

Tinatin Erkvania*

Interpretation Methods of the Constitution in German Constitutionalism (Distinct Aspects)

At this stage of development, it is vital for the science of Georgian constitutional law to actively conduct comparative-legal studies in order to perceive better both their own (constitutional) identity and the experience of other legal cultures and the prospects of integrating their best practices into the national legal system.

The article analyzes the key issues for the theory of constitutional law (distinct spectrum), in the context of interpretation methods of the constitution seeing the example of the German constitutionalist discourse, which in turn, is essential considering the science of European constitutional law, on the subject of perceiving and determining the worth schemes of basic human rights and, in general, understanding the essence of constitutionalism.

Keywords: *worth schemes of the constitution, comparative constitutionalism, interpretation methods of the constitution, basic human rights, concept of human dignity.*

“The liberal (German “freiheitlich”), secularized state lives by prerequisites which it cannot guarantee itself. This is the great adventure it has undertaken for freedom's sake. As a liberal state it can endure only if the freedom it bestows on its citizens takes some regulation from the interior, both from a moral substance of the individuals and a certain homogeneity of society at large. On the other hand, it cannot by itself procure these interior forces of regulation, that is not with its own means such as legal compulsion and authoritative decree. Doing so, it would surrender its liberal character (freiheitlichkeit) and fall back, in a secular manner, into the claim of totality it once led the way out of, back then in the confessional civil wars.”¹

* Professor in Public Law at School of Law and Politics, Georgian Institute of Public Affairs (GIPA); Visiting Scholar at Max Planck Institute for Comparative Public Law and International Law and at École de droit de Sciences Po (Paris). The article was written at the Free University of Berlin, within the framework of a research project funded by a joint scientific-research grant of the Shota Rustaveli National Science Foundation of Georgia and the German Academic Exchange Service (DAAD) – “Interpretation of the Constitution and Methods of Its Interpretation: US and European Experience in the Georgian Context”.

¹ “Der freiheitliche, säkularisierte Staat lebt von Voraussetzungen, die er selbst nicht garantieren kann. Das ist das große Wagnis, das er, um der Freiheit willen, eingegangen ist. Als freiheitlicher Staat kann er einerseits nur bestehen, wenn sich die Freiheit, die er seinen Bürgern gewährt, von innen her, aus der moralischen Substanz des einzelnen und der Homogenität der Gesellschaft, reguliert. Andererseits kann er diese inneren Regulierungskräfte nicht von sich aus, das heißt mit den Mitteln des Rechtszwanges und autoritativen Gebots zu garantieren suchen, ohne seine Freiheitlichkeit aufzugeben und – auf säkularisierter Ebene – in jenen Totalitätsanspruch zurückzufallen, aus dem er in den konfessionellen Bürgerkriegenherausgeführt hat” – Ernst-Wolfgang Böckenförde, In: Staat, Gesellschaft, Freiheit, 1976, 60. This quote reviews the so-called Böckenförde Dilemma (Böckenförde-Dilemma), which Ernst

“The Role of the judge is to understand the purpose of law in society and to help the law achieve its purpose.”²

1. Introduction

The concept of the constitution is directly related to the idea³ of constitution definition. The idea of restricting government power with basic rights is a prerequisite for the legitimacy of the constitution. These prerequisites need to be identified in detail, which, due to the abstract nature of the text of the constitution, creates a problem of interpretation.

The constitution is both the basis and the limit of the government activities. Constitutions define the scope of the government's activities and are the precondition of the legitimacy of the government.

In recent decades, the European continent has experienced significant political changes. Political development is the main determinant of constitutional development. This type of important events are the “return to Europe” of the Baltic countries, as well as the reception of the Euro-Atlantic constitutional experience in the post-Soviet countries, the formation of common European Market, breaking the “Iron Curtain” and the demolition of the Berlin wall, the end of Marxism-Leninism (1989)⁴ and the European Union, establishing a supranational, multi-level legal space.

After the end of the Cold War, researchers of comparative law and political science specialists began to compare the European experience to the Atlantic region.⁵ Today, some generally speak about the “European-Atlantic constitutional state”.⁶ The comparison of these two spaces is logical, because they have a lot in common considering the political and legal processes from the 18th century to the present day. The same processes, for instance, the end of socialism, produced many innovations in Europe, which resulted in the emergence of different legal categories in the European context. The development of Georgian constitutionalism is inconceivable without the analysis of this comparative-legal context. In accordance with all of the above, taking into account its limited scope, the purpose of the article is to review only certain aspects (and not a complete) of the constitution interpretation methods, directly characteristic of German constitutionalism. From this point of view, the article reviews the essential postulates of the concept of constitution and constitutionalism, issues of an institutionalization of constitutional justice, the distinct methods of constitution interpretation and their interrelation; the essence of the principles of inviolability of human dignity; particularities of the definition of the constitution essential principles; the so-called “Anti-constitutional constitutional law” as a phenomenon; the so-called “Formula of constancy” of constitution, the concept of the so-called

Wolfgang Böckenförde (a famous constitutional theorist and philosopher of law, a judge of the German Federal Constitutional Court in 1983-1996) formulated in the 60s of the 20th century.

² Barak, Aharon, *The Judge in a Democracy*, 2006.

³ *Starck Chr.*, Maximen der Verfassungsauslegung, in: *Isensee J., Kirchhof P.*, *Handbuch des Staatsrechts*, B. XII, Normativität und Schutz der Verfassung, 3. Völlig neubearbeitete und erweiterte Aufl., 2014, 614.

⁴ *Häberle P.* in: *Battis U., Mahrenholz E.G., Tsatsos D.* (Hrsg.), *Das Grundgesetz im internationalen Wirkungszusammenhang der Verfassungen – 40 Jahre Grundgesetz*, Berlin 1990, 19 ff.

⁵ *Nolte G.*, European and US constitutionalism: Comparing essential elements, in: *Nolte G. (ed.)*, *European and US Constitutionalism*, Cambridge 2005, 3-20.

⁶ *Ibid.*

“constitutional identity” in the multi-level legal framework of the European Union and other essential issues related to the methods of interpretation of the constitution, considering the diverse legal context of continental Europe, essentially, on the example of Germany.

Law regulates relations between people and reflects their own values.⁷ The main function of a judge is to perceive the social goal of law and support the process of achieving this goal.

The role of the judge is logical and special in the process of clarification/interpretation of the constitution.

From this perspective, the purpose of the article is to provide Georgian judges with material for judgment about separate schemes of constitutional interpretation methods, to deepen the scientific discourse related to these issues, to encourage academic discussions, in general, and to offer a comparative legal overview for relevant theoretical reflections.

2. The Concept of Constitution and Constitutionalism – Essential Elements

The constitution may consist of one or many equally important basic laws (Israel) or unwritten customs (United Kingdom).⁸ Some constitutions are defined by the international legal context (Bosnia-Herzegovina), and in some totalitarian states there is a system of other norms above the constitution or at its level, which absorbs the text of the constitution.⁹

Constitutions delineate the goals of states, form the collective memory¹⁰ of the constituent society, and legitimize the idea of a state by appealing to specific ideals. For example, the Article 2 of the Treaty on European Union defines the essential value spectrum of the Union, and the Article 7 of the same Treaty provides the procedures for breaching the Treaty in case of violation of these values. This procedure was successfully used by the European Commission in relation to Poland, which was accused of subjecting the judicial system to political influences and violating the principle of the rule of law (appointing new judges after shortening the general tenure of judges).

In reality, the text of the constitution and the degree of its implementation differ from each other. The idea of the constitution and its normativity are determined by the interaction of these two

⁷ Barak A., *The Judge in a Democracy*, 2006, 3 et seq.

⁸ Supreme Court (UK), the decision of September 24, 2019, UKSC 41, paragraph 39: “Although the United Kingdom does not have a single document entitled “The Constitution”, it nevertheless possesses a Constitution, established over the course of our history by common law, statutes, conventions and practice. Since it has not been codified, it has developed pragmatically, and remains sufficiently flexible to be capable of further development. Nevertheless, it includes numerous principles of law, which are enforceable by the courts in the same way as other legal principles. In giving them effect, the courts have the responsibility of upholding the values and principles of our constitution and making them effective. It is their particular responsibility to determine the legal limits of the powers conferred on each branch of government, and to decide whether any exercise of power has transgressed those limits. The courts cannot shirk that responsibility merely on the ground that the question raised is political in tone or context.”

⁹ For example, the order on the deportation and extermination of Jews in Germany during the National Socialism (The Third Reich), see. („Jüdenbefehle”); See *Herdegen M.* in: *Herdegen M., Masing J., Poscher R., Gärditz K.F.*, *Handbuch des Verfassungsrechts*, 1. Auflage 2021, § 1 Das Grundgesetz im Gefüge des westlichen Konstitutionalismus, Rn. 1.

¹⁰ *Ibid*, Rn. 2.

factors. The Constitution is the “Memory of Democracy”.¹¹ If the text of the constitution and the quality of its implementation are interconnected, the constitutional culture is higher.

The 1787 Constitution of the USA is the first constitution drawn up by modern standards in the world. The first constitution of the analogues standards in Europe was adopted in Poland in 1791. It is also worth noting the Constitution of Corsica of 1755, written in Italian, which took into consideration the worldview prerequisites of antiquity with democratic elements.¹² The same can be said about the San Marino Constitution of 1600.

In Europe, the French Revolution contributed to the development of the idea of a constitution. During the 19th century, the majority of European countries had their own constitutions. The clearest example of a liberal constitution is the Belgian constitution of 1831, which recognized the standards of parliamentarism and a catalog of fundamental rights. At that time, In Europe, if a state had a written constitution, it was regarded as a good “tone”.¹³

The type of the constitutional state is the result of the development of common European/Atlantic legal culture.¹⁴ A number of dates are important in the context of constitutional development: 1776 (Virginia Bill of Rights), 1789 (French Revolution), 1848 (so-called Paulskirche Constitution), 1689 (“Glorious Revolution ”), 1831 (Belgian Constitution), 1919 (so-called Weimar Constitution), 1947 (Italian Constitution) and a new wave of constitutions, starting from Sweden – 1974, then Greece – 1975, Netherlands – 1983, etc.

In Europe, after the end of the First World War and the Russian Revolution of 1917, European states established democratic republics and adopted the first constitutions: 1920 – the Constitution of Estonia, 1921 – the Constitution of Georgia, 1922 – the Constitution of Latvia, which is valid until today,¹⁵ the Constitution of Lithuania in 1922, etc.

The type of living constitutional state is presented in the works by the authors: John Locke and Charles-Louis Montesquieu, Jean-Jacques-Rousseau and Immanuel Kant. From this point of view, the USA has been noteworthy with „Federalist Papers” since 1787.

In 1803 the Supreme Court of the USA made an important decision, “Marbury vs. Madison.”¹⁶ It should be mindful of noting the decision of the German Federal Constitutional Court of January 15, 1958 -,Lüth Urteil “¹⁷, which emphasizes the “system of objective values” as a phenomenon and perceives it as an essential part of the German Federal Constitution objective values” as a phenomenon and perceives it as an essential part of the German Federal Constitution.

¹¹ *Kirchhof P.* in: *Depenhauer O., Grabenwarter Chr., (Hrsg.), Verfassungstheorie*, 2010, 70 f. Rn. 2.

¹² *Küpper H.*, *Einführung in die Verfassungssysteme Südosteuropas*, Wien, 2018, 13 f.

¹³ *Ibid.*

¹⁴ *Häberle P.* in: *Battis U., Mahrenholz, E.G., Tsatsos D. (Hrsg.), Das Grundgesetz im internationalen Wirkungszusammenhang der Verfassungen – 40 Jahre Grundgesetz*, Berlin 1990, 19 ff.

¹⁵ After de-Sovietization, Latvia did not adopt a new constitution, only the Constitution of the First Democratic Republic of 1922 was restored (Latvian language: action. It is worth noting that from the countries united in the Soviet Union, only these four countries managed to adopt the constitution (Baltic countries and Georgia).

¹⁶ *Häberle P.* in: *Battis U., Mahrenholz E.G., Tsatsos D. (Hrsg.), Das Grundgesetz im internationalen Wirkungszusammenhang der Verfassungen – 40 Jahre Grundgesetz*, Berlin 1990, 19 ff.

¹⁷ BVerfGE 7, 198.

From the legal and cultural point of view, the important stage¹⁸ of developing constitutional life is the emergence of the “formula of permanence” in the Norwegian constitution (1814), as well as in the constitutions of Portugal and Spain (1976 and 1987/82), the references to the founder people of the constitution and the annals of “cultural heritage” in the constitutions of Italy 1947 and Spain 1978, and other.

Western “constitutionalism” is more of law and order?? than the special variety.¹⁹ Its spiritual and worldview foundations are primarily the Age of Enlightenment, constitutional development in the North American colonies, „Federalist Papers”, the French Revolution, and political liberalism of the 19th century. There is no so-called Non-Western constitutionalism, therefore, the term “Western” is not exclusive, but descriptive. Constitutionalism is “Western” in the sense of the historical developments of Western Europe and North America. As a model, constitutionalism has already been adapted in Latin America, India, South Africa, Israel, Japan, Taiwan, etc.

The concept of “constitutionalism” includes a wide range of models related to the idea of perceiving the right of people to political self-determination as the source of the legitimacy of a state and exercising power within the constitutional framework. The models of “legal constitutionalism” and “political constitutionalism” are opposed to each other: the first one implies a constitutional-legal model based on fundamental rights and the idea of judicial control of political (majority) decisions; The second involves the idea of securing a democratic order through the interaction of political forces and an increased republican culture.

Within the framework of Western constitutionalism, law and order is characterized by a number of elements, which include the direct application of the norms of the constitution, the principle of the primacy of the constitution and constitutional laws, the horizontal distribution of power with the institutional provision of their balance, the system of basic rights and strong constitutional justice from a material point of view. Some constitutions also recognize a “vertical” division of powers taking into account the principle of federalism and the acceptance of local self-government.

In addition to all of the above, constitutionalism is a socio-cultural phenomenon.²⁰ The prerequisite of the concept of the state is the concept of politics. The state represents the political status²¹ of the people. Accordingly, constitutional law is “political law”.²² From this point of view, the process of interpretation/explanation of the constitution cannot be completely freed from the political context.²³ In addition, constitutional law can be discerned perfectly when it is practiced.²⁴

¹⁸ Ibid, 19 ff.

¹⁹ Herdegen M. in: Herdegen M., Masing J., Poscher R., Gärditz K.F., Handbuch des Verfassungsrechts, 1. Auflage 2021, §1 Das Grundgesetz im Gefüge des westlichen Konstitutionalismus, Rn. 1-6.

²⁰ Ibid. Rn. 17.

²¹ Schmitt C., Der Begriff des Politischen, in: Walter M. (Hrsg.), Carl Schmitt: Der Begriff des Politischen – Synoptische Darstellung der Texte, Berlin, 2018, 55 ff.

²² Isensee J. in: Isensee J., Kirchhof P. (Hrsg.), Handbuch des Staatsrechts, 3. Aufl. 2014, §268 Verfassungsrecht als „politisches Recht”.

²³ Dworkin R., Law as Interpretation, in: Texas Law Review, Vol. 60, 1982, 527 et seq.

²⁴ Herdegen M., Masing J., Poscher R., Gärditz K.F., Handbuch des Verfassungsrechts, 1. Auflage 2021, Einleitung, Rn. 10.

In contemporary reality, the processes of political democratization and transformation, including revolutions taking place in many countries were followed by the creation of an exceptional political and legal order, within which the constitution and its composition not only acquired a special role, but also became a defining political action in the essence of these processes. This implied South Africa, the transitional constitution established in 1994 after toppling the Apartheid regime and the current constitution of 1997, Latin American countries, etc. The same can be said about the post-Soviet space and the countries formed within it, freed after the collapse of the Soviet Union, and regaining independence, which adopted new constitutions or restored the old ones (for example, the Constitution of Latvia in 1922). In this regard, the term “transformational constitutionalism”²⁵ was created and developed. In connection to this type of transformability, the catalog of basic rights recognized by the constitution and a certain amount of judicial activism acquire a special importance to the development of social and economic rights, as well as to the establishment of standards for banning the discrimination. In this context, there arise some questions about the degree of judicial activism in accordance with the constitutional framework when judges explain/interpret constitutional norms. From this perspective, the issue of the scopes of the constitutional legal methodology and their identification, as well as the legitimation of judicial law, is of special concern.

3. The Role of Courts in the Constitution Interpretation: Two Different Institutional Models of Constitutional Justice

Two models of constitutional justice institutionalism differ from each other²⁶: the American, within the framework of the model of 1803, the general judicial justice checks the constitutionality of laws “incidentally” and administrative measures in relation to ordinary laws. This model of “mixed” justice has been adopted by Canada, India, Australia and Israel. It is in operation in Japan and many Latin American countries. In Europe, this model was shared by Switzerland and the Scandinavian countries. Besides, without any correlation to the power of the Constitutional Court, ordinary court judges in Greece and Portugal have the right not to apply laws if they consider them unconstitutional.

The American model is contrasted with Hans Kelsen's Austrian model of 1920, in the arrangement of which the constitutionality of laws is verified by specially created constitutional courts. This model of “concentrated” justice has been embraced by many states in continental Europe, including: Germany, Italy, France, Spain, Belgium, Liechtenstein, Poland, Greece, Portugal and some Latin American countries.

Generally, it is not essential which model a country prefers, the main thing is how effective the judicial practice is. In this regard, as it is often noted in scientific sources, there is no longer any difference between American „judicial review”²⁷ and European „Constitutional review”.²⁸ According

²⁵ Herdegen M. in: Herdegen M., Masing J., Poscher R., Gärditz K.F., Handbuch des Verfassungsrechts, 1. Auflage, 2021, §1 Das Grundgesetz im Gefüge des westlichen Konstitutionalismus, Rn. 82-89.

²⁶ Brünneck A. v., Verfassungsgerichtsbarkeit in den westlichen Demokratien, Ein systematischer Verfassungsvergleich, 1992, 28 ff.

²⁷ When the founding fathers of the US Constitution met in Philadelphia in 1787, they had knowledge of the foundations and prerequisites of European constitutionalism. Their worldview was imbued with the views

to the widespread opinion, the idea of the supremacy of the constitution includes the tools²⁹ to automate provisioning in a systemic-immanent manner.³⁰ From this point of view, special attention is drawn to the scheme³¹ of basic rights, essential principles³² and the issue of legitimacy of constitutional justice. In addition, the scope of action³³ of constitutional courts³⁴ when interpreting the Constitution is also subject of dispute: on the ground of the widespread opinion, the principle “in

of Locke and Montesquieu. The US Supreme Court was established in 1789 based on Article III, Paragraph 1 of the US Constitution, which in turn was supplemented by the Judiciary Act of 1789. Initially, the court consisted of 6 judges. Since 1869, there have been 9 members of the US Supreme Court.

²⁸ *Brünneck A. v.*, Verfassungsgerichtsbarkeit in den westlichen Demokratien, Ein systematischer Verfassungsvergleich, 1992, 30.

²⁹ *Stern K.*, Das Staatsrecht der Bundesrepublik Deutschland, B. 1. Zweite, völlig neubearb. Aufl., München 1984, 165 ff.

³⁰ *Starck Chr.*, Das Bundesverfassungsgericht in der Verfassungsordnung und im politischen Prozeß, in: FS 50 Jahre Bundesverfassungsgericht, Tübingen, 2001, 3; Kritisch dazu: *Möllers Chr.*, Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts, in: Das entgrenzte Gericht, Berlin, 2011, 285; vgl. *Kenntner M.*, Das BVerfG als subsidiärer Superrevisor? in: NJW 2005, 787 f.; s. auch, *Heusch, A.*, Der Präsident des Bundesverfassungsgerichts als Hüter und Reform der Verfassung, in: NVwZ 2010, 210 f.

³¹ “In consideration of the ever increasing politisation of society, the constitutional review process will defend more intensively both the structure of the constitution as one of democracy and rule of law as well as the political and personal rights of the individual.” Cited: *von Brünneck A.*, Constitutional Review and Legislation in Western Democracies, in: *Landfried Chr. (ed.)*, Constitutional Review and Legislation, Baden-Baden 1988, 260; Cf. *Brugger W.*, Grundrechte und Verfassungsgerichtsbarkeit in den Vereinigten Staaten von Amerika, Tübingen, 1987, 22 ff.; See also: *Starck Chr.*, Menschenrechte – aus den Büchern in die Verfassungen, in: *Nolte G., Schreiber L.*, Der Mensch und seine Rechte – Grundlagen und Brennpunkte der Menschenrechte zu Beginn des 21. Jahrhunderts, Göttingen 2004, 9 ff.

³² Es gibt also Rechtsgrundsätze, die stärker sind als jede rechtliche Satzung, so daß ein Gesetz, das ihnen widerspricht, der Geltung bar ist. Man nennt diese Grundsätze das Naturrecht oder das Vernunftrecht. Gewiß sind sie im Einzelnen von manchem Zweifel umgeben, aber die Arbeit der Jahrhunderte hat doch einen festen Bestand herausgearbeitet, und in den sogenannten Erklärungen der Menschen- und Bürgerrechte mit so weitreichender Übereinstimmung gesammelt, daß in Hinsicht auf manche von ihnen nur noch gewollte Skepsis den Zweifel aufrechterhalten kann”. Cited: *v. Radbruch G.*, Fünf Minuten Rechtsphilosophie, in: Rhein-Neckar-Zeitung vom 12.09.1945, Cited: *Radbruch G.*, Rechtsphilosophie, 8. Aufl., v. *Wolf E., Schneider H.-P.*, (Hrsg.), Stuttgart 1973, 327 ff.

³³ Dazu *Dreier R.*, Zur Problematik und Situation der Verfassungsinterpretation, in: *Dreier R., Schwegmann F.*, Probleme der Verfassungsinterpretation, Baden-Baden 1976, 13 ff.; See also, *Schneider Hans-Peter*, Verfassungsinterpretation aus theoretischer Sicht, in: *Schneider H.-P., Steinberg R. (Hrsg.)*, Verfassungsrecht zwischen Wissenschaft und Richterkunst, Heidelberg, 1990, 39 ff.; See also, *Mahrenholz G. E.*, Verfassungsinterpretation aus praktischer Sicht, in: *Schneider H.-P., Steinberg R. (Hrsg.)*, Verfassungsrecht zwischen Wissenschaft und Richterkunst, Heidelberg 1990, 53 ff.; zur grundrechtlich legitimierten Verfassungsinterpretation *Hillgruber Chr.*, Verfassungsinterpretation, in: *Depenheuer O., Grabenwarter Chr.*, Verfassungstheorie, Tübingen, 2010, 506 ff.; auch, *Grimm D.*, Constitutional Adjudication and Constitutional Interpretation: between law and politics, in: 4 NUJS L. Rev., 2011, 5 ff.

³⁴ Bishop Hoadly’s Sermon (preached before the King, 1717): „Whoever hath on absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first spoke or wrote them.” Zitiernach *Lockhart W. B., Kamisar Y., Choper J. H., Shiffrin St. H.*, Constitutional Law, Cases-Comments-Questions, 1991, 7th ed., 1; See also, *Häberle P.*, Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat, JZ 1989, 913 ff.

claris non fit interpretatio”³⁵ does not apply with reference to the Constitution. Many entities („offene Gesellschaft der Verfassungsinterpreten”)³⁶ are involved in the process of interpreting the Constitution but as the last interpreters³⁷, only the Constitutional Courts are authorized to represent the main actors.³⁸

The special constitutional court acts as „the least dangerous to the political rights of the constitution”³⁹ in relation to other state bodies, and it is also perceived as “the most dangerous branch”⁴⁰ with respect to other constitutional bodies.⁴¹ In addition, within the framework of specialized and mixed constitutional justice, the theses related to the idea⁴² of their legal legitimacy are opposed to each other. For example: Judicial activism vs. Judicial self-restraint,⁴³ Countermajoritarian difficulty,⁴⁴ Political question doctrine⁴⁵ and so on.

After the development of supranational legal instruments⁴⁶ in the field of human rights, they speak about cooperative relations (sometimes collision relations)⁴⁷ between national, international and supranational courts.⁴⁸ There is also a conversation about “asymmetry of constitutional justice”⁴⁹ or

³⁵ The legal principle implies the following: if the content of the norm is clear, it should not be violated by its interpretation.

³⁶ *Häberle P.*, *Der Kooperative Verfassungsstaat*, Berlin, 2013, 263.

³⁷ “Das Subsidiaritätsprinzip verlagert diese Ermessensfreiheit [für die Auslegung des Grundsatzes der Subsidiarität] nicht gewaltenteilungswidrig auf die Gerichte. Somit liegt die primäre Interpretationskompetenz bei der Legislative und bei der Exekutive.” *Isensee J.*, *Subsidiaritätsprinzip und Verfassungsrecht*, 2. Aufl., Berlin, 2001, 315.

³⁸ *Carl Schmitt*: “Jeder Interpretationsakt ist ein Akt selbständig schaffender Synthese eines “Gesetzgebers”, mag es sich um extensive oder intensive Interpretation, um Analogie oder “einen Beweis aus dem Gegenteil” handeln. Der Gesetzgeber wird konstruiert, nicht rekonstruiert. Der Jurist, der ein System schafft, formt alte Gedanken um und führt neue ein,” Cited: *Wilde R. C.*, „Das letzte globale Linie”, *Carl Schmitt und der Kampf um das Völkerrecht*, Berlin 2014, 69.

³⁹ *Hamilton A.*, in: *The Federalist Papers*, Nr. 78.

⁴⁰ See in detail: *Carey G. W.*, *The Judicial Assault on the Constitution*, in: *McLean E. (ed.)*, *The Most Dangerous Branch*, Lanham 2008, 1-16; See also, *Klein H.H.*, *Verfassungsgerichtsbarkeit und Gesetzgebung*, in: *Badura P., Scholz R.*, *Verfassungsgerichtsbarkeit und Gesetzgebung*, München, 1998, 49 ff.

⁴¹ *Herdegen M.*, *Verfassungsgerichtsbarkeit als pouvoir neutre*, in: *ZaöRV* 2009, 259 ff.

⁴² *Bischof G., Gehler M.*, „Foundering Fathers” versus „Founding Fathers”? Comparative Aspects of Constitutionalizing EU-Europe and the United States, in: *Bischof G., Gehler M., Kühnhardt L., Steininger R.*, *Toward a European Constitution*, Salzburg 2005, 11 ff.

⁴³ *Allan T. R. S.*, *Constitutional Justice, A liberal Theory of the Rule of Law*, Oxford New York 2001, 185 ff.

⁴⁴ *Hwang Sh.-P.*, *Verfassungsgerichtlicher Jurisdiktionsstaat? (Diss.)*, Berlin 2005, 61 ff.

⁴⁵ See in Detail: *Allan T. R. S.*, *Constitutional Justice, A liberal Theory of the Rule of Law*, Oxford New York 2001, 161 ff.

⁴⁶ *Hesse K.*, *Deutsche Verfassungsgerichtsbarkeit an der Schwelle zum neuen Jahrhundert*, in: *Schwarze J.*, *Verfassungsrecht und Verfassungsgerichtsbarkeit im Zeichen Europas*, Baden-Baden 1998, 170 f.

⁴⁷ *Proelss A.*, *Bundesverfassungsgericht und überstaatliche Gerichtsbarkeit*, Diss., Tübingen, 2014, 15 ff., 203 ff.

⁴⁸ *Due O.*, *A constitutional Court for the European Communities*, in: *Constitutional Adjudication in European Community and National Law*, Butterworth 1992, 3 ff.; *Badura P.*, *Supranationalität und Bundestaatlichkeit durch Rangordnung des Rechts*, in: *Schwarze J. (Hrsg.)*, *Verfassungsrecht und Verfassungsgerichtsbarkeit im Zeichen Europas*, Baden-Baden 1998, 71 ff.; *Rosenfeld M.*, *Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court*, in: *international journal of constitutionallaw*, Vol. 4,

“unification of constitutional courts”⁵⁰ in the „Multilevel Constitutionalism”⁵¹ of “common European constitutional law”⁵².

2006, 623 f.; *Herresthal C.*, Voraussetzungen und Grenzen der gemeinschaftsrechtskonformen Rechtsfortbildung, in: *EuZW* 2007, 398; *Haratsch A.*, Die kooperative Sicherung der Rechtsstaatlichkeit durch die mitgliedstaatlichen Gerichte und die Gemeinschaftsgerichte aus mitgliedstaatlicher Sicht, in: *EuR* 2008 Heft Beiheft 3, 99 ff.; *Sauer H.*, Kompetenz- und Identitätskontrolle von Europarecht nach dem Lissabon-Urteil – Ein neues Verfahren vor dem Bundesverfassungsgericht? In: *ZRP* 2009, 197; *Hofmann J.*, Zur Absolutheit des Menschenwürdeschutzes im Wirken des Präsidenten des BVerfG Hans-Jürgen Papier, in: *NVwZ* 2010, 218; *Isensee J.*, Integrationswille und Integrationsresistenz des Grundgesetzes – Das Bundesverfassungsgericht zum Vertrag von Lissabon, in: *ZRP* 2010, 34; *von Bogdandy A.*, Prinzipien der Rechtsfortbildung im europäischen Rechtsraum – Überlegungen zum Lissabon-Urteil des BVerfG, in: *NJW* 2010, 1 (2); *Everling U.*, Europas Zukunft unter der Kontrolle der nationalen Verfassungsgerichte, in: *EuR* 2010, 91 (94); *Nettesheim M.*, Die Karlsruher Verkündung – Das BVerfG in staatsrechtlicher Endzeitstimmung, in: *EuR-Bei* 2010, 118; *Proelß A.*, Zur verfassungsgerichtlichen Kontrolle der Kompetenzmäßigkeit von Maßnahmen der Europäischen Union: Der „ausbrechende Rechtsakt” in der Praxis des BVerfG, in: *EuR* 2011, 243; *Beck G.*, The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There is No Praetor, in: *ELJ: review of european law in context*, 17, 2011, 480 f.; *Möllers Th., M.J., Redcay K.*, Das Bundesverfassungsgericht als europäischer Gesetzgeber oder als Motor der Union? In: *EuR* 2013, 416; *Gerhardt M.*, Europäisches Parlament und Bundesverfassungsgericht, in: *NVwZ-Beilage* 2013, 54 ff.; *Vofßkuhle A.*, Verfassungsgerichtsbarkeit und europäische Integration, in: *NVwZ-Beilage* 2013, 27 ff.; *Méndez Cr.E.*, Current trends and perspectives regarding constitutional jurisdiction in the Member States of the EU, in: *Rivista di studi politici internazionali: Vol. 80, 2013, 559 ff. etc.*

⁴⁹ *Mayer F. C.*, Verfassungsgerichtsbarkeit, in: *von Bogdandy A., Bast J., (Hrsg.), Europäisches Verfassungsrecht*, 2. Aufl., Heidelberg 2009, 598; See also, *Hong Q. L.*, Constitutional Review in the Mega-Leviathan: A Democratic Foundation for the European Court of Justice, in: *ELJ – review of European law in Context*, 16 (2010), 697 f.; s. auch, *Dyevre A.*, The German Federal Constitutional Court and European Judicial Politics, in: *West European politics*, Vol. 34, 2011, 346 ff.

⁵⁰ *Vofßkuhle A.*, Das europäische Verfassungsgerichtsverbund, in: *NVwZ* 2010, 1 ff.; auch, *Vesterdorf B.*, A constitutional Court for the EU? in: *International journal of constitutional law*, Vol. 4, Issue 4, 2006, 607 ff.; See also, *Hatje A.*, Demokratische Kosten souveräner Staatlichkeit im europäischen Verfassungsverbund, in: *EuR-Bei* 2010, 124; *Nettesheim M.*, Europäischer Verfassungsverbund? in: *Depenheuer O., Heintzen M., Jestaedt M., Axer P.*, FS für Josef Isensee, Staat im Wort, Heidelberg 2007, 733 ff.; *Pernice I.*, La Rete Europea di Costituzionalità – Der Europäische Verfassungsverbund und die Netzwerktheorie, in: *ZaöRV* 2010, 59.

⁵¹ On this issue, see: *Pernice I.*, Multilevel Constitutionalism in the European Union, WHI – Paper 5/02, 3 ff.; *Walter Chr.*, Constitutionalizing (Inter)national Governance – Possibilities for and Limits to the Development of an International Constitutional Law, in: *German Yearbook of International Law* 44 (2001), 175 f.; *Fabrini S.*, Transatlantic Constitutionalism: Comparing the United States and European Union, in: *European Journal in political research: official journal of the European Consortium for Political Research*, Vol. 43, 2002, 549 ff.; *Ress G.*, Supranationaler Menschenrechtsschutz und der Wandel der Staatlichkeit, in: *ZaöRV* 2004, 636 ff.; *Walter Chr.*, Der französische Verfassungsrat und das Recht der Europäischen Union, in: *EuGRZ* 2005, 32. Jg., Heft 4-7, 79 f.; *Leschke M.*, Die Verfassung der Europäischen Union: Eine kritische Betrachtung grundlegender Anreizwirkungen der europäischen Gewaltenteilung, in: *Beckmann K., Dieringer J., Hufeld U. (Hrsg.), Eine Verfassung für Europa*, 2., aktualisierte und erweiterte Aufl., Tübingen, 2005, 183 ff.; *Wilkinson M. A.*, Who’s afraid of a European Constitution? In: *E.L.Rev.*, Vol. 30, 2005, 297 ff. *Similarly see:* *Political Constitutionalism and the European Union*, in: *The Modern Law Review*, Vol. 76, 2002, Nr. 2, 213 f.; *Haack St.*, Verlust der Staatlichkeit? Tübingen 2007, 115 ff., 157 ff.; *Schlink B.*, Abschied von der Dogmatik: Verfassungsrechtsprechung und Verfassungsrechtswissenschaft im Wandel, in: *JZ*, 62. Jg., 2007, 157 f.; *Knauff M.*, Konstitutionalisierung im inner- und überstaatlichen Recht

Among the international and regional instruments of human rights protection, the European Convention on Human Rights and the European Court of Human Rights have a dynamically growing influence on the development of the judiciary, constitutional and common courts of the Georgian legal system. Since its entry into force (May 20, 1999), the European Convention on Human Rights has been an integral part of the Georgian judicial area and an important source after the Constitution, taking into account the hierarchy of norms.

Besides, under the auspices of the European Union's coherent rights policy, the latter often uses human rights reservations when reaching agreements with the third countries. From this point of view, the newly ratified EU/Georgia Association Agreement is also a special legal source. Although the prospect for Georgia to join the European Union is already discussed, the modern constitutional-legal discourse in the country is closed to the topics about the impact of supranational legal instruments (e.g., the Charter of Fundamental Rights of the European Union or the judicial system of the European Union) on protection of human rights, which requires further research. Within the framework of constitutional legal dogmatics, the theses of the legitimacy⁵³ of constitutional control⁵⁴ differ from each other that refer to the necessity of special constitutional justice (or the so-called real control) of

– Konvergenz oder Divergenz? in: *ZaöRV* 2008, 484; *Pieroth B.*, Politischer Freiraum zur Umgestaltung des Bundesstaats, in: *ZRP* 2008, 90 (90 ff.); *Diggelmann O.*, *Altwickler T.*, Is there Something Like a Constitution of International Law? A Critical Analysis of the Debate on World Constitutionalism, in: *ZaöRV* 2008, 632 f.; *d'Aspremont J.*, *Dopagne F.*, Two Constitutionalisms in Europe: Pursuing an Articulation of the European and International Legal Order, in: *ZaöRV* 2008, 974 f.; *Ley I.*, Kant versus Locke: Europarechtlicher und völkerrechtlicher Konstitutionalismus im Vergleich, in: *ZaöRV* 2009, 335 f.; *Similarly see*: *Verfassung ohne Grenzen? Zur Bedeutung von Grenzen im postnationalen Konstitutionalismus*, in: *Pernice I.*, *von Engelhardt B.*, *Krieg S.H.*, *Ley I.*, *Saldias O.*, (Hrsg.), *Europa jenseits seiner Grenzen*, Baden-Baden, 2009, 91 ff.; *Walker N.*, Multilevel Constitutionalism: Looking Beyond the German Debate, LSE 'Europe in Question' Discussion Paper Series, Nr. 08/2009 June 2009, 3 ff.; *Cananea G. D.*, Is European Constitutionalism Really "Multilevel"? in: *ZaöRV* 70, 2010, 06 f.; *Steiger H.*, Staatlichkeit und Mitgliedstaatlichkeit – Deutsche staatliche Identität und Europäische Integration, in: *EuR-Bei* 2010, 57 (58); *Mahoney P.*, From Strasbourg to Luxemburg and Back: Speculating about Human Rights Protection in the European Union after the Treaty of Lisbon, in: *HRLJ*, Vol. 31/2011, Nr. 2-6, 75 ff.; *Tridimas T.*, Constitutional review of member state action: The virtues and vices of an incomplete jurisdiction, in: *Int J Constitutional Law*, Vol. 9 2011, 739 ff.; *Thym D.*, Euro-Rettungsschirm: zwischenstaatliche Rechtskonstruktion und verfassungsrechtliche Kontrolle, in: *EuZW* 2011, 169 f.; *Jestaedt M.*, Verfassungsgerichtsbarkeit und Konstitutionalisierung des Verwaltungsrechts, in: *Masing J.*, *Jounjaan O.*, (Hrsg.), *Verfassungsgerichtsbarkeit*, Tübingen 2011, 37 ff.; *Franzius Cl.*, Europäische Verfassung als Rahmenordnung demokratischer Politik, in: *EuR-Bei* 2013, 169 f.; *Bieling H.-J.*, Europäische Verfassung als „neuer Konstitutionalismus“, oder: zur europäischen Begrenzung der demokratischen Politik, in: *EuR-Bei* 2013, 219 f., etc.

⁵² *Häberle P.*, Gemeineuropäisches Verfassungsrecht, in: *EuGRZ* 1991, 18. Jg. Heft 12/13, 261 ff.; See also, *Arnold R.*, Das Prinzip der Kontrolle des Gesetzgebers in der Verfassungsgerichtsbarkeit Mittel- und Osteuropas als Ausdruck gemeineuropäischen Verfassungsrechts, in: *Jahrbuch für Ostrecht*, Bd. 43, 1. Halbband, 2002, 17-28.

⁵³ *Möllers Chr.*, *The Three Branches – A comparative Mode of Separation of Powers*, Oxford, 2013, 126 ff.; *Böckenförde E.-W.*, Verfassungsgerichtsbarkeit: Strukturfragen, Organisation, Legitimation, in: *NJW* 1999, 9 ff.

⁵⁴ *Häberle P.*, Grundprobleme der Verfassungsgerichtsbarkeit, in: *Häberle P.* (Hrsg.), *Verfassungsgerichtsbarkeit*, Darmstadt 1976, 3 ff.

the scope of constitutional control, which is inspired and determined by the classical debate on the mutual influence⁵⁵ of law and politics, as well as the legal and political discourse⁵⁶ distinct⁵⁷ by corresponding legal mindset⁵⁸ domestic, regional and international legal area⁵⁹ provided with relevant constitutional⁶⁰ and legal⁶¹ perspectives.⁶² For various legal orders, the determining factor of identity is the pertinent constitutional law⁶³, therefore, the appropriate constitutional-legal reality⁶⁴ is a peculiar perception of “essence” and “the very essence”⁶⁵ in multilaterally divided context of our reality.⁶⁶

This well-known phrase by *Charles Evans Hughes*, „We are under a Constitution, but the Constitution is what the judges say it is,” attracts the special attention of specialized constitutional control systems. Considering the classic assumption, the issue of legal concretization, in an extended sense, is also the subject of “discourse interactions”⁶⁷ („offene Gesellschaft der Verfassungsinterpreten”) ⁶⁸ of various state bodies; the definition and interpretation⁶⁹ of the constitution norms is an immanent function of the constitutional courts.⁷⁰ From this viewpoint, the Constitutional Court is the last interpreter of the Constitution.⁷¹

⁵⁵ Cf. *van Ooyen R. Ch.*, Politics, Staatsrecht und die demokratische Kontrolle der Macht im Spiegel totalitärer Erfahrung, in: *van Ooyen R. Ch (Hrsg.)*, Verfassungsrealismus, Baden-Baden 2007, 15 ff.

⁵⁶ Cf. *Langer L.*, Judicial Review in State Supreme Courts, NY, 1965, 123 ff.

⁵⁷ Cf. *von Beyme K.*, The Genesis of Constitutional Review in Parliamentary Systems, *Landfried Chr. (ed.)*, Constitutional Review and Legislation, Baden-Baden, 1988, 38.

⁵⁸ *Möllers Chr.*, Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts, in: Das entgrenzte Gericht, Berlin, 2011, 323 ff.

⁵⁹ *Huber P.*, Die EU als Herausforderung für das Bundesverfassungsgericht, Vortrag an der Humboldt-Univ. zu Berlin am 26. April 2012 (FCE 02/12).

⁶⁰ Cf. *Häberle P.*, Gemeineuropäisches Verfassungsrecht, in: *von Bogdany A./Bast J. (Hrsg.)*, Europäisches Verfassungsrecht, 2. Aufl., Heidelberg 2009, 26 -31.

⁶¹ Cf. *Nolte G.*, Messias oder Machiavell? Die Menschenrechtspolitik der USA, in: *Nolte G., Schreiber L., Der Mensch und seine Rechte – Grundlagen und Brennpunkte der Menschenrechte zu Beginn des 21. Jahrhunderts*, Göttingen 2004, 86 ff.

⁶² *Meyer T. D.*, Die Rolle der Verfassungsgerichtsbarkeit zwischen Recht und Politik, Diss., Bern 2011, 83 ff.

⁶³ Cf. *Canothilo J. J. G.*, Interkonstitutionalität und Interkulturalität, in: *Blankenagel A., Pernice I., Schulze-Fielitz H. (Hrsg.)*, Verfassung im Diskurs der Welt, Tübingen, 2004, 83 ff.

⁶⁴ *Kloepfer M.*, Perspektiven der Verfassung, in: *Grundmann St., Kloepfer M., Paulus Chr., Schröder R., Werle G., (Hrsg.)*, FS 200 Jahre Juristische Fakultät der Humboldt-Universität zu Berlin, Berlin 2010, 1299 ff.

⁶⁵ *Häberle P.*, Menschenbild im Verfassungsstaat, Berlin, 2005, 29.

⁶⁶ Carl Schmitt (1954): “Das Volk, die Nation bleibt der Urgrund alles politischen Geschehens, die Quelle aller Kraft, die sich in immer neuen Formen äußert, immer neue Formen und Organisationen aus sich herausstellt, selbst jedoch niemals ihre politische Existenz einer endgültigen Formierung unterordnet”, cited: *Bascheck N.*, Anfeindungen – Carl Schmitts “Begriff des Politischen” aus der Perspektive der Systemtheorie Niklas Luhmanns, Darmstadt 2010, 79.

⁶⁷ *Müller J. P.*, in: *Schefer M., Peters, A.*, Grundprobleme der Auslegung aus Sicht des öffentlichen Rechts, Symposium zum 60. Geburtstag von René Rhinow, Bern 2004, 84.

⁶⁸ *Häberle P.*, Der kooperative Verfassungsstaat, Berlin, 2013, 263 f.

⁶⁹ About the limit and object of interpretation, see in detail: *Barak A.*, Purposive Interpretation in Law, 2005, 3 et seq.

⁷⁰ *Quint P. E.*, 60 Years of the Basic Law and its Interpretation, in: *JöR (N. F. 57)* 2009, 1 ff.

⁷¹ Cf. *Möllers Chr.*, Die drei Gewalten, Göttingen 2008, 137.

The science of modern constitutional law does not debate the issue of the need to interpret the norms of the Constitution:

Considering the scope and scale of the interpretation of norms, a number of theses have been developed over time: „only by considering the meaning of the constitutional text, the idea of the primacy of the constitution can be understood. This primacy is of a semantic nature, because it would be rather strange to say that a text of uninterpreted symbols has such primacy; the idea of syntactic primacy is unintelligible.”⁷²

Taking into account the scope of the interpretation of norms, a number of theses has been developed over time:⁷³ „An Interpretation is correct in law if and only if it reflects the author’s intention“⁷⁴; „[...] to the extent that the law derives from deliberative law-making, its interpretation should reflect the intentions of its law-maker”. It [here: Germany's Federal Constitutional Court] has the last word in the interpretation of the constitution, which means that the latter defines the framework within which the constitution gets involved in political processes. This provided *R. Smend* with the opportunity to say in celebration of the ten-year anniversary of the Federal Constitutional Court that the basic federal law, in practice, works as the Federal Constitutional Court interprets it. But this does not mean that the Federal Constitutional Court is free to interpret the Constitution. If it were so, the principle of the Constitutional Supremacy would be violated and the principle of the primacy of the constitutional freedom and legal assessment would come into. This would oppose the basic law, which recognizes the supremacy (paragraph 3 of article 1, paragraph 3 of article 20 of the basic law) and implies the principle of supremacy on action, but not the principle of constitutional freedom and legal assessment. Therefore, the German Federal Constitutional Court adheres to the general rules of interpretation of the law. Constitutional control is carried out by taking account of the existing dimensions.”⁷⁵

The Federal Constitutional Court of Germany also notes that “the purpose of the interpretation is to determine the content of the norm in accordance to its literal meaning and essential composition”,⁷⁶ etc.⁷⁷

In this context, *Alexander Hamilton* mentions: „The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any

⁷² “only by considering the meaning of the constitutional text, the idea of the primacy of the constitution can be understood. This primacy is of a semantic nature, because it would be rather strange to say that a text of uninterpreted symbols has such primacy; the idea of syntactic primacy is unintelligible. See *Moreso J. J.*, *Legal Indeterminacy and Constitutional Interpretation*, Dordrecht, 1998, 131.

⁷³ Cf. *Berns W.*, *Constitutional Interpretation in the Court’s first Decades*, in: *Eastland T. (ed.)*, *Benchmarks – Great Constitutional Controversies in the Supreme Court*, Washington, 1995, 1-12; *Glendon M.A.*, *Toward a Structural Approach to Constitutional Interpretation*, in: *Eastland T. (ed.)*, *Benchmarks – Great Constitutional Controversies in the Supreme Court*, Washington 1995, 141 ff.; *Kavanagh A.*, *The Idea of Living Constitution*, in: *Canadian Journal of Law and Jurisprudence* Vol. 16, No.1, 55 ff.

⁷⁴ *Moreso J. J.*, *Legal Indeterminacy and Constitutional Interpretation*, Dordrecht, 1998, 160 -161.

⁷⁵ *Starck Chr.*, *Verfassungen*, Tübingen, 2009, 125.

⁷⁶ BVerfGE 35, 263, 278.

⁷⁷ *Imboden M.*, *Normenkontrolle und Verfassungsinterpretation*, in: *Verfassungsrecht und Verfassungswirklichkeit*, Festschrift von Hans Huber zum 60. Geburtstag 24. Mai 1961, Bern 1961.

particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.”⁷⁸

Before the establishment of separate constitutional courts, the authority to interpret the constitution was held by the Parliament, in the socialist republics – by the Supreme Presidium.

In general, two types of interpretation of the constitution differ from each other: concrete and abstract interpretation.⁷⁹

The Constitutional Court is equipped with the power of abstract interpretation, if the latter has the type of constitutional proceedings on the basis of the Constitution, which creates the possibility to interpret the norms of the Constitution separately and abstractly without referring to a specific case, as a result of submitting a relevant application (e.g. Bulgaria, Hungary, Ukraine, etc.). In some countries, the Constitutional Court is entitled to interpret not only the constitution norms but also the general legal norms within the framework of abstract interpretation (e.g. Azerbaijan, Ukraine). The specific interpretation of the Constitution is the opposite version – the Constitutional Court interprets the norms of the Constitution on the basis of the disputes under consideration within its classical powers.

The Constitutional Court of Georgia is not equipped with an independent type of constitutional proceedings that allows to interpret the Constitution. The Constitutional Court of Georgia interprets the norms of the Constitution within its powers, and not in the format of independent proceedings specially created for this purpose.

The normative framework, which allows the Constitutional Court of Georgia to interpret the norms of the Constitution, is quite diverse, however, in terms of this the Court seems fairly restrained in practice. In this regard, the judgment of February 5, 2013⁸⁰ is particularly significant. By this judgment the Constitutional Court refused to consider the constitutionality of constitutional laws (in terms of substantive constitutionality), which is a clearly controversial topic, because the constitutional law is also a normative act, any form of which can be appealed in the Constitutional Court. The justice of the Georgian Constitutional Court is going through the new stages of development and, so far, it does not have a firmly established dogmatics regarding a number of fundamental issues. It should be emphasized that with the established justice of the Constitutional Court of Georgia⁸¹:

"When resolving specific disputes, the Constitutional Court is obligated to analyze and evaluate both the relevant provision of the Constitution and the disputed norm in the context of the basic principles of the Constitution not to deviate completely from the order of values provided by the Constitution as a result of the interpretation. This is the only way to achieve a complete definition of

⁷⁸ The Federalist Papers, no 78; *Gerber S. D.*, To Secure These Rights, The Declaration of Independence and Constitutional Interpretation, New York 1995, 103 ff.

⁷⁹ *Tsanava L.*, Constitutional Control and Interpretation of the Constitution (Modern Constitutional Law (Book I), 2012 (in Georgian).

⁸⁰ Citizens of Georgia – Irma Inashvili, Davit Tarkhan-Mouravi and Ioseb Manjavidze against the Parliament of Georgia, N1/1/549 (in Georgian).

⁸¹ Decision of the Constitutional Court of June 28, 2010 (466th Constitutional Lawsuit) – Public Defender of Georgia against the Parliament of Georgia, II-4.

the constitution norm which, in turn, contributes to the correct assessment of the constitutionality of a specific disputed norm.” (Decision N1/3/407 of the Constitutional Court of Georgia, December 26, 2007 on the case of the Association of Young Lawyers of Georgia and Georgian citizen Ekaterine Lomtadze against the Parliament of Georgia). The Constitutional Court expressed a similar approach to the case of Georgian citizen Maya Natadze and others against the Parliament of Georgia and the President of Georgia (decision N2/2-389 of October 26, 2007). “The Constitutional Court, when checking the constitutionality of disputed norms, is not limited only to specific norms of the Constitution. It is true that constitutional principles do not establish basic rights, but the contested normative act is also subject to verification on the ground of the main principles of the Constitution, in connection with individual norms of the Constitution, and from this point of view, the judgment must be conducted in a unified context. The Constitutional Court must determine to what extent the appealed act is compatible with the constitutional-legal order established by the Constitution”.

4. Methods of Constitution Interpretation in German Constitutionalism

4.1. Principles and Criteria of Constitution Interpretation

The principle is clear, nevertheless, the constitution itself is not an apparently discernible phenomenon, it needs to be interpreted.⁸² A central theme of modern constitutionalism is the constitution interpretation by the criteria that go beyond common law standards⁸³ of interpretation. A well-known example is the methodological dispute in the US constitutional law between different forms of historical interpretation (“originalism”) and the idea of perceiving the constitution as a “living instrument”. A number of methodological approaches also competes in making an interpretation of the German Federal Constitution.

The conventionalities for the normative constitution⁸⁴ are the limit of legislative (including the founder of the constitution), executive and judicial powers with the value scales in the constitution and the entire text of the constitution. They highlight the problem of constitution interpretation. Setting the limit for the legislators and free political decision-makers to steer, depends on the constitution interpretation. In this sense, the legislator is not outside the limit established by the constitution. The limit is identified by the interpretation of the Constitution, which is under the control of the Constitutional Court.

The normative constitution is determined by several factors: the normative and real conventionality⁸⁵ differ from each other. The normative conventionalities are: the principle of the constitution supremacy, separation of powers, protection of basic rights. In particular, the constitution

⁸² *Hillgruber Chr.*, Verfassungsinterpretation, in: *Depenhauer O., Grabenwarter Chr.*, (Hrsg.), Verfassungstheorie, 506 ff.

⁸³ *Herdegen M.* in: *Herdegen M., Masing J., Poscher R., Gärditz K.F.*, Handbuch des Verfassungsrechts, 1. Auflage 2021, § 1 Das Grundgesetz im Gefüge des westlichen Konstitutionalismus, Rn. 82-89.

⁸⁴ *Starck Chr.*, Maximen der Verfassungsauslegung, in: *Isensee J., Kirchhof P.*, (Hrsg.), Handbuch des Staatsrechts, B. XII, Normativität und Schutz der Verfassung, 3. völlig neubearbeitete und erweiterte Aufl., 2014, 613 ff.

⁸⁵ *Ibid.*

should create such a structure of a government organization that power cannot be monopolized and, the possibility for executive bodies to fulfil their own functions (obviously, within the constitutional framework). Constitution lacks legitimacy if it does not recognize the essential components of the separation of powers. Political culture and the readiness of civil society to lead political processes and to participate in them are the real conventionalities for the normative constitution.⁸⁶ The political culture, which determines the degree of constitution norms, also needs to develop the science of law to an appropriate stage.⁸⁷ The real fundamentals of the constitution are based on the normative cores of the constitution, , for example, the political beliefs of the political parties and candidates are the reflection of the political culture of the society that vote for them.

The constitution is both the basis and the limit (scale) of the state's activities. When interpreting the constitution, the principle of the supremacy of the constitution should be taken into account. To determine how the activity of the state is regulated by the constitution, it is necessary to identify the essence of the relevant constitutional norm.

The science of German constitutional law distinguishes several principles of the interpretation of the constitution:⁸⁸ literal meaning, grammatical construction, systematic definition, normative will of the historical legislator and objective teleological issues. The definition of a constitutional norm and, in general, the definition of a norm is always abetted by creativity. But the latter should not go beyond the essence of the norm to be explained.

When interpreting the constitution, it is common to address to the methodology of norm interpretation by Friedrich Karl von Savigny for the purposes of private law and further teleological factors, which, in addition to the latter (teleological interpretation), includes: grammatical, logical, historical and systematic methods of interpretation. Despite the possibility of using this classical canon of norm interpretation, the process of constitutional interpretation follows special rules and methods.

In this context, the classical methods to ascertain the norm in the science of constitutional law, considering the methodology of norm definition, are exposed in their own way. In particular, the use of the canon established by Savigny is inevitable. It is also inevitable to use the method of teleological explanation. However, the latter is used in constitutional law with different substantive composition. For example, the definition of the constitution is followed by additional factors, such as “the idea of the constitution unity”, “practical compatibility” (to allow for monitoring legal benefits), “functional-legal correctness” and others.⁸⁹ The last-mentioned, in fact, forms the components of the method for systematic explanation, which is a variety of Savigny's classical methods of explanation. In addition, the historical will of a legislator is also considered when interpreting the constitution, which is a type of historical interpretation as well. Besides, the teleological definition is used to identify the goals of constitutional norms. Savigny’s classical methods used to interpret the constitution are of equal grade and none of them is preferred.

⁸⁶ Hesse K., *Die Normative Kraft der Verfassung*, 1959, 16 ff.

⁸⁷ Starck Chr., *Maximen der Verfassungsauslegung*, in: *Isensee J., Kirchhof P. (Hrsg.), Handbuch des Staatsrechts*, B. XII, *Normativität und Schutz der Verfassung*, 3. Völlig neubearbeitete und erweiterte Aufl., 2014, 613 ff.

⁸⁸ *Ibid.*

⁸⁹ 625 ff.

Although scholarly legal opinion has consolidated on the idea of constitutional justice, the same cannot be said about the methods of Constitution interpretation, about which, differences of opinions and discussions continue to this day.

Modern positivized constitutions, successors of the US Constitution, are characterized with a high degree of normativity. Legally binding constitution that proclaims this idea should facilitate and stabilize democratic political processes⁹⁰. This requirement has to be required while interpreting the constitution. When interpreting the constitution, the will of the constituted legislative must be identified and not to be allowed to act on the ground of the subjective attitude of the norm interpreter. But can the “will of a lawmaker” be a chimera?⁹¹ The legislature of the Constitution and its will are a fiction from a legal perspective.⁹²

The majority of modern constitutions base their legitimacy, explicitly or implicitly, on the idea of popular sovereignty. German constitutional law theorist Christian Stark diagnosis several special methods of interpreting the constitution:⁹³ classical-hermeneutic method of interpreting the Constitution, schematic (problem-oriented) interpretation of the Constitution, the so-called scientific interpretation of reality, hermeneutic-concretizing interpretation of the Constitution, etc. The following chapters discuss each of them.

4.2. Methods of Interpreting the Constitution

4.2.1. Classical-hermeneutic Model of the Constitution Interpreting

The development of this method is connected with the ideas of the German scientist Ernst Forsthoff.⁹⁴ The explanation of the classical hermeneutic method of Constitution interpreting is expressed in several sentences:⁹⁵

- The Constitution must be interpreted in the same way that laws are interpreted. The existence of the constitution in the form of law is the result of the rule of law and the basis of its stability;
- The process of interpreting the law is confined within limits according with the classical-hermeneutic interpretive methods by Karl von Savini.⁹⁶ These methods of explanation include: grammatical, logical, historical and systematic methods. In this context, the special nature of the Constitution is not rejected in relation to other laws. The latter can be

⁹⁰ *Hillgruber Chr.*, Verfassungsinterpretation, in: *Depenhauer O., Grabenwarter Chr.*, (Hrsg.), *Verfassungstheorie*, 506 ff.

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Starck Chr.*, Maximen der Verfassungenauslegung, in: *Isensee J., Kirchhof P.*, (Hrsg.), *Handbuch des Staatsrechts*, B. XII, Normativität und Schutz der Verfassung, 3. Völlig neubearbeitete und erweiterte Aufl., 2014, 613 ff.

⁹⁴ *Forsthoff E.*, Die Umbildung des Verfassungsgesetzes = ders., *Rechtsstaat im Wandel*, 2. Aufl., 1976, 130 ff.

⁹⁵ *Böckenförde E.-W.*, Die Methoden der Verfassungsinterpretation – Bestandaufnahme und Kritik, in: *NJW* 1976, 2089 ff.

⁹⁶ *Savigny C. v.*, *System des heutigen römischen Rechts* I, 1840, 212 ff.

examined as an additional element to the interpretation. This factor should not lead to the infirmity of the classical methods to interpret the law.

By the specified method, the constitution is equated with the law. Nevertheless, the constitution creates a framework and its norms are more abstract than ordinary law⁹⁷. This is already an answer to the question whether only the Savinian canon is sufficient for the interpretation of the Constitution. Obviously, it is not enough, because the constitution differs from ordinary law in many ways and requires additional standards of interpretation.

4.2.2. A Schematic, Problem-oriented Interpretation of the Constitution Norms

In general, during the interpretation of the constitution, the classical methods of norm interpretation are completed. Only the fact that the text of the Constitution is the limit of its interpretation is not sufficient to ensure the legitimacy of the Constitution (only the latter can be binding), because the normative composition of the same text frequently requires interpretation.⁹⁸ From this point of view, when interpreting the constitution, the classical methods of norm interpretation are extended through a schematic explanation. In this context, there must be considered: the importance of prejudice; Comparative-legal aspects and the European Convention on Human Rights, with its European judicial interpretations of human rights and justice; The principle of proportionality, etc. In this process, the importance of prejudices is special, which creates the experience of interpreting the constitution norms.

Peter Häberle also often emphasizes the importance of “an open society interpreting the constitution”.⁹⁹ In the scope of the latter, a broad concept of the constitution interpretation has been developed, according to which the final responsibility for the interpretation of the Constitution rests with the Constitutional Court, and before the Constitutional Court, the Constitution is actually “interpreted” by various branches of government and also by social groups through their legal activities.

Christian Stark criticizes such a broad interpretation of the constitution and calls it incompatible with the framework-character of the constitution and the scientific context of law. He notes that the legislation is not a concretization of the Constitution, but a politically directed activity of the legislator, relied on the constitutional powers and substantive and procedural instruments of the Constitution.¹⁰⁰

⁹⁷ Böckenförde E.-W., Die Methoden der Verfassungsinterpretation – Bestandaufnahme und Kritik, in: NJW 1976, 2089 ff.

⁹⁸ Starck Chr., Maximen der Verfassungsauslegung, in: Isensee J., Kirchhof P., (Hrsg.), Handbuch des Staatsrechts, B. XII, Normativität und Schutz der Verfassung, 3. Völlig neubearbeitete und erweiterte Aufl., 2014, 628.

⁹⁹ Häberle P., Die offee Gesellschaft der Verfassungsinterpreten, in: JZ 1975, 297 ff.

¹⁰⁰ Starck Chr., Maximen der Verfassungsauslegung, in: Isensee J., Kirchhof P. (Hrsg.), Handbuch des Staatsrechts, B. XII, Normativität und Schutz der Verfassung, 3. völlig neubearbeitete und erweiterte Aufl., 2014, 627.

4.2.3. The So-called a Scientific Interpretation Corresponding to Reality

This method of constitution interpretation derives from Rudolf Smend's doctrine of "integration".¹⁰¹ The essential thesis of this method of interpretation is the following: the substance and reality of the constitution, not its literal composition or terms, are the basis and scope of its interpretation.¹⁰²

This method of constitution interpretation is an extreme form of its schematic interpretation, which is saturated, in part, with the arguments of Peter Heberlet. First of all, this method should be distinguished from the process of constitution interpretation, within the framework of which it is studied the description of the reality setting in the norm and the redirection to it. The following non-normative factors: the social function of the constitution, the conscience of citizens, social transformations are considered in the scientific interpretation of reality. In this context, the normative factors of the interpretation of the Constitution are overcome providing for the contemporary epochal changes. At this time the flexibility of the constitution is addressed to be in correlation with the contemporary reality. Christian Stark¹⁰³ points out that this method of interpreting the constitution gets the normative preconditions concealed and interpreting the constitution on the ground of social sciences, the normative dimensions of the interpretation are changed into non-normative factors and furnish social philosophy to grasp normativism, which is unacceptable. In his opinion, the constitution, as a groundwork document, leaves enough space for politics and social philosophy, and a further expansion in the so-called "reflection of reality with a scientific interpretation" is not necessary.

4.2.4. Hermeneutic, Concrete Interpretation of the Constitution

The starting point of this method are the following theses:

- The interpretation of the constitution as concretization (Konrad Hesse)¹⁰⁴; In that regard, problems of interpretation arise only when the constitution does not contain unambiguous scales and there is no constitutional solution to the problem. The interpretation of the constitution, in this sense, has a law-making and complementary nature, which results in a legal "concretization". In practice, this kind of interpretation is done using the frame-norms of the Constitution (essential principles, basic rights). The limit for such an interpretation of the Constitution is the text of the Constitution.
- Methodical rationalization of the concretization process; in this light, the constitutional norm is perceived as a scale and framework of norms designed for individual cases. From

¹⁰¹ *Böckenförde E.-W.*, Die Methoden der Verfassungsinterpretation – Bestandaufnahme und Kritik, in: NJW 1976, 2089 ff.

¹⁰² *Smend R.*, Staatsrechtliche Abhandlungen, 2. Aufl., 1968, 188-196.

¹⁰³ *Starck Chr.*, Maximen der Verfassungsauslegung, in: *Isensee J., Kirchhof P.* (Hrsg.), Handbuch des Staatsrechts, B. XII, Normativität und Schutz der Verfassung, 3. völlig neubearbeitete und erweiterte Aufl., 2014, 631.

¹⁰⁴ *Hesse K.*, Grundzüge des VerfassungsR der Bundesrepublik Deutschland, 8. Aufl., 1976, 11 f.

this standpoint, it is necessary to concretize the constitutional norm for individual cases but in unviolated way.¹⁰⁵

4.2.5. Integration Function

Besides, its integrative function is also considered when interpreting the Constitution. Obviously, it is incontrovertible that a good constitution serves the function of public integration.¹⁰⁶ The methods of its interpretation are not freely chosen. The use of each method should include and be consistent with a specific ground.

4.2.6. Lawmaking through Interpretation of the Constitution

It is difficult to neatly disconnect the method of interpretation of the Constitution from the teleological interpretation of the norm which constitutional law-making is committed.¹⁰⁷ Constitutional law-making, like legislating, in general, is necessary when the law flaws and needs to be filled. In this context, no one is unlimited, the functional purpose of the constitution appears as a binding mechanism in this process. In constitutional law-making, consideration should be focused on the fact that sometimes the constitution provides a legislator making political decisions that It is not allowed.

Constitutional legislation is not always a fact that the constitution interpretation goes beyond the text of the constitution. In German constitutional law represents several cases¹⁰⁸ when the issue concerns constitutional law-making: for example, the possibility of deploying German Peace Corps in different parts of the world under the auspices of the United Nations (UN) is not provided by the German Federal Constitution. On the contrary, Clause 2 of Article 87 “A” of the Constitution emphatically states that “military forces must be used for self-defense only in the cases expressly provided by the Constitution”. If we consider that the changed international legal and political reality requires a similar activity on the part of the German Federation (Article 24 Paragraph 2 of the German Federal Law and Germany's Accession to the UN) the Federal Constitutional Court Germany made the decision that obliges the German government to seek the prior approval of the Lower House of Parliament for each new deployment of military forces in a peacekeeping mission in any parts of the world.¹⁰⁹

Another example is the 1999 decision of the German Federal Constitutional Court on the financial equalization of federal lands.¹¹⁰ Without specific constitutional provisions, the German Federal Constitutional Court compels the federal legislature to adopt the so-called the scaling law that

¹⁰⁵ See in detail: *Böckenförde E.-W.*, Die Methoden der Verfassungsinterpretation – Bestandaufnahme und Kritik, in: NJW 1976, 2089 ff.

¹⁰⁶ *Starck Chr.*, Maximen der Verfassungenauslegung, in: *Isensee J., Kirchhof P.*, (Hrsg.), Handbuch des Staatsrechts, B. XII, Normativität und Schutz der Verfassung, 3. völlig neubearbeitete und erweiterte Aufl., 2014, 631.

¹⁰⁷ *Ibid*, 634.

¹⁰⁸ *Ibid*, 635.

¹⁰⁹ BVerfGE 90, 286 (381 f.).

¹¹⁰ BVerfGE 101, 158.

will specify and complement the relevant constitutional-legal provisions on horizontal financial equalization (Article 106, paragraph 3, sentence 4 of the German Federal Constitution; Article 107, paragraph 2, 1, 2 and sentences 3). The Federal Constitutional Court of Germany emphasizes the need to “develop” the federal constitutional principles and “to shape them for getting the financial constitution coincided with the contemporary dimensions and verified periodically.”¹¹¹

Another example of constitutional legislation is the so- called legal obligations for protection (*grundrechtliche Schutzpflichten*), which are used as subjective rights, developed within the framework of Article 1, Paragraph 1 and Article 6, Paragraph 1 of the Federal Constitution of Germany.

Christian Stark indicates that what cannot be substantiated through an objective teleological definition, considering the frame-character of the constitution, must be affirmed by its own spatial explanation.¹¹²

4.2.7. Interpretation According to the Constitution (Verfassungskonforme Auslegung)

To ensure the effective working of the Constitution, it is necessary to interpret the existing legislation in accordance with the Constitution, even if the common law is explained contrary to the Constitution.¹¹³ This definition of the constitution is one of the variations of the legislative norm definition, not the constitution. Using this type of interpretation method requires vigilance for a law not to be added different meaning by a judge and replaced the essential composition of the legal norm with his own individual narrative.

It should be noted that not only the Federal Constitutional Court, but also ordinary courts are restricted by the constitution interpretation in Germany. The ordinary courts are required checking the possibility of interpreting the norm constitutionally by using this interpretation method, and then stop the proceedings and apply to the Constitutional Court with appropriate constitutional submissions regarding the issue of the constitutionality of the applicable norm.¹¹⁴

4.2.8. Comparative Legal Method (Comparativism) as a Method of the Constitution Interpretation

The process of using the comparative legal method is like a journey.¹¹⁵ There is an opinion that comparative legal analysis has its own methods, which are completely different from the methodical

¹¹¹ BverfGE 58 (218); *Starck Chr.*, Maximen der Verfassungskonforme Auslegung, in: *Isensee J., Kirchhof P.* (Hrsg.), *Handbuch des Staatsrechts*, B. XII, Normativität und Schutz der Verfassung, 3. völlig neubearbeitete und erweiterte Aufl., 2014, 635.

¹¹² *Starck Chr.*, Maximen der Verfassungskonforme Auslegung, in: *Isensee J., Kirchhof P.*, (Hrsg.), *Handbuch des Staatsrechts*, B. XII, Normativität und Schutz der Verfassung, 3. völlig neubearbeitete und erweiterte Aufl., 2014, 636.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*, 637.

¹¹⁵ *Frankeberg G.*, *Critical Comparisons: Re/thinking Comparative Law*, 26 *Harv. Int'l L. J.*, 1985, 411-455.

teachings of national law and the process of presenting them in a comparative context.¹¹⁶ The comparative legal method has become an method of constitution interpretation in many of the highest courts¹¹⁷ in the world, for instance, the Supreme Court of the Great Britain, the Constitutional Court of Colombia, the Constitutional Court of South Africa, and to some degree, the Supreme Court of the United States. The importance of this method to interpret the fundamental rights is special. Decisions of the supreme courts of different countries are essentially used as comparative legal examples. In particular, the German Federal Constitutional Court is active in using the comparative legal method as a method of constitution interpretation. It is problematic and interesting how relevant examples are used as comparative legal tools. From this angle, the issue of “functional equivalence” of the comparable norm or constitutional institution is of decisive importance.

In Europe and Germany, the comparative method of constitutional law has more applications in practice, which is not the case with the US Supreme Court.¹¹⁸ The different development of the USA and Europe can be explained by the dynamic processes taking place within the framework of European law and the growing intensity of judicial practice ensuring integration. Comparative legal interpretation played a special role in interpreting the Treaty on European Union itself. The comparative legal interpretation of the Constitution takes place at several levels: when strengthening one's own arguments while rejecting or recognizing the examples given in the manner of comparative legal analysis.

The frequency of using the comparative legal method at the level of the European Supreme and Constitutional Courts is due to the worldview proximity of the national legal order of the European Union countries and the European supranational law. This reason explains the fact that the German model of reservations about integration was successfully introduced in other countries of the European Union (Denmark, Czech Republic, Spain).¹¹⁹

4.2.9. The So-called Dynamic, the Same, Evolutionary Definition Method

The dynamic, the same evolutionary definition method is used to interpret¹²⁰ the European Convention on Human Rights. This method is a type of the teleological interpretation method. In this case, the convention is interpreted as „living instrument, which must be interpreted in the light of present day conditions”.¹²¹ Applying to this method, despite the emphasis on evolution and dynamism, the European Court of Human Rights does not go beyond the classical criteria of norm interpretation. The appeal of the dynamic, the same, evolutionary method of norm definition is connected with such

¹¹⁶ *Hwang Sh.-P.*, *Verfassungsrechtlicher Jurisdiktionsstaat? Eine rechtsvergleichende Analyse zur Kompetenzabgrenzung vopn Verfassungsgericht und Gesetzgeber in den USA und der Bundesrepublik Deutschland*, Berlin 2005, 35.

¹¹⁷ *Herdegen M.* in: *Herdegen M., Masing J., Poscher R., Gärditz K.F.*, *Handbuch des Verfassungsrechts*, 1. Auflage 2021, § 1 Das Grundgesetz im Gefüge des westlichen Konstitutionalismus, Rn. 82-89.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Grabenwarter/Pabel*, § 5. Allgemeine Fragen der Auslegung der EMRK, in: *Europäische Menschenrechtskonvention*, 7. Auflage 2021, Rn. 14-16.

¹²¹ *Ibid.*

multi-meaningful conventional concepts as “morality” and “public order”. The ideas about them have significantly changed since the 50s, therefore, when focusing on these concepts, the quality of modern social development should be taken into account. It is an engrossing subject how the method of interpreting the norms of the European Convention on Human Rights can be used to interpret constitutional norms. In this context, we approach the classic debate in the US constitutionalism: originalism or non-originalism, or the idea of a “living constitution”. This problem is complicated enough to sort out a dogmatic solution, it depends on each case and context. In general, the method of dynamic or evolutionary definition can be used in the interpretation of ambiguous concepts like “morality” in the case of the definition of the constitution. However, for “originalists” this may be debatable.

4.3. Comparison of Interpretive Methods

In Europe, originalism is not used as a method of interpretation, however, in Austria, regarding the issues of federal separation of legislative powers, originalist and structuralist interpretation methods are applied.¹²² It is difficult to describe the methodology of interpretation of the norm within the judicial system of any country by emphasizing the superiority of any method of the constitution interpretation because the process of interpretation is quite complex and, from this frame of reference, judicial practice creates an eclectic reality. In this respect, Mark Tashnet also talks about a kind of “eclecticism”.¹²³ It is generally accepted that the Austrian Supreme Court is more legalistic than its Canadian, German, Indian or South African counterparts.¹²⁴

The standard of the constitution interpretation is elucidated by many factors: textualism that provides reading the text of the constitution word-for word, the contextual perception of interrelated norms, the identification of criteria confirming the will of the legislator, the identification of the preconditions for spatial or objective interpretation, the perception of the “structural” principles of individual norms of the constitution or the system of norms, precedent and judicial doctrines that have been developed on this basis, court evaluations and public policy.¹²⁵ Additional requirements are: the principles of constitutional interpretation followed by the deference to established judicial practice or newly elected government, international and comparative law, or the advanced scientific opinions rampant in academic circle.¹²⁶

Despite the above-mentioned factors, it would be a mistake not to notice the similarity in the interpretation methodology of the Constitution. Despite similar arrangements in the context of constitution interpretation and the resemblance of the interpretation method, there are clear differences: for example, in the USA, the comparative interpretation method is used less than in

¹²² *Rosenfeld M., Sajó A.*, *The Oxford Handbook of Comparative Constitutional Law*, New York 2012, 689 et seq.

¹²³ *Tushnet M.*, *The United States: Eclecticism in the Service of Pragmatism*, in: *Goldsworthy J.* (ed.), *Interpreting Constitutions: A Comparative Study*, 2007, 7.

¹²⁴ *Rosenfeld M., Sajó A.*, *The Oxford Handbook of Comparative Constitutional Law*, New York, 2012, 695 et seq.

¹²⁵ *Ibid*, 696.

¹²⁶ *Ibid*.

European countries while the originalist method of interpretation is used more in the US and sometimes in Australia; the “structural” principle of constitutional norm interpretation plays a more important role in Germany, Canada, India and South Africa than in the USA and Australia; Academic scientific opinion is more vital to interpret the constitution in Germany than in other countries of common law, especially while interpreting old constitutions, etc.¹²⁷

There is no hierarchy among the classical methods of norm definition, although some reservations can be made about when which one is used:¹²⁸

- The literal interpretation of the norm is used when the content of the text is appreciable. An “interpretation” inconsistent with the literal meaning of the norm is already legal action through the addition-correction of the law;
- Through the teleological definition it can be proved that the specific meaning of the norm must be interpreted against the established legal terminology, because the norm can include exceptional expressions through non-established terms;
- Systematic interpretation of the law is relevant in the case when the interrelationship of norms provides the interpreted norm with a unique, specific acknowledgment;
- An important criterion to interpret the norm is also the substantive precondition that guided the law-makers in the process of developing the norm. But it is not restricting for the interpreter of the norm and is less extensive in relation to the teleological definition of the norm;
- In relation to the teleological criteria in the process of defining the norm, the purpose of the law foreseen by the legislator is also important. The judge is restricted by this purpose of the norm to assign another function to the norm;
- The objective teleological definition of the norm is mainly applicable even when the historical aim of the legislator is not uniquely recognized and the aims stated by the content of the norm, in a way, are contradictory. Sometimes, during the teleological interpretation of the norm, one can also appeal to the purpose of the legislator if using teleological criteria turns out that the legislator was likely to mean the same thing. From this perspective, the purpose of the legislator and the objective-immanent goal of the norm create mutually complementary factors. In order to identify the aim of the norm, this type of interactive understanding of the latter (the interrelationship of subjective-objective definitions) is often fruitful.

4.4. The Distinctive Issues Related to the Definition of Fundamental Rights

The catalog of basic rights in the Constitution of Germany was rarely changed. Despite this solid nature and long constitutional jurisprudence, judicial practice continues to face unanswered questions that has developed a number of theories for using to interpret fundamental rights. The liberal, institutional, democratic-functional, social state compatible theories of basic rights and also the

¹²⁷ Ibid.

¹²⁸ Larenz K., *Methodenlehre der Rechtswissenschaft*, 1960, 258 ff.

value theory about the definition of basic rights differ from each other.¹²⁹ The standard of interpretation of fundamental rights depends on which theory is followed by the interpreting authority. Nevertheless, when selecting these theories, the interpreter of the norm is still not completely free, he is constrained with the constitutional restrictions. In addition, classical methods of defining the norm are used to determine basic rights, which, in turn, is a kind of limiting factor. According to the justice of the Federal Constitutional Court of Germany, the method of interpretation is preferred when explaining the norm and considering the core of the constitutional norm describing the basic right reaches the maximum limit of its validity.¹³⁰ However, all of this depends on what the limit of the relevant basic right is and how it is interpreted, and what type of legal kindness can be discerned as a counterweight to the basic right. The most recognized principle to define the fundamental right is that the scope protected by the fundamental right and its limit should be distinguished from each other. The protected area is identified by the definition of the fundamental right, taking into account the constitutional limit of the individual fundamental right. In view of the justice of the German Federal Constitutional Court, the area protected by fundamental rights is, in essence, broadly interpreted. If the sphere, protected by the fundamental right is harassed, the right to free development of a person should be considered (Paragraph 1 of Article 2 of the Federal Constitution). For example, the German Federal Constitutional Court provides a wide interpretation of the constitutional concept of a family including unmarried parents. If the parents are divorced, there are two families.¹³¹ Besides, according to the German justice established by the constitutional concept of marriage, only the relationship between a man and a woman is considered, the partnership between representatives of the same gender is not recognized by the constitutional concept of marriage, but it is protected by the basic right to the free development of a person.¹³²

Fundamental rights can be limited by valuable legal favors. The issue concerns legal kindness provided by the Constitution (eg, the rights of others) or values derived from the Constitution (eg, public health). The means used to protect these values must be useful, necessary and proportionate (principle of proportionality)¹³³. In this context, the Federal Constitutional Court of Germany develops the control tools to identify the legitimate limitation of fundamental rights or their violations. Proportionality is usually balanced by the Federal Constitutional Court¹³⁴ of Germany, based on the principle of the rule of law. The principle of proportionality emanates from the principle of the rule of law.

¹²⁹ *Starck Chr.*, Maximen der Verfassungsauslegung, in: *Isensee J., Kirchhof P.*, (Hrsg.), *Handbuch des Staatsrechts*, B. XII, Normativität und Schutz der Verfassung, 3. völlig neubearbeitete und erweiterte Aufl., 2014, 638.

¹³⁰ *Ibid.*, 639; BVerfGE 4, 7 (72); 32, 54 (71); 39, 1 (38).

¹³¹ BVerfGE 127, 263 (287).

¹³² *Starck Chr.*, Maximen der Verfassungsauslegung, in: *Isensee J., Kirchhof P.*, (Hrsg.), *Handbuch des Staatsrechts*, B. XII, Normativität und Schutz der Verfassung, 3. völlig neubearbeitete und erweiterte Aufl., 2014, 641.

¹³³ See in detail: *Barak A.*, *Proportionality – Constitutional Rights and their Limitations*, Cambridge 2012, 129 et seq.

¹³⁴ BVerfGE 23, 127 (133).

"Hypertropia of basic rights" – that is how Karl August Bettermann¹³⁵ characterized the process of continuous expansion of the normative essence of basic rights recognized by the German Federal Constitution 35 years ago.¹³⁶

As mentioned, to explain fundamental rights there is used a specific theory, more relevant to it. In this sense, the content of a fundamental right can be identified differently, depending on which theory of fundamental rights is used by the judiciary – liberal (and based on the rule of law), institutional or democratic-functional.¹³⁷ Therefore, it is interesting how to select between the theories of basic rights and whether the constitution furnishes some restrictive criteria for this type of freedom of choice.¹³⁸ The essential theories about basic rights, according to Ernst-Wolfgang Bickenforde¹³⁹, are the following: liberal or civil (adequate to the legal state ground) theory of basic rights, institutional theory, value theory of human rights, the theory of basic rights appropriate to the democratic functional and social state.

According to the theory of liberal or civil (adequate to the legal state ground) rights, fundamental rights are the individuals' rights to liberty against the state. In this regard, basic rights are perceived as pre-state rights that are realized without interference by the government. Such liberal understanding of freedom only provides the state with negative obligations. This context is the problematic part of the theory of liberal basic rights: the so-called Blindness to the social prerequisites of freedom (rights to liberty) and the process of its implementation.¹⁴⁰

According to the theory of institutional basic rights, basic rights are represented not only by the rights to personal self-defense against the state, but objective principles for the areas protected by them. In this context, basic rights are discerned to require institutionally secured spheres of life. Basic rights (and the idea of freedom) within this theory are perceived not only as subjective rights, but also as "objectified", already normatively and institutionally determined¹⁴¹ rights (freedom). The influence of this theory in practice is great, because under its influence, the space to implement basic rights is opened for legislative regulation of the areas protected by basic rights. From this point of view, the law is perceived not as an interference with the fundamental right, but as a prerequisite for its implementation. Freedom, in this context, is understood not only as a normative idea directed against the home state, but also the idea oriented on specific goals, which aims at executing the institutional objective essence of the practical provision of the freedom principle.¹⁴²

The value theory of basic rights is established on Rudolph Smend's¹⁴³ theory of integration. In accordance to this theory: basic rights are valuable?? categories with which legal order is imbued and

¹³⁵ *Bettermann K. A.*, *Hyperthropie der Grundrechte. Eine Streitschrift*, Hamburg, 1984.

¹³⁶ *Sommermann K.-P.*, *Die Entwicklung der Grundrechte und Grundrechtsdogmatik in Deutschland*, in: *Blanke H.-J., Magiera S., Pielow J.-C., Weber A., (Hrsg.), Verfassungsentwicklungen im Vergleich – Italien 1947 – Deutschland 1949 – Spanien 1978*, Berlin 2021, 62ff.

¹³⁷ *Böckenförde E.-W.*, *Grundrechtstheorie und Grundrechtsinterpretation*, in: *NJW* 1974, 1529 ff.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

on which the idea of the state is based, in turn, whose function is integration. Integration of the people living within the state, in the context of the values is recognized by the basic rights. Conforming to this theory, the entire state and public culture is revolved around these values. Consistently, the basic rights, as well as institutional theory, have primarily an objective dimension and not subjective requirements. In this respect, the value categories recognized by the idea of freedom are not considered a pre-state reality, it is a part of the constitution from the moment of its adoption.¹⁴⁴ The results of the institutional theory of fundamental rights and the value theory are comparable, because in both cases the issue concerns the objectification of the right to freedom. Nevertheless, the value theory of basic rights contains additional components: values often change, and this also causes the “change” of the essence of rights, which is problematic; It is impossible to identify values only by legal methods, and humanitarian sciences appear to be an additional methodology of definition, which is also problematic. On this occasion the idea of freedom gets relativized, because it turns into a freedom determined by value categories, which is ensured by a state, which is problematic as well.

In general, the constitutional courts try to use the value theory of basic rights or the standard of basic rights interpretation, through the values recognized by the latter in case of conflict of fundamental rights or values weighting. However, this theory does not ensure the final answer in the mentioned cases. As there is no hierarchy between values, simultaneously interests are weighed when fundamental rights collide and priority is given to the greater kindness. This conflicting context makes the theory ambiguous and it must be used in practice conscientiously in order not to undermine the essence of any fundamental right. The starting point of the theory of democratic functional basic rights is their perception in accordance with the public and political functions.¹⁴⁵ From this perspective, there are considered democratically determined basic such as freedom of expression, freedom of assembly and demonstrations, freedom of the press, freedom of association, etc. According to this theory, basic rights are perceived as factors implementing the public interests of citizens, within the framework of which political processes take place “from the bottom up” citizens to the principles of state management. The idea that basic rights mainly define the individual's non-state and pre-state opinion, in accordance with this theory, is recognized but perceived as the result of apolitical, bourgeois thinking. The notion of basic rights, in keeping with this theory, is manifested in public, democratically constitutive functions, which define and determine the content of basic rights. In this regard, basic rights are functional, competent norms for the subjects of basic rights to participate in public and political processes and are not made out as separation and redistributing categories of competences between an individual and the state.¹⁴⁶ The influence of this theory on fundamental rights interpretation is considerable. In consonance with this, freedom is not only freedom as a value, but freedom “for something”. From this point of view, ensuring freedom is a prerequisite for the exertion of democratic, political processes. The content and extent of freedom is determined by that function it serves. It is interesting that the intensification of the theory of basic rights, or the idea of the need to

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ *Smend R., Bürger und Bourgeois im deutschen Staatsrecht, ders., Staatsrechtliche Abhandlungen, 1955, 313, 314.*

exercise freedom, can lead to the relativization of the idea of freedom, which implies the obligation to exercise freedom. This context is not far from the communist theory of fundamental rights and caution is warranted when applying it in the process of interpreting fundamental rights.¹⁴⁷ Within the scope of the relevant definition of the social state of basic rights it is essential to consider the results of the liberal order formed within the theory of liberal basic rights, public development, the social life and social relations that replace this individual autarchy. From this angle, there are frequent cases when social preconditions determine the quality of the exercise of freedom. This means that the state should acquire an active role in creating social preconditions for the enjoyment of freedom. The theory of basic rights corresponding to the welfare state tries to overcome the issue of such legal and real alienation of freedom. According to this theory, basic rights define not only negative obligations of the state, but also represent rights of social demand addressed to the state. In this context, the positive obligation of the state to perform appropriate activities to ensure real social preconditions for the realization of freedom. In this respect, Individuals within the framework of the corresponding rights to social demands, are co-participants of the good things that the state creates for the real provision of the exercise of freedom. All this implies the necessity of mobilizing financial opportunities of the state. Since, in this sense, the implementation of basic rights depends on the financial capacity of the state, which includes limited resources, the social context of rights is narrowed in practice to the constitutional tasks of the state. This means that basic rights are not converted into rights to be supplied with social benefits in Germany. It becomes only the duties/tasks of the state to take into account the standard of the social state principle in making any decision. Accordingly, when defining the basic rights within the standard of the social state, their content is limited by assigning tasks to the state (Based on this type of theory, only this normative context is formed when defining the basic rights) and the rights of demand to receive social subsidies are not established. It is interesting what type of constitutional preconditions nourish this variety of theories to interpret basic rights and which theory of basic rights is recognized by the constitution. This arises the question about the availability of the unequivocal constitutional determinant.

Ernst-Wolfgang Böckenförde answers this question by describing several constitutional theoretical passages, emphasizing that the German federal constitution has its own theory of fundamental rights, which is nuanced in a number of contexts: the essential part of the federal constitution related to fundamental rights considers fundamental rights as freedom rights which implies the idea of a liberal and legal state based on the principle of freedom. This, in turn, is a response to National Socialism. The perception of the basic rights in accordance to the federal constitution does not end with this, in particular, by recognizing the principle of the social state, along with the principle of the rule of law, the federal constitution creates an instrument of social tasks of a state that emphasis the role of the objective dimension of the basic rights and the scope of the state's positive obligations. In this context, the state is obligated to create social preconditions for the full exercise of freedom. Relating to this point, the corresponding theory of liberal fundamental rights and the rule of law is not rejected, but modified by adding social elements.¹⁴⁸

¹⁴⁷ Böckenförde E.-W., Grundrechtstheorie und Grundrechtsinterpretation, in: NJW 1974, 1529 ff.

¹⁴⁸ Ibid.

Besides, the principle of democracy, which is the basis of the federal constitution, does not change or modify the theory of fundamental rights. The connection between the principles of the rule of law and democracy, the “liberal democratic legal order” (“freiheitlich-demokratische Grundordnung”) that recognizes democracy and freedom within the rule of law) do not replace or suppress each other, but completes.¹⁴⁹ Democracy is a constitutional principle which creates an immanent constitutional limit.¹⁵⁰

4.5. The Explanation of the Constitution Structural Principles

The constitution structural principles provide for special requirements for their interpretation. In German constitutionalism, the structural principles of the constitution, such as the principles of the legal state, democracy, a social state, federalism and republicanism, are connected to the categories of basic rights, as well as the concept of human dignity, and getting their interpretation isolated is not allowed.¹⁵¹ This interrelation stems from Articles 20 and 28 of the German Federal Constitution where these principles are recognized as closely related standards.

Considering the essential principle of federalism federal entities should conduct their activities in accordance with the principle of federal loyalty. In order to ensure people's sovereignty, the federal constitution envisages a system of democratic governance and local self-government. The concept of democracy derives from a number of constitutional norms that describe electoral principles, the status of a member of the parliament, the law of parties, the principle of the majority, the separation of powers, the issue of parliamentary responsibility of the government, basic rights as negative rights, the principle of equality, the rule of law, administrative and constitutional justice.¹⁵² Public formations, as an exception, are subject to the principle of democracy. For example, political parties, considering their functions.

As for the legal state, it can be a state that recognizes the principle of separation of powers and, simultaneously, has a monopoly of power.¹⁵³ From this point of view, the phenomenon of monopoly of power is in systematic contradiction with the principle of separation of powers and balanced by the latter. A legal state is bound to perform its duties. This law is the basic rights that guarantee freedom and equality. The principle of the rule of law also includes formal prerequisites, such as – paragraph 4 of Article 19 of the Federal Constitution, paragraph 3 of Article 20, Article 34, sentence 2 of paragraph 1 of Article 80, 103 – This article contains organizational and procedural norms that ensure¹⁵⁴ the implementation of basic rights. This principle generates the principle of certainty (foreseeability). In addition, state activities must be predictable and evaluable. Another important aspect is the idea of constitutionally binding state bodies and the powers of the Federal Constitutional Court. These material and formal preconditions of the rule of law principle lead to democratically

¹⁴⁹ BVerfGE 2, 1 (12 f.); BVerfGE 5, 85 (140 ff.).

¹⁵⁰ Böckenförde E.-W., Grundrechtstheorie und Grundrechtsinterpretation, in: NJW 1974, 1529 ff.

¹⁵¹ Ibid, 641.

¹⁵² Ibid, 650.

¹⁵³ BVerfGE 50, 290 (336).

¹⁵⁴ BVerfGE 2, 380 (403); 45, 187 (246); 81, 347 (356).

legitimate state power.¹⁵⁵ The principle of the social state is an attribute¹⁵⁶ of the rule of law and federalism. The principle of the welfare state is a requirement for legislation to bring social balance and ensure social security.¹⁵⁷ The principle of the social state implies a task for the state to create a social order. In the exercise of this duty, the legislature enjoys a wide discretion.¹⁵⁸ The principle of the welfare state obligates the state, but does not point out how this obligation is to be carried out. If it were the other way around, it would contradict the principle of democracy.¹⁵⁹

In the case of interpretation of the authority, organizational and procedural norms of the Constitution, classical methods of norm interpretation are also valid. When explaining the norms of competence, the origin of the constitutional norm is specially focused on. In this sense, it is common to refer to the legacy of the Weimar Constitution of 1919.

4.6. The Concept of Human Dignity – the Principle of Inviolability of Human Dignity

“Human dignity is inviolable.” The German federal constitution begins with these words.¹⁶⁰ The obligation of the state to protect and ensure the principle of inviolability of dignity is a basis citizens' trust¹⁶¹. The concept of dignity is clear and nebulous at the same time. From this perspective, it is necessary to clarify whether this right represents an ethical appeal or a true legal norm, a political manifesto or a normative command, a description or a prescription.¹⁶² It is very difficult to recognize its legal meaning. If this record is a legal norm, it arises the questions about the degree of its normative binding and the legal consequences it generates.

In the scientific literature, this sentence is often found categorical and, in this sense, imperative. On this basis it is clearly prescriptive rather than descriptive. It is complicated to define the principle of inviolability of dignity. The justice of the Federal Constitutional Court of Germany is diverse in this regard, but the more specific cases of the interpretation of this principle are, the more disputes its content arises.¹⁶³ Law does not have a monopoly on the definition of the concept of dignity, it is also explained by theology and philosophy. The record on the concept of dignity does not follow the classical standards on the definition of fundamental rights, it has its own dimensions.

¹⁵⁵ *Starck Chr.*, Maximen der Verfassungsauslegung, in: *Isensee J., Kirchhof P.*, (Hrsg.), *Handbuch des Staatsrechts*, B. XII, Normativität und Schutz der Verfassung, 3. völlig neubearbeitete und erweiterte Aufl., 2014, 652.

¹⁵⁶ *Ibid.*

¹⁵⁷ BVerfGE 5, 85 (198); 22, 180 (204); 27, 253 (283); 35, 202 (235f.).

¹⁵⁸ BVerfGE 18, 257 (273); 29, 221 (235).

¹⁵⁹ *Starck Chr.*, Maximen der Verfassungsauslegung, in: *Isensee J., Kirchhof P.*, (Hrsg.), *Handbuch des Staatsrechts*, B. XII, Normativität und Schutz der Verfassung, 3. völlig neubearbeitete und erweiterte Aufl., 2014, 653.

¹⁶⁰ The catalog of basic rights recognized by the Constitution of Georgia begins with this phrase. The influence of German Constitutionalism is clear.

¹⁶¹ *Isensee J.*, § 87 Würde des Menschen, in: *Detlef M., Papier, H.-J.*, *Handbuch der Menschenrechte*, B. IV, Grundrechte in Deutschland, Einzelne Grundrechte I, 5 ff.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*, 6 ff.

The record of the concept of dignity can be found in both liberal and authoritarian and socialist constitutions.

The difficulty of defining the principle of inviolability of dignity is caused by its highest value. It is not allowed to change the concept of dignity either by the ordinary or a founding legislator of the constitution. It has a claim to absoluteness, which is alien to conventional norms.

The Federal Constitution of Germany recognizes the principle of secularism, therefore, it recognizes and perceives the concept of dignity in worldly relationships. Religion is not thematic for the Constitution but it does not exclude the access to such ethical standards that do not have worldly foundations considering the secular foundations of the Constitution.¹⁶⁴ Although the doctrine of the inviolability of dignity is a result of modern humanism, there is no records about it in the proclamations of human rights of the 18th century and in the legislative texts formed by the socialist trends in the 19th century.

For the first time, the concept of human dignity is found in the Weimar Constitution of 1919, where is an entry about “ensuring a life corresponding to human dignity”. The concept of dignity is also mentioned in the preamble of the 1937 Irish Constitution and the 1945 Spanish Constitution.

After the Second World War, the evidence of the inviolability of human dignity can be found in a number of legal acts. Such is the Charter of 1945, the founding document of the United Nations (UN) of 1945, the Universal Declaration of Human Rights of 1948...

The appearance of references to human dignity in these texts was the result of the formal consensus of the anti-Hitler coalition.

After 1945, the concept of dignity appears in the Constitutions of the German Federal Units, in their preambles.

The German Federal Constitution became a guide for European Constitutional development.

In the European constitutions adopted after 1949, there is already a record about the concept of dignity. The Lisbon Treaty of the European Union of 2009 also appeals to the concept of dignity. The European Charter on Fundamental Rights repeats the same.

In contrast, the European Convention on Human Rights of 1950 does not mention the principle of inviolability of dignity, although the modern definition of the latter includes the concept of dignity in the guarantees of rights and freedoms. The European Court of Human Rights often appeals to this unwritten principle of inviolability of dignity.

The universal recognition of fundamental rights would lead to a renaissance of natural law after World War II. The reason for this is the Thomistic natural legal philosophy, as well as the Judeo-Christian doctrine of God's image and likeness. The positivism of the concept of dignity was perceived as a victory over the positive law of natural law. These types of entries do not contradict the secular character of the Constitution, but include prerequisites that are pre-constitutional. In general, the concept of dignity includes the ethical foundations that are worldview-determining for the modern state and, in this regard, “religion”¹⁶⁵ presented in the form of a mandatory ethos is peculiarly considered.

¹⁶⁴ Ibid, 9 ff.

¹⁶⁵ Ibid, 21.

Paragraph 1 of Article 1 of the German Federal Constitution (“Human dignity is inviolable. It is the responsibility of the state to protect and respect it”) represents positive law.¹⁶⁶ In this context, the positive category is positivized. But this still does not mean an exact answer to the question of what type of direct legal action this guarantee includes. The federal basic law for the principle of inviolability of dignity does not provide for its limitation and possibilities of weighing values, as it is contingent upon other basic rights. Thus, the concept of dignity is transformed into an absolute category within the framework of the current legal system. The revision of the principle of dignity of inviolability is not allowed within the framework of formal constitutional amendments (Paragraph 3 of Article 79 of the Federal Constitution, the so-called “constancy formula”). The relevance of the principle of inviolability of dignity is emphasized by the fact that the text of the Constitution begins with it. The principle of inviolability of dignity is a positive basis for other fundamental rights. But the concept of dignity itself is not a maintainable category.

Perceiving the concept of dignity as a positive law does not contradict the fact that the Constitution considered it as a positive category in its own text. The founders of the constitution took into account the non-legal category, the content of which they did not specify. Thus, the question of what the concept of dignity includes was left open for further interpretation but this does not mean unlimited freedom of interpretation. Arbitrariness¹⁶⁷ must be excluded when interpreting this context. The concept of dignity includes everything that was rejected by National Socialism. This is the person himself. The vagueness of the concept of dignity is caused by this. “Man is more than he himself knows.” (Karl Jaspers).¹⁶⁸

In general, the norms of the Constitution on basic rights are considered to be concretizations of the concept of dignity. Accordingly, the concept of dignity derives from the content of fundamental rights and vice versa. In this sense, there is a kind of interpretive interrelationship. If we interpret the concept of dignity in the nature-legal point of view, the latter aims at its absolutization, and on the contrary, when interpreting it in the international legal point of view, the concept of dignity is relativized.¹⁶⁹

The principle of inviolability of dignity is a difficult legal category to define legal category, which does not mean a deficiency in its normative nature. According to the constitution, dignity is recognized equally for everyone, regardless of gender, origin, social affiliation, etc. The state is in the service of dignity, and people respect each other (recognize each other's dignity), regardless of any sign.

In the form of dignity, the constitution received the cultural and philosophical reception with its own text. The pre-legal essence of the concept of dignity is diverse. The idea of dignity was born and developed in the Judeo-Christian culture. This is not a coincidence.¹⁷⁰ The content and justification of dignity, considering its origin, is religious.

¹⁶⁶ Ibid, 23.

¹⁶⁷ Ibid, 25

¹⁶⁸ Ibid, 34.

¹⁶⁹ Ibid, 40.

¹⁷⁰ Ibid, 18.

On the way of its own development, the idea of God's image and likeness is connected to the Roman perception of the concept – and the philosophy of the Stoics. For Immanuel Kant, a man himself is the value, which is always an end and should not be a mean.¹⁷¹ The humanism of the Renaissance and the philosophy of the Enlightenment corrected the content of the concept of dignity and turned it into a category of basic rights. This does not mean the denial or the need to deny the religious origin of the principle of inviolability of dignity, its genetic past. The constitutional recognition of the concept of dignity does not signify the constitutional recognition of Christianity as a religion. This development is simply an indirect result of the development of Christian culture.¹⁷² Ideologically, freedom and dignity are considered together. In its religious origin, dignity is based on freedom of the will, in the ontological meaning on mind, in the moral meaning on the customary autonomy.¹⁷³ From a legal point of view, freedom is an emanation of dignity.¹⁷⁴ A liberal state recognizes and pays attention to dignity, as long as it does not interfere with the right to free development of a person and does not try to manage it. The goal of the social state is related to the concept of dignity.

The Federal Constitution of Germany does not rely only on its religious roots in the reception of the concept of dignity, it also shares the thoughts of Cicero, Thomas Aquinas, Pufendorf, Kant and other classics. The heritage connected to the concept of dignity in the creation of the constitution was nourished by Christianity, which was saturated with Platonist-Stoic elements and the secular ethos of the time of humanism (in turn, which is based on Christian traditions).¹⁷⁵ Appealing to the Christian foundations of the concept of dignity has only historical significance. The modern constitutional state perceives the concept of dignity considering the principle of secularism. The guarantee of dignity is secular and not religious in nature. Its meaning is prescriptive, not descriptive. The addressee of the principle of inviolability of dignity is the state government.

Dignity represents the highest value within the constitutional order. Human dignity is the “highest constitutional principle”.¹⁷⁶ “The state exists by the will of the people, not vice versa – the people by the will of the state.”¹⁷⁷ The concept of human dignity contains elementary standards of humanity. Based on this, the concept of dignity includes a kind of “humanitarian minimum”. Dignity is the “foundation of fundamental rights”, the “fundamental norm of the state” and the “highest constitutional value”.¹⁷⁸ From this point of view, the importance of the principle of inviolability of dignity becomes clear. As a normative basis of law and order, it is guaranteed to the highest degree – the German Federal Constitution begins with the recognition of the inviolability of human dignity. In

¹⁷¹ *Kant I.*, *Metaphysik der Sitten*, 1797.

¹⁷² *Isensee J.*, § 87 *Würde des Menschen*, in: *Detlef M., Papier H.-J.*, *Handbuch der Menschenrechte*, B. IV, *Grundrechte in Deutschland, Einzelne Grundrechte I*, 40.

¹⁷³ *Ibid*, 55.

¹⁷⁴ *Ibid*, 57.

¹⁷⁵ *Ibid*, 58.

¹⁷⁶ *Dürig G.* in: *Maunz Th., Dürig G.*, *GG (LitVerz)*, Stand 1958, Art. 1, Abs. 1, Rn. 14; *BVerfGE* 61, 127 (137).

¹⁷⁷ *Herdegen M.* in: *Maunz Th., Dürig G.*, *GG*, Stand: 2020, Art. 1, Abs. 1, Rn. 1.

¹⁷⁸ *Ibid*, Rn. 3.

addition, the inviolability of dignity implies that “interfering” with it to any degree is already a violation of the right and is not allowed. At this time, the principle of proportionality does not apply.

The constitutional record on the inviolability of dignity is not only an ethical and moral category that you can deny or affirm, but it is a part of the constitution and a normative principle.¹⁷⁹ In this sense, dignity is a “right to rights”.¹⁸⁰

The issue of recognition of the principle of inviolability of dignity as an individual fundamental right, despite the fact that it is considered accepted by the German Federal Constitutional Court and a number of famous scholars, is still controversial in German constitutionalism. Mainly, it would be too puritanical approach to perceive the constitutional record on the inviolability of dignity as having only an objective legal function and not as strained¹⁸¹ with subjective legal components, in any case, the violation of the principle of inviolability of dignity, as a rule, leads to interference in a number of other areas protected by fundamental rights of freedom and equality, and, accordingly, the constitutional lawsuit can still be filed. The principle of inviolability of dignity protects not humanity in general, but each individual and his personal essence, therefore, it has an individual-subjective composition. The origin of the concept of dignity also indicates to its subjective nature and does not represent only a value-objective category. It is impossible to de-subjectify and objectify (generalize) the fact of violating the dignity of the Holocaust victims in the way of emphasizing the valuable goods infringed by state terror.¹⁸²

In addition, if we perceive the basic right only as an objective principle, there is a danger that dignity will be subsumed by other basic rights. Consequently, the arguments in favor of the idea that dignity is also a basic individual right are compelling and more acceptable than the opposite.¹⁸³

The concept of dignity, as mentioned, is difficult to define. The most common form is the Kantian thesis, according to which a person cannot be objectified and should only be the purpose of the law: the dignity of a person is violated when he is perceived only as an object, a mean to an attainable goal.¹⁸⁴ The concept of dignity is based on Judeo-Christian foundations (as a reaction to the crimes committed during the Nazi Third Reich) and this definition is not the only and final version of it. In this sense, it is subject to development.¹⁸⁵ Besides, when defining the concept of dignity, international legal standards are taken into account, such as, Article 3 of the European Convention on Human Rights, which prohibits “torture, inhuman or degrading treatment or punishment of a person”. In general, the comparative legal method is an important landmark considering this context. It should be noted that the US Supreme Court often criticizes its own decisions, based on the comparative legal method.¹⁸⁶

¹⁷⁹ *Böckenförde E.-W.*, in: JZ 2003, 809 ff. (812).

¹⁸⁰ *Ibid.*

¹⁸¹ *Herdegen M.*, in: *Maunz Th., Dürig G.*, Grundgesetz-Kommentar, GG Art. 1 Abs. 1., Werkstand: 94. EL Januar 2021, Rn. 1-121.

¹⁸² *Ibid.*

¹⁸³ *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ US Supreme Court, *Urt. v. 20. 6. 2002, Atkins v. Virginia*, 536 U.S. 304 (2002) Fn. 21 (applying the death penalty to a disabled person): “Moreover, within the world community, the imposition of the death penalty

Every person is a subject of dignity. The concept of dignity ensures the protection of the individuality of every person in his or her existence. A person cannot be deprived of his dignity in the case of a criminal offense or “unworthy” behavior. The issue of persons with disabilities is particularly problematic, for example, in the case of sterilization, when the latter are not capable of giving consent in such cases. The constitutional record of dignity requires that the need for sterilization must be determined as a last suggestion, *ultima ratio* and both the guardian/ caretaker and the court should get involved in making that decision.¹⁸⁷

Protection of dignity continues until the death of a person. However, when the issue concerns general personal rights, the protection of dignity continues even after death (postmortem protection of dignity). It is interesting that, in the case of organ transplantation, if there is no consent of the deceased, the transplantation violates his dignity.

The issue of protecting dignity in the prenatal (before human birth) stage is especially complex. The stage of making a person's right to life a subject within the framework of basic rights and the issue of activating the protection of dignity in the prenatal phase differ from each other.

The protection of dignity is logical, it does not apply to legal entities, because dignity is only a human phenomenon and addresses to a physical person. The principle of inviolability of dignity concerns not only a state, but also private individuals. In this context, it has a penetrating power in horizontal, private legal relations as well.¹⁸⁸ Protection of human dignity by the state implies that the state is obliged to create social preconditions that ensures dignity and protects it from interference by the third parties. In this respect, the concept of dignity has a social dimension. It should be noted that Article 79, Clause 3 of the German Federal Constitution protects the principle of inviolability of dignity. With the guarantee of immutability (the so-called formula of permanence): the constitutional concept of the inviolability of dignity must not be changed, otherwise the constitution will lose its identity.¹⁸⁹ It is obvious that the constitutional record on dignity, according to the German Constitutional Theory, has a pungent power in relation to the normative components¹⁹⁰ of the constitutional principles as well.

The concept of dignity is not found in Anglo-American constitutions. It should be mentioned that the European perception of the concept of human dignity is not fixed in the USA. This is evident by the fact that the US rarely accedes to international treaties in the field of human rights, and if it

for crimes committed by mentally retarded offenders is overwhelmingly disapproved”, Cited from the following source: *Herdegen M.* in: *Maunz Th., Dürig G.*, Grundgesetz-Kommentar, GG Art. 1 Abs. 1., Werkstand: 94. EL Januar 2021, Rn. 43.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ *Poscher R.* in: *Herdegen M., Masing J., Poscher R., Gärditz K.F.*, Handbuch des Verfassungsrechts, 1. Auflage 2021, §17, Das Grundgesetz im Gefüge des westlichen Konstitutionalismus, Rn. 3-131; *Bognetti G.*, The concept of human dignity in European and US constitutionalism, in: *Nolte G. (ed.)*, European and US Constitutionalism, 2005, 85-107.

¹⁹⁰ *Häberle P.* in: *Isensee J., Kirchhof P. (Hrsg.)*, Handbuch des Staatsrechts, 3. Aufl. 2004, §22 Die Menschenwürde als Grundlage der staatlichen Gemeinschaft.

does, with numerous reservations. The imperative concept of dignity is unusual to the US.¹⁹¹ When it comes to dignity, the two sides of the Atlantic take different positions. The US and European visions, in this case, do not coincide. There is a difference between legal cultures. These differences are determined by the legal historical past. These differences can be seen in the following examples: criminal witchcraft, the so-called hate speech and protection of dignity in the workplace, as well as privacy.

As for the criminal penalties, the US approach is known to be very harsh. The size of the fine is much higher than in similar cases in Germany and France. However, the death penalty returned to the US as a punishment just as it was slowly being abolished in European countries. Continental European countries have historically had different punishments for different social hierarchy. From the 1750s, the types of punishments imposed on the lower social classes were abolished, and a variety of relatively mild punishments remained in effect as such. At that time, In the USA, the situation was different¹⁹² – on the contrary, light punishments imposed for high social classes were canceled and a variety of harsh punishments got prevailed.

The regulations imposed regarding Hate Speech are different in the US and European legal space. What is prohibited in Europe, in this sense, is allowed in the USA. The main reason for this is the European perception of the concept of dignity. In addition, so-called “mobbing” in the workplace is forbidden in European countries – directly by legislation (France) or judicial practice (Germany). This phenomenon does not occur in the USA. Although the concept of sexual harassment at the workplace was received in Europe from the USA, in the USA this concept is based on completely different legal prerequisites than in Europe. In this point, in the US, financial interest and career advancement motives are prioritized more than the concept of dignity.¹⁹³ As for the inviolability of private life, it is worth noting that the US prohibitions are directed only at the state, while in Europe identical prohibitions are directed not only at the state, but also at the media and, in general, at the public space.

Accordingly, the “mind of the law” in relation to the principle of inviolability of dignity significantly differs on both sides of the Atlantic. But it differs because the social development in these two cultural spaces is dissimilar from each other.¹⁹⁴

4.7. Objective Dimension of Basic Rights – about the Positive Obligations of the State

When the German Federal Constitution was adopted, the objective legal character of basic rights was rejected.¹⁹⁵ Essentially, based on the decision of the state- Lüth¹⁹⁶ the defensive functions of basic

¹⁹¹ *Whitman J. Q.*, ‘Human dignity’ in Europe and the United States: The social foundations, in: *Nolte G. (ed.)*, *European and US Constitutionalism*, 2005, 108-124.

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ *Ibid.*

¹⁹⁵ *Starck Chr.*, *Maximen der Verfassungsauslegung*, in: *Isensee J., Kirchhof P.*, (Hrsg.), *Handbuch des Staatsrechts*, B. XII, *Normativität und Schutz der Verfassung*, 3. völlig neubearbeitete und erweiterte Aufl., 2014, 644.

¹⁹⁶ BVerfGE 7, 198 (204 ff.).

rights were filled with their own objective legal dimensions,¹⁹⁷ which determine the law of German human rights. The subjective nature of basic rights is strengthened by their objective legal categories.¹⁹⁸ The constitutional record of some basic rights indicates its objective legal character. For example, the norms on marriage and family (paragraph 1 of Article 6 of the German Constitution), property and inheritance (paragraph 1 of Article 14 of the German Constitution), etc.

The pervasive action of basic rights in private legal relations is a manifestation¹⁹⁹ of the objective dimension of basic rights. In addition, according to this doctrine, the so-called sovereignty of the state derives from the basic rights. Protective obligations, which imply the following: the state must create preconditions for the realization of fundamental rights, and during implementation of these rights it must be in accordance of the principle of proportionality, without violating the normative essence of fundamental rights.

However, the German Federal Constitution prefers the subjective legal function of basic rights, the objective-legal dimension only serves the idea of strengthening the subjective dimension.²⁰⁰

4.8. The Concept of “Constitutional Identity” in the Multi-level European Legal Space

Paragraph 1 of Article 24 of the German Constitution admits that on the basis of appropriate law, the supreme governing authority of the state can be given to interstate organizations. Lex specialis of the Article 24 of the Federal Constitution of Germany is Article 23, which recognizes the principle of “open statehood” („offene Staatlichkeit”) as well as the idea of European unity („europäische Einigung”) and contains the norms related to the issue of allocating state management powers in the context of integration into the European Union.

To join the European Union, it will be necessary to make changes to the Constitution of Georgia, which will consider the interaction of Georgian law with the law of the European Union and the list of relevant issues for the process of integration into the European Union, such as: the principle of subsidiarity, the limit of transferring state management competences, the manner of its resolution in case of a competence dispute, etc.

The so-called 2009 decision of the Federal Constitutional Court of Germany after the Lisbon decision²⁰¹, the concept of constitutional identity has become an important orientation for these member states of the European Union in the context of the application of European Union law.²⁰² The source of the concept related to “national identity as a limit of European integration” is the first sentence of Article 4, Paragraph 2 of the Treaty on European Union itself: „The Union shall respect

¹⁹⁷ *Deppenheuer* in: *Maunz Th., Dürig G.*, Grundgesetz-Kommentar, GG Art. 8., Werkstand: 94. EL Januar 2021, Rn. 121 ff.

¹⁹⁸ *Herdegen* in: *Maunz Th., Dürig G.*, Grundgesetz-Kommentar, GG Art. 8., Werkstand: 94. EL Januar 2021, Rn. 17-25.

¹⁹⁹ *Sachs* in: *Sachs M.*, Kommentar zum GG, 9. Aufl. 2021, Vor Art. 1, Rn. 27-38.

²⁰⁰ *Starck* in: *von Mangoldt H. v., Klein F., Starck Ch.*, (Hrsg.), Grundgesetz, 7. Auflage, 2018, Abs. 3 Art 1, Rn. 181.

²⁰¹ BVerfGE 123, 267.

²⁰² For a detailed comparative legal review on this issue see, *Calliess Chr., van der Schyff G. (ed.)*, Constitutional Identity in a Europe of Multilevel Constitutionalism, Cambridge, 2020, 3 et seq.

the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.” According to this formulation, the European Union is obliged to respect the constitutional identity of the member states. In this context, the principle of commitment to the European Union, which is described in Article 4, paragraph 3 of the Treaty on European Union, is often accentuated. The ongoing scientific debate at the level of the European Union and the member states, which is related to the identification of the concept of “constitutional identity”, is quite intense. There are similarities and differences in the perception of this concept across the member states themselves.²⁰³

The German perspective is the following: the concept of “constitutional identity” is not found in the German federal constitution. This concept was developed by the German Federal Constitutional Court through its own decisions, *Solange I*²⁰⁴ and *Solange II*²⁰⁵, then the *Maastricht*²⁰⁶ and finally the *Lisbon* decision.

In this context, it is important to consider the formula of permanence, which is also recognized by Article 23 of the same Constitution (Constitutional record of the European Union, its integration, its development and cooperation with it), Paragraph 1, Sentence 3. In this sense, the formula of permanence includes the immutability of such structural principles as: the principle of inviolability of dignity, the principle of the rule of law, the principle of democracy, the principle of republicanism, the principle of the social state and the catalog of basic rights. Consequently, in the process of European integration, these values are protected by the constitutional guarantee of immutability, which means that this constitutional core is inviolable. The German Federal Constitution discerns the concept of the identity of the constitution in close connection with the principle of democracy. According to the decision of Lisbon, the Federal Constitutional Court of Germany went further and assigned the following issues to the constitutional identity: citizenship, monopoly of military power, criminal law issues (separate aspects), financial management of the state, socio-cultural issues, etc.²⁰⁷ Within the mentioned issues, the German legislature maintains its sovereignty. In this connection, the German approach differs from the Czech approach, where the Parliament, not the Constitutional Court, is authorized to review the transfer of governance and power (in particular, sovereignty) to the European Union in certain areas.²⁰⁸ It is worth noting that by the justice of the France Conseil constitutionnel (Constitutional Council), constitutional identity is perceived as *réserve de constitutionnalité*.²⁰⁹ The

²⁰³ *Walter M.*, Integrationsgrenze Verfassungsidentität – Konzept und Kontrolle aus europäischer, deutscher und französischer Perspektive, in: *ZaöRV* 72, 2012, 177-200.

²⁰⁴ BVerfGE 37, 271.

²⁰⁵ BVerfGE 73, 339.

²⁰⁶ BVerfGE 89, 155.

²⁰⁷ Cf. BVerfGE 123, 267 (357 f.).

²⁰⁸ See Pl. ÚS 19/08, 26.11.2008, para. 109, available at: <<http://www.concourt.cz/clanek/pl-19-08>>.

²⁰⁹ CC, 10.6.2004, Loi pour la confiance dans l'économie numérique, déc. n° 2004-496 DC, Rec. 101; CC, 1.7.2004, Loi relative aux communications électroniques et aux services de communication audiovisuelle, déc. n° 2004-497 DC, Rec. 107; CC, 29.7.2004, Loi relative à la bioéthique, déc. n° 2004-498 DC, Rec. 122; CC, 29.7.2004, Loi relative à la protection des personnes physiques à l'égard des traitements des données à caractère personnel, déc. n° 2004-499, Rec. 126, cited according to the source: *Walter M.*,

concept of constitutional identity, in the case of France, derives from the decisions of the Constitutional Council and not from the French Constitution. From this point of view, the concept of constitutional identity belongs to the approach recognized by paragraph 5 of Article 89 of the French Constitution, which is similar to the formula of permanence and accepts the principle of immutability of republicanism. Related to this (Article 89 implies the immutability of the principles listed in Article 1 of the French Constitution of 1958) there is the issue of the persistence of such legal principles as: the principle of democracy and social state, laicism, unitarism, equality before the law, decentralization, etc. So far, based on Article 89, the Constitutional Council has not discussed the issue of European integration. It should also be noted that the French Constitutional Council does not consider the issue of constitutionality of constitutional amendments. In addition to Article 89(5), French constitutional identity may include Articles 2 and 3 of the Constitution, as well as Article 6 of the 1789 Declaration of a Man and Citizen. In this sense, French constitutional identity includes state symbols and the French language, as well as electoral principles and access to civil service.²¹⁰ Accordingly, French and German approaches to describing constitutional identity differ from each other. In addition, there is no common benchmark of any kind to construct a unified concept of constitutional identity in relation to EU law across member states. Accordingly, French and German approaches to describing constitutional identity diverge from each other. Moreover, there is no common benchmark to construct a unified concept of constitutional identity in relation to EU law across member states. Normally, based on Article 23 of the German Federal Constitution, the German Federal Constitutional Court carries out several types of control: a) identity control – whether issues subject to the guarantee of immutability (constitutional identity as a principle) are protected by EU law; b) subsidiarity control – whether the acts of the European Union are subject to the principle of subsidiarity; c) Control – whether the acts of the European Union comply with the limit (scope) of the separate governing powers devaluated to the European Union. Consistently, within the powers transferred to the European Union, Article 23 of the Federal Constitution of Germany with Article 79, Clause 3 of the same Constitution (formula of immutability) creates a boundary (constitutional identity), within which the European Union is not authorized to exercise governing powers. It should be noted that the issue of the relationship between European Union law and national law still has not been clearly identified. In relation to German federal legislation (including constitutional legislation), EU law is predominantly applicable, but the constitution still takes precedence. Individual details about this issue are regulated by Article 23 of the German Federal Constitution, already described in part (the so-called European Article). In this perspective, there is a cooperative relationship between the Court of Justice of the European Union and the constitutional courts of individual member states. In addition to the above, there are cases when the so-called the concept of “constitutional identity” is used by some member states to ignore the legislation of the European Union (for example, Poland),

IntegrationsgrenzeVerfassungsidentität – KonzeptundKontrolleauseuropäischer, deutscherundfranzösischer-Perspektive, in: ZaöRV 72 (2012), 177-200.

²¹⁰ *Walter M.*, Integrationsgrenze Verfassungsidentität – Konzept und Kontrolle aus europäischer, deutscher und französischer Perspektive, in: ZaöRV 72, 2012, 177-200.

which is unacceptable. Recently, the Court of Justice of the European Union often highlights²¹¹ that it is unacceptable for the member states of the European Union to emphasize the principle of “constitutional identity” and not comply with the decisions of the same court. In this context, the Georgian legal and academic space should be significantly prepared, not to repeat the example of Poland, and to correctly interpret/configure the idea and concept of “constitutional identity” provided by the founding treaty of the European Union.

4.9. The So-called Formula of Permanence and “Unconstitutional Constitutional Law” as a Phenomenon

Article 79 of the German Federal Constitution provides for the possibility of amending the constitution and, simultaneously, defines what is not subject to amendment (the so-called guarantee of permanence). These are: basic human rights, the principle of the social state, the principle of the rule of law, the principle of separation of powers, the principle of democracy, the principle of federalism and the right to rebel (*Widerstandsrecht*). This article of the constitution is also a prerequisite for the elasticity of the constitution and the immutability of the value categories recognized by it.²¹²

This entry of the constitution is a reaction to the reality of National Socialism, when the law of March 24 1933, *Ermächtigungsgesetz* (the so-called “authorizing” law) rejected the legal order established by the Weimar Constitution.

Furthermore, Article 146 of the German Federal Constitution, unlike other constitutions, states that the constitution is only valid until it is replaced by a new constitution. In this context, the issue of interrelationship between Article 146 and Article 79 of the Federal Constitution is unclear and a matter of dispute.

In general, the Federal Constitution, by including these articles in the text of the Constitution, recognizes the well-known constitutional doctrine of the distinction between the “founding government” and the “founded government”. *Pouvoir constituant* is the founding government while *pouvoir constitué*—founded government. This doctrine derives from the Emer de Vattel's teachings of the defining doctrines of the US constitutional order, and Abbé Emmanuel Joseph Sieyès, the revolutionary pamphlet—, *Qu'est-ce le Tiers État?*“?

Article 79 of the German Federal Government binds the established government with the unchanged norms of the Constitution. What happens if the new constitution is adopted? In this context, there are several theories, some of them exclude confining the constituent power by the majority principle in agreement of the Article 79, while others, on the contrary, need to pursue the procedures considering the same article. Regarding the guarantee of permanence/immutability, which is included in paragraph 3 of Article 79, it is also in question whether the founding government should follow this standard or not (the guarantee of immutability or permanence – constitutional identity).

²¹¹ See the most relevant decision of the Court of Justice of the European Union of February 22, 2022 in the case: C 430/21 (in Georgian).

²¹² *Herdegen M. in: Maunz Th., Dürig G., Grundgesetz-Kommentar, GG Art. 79., Werkstand: 94. EL Januar 2021, Rn. 1-195.*

According to the common opinion, the guarantee of permanence extends to the content of the new constitution.

In addition, constitutional laws and records that contradict the Constitution are considered “Unconstitutional constitutional law”.²¹³

As a rule, such laws do not have legal force, but in some cases, if their repeal leads to a worse result, it can be temporarily left in force based on the relevant constitutional record. For example, the entry provided for in Article 117, paragraph 1 of the German Federal Constitution, which provided leaving in force the norms inconsistent with Article 3, paragraph 2 (equality of men and women) of the Constitution until March 31, 1953, until repealed by a new federal law.

It is often indicated in the scientific literature that despite the constitutional principle of separation of church and state (principle of secularism), the constitutional norms on the cooperation of the church and the state may represent “unconstitutional” constitutional law.

Finally, this opinion is rejected (referring to the relevant articles of the Weimar Constitution, which are part of the 1949 Federal Constitution in accordance with Article 140 of the German Federal Constitution). Constitutional laws that contravene Article 79, Part 3 of the Federal Constitution (formula of permanence) are void upon entry into force, even if it was enacted in full compliance with legislative procedures. Such would be the case of the entry in the constitution of the death penalty, which, on the ground of the German doctrine, contradicts Article 1 of the Constitution (principle of inviolability of dignity).

5. Conclusion

Constitutionalism encompasses substantive rules and cultural identity, as well as the self-perception of each political society.²¹⁴ The development of European integration processes has made the differences between the US²¹⁵ and European constitutionalism more obvious, which is evident in the light of the justices of the Strasbourg and Luxembourg courts.

Interestingly, comparative constitutionalism has been experiencing some renaissance in recent years.²¹⁶ Accordingly, taking into account the Georgian reality, for the development of the science of Georgian constitutional law, it is necessary to review the experience that creates unity in the analysis of the US and European constitutionalism. It is necessary to develop Georgian constitutionalism in the context of mutual analysis and reconciliation of the European and American constitutional theories.

From this point of view, the article considering its limited scope, offers an overview of the individual methods of the constitution interpretation directly characteristic of German constitutionalism.

²¹³ Cf. *Jacobson G. J.*, *Constitutional Identity*, 2010, 34 et seq.

²¹⁴ *Ibid.*

²¹⁵ Cf. *Murphy W. F., Fleming J. E., Barber S. A., Macedo St. (ed.)*, *American Constitutional Interpretation*, Sixth Ed., 2019, 107 et seq.

²¹⁶ *Ginsburg T.*, *Comparative Foreign Relations Law*, in: *Bradley C. A. (ed.)*, *The Oxford Handbook of Comparative Foreign Relations Law*, 2019, 64.

The conclusions presented in the article may become an important impetus for a Georgian legislator or law enforcer when explaining the elements of constitutional framework or re-defining them in accordance with modern constitutional and legal standards.

Bibliography:

1. *Allan T. R. S.*, *Constitutional Justice, A liberal Theory of the Rule of Law*, Oxford New York 2001, 185 ff., 161 ff.
2. *Arnold R.*, *Das Prinzip der Kontrolle des Gesetzgebers in der Verfassungsgerichtsbarkeit Mittel- und Osteuropas als Ausdruck gemeineuropäischen Verfassungsrechts*, in: *Jahrbuch für Ostrecht*, Bd. 43, 1. Halbband, 2002, 17-28.
3. *Badura P., Scholz R.*, *Verfassungsgerichtsbarkeit und Gesetzgebung*, München 1998, 49 ff.
4. *Barak A.*, *Proportionality – Constitutional Rights and their Limitations*, Cambridge 2012, 129 et seq.
5. *Barak A.*, *Purposive Interpretation in Law*, 2005, 3 et seq.
6. *Barak A.*, *The Judge in a Democracy*, 2006, 3 et seq.
7. *Bascheck N.*, *Anfeindungen – Carl Schmitts „Begriff des Politischen“ aus der Perspektive der Systemtheorie Niklas Luhmanns*, Darmstadt 2010, 79.
8. *Battis U., Mahrenholz E. G., Tsatsos D. (Hrsg.)*, *Das Grundgesetz im internationalen Wirkungszusammenhang der Verfassungen – 40 Jahre Grundgesetz*, Berlin 1990, 19 ff.
9. *Beck G.*, *The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There is No Praetor*, in: *ELJ: Review of European Law in Context*, Vol.17, 2011, 480 f.
10. *Beckmann K., Dieringer J., Hufeld U. (Hrsg.)*, *Eine Verfassung für Europa, 2., aktualisierte und erweiterte Aufl.*, Tübingen, 2005, 183 ff.
11. *Bettermann K. A.*, *Hyperthrophie der Grundrechte. Eine Streitschrift*, Hamburg, 1984.
12. *Bieling H.-J.*, *Europäische Verfassung als „neuer Konstitutionalismus“, oder: zur europäischen Begrenzung der demokratischen Politik*, in: *EuR-Bei* 2013, 219 f., etc.
13. *Bischof G., Gehler M., Kühnhardt L., Steininger R.*, *Toward a European Constitution*, Salzburg, 2005, 11ff.
14. *Blanke H.-J., Magiera S., Pielow J.-C., Weber A. (Hrsg.)*, *Verfassungsentwicklungen im Vergleich – Italien 1947 – Deutschland 1949 – Spanien 1978*, Berlin 2021, 62ff.
15. *Blankenagel A., Pernice I., Schulze-Fielitz H., (Hrsg.)*, *Verfassung im Diskurs der Welt*, Tübingen, 2004, 83 ff.
16. *Böckenförde E.-W.*, *Die Methoden der Verfassungsinterpretation – Bestandaufnahme und Kritik*, in: *NJW* 1976, 2089 ff.
17. *Böckenförde E.-W.*, *Grundrechtstheorie und Grundrechtsinterpretation*, in: *NJW* 1974, 1529 ff.
18. *Böckenförde E.-W.*, in: *JZ* 2003, 809 ff. (812).
19. *Böckenförde E.-W.*, *Verfassungsgerichtsbarkeit: Strukturfragen, Organisation, Legitimation*, in: *NJW* 1999, 9 (9 ff.).
20. *Bradley C. A. (ed.)*, *The Oxford Handbook of Comparative Foreign Relations Law*, 2019, 64.
21. *Brugger W.*, *Grundrechte und Verfassungsgerichtsbarkeit in den Vereinigten Staaten von Amerika*, Tübingen, 1987, 22 ff.

22. *Brünneck A. v.*, Verfassungsgerichtsbarkeit in den westlichen Demokratien, Ein systematischer Verfassungsvergleich, 1992, 28 ff.
23. *Calliess Chr., van der Schyff G. (ed.)*, Constitutional Identity in a Europe of Multilevel Constitutionalism, Cambridge, 2020, 3 et seq.
24. *Cananea G. D.*, Is European Constitutionalism Really “Multilevel”? in: *ZaöRV* 70, 2/2010, 306 f.
25. CC, 10.6.2004, Loi pour la confiance dans l'économie numérique, déc. n° 2004-496 DC, Rec. 101; CC, 1.7.2004, Loi relative aux communications électroniques et aux services de communication audiovisuelle, déc. n° 2004-497 DC, Rec. 107; CC, 29.7.2004, Loi relative à la bioéthique, déc. n° 2004-498 DC, Rec. 122; CC, 29.7.2004, Loi relative à la protection des personnes physiques à l'égard des traitements des données à caractère personnel, déc. n° 2004-499, Rec. 126.
26. *d'Aspremont J., Dopagne F.*, Two Constitutionalisms in Europe: Pursuing an Articulation of the European and International Legal Order, in: *ZaöRV* 2008, 974 f.
27. *Depenheuer O., Grabenwarter Chr. (Hrsg.)*, Verfassungstheorie, Tübingen, 2010, 506 ff.
28. *Depenheuer O., Heintzen M., Jestaedt M., Axer P.*, FS für Josef Isensee, Staat im Wort, Heidelberg, 2007, 733 ff.
29. *Detlef M., Papier H.-J.*, Handbuch der Menschenrechte, B. IV, Grundrechte in Deutschland, 2001.
30. *Diggelmann O., Altwickler T.*, Is There Something Like a Constitution of International Law? A Critical Analysis of the Debate on World Constitutionalism, in: *ZaöRV* 2008, 632 f.
31. *Dreier R.*, Zur Problematik und Situation der Verfassungsinterpretation, in: *Dreier R., Schwegmann F.*, Probleme der Verfassungsinterpretation, Baden-Baden, 1976, 13 ff.
32. *Due O.*, A constitutional Court for the European Communities, in: *Constitutional Adjudication in European Community and National Law*, Butterworth 1992, 3 ff.
33. *Dworkin R.*, Law as Interpretation, in: *Texas Law Review*, Vol. 60 (1982): 60, 527 et seq.
34. *Dyevre A.*, The German Federal Constitutional Court and European Judicial Politics, in: *West European politics*, Vol. 34, 2011, 346 ff.
35. *Eastland T. (ed.)*, Benchmarks – Great Constitutional Controversies in the Supreme Court, Washington, 1995, 1-12.
36. *Everling U.*, Europas Zukunft unter der Kontrolle der nationalen Verfassungsgerichte, in: *EuR* 2010, 94.
37. *Fabrini S.*, Transatlantic Constitutionalism: Comparing the United States and European Union, in: *European Journal in political research: official journal of the European Consortium for Political Research*, Vol. 43, 2002, 549 ff.
38. *Forsthoff E.*, Die Umbildung des Verfassungsgesetzes = ders., Rechtsstaat im Wandel, 2. Aufl., 1976, 130 ff.
39. *Frankeberg G.*, Critical Comparisons: Re/thinking Comparative Law, Vol. 26 *Harv. Int'l L. J.*, 1985, 411-455.
40. *Franzius C.*, Europäische Verfassung als Rahmenordnung demokratischer Politik, in: *EuR-Bei*, 2013, 169 f.
41. *Gerber S. D.*, To Secure These Rights, The Declaration of Independence and Constitutional Interpretation, New York 1995, 103 ff.
42. *Gerhardt M.*, Europäisches Parlament und Bundesverfassungsgericht, in: *NVwZ-Beilage* 2013, 54 ff.
43. *Goldsworthy J. (ed.)*, Interpreting Constitutions: A Comparative Study, 2007.

44. *Grabenwarter/Pabel*, § 5. Allgemeine Fragen der Auslegung der EMRK, in: Europäische Menschenrechtskonvention, 7. Auflage 2021, Rn. 14-16.
45. *Grimm D.*, Constitutional Adjudication and Constitutional Interpretation: Between Law and Politics, in: 4 NUJS L. Rev., 2011, 15 ff.
46. *Grundmann St., Kloepfer M., Paulus Chr., Schröder R., Werle G.*, (Hrsg.), FS 200 Jahre Juristische Fakultät der Humboldt-Universität zu Berlin, Berlin 2010, 1299 ff.
47. *Haack St.*, Verlust der Staatlichkeit? Tübingen, 2007, 115 ff., 157 ff.
48. *Häberle P.* (Hrsg.), Verfassungsgerichtsbarkeit, Darmstadt, 1976, 3ff.
49. *Häberle P.*, Der Kooperative Verfassungsstaat, Berlin, 2013, 263 f.
50. *Häberle P.*, Gemeineuropäisches Verfassungsrecht, in: EuGRZ 1991, 18. Jg. Heft 12/13, 261 ff.
51. *Häberle P.*, Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat, JZ 1989, 913 ff.
52. *Häberle P.*, Menschenbild im Verfassungsstaat, Berlin, 2005, 29.
53. *Hamilton A.*, in: The Federalist Papers, Nr. 78.
54. *Haratsch A.*, Die kooperative Sicherung der Rechtsstaatlichkeit durch die mitgliedstaatlichen Gerichte und die Gemeinschaftsgerichte aus mitgliedstaatlicher Sicht, in: EuR 2008 Heft Beiheft 3, 99 ff.
55. *Hatje A.*, Demokratische Kosten souveräner Staatlichkeit im europäischen Verfassungsverbund, in: EuR-Bei, 2010, 124.
56. *Herdegen M.*, Verfassungsgerichtsbarkeit als *pouvoir neutre*, in: ZaöRV 2009, 259 ff.
57. *Herdegen M., Masing J., Poscher R., Gärditz K.F.*, Handbuch des Verfassungsrechts, 1. Auflage 2021, Rn. 3-131, R. 82-89.
58. *Herresthal C.*, Voraussetzungen und Grenzen der gemeinschaftsrechtskonformen Rechtsfortbildung, in: EuZW 2007, 398.
59. *Hesse K.*, Die Normative Kraft der Verfassung, 1959, 16 ff.
60. *Hesse K.*, Grundzüge des VerfassungsR der Bundesrepublik Deutschland, 8. Aufl., 1976, 11 f.
61. *Heusch A.*, Der Präsident des Bundesverfassungsgerichts als Hüter und Reformier der Verfassung, in: NVwZ 2010, 210 f.
62. *Hofmann J.*, Zur Absolutheit des Menschenwürdeschutzes im Wirken des Präsidenten des BVerfG Hans-Jürgen Papier, in: NVwZ 2010, 218.
63. *Hong Q. L.*, Constitutional Review in the Mega-Leviathan: A Democratic Foundation for the European Court of Justice, in: ELJ – review of European law in Context, 16 2010, 697 f.
64. *Huber P.*, Die EU als Herausforderung für das Bundesverfassungsgericht, Vortrag an der Humboldt- Univ. zu Berlin am 26. April 2012 (FCE 02/12).
65. *Hwang S.-P.*, Verfassungsrechtlicher Jurisdiktionsstaat? Eine rechtsvergleichende Analyse zur Kompetenzabgrenzung vopn Verfassungsgericht und Gesetzgeber in den USA und der Bundesrepublik Deutschland, Berlin, 2005, 35.
66. *Hwang Sh.-P.*, Verfassungsgerichtlicher Jurisdiktionsstaat? (Diss.), Berlin, 2005, 61 ff.
67. *Imboden M.*, Normenkontrolle und Verfassungsinterpretation, in: Verfassungsrecht und Verfassungswirklichkeit, Festschrift von Hans Huber zum 60. Geburtstag 24. Mai 1961, Bern 1961.
68. *Isensee J.*, Integrationswille und Integrationsresistenz des Grundgesetzes – Das Bundesverfassungsgericht zum Vertrag von Lissabon, in: ZRP 2010, 34.
69. *Isensee J.*, Subsidiaritätsprinzip und Verfassungsrecht, 2. Aufl., Berlin 2001, 315.

70. *Isensee J., Kirchhof P. (Hrsg.)*, Handbuch des Staatsrechts, B. XII, Normativität und Schutz der Verfassung, 3. völlig neubearbeitete und erweiterte Aufl., 2014, 613, 627, 631, 634-638, 641, 644, 652-652 ff.
71. *Jacobson G. J.*, Constitutional Identity, 2010, 34 et seq.
72. *Kant I.*, Metaphysik der Sitten, 1797.
73. *Kavanagh A.*, The Idea of Living Constitution, in: Canadian Journal of Law and Jurisprudence Vol. 16, No.1, 55 ff.
74. *Kenntner M.*, Das BVerfG als subsidiärer Superrevisor? in: NJW 2005, 787 f.;
75. *Knauff M.*, Konstitutionalisierung im inner- und überstaatlichen Recht – Konvergenz oder Divergenz? in: ZaöRV 2008, 484.
76. *Küpper H.*, Einführung in die Verfassungssysteme Südosteuropas, Wien 2018, 13 f.
77. *Landfried Chr. (ed.)*, Constitutional Review and Legislation, Baden-Baden, 1988, 38, 260.
78. *Langer L.*, Judicial Review in State Supreme Courts, NY, 1965, 123 ff.
79. *Ley I.*, Kant versus Locke: Europarechtlicher und völkerrechtlicher Konstitutionalismus im Vergleich, in: ZaöRV 2009, 335 f.
80. *Lockhart W.B., Kamisar Y., Choper J.H., Shiffrin St.H.*, Constitutional Law, Cases-Comments-Questions, 7th ed., 1991, 1.
81. *Mahoney P.*, From Strasbourg to Luxemburg and Back: Speculating about Human Rights Protection in the European Union after the Treaty of Lisbon, in: HRLJ, Vol. 31/2011, Nr. 2-6, 75 ff.
82. *Masing J., Jounjaan O. (Hrsg.)*, Verfassungsgerichtsbarkeit, Tübingen, 2011, 37 ff.
83. *Maunz Th., Dürig G.*, Grundgesetz-Kommentar, GG Art. 1 Abs. 1., Werkstand: 94. EL Januar 2021, Rn.17-25, Rn.121 ff, R. 1-195.
84. *Mayer F. C.*, Verfassungsgerichtsbarkeit, in: *von Bogdany A., Jürgen B., (Hrsg.)*, Europäisches Verfassungsrecht, 2. Aufl., Heidelberg 2009, 598.
85. *McLean E. (ed.)*, The Most Dangerous Branch, Lanham, 2008, 1-16.
86. *Méndez Cr. E.*, Current trends and perspectives regarding constitutional jurisdiction in the Member States of the EU, in: Rivista di studi politici internazionali: Vol. 80, 2013, 559 ff. etc.
87. *Meyer T. D.*, Die Rolle der Verfassungsgerichtsbarkeit zwischen Recht und Politik, Diss., Bern 2011, 83 ff.
88. *Möllers Chr.*, Die drei Gewalten, Göttingen 2008, 137.
89. *Möllers Chr.*, Legalität, Legitimität und Legitimation des Bundesverfassungsgerichts, in: Das entgrenzte Gericht, Berlin, 2011, 285, 323 ff.
90. *Möllers Chr.*, The Three Branches – A comparative Mode of Separation of Powers, Oxford, 2013, 126 ff.
91. *Möllers Th.M.J., Redcay K.*, Das Bundesverfassungsgericht als europäischer Gesetzgeber oder als Motor der Union? In: EuR 2013, 416.
92. *Moreso J. J.*, Legal Indeterminacy and Constitutional Interpretation, Dordrecht, 1998, 160-161, 131.
93. *Müller J. P.* in: *Schefer M., Peters A.*, Grundprobleme der Auslegung aus Sicht des öffentlichen Rechts, Symposium zum 60. Geburtstag von René Rhinow, Bern 2004, 84.
94. *Murphy W. F., Fleming J. E., Barber S. A., Macedo St. (ed.)*, American Constitutional Interpretation, 6th ed., 2019, 107 et seq.
95. *Nettesheim M.*, Die Karlsruher Verkündigung – Das BVerfG in staatsrechtlicher Endzeitstimmung, in: EuR-Bei 2010, 118.

96. *Nolte G. (ed.)*, European and US Constitutionalism, Cambridge, 2005, 3-20, 85-107, 108-124.
97. *Nolte G., Schreiber L.*, *Der Mensch und seine Rechte – Grundlagen und Brennpunkte der Menschenrechte zu Beginn des 21. Jahrhunderts*, 2004, 9 ff., 86 ff.
98. *Pernice I.*, La Rete Europea di Costituzionalità – Der Europäische Verfassungsverbund und die Netzwerktheorie, in: *ZaöRV* 2010, 59.
99. *Pernice I.*, Multilevel Constitutionalism in the European Union, WHI – Paper 5/02, 3 ff.
100. *Pernice I., von Engelhardt B., Krieg S.H., Ley I., Saldias O. (Hrsg.)*, *Europa jenseits seiner Grenzen*, Baden-Baden, 2009, 91 ff.
101. *Pieroth B.*, Politischer Freiraum zur Umgestaltung des Bundesstaats, in: *ZRP* 2008, 90 ff.
102. Pl. ÚS 19/08, 26.11.2008, 375360. 109, <<http://www.concourt.cz/clanek/pl-19-08>> [23.02.2023].
103. *Proelss A.*, Bundesverfassungsgericht und überstaatliche Gerichtsbarkeit, Diss., Tübingen 2014, 15 ff., 203 ff.
104. *Proelß A.*, Zur verfassungsgerichtlichen Kontrolle der Kompetenzmäßigkeit von Maßnahmen der Europäischen Union: Der „ausbrechende Rechtsakt“ in der Praxis des BverfG, in: *EuR* 2011, 243.
105. *Quint P. E.*, 60 Years of the Basic Law and its Interpretation, in: *JöR (N. F. 57)* 2009, 1 ff.
106. *Radbruch G.*, *Rechtsphilosophie*, 8. Aufl., v. *Wolf E., Schneider H.-P. (Hrsg.)*, Stuttgart 1973, 327 ff.
107. *Ress G.*, Supranationaler Menschenrechtsschutz und der Wandel der Staatlichkeit, in: *ZaöRV* 2004, 636 ff.
108. *Rosenfeld M.*, Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court, in: *international journal of constitutional law*, Vol. 4, 2006, 623 f.
109. *Rosenfeld M., Sajó A.*, *The Oxford Handbook of Comparative Constitutional Law*, New York, 2012.
110. *Sachs M.*, Kommentar zum GG, 9. Aufl. 2021, Vor Art. 1, Rn. 27-38.
111. *Sauer, H.*, Kompetenz- und Identitätskontrolle von Europarecht nach dem Lissabon-Urteil – Ein neues Verfahren vor dem Bundesverfassungsgericht? In: *ZRP* 2009, 195 (197);
112. *Savigny C. v.*, *System des heutigen römischen Rechts I*, 1840, 212 ff.
113. *Schlink B.*, Abschied von der Dogmatik: Verfassungsrechtsprechung und Verfassungsrechtswissenschaft im Wandel, in: *JZ*, 62. Jg., 2007, 157 (157 f.).
114. *Schneider H.-P./Steinberg, R. (Hrsg.)*, *Verfassungsrecht zwischen Wissenschaft und Richterkunst*, Heidelberg 1990, 39 ff.
115. *Schwarze J.*, *Verfassungsrecht und Verfassungsgerichtsbarkeit im Zeichen Europas*, Baden-Baden 1998.
116. *Smend R.*, Bürger und Bourgeois im deutschen Staatsrecht, ders., *Staatsrechtliche Abhandlungen*, 1955, 313, 314.
117. *Smend R.*, *Staatsrechtliche Abhandlungen*, 2. Aufl., 1968, 188-196.
118. *Starck Chr.*, Das Bundesverfassungsgericht in der Verfassungsordnung und im politischen Prozeß, in: *FS 50 Jahre Bundesverfassungsgericht*, Tübingen 2001, 3.
119. *Starck Chr.*, *Verfassungen*, Tübingen 2009.
120. *Steiger H.*, Staatlichkeit und Mitgliedstaatlichkeit – Deutsche staatliche Identität und Europäische Integration, in: *EuR-Bei* 2010, 57 (58).
121. *Stern K.*, *Das Staatsrecht der Bundesrepublik Deutschland*, B. 1. Zweite, völlig neubearb. Aufl., München 1984, 165 ff.
122. Supreme Court (UK), the decision of September 24, 2019, UKSC 41, paragraph 39.

123. *Thym D.*, Euro-Rettungsschirm: zwischenstaatliche Rechtskonstruktion und verfassungsrechtliche Kontrolle, in: *EuZW* 2011, 169 f.
124. *Tridimas T.*, Constitutional review of member state action: The virtues and vices of an incomplete jurisdiction, in: *Int J Constitutional Law*, Vol. 9 2011, 737 (739 ff.).
125. *Tsanava L.*, Constitutional Control and Interpretation of the Constitution (Modern Constitutional Law (Book I), 2012).
126. *v. Bogdany A., Bast J. (Hrsg.)*, Europäisches Verfassungsrecht, 2. Aufl., Heidelberg 2009.
127. *v. O. Robert Ch (Hrsg.)*, Verfassungsrealismus, Baden-Baden 2007.
128. *von Bogdandy A.*, Prinzipien der Rechtsfortbildung im europäischen Rechtsraum – Überlegungen zum Lissabon-Urteil des BVerfG, in: *NJW* 2010, 1 (2).
129. *Mangoldt H. v., Klein F., Starck Ch.*, Grundgesetz, 7. Auflage, 2018, Abs. 3 Art 1, Rn. 181.
130. *Vofßkuhle A.*, Das europäische Verfassungsgerichtsverbund, in: *NVwZ* 2010, 1 (1 ff.);
131. *Vofßkuhle A.*, Verfassungsgerichtsbarkeit und europäische Integration, in: *NVwZ-Beilage*, 2013, 27 ff.
132. *Vesterdorf Bo*, A constitutional Court for the EU? in: *International journal of constitutional law*, Vol. 4, Issue 4, 2006, 607 ff.
133. *Walker N.*, Multilevel Constitutionalism: Looking Beyond the German Debate, LSE ‘Europe in Question’ Discussion Paper Series, LEQS Paper Nr. 08/2009 June 2009, 3 ff.
134. *Walter Chr.*, Der französische Verfassungsrat und das Recht der Europäischen Union, in: *EuGRZ* 2005, 32. Jg., Heft 4-7, 79 f.
135. *Walter Chr.*, Constitutionalizing (Inter)national Governance – Possibilities for and Limits to the Development of an International Constitutional Law, in: *German Yearbook of International Law* 44, 2001, 175 f.
136. *Walter M. (Hrsg.)*, Carl Schmitt: Der Begriff des Politischen – Synoptische Darstellung der Texte, Berlin, 2018, 55ff.
137. *Walter M.*, Integrationsgrenze Verfassungsidentität – Konzept und Kontrolle aus europäischer, deutscher und französischer Perspektive, in: *ZaöRV* 72, 2012, 177-200.
138. *Wilde R. C.*, „Das letzte globale Linie“, Carl Schmitt und der Kampf um das Völkerrecht, Berlin 2014, 69.
139. *Wilkinson M. A.*, Political Constitutionalism and the European Union, in: *The Modern Law Review*, Vol.76, Nr. 2, 2002, 213 f.
140. *Wilkinson M. A.*, Who’s afraid of a European Constitution? In: *E.L.Rev.*, Vol. 30, 2005, 297 ff.
141. Decisions of the Constitutional Court of Georgia: Citizens of Georgia – Irma Inashvili, Davit Tarkhan-Mouravi and Ioseb Manjavidze against the Parliament of Georgia, NI/1/549; Decision of the Constitutional Court of June 28, 2010 (466th Constitutional Lawsuit) – Public Defender of Georgia against the Parliament of Georgia, II-4.
142. Decisions of the Federal Court of Germany: BVerfGE 35, 263, 278; BVerfGE 58 (218); BVerfGE 90, 286 (381 f.); BVerfGE 101, 158; BVerfGE 23, 127 (133); BVerfGE 2, 1 (12 f.); BVerfGE 5, 85 (140 ff.); BVerfGE 50, 290 (336); BVerfGE 2, 380 (403); 45, 187 (246); 81, 347 (356); BVerfGE 7, 198 (204 ff.); BVerfGE 123, 267; BVerfGE 37, 271; BVerfGE 73, 339; BVerfGE 89, 155; BVerfGE 123, 267 (357 f.); BVerfGE 7, 198. BVerfGE 5, 85 (198); 22, 180 (204); 27, 253 (283); 35, 202 (235f.). BVerfGE 18, 257 (273); 29, 221 (235); BVerfGE 61, 127 (137).