation available at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0019 (last accessed on 28 September 2022).

constitutional amendment[2] and therefore belongs – as the Federal Constitutional Court (*Bundesverfassungsgericht*) puts it – to the "eternal" principles which define the "constitutional identity" of the Federal Republic of Germany.[3]

Whilst human dignity has been fully embraced in German constitutional practice and is indeed today considered the hallmark of Germany's constitutional identity,[4] inalienable human rights, despite their equally prominent position in the Constitution, have long lain dormant in constitutional jurisprudence and scholarship. The Federal Constitutional Court only rediscovered the constitutional dimension of inalienable human rights in the early 2000s.[5] Since then, the Court has increasingly referred to inalienable human rights, in particular to rationalise the interaction between constitutionally entrenched fundamental rights on the one hand and European and international human rights on the other.[6]

The renaissance of inalienable human rights reached its preliminary peak in an order handed down by the Federal Constitutional Court in April 2021.[7] In this decision the Court emphasised that from a German constitutional perspective the commitment to inalienable human rights provides the common reference point for the determination of the proper relationship between the German bill of rights, the EU Charter of Fundamental Rights[8] and the European Convention on Human Rights.[9]

It is against this backdrop that the present chapter will attempt to establish why inalienable human rights have long been neglected and what accounts for their sudden renaissance. A special emphasis will be placed on the methodological dimension of this process. It will be demonstrated that the difficulty of capturing the legal meaning of a notion specifically intended to transcend positive law has from the outset posed a tremendous interdisciplinary challenge to the discipline of law and that this challenge has still not yet been fully mastered.

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[2] Art. 1(3) Basic Law.

[3] Federal Constitutional Court, judgment of 30 June 2009, BVerfGE 123, 267, para. 218.

[4] See *M. Baldus*, Kämpfe um Menschenwürde: Die Debatten seit 1949 (2016).

[5] See pp. 138 ff., below.

[6] See pp. 144 ff., below.

[7] Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1; for a detailed analysis see pp. 145 ff., below.

[8] Charter of Fundamental Rights of the European Union, as amended on 12 December 2007, Official Journal of the European Union 2012 C 236/391 (hereinafter: EU Charter).

[9] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, ETS 5 (hereinafter: ECHR).

II. Inalienable human rights as an interdisciplinary challenge

The Basic Law acknowledges inviolable human dignity and inalienable human rights as the "basis of every community, of peace and of justice in the world."[10] Human dignity and human rights must thus be respected and protected by "all state authority",[11] regardless of when and where it is exercised. Given their timeless and universal quality, human dignity and human rights are accordingly not established by constitutional fiat but simply reaffirmed by constitutional creed: the German people as the *pouvoir constituant* humbly "profess their faith"[12] in human dignity and human rights and thereby recognise that their otherwise unbridled power is reined in by the constant duty to respect and protect these meta-positive values.

In discharging this duty, the framers of the Basic Law "transformed"[13] human dignity and inalienable human rights into a bill of "fundamental" rights.[14] According to the wording and systematic structure of Art. 1 Basic Law, it is only via the medium of such positive fundamental rights that human dignity and inalienable human rights partake in the supremacy of the constitution and thus bind all three branches of government "as directly applicable law".[15]

However, given the stated object and purpose of fundamental rights as a means of respecting and protecting human dignity and inalienable human rights, these meta-positive values continue to play a significant role in interpreting the constitutionally entrenched bill of rights.[16] Moreover, human dignity and inalienable human rights belong to the "eternal" principles protected against constitutional amendment.[17] When interpreting fundamental rights and reflecting on the immutable "identity"[18] of the constitution, constitutional lawyers are thus confronted with the difficult task of establishing the specifically *legal* meaning of foundational values to which the constitution itself ascribes a meta-positive quality. This poses a considerable challenge to the discipline of law. Without overstretching the concepts of "law" and the "discipline of law",[19]

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[10] Art. 1(1) and (2) Basic Law.

[11] Art. 1(1)(2) Basic Law.

[12] Art. 1(2) Basic Law.

[13] As to the notion of "transformation" in the deliberations of the Parliamentary Council on the draft text of the Grundgesetz, see *M. Hong*, Der Menschenwürdegehalt der Grundrechte (2019), 208 with further references.

[14] Art. 1(3) Basic Law refers to constitutionally entrenched "fundamental rights" as opposed to the meta-positive "human rights" acknowledged in Art. 1(2) Basic Law.

[15] Art. 1(3) in conjunction with Art. 20(3) Basic Law.

[16] On this interpretative function, see pp. 141 ff., below.

[17] Art. 79(3) Basic Law.

[18] See n. 3, above.

[19] As to the problem of determining the "identity" of the discipline of law in an interdisciplinary context, see *S. Kirste*, Voraussetzungen von Interdisziplinarität der Rechtswis-

legal scholarship is inevitably reliant on transdisciplinary assistance and interdisciplinary exchange in its effort to unearth the deeper philosophical, theological, political, cultural, and social roots which inform the proper understanding of human dignity and inalienable human rights.[20]

III. Inalienable human rights, human dignity and the discipline of law

It is therefore not surprising that ever since the Basic Law entered into force in 1949, constitutional jurisprudence and scholarship have been battling to make sense of the invocation of human dignity and inalienable human rights. In the judicial and academic responses to this methodological conundrum, three main approaches can be distinguished: Firstly, the acknowledgement that meta-positive values are beyond the reach of the discipline of law; secondly, the adaptation of legal methodology to the meta-positive object of interpretation; and thirdly, *vice versa*, the adaptation of the object of interpretation to legal methodology.

A. Beyond the discipline of law: marginalisation of inalienable human rights

Following the first approach, constitutional scholars have long marginalised the significance of the human rights clause in Art. 1(2) Basic Law. The invocation of inalienable human rights continues to be considered a "misplaced preambular paragraph"[21] or a mere reference to the "abstract idea"[22] of human rights and thus largely devoid of tangible substance.

Some early commentators did in fact recognise the intended link[23] between Art. 1(2) Basic Law and the emerging body of international human rights.[24] However, since the 1948 Universal Declaration of Human Rights[25] was a non-binding political resolution and it was to take until the mid-1970s for a treaty-based "International Bill of Rights" to enter into force,[26] Art. 1(2) Basic Law

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senschaften, in: idem (ed.), Interdisziplinarität in den Rechtswissenschaften (2016), 35–85, 38–45.

[20] As to human dignity, see, e.g. *D. Grimm* et al. (eds.), Human Dignity in Context (2018); as to human rights see the contributions in *Kirste* (n. 19), 343–430.

[21] *H. Dreier*, Art. 1 Abs. 2, para. 11, in: idem (ed.), Grundgesetz-Kommentar (3rd edn., 2018).

[22] *C. Walter*, Art. 1 Abs. 2, paras. 35, 37, 42, in: W. Kahl et al. (eds.), Bonner Kommentar zum Grundgesetz (Looseleaf, 214th instalment, 2021).

[23] See pp. 121, below.

[24] *G. Dürig*, Art. 1, para. 55, in: idem/T. Maunz (eds.), Grundgesetz: Kommentar (1958).

[25] Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810, 71 (1948) (hereinafter: UDHR).

[26] See pp. 138 ff., below.

remained – at least for the time being – beyond the cognition of the discipline of law.[27]

B. Eclectic interdisciplinarity: elevation of human dignity to a constitutional supernorm

In stark contrast, the invocation of human dignity in Art. 1(1) Basic Law has, from the very beginning, been fully espoused by constitutional scholarship.[28] Despite being of an even more abstract nature than inalienable human rights, human dignity quickly developed into a constitutional "supernorm"[29] radiating into every corner of the legal system.[30]

Initially, the problem of the meta-positive origin of human dignity was predominantly viewed through the lens of the second approach, the adaptation of constitutional methodology to the object of interpretation. This approach is based on the assumption that the constitutional reference to human dignity is either declaratory of, or a *renvoi* to, a meta-positive principle. According to *Günter Dürig*, the most famous and influential early representative of this approach,

> "the moral value of human dignity, by having been incorporated into the positive constitution, has, from the perspective of positive law, simultaneously become a legal value so that positive law itself now mandates its still unfamiliar and therefore admittedly difficult legal interpretation."[31]

In *Dürig*'s view, the affirmation of human dignity in the positive constitution did not, however, change its meta-positive nature.[32] The meaning of human dignity as a "legal value" therefore continued to be informed by its meta-positive origin. *Dürig*, like many other pioneering legal scholars of the 1950s assumed that the pre-constitutional roots of human dignity, and hence the key to its understanding as a parallel "legal value", lay primarily in the Christian *imago dei*-doctrine and its "personalist" application in Catholic and Protestant social thought.[33] Although this Christian natural law approach did not find any

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[27] *Dürig* (n. 24), paras. 55 f.

[28] See *Baldus* (n. 4), 60–88, 104–184, 246–250 with further references. For one of the very few authors who, in keeping with the first approach, considers the human dignity clause beyond the cognition of the discipline of law and hence largely devoid of legal meaning, see *E. Forsthoff*, Die Umbildung des Verfassungsgesetzes, in: E. Barion et al. (eds.), Festschrift für Carl Schmitt (1959), 35–62, 53.

[29] *Baldus* (n. 4), 14, 28, 253.

[30] *Baldus* (n. 4), 246 f.

[31] *Dürig* (n. 24), para. 1 (translation by the author).

[32] *Dürig* (n. 24), paras. 2, 73.

[33] *Dürig* (n. 24), para. 15. As to other authors following this Christian natural law approach, see *Baldus* (n. 4), 78–81, 241–243.

convincing support in the *travaux préparatoires*,[34] it remained the prevailing understanding of the human dignity clause during the first two decades after the Basic Law entered into force.[35]

Later, *Dürig* openly admitted that his more or less direct recourse to natural law and Christian social thought – interspersed with elements of Kantian philosophy – found little support in traditional legal hermeneutics.[36] His methodological approach was, as he put it, a "pilot project" largely conducted as a "blind flight" with the aid of a "compass" he had "cobbled together" himself.[37]

Dürig's eclectic approach has nevertheless remained influential to this day.[38] In an increasingly secularised and pluralistic society, it is, however, not so much his Christian reading of the dignity clause but rather his methodological point of departure which lives on in today's constitutional discourse. *Dürig*'s assumption that human dignity provides a gateway to the meta-positive world of ideas has subsequently encouraged many others to interpret the dignity clause in the light of their own preferred theological, philosophical or social theory.[39]

Consequently, we are faced today with a bewildering multitude of understandings of human dignity as a legal concept. Given the diversity and at times contradictory nature of the meta-positive ideas projected onto the dignity clause, all attempts at creating a workable synthesis by finding an "interdisciplinary consensus"[40] have been doomed to failure.[41]

It has thus become increasingly clear that only a legal approach severed from any particular meta-positive school of thought is capable of providing a generally accepted understanding of human dignity as the highest constitutional value.

C. The turn to positive law: re-emergence of inalienable human rights

Dürig's pioneering interpretation of Art. 1 formed part of the leading commentary on the Basic Law, at the time jointly edited by himself and the now disgraced[42] *Theodor Maunz*. Since its first edition in 1958, the commentary has been published as a looseleaf binder with a view to keeping it constantly up to

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[34] See pp. 121 ff., below.

[35] *Baldus* (n. 4), 98.

[36] *G. Dürig*, Dankrede am 65. Geburtstag, Jahrbuch des öffentlichen Rechts der Gegenwart NF 36 (1987), 91–103, 95.

[37] *Dürig* (n. 36), 95 (translation by the author).

[38] See *Baldus* (n. 4), 237.

[39] See *Baldus* (n. 4), 98–103 with further references.

[40] As to such attempts, see *Baldus* (n. 4), 241 f.

[41] *Baldus* (n. 4), 260, 429.

[42] See *M. Stolleis*, Theodor Maunz: Ein Staatsrechtslehrerleben, Kritische Justiz 26 (1993), 393–396.

date.[43] Against this backdrop it is telling that *Dürig*'s commentary on Art. 1(1) and (2) Basic Law remained unchanged until 2003/2004, when it was completely reworked by *Matthias Herdegen*.[44]

In his new commentary, *Herdegen* advocates a distinctly "legal reading" (*staatsrechtliche Betrachtung*)[45] of the pledge to human dignity and inalienable human rights that is strictly limited to established methods of constitutional interpretation.[46] Human dignity and human rights are, accordingly, largely severed from their meta-positive origins and treated as – or at least equated to – notions of positive law.[47] The object of interpretation is thus adapted to legal methodology.

In search of reliable guideposts for the interpretation of human dignity and human rights within the realm of positive law, *Herdegen* places a particular emphasis on Art. 1(2) Basic Law as a gateway to the fundamental values of the international community.[48] Based on the observation that the drafters had modelled the first two paragraphs of Art. 1 Basic Law on the Universal Declaration of Human Rights,[49] he posits that the pledge to inalienable human rights "as the basis of every community, of peace and of justice in the world"[50] forms a bridge to the body of universal human rights recognised today as an integral part of positive international law.[51] These international human rights standards, in turn, are considered to provide essential guidance in the interpretation of both the dignity clause and the subsequent bill of fundamental rights.[52]

When *Herdegen*'s new commentary on Art. 1(1) and (2) Basic Law was first published, his "positivist" reinterpretation of *Dürig*'s – by then canonical – text was met with stinging criticism from other constitutional scholars. Initially, the focus of the debate was on the dignity clause. *Ernst Wolfgang Böckenförde*, a prominent constitutional lawyer and legal philosopher who had served on the Federal Constitutional Court from 1983 to 1996, accused *Herdegen* of having wilfully broken with the post-war constitutional consensus of human dignity

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[43] *G. Dürig/T. Maunz*, Vorwort zur 1. Auflage, in: idem (eds.), Grundgesetz: Kommentar (1958).

[44] *M. Herdegen*, Art. 1 Abs. 1, in: G. Dürig et al. (eds.), Grundgesetz: Kommentar (2003); *idem*, Art. 1 Abs. 2, in: G. Dürig et al. (eds.), Grundgesetz: Kommentar (2004). The following citations refer to the newest edition (Looseleaf, 100th instalment, 2023).

[45] *Herdegen* (n. 44), Art. 1 Abs. 1, para. 20 ("staatsrechtliche Betrachtung").

[46] *Herdegen* (n. 44), Art. 1 Abs. 1, para. 20.

[47] *Herdegen* (n. 44), Art. 1 Abs. 1, para. 20.

[48] *Herdegen* (n. 44), Art. 1 Abs. 1, paras. 3, 42, 44.

[49] See also pp. 121 ff., below.

[50] Art. 1(2) Basic Law.

[51] *Herdegen* (n. 44), Art. 1 Abs. 1, paras. 3, 42, 44; *idem*., Art. 1 Abs. 2, paras. 1 f., 22–35, 39–51.

[52] *Herdegen* (n. 44), Art. 1 Abs. 1, para. 42, 44; *idem*., Art. 1 Abs. 2, paras. 47–51.

being firmly anchored in Christian natural law.[53] *Böckenförde* spoke of an "historic turning point" and a "watershed moment".[54]

The "Herdegen-Böckenförde debate" even made it to the frontpage of the *Frankfurter Allgemeine Zeitung*, Germany's leading conservative broadsheet.[55] The remarkable fact that a scholarly dispute about constitutional methodology became headline news highlights the pivotal role human dignity played and still plays in Germany's political culture. Human dignity not only defines the "identity" of the German constitution[56] but has at the same time, in a much broader sociological sense, become a crucial "integrative factor"[57] in the forging of Germany's distinctive identity as a nation.[58]

This may also explain why the pledge to inalienable human rights has until recently been largely neglected in German constitutional jurisprudence and scholoarship. Given that Germany was unable to boast an unbroken human rights tradition of its own, the fledgling (West) German democracy, in fleshing out its new identity, gravitated first towards the novel[59] and therefore more open constitutional concept of human dignity. Given that the overwhelming majority of the population were still practising Catholics and Protestants at this time, the concepts of Christian personalism and German idealism conjured up by the notion of human dignity seemed far better suited as a rallying point for Germany's new constitutional identity[60] than the more generic human rights tradition commonly associated with inalienable rights.[61]

It should have come as no surprise, therefore, that *Herdegen*'s interpretation of inalienable human rights as a normative bridge to international human rights law was considered just as "revolutionary"[62] as his "positivist" reinterpretation of the dignity clause. His critics insisted that the natural law notion of inalienable human rights cannot be magically transformed into a gateway to positive

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[53] *E.-W. Böckenförde*, Die Würde des Menschen war unantastbar, Frankfurter Allgemeine Zeitung, 3 September 2003, 33.

[54] *Böckenförde* (n. 53), 33.

[55] Streit über Menschenwürde im Grundgesetz, Frankfurter Allgemeine Zeitung, 3 September 2003, 1.

[56] See n. 3, above.

[57] As to "integrative factors" and their origin in Rudolf Smend's "integration theory", see pp. 125 ff., below.

[58] As to the legal notion of national identity, see Art. 4(2) Treaty on European Union, 2012 Official Journal of the European Union C 326/13 (hereinafter: TEU).

[59] As to the novelty of human dignity as a legal concept, see pp. 121 ff., below.

[60] See *Baldus* (n. 4), 60–103.

[61] As to the link between inalienable rights and the human rights tradition, see pp. 121 ff. and pp. 145 ff., below.

[62] *C. Hillgruber*, Der internationale Menschenrechtsstandard – geltendes Verfassungsrecht?, in: G. Gornig et al. (eds.), Iustitia et Pax: Gedächtnisschrift für Dieter Blumenwitz (2008), 123–142, 128.

human rights law.[63] They argued that the drafters of the Basic Law purposefully ranked international treaties and general international law below the constitution.[64] This original intent would therefore be turned on its head if, via the pledge to inalienable human rights, international human rights law were suddenly elevated to the pinnacle of the constitution.[65] The constitutional floodgates would then be opened to the unfiltered influx of international human rights law, and the idiosyncrasies of Germany's celebrated post-war fundamental rights jurisprudence would gradually be washed away.[66] The novel "positivist" reading of the pledge to inalienable human rights would thereby lead inexorably to the erosion of Germany's constitutional identity.

IV. Inalienable human rights in the jurisprudence of the Federal Constitutional Court

The evolution of the jurisprudence of the Federal Constitutional Court points, however, in a different direction. Rather than eroding Germany's constitutional identity, the link established between the pledge to human dignity and inalienable human rights on the one hand and international human rights law on the other is in fact deeply embedded in Germany's constitutional DNA.

A closer look at the Federal Constitutional Court's case law demonstrates that the Court has in fact always been conscious of this essential connection between human dignity, inalienable human rights, positive constitutional law and the emergence of the international human rights system.

A. Context: the role of the Universal Declaration of Human Rights in the travaux préparatoires of the Basic Law

The genetic link between inalienable and international human rights finds its most conspicuous expression in the fact that the first two paragraphs of Art. 1 Basic Law echo – practically in *haec verba* – the preamble of the Universal Declaration of Human Rights.[67] This textual match is no coincidence. The *travaux préparatoires* document extensively that the drafters of the Basic Law

[63] *Hillgruber* (n. 62), 139. In a similar vein, *M. Jestaedt*, Selbstand und Offenheit der Verfassung gegenüber nationalem, supranationalem und internationalem Recht, in: J. Isensee/P. Kirchhof (eds.), Handbuch des Staatsrechts der Bundesrepublik, vol. 12 (3rd edn., 2014), § 264 para. 84.

[64] *Hillgruber* (n. 62), 139–142.

[65] *Hillgruber* (n. 62), 128 f.

[66] *Hillgruber* (n. 62), 129.

[67] UDHR, Preamble, para. 1: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, […]."

attached great importance to the Universal Declaration because it embodied a "common understanding"[68] of human rights, which, in 1948, had almost miraculously bridged the deepening ideological divide between East and West.[69] Taking the Declaration as a reference point for drafting the bill of fundamental rights was thus informed by the hope that a constitution anchored in this universal consensus could serve as a basis for Germany's swift reunification and reinstatement as an "equal partner"[70] within the international community.[71]

Accordingly, the pledge to human dignity and inalienable human rights in Art. 1(1) and (2) Basic Law refers to the common, universal understanding of these foundational values as laid down in the Universal Declaration. Whereas the reference to inalienable rights conjures up associations with the human rights tradition of the enlightenment, the simultaneous invocation of human dignity marks, however, a new departure in the evolution of human rights.

During the 1940s human dignity was a novel concept in the human rights domain.[72] Its emergence as the highest value underpinning the fledgling international human rights system therefore signalled a break with the previous human rights tradition in two important respects.

Firstly, human dignity was intended to provide human rights with a pluralistic foundation.[73] The aim of making human rights truly universal was irreconcilable with grounding them in any particular theory of natural law. In the Universal Declaration all references to nature and the Creator were accordingly erased from the classical templates and substituted by the notion of human dignity.[74] Human dignity was, however, not intended to be a full substitute for the omitted answers to the question of the ultimate foundation of human rights. The value of dignity operates rather as a "halt to reflection" (*Reflexionsstop*);[75] it marks the thin "overlapping consensus"[76] on which the modern edifice of international human rights law is built. In a similar vein, *René Cassin*, one of the "fathers" of the Declaration, described the function of human dignity as allowing the drafters

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[68] UDHR, Preamble, para. 7.

[69] See *Hong* (n. 13), 241–244, 613 f. and *T. Rensmann*, Wertordnung und Verfassung (2007), 25–42, each with further references.

[70] See the Preamble of the Basic Law: "[…] Inspired by the determination to promote world peace as an equal partner in a united Europe […]."

[71] *Rensmann* (n. 69), 25 f.

[72] *T. Rensmann*, Menschenwürde als universaler Rechtsbegriff, in: C. Thies (ed.), Der Wert der Menschenwürde (2009), 75–92.

[73] *Rensmann* (n. 72), 77–79, 85–89.

[74] *Rensmann* (n. 69), 15 f. with further references.

[75] *N. Luhmann*, Gibt es in unserer Gesellschaft noch unverzichtbare Normen? (1993), 19.

[76] *J. Rawls*, A Theory of Justice (revised edn., 1999), 340.

"to take no position on the nature of man and of society and to avoid metaphysical controversies, notably the conflicting doctrines of spiritualists, traditionalist, and materialists regarding the origin of the rights of man."[77]

The French Catholic philosopher *Jacques Maritain* who in 1947 had been commissioned by UNESCO to preside over an interdisciplinary and intercultural "Committee on the Philosophic Bases of Human Rights" put it similarly:

"The philosophies of our times, notwithstanding their divergencies, have deepened faith in the dignity of man."[78]

Given the variety of faiths and beliefs amongst the drafters of the Basic Law, this pluralistic conception of human dignity provided a welcome compromise position in the intense and divisive debates on the meta-positive origin of human rights during the drafting process.[79] The invocation of human dignity in Art. 1(1) Basic Law was thus also conceived as an "uninterpreted hypothesis" (*nicht interpretierte These*) which "could be understood theologically by some, philosophically by others and ethically by yet others."[80]

Secondly, human dignity also marked a substantive break with the prevailing liberal human rights tradition. The Universal Declaration is built on a "value system" in which human dignity as the highest value overarches the trinity of freedom, equality and brotherhood (or "solidarity" in modern parlance).[81] The ultimate goal of human rights is hence no longer limited to ensuring "freedom" in the sense of a "right to be let alone"[82] but extends to those societal conditions that are "indispensable for […] [a person's] dignity and the free and full development of his [or her] personality".[83]

This communitarian vision of freedom in dignity substantially changes the ambit and structure of human rights. The Universal Declaration not only guarantees classical negative rights but also social rights which typically require positive action by the State.[84] All human rights – liberal and social rights – are

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[77] *R. Cassin*, La pensée et l'action (1972), 108; English translation by *J. Morsink*, The Universal Declaration of Human Rights (1999), 287.

[78] UNESCO (ed.), Human Rights: Comments and Interpretations (1949), 260.

[79] *Rensmann* (n. 69), 29–32.

[80] *T. Heuss*, Fourth Session of the Policy Committee (Grundsatzausschuss) of the Parliamentary Council, 23 September 1948, in: Deutscher Bundestag/Bundesarchiv (eds.), Der Parlamentarische Rat 1948–1949 – Akten und Protokolle, vol. 5/1 (1993), 67, 72 (translation by the author).

[81] Art. 1 UDHR and Preamble, para. 1. As to the conceptualisation of the UDHR as a value system, see *Rensmann* (n. 69), 29–32; *idem*, Normative Values in Modern Constitutionalism, in: C. Hugo/T.M.J. Möllers (eds.), Legality and Limitation of Powers (2019), 19–34, 24–26.

[82] *S. Warren/L. Brandeis*, The Right to Privacy, Harvard Law Review 4 (1890), 193–216, 193.

[83] Art. 22 UDHR.

[84] Art. 22–27 UHDR.

thus considered "inalienable"; they are – as it was later put – "indivisible, interdependent and interrelated".[85]

By tearing down the wall of separation established by the liberal human rights tradition between the governmental and societal spheres, human rights are, in addition, endowed with a constitutive and "transformative"[86] dimension. This finds its clearest expression in Art. 28 UDHR, according to which "everyone is entitled to a social and international order in which the rights and freedoms set forth in […] [the] Declaration can be fully realised". Human rights are thus understood not only as individual rights but also as normative "values" or "principles" which underpin and structure the social order at the domestic and international levels. As essential constitutional building blocks, they provide the "basis of every community […] in the world"[87].

The framers of the Basic Law recognised that their programmatic commitment to human dignity and the value system of the Universal Declaration inevitably encompassed these social and constitutive dimensions of human rights.[88] Yet, at the same time they were determined not to repeat the mistakes that had led to the downfall of the Weimar Republic. The Achilles' heel of the Weimar Constitution of 1919[89] was considered to have been its procedural, relativistic approach to democracy and, in particular, the weak normative power of fundamental rights.[90] As a response, Art. 1(3) Basic Law, which immediately follows the pledge to human dignity and inalienable human rights, declares the bill of fundamental rights binding on "the legislature, the executive and the judiciary as directly applicable law".

The goal of endowing fundamental rights with strict normativity and justiciability, however, seemed to militate against the incorporation of such positive human rights dimensions, which under the Weimar Constitution had been widely considered mere "programmatic" provisions devoid of any normative force.[91] In the process of drafting the Basic Law the issue of reconciling the programmatic commitment to human dignity and inalienable human rights, on the one hand, with the strict normativity of the new constitution, on the other, remained largely unresolved.[92] The social and constitutive dimensions of

[85] Vienna Declaration and Programme of Action, 25 June 1993, International Legal Materials 32 (1993), 1661, chapter I, para. 5.

[86] *K.E. Klare*, Legal Culture and Transformative Constitutionalism, South African Journal on Human Rights 14 (1998), 146–188.

[87] See Art. 1(2) Basic Law.

[88] See *Rensmann* (n. 69), 33–36.

[89] Constitution of the German Empire, 11 August 1919, Reichsgesetzblatt 1919, 1383.

[90] *Rensmann* (n. 69), 33; *idem* (n. 81), 26 f.

[91] *Rensmann* (n. 81), 27. See also *idem*, Domestic Courts as International Human Rights Courts: A German Perspective, in: S. Kadelbach et al. (eds.), Judging International Human Rights (2018), 471–496, 473 f.

[92] *Rensmann* (n. 69), 33–36, 40–42.

human dignity and inalienable human rights therefore did not find clear textual expression in the bill of fundamental rights. The tasks of completing the "human rights revolution"[93] proclaimed in the Universal Declaration and the first two paragraphs of Art. 1 Basic Law was therefore left primarily to the judiciary and in particular to the Federal Constitutional Court.[94]

B. History, philosophy and sociology: inalienable human rights as meta-positive values

1. Radbruch, Smend and the United Nations

The main battleground for the early jurisprudence of the Federal Constitutional Court on the relationship between inalienable human rights, human dignity and positive constitutional law was the equality of men and women, in particular in matrimonial and family matters.[95] Although gender equality had already featured amongst the fundamental rights of the Weimar Constitution,[96] it had not been considered a human right and consequently its personal ambit only extended to German nationals.[97] Equality of men and women was restricted to "civil rights" and, moreover, only guaranteed "in principle", thus leaving its interpretation open to unspecified limitations.[98] Whilst the Weimar Constitution explicitly stated that marriage "shall rest upon the equality of both sexes", this provision was placed in the programmatic and hence legally non-binding section on community life.[99]

Against this backdrop and the social reality in post-war West Germany, the elevation of the equality of men and women to a fundamental right of "all human beings"[100] binding on all three branches of government "as directly applicable law"[101] was nothing short of a revolution. This constitutional revolution was foreshadowed by the emergence of international human rights law. The Charter of the United Nations,[102] the new "constitution" of the international community, had prepared the ground by putting special emphasis on the close connection between human dignity, human rights and equal rights for men and

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[93] See *L.B. Sohn*, The New International Law: Protection of the Rights of the Individuals Rather Than States, American University Law Review 32 (1982–1983), 1–64, 1.

[94] *Rensmann* (n. 91), 474.

[95] As to the issue of equal pay for men and women, see *Rensmann* (n. 69), 76–81.

[96] See n. 89, above.

[97] Art. 109(1) and (2) Weimar Constitution.

[98] Art. 109(2) Weimar Constitution.

[99] Art. 119(1) Weimar Constitution. As to the programmatic nature, see Federal Constitutional Court, judgment of 18 December 1953, BVerfGE 3, 225, 242.

[100] Art. 3(2) in conjunction with (1) Basic Law.

[101] Art. 1(3) Basic Law.

[102] Charter of the United Nations, 26 June 1945, 1 UNTS 15 (hereinafter UN Charter).

women.[103] Three years later the Universal Declaration of Human Rights resoundingly reaffirmed that "all human beings are born free and equal in rights"[104] and hence "entitled to all […] [human] rights […] without distinction of […] sex".[105] The Declaration explicitly stresses that gender equality also applies "to marriage, during marriage and at its dissolution".[106]

When the framers of the Basic Law took up the baton from the United Nations by recognising the equality of men and women as a human and fundamental right in Art. 3(2) Basic Law,[107] they were well aware of the revolutionary consequences of this move and therefore took the unusual step of suspending the revolution for almost four years. In order to allow sufficient time for Parliament to eliminate all patriarchal privileges from existing legislation, Art. 117(1) Basic Law set forth that all law inconsistent with Art. 3(2) Basic Law was to "remain in force until adapted to that provision, but not beyond 31 March 1953."[108]

The deadline passed without Parliament having been able to agree on the reforms necessary to bring all pre-constitutional statutes in line with the principle of gender equality.[109] The government and the parliamentary majority saw in particular no need to amend matrimonial and family law. They argued that the subservience of women within the family was anchored in Christian natural law and that the equality clause of Art. 3(2) Basic Law in its interplay with the constitutional protection of marriage and the family (Art. 6(1) Basic Law) ought to be interpreted accordingly.[110] This view was seconded by *Dürig*[111] and other constitutional scholars who championed a Christian natural law interpretation of human dignity and inalienable human rights.[112]

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[103] UN Charter, Preamble, Art. 1(3), 13(1)(b), 55(3), 76.

[104] Art. 1 UDHR.

[105] Art. 2(1) UDHR.

[106] Art. 16(1) UDHR.

[107] See Art. 1(3) Basic Law.

[108] On the continuing validity of pre-constitutional law according to Art. 123(1) Basic Law see *T. Rensmann*, Die Einheit der Rechtsordnung auf Grundlage der Grund- und Menschenrechte, in: P. Hellwege/M. Soniewicka (eds.), Die Einheit der Rechtsordnung (2020), 83–105, 91.

[109] See Federal Constitutional Court, judgment of 18 December 1953, BVerfGE 3, 225, 226; *T. Darnstädt*, Verschlusssache Karlsruhe (2018), 98–100.

[110] See Federal Constitutional Court, judgment of 29 July 1959, BVerfGE 10, 59, 63–65; *Darnstädt* (n. 109), 98–100.

[111] *G. Dürig*, Art. 3 II GG – vom verfassungsrechtlichen Standpunkt gesehen, Zeitschrift für das gesamte Familienrecht 1 (1954), 2–5, 4. As to Dürig's Christian interpretation of human dignity, see pp. 117 ff., above.

[112] See Federal Constitutional Court, judgment of 29 July 1959, BVerfGE 10, 59, 72 with further references.

As soon as the deadline set in Art. 117(1) Basic Law had passed, the matter was brought before the Federal Constitutional Court.[113] In a curious procedural twist, the Court was confronted with the issue in the context of a reference by a higher regional court challenging the "constitutionality" of Art. 117(1) Basic Law.[114] The case thus raised the intriguing question of "unconstitutional constitutional law"[115] and thereby elevated the issue of gender equality to a meta-positive level.

The referring court argued that Art. 117(1) Basic Law had created "legal chaos" by having rendered large parts of matrimonial and family law void after the constitutional deadline lapsed.[116] Given that no amending legislation had been passed, the judiciary was now left without any statutory guidance as to how to fill the ensuing gaps; this, in turn, was considered by the referring court as violating the principle of legal certainty, which, as a core tenet of the rule of law, was argued to be binding not only on all constituted State power but also on the *pouvoir constituant* itself. For this reason, the referring court asked the Federal Constitutional Court to rule that the statutory provisions affected by the principle of gender equality were to remain in force until the legislature had addressed the situation.

Had the reference been successful, the gender equality revolution would have been delayed even further. As chance would have it, however, the revolution had already reached the Federal Constitutional Court. The judge rapporteur in this case was *Erna Scheffler*, the first and for many years only female justice on the Federal Constitutional Court.[117] Prior to her appointment she had earned herself a reputation as a women's rights activist. In a high-profile presentation at the annual conference of the German Lawyer's Association (*Deutscher Juristentag*) in 1950 she had argued forcefully that Art. 3(2) Basic Law required the unconditional removal of all male privileges from the statute book.[118]

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[113] Federal Constitutional Court, judgment of 18 December 1953, BVerfGE 3, 225.

[114] Federal Constitutional Court, judgment of 18 December 1953, BVerfGE 3, 225, 226 f.

[115] Federal Constitutional Court, judgment of 18 December 1953, BVerfGE 3, 225, 231–234.

[116] See Federal Constitutional Court, judgment of 18 December 1953, BVerfGE 3, 225, 226 f., 239.

[117] See *M. Hansen*, Erna Scheffler (1893–1983): Erste Richterin am Bundesverfassungsgericht und Wegbereiterin einer geschlechtergerechten Gesellschaft (2019); on her role in this particular case, *Darnstädt* (n. 109), 91–127; *T. Rensmann*, Abschied von Lüth? Zur Kontextualisierung und Historisierung von verfassungsgerichtlichen Leitentscheidungen, in: T. Groh et al. (eds.), Verfassungsrecht, Völkerrecht, Menschenrechte – Vom Recht im Zentrum der Internationalen Beziehungen. Festschrift für Ulrich Fastenrath (2019), 55–77, 67–71.

[118] *E. Scheffler*, Gleichberechtigung der Frau: In welcher Weise empfiehlt es sich, gemäß Art. 117 des Grundgesetzes das geltende Recht an Art. 3 Abs. 2 des Grundgesetzes anzupassen?, Verhandlungen des Deutsches Juristentages 38 (1950), B 3–B 30.

In her new role as justice at the Federal Constitutional Court, *Scheffler* managed to convince her male colleagues on the bench to grasp the opportunity presented by these proceedings and spell out clearly the proper understanding of Art. 3(2) Basic Law in matrimonial and family law.[119] The case pitted the natural law reading embraced by the parliamentary majority against the pluralistic understanding of human dignity and human rights espoused by the United Nations, the drafters of the Basic Law and *Scheffler*.

The Court acknowledged the, albeit highly unlikely, possibility of "unconstitutional constitutional law" and considered its power of judicial review, in such exceptional instances, to extend to original constitutional law.[120] The Federal Constitutional Court based this extraordinary power on the close link between the Federal Republic of Germany's constitutional identity and the historical context in which the Basic Law was drafted. In the eyes of the Federal Constitutional Court, the experience of the Nazi dictatorship had discredited a strictly positivist approach to the law since some of the worst injustice perpetrated during the "Third Reich" had been committed under the cloak of properly enacted statutes.[121] Consequently, the drafters of the Basic Law had opted for a value-oriented conception of the rule of law and had entrenched basic tenets of justice in Art. 1 and 20 Basic Law.

The Court stressed that by having been incorporated into positive constitutional law, human dignity, inalienable human rights and other principles of "substantive justice" had not lost their meta-positive quality.[122] Accordingly, the Federal Constitutional Court considered the *pouvoir constituant* itself to have been bound by such principles of justice. In order to delineate more precisely the limits of the otherwise unfettered power of constitution-making, the Court relied on *Gustav Radbruch*'s famous formula:[123]

> "The conflict between justice and legal certainty may well be resolved in this way: The positive law, secured by legislation and power, takes precedence even when its content is unjust and fails to benefit the people, unless the conflict between statute and justice reaches such an intolerable degree that the statute, as 'flawed law', must yield to justice."[124]

In the case at issue, the reliance of the Court on the *Radbruch* formula was significant because it underscored the paramount importance attached by the Federal Constitutional Court to the rule of law, legal certainty and the supremacy of the positive constitution. The strong emphasis on legal certainty as the

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[119] *Darnstädt* (n. 109), 108–120.

[120] Federal Constitutional Court, judgment of 18 December 1953, BVerfGE 3, 225, 231–236.

[121] Federal Constitutional Court, judgment of 18 December 1953, BVerfGE 3, 225, 232.

[122] Federal Constitutional Court, judgment of 18 December 1953, BVerfGE 3, 225, 233.

[123] Federal Constitutional Court, judgment of 18 December 1953, BVerfGE 3, 225, 232 f.

[124] *G. Radbruch*, Statutory Lawlessness and Supra-Statutory Law (1946), Oxford Journal of Legal Studies 26 (2006), 1–11, 7 (translated by B. Litschewski/S.L. Paulson).

default position in the *Radbruch* formula reflected the Federal Constitutional Court's consciousness of a second historical lesson to be gleaned from Germany's recent dictatorial past. Since the Nazi regime in its constitutional theory and practice had in fact relied heavily on its own – Darwinist – version of natural law,[125] the dangers of value-free positivism needed to be carefully balanced against the hazards of an unqualified reliance on natural law.

The Federal Constitutional Court thus unequivocally rejected any direct recourse to natural law. Due to the multitude of approaches and theories associated with this indeterminate notion, natural law as such was considered unsuitable as a basis for judicial review.[126]

In the case at hand, the Federal Constitutional Court assumed that the *pouvoir constituant*, by incorporating the pledge to human dignity and inalienable human rights into the constitution, had bound itself to meta-positive standards of justice.[127] However, bearing in mind that human dignity conjured up associations with Christian natural law theory,[128] this argument begged the question as to whether the pledge in Art. 1(1) and (2) Basic Law referred to a Christian understanding of justice after all. Notwithstanding, the Federal Constitutional Court insisted that in view of the pluralistic composition of the Parliamentary Council (the *Parlamentarischer Rat* – the body which had drafted the Basic Law), the interpretation of human dignity and human rights in the light of any particular faith or belief would be incompatible with the original intent.[129]

Given that the Federal Constitutional Court therefore assumed that recourse to any *specific* strand of natural law was impermissible, the question arose as to how else to determine the substance of human dignity, inalienable human rights and other principles of justice. In the context of his formula, *Radbruch* provided the following answer:

> "There are principles of law […] that are weightier than any legal enactment, so that a law in conflict with them is devoid of validity. These principles are known as natural law or the law of reason. To be sure, their details remain open to question, but the work of centuries has in fact established a solid core of them, and they have come to enjoy such far-reaching consensus in the so-called declarations of human and civil rights that only the dogmatic sceptic could entertain doubts about […] them."[130]

Radbruch's formula is thus based on a universal, pluralistic and dynamic notion of justice which leaves the "details" of its ultimate origin (such as nature or reason) open and instead relies on a global consensus evolving over time

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[125] See *Rensmann* (n. 69), 29 f.; *idem* (n. 108), 87–90, 104.

[126] See Federal Constitutional Court, judgment of 29 July 1959, BVerfGE 10, 59, 81.

[127] Federal Constitutional Court, judgment of 18 December 1953, BVerfGE 3, 225, 233.

[128] See pp. 117, above.

[129] Federal Constitutional Court, judgment of 18 December 1953, BVerfGE 3, 225, 233 f.

[130] *G. Radbruch*, Five Minutes of Legal Philosophy (1945), Oxford Journal of Legal Studies 26 (2006), 13–15, 14 f. (translated by B. Litschewski/S.L. Paulson).

("the work of centuries") and finding its authoritative expression in successive human rights declarations.[131] Several references to the Universal Declaration of Human Rights,[132] to the French Declaration of the Rights of Man and of the Citizen[133] and to the American human rights tradition[134] in the Federal Constitutional Court's early jurisprudence bear witness to the influence of *Radbruch*'s thinking in this regard.

The Federal Constitutional Court found additional support for such a pluralistic and dynamic approach in *Rudolf Smend*'s "theory of integration", which was very influential in constitutional scholarship and judicial practice during the formative years of the Federal Republic of Germany.[135] In his pioneering interdisciplinary study *Verfassung und Verfassungsrecht* (The Constitution and Constitutional Law), first published in 1928 during the Weimar Republic, *Smend* combined legal theory and doctrine with sociological methodology.[136] He conceptualised the social phenomenon (the "reality") of the State as a constant process of "integration".[137] In this process the constitution is considered a decisive "integrative factor".[138] In particular, fundamental rights are accordingly not perceived primarily as "technical legal norms" but rather as the proclamation of a "cultural" or "value system" in the name of which a people aspire to be constitutionally united.[139] In *Smend*'s view fundamental rights are hence the source of the legitimacy of a given legal order and the embodiment of its object and purpose. As a matter of legal doctrine, he posited that fundamental rights therefore assume an important "directive function" in the sense that the "value system" established by them provides essential guidance for the interpretation of the entire legal order.[140]

Applied to the Basic Law, *Smend*'s theory, however, assumed a new, universal dimension: In Art. 1 Basic Law the German people profess their faith in human dignity and inalienable human rights "as the basis of every community, of peace and of justice in the world". Since 1949 it is thus the "value system"

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[131] See also *G. Lohmann*, Menschenrechte und Recht. Zu Gustav Radbruchs "Fünfter Minute", in: Kirste (n. 18), 361–368.

[132] Federal Constitutional Court, order of 17 January 1957, BVerfGE 6, 55, 73; Federal Constitutional Court, order of 30 June 1964, BVerfGE 18, 112, 118; Federal Constitutional Court, order of 4 May 1971, BVerfGE 31, 58, 68.

[133] Federal Constitutional Court, judgment of 15 January 1958, BVerfGE 7, 198, 208.

[134] Federal Constitutional Court, judgment of 15 January 1958, BVerfGE 7, 198, 208 (with reference to *Palko v. Connecticut*, 302 US 319 [1937]).

[135] See *Rensmann* (n. 69), 107–113.

[136] *R. Smend*, Verfassung und Verfassungsrecht (1928), reprinted in: idem, Staatsrechtliche Abhandlungen (2nd edn., 1968), 119–276.

[137] *Smend* (n. 136), 136–142.

[138] *Smend* (n. 136), 189–198.

[139] *Smend* (n. 136), 264 f.

[140] *Smend* (n. 136), 265.

of the international community in the name of which the German people have vowed to be constitutionally united.

In relation to the debate about gender equality, *Smend*'s integration theory thus offered two important arguments against an instrumentalisation of Christian natural law in order to preserve male privileges in matrimonial and family law.[141] Firstly, in the dynamic process of integration the German people had chosen the core humanitarian values of the UN Charter and Universal Declaration of Human Rights as their constitutional rallying point, namely human dignity, inalienable human rights and equal rights for men and women. Secondly, in the light of this fundamental constitutional decision, the interpretation of marriage and family as legal notions had thus to be based on the "directive dimension" of this "value system" rather than on static notions of natural law or traditional values.

In the case at hand, the Federal Constitutional Court, however, still needed to overcome the argument made by the referring court that, due to its general and "ideological" nature, the principle of gender equality was not amenable to judicial application without a prior concretisation by the legislature.[142] In the eyes of the referring court, the *pouvoir constituant* had therefore in effect relinquished large swathes of matrimonial and family law to the subjective preferences of the judiciary and had accordingly acted with intolerable disregard for the principles of legal certainty and the rule of law.[143]

The Federal Constitutional Court conceded that legal certainty itself belonged to the indispensable conditions for a just constitutional order and that, in extreme cases, its violation could thus render a constitutional provision void.[144] At the same time, however, the Court insisted that the enactment of Art. 117(1) Basic Law had not transgressed these outer boundaries.

In support of this assessment the Court pointed out that the process of constitution-making itself frequently requires that legal certainty be balanced against substantive principles of justice and that the *pouvoir constituant* enjoyed a large margin of appreciation in this regard.[145] The Federal Constitutional Court highlighted that the equality of men and women must also be considered a fundamental tenet of justice and that the goal of its effective implementation would accordingly justify a certain interference with the principle of legal certainty.[146]

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[141] In a closely related case (Federal Constitutional Court, judgment of 29 July 1959, BVerfGE 10, 59), in which Erna Scheffler also acted as judge rapporteur, she explicitly relied on Smend in her draft judgment to counter the argument that Art. 3(2) Basic Law ought to be interpreted in the light of Christian natural law, see *Darnstädt* (n. 109), 122 f.

[142] See Federal Constitutional Court, judgment of 18 December 1953, BVerfGE 3, 225, 239.

[143] See Federal Constitutional Court, judgment of 18 December 1953, BVerfGE 3, 225, 239.

[144] Federal Constitutional Court, judgment of 18 December 1953, BVerfGE 3, 225, 237.

[145] Federal Constitutional Court, judgment of 18 December 1953, BVerfGE 3, 225, 237 f.

[146] Federal Constitutional Court, judgment of 18 December 1953, BVerfGE 3, 225, 238.

In the opinion of the Court, any legal uncertainty caused by Art. 117(1) Basic Law would at any rate not have reached the "intolerable" degree required by the *Radbruch* formula. The Court drew attention to the fact that Art. 3(2) Basic Law supplied the judiciary with a sufficiently objective standard to fill any gaps created by Parliament having failed to introduce amending legislation within the constitutional deadline. Importantly, this implied the recognition of a constitutive or transformative dimension of fundamental rights since the Court considered Art. 3(2) Basic Law to provide guidance in the adjudication of the relationship between private individuals in matrimonial and family matters.[147]

At this juncture the Court used the opportunity to make some important general observations on the methodological challenges presented by the Basic Law having endowed the universal values of human dignity and inalienable human rights, and hence also the principle of gender equality, with the status of "directly applicable" constitutional law.[148] The key contentions can be summed up as follows:[149]

(a) Due to their general and "programmatic" nature, fundamental rights cannot be interpreted in the positivist tradition in which the judicial branch is perceived to be completely controlled by statutory provisions and in this sense "*en quelque façon nulle*".[150]

(b) The open-textured nature of human and fundamental rights requires, rather, that these rights be fleshed out by the judiciary. Under the Basic Law the judiciary is therefore assigned a new role which is more akin to the judicial function in common law systems.

(c) In this new role judges remain subject to the rule of law. The rationality and objectivity of their judgments is primarily secured by the time-honoured methods of the common law tradition.

(d) Human and fundamental rights jurisprudence, hence, gradually develops from the abstract "first principles" laid down in the bill of rights into an increasingly differentiated body of case law. By virtue of the rule-of-law principle, this case law exerts a certain *stare decisis* effect. This in turn contributes to the gradual emergence of a "common law" of human and fundamental rights.

(e) Given the universal nature of the underlying values of human dignity and inalienable human rights, jurisprudence from other jurisdictions following the

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[147] *Rensmann* (n. 117), 71.

[148] Federal Constitutional Court, judgment of 18 December 1953, BVerfGE 3, 225, 239–247.

[149] See also *Rensmann* (n. 117) 64–67.

[150] See *C. de Montesquieu*, De l'Esprit des Lois (1748), Livre XI, Chapitre VI.

same "value system" needs to be accorded "decent respect".[151] Comparative law hence becomes a key element of fundamental rights adjudication.[152]

(f) A central function of the judiciary is to translate the abstract principles of human and fundamental rights into individual justice.[153] This can be achieved only if "all relevant circumstances of the individual case are taken into account".[154] Since the judicial function therefore increasingly turns on the proper assessment of the factual context of a given case, fundamental rights jurisprudence is increasingly dependent on trans- and interdisciplinary assistance. In this context, *Martin Drath*, at the time one of *Scheffler*'s fellow justices on the bench, urgently called on constitutional scholars and practitioners "to venture beyond the traditional limits of their discipline and methodology and seek intensive cooperation with other humanities, in particular the social sciences."[155]

When *Scheffler* read out the Court's judgment confirming the constitutionality of Art. 117(1) Basic Law on 18 December 1953, she and her fellow justices had not only taken gender equality but indeed the overall "human rights revolution" a decisive step forward. It was the first time the Court unequivocally recognised the two innovations introduced by the Universal Declaration into the human rights tradition: firstly, the universal and pluralistic understanding of human dignity and inalienable human rights, and secondly, the constitutive and transformative dimension of human and fundamental rights which provide "guidelines and impulses"[156] for all areas of law, including matrimonial and family law.

At the same time the Court supplied the judiciary with a toolbox for transporting the "guidelines and impulses" of the "value system" of international human rights into the entire legal system and thereby into the fabric of German society. Both for gender equality and the "human rights revolution" at large, this was to be, however, only the first episode in the ongoing and probably never-ending journey towards "the full realization of [the] pledge"[157] to human dignity and inalienable human rights.

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[151] The link between "inalienable" or "unalienable" human rights and the duty to pay "decent respect to the opinions of mankind" was first established in the United States Declaration of Independence, 4 July 1776, paras. 1 f.; see *M. Risse*, On American Values, Unalienable Rights, and Human Rights: Some Reflections on the Pompeo Commission, Ethics & International Affairs 34 (2020), 13–31, 15–19.

[152] Federal Constitutional Court, judgment of 18 December 1953, BVerfGE 3, 225, 244.

[153] Federal Constitutional Court, judgment of 18 December 1953, BVerfGE 3, 225, 243.

[154] See Federal Constitutional Court, judgment of 15 January 1958, BVerfGE 7, 198, 212 (translation by the author).

[155] *M. Drath*, Die Grenzen der Verfassungsgerichtsbarkeit, in: Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 9 (1950), 17–116, 111 (translation by the author).

[156] See Federal Constitutional Court, judgment of 15 January 1958, BVerfGE 7, 198, 205.

[157] UDHR, Preamble, para. 7.

2. Evolving standards of decency and the Universal Declaration of Human Rights

The first decision containing an explicit reference to the human rights clause in Art. 1(2) Basic Law concerned an extradition request by France in relation to a Yugoslav member of the French Foreign Legion who had fled to Germany.[158] The legionnaire was accused of having killed at least eleven civilians in a targeted attack carried out jointly with other comrades during their service in Algeria. Under French law he faced the death penalty.[159] A German court granted the extradition request in accordance with the terms of a bilateral extradition treaty. The legionnaire filed a constitutional complaint against the authorisation of his extradition. He argued that Art. 102 Basic Law had abolished capital punishment[160] and that exposing him to the risk of the death penalty thus violated his right to life under Art. 2(2) Basic Law.[161]

In the proceedings before the Federal Constitutional Court the German government submitted that the abolition of capital punishment did not belong to the "meta-constitutional values" recognised by Art. 1(1) and (2) Basic Law and was therefore simply based on a "positive decision" of the German *pouvoir constituant*.[162] Art. 102 Basic Law could thus not be considered to stand in the way of the complainant's extradition since both the prosecution and the execution of the sentence lay exclusively within the responsibility of France.

In its decision of 30 June 1964, the Federal Constitutional Court dismissed the constitutional complaint as unfounded. The Court agreed with the German government that, interpreted in its constitutional context and in the light of its object and purpose, Art. 102 Basic Law could not be considered to impede extradition to countries which had not yet abolished the death penalty.[163] This restrictive approach was based primarily on the "openness" of the constitution to international law and on the fact that at the time the death penalty was considered lawful under both international law and the majority of domestic legal orders.

The Court argued that the Basic Law, being underpinned by a pronounced "openness to international law" in principle, requires respect for the laws and legal views of foreign States even if they are not fully consistent with the "value order" of the German constitution.[164] In this context the Federal Constitutional

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[158] Federal Constitutional Court, order of 30 June 1964, BVerfGE 18, 112.

[159] As to the facts, see Federal Constitutional Court, order of 30 June 1964, BVerfGE 18, 112, 112 f.

[160] Art. 102 Basic Law reads: "Capital punishment is abolished".

[161] Federal Constitutional Court, order of 30 June 1964, BVerfGE 18, 112, 114.

[162] Federal Constitutional Court, order of 30 June 1964, BVerfGE 18, 112, 114 f. (translations by the author).

[163] Federal Constitutional Court, order of 30 June 1964, BVerfGE 18, 112, 116–121.

[164] Federal Constitutional Court, order of 30 June 1964, BVerfGE 18, 112, 121. This is by now established case law, see, e.g. Federal Constitutional Court, order of 6 July 2005,

Court put special emphasis on the role of human rights as both the foundation and the limit of international cooperation in criminal matters.[165]

On the one hand the Court stressed that mutual legal assistance contributes to ensuring the prosecution and punishment of human rights violations "which are of common concern to all States".[166] In the present case a war crime was at issue: the complainant was accused of extrajudicial killings committed as a member of the armed forces during an armed conflict. On the other hand, given that the "openness" of the constitution to international law is itself premised on an international legal order rooted in "inalienable human rights",[167] the inviolability of these meta-constitutional values also defines the limits of the duty to respect the idiosyncrasies of other legal systems.[168]

At the heart of the case therefore lay the question as to whether the constitutional decision to abolish capital punishment in Art. 102 Basic Law was an emanation of inalienable human rights or not. In making this assessment, the Federal Constitutional Court could not rely on binding international law as such since the European Convention on Human Rights had not yet been ratified by France and the International Human Rights Covenants[169] were still under negotiation. The Court was therefore once again faced with the methodological problem of identifying those timeless and universal human rights which according to Art. 1(2) Basic Law are "the basis of every community, of peace and of justice in the world".

In order to establish the compatibility of the death penalty with such universal standards of justice, the Court proceeded to analyse the "legislation" and

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BVerfGE 113, 154, para. 24: "[…] [T]he Basic Law proceeds on the basis that the state constituted by it is integrated into the system of international law of the community of States […] [and] it [therefore] requires that, in particular in matters of judicial assistance, the structures and contents of foreign legal systems and views of the law must in principle be respected […], even if in detail they do not comply with German views." English translation available at http://www.bverfg.de/e/rs20050706_2bvr225904en.html (last accessed on 28 September 2022).

[165] See also Federal Constitutional Court, order of 4 May 1971, BVerfGE 31, 58, a private international law case in which the Federal Constitutional Court enlarges upon the principles established in the *Death Penalty* case. At 75 f. the Federal Constitutional Court explicitly cites Art. 1(2) Basic Law both in support of the principle of "openness to international law" and with a view to defining its limits.

[166] Federal Constitutional Court, order of 30 June 1964, BVerfGE 18, 112, 121.

[167] See, with explicit reference to Art. 1(2) Basic Law, Federal Constitutional Court, order of 4 May 1971, BVerfGE 31, 58, 76.

[168] See the explicit reference to Art. 1(2) Basic Law in the arguments submitted by the Federal Government, Federal Constitutional Court, order of 30 June 1964, BVerfGE 18, 112, 114.

[169] International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UNTS 993, 3; International Covenant on Civil and Political Rights, 16 December 1966, UNTS 999, 171.

"public opinion" of the "civilized world".[170] Importantly, the Federal Constitutional Court referred to the "standard of civilisation *reached today*"[171] and thereby echoed the dynamic approach of the US Supreme Court which – only a few years before in a comparable factual setting – had similarly interpreted the constitutional bill of rights in the light of "evolving standards of decency that mark the progress of a maturing society".[172]

At this juncture the Federal Constitutional Court for the first time explicitly recognised the pivotal role of the Universal Declaration of Human Rights as an authoritative restatement of inalienable human rights. Whilst the Court also referred to the European Convention on Human Rights, this was not motivated by its status as treaty law or as a reflection of a specifically European standard but rather by the fact that the Convention perceives itself merely as a means of reiterating and enforcing "rights stated in the Universal Declaration".[173]

In keeping with its previous jurisprudence,[174] the Federal Constitutional Court in addition undertook a comparative analysis of the attitude of foreign legal orders to the death penalty.[175] The particular attention paid by the Court to the "leading democracies of the Western world" is primarily attributable to the backdrop of the Cold War and to (West) Germany's special political status at the time.[176] However, the implied emphasis on democratic governance and the values of the "free world" also points to the fact that the *tertium comparationis* of any meaningful comparison must be the shared and effective commitment to the "common standard of achievement"[177] formulated in the Universal Declaration.

The result of this comparative analysis was crystal clear: The Universal Declaration had not outlawed the death penalty, its lawfulness was explicitly reaffirmed in the European Convention on Human Rights and the majority of States, including France and other "leading democracies", had retained capital punishment. Hence there was no doubt that at the time the imposition of the

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[170] Federal Constitutional Court, order of 30 June 1964, BVerfGE 18, 112, 117.

[171] Federal Constitutional Court, order of 30 June 1964, BVerfGE 18, 112, 117 (emphasis added).

[172] *Trop v. Dulles* 356 US 86, 101 (1958). On the influence of the Universal Declaration of Human Rights on this case, see *T. Rensmann*, The Constitution as a Normative Order of Values, in: P.-M. Dupuy et al. (eds.), Völkerrecht als Wertordnung. Festschrift für Christian Tomuschat (2006), 259–278, 269 f.

[173] ECHR, Preamble, para. 5. See also Federal Constitutional Court, order of 4 May 1971, BVerfGE 31, 58, 68, with explicit reference to the Preamble.

[174] See Federal Constitutional Court, judgment of 18 December 1953, BVerfGE 3, 225, 244 and pp. 125 ff., above.

[175] Federal Constitutional Court, order of 30 June 1964, BVerfGE 18, 112, 118.

[176] Federal Constitutional Court, order of 30 June 1964, BVerfGE 18, 112, 118 (translation by the author).

[177] UDHR, Preamble, para. 8.

death penalty was compatible with the pledge to human dignity and inalienable human rights in Art. 1(1) and (2) Basic Law.

The Court seemed to suggest, however, that this assessment was not carved in stone and pointed to the continuing "general discourse" on the legitimacy and utility of the death penalty.[178] In the eyes of the Federal Constitutional Court, domestic public opinion and the "decent opinions of mankind"[179] thus deserve particular attention when monitoring "evolving standards of decency". This, in turn, involves, as the Court explicitly pointed out, the need to interact with other disciplines, since public opinion is shaped by a multitude of social, historical, philosophical and theological factors.[180]

Last but not least, the Federal Constitutional Court made some significant observations on the relationship between inalienable human rights and national constitutional identity. Whilst otherwise in agreement with the submissions of the Federal Government, the Court emphasised that the importance of Art. 102 Basic Law reached far beyond its status as positive constitutional law:

> "[Article 102 Basic Law] […] is a decision of great significance in terms of state policy and legal policy. It contains a commitment to the fundamental value of human life and to a conception of the state which stands in marked contrast to the views of a political regime to which individual life meant little and which therefore blatantly abused the arrogated right over the life and death of the citizen. This decision must be understood against the backdrop of the particular historical situation in which it was made. It cannot therefore imply a value judgement on other legal orders which have not had this experience with a system of injustice and which – due to a different historical development, other political circumstances and a different political philosophy – have not made such a decision for themselves."[181]

Inalienable human rights thus allow for constitutional pluralism to accommodate different historical experiences, cultural traditions and philosophical outlooks. Within the limits set by inalienable human rights such pluralism requires mutual tolerance[182] and thus respect for the "constitutional identity" of other States. This also holds true for the human right to life which is at the heart of some of the most divisive issues in modern societies, such as the death penalty, abortion or the "right to die". As illustrated by the example of the death penalty, each domestic "constitutional decision" on these matters at the same time contributes to the universal discourse on "evolving standards of decency". Also in this sense, Art. 102 Basic Law was indeed a "decision of great significance". It stood at the beginning of a growing European and international consensus that "the abolition of the death penalty is essential for the protection of th[e]

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[178] Federal Constitutional Court, order of 30 June 1964, BVerfGE 18, 112, 118.

[179] See n. 151, above.

[180] Federal Constitutional Court, order of 30 June 1964, BVerfGE 18, 112, 118.

[181] Federal Constitutional Court, order of 30 June 1964, BVerfGE 18, 112, 117 (translation by the author).

[182] See also Federal Constitutional Court, order of 4 May 1971, BVerfGE 31, 58, 75.

right [to life] and for the full recognition of the inherent dignity of all human beings".[183]

C. The turn to positive law: inalienable human rights as international human rights

Up until the early 2000s, inalienable human rights only received scant attention in the Federal Constitutional Court's jurisprudence.[184] This is primarily attributable to the fact that the Basic Law internalised the essential pillars of the "value system" of the Universal Declaration of Human Rights[185] and that constitutionally entrenched fundamental rights therefore provided the Federal Constitutional Court with a sufficient basis to uphold "substantive justice" within the German legal order.[186] The Court's rapidly expanding fundamental rights jurisprudence quickly coalesced into established case law and any remaining need for "meta-positive" reassurance was exclusively projected onto the dignity clause. At the same time, the international pedigree of human dignity and its inextricable connection with inalienable human rights faded into oblivion.

1. Consolidation of international human rights law, European integration and the end of the cold war

The renewed interest in inalienable human rights by the beginning of the new millennium can be attributed to several factors:

First, human rights gained a firm foothold in positive international law. By virtue of the two International Covenants[187] and a number of other "Core International Human Rights Instruments",[188] the rights laid down in the Universal

[183] ECtHR, *Al Nashiri v. Romania*, App. No. 33234/12, 31 May 2018, § 727.

[184] Subsequent to Federal Constitutional Court, order of 30 June 1964, BVerfGE 18, 112, explicit references to Art. 1(2) Basic Law can be found in Federal Constitutional Court, order of 4 May 1971, BVerfGE 31, 58, 75 f.; Federal Constitutional Court, order of 18 July 1973, BVerfGE 35, 382, 407; Federal Constitutional Court, judgment of 23 April 1991, BVerfGE 84, 90, 121; Federal Constitutional Court, judgment of 14 May 1996, BVerfGE 94, 49, 102 f.; Federal Constitutional Court, judgment of 3 March 2004, BVerfGE 109, 279, 310.

[185] See pp. 121, above.

[186] It was probably only a Freudian slip but nevertheless telling that, in one of the few instances in which the Federal Constitutional Court referred to Art. 1(2) Basic Law, the Court in Federal Constitutional Court, order of 18 July 1973, BVerfGE 35, 382, 407, referred to "fundamental rights" rather than "human rights" as "the basis of every community in the world."

[187] See n. 169, above.

[188] For a list of these treaties, see *United Nations, Office of the High Commission for Human Rights*, The Core International Human Rights Instruments and their Monitoring Bodies, available at https://www.ohchr.org/en/core-international-human-rights-instruments-and-their-monitoring-bodies (last accessed on 28 September 2022).

Declaration of Human Rights have been transformed into binding treaty law and become subject to the supervisory jurisdiction of the respective treaty bodies. It is also recognised today that certain fundamental human rights have become "constitutional" principles of the international legal order and therefore belong to the indispensable core of peremptory norms of general international law (*jus cogens*).[189]

At the regional level, following the accession of the Middle and Eastern European States in the 1990s and early 2000s, the European Convention of Human Rights has developed into a pan-European human rights standard. Since the entry into force of Protocol XI in 1998, individuals are granted direct access to the European Court of Human Rights.[190]

Second, the collapse of the Soviet Union gave rise to the hope that the "end of history"[191] had been reached and that the international legal order was "gradually developing [into an] international community of democratic states under the rule of law".[192] Against this backdrop the Federal Constitutional Court posited with increasing confidence that general rules of international law recognise a "minimum standard of human rights"[193] and that certain "fundamental human rights" have attained the status of *jus cogens*.[194]

Third, in the aftermath of German reunification the Federal Constitutional Court was compelled to revisit the problem of transitional justice and the concomitant tension between positive law and substantive justice. The Court perceived this as an opportunity to move inalienable human rights from the lofty heights of meta-positive ideas to the supposedly firmer ground of positive law. In the *Border Guard* cases, the Federal Constitutional Court endorsed the approach of the criminal courts[195] which, when applying the *Radbruch* formula, had relied heavily on the International Covenant on Civil and Political Rights to determine the intolerable degree of injustice required to override the

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[189] Art. 53 Vienna Convention on the Law of Treaties, 23 May 1969, UNTS 1155, 331; *International Law Commission*, Articles 40 and 41 of the Articles on the Responsibility of States for Internationally Wrongful Acts 2001, General Assembly resolution 56/83, Annex, 12 December 2001, UN Doc. A/56/49(Vol. I)/Corr.4.

[190] Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby, ETS No. 155.

[191] See *F. Fukuyama*, The End of History and the Last Man (1992).

[192] Federal Constitutional Court, order of 14 October 2004, BVerfGE 111, 307, para. 36. English translation available at http://www.bverfg.de/e/rs20041014_2bvr148104en.html (last accessed on 28 September 2022).

[193] Federal Constitutional Court, order of 25 March 1981, BVerfGE 57, 9, 25. For further references see *D. Wolff*, Der Einzelne in der offenen Staatlichkeit (2020), 199–227.

[194] Federal Constitutional Court, order of 26 October 2004, BVerfGE 112, 1, para. 98.

[195] See in particular Federal Court of Justice, judgment of 3 November 1992, BGHSt 39, 1.

principle of *nulla poena sine lege*.[196] In a decision on expropriation in the former Soviet occupation zone, the Federal Constitutional Court perceived Art. 1(2) Basic Law as a gateway to *jus cogens*. Addressing the substantive limits imposed on the *pouvoir constituant* and the legislature when amending the constitution,[197] the Court thus equated "fundamental tenets of justice" (*grundlegende Gerechtigkeitspostulate*) with peremptory norms of general international law.[198]

Fourth, with the accelerating activity and growing institutional strength of the European Court of Human Rights, the Federal Constitutional Court became increasingly conscious of the fact that it had lost its exclusive position as the "ultimate guardian" of human dignity and inalienable human rights in Germany.[199] More and more individuals availed themselves of the possibility of challenging Federal Constitutional Court decisions before the Strasbourg court. This led to some high-profile cases in which the European Court of Human Rights questioned key aspects of fundamental rights doctrine in Germany. The political discontent caused by this development prompted the Federal Constitutional Court to reconsider the relationship between the German constitution and the European Convention on Human Rights. Art. 1(2) Basic Law offered the constitutional anchor necessary for the desired realignment of the judicial dialogue between the Karlsruhe and Strasbourg courts.

Finally, the move towards an "ever closer union"[200] within the process of European integration has led to a significant shift of power with regard to fundamental rights protection. In its seminal *Solange II* decision, the Federal Constitutional Court finally acknowledged that (secondary) EU law, in view of its primacy over domestic law, may not be reviewed against the yardstick of German fundamental rights.[201] The Court added, however, the important caveat that Germany will only honour the primacy of EU law "as long as" (*solange*)

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[196] Federal Constitutional Court, order of 24 October 1996, BVerfGE 95, 96. For further details, see *T. Rensmann*, Systemunrecht und die Relativität des absoluten Rückwirkungsverbots, in: J. Menzel et al. (eds.), Verfassungsrechtsprechung (3rd edn., 2017), 606–613.

[197] See Art. 79(3) Basic Law.

[198] Federal Constitutional Court, order of 26 October 2004, BVerfGE 112, 1, para. 97: "In Article 1.2 and Article 25 sentence 1 of the Basic Law, the Basic Law also adopts the gradual recognition of the existence of mandatory provisions, that is, provisions that are in the individual case not open to disposition by the states (*ius cogens*)." English translation available at http://www.bverfg.de/e/rs20041026_2bvr095500en.html (last accessed on 28 September 2022).

[199] See, e.g. *H. Steinberger*, Entwicklungslinien in der neueren Rechtsprechung des Bundesverfassungsgerichts zu völkerrechtlichen Fragen, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 48 (1988), 1–17, 8.

[200] See Art. 1 TEU.

[201] Federal Constitutional Court, order of 22 October 1986, BVerfGE 73, 339, 387.

the Union "guarantees a level of [fundamental rights] protection […] essentially comparable to that afforded by the Basic Law."[202]

Since the proclamation of the Charter of Fundamental Rights and its elevation to the status of binding primary law,[203] the *Solange*-caveat has become virtually moot. This has shifted attention beyond positive fundamental rights to the protection of Germany's "constitutional identity" and thus to the commitment to human dignity and inalienable human rights.[204] With reference to the fact that the Basic Law has "not giv[en] up the final responsibility" for protecting these values,[205] the Federal Constitutional Court insists on the right to "identity review" of EU law.[206] In this particular context, however, the Court has up to this point exclusively referred to the dignity clause of Art. 1(1) Basic Law, presumably because human dignity is more evocative of Germany's idiosyncratic constitutional tradition than inalienable human rights.[207] Yet, as the recent *Ökotox* decision demonstrates, the pledge to inalienable human rights has nevertheless become a key concept in recalibrating the balance of power between the Federal Constitutional Court and the ECJ in the domain of fundamental rights protection.[208]

2. Inalienable human rights as a gateway to international human rights

The backdrop for the spectacular comeback of inalienable human rights was provided by the *Görgülü* case, which concerned the status of judgments of the European Court of Human Rights within the German legal order.[209] At issue was a constitutional complaint by *Kazim Görgülü*, the father of *Christopher*,

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[202] See Art. 23 (1) Basic Law in which the Solange-caveat was codified.

[203] See Art. 6(1) TEU.

[204] See Art. 23(1)(3) in conjunction with Articles 79(3) and 1(1) and (2) Basic Law.

[205] As to this formulation see Federal Constitutional Court, order of 26 October 2004, BVerfGE 112, 1, 26: "[…] without giving up the final responsibility for respect for human dignity and for the observance of fundamental rights by German state authority"; with particular reference to EU law, see Federal Constitutional Court, judgment of 30 June 2009, BVerfGE 123, 267, 400 f.: "The Basic Law strives to integrate Germany into the legal community of peaceful and free states, but does not waive the sovereignty contained in the last word of the German constitution as a right of the people to take constitutive decisions concerning fundamental questions as to its own identity." English translation available at http://www.bverfg.de/e/es20090630_2bve000208en.html (last accessed on 28 September 2022).

[206] See Federal Constitutional Court, judgment of 30 June 2009, BVerfGE 123, 267, 353 f.; Federal Constitutional Court, order of 15 December 2015, BVerfGE 140, 317, paras. 42 f.; Federal Constitutional Court, order of 6 November 2019, BVerfGE 152, 216, para. 49.

[207] See also pp. 118 ff., above.

[208] See pp. 145 ff., below.

[209] Federal Constitutional Court, order of 14 October 2004, BVerfGE 111, 307. For a more detailed analysis, see *Rensmann* (n. 91), 485–492.

who was born out of wedlock and whose mother had given him up for adoption.[210] *Görgülü* had unsuccessfully sought custody of his son before German courts. He took the matter to the European Court of Human Rights, which found a violation of Art. 8 ECHR.[211] A regional court nevertheless continued to deny *Görgülü* access to his son, arguing that the European Court of Human Rights judgment had no binding effect within the German legal order. *Görgülü* filed a constitutional complaint arguing that the regional court had failed to implement the Strasbourg judgment properly.

In its decision of 14 October 2004, the Federal Constitutional Court thoroughly reassessed the relationship between the Convention system and the German constitutional order. The central issue to be resolved was the question as to whether the disregard of a European Court of Human Rights judgment by a domestic court could as such be challenged before the Federal Constitutional Court by means of a constitutional complaint.

The extent to which European Court of Human Rights judgments must be followed by German courts primarily depends on the pertinent provisions of the Convention and their status within the German legal order. In *Görgülü* the Court reaffirmed the generally accepted view that the Convention is endowed with the domestic status of the statute giving parliamentary assent[212] to the ratification of the Convention.[213] Given that the European Convention on Human Rights does thus not possess constitutional status, a constitutional complaint cannot be based directly on a violation of the Convention or the disregard of a European Court of Human Rights judgment. However, in a decisive strategic move the Federal Constitutional Court nevertheless endowed the Convention with "constitutional significance" and hence proceeded to assume control over the proper interpretation and application of Convention rights within the German legal order.[214]

The main lever for this partial "constitutionalisation" of the Convention is the commitment to inalienable human rights in Art. 1(2) Basic Law which – as the Federal Constitutional Court put it – "accords special protection to the core

[210] As to the facts, see Federal Constitutional Court, order of 14 October 2004, BVerfGE 111, 307, 308–313.

[211] ECtHR, *Görgülü v. Germany*, App No 74969/01, 26 February 2004.

[212] See Art. 59(2) Basic Law.

[213] Federal Constitutional Court, order of 14 October 2004, BVerfGE 111, 307, 317.

[214] Federal Constitutional Court, order of 14 October 2004, BVerfGE 111, 307, 317. This move was prepared by Federal Constitutional Court, order of 26 March 1987, BVerfGE 74, 358, 370, and Federal Constitutional Court, order of 29 May 1990, BVerfGE 82, 106, 114, which, however, rely on the "openness to international law" rather than Art. 1(2) Basic Law. On these decisions, see *Steinberger* (n. 199), 7–9.

of international human rights."[215] The Federal Constitutional Court was, however, careful not to attach "direct constitutional status" to the Convention via the "gateway" of Art. 1(2) Basic Law[216] since this would not only have elevated the Convention guarantees to the constitutional level but also incorporated them as such into the core of the "eternal" principles exempt from constitutional amendment.[217] Instead, the Federal Constitutional Court posited "a constitutional duty" to interpret the "content and scope" of German fundamental rights in the light of the Convention.[218] It derived this duty from Art. 1(2) Basic Law in conjunction with the more general principle of the "openness" of the Constitution to international law.[219]

Accordingly, whenever German courts fail to pay due regard to the Convention or judgments of the European Court of Human Rights, they not only violate the rule-of-law principle, which requires them to respect the binding force of the Convention as a federal statute (Art. 20(3) Basic Law), but also – in view of the Convention's "radiating effect"[220] on the German bill of rights – infringe the fundamental right corresponding to the Convention guarantee.[221] The Federal Constitutional Court thereby opened up the possibility for individuals to challenge court decisions on the basis of the Convention not having been properly applied. Via this partial "constitutionalisation" of the Convention, the Federal Constitutional Court thus established itself as the ultimate (domestic) guardian of the Convention within the German legal order. Whilst from the external perspective of international law the European Court of Human Rights retains the "last word"[222] on the proper interpretation of Convention guarantees, the Court can at least since *Görgülü* lay claim to having the first say in matters pertaining to the German legal order.

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[215] Federal Constitutional Court, order of 14 October 2004, BVerfGE 111, 307, 329. English translation available at http://www.bverfg.de/e/rs20041014_2bvr148104en.html (last accessed on 28 September 2022).

[216] Thus the formulation in Federal Constitutional Court, judgment of 4 May 2011, BVerfGE 128, 326, 369. English translation available at http://www.bverfg.de/e/rs20110504_2bvr236509en.html (last accessed on 28 September 2022). See also Federal Constitutional Court, order of 14 October 2004, BVerfGE 111, 307, 317.

[217] See Art. 79(3) Basic Law.

[218] Federal Constitutional Court, order of 14 October 2004, BVerfGE 111, 307, 329.

[219] Federal Constitutional Court, order of 14 October 2004, BVerfGE 111, 307, 329.

[220] As to this notion, see Federal Constitutional Court, judgment of 15 January 1958, BVerfGE 7, 198, 207.

[221] Federal Constitutional Court, order of 14 October 2004, BVerfGE 111, 307, 330.

[222] Federal Constitutional Court, order of 14 October 2004, BVerfGE 111, 307, 319. On the problem of both the Federal Constitutional Court and the ECtHR laying claim to having the "last word" see *Rensmann* (n. 91), 487–489.

D. Return to values and traditions: inalienable human rights as common law

1. From international to general human rights

In *Görgülü* it remains somewhat obscure how the Federal Constitutional Court conceptualises the link between inalienable and international human rights. The term "*international* human rights"[223] and the simultaneous reliance on the "openness to international law" suggest that the Court equates "inalienable human rights" with positive "international human rights law". Equally ambiguous is the limitation of the relevant spectrum of international human rights to their "core".[224] Whilst the reasoning in *Görgülü* appears to be based on the assumption that all Convention rights are reflective of this core, later decisions suggest that the "international human rights core" refers exclusively to peremptory norms of international law.[225]

In its subsequent jurisprudence on the status of the European Convention on Human Rights within the German legal order, the Federal Constitutional Court has apparently tried to dispel the impression of simply equating inalienable rights with international human rights. This seems to be the reason why the Court, in more recent cases, has dropped the reference to "*international* human rights". The constitutional pledge to inalienable human rights is now simply interpreted as a substantive orientation towards "human rights".[226] The latest judgment in this line of jurisprudence describes Art. 1(2) Basic Law as a "manifestation of *general* human rights".[227]

According to the Federal Constitutional Court's established jurisprudence, other human rights treaties must also be taken into account when interpreting the German bill of fundamental rights. This applies in particular to the two International Human Rights Covenants[228] and other "Core International Human Rights Instruments",[229] such as the United Nations Convention on the Rights

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[223] Federal Constitutional Court, order of 14 October 2004, BVerfGE 111, 307, 329.

[224] Federal Constitutional Court, order of 14 October 2004, BVerfGE 111, 307, 329.

[225] Federal Constitutional Court, order of 15 December 2015, BVerfGE 141, 1, para. 76: "[T]he Basic Law distinguishes not only between international treaty law and the general rules of international law, but also between peremptory provisions that may not be modified even by the constitutional legislature (*Verfassungsgeber*) – particularly inviolable and inalienable human rights (Art. 1(2) GG) – and other international law […]." English translation available at http://www.bverfg.de/e/ls20151215_2bvl000112en.html (last accessed at 28 September 2022).

[226] Federal Constitutional Court, judgment of 4 May 2011, BVerfGE 128, 326, 369.

[227] Federal Constitutional Court, judgment of 12 June 2018, BVerfGE 148, 296, para. 130 (emphasis added). See, however, Federal Constitutional Court, judgment of 19 May 2020, BVerfGE 154, 152, para. 94–96, which still refers to "international human rights".

[228] Federal Constitutional Court, order of 16 December 2021, 1 BvR 1541/20, para. 107. English translation available at http://www.bverfg.de/e/rs20211216_1bvr154120en.html (last accessed on 28 September 2022).

[229] See n. 188, above.

of Persons with Disabilities.[230] Whilst one would intuitively agree that these treaties are also emanations of "general human rights", other treaties designated as human rights instruments[231] would require closer scrutiny, in particular if they relate to contentious issues and are only supported by a limited number of Contracting States.

2. Common constitutional traditions and the Universal Declaration of Human Rights

Until recently, the Court had never convincingly explained how the reference to inalienable human rights as a meta-positive concept could serve as a gateway to positive international human rights law. With its *Ökotox* decision the Federal Constitutional Court has now provided this missing link.[232]

At issue was a constitutional complaint in which a pharmaceutical company claimed that a marketing authorisation granted to a competitor for a veterinary medicinal product was based on the impermissible use of the complainant's business secrets and therefore in violation of its fundamental rights.[233] The authorisation was granted by a German agency under the provisions of the German Medicinal Products Act (*Arzneimittelgesetz*), which implements a corresponding EU directive.[234]

Since the Federal Constitutional Court's ground-breaking *Right to be Forgotten* decisions, the yardstick against which the Court measures the domestic application of EU law depends on whether the matter is fully determined by EU law or not.[235] If this is not the case, the fundamental rights of the Basic Law apply;[236] if the matter is, however, fully harmonised by EU law, the EU Charter provides the relevant standard of review.[237]

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[230] Federal Constitutional Court, order of 16 December 2021, 1 BvR 1541/20, para. 102.

[231] As to the reverse problem of individual rights which are not explicitly designated as human rights, see *Rensmann* (n. 91), 487–489.

[232] Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1. English translation available at http://www.bverfg.de/e/rs20210427_2bvr020614.html (last accessed on 28 September 2022).

[233] As to the protection of business secrets both under Art. 12(1) in conjunction with 19(3) Basic Law and under Art. 16 EU Charter, see Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, paras. 47–52, 75 f.

[234] Directive 2001/82/EC of 6 November 2001 on the Community code relating to veterinary medicinal products, Official Journal of the European Union 2001 L 311/1.

[235] Federal Constitutional Court, order of 6 November 2019, BVerfGE 152, 152; Federal Constitutional Court, order of 6 November 2019, BVerfGE 152, 216.

[236] Federal Constitutional Court, order of 6 November 2019, BVerfGE 152, 216; Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, paras. 35, 45.

[237] Federal Constitutional Court, order of 6 November 2019, BVerfGE 152, 152; Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, paras. 35, 56.

Rather than deciding the threshold issue as to whether the applicable EU directive left any latitude to German authorities, the Court in the *Ökotox* case immediately proceeded to review the constitutional complaint against the yardstick of *both* the German bill of rights and the EU Charter.[238] The Federal Constitutional Court based this cumulative or hybrid approach on the general assertion that German and EU fundamental rights are typically congruent, with the consequence that the applicable standard of review could in most future cases be left undecided.[239]

The Federal Constitutional Court's contention that fundamental rights standards under German and EU law are in most instances identical, is based on two initial observations: The starting point of the Court's reasoning is the important unifying role played by the European Convention on Human Rights, on which the interpretation of both German fundamental rights[240] and the EU Charter[241] heavily rely.[242] The Court then proceeds to emphasise that all three instruments – the German bill of fundamental rights, the EU Charter and the European Convention – are "rooted in common constitutional traditions and are thus a manifestation of common European and universal values".[243]

The Court argues that these common values and traditions are based on the "shared commitment to human dignity"[244] which in turn finds its "reference point" in the Universal Declaration of Human Rights".[245] Whilst the European Convention on Human Rights explicitly establishes this link to the Universal Declaration in its preamble,[246] the fundamental rights of the Basic Law are embedded in this modern human rights tradition by virtue of the pledge to human dignity and inalienable human rights in Art. 1(1) and (2) Basic Law.[247] The Court stresses that the EU Charter similarly recognises human dignity as the "real basis of human rights"[248] and in its preamble "invokes […] the inviolable and inalienable human rights enshrined in international conventions and in the European Convention on Human Rights".[249] In addition, both the EU Charter and the Treaty on European Union highlight the importance of "constitutional

[238] Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, paras. 45–55, 56–81.

[239] Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, paras. 45–81.

[240] See pp. 134 ff. and pp. 144 f., above.

[241] See Art. 52 (3) and 53 EU Charter.

[242] Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, para. 57.

[243] Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, para. 57.

[244] Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, para. 72.

[245] Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, para. 63.

[246] See n. 173, above; Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, para. 61.

[247] Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, paras. 59 f.

[248] Explanations relating to the Charter, Official Journal of the European Union 2007 C 303/17; Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, para. 62.

[249] Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, para. 68.

traditions common to the Member States" as a "source"[250] of fundamental rights.[251]

The Federal Constitutional Court therefore perceives the fundamental rights of the Basic Law, the European Convention and the EU Charter as "manifestations" of the "common values" laid down in the Universal Declaration of Human Rights.[252] Echoing the methodological approach in its early jurisprudence,[253] the Court conceptualises the development of human and fundamental rights at the domestic, regional and international levels as a constant process of further "fleshing out" (*Konkretisierung*) the "value system" of the Universal Declaration. The Court considers the codification of bills of rights in constitutions and treaties to be the first step in this process.[254] The task of "further refining"[255] human rights standards then passes to the domestic constitutional and apex courts as well as to the European Court of Human Rights and the European Court of Justice.[256]

According to the Federal Constitutional Court, this process unfolds in a common "legal sphere" (*Rechtsraum*)[257] which is defined by the shared commitment to human dignity and the value system of the Universal Declaration. The Court primarily refers to the "European legal sphere", which is composed of the Council of Europe, the European Union and their respective member States.[258] In applying the common values to individual cases, their courts thus contribute to the development of "common European standards of fundamental rights" which gradually evolve into regional common law (*ius publicum europaeum*).[259]

However, given that non-European States and other regional human rights systems also follow the lodestar of the Universal Declaration of Human Rights, a larger "legal sphere", that of "constitutional democracies" and their constitutional or apex courts, also comes into play.[260] In this context the Court points

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[250] See Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, para. 71.

[251] Art. 52(4) EU Charter; Art. 6(3) TEU.

[252] See Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, para. 57.

[253] See pp. 125 ff., above.

[254] Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, paras. 41, 56, 63, 68. For an early expression of this idea, see Federal Constitutional Court, judgment of 23 October 1952, BVerfGE 2, 1, 13 and Federal Constitutional Court, judgment of 17 August 1956, BVerfGE 5, 85, 140.

[255] Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, para. 68.

[256] Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, paras. 57, 65, 69, 70, 72.

[257] Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, para. 71. See also Federal Constitutional Court, order of 18 November 2020, 2 BvR 477/17, para. 26.

[258] Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, para. 71.

[259] Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, para. 71.

[260] Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, para. 70. As to the Court's earlier references to (leading) democracies, see pp. 134 ff., above.

in particular to the significance of the fundamental rights jurisprudence of the US and Canadian Supreme Courts.[261] At the same time, however, the Federal Constitutional Court emphasises that due to Germany's integration into Europe and the "openness" of the constitution to European law,[262] particular weight must be attached to the European tradition and to the development of human rights.[263]

The Federal Constitutional Court argues that within these "legal spheres" the courts are joint trustees[264] of the common value system of the Universal Declaration. With regard to the "European legal sphere", the Federal Constitutional Court describes this fiduciary duty as a responsibility to "promote […] the reinforcement of common European standards of fundamental rights" and to further their effectiveness and legal certainty by "prevent[ing] friction and conflicting value decisions in the protection of fundamental rights."[265]

In Art. 1(2) Basic Law this fiduciary duty is accorded a "constitutional dimension". By virtue of this constitutional duty, not only the European Convention but also the EU Charter and the constitutional traditions common to the Member States and other constitutional democracies must be taken into account when interpreting German fundamental rights.[266] This duty is mirrored in the EU Charter, which explicitly sets forth that its rights and principles must be interpreted in harmony with the European Convention and the common constitutional traditions of the Member States.[267]

The Federal Constitutional Court places particular emphasis on the fact that the constitutional traditions of the Member States are primarily reflected in the jurisprudence of their constitutional and apex courts.[268] It stands to reason that the Federal Constitutional Court, when interpreting the EU Charter, thereby attributes particular weight to its own case law. This is not only due to the sheer volume of fundamental rights jurisprudence that has been produced by the Court since it took up its work more than 70 years ago; more importantly, the fact that the Federal Constitutional Court itself now has a long-standing practice of interpreting German fundamental rights in the light of the European

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[261] See Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, para. 70, in conjunction with the reference to Federal Constitutional Court, judgment of 22 February 2011 BVerfGE 128, 226, 253, 267.

[262] Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, para. 71.

[263] Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, para. 60.

[264] As to the role of domestic courts as trustees of the observance of international human rights, see *H. Lauterpacht*, An International Bill of the Rights of Man (1945), 185.

[265] Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, para. 71.

[266] Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, paras. 69, 70.

[267] Art. 52(3) and 52(4) EU Charter.

[268] Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, paras. 57, 69, 70, 72.

Convention[269] – and the case law of constitutional and apex courts of the Member States[270] – means that its jurisprudence incorporates and consolidates "common European standards of fundamental rights".[271] The Federal Constitutional Court thus seems to suggest that German fundamental rights jurisprudence offers – to use a term popularised by a former British prime minister – "oven-ready" interpretative solutions for the EU Charter on Fundamental Rights.

V. Conclusion

Inalienable human rights transcend positive law and are therefore difficult to grasp for the discipline of law. In its quest for the essence of inalienable human rights, the Federal Constitutional Court has thus ventured beyond the realm of positive law, ultimately finding firm ground in traditions, values and a non-binding political resolution, the Universal Declaration of Human Rights. From a legal perspective this raises many vexing issues that can be adequately resolved only on the basis of transdisciplinary assistance and interdisciplinary exchange.

The Federal Constitutional Court's approach touches upon some of the key challenges currently facing international human rights. How, for example, does the discipline of law approach the interpretation of the Universal Declaration as a non-binding political instrument? Is the Declaration interpreted in the same way as a binding human rights treaty? The Federal Constitutional Court advocates a dynamic approach which echoes the "living instrument" doctrine of the European Court of Human Rights.[272] In contrast, the final report of the Commission on Unalienable Rights,[273] an interdisciplinary panel of experts established in 2017 by then US Secretary of State *Michael Pompeo*, insists on a strict "originalist" reading of the Declaration and thus delegitimises many subsequent developments in international human rights law.[274]

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[269] See pp. 144 f., above.

[270] See the references in Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, para. 70.

[271] Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, para. 71.

[272] See the Federal Constitutional Court's repeated emphasis on the fact that the human rights tradition is open to further development, Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, paras. 46, 56, 60, 65, 71.

[273] *Commission on Unalienable Rights*, Report of the Commission on Unalienable Rights, 26 August 2020, available at https://2017-2021.state.gov/report-of-the-commission-on-unalienable-rights/ (last accessed on 28 September 2022).

[274] See *K. Young*, Human Rights Originalism, Georgetown Law Journal 110 (2022), 1–91; from a philosophical perspective, *Risse* (n. 151), 13–31.

The Federal Constitutional Court's invocation of traditions and values must also be considered carefully in the light of more recent attempts, most prominently by Russia, to utilise "traditional values" as a means of undermining international human rights protection.[275] It is therefore important to unpack the fundamentally different meanings and functions ascribed by the Federal Constitutional Court to traditions[276] and values[277] in its most recent jurisprudence.

Last but not least, the question as to how to accommodate the universality of inalienable human rights and the political and cultural idiosyncrasies of individual States[278] raises one of the perennial problems of international human rights protection. The latest example is provided by the claim of the People's Republic of China to "human rights with Chinese characteristics".[279] This renewed reliance on the theory of cultural relativism highlights the enduring need to rest the universality of human rights on solid conceptual foundations.[280]

The future of domestic and international human rights protection will thus depend not least on the ability of the law to successfully master the interdisciplinary challenge posed by the inalienability of human rights.

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[275] See, e.g. *A. Faiola*, How Putin is weaponizing "traditional values" to defend Russian aggression in Ukraine, Washington Post, 23 March 2022, available at https://www.washingtonpost.com/world/2022/03/23/putin-russia-ukraine-orthodox/ (last accessed on 28 September 2022); *C. McCrudden*, Human Rights and Traditional Values, in: U. Braxi et al. (eds.), Law's Ethical, Global and Theoretical Contexts – Essays in Honour of William Twining (2018), 38–72.

[276] See *S. Cassese*, Ruling from Below: Common Constitutional Traditions and Their Role, NYU Environmental Law Journal 29 (2021), 591–618; *M. Krygier*, Law as Tradition, Law and Philosophy 5/2 (1986), 237–262.

[277] For a legal perspective on values and "orders of values", see *Rensmann* (n. 69); from a sociological perspective, see *H. Joas*, Die Sakralität der Person (2nd edn., 2019), 251–281; *idem*, Value Generalization, Limitations and Possibilities of a Communication about Values, Zeitschrift für Wirtschafts- und Unternehmensethik 9 (2008), 88–96.

[278] See pp. 134 ff., above with regard to Federal Constitutional Court, order of 30 June 1964, BVerfGE 18, 112. This issue is also raised in the Ökotox decision, see Federal Constitutional Court, order of 27 April 2021, BVerfGE 158, 1, para. 73.

[279] *State Council Information Office of the People's Republic of China* (PRC), Progress in Human Rights over the 40 Years of Reform and Opening Up in China (2018), available at http://english.www.gov.cn/archive/white_paper/2018/12/13/content_281476431737638.htm (last accessed on 28 September 2022).

[280] *Yu-Jie Chen*, China's Challenge to the International Human Rights Regime, NYU Journal of International Law and Politics 51 (2019), 1179–1222.