JUS CIVILE

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HOW TO WORK WITH THE GERMAN CONSTITUTION. A CONTRIBUTION TOWARDS GREATER METHODICAL HONESTY IN THE DISPUTE BETWEEN THE TWO SENATES OF THE FEDERAL CONSTITUTIONAL COURT

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I. Introduction

A. Constitutional law by the courts

1. – In many states the constitution is the most important source of law, it can set aside non-constitutional law. In Germany the Constitution is particularly powerful. Any citizen may assert breaches of his or her fundamental rights with a constitutional complaint before the Federal Constitutional Court if other legal avenues have been exhausted. In accordance with Art. 20 para. 3 of the Basic Law, the courts are bound by law and justice as well as equality before the law, so that, as a matter of principle, any judgment containing errors may be successfully reviewed before the Federal Constitutional Court.

A law can be unconstitutional, if it is formally not compatible with the Constitution, e.g. because the legislative procedure was evidently errouneous [1] or the provisions about competency have been violated. [2] In addition a law can materielly breach the Constitution. For example in tax law a violation against the principle of taxation equality is often complained, this violation derives from the principle of equality of Article 3 (1) GG. [3] In general such an unconstitutional law has to be declared null and void by the Federal Constitutional Court, section 78 sentence 1 and section 93 subsection (3) sentence 1 BVerfGG. The decision has a general binding effect – in most cases even legal force – and has to be published in the Federal Law Gazette, section 31 BVerfGG. [4]

The unconstitutionality and nullity of a norm is the *ultima ratio*, i.e. it is the last resort. In cases of doubt, therefore, an interpretation that is in conformity with the Constitution is preferable vis-à-vis nullity. [5] In other words, it leads not to the formal rejection of a norm, but to its *retention*. [6] A mandatory interpretation in conformity with the Constitution can be reasoned with a variety of different considerations. Firstly, according to

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[1] Federal Constitutional Court (BVerfG), order of 8 December 2009: 2 BvR 758/07, Decision of the Federal Constitutional Court (BVerfGE) 125, 104, 132 – Conciliation Committee III.

[2] BVerfG, judgment of 15 February 2006: 1 BvR 357/05, BVerfGE115, 118, 165 – Aviation Security Act I.

[3] BVerfG, order of 7 November 2006: 1 BvL 10/02, BVerfGE 117, 1 = BGBl. I 2007, 194 – Inheritance Tax I; BVerfG, judgment of 17 December 2014: 1 BvL 21/12, BVerfGE 138, 136 = (2015) 68 Neue Juristische Wochenschrift (NJW) 303 – Inheritance Tax II.

[4] Just as Art. 136 of the Constitution of the Italian Republic.

[5] See established case-law, BVerfG, judgment of 4 May 2011: 2 BvR 2365/09 et al., BVerfGE 128, 326 and 400 – Preventive detention; BVerfG, order of 7 May 1953: 1 BvL 104/52, BVerfGE 2, 266 and 282; BVerfG, order of 3 June 1992: 2 BvR 1041/88 and 78/89, BVerfGE 86, 288 and 320 – § 57a Criminal Code.

6H. Dreier in H. Dreier (ed.), GG, 3rd ed. (Tübingen 2013), Art. 1 III para. 85.

the stage-by-stage structure of the law, the Constitution ranks higher than non-constitutional law, and is already to be complied with because of the *lex superior* rule.[7] The concept of the continuity of the law and the avoidance of a legal vacuum furthermore require that the norm be retained in cases of doubt. Moreover, the rule of law requires there to also be a prohibition of disproportionality among the powers of the State.[8] Finally, respect for the legislative power requires that a law not be declared null and void, but that it should be maintained by lending it an interpretation that is in conformity with the Constitution.[9] This gives rise to a principle of retaining the norm (*favor legis*).[10] Similarly, an obligation is also embedded in Anglo-American law to interpret the norm in such a way that it does not breach the Constitution.[11]

2. – Given the extended application of fundamental rights[12], all non-constitutional

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[7] H. Kelsen, Reine Rechtslehre, 2nd ed. (Vienna 1960), 228 et seqq.; K.F. Röhl and H.C. Röhl, Allgemeine Rechtslehre, 3rd ed. (Munich 2008), 308 et seq.; B. Rüthers, C. Fischer and A. Birk, Rechtstheorie, 8th ed. (Munich 2015), paras. 272 et seqq.; F. Bydlinski, Juristische Methodenlehre und Rechtsbegriff, 2nd ed. (Vienna 1991), 201; E.A. Kramer, Juristische Methodenlehre, 4th ed. (Munich 2013), 92. Besides the argument of the unity of the legal system is raised, see K. Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 20th ed. (Heidelberg 1995), para. 80.

[8] R. Zippelius, "Verfassungskonforme Auslegung von Gesetzen" in C. Starck (ed.), Festgabe 25 Jahre BVerfG, vol. II (Tübingen 1976), 108 and 111.

[9] Established case-law (see footnote 5 above); H.G. Dederer in T. Maunz and G. Dürig (eds.), GG, 78th supplement (Munich 2016), Art. 100 paras. 16 and 22 et seq.

[10] H. Bogs, Die verfassungskonforme Auslegung von Gesetzen (Dillingen 1966), 21 et seq.; K. Schlaich and S. Korioth, Das Bundesverfassungsgericht, 10th ed. (Munich 2015), para. 442; C.-W. Canaris, "Die verfassungskonforme Auslegung und Rechtsfortbildung im System der juristischen Methodenlehre" in H. Honsell et al. (eds.), Festschrift Kramer (Basel and Geneva 2004), 141 and 149; J.H. v. Dannecker in H.W. v. Laufhütte, R. Rissing-van Saan and K. Thiedemann (eds.), LK-StGB, 12th ed. (Berlin 2007), § 1 para. 326.

[11] Statutes are to be interpreted in such a way that they are not in breach of the Constitution, just as in US law, Crowell v Benson [1932] 285 U.S. 22, 62: "When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."; R.A. Posner, "Statutory Interpretation" (1983), 50 U.Chi.L.Rev. 800 and 815.

[12] BVerfG, judgment of 15 January 1958: 1 BvR 400/51, BVerfGE 7, 198 and 206 et seq. – Lüth. Unambiguously also BVerfG, order of 11 June 1991: 1 BvR 239/90, BVerfGE 84, 192 and 195 – Disclosure of placing under guardianship: "The Constitution requires the judge to examine whether the application of provisions of civil law impacts on fundamental rights in the individual case. If this is so, he or she must interpret and apply these provisions in the light of fundamental rights." See also BVerfG, order of 19 October 1993: 1 BvR 567, 1044/89, BVerfGE 89, 213 and 229 et seq. – surety from relatives with no assets.

courts are called on to also simultaneously comply with the Basic Law in addition to their respective specialist field in order to prevent unconstitutional rulings. They are also constitutional courts in this sense, so that there are thousands of "constitutional courts" in Germany. [13] The imprecise use of the term "interpretation in conformity with the Constitution" by the Federal Constitutional Court does not make it easy for the non-constitutional courts to work with the Constitution. On the one hand, the interpretation in conformity with the Constitution is close to the constitutionally-orientated interpretation, which does not take priority but only constitutes a standard for assessment. [14] On the other hand, little has been done to clarify when an interpretation in conformity with the Constitution is not permissible and to what degree further development of the law in conformity with the Constitution remains possible. [15] This leads to a danger that the non-constitutional courts are overburdened with this task. [16]

B. Disputed arguments of constitutional law

1. – The mandatory interpretation in conformity with the Constitution has been acknowledged for many years, but this term is otherwise used for four different circumstances, which strictly speaking are not suited to this term: The Federal Constitutional

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[13] K. Schlaich and S. Korioth, Das Bundesverfassungsgericht, 10th ed. (Munich 2015), para. 441: "[…] the interpretation in conformity with the Constitution is incumbent on each judge."

[14] L.Kuhlen, Die verfassungskonforme Auslegung von Strafgesetzen (Heidelberg 2006), 3: speaks of boundaries in flux; see also R. Zippelius, Juristische Methodenlehre, 11th ed. (Munich 2012), 33.

[15] H. Schulze-Fielitz in H. Dreier, GG, 3rd ed. (Tübingen 2015), Art. 20 (constitutional state) para. 87.

[16] K. Schlaich and S. Korioth, Das Bundesverfassungsgericht, 10th ed. (Munich 2015), para. 145; J. Wieland in H. Dreier, GG, 2nd ed. (Tübingen 2008), Art. 100 para. 19;M. Ruffert, "Die Rechtsprechung des BVerfG zum Privatrecht"(2009) 64 JuristenZeitung (JZ) 389 and 397 et seq. on the evaluation of the case-law of the Federal Labour Court (BAG). One example is the Macrotron ruling of the Federal Court of Justice (BGH). This ruling considered that withdrawal from the stock exchange violated the marketability of the share, and hence ownership of shares within the meaning Art. 14 para. 1 of the Basic Law. In order to protect the minority shareholders, it developed the law by developing the precondition that the company had to obtain a resolution on the part of the shareholders' meeting, as well as a mandatory offer of the public limited company or of the major shareholder regarding the purchase of the shares belonging to the minority shareholders. The Federal Constitutional Court affirmed as a matter of principle the right of the Federal Court of Justice to further develop the law, but rejected in the concrete case reasoning the further development of the law with a breach of the right of property since the marketability of the share as a mere asset was said not to fall within the area protected by property in accordance with Art. 14 para. 1 of the Basic Law. Federal Court of Justice, judgment of 25 November 2002: II ZR 133/01, BGHZ 153, 47 and 55 – Macrotron; BVerfG, judgment of 11 July 2012: 1 BvR 3142/07, 1569/08, BVerfGE 132, 99 paras. 54 et seqq. – Delisting.

Court for instance carries out further development of the law in conformity with the Constitution in many rulings *without* using this term. Instead, the talk is partly of an interpretation in conformity with the Constitution.[17] The Federal Constitutional Court ultimately also does *not* use the term "constitutionally-orientated interpretation", even though it has long since been introduced into the legal reference material.[18] In its place, there is only rather imprecise talk of the extended application (*Ausstrahlungswirkung*).[19]

2. – In the view put forward here, three methodical figures can be made out influencing non-constitutional law: constitutionally-orientated interpretation, albeit little has been done to clarify it (II), the well-known figure of the interpretation in conformity with the Constitution (III) and to be distinguished from it, further development of the law in conformity with the Constitution (IV. + V). On the one hand, the Constitution is a standard for interpretation for non-constitutional law, but on the other hand, itself consists of norms, which are amenable to and in need of interpretation.[20] Apart from such paradoxical realisations, it is to become clear that the Constitution is an abstract foundation which permits latitude to be exercised in the interpretation of the non-constitutional statutes, as well as, firstly, having a *limiting* function (interpretation in conformity with the Constitution), secondly constituting a *shaping mandate* of last resort to the case-law (further development of the law in conformity with the Constitution) and thirdly having a *role of weighing up* without priority (constitutionally-orientated interpretation).

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[17] BVerfG, judgment of 4 May 2011: 2 BvR 2365/09 et al., BVerfGE 128, 326 and 400 – Preventive detention IV.

[18] See for instance H. Dreier, "Grundrechtsdurchgriff contra Gesetzesbindung?" (2003) 36 Die Verwaltung 105 and 111 footnote 43; the term is however used in the collection of case-law C. Bumke/A. Voßkuhle, Casebook constitutional law (Tübingen 2015), paras. 161 and 669.

[19] P. Lerche, "Grundrechtswirkungen im Privatrecht, Einheit der Rechtsordnung und materielle Verfassung" in R. Böttcher, G. Hueck, B. Jähnke (eds.), Festschrift Odersky (Berlin 1996), 215, 216 et seq., 223 and 225 et seq.; C.-W. Canaris, Grundrechte und Privatrecht (Berlin 1999), 30 and 93 speaks of a solution of convenience of this figurative use in slang. Extended application is disparagingly also referred to as a "headlight theory", see H.-W. Friedrich, "Arbeitsgerichtsbarkeit und Verfassungsgerichtsbarkeit" in D.C. Umbach, T. Clemens and F.-W. Dollinger (eds.), BVerfGG – Mitarbeiterkommentar, 2nd ed. (Heidelberg 2005), 93 and 104 footnote 55.

[20] R. Zippelius, "Verfassungskonforme Auslegung von Gesetzen" in C. Starck (ed.), Festgabe 25 Jahre BVerfG, vol. II (Tübingen 1976), 108 and 112.

II. The constitutionally-orientated interpretation

A. The difference of opinion on the constitutionally-orientated interpretation

The constitutionally-orientated interpretation is one of the legal figures with respect to which the least clarification has been carried out. The Federal Constitutional Court does not explicitly use the legal figure to the present day; instead, for instance, there is talk of extended application and fundamental rights as a value system. One view that has been put forward in the reference material is that the delimitation between a constitutionally-orientated interpretation and one that is in conformity with the Constitution is a grey area.[21] Some authors even go so far as to state that constitutionally-orientated interpretation and interpretation in conformity with the Constitution are one and the same.[22] The figure of constitutionally-orientated interpretation is said to be superfluous in this regard.[23] According to another view, the constitutionally-orientated interpretation may be carried out by anyone, but the interpretation in conformity with the Constitution may only be effected by the Federal Constitutional Court.[24] One counter-argument to this could be that a distinction by addressees cannot be constitutionally reasoned.[25] According to a third view, the interpretation in conformity with the Constitution serves in a first step to rule out those results which are ascertained by means of a grammatical, historical and teleological interpretation and which are not compatible with the Constitution. The constitutionally-orientated interpretation is said to serve in, a second step, to select from among the constitutional results the one, which comes closest to the Constitution or to the protection mandate under constitutional law.[26] This is said to be parallel to the "*effet utile*" under European law.[27]

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[21] J.H. v. Dannecker in H.W. v. Laufhütte, R. Rissing-van Saan and K. Thiedemann (eds.), LK-StGB, 12th ed. (Berlin 2007), § 1 para. 333; L.Kuhlen, Die verfassungskonforme Auslegung von Strafgesetzen (Heidelberg 2006), 2: "boundaries in flux."

22U. Lembke, Einheit aus Erkenntnis?(Berlin 2009), 247; F. Reimer, Juristische Methodenlehre(Baden-Baden 2016), paras. 400 et seq.

[23] For instance C.-W. Canaris, "Die verfassungskonforme Auslegung und Rechtsfortbildung im System der juristischen Methodenlehre" in H. Honsell et al. (eds.)Festschrift Kramer (Basel and Geneva 2004), 141 and 154.

[24] H. Simon, "Die verfassungskonforme Gesetzesauslegung" (1974) 1 Europäische Grundrechte Zeitschrift (EuGRZ) 85 and 87; K. Stern, Das Staatsrecht der Bundesrepublik Deutschland, vol. I, 2nd ed. (München 1984), 136.

[25] R. Wendt, "Verfassungsorientierte Gesetzesauslegung" in D. Heckmann, R. P. Schenke, G. Sydow (eds.) Festschrift Würtenberger (Berlin 2013), 123 and 126.

[26] R. Wendt, "Verfassungsorientierte Gesetzesauslegung" in D. Heckmann, R.P. Schenke, G. Sydow (eds.),Festschrift Würtenberger (Berlin 2013), 123 and 130.

This view is pleasing in that the constitutionally-orientated interpretation uses fundamental rights in its weighing up, and uses them as principles in this regard. Having said that, it is too restrictive since, in a second step, it is not intended to be used until after the interpretation in conformity with the Constitution. The constitutionally-orientated interpretation however also has scope if the Constitution does nothing to enforce prioritisation, so that there are no unconstitutional outcomes at all. What is more, the principle of optimisation may already form part of the interpretation in conformity with the Constitution.[28] This renders subordinate the interpretation of the constitutionally-orientated interpretation in conformity with the Constitution.[29]

B. The definition of the "constitutionally-orientated interpretation"

In the view put forward here, a constitutionally-orientated interpretation is when the fundamental rights only constitute a simple argument, which *(only) ranks equally with the previous interpretation figures*. The influence exerted by the Constitution on non-constitutional law is hence so weak that it particularly does not require any priority of the Constitution, but where appropriate is not victorious over the other figures. Only the extended application of fundamental rights in civil law and in criminal law is to be revealed below. The concretisation of fundamental rights and the weighing up of various fundamental rights is a separate topic. This enables a three-fold distinction between a constitutionally-orientated interpretation and one that is in conformity with the Constitution:

Firstly, a constitutionally-orientated interpretation only requires taking the Constitution into account and involving it in the weighing up.[30] An interpretation in conformity

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[27] C. Armbrüster, "Kontrahierungszwang im Allgemeinen Gleichbehandlungsgesetz?" (2007) 60 NJW1494 and 1496. On the "effet utile" for instance ECJ, judgment of 15 July 1963: Case 34/62 [1963] ECLI:EU:C:1963:18, 269 and 318 –Germany/Commission; H. Kutscher,"Thesen zu den Methoden der Auslegung des Gemeinschaftsrechts, aus der Sicht eines Richters" in Luxemburg Amt für amtliche Veröffentlichungen der Europäischen Gemeinschaften (ed.), Begegnung von Justiz und Hochschule(Luxembourg 1976),1-43; G. Hager,Rechtsmethoden in Europa(Tübingen 2009), 254; M. Pechstein and C. Drechsler,"Die Auslegung und Fortbildung des Primärrechts" in K. Riesenhuber (ed.), Europäische Methodenlehre, 3rd ed. (Berlin and Boston 2015), § 7 paras. 56 et seqq.; U. Everling,"Richterliche Rechtsfortbildung in der Europäischen Gemeinschaft"(2000) 55 JZ217 and 223.

[28] F. Reimer, Juristische Methodenlehre(Baden-Baden 2016), para. 400. Different view R. Wendt, "Verfassungsorientierte Gesetzesauslegung" in D. Heckmann, R. P. Schenke, G. Sydow (eds.), Festschrift Würtenberger (Berlin 2013), 123 and 130.

[29] C. Höpfner, Die systemkonforme Auslegung (Tübingen 2008), 180.

[30] J. Burmeister, Verfassungsorientierung (Cologne 1966), 14 et seqq.; H. Simon, "Die verfassungskon-

with the Constitution, by contrast, is stronger: It forces legal practitioners to allot preference to the constitutional result over the others if various interpretation results are possible.

Consequently, and secondly, the constitutionally-orientated interpretation is only one criterion among several interpretation figures. In this regard, it is only an interpretation figure with equal rank, without demanding priority,[31] whilst conversely the interpretation in conformity with the Constitution particularly forces this priority by separating out unconstitutional results. It is hence only a *weighing up rule,without* any presumption effect. *Kudlich* describes a highly-figuratively turning point in this regard between a constitutionally-orientated interpretation and an interpretation in conformity with the Constitution: "at the moment when the interpretation becomes unconstitutional, the argumentation becomes an interpretation in conformity with the Constitution, which at least explicitly prohibits a specific outcome."[32]Dworkin identified principles as norms, which – without being rules – can serve as arguments for individual rights.[33]Rules meaning norms are either met or not, and thus prescribe a decision.[34] Principles, by contrast, cannot absolutely specify a decision, because they are to be balanced against other principles.[35] In this respect, principles are (only) optimization requirements which can be fulfilled to various degrees and be incorporated into the decision.[36].Whilst the interpretation in conformity with the Constitution can be referred to as a rule, the constitutionally-orientated interpretation is only a principle[37]inthis regard which is to be taken into ac-

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forme Gesetzesauslegung" (1974) 1 EuGRZ 85 and 86 et seq.; K. Stern, Das Staatsrecht der Bundesrepublik Deutschland, vol. I, 2nd ed. (München 1984), 136; K. Schlaich/S. Korioth, Das Bundesverfassungsgericht, 10th ed. (Munich 2015), para. 448; H. Kudlich, "Grundrechtsorientierte Auslegung im Strafrecht" (2003) 58 JZ 127 and 130.

[31] C. Höpfner, Die systemkonforme Auslegung (Tübingen 2008), 180; in part already W. Skouris, Teilnichtigkeit von Gesetzen (Berlin 1973), 115.

[32] H. Kudlich, "Grundrechtsorientierte Auslegung im Strafrecht"(2003) 58 JZ 127 and 130.

33R. Dworkin, Taking Rights Seriously, 2nd ed. (London 1978), 90.

[34] R. Dworkin, Taking Rights Seriously, 2nd ed. (London 1978), 24 et seq. (German: Bürgerrechte ernst genommen, 1984); R. Alexy, Theorie der Grundrechte (Frankfurt am Main 1986), 76 (English: Theory of Constitutional Rights, 2002); R. Alexy, "Rechtsregeln und Rechtsprinzipien" (1985) 71 supplement 25 Archiv für Rechts-und Sozialphiliosophie(ARSP) 13 and 20.

[35] R. Dworkin, Taking Rights Seriously, 2nd ed. (London 1978), 26.

[36] R. Alexy, "Rechtsregeln und Rechtsprinzipien" (1985) 71 supplement 25 ARSP 13 and 19; R. Alexy, Theorie der Grundrechte (Frankfurt am Main 1986), 75 et seq.; R. Alexy, "Rechtssystem und praktische Vernunft" (1987) 18 Rechtstheorie 405 and 407, agreeing K. Larenz, Methodenlehre des Rechts, 6th ed. (Berlin 1991), 475; N. Jansen, Die Struktur der Gerechtigkeit (Baden-Baden 1998), 106 et seq., A Röthel, Normkonkretisierung (Tübingen 2004), 146 et seq. and 225 et seq.

[37] See T.M.J. Möllers, Juristische Methodenlehre (Munich 2017), § 11 paras. 11 et seqq. on the terms "rule" and "principle".

count when weighing up.[38] Fundamental rights positions can thus be included in the argumentation in defence against the solution of non-constitutional law without finally being enforced. Conversely, they can be affected on both sides and included in the weighing up. It is typically a matter of the extended application, and hence of the development and enforcement of fundamental rights. Typical application cases include freedom of opinion, coalition and occupation, and these are to be taken into account in labour law.

And thirdly, the interpretation in conformity with the Constitution is aimed to maintain the provision,[39] whilst the constitutionally-orientated interpretation only aims to optimise the norm[40], without however the norm otherwise threatening to become unconstitutional. The optimisation of the norm is hence to be understood such that, in addition to the usual interpretation criteria, other – constitutional – aspects are brought into the equation, which however do not ultimately need to take priority.

C. The constitutionally-orientated interpretation as a simple weighing up rule in civil law. Two examples shall clarify the area of constitutionally-orientated interpretation

1. – Under the law as it previously stood, were the tenant to die, only the spouse or relatives were able to succeed to the lease, section 569a of the German Civil Code (BGB) old version (now: section 563 of the Civil Code). The Federal Constitutional Court approved the further development of the law carried out by the Federal Court of Justice to analogously apply section 569a of the Civil Code to civil partnerships, amongst other things also because the legislature and the judicative had already recognised civil partnerships in a variety of statutes.[41]

This has been massively criticised in the literature, arguing amongst other things that this constituted for the landlord an impermissible violation of the freedom of contract protected via the general freedom to act in accordance with Art. 2 para. 1 of the Basic

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[38] J.H. v. Dannecker, H.W. v. Laufhütte, R. Rissing-van Saan and K. Thiedemann (eds.), LK-StGB, 12th ed. (Berlin 2007), Art. 1 para. 332;L.Kuhlen, Die verfassungskonforme Auslegung von Strafgesetzen (Heidelberg 2006), 2.

[39] H. Dreier in H. Dreier, GG, 3rd ed. (Tübingen 2013), Art. 1 III paras. 85 et seqq.; see T.M.J. Möllers, Juristische Methodenlehre (Munich 2017), § 7 para. 35.

[40] F. Reimer, Juristische Methodenlehre(Baden-Baden 2016), para. 398.

[41] Federal Court of Justice, judgment of 13 January 1993: 8 ARZ 6/92, BGHZ 121, 116 and 121 et seqq. – § 569a analogously; BVerfG, order of 3 April 1990: 1 BvR 1186/8, BVerfGE 82, 6 and 15 et seq. – Unmarried civil partnership and tenancy succession.

Law and the right of property contained in Art. 14 of the Basic Law. [42]This is to be countered by the fact that the legislature has already considerably restricted the freedom of contract and the right of property of the landlord in recent decades. [43] The background is the consideration that the tenant is to enjoy particular protection in his or her social environment. [44]It is consistent in this regard to have civil partnerships participate here by analogy. As a result, fundamental rights do not therefore lead to priority.

In the case of the right of a civil partnership to succeed to a lease, the landlord may invoke the right of property of Art. 14 of the Basic Law. The rights of the tenant under Art. 14 of the Basic Law were brought into the equation, but particularly cannot be enforced, and are hence only a weighing up position. This is the typical case of the constitutionally-orientated interpretation.

2. – aa) The Federal Constitutional Court developed the influence of the Constitution on civil law (the "Whether") in the *Lüth* judgment. A boycott appeal had previously been categorised by the civil courts as constituting intentional damage contrary to public policy in accordance with section 826 of the Civil Code and as an encroachment on the established and exercised business operation in accordance with section 823 subsection (1) of the Civil Code. Having said that, the boycott appeal may fall in the area protected by freedom of opinion in accordance with Art. 5 para. 1 of the Basic Law. Section 826 of the Civil Code may hence not only be interpreted according to the evaluations of the Civil Code (so that any boycott appeal would be unlawful), but must also consider the Basic Law as a value system and the extended application of fundamental rights, here freedom of opinion. The *interpretation in conformity with the Constitution* forces one to negate the unlawfulness of the boycott appeal and to interpret it in the light of the Constitution. The image of the indirect third-party effect appears to be convincing here. The Federal Constitutional Court did not immediately weigh up the interests, but concretised the collision between freedom of opinion (Art. 5 of the Basic Law) on the one hand, as well as occupational freedom (Art. 12 of the Basic Law) and freedom of property (Art.

[42]G. Roellecke, "Anmerkung zu BVerfG, Beschl. v. 03.04.1990 1 BvR 1186/89" (1990) 25 JZ 813; C. Hillgruber, "Richterliche Rechtsfortbildung als Verfassungsproblem"(1996) 51 JZ 118, 119 and 122; U. Diederichsen, "Die Selbstbehauptung des Privatrechts gegenüber dem Grundgesetz"(1997) 20 Jura 57 and 62 et seqq.; B. Rüthers, C. Fischer and A. Birk, Rechtstheorie, 9th ed. (Munich 2016), para. 875.

[43] T.M.J. Möllers, Juristische Methodenlehre (Munich 2017), § 13 para. 99.

44BVerfG, order of 3 April 1990: 1 BvR 1186/8, BVerfGE 82, 6 and 16 et seq.

14 of the Basic Law) on the other. The motives, goal and purpose of the expression of opinion are crucial: When it comes to a *contribution towards the intellectual clash of opinions* in a question, which has a major impact on the public, the presumption was said to be in favour of the permissibility of freedom of speech.[45] The constitutionally-orientated interpretation then becomes a constitutional one because one fundamental right is enforced and corrects the non-constitutional result. In terms of proportionality, it will furthermore be necessary to demand that the party calling for the boycott must seek a dialogue with the subject of the boycott prior to calling for a boycott.[46]

bb) A fundamental right may however also only constitute a non-constitutional *weighing up rule* without already prejudicing the outcome. If the boycott appeal for instance serves to encroach on the individual sphere of *economic competition between specific competitors on the market*, over and above a certain fundamental opinion, by for instance threatening to cause economic disadvantages in case of non-compliance,[47] the right of freedom of opinion and the public interest in information is only used as a means to the end of promoting *private competitive interests*. A principal priority of the interests of the subject of the boycott is presumed to exist in this case.[48] The freedom of opinion of the party calling for the boycott is only one argument among several; it is *not enforced, and also does not take priority in this regard*. An interpretation in conformity with the Constitution is also not relevant here.[49] The constitutionally-orientated interpretation remains in force.

III. Interpretation in conformity with the Constitution

A. Fundamental questions on the interpretation in conformity with the Constitution

1. – A norm is to be interpreted constitutionally if, among several possible interpreta-

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[45] BVerfG, judgment of 15 January 1958: 1 BvR 400/51, BVerfGE 7, 198 and 216 et seqq. – Lüth; Federal Court of Justice, judgment of 21 June 1966: VI ZR 261/64, BGHZ 45, 296 and 308 –"Höllenfeuer".

[46] T.M.J. Möllers, "Zur Zulässigkeit des Verbraucherboykotts" (1996) 49 NJW 1374 and 1376 et seq.

[47] BVerfG, judgment of 26 February 1969: 1 BvR 619/63, BVerfGE 25, 256 and 264 et seq. – "Blinkfüer".

[48] Federal Court of Justice, judgment of 2 February 1984: I ZR 4/82, (1985) 38 NJW 60 and 62 para. 38 – "Röster Uhren".

[49] Different view R. Wendt, "Verfassungsorientierte Gesetzesauslegung" in D. Heckmann, R. P. Schenke, G. Sydow (eds.), Festschrift Würtenberger (Berlin 2013), 123 and 130, according to which the constitutionally-orientated interpretation is to follow the interpretation in conformity with the Constitution.

tions, only one is constitutional. In most cases, there are however likely to be several interpretations in conformity with the Constitutions. Conversely, it is hence prohibited to select an interpretation result that is not in conformity with the Constitution.[50] The interpretation in conformity with the Constitution consequently takes on a filter function. The Constitution is not only a common sense norm, but at the same time also a control norm in this regard.[51] If the interpretation in conformity with the Constitution no longer permits an interpretation result that is in conformity with the Constitution, the provision is as a matter of principle to be rejected as unconstitutional unless scope remains for a further development of the law in conformity with the Constitution. In the view of the Federal Constitutional Court, the boundaries of the permissible interpretation in conformity with the Constitution are said to be reached when an interpretation of the wording of the statute and the purpose which the legislature clearly wished to pursue with the norm contradict one another.[52] The interpretation in conformity with the Constitution is hence within the boundaries of the wording, and typically occurs in general clauses or undetermined legal definitions.

2. – The interpretation in conformity with the Constitution is largely counted as part of the systematic interpretation,[53] whilst others speak of a variant of the systematic-teleological interpretation.[54] This is correct insofar as it is possible to understand the stage-by-stage structure of the law as forming part of the external system. Whilst the teleological interpretation as a rule locates the purpose of a norm within the codification, or

[50] H. Bogs, Die verfassungskonforme Auslegung von Gesetzen (Dillingen 1966), 94 et seq.; R. Zippelius, "Verfassungskonforme Auslegung von Gesetzen" in C. Starck (ed.), Festgabe 25 Jahre BVerfG, vol. II (Tübingen 1976), 108 and 111.

[51] R. Wank, Grenzen richterlicher Rechtsfortbildung(Berlin 1978), 97 et seqq.; A. Voßkuhle, "Theorie und Praxis der verfassungskonformen Auslegung von Gesetzen durch Fachgerichte" (2000) 125 Archiv des öffentlichen Rechts(AöR) 177 and 181.

[52] See for instance BVerfG, order of 19 September 2007: 2 BvF 3/02, BVerfGE 119, 247 and 274 – Part-time employment of civil servants.

[53] °F. Müller and R. Christensen, Juristische Methodik I, 11th ed. (Berlin 2013), para. 100; K.F. Röhl and H.C. Röhl, Allgemeine Rechtslehre, 3rd ed. (Munich 2008), 623; P. Raisch, Juristische Methoden (Heidelberg 1995), 180; B. Rüthers, C. Fischer and A. Birk, Rechtstheorie, 9th ed. (Munich 2016), para. 759, but then different in para. 762a: "application of the law in conformity of the system" (German: "systemkonforme Rechtsanwendung"); C. Grüneberg in O. Palandt (founder), BGB, 76th ed. (Munich 2017), supplement para. 42.

[54] F. Bydlinski, Juristische Methodenlehre und Rechtsbegriff, 2nd ed. (Vienna 1991), 455.

at least within the field of the law, such as civil law, the interpretation in conformity with the Constitution broadens this very perspective by also permitting the status of the provision in the overall structure of the hierarchy of statutes, and the supraordinate status of the Constitution, to flow into the interpretation.

Having said that, the Constitution comprises a separate value system, which stands above the principles of the Civil Code and of the Criminal Code (StGB) and is able to correct interpretation results, which were found merely,based on non-constitutional law. This view does too little to take account of the fact that the Constitution may, on the one hand, be the standard for assessment, whilst on the other hand non-constitutional law may also act mandatorily because, where there are several interpretation results, the interpretation in conformity with the Constitution is to take precedence.[55] This constitutes a *priority arrangement* in this regard.[56] The interpretation in conformity with the Constitution is consequently a separate interpretation figure.[57]There is a need for a two-tier review: According to the result of non-constitutional law, the constitutional law component is to be taken into account in a second step.

B. Interpretation in conformity with the Constitution in civil law

Two sub-areas of civil law are to be mentioned by way of example in which the interpretation in conformity with the Constitution of the case-law was used as a tool. This is on the one hand the reasoning of obligations to provide protection, in particular to protect health and the general right of personality (a), whilst on the other hand self-

[55] See established case-law, BVerfG, order of 19 September 2007: 2 BvF 3/02, BVerfGE 119, 247 and 274 – Part-time employment of civil servants; BVerfG, order of 14 October 2008: 1 BvR 2310/06, BVerfGE 122, 39 and 60 et seq. – Legal advice and representation; BVerfG, judgment of 4 May 2011: 2 BvR 2365/09 et al., BVerfGE 128, 326 and 400 – Preventive detention; see previously already BVerfG, order of 7 May 1953: 1 BvL 104/52, BVerfGE 2, 266 and 282; BVerfG, notice of 1 March 1978: 1 BvL 20/77, BVerfGE 48, 40 and 45 et seq.; BVerfG, order of 19 June 1979: 2 BvL 14/75, BVerfGE 51, 304 and 323 – Writings harmful to minors; BVerfG, order of 3 June 1992: 2 BvR 1041/88, 78/89, BVerfGE 86, 288 and 320 – § 57a Criminal Code.

[56] C.-W. Canaris, "Die verfassungskonforme Auslegung und Rechtsfortbildung im System der juristischen Methodenlehre" in H. Honsell et a. (eds.), Festschrift Kramer (Basel and Geneva 2004), 141 and 143 et seqq.; C. Höpfner, Die systemkonforme Auslegung (Tübingen 2008), 183; F. Reimer, Juristische Methodenlehre(Baden-Baden 2016), para. 632.

[57] M. Auer, "Die primärrechtskonforme Auslegung" in J. Neuner (ed.), Grundrechte und Privatrecht aus rechtsvergleichender Sicht (Tübingen 2007), 27 and 31; F. Reimer, Juristische Methodenlehre(Baden-Baden 2016), para. 630.

determination is protected by means of the limited permissibility of restrictions imposed by contract (b).

1. – There was previously no explicit statutory foundation for the information of the patient for the purposes of self-determination regarding medical interventions. The Federal Court of Justice has always considered a medical intervention to be unlawful where the patient was not informed and had not effectively consented.[58] It was thus able to use this interpretation in conformity with the Constitution of the component of "unlawfulness" in section 823 subsection (1) of the Civil Code to force a physician to provide such information. The requirement of informed consent to diagnostic, preventive and medical interventions follows from the right to physical integrity which is entrenched in the Basic Law (Art. 2 para. 2 of the Basic Law) and from the freedom and dignity of the human personality (Art. 1 and 2 para. 1 of the Basic Law).[59] The legislature has now normed this case-law in sections 630d and 630e of the Civil Code.

2. – Such cases relate less to the interpretation of a norm in conformity with the Constitution than to a restriction of contractual agreements. The case-law restricts contractual agreements if the freedom of a contracting partner is excessively restricted. A contractually-agreed determination of the place of residence[60], or the mandatory taking of contraceptives[61], are for instance impermissible, meaning contrary to public policy in accordance with section 138 of the Civil Code. It is also impermissible to exploit inferiority so that one

[58] Reich Court of Justice, judgment of 31 May 1894: 1406/94, RGSt 25, 375 and 377 et seqq.; Reich Court of Justice, judgment of 27 May 1908: VI 484/07, RGZ 68, 432 and 434; BVerfG, judgment of 9 December 1958: VI ZR 203/57, BGHZ 29, 46, 49 and 54 et seq. – Electric shock II; Federal Court of Justice, judgment of 14 February 1989: VI ZR 65/88, BGHZ 106 and 291, 397 et seq. – Physician's liability for operation-related risk not requiring provision of information; Federal Court of Justice, judgment of 28 November 1957: 4 StR 525/57, BGHSt 11, 111 and 114 – Myom.

[59] See the dissenting opinion, in: BVerfG, order of 25 July 1979: 2 BvR 878/74, BVerfGE 52, 131 and 173 – Medical liability proceedings; different view the dissenting opinion in BVerfGE (loc. cit., 131 and 168 et seq.).

[60] Federal Court of Justice, judgment of 26 April 1972: IV ZR 18/71, (1972) 25 NJW 1414 and 1415 para. 16 as a violation of the fundamental right to freedom of movement in accordance with Art. 11 para. 1 of the Basic Law.

[61] Federal Court of Justice, judgment of 17 April 1986: IX ZR 200/85, BGHZ 97, 372 and 379 – Agreement on the use of contraceptives as a violation of the fundamental right of human dignity (Art. 1 Basic Law) and general freedom of action (Art. 2 para. 1 Basic Law).

side is *not* able to act *in a self-determined manner*.[62] This is to be affirmed in a prenuptial agreement if an unmarried pregnant woman is faced with the alternative of either having to look after the as yet unborn child alone in future or concluding a prenuptial agreement ruling out maintenance entitlements in the event of a divorce.[63] An *excessive restriction of freedom* however also applies if severe financial burdens are imposed on one side.

Surety from relatives with no assets: A 21-year-old daughter who had not completed any vocational training, who was mostly unemployed and was earning 1,150.00 DM net per month in a fish factory at the time when the surety was declared stood surety for her father in respect of a loan of 100,000.00 DM. Until the 1990s, the case-law took the view that young relatives who were of age could unrestrictedly stand surety at any time, given that an adult could estimate the risk as a matter of principle. The surety was said to be a high-risk transaction and explicitly permitted by the Civil Code. The fact of being bound by law and justice in accordance with Art. 20 para. 3 of the Basic Law was said to prohibit regarding high-risk transactions the expectations and hopes of which were subsequently not realised for the debtor as unwise, with the consequence that a person was released from this obligation. The guarantor was also adequately protected by the limits on attachment contained in sections 859 et seq. of the Code of Civil Procedure (ZPO).[64]

Massive criticism has been voiced against this case-law because a life of indebtedness is said to be in violation of the search for happiness as an unalienable human right.[65] v*Honsell* spoke of an "icy wind of the principle of freedom of action of the end of the 19th Century", which was said to provide the reasoning for the case-law of the Federal Court of Justice.[66] The Federal Constitutional Court concurred with the literature, and found that the

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[62] Details in T.M.J. Möllers, Juristische Methodenlehre (Munich 2017), § 11 paras.43 et seqq.

[63] BVerfG, judgment of 6 February 2001: 1 BvR 12/92, BVerfGE 103, 89 and 100 et seqq. – Waiver of maintenance: breach of Art. 2 para. 1 in conjunction with Art. 6 para. 4 of the Basic Law and Art. 6 para. 2 of the Basic Law.

[64] On earlier case-law see for instance Federal Court of Justice, judgment of 9 January 1989: IX ZR 124/88, BGHZ 106, 269 and 272; Federal Court of Justice, judgment of 24 November 1992: XI ZR 98/92, BGHZ 120 and 272 et seqq.; K. Larenz and C.-W. Canaris, Lehrbuch des Schuldrechts, Besonderer Teil, vol. 2/2, 13th ed. (Munich 1994) 9 et seq.

[65] Stuttgart Higher Regional Court, judgment of 12 January 1988: 6 U 86/87, (1988) 41 NJW 833 and 835.

[66] H. Honsell, "Zur Frage, ob sich vermögenslose, volljährige Kinder eines Hauptschuldners wirksam zur Übernahme einer Bürgschaftsverpflichtung von DM 350 000 für diesen verpflichten können" (1989) 44 JZ 495 re BGHZ 106 and 269; critical also D. Reinicke and K. Tiedtke, "Zur Sittenwidrigkeit hoher Verpflichtungen vermögens- und einkommensloser oder einkommensschwacher Bürgen" (1989) 10 ZIP 613 and 615.

Federal Court of Justice was disregarding essential fundamental rights. Whilst the principle of freedom of action, as guaranteed in Art. 2 para. 1 of the Basic Law, also permitted high-risk transactions, it nonetheless required self-determination, which was said not to exist where there was "disturbed contractual parity" – this being the term used by the Federal Constitutional Court. A correction was said to always be required where it was no longer possible to take a *responsible decision* given the predominance of a party. [67]

The current case-law of the Federal Court of Justice and the stipulations of the Federal Constitutional Court do not create a situation in which any contract must be subject to a review of reasonableness. Rather, the stipulations are to be implemented in conformity with the system by stringently applying section 138 subsection (1) of the Civil Code. As so often happens with section 138 of the Civil Code, an overall evaluation must be carried out of all the circumstances of the individual case. [68]

IV. Further development of the law in conformity with the Constitution ("verfassungskonforme Rechtsfortbildung")

A. The contradictory case-law of the Federal Constitutional Court

1. – The legal figure of further development is partly rejected in constitutional law. Further development of the law is to be impermissible if it is in breach of the unambiguous wording [69] or the subjective will of the legislature [70]. The Federal Constitutional Court also put it in a similar way, stating that boundaries are established for the interpretation in conformity with the Constitution towards the "clearly-expressed will of the legislature" because the Federal Constitutional Court would otherwise take the place of the democratically-elected legislature. [71]

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[67] BVerfG, order of 19 October 1993: 1 BvR 567, 1044/89, BVerfGE 89, 214 and 231 et seqq. – Surety from relatives with no assets.

[68] J. Ellenberger in O. Palandt (founder), BGB, 76th ed. (Munich 2017), section 138 paras. 37 et seqq.

[69] R. Zippelius, "Verfassungskonforme Auslegung von Gesetzen", in C. Starck (ed.), Festgabe 25 Jahre BVerfG, vol. II (Tübingen 1976), 108 and 115 et seq.

[70] K. Stern, "Verfassungskonforme Gesetzesauslegung" (1958) 11 NJW 1435; J. Neuner, Privatrecht und Sozialstaat (Munich 1999), 47 et seq.; A. Voßkuhle, "Theorie und Praxis der verfassungskonformen Auslegung von Gesetzen durch Fachgerichte" (2000) 125 AöR 177 and 197 et seq.

[71] BVerfG, order of 14 October 2008: 1 BvR 2310/06, BVerfGE 122, 39 and 60 et seq. – Legal advice and representation: "An understanding of norms which contradicts the clearly-recognisable will of the legi-

2. – Even if the Federal Constitutional Court only uses the term "interpretation in conformity with the Constitution" [72] and rejects in formal terms a further development of the law in conformity with the Constitution, it has recognised in many rulings a further development of the law in conformity with the Constitution beyond the limits imposed by the wording. It has even explicitly ruled against the will of the legislature at that time in some cases, and has invoked with the objective theory today's understanding of the norm. [73] The case-law of the Federal Constitutional Court is hence contradictory. This legal figure is consistently recognised in the more recent legal reference material. [74] Having said that, the stipulations as to when such a further development of the law is impermissible are the subject of heated debate between the Senates. [75]

As a matter of principle, the will of the legislature is to be complied with, as this is required by respect for the legislative power. [76] The Federal Constitutional Court may not puff itself up into a replacement legislature. [77] Were courts to consider a formal post-constitutional federal law to be unconstitutional in accordance with a previous, unsuccessful interpretation in conformity with the Constitution, they would have to call on the Federal Constitutional Court within a concrete judicial review in accordance with Art. 100 para. 1 of the Basic Law. Citizens may lodge a constitutional complaint. [78] The Federal Constitutional Court can declare the norm unconstitutional and hence null and void, section 78, sentence 1, and section 95 subsection (3), sentence 1 of the Federal Constitutional Court Act (BVerfGG). Were one to permit more prolific further development of the law in conformity with the Constitution against the wording of the law, the valid law

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slature can also not be justified by means of an interpretation in conformity with the Constitution" referring to "BVerfGE 54, 277 [299 et seq.]; 71, 81 [105]; 90, 263 [275]; 95, 64 [93]; 98, 17 [45]; 99, 341 [358]; 101, 54 [86, 88], as well as 312 [329]; 112, 164 [183]".

[72] See footnote 17 above.

[73] See footnote 89 below.

[74] For instance C.-W. Canaris, "Die verfassungskonforme Auslegung und Rechtsfortbildung im System der juristischen Methodenlehre" in H. Honsell et al. (eds.), Festschrift KramerFestschrift(Basel and Geneva 2004), 141 and 155 et seqq.; M. Auer, "Die primärrechtskonforme Auslegung" in J. Neuner (ed.), Grundrechte und Privatrecht aus rechtsvergleichender Sicht (Tübingen 2007), 27 and 30 et seqq.; U. Lembke, Einheit aus Erkenntnis?(Berlin 2009), 250 et seqq.

[75] T.M.J. Möllers, Juristische Methodenlehre (Munich 2017),§ 7 paras. 79.

76See footnote 5 above.

[77] A. Voßkuhle, "Theorie und Praxis der verfassungskonformen Auslegung von Gesetzen durch Fachgerichte" (2000) 125 AöR 177 and 198. The rulings of the Federal Constitutional Court which he cites however do not lend weight to the hypothesis since they only relate to the omission of legislative activity, and not to further development of the law in conformity with the Constitution.

[78] C. Hillgruber, "Richterliche Rechtsfortbildung als Verfassungsproblem" (1996) 51 JZ 118 and 122.

would be cemented, thus obviating the need to close the loophole by means of a formal statute.[79] The acknowledgement of the right of personality by the Federal Constitutional Court would hence lead to a situation in which the legislature still did not yet consider itself to be required[80] to create a statutory foundation for this legal institute, which is so important in practice.

A permissible further development of the law must therefore move within the boundaries specified above. Further development of the law against the wording, the system, the historical will and the telos of the norm is therefore (exceptionally) permissible in the following case groups if an unambiguous and unmistakeable violation of fundamental rights has been committed. Conversely, further development of the law in conformity with the Constitution is no longer permissible, and hence *contra legem*, if it massively encroaches on third-party fundamental rights.

B. Groups of cases of permissible further development of the law in conformity with the Constitution

1. – Further development of the law in conformity with the Constitution can as a rule be described in criminal law and in public law as the expression of the rights-of-aversion dimension of fundamental rights, given that here the State encroaches on the fundamental rights of the citizen in question. A further development of the law can be justified most simply via the wording of the norm if it depicts a teleological reduction. In such cases, what is unequal is treated unequally for reasons of equitableness in order to do justice to the regulatory purpose of the norm.[81] Further development of the law in conformity with the Constitution within the meaning of a teleological reduction is possible here favouring the citizen in question, and is soundly established. Amongst other things, the right of free development of the personality in accordance with Art. 2 para. 1 of the Basic Law, and the fundamental judicial rights in accordance with Articles 101 and 103 of the Basic Law, are decisive. Above all, the principle of proportionality is to be complied with.[82]

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[79] G. Hermes, "Verfassungsrecht und einfaches Recht" (2002) 61 Veröffentlichungen der Vereinigung Deutschen Staatsrechtlehrer (VVDStRL) 119 and 140.

[80] See footnote 96 below.

[81] E. A. Kramer, Juristische Methodenlehre, 6th ed. (Munich 2016), 234.

[82] For a good overview see L. Kuhlen, Die verfassungskonforme Auslegung von Strafgesetzen (Heidelberg 2006); J.H. v. Dannecker in H.W. v. Laufhütte, R. Rissing-van Saan and K. Thiedemann (eds.), LK-StGB, 12th ed. (Berlin 2007),§ 1 paras. 326-341.

The Federal Constitutional Court has teleologically reduced life imprisonment in case of murder in accordance with section 211 of the Criminal Code in favour of the offender, in contradistinction to the unambiguous wording and the will [83] of the legislature. Human dignity (Article 1 para. 1 of the Basic Law) requires that a murderer sentenced to life imprisonment must have an opportunity to regain his or her freedom after having served a certain sentence. [84] The characteristic of murder is restrictively interpreted in favour of the offender because it is required, over and above the wording of section 211 of the Criminal Code that the offender acted in case of malice with hostile intention. [85]

2. – aa) The question however becomes much more complicated if one wishes to use further development of the law in conformity with the Constitution to ignore the (subjective) will of the legislature at that time. The above wording of the Federal Constitutional Court [86] appears to speak against such permissibility. This is however incorrect at this level of absoluteness, as is shown by the rulings in which the Federal Constitutional Court itself opposed the will of the legislature. Further development of the law in conformity with the Constitution is still made clearest today with the ruling of the Federal Court of Justice on the entitlement of non-material damages for pain and suffering in case of a violation of rights of personality, in which the Federal Court of Justice developed, against the wording and will of the legislature, an entitlement to damages for pain and suffering in case of a violation of rights of personality. This case-law is criticised in the reference material as an impermissible further development of the law *contra legem*, and it is demanded that, instead, the Federal Constitutional Court should have rejected the norm to be reviewed in each case. [87] It in fact relates to the dispute between an objective and a subjective interpre-

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[83] See on this the voices explicitly pleading for life imprisonment, reproduced in BVerfG, judgment of 21 June 1977: 1 BvL 14/76, BVerfGE 45, 187 and 194 et seqq. – § 211 Criminal Code.

[84] BVerfG, judgment of 21 June 1977: 1 BvL 14/76, BVerfGE 45, 187 and 258 – § 211 Criminal Code. The legislature reacted with sections 57a and 57b of the Criminal Code.

[85] Federal Court of Justice, judgment of 22 September 1956: GSSt 1/56, BGHSt 9, 385 and 390 – Malice.

[86] See footnote 5 above. Furthermore BVerfG, order of 11 June 1980: 1 PBvU 1/79, BVerfGE 54, 277 and 299: "In accordance with the case-law of the Federal Constitutional Court, the interpretation may not lend a statute which is unambiguous by its wording and meaning a contrary meaning fundamentally redetermining the normative content of the norm that is to be interpreted, and the legislative goal may not be missed with regard to an essential aspect."

[87] Consistently critical regarding this further development of the law in conformity with the Constitution K. Larenz, Methodenlehre der Rechtswissenschaft, 6th ed. (Berlin 1991), 426 et seqq.; C.-W. Canaris, Die Feststellung von Lücken im Gesetz, 2nd ed. (Berlin 1983), 187 et seq.; C. Hillgruber, "Richterliche Rech-

tation;[88] in the *Soraya* ruling, the Federal Constitutional Court explicitly came out on a change in values and the changed understanding of the norms.[89]

In the dressage rider case, advertising had been released for an impotence treatment with the image of Olympic champion Neckermann without consent; in the television announcer judgment, a television announcer was referred to amongst other things as a "dried up goat"; in the Soraya judgment, an interview with the then Princess Soraya was invented. In each case, those who had been affected filed suit for a violation of personality in order to receive damages for pain and suffering.

Although the legislature did not wish to protect an absolute right of personality in accordance with section 823 subsection (1) of the Civil Code when creating the Civil Code,[90] the Federal Court of Justice acknowledged this after the Second World War in a first step.[91] And although the entitlement to damages for pain and suffering was limited to the cases that were regulated by law (section 847 of the Civil Code old version), the Federal Court of Justice ruled in a second step that a violation of this right could trigger an entitlement to damages for pain and suffering under civil law, and reasoned this with the right of personality of Articles 1 and 2 of the Basic Law.[92] The Federal Constitution-

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tsfortbildung als Verfassungsproblem"(1996) 51 JZ 118 and 119 et seqq.; G. Hermes, "Verfassungsrecht und einfaches Recht" (2002) 61 VVDStRL119 and 131 et seq.; J. Neuner, Die Rechtsfindung contra legem, 2nd ed. (Munich 2005), 130 et seq.; B. Rüthers, C. Fischer and A. Birk, Rechtstheorie, 9th ed. (Munich 2016), paras. 806 et seqq.; S. Oeter,""Drittwirkung" der Grundrechte und die Autonomie des Privatrechts" (2000) 119 AöR 529 and 551 et seqq.; U. Diederichsen, "Die Selbstbehauptung des Privatrechts gegenüber dem Grundgesetz",(1997) 19 Jura 57 and 59 et seqq.

[88] Descriptive on the state of the dispute for instance L. Enneccerus and H. C. Nipperdey, Allgemeiner Teil des Bürgerlichen Rechts, vol. I/1, 15th ed. (Tübingen 1959), 54.II.; K. Engisch, Einführung in das juristische Denken, 11th ed. (Stuttgart 2010), 160 et seqq.; E.A. Kramer, Juristische Methodenlehre, 5th ed. (Munich 2016), 125 et seqq.; W. Fikentscher, Methoden des Rechts, vol. III (Tübingen 1976), 662 et seqq.; H. Fleischer, "Rechtsvergleichende Beobachtungen zur Rolle der Gesetzesmaterialien bei der Gesetzesauslegung" (2011) 211 Archiv für civilistische Praxis(AcP) 318 and 321 et seqq.

89BVerfG, order of 14 February 1973: 1 BvR 112/65, BVerfGE 34, 269 and 288 – Soraya.

[90] Minutes on the second reading of the Civil Code, vol. 2 (1897), 573 et seq. and 640 et seq.; contrasting to section 704 subsection 2 of the 1st draft of the Civil Code. Reich Court of Justice, judgment of 7 November 1908: I 638/07, RGZ 69, 401 and 403 – Nietzsche-Letters: "A general subjective right of personality is alien to the applicable civil law"; see instructively H. Kötz and G. Wagner, Deliktsrecht, 13th ed. (Munich 2016), paras. 365 et seqq.

[91] Federal Court of Justice, judgment of 25 May 1954: I ZR 211/53, BGHZ 13, 334 and 338 – "Schachtbrief".

[92] Federal Court of Justice, judgment of 14 February 1958: I ZR 151/56, BGHZ 26, 349 and 354 – Dressage rider; Federal Court of Justice, judgment of 5 March 1963: VI ZR 55/62, BGHZ 39, 124 and 130 et seqq. – Television announcer. Ultimately concurring for instance K. Larenz and C.-W. Canaris, Lehrbuch des Schuldrechts, Besonderer Teil, vol. 2/2, 13th ed. (Munich 1994), 494.

al Court approved this "interpretation in conformity with the Constitution". [93] The use of the term "interpretation" is incorrect, given that this is a clear case of further development of the law in conformity with the Constitution because it ruled against the wording, will, system and Telos of the Civil Code.

Interestingly, such reasoning continues to be used today: [94] Although the legislature deleted section 847 from the Civil Code, old version, in 2001, the newly-worded section 253 of the Civil Code does not include the general right of personality in the elements. In the minutes of the Bundestag proceedings, the legislature did not go further than indicating that the case-law had recognised the general right of personality and that, at present, it was not possible to comprehensively legally regulate the right of personality. [95]

bb) A change in the values is not sufficient in itself, given that this would open up the floodgates to a subjective preliminary understanding on the part of the respective legal practitioner [96]. It will only be possible to defend a further development of the law against the will of the respective legislature if a *loophole in legal protection particularly imposes itself* and *a violation of the fundamental rights of the party seeking justice is particularly manifest*. Such protection applies for instance to personal rights with a strong reference to human dignity, [97] so that gaps in legal protection in the written law can be closed through further development of the law. The Federal Constitutional Court consequently formulated such loopholes in protection in the violation of rights of personality [98] in the census judgment [99] and in the ruling on online searches. [100] It also appears to be convinc-

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[93] BVerfG, order of 14 February 1973: 1 BvR 112/65, BVerfGE 34, 269 and 289 et seqq. – Soraya.

[94] Federal Court of Justice, judgment of 17 December 2013: VI ZR 211/12, BGHZ 199 and 237 para. 40 – Monetary compensation for Internet publication: "Mandate to protect resulting from Art. 1 and 2 para. 1 of the Basic Law"; C. Grüneberg in O. Palandt (founder), BGB, 76th ed. (Munich 2017), § 253 para. 10.

[95] Bundestag printed paper 14/7752, pp. 25, 156 et seq.

[96] J. Esser, Vorverständnis und Methodenwahl in der Rechtsfindung(Frankfurt am Main 1970), 139 et seqq. and 149 et seqq.

[97] J. Neuner, "60 Jahre Grundgesetz aus Sicht des Privatrecht" (2011) 59 Jahrbuch für öffentliches Recht(JöR) 29 and 38.

[98] BVerfG, order of 14 February 1973: 1 BvR 112/65, BVerfGE 34, 269 and 281 – Soraya: "The legal figure of the general right of personality (…) fills loopholes in the protection of personality which remain here despite the acknowledgement of individual rights of personality which had become increasingly tangible over time for a variety of reasons."

[99] Federal Constitutional Court, judgment of 15 December 1983: 1 BvR 209, 269, 362, 420, 440 and 484/83, BVerfGE 65, 1 and 42 et seq. – Consensus judgment: "Consequently, the possibilities of inspection and influencing have broadened in a manner previously unknown, which can exert an impact on the conduct of the individual already by virtue of emotional pressure of public participation."

[100] For online searches: BVerfG, judgment of 27 February 2008: 1 BvR 370, 595/07, BVerfGE 120, 274

ing in these extreme cases to speak of an obligation of protection incumbent on the State [101], or perhaps even of a direct third-party impact of fundamental rights [102], in order to protect those concerned against the violation of their rights, or to at least grant them compensation. The case-law complies with its constitutional obligation vis-à-vis the citizen with the further development of the law. The recognition of the right of personality is also easy to justify with the necessary protection of fundamental rights in accordance with Articles 1 and 2 para. 1 of the Basic Law.

V. Boundaries imposed on the further development of the law by the Constitution (impermissible further development of the law *contra legem*)

A. Boundaries imposed on the further development of the law in criminal law: the principle of lawfulness

There is no impermissible further development of the law in conformity with the Constitution *contra legem* because constitutionality cannot be unconstitutional. [103] Having said that, there are limits as to when the further development of the law remains constitutional. This is the case in criminal law in case of violations of the limit of the wording because then the citizen concerned is no longer able to realise the burdening regulatory order. The same applies if the provision is not sufficiently determined. [104] A further

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and 303 et seqq. – Online search: "Such a loophole-closing guarantee [by the general right of personality] is needed in particular in order to counter new types of endangerment which may occur in the course of scientific and technical progress or changed circumstances (cf. BVerfGE 54, 148 [153]; 65, 1 [41]; 118, 168 [183])"; see on this analysis G. Hornung, Grundrechtsinnovationen (Tübingen 2015), 355 et seqq.

101 See footnote 94 above.

[102] In general on the doctrine of the direct third-party effect, reasoned by C. Nipperdey, "Gleicher Lohn der Frau für gleiche Leistung" (1950) 3 Recht der Arbeit (RdA) 121 and 125; C. Nipperdey, Allgemeiner Teil des Bürgerlichen Rechts, vol. 1 (1959), 93 et seqq.; concurring with him Federal Labour Court, judgment of 3 December 1954: 1 AzR 150/54, Decisions of the Federal Labour Court (BAGE) 1, 185 and 193 et seq. para. 25; a direct third-party effect of Art. 1 and 2 of Basic Law for the general right of personality was then however rejected by the Federal Labour Court, order of 27 February 1985 (GS 1/84): BAGE 48, 122 and 138 et seq. para. 45 –Entitlement to continued employment.

[103] M. Auer, "Die primärrechtskonforme Auslegung" in J. Neuner (ed.), Grundrechte und Privatrecht aus rechtsvergleichender Sicht (Tübingen 2007), 27 and 44.

[104] BVerfG, order of 21 June 1977: 2 BvR 308/77, BVerfGE 45, 363 and 371 et seq.; see C. Roxin, Strafrecht Allgemeiner Teil, vol. 1, 4th ed. (Munich 2006), § 5 para. 11;L. Kuhlen, Die verfassungskonforme Auslegung von Strafgesetzen (Heidelberg 2006), 86 et seqq.; J.H. v. Dannecker in H.W. v. Laufhütte, R. Rissing-van Saan and K. Thiedemann (eds.), LK-StGB, 12th ed. (Berlin 2007),§ 1 para. 337.

development of the law in conformity with the Constitution benefiting the citizen is however conceivable. [105]

B. Encroachment on third-party fundamental rights constituting a relevant boundary on permissible further development of the law? The dispute between the Constitutional Court Senates

Entitlements to damages for pain and suffering from false interviews protect the right of personality, but impair the freedom of the press. In cases of doubt, the protection of the fundamental right of one side impairs the fundamental right of the other. [106] It is now disputed between the two Senates of the Federal Constitutional Court to what degree a further development of the law is impermissible if legal positions and fundamental rights of third parties are affected. Three views (a, b and 3.) can be put forward:

a) In the ruling on atrophy of remedies [107], the *second Senate of the Federal Constitutional Court* had formulated with its majority that the *boundaries imposed on the further development of the law* areto be drawn *regardless of* whether the respective interpretation has a positive or negative impact on individual parties affected. [108]

b) In contrast to this, three judges stated the exact opposite in a *dissenting opinion*: The *boundaries imposed on the judicial further development of the law* require to be particularly taken into account where the *legal situation of the citizen worsens* without it being possible to put forward any constitutional reasons for this. [109] In general terms, the boundaries should be broader when supporting constitutional rights, and when legal positions are restricted, they should be more stringent. [110] The *first Senate* has now taken up

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[105] Cf. for instance Federal Fiscal Court, judgment of 18 June 2009: VI R 14/07, Decisions of the Federal Fiscal Court (BFHE) 225 and 393 – Expenses for first studies.

[106] BVerfG, order of 24 February 2015: 1 BvR 472/14, BVerfGE 138, 377 and 392 et seq. para. 42 – Right of the ostensible father to receive information.

[107] We speak of an atrophy of remedies if formal procedural errors are complained of in an appeal on points of law which are contained in the minutes, but which were removed once more because of a subsequent correction of the minutes, and hence lead to the appeal on points of law being ill founded.

[108] BVerfG, order of 15 January 2009: 2 BvR 2044/07, BVerfGE 122, 248 and 268 – Atrophy of remedies: "The boundaries emerging from Art. 20 para. 2, sentence 2, and para. 3 of the Basic Law for the judicial interpretation of non-constitutional law can therefore not be fundamentally narrower or broader, depending on whether the respective interpretation positively or negatively impacts on individuals concerned."

[109] Dissenting opinion of justices A. Voßkuhle, L. Osterloh and U. Di Fabio: BVerfG, order of 15 January 2009: 2 BvR 2044/07, BVerfGE 122, 248, 282 and 301 – Atrophy of remedies.

[110] Dissenting opinion of justices A. Voßkuhle, L. Osterloh and U. Di Fabio, BVerfG, order of

the considerations of the dissenting opinion, and made them more precise, defining the following abstract rules:

> If a civil court for instance imposes on a person an obligation based on the further development of the law, this takes place in most cases in order to strengthen the legal position of another person. The weightier the constitutional content of the strengthened position, the clearer a corresponding solution is predefined to the court and the legislature by the Constitution, and the further the power of the courts can reach when it comes to enforcing this position by means of further development of the law – also whilst burdening a contrary but weaker legal position (see for instance BVerfGE 96, 56 [62 et seqq.]). Conversely, in the same way: *The weightier the burden in constitutional terms, and the weaker the constitutional content of the counter position that is to be enforced with it, the narrower are the limits for the further development of the law, and thus the more stringently the civil courts' findings must be maintained within the limits of the established law.* The boundaries on judicial findings require to be particularly complied with where the legal situation of the citizen *becomes worse without* it being possible to advance constitutional reasons for this (BVerfGE 122, 248 [301] – dissenting opinion). A considerable constitutional burden on a party concerned can be even less easily based on a general clause under private law the less indications can be found for this in the non-constitutional environment (cf. Röthel, Normkonkretisierung im Privatrecht, 2004, pp. 120 et seq.). [111]

C. Own view of the further development of the law contra legem in the case of a serious encroachment on third-party fundamental rights

a) The view held by the majority of the second Senate that fundamental rights *play no role at all* for the boundaries on permissible further development of the law *is too narrow*. If the party seeking protection is able to invoke fundamental rights in order to override classical interpretation figures, the other side must also be entitled to this right. In other words: The *unambiguous, clear violation of fundamental rights must justify a further development of the law*, and it must be able to override the wording of non-constitutional law, so that any further development of the law in conformity with the

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15 January 2009: 2 BvR 2044/07, BVerfGE 122, 248, 282 and 286 – Atrophy of remedies; concurring Federal Constitutional Court, order of 24 February 2015: 1 BvR 472/14, BVerfGE 138, 377 and 392 para. 41 – Right of the ostensible father to receive information.

[111] BVerfG, order of 24 February 2015: 1 BvR 472/14, BVerfGE 138, 377 and 392 et seqq. paras. 42 et seqq. – Right of the ostensible father to receive information.

Constitution is permissible. And, conversely, a *further development of the law in conformity with the Constitution is impermissible if it constitutes a massive encroachment on third-party fundamental rights.*

This made a restriction of the criminal liability of the expert to gross negligence, thus constituting a further development of the law, impermissible because the erroneous report led to the convict not being released from the psychiatric institute, given that such a deprivation of liberty constitutes a massive encroachment on fundamental rights. In contrast to the Soraya ruling, the further development of the law *considerably worsened* the position of the other side in question (convict). [112] The legislature reacted by introducing section 839a of the Civil Code [113], and expanded the liability to include property damage, but restricted to gross negligence and intent. [114]

b) Conversely, the view of the first Senateand the dissenting opinion of the second Senate *to always carry out a weighing up of fundamental rights between the two parties are much too advanced*. The Federal Constitutional Court was acting as an overall instance for appeals on points of law only because any dispute regarding civil-law interests can now be easily "loaded up" in terms of fundamental rights. It is known that the non-constitutional courts however have greater expertise as a matter of principle when it comes to deciding on substantive problems. [115] In formal terms, it is noticeable that the first Senate formulates comparative sentences such as "The more (…) the more". As with the moveable system, sentences of this nature are relatively unclear and impair legal certainty. [116] In content terms, the review of fundamental rights is reminiscent of a constitutionally-orientated interpretation, which is however unable to determine an unambiguous outcome, but only constitutes an argument of weighing up. It is furthermore noticeable that the Basic Law does not have any boundaries in accordance with which im-

[112] The further development of the law would improve the legal position of the expert, who can invoke Art. 12 para. 1 of the Basic Law. This consideration is however secondary.

[113] Bundestag printed paper 13/10435, p. 18; Bundestag printed paper 14/7752, p. 28.

[114] BVerfG, order of 11 October 1978: 1 BvR 84/74, BVerfGE 49, 304 and 320 – Expert witness liability. Different view also by Federal Court of Justice, judgment of 8 May 1956: VI ZR 113/71, BGHZ 62, 54 and 56 –Expert witness liability.

[115] J. Neuner, "Das BGB unter dem Grundgesetz" in U. Diederichsen and W. Sellert (eds.), Das BGB im Wandel der Epochen (Göttingen 2002), 131 and 150.

[116] Similar also J. Neuner, "Die Kontrolle zivilrechtlicher Entscheidungen durch das Bundesverfassungsgericht" (2016) 71 JZ 435 and 439: "extremely subtle and highly difficult constitutional considerations on the part of the civil courts."

pairments of third-party fundamental rights give rise to a boundary on the permissible further development of the law. It is also virtually impossible to identify a reliable boundary because both sides are entitled to fundamental rights. [117] The problem was discussed by the Federal Constitutional Court with regard to the right of the ostensiblefather to information from the mother.

Right to information of the ostensible father: The civil courts have affirmed a right of the ostensible father to receive information from the mother under section 242 of the Civil Code in order to prevent him needing to pay child maintenance for years in place of the real father. [118] By contrast, the Federal Constitutional Court found that such a further development of the law was legally impermissible: A right to receive information was said to violate the right of personality of the mother and of the biological father because they would then have to reveal information regarding their sexual contacts. [119] The Federal Constitutional Court places the interests of the mother in higher regard across the board vis-à-vis the purely "non-constitutional right of recourse" of the ostensible father. [120]

The ruling of the Federal Constitutional Court has been the subject of massive criticism. The abstract higher weighting of the interests of the mother vis-à-vis those of the ostensible father is highly vulnerable. The protection of marriage stipulated by Art. 6 para. 1 of the Basic Law speaks in favour of the interests of the ostensiblefather, but the Federal Constitutional Court completely ignores this. [121] The right of recourse of the ostensiblefather vis-à-vis the biological father was said to be ineffective in practical terms were one to reject a right to receive information; the ostensiblefather would be left without legal protection. [122]If, however, the child indisputably has a constitutionally-secured

[117] J. Neuner, "Die Kontrolle zivilrechtlicher Entscheidungen durch das Bundesverfassungsgericht" (2016) 71 JZ 435 and 439.

[118] Federal Court of Justice, judgment of 9 November 2011: XII ZR 136/09, BGHZ 191 and 259 – Right of the ostensible father to receive information; Federal Court of Justice, judgment of 20 February 2013: XII ZB 412/11, BGHZ 196 and 207 – Right of the ostensible father to receive information.

[119] T. Rauscher, "Anm. zu BVerfG, Beschl. v. 24.2.2015 (Az. 1 BvR 472/14)" (2015) 70 JZ 624 and 625.

[120] BVerfG, order of 24 February 2015: 1 BvR 472/14, BVerfGE 138, 377 para. 46 – Right of the ostensible father to receive information.

[121] Critical consequently B. Forschner, "Zum Auskunftsanspruch des Scheinvaters gegen die Kindesmutter" (2015) 25 Familie und Recht (FuR) 451 and 453.

[122] M. Preuß, "Auskunftsanspruch des Scheinvaters gegen Mutter über sexuelle Beziehungen" (2015) 68 NJW 1509 and 1510; S. Muckel, "Auskunftsanspruch des Scheinvaters gegen die Mutter über sexuelle Beziehungen" (2015) 47 JA 953 and 954.

right to receive information from his or her biological father,[123] such a right to receive information should also be affirmed for the ostensiblefather, and hence both cases should be treated equally.[124] Were one to however reject such an entitlement, the child would be involved in the dispute, since the ostensiblefather would then push the child to provide information regarding the biological father.[125]Such a consequence to the disadvantage of the child's best interests should however be avoided.

Finally, it is also doubtful whether the mother has *a status entitling her to protection at all*. May hence the mother keep the identity of the biological father secret to the ostensiblefather, and permanently burden him with maintenance payments which the biological father has to pay? This is already countered by the fact that it calls up the burden on property because she conceived the child with a third party and now triggers the maintenance claim on the ostensiblefather.[126] Her own action in breach of trust triggers the maintenance payments; she could inform the ostensiblefather of the paternity of the third party before maintenance entitlements become relevant.[127] The ostensiblefather is in a structurally disadvantageous situation vis-à-vis the mother[128] because the problem of a ostensiblemother is biologically impossible, and only she knows who the biological father is. The Federal Constitutional Court refuses to adopt a solution treating interests equally by enabling the mother, who acted in breach of trust, to protect the biological father by imposing alimony on the cuckold.[129] This perpetuates a gap in legal protection.

c) In contradistinction to the view taken by the first Senate, therefore, it is not already the case that any impairment of third-party fundamental rights blocks a further develop-

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[123] BVerfG, order of 6 May 1997: 1 BvR 409/90, BVerfGE 96, 56 and 61 et seq. – Right to receive information of the child vis-à-vis the father:"With the derivation of a right to receive information vis-à-vis the mother from section 1618 a of the Civil Code, the Regional Court did not overstep the boundaries of impermissible further development of the law."

[124] J. Neuner, "Die Kontrolle zivilrechtlicher Entscheidungen durch das Bundesverfassungsgericht" (2016) 71 JZ 435 and 438.

[125] M. Löhnig, "Grenzen der Auskunftspflicht der Kindesmutter gegenüber dem Scheinvater über die Person des leiblichen Vaters" (2015) 2Neue Zeitschrift für Familienrecht (NZFam) 355 and 359.

[126] M. Sachs, "Staatsorganisationsrecht: Verfassungsrechtliche Grenzen richterlicher Rechtsfortbildung" (2015) 55 Juristische Schulung (JuS) 860 and 861.

[127] T. Rauscher, "Anm. zu BVerfG, Beschl. v. 24.2.2015 (Az. 1 BvR 472/14)"(2015) 70 JZ 624 and 626.

[128] T. Rauscher, "Anm. zu BVerfG, Beschl. v. 24.2.2015 (Az. 1 BvR 472/14)" (2015) 70 JZ 624 and 626.

[129] Clearly M. Löhnig, "Grenzen der Auskunftspflicht der Kindesmutter gegenüber dem Scheinvater über die Person des leiblichen Vaters" (2015) 2NZFam 355 and 359: It is said to be a matter of whether the mother wished to "make trouble for" the biological father or to protect him.

ment of the law. Therefore, the result of the Federal Supreme Court was accurate. Rather, a constitutional review by the Federal Constitutional Court should not apply until a *fundamental right of the third party is clearly and seriously violated*. In vivid terms, it will for instance be possible to affirm a violation of the Constitution if a statute with the same wording would also no longer be compatible with the Constitution. [130]

VI. Conclusion

To sum up, the Constitution can be considered in the interpretation of non-constitutional norms in three ways.

1. In many states the constitution is the most powerful source of law. Norms violating the constitution can be null and void. To avoid the nullification, the norm needs to be interpreted in the light of the constitution (favor legis). However, little has been done to clarify boundaries and the scope of this obligation. Three different areas can be distinguished.

2.a) Firstly, the value system of the Constitution, in addition to the classical four types of interpretation method in the shape of the *constitutionally-orientated interpretation*,constitutes an additional, equally valid standard for assessment. The extended application of the Constitution hence already acts as a source of information in the understanding of the norm, and guarantees *optimisation* within the meaning of the Constitution.

b) Secondly, in a second step via the *interpretation in conformity with the Constitution*, those results of the interpretation are explicitly removed which are not compatible with the Constitution. This validates the *priority* of the Constitution vis-à-vis non-constitutional law.

c) If there is no constitutional outcome after these two steps, the norm is to be rejected by the Federal Constitutional Court as fundamentally unconstitutional.

d) It is highly controversial, if the Federal Constitutional Court may exceptionally override the wording and the will of the historical legislature by means of a *further de-*

[130] See E. Schumann, Verfassungs- und Menschenrechtsbeschwerde gegen richterliche Entscheidungen (Munich 1963), 239 on the "Schumann Formula"; BVerfG, judgment of 14 February 1989: 1 BvR 1131/87, BVerfGE 79, 283 and 290; BVerfG, order of 3 April 1990: 1 BvR 1186/89, BVerfGE 82, 6 and 15 et seq.; BVerfG, order of 26 June 1991: 1 BvR 779/85, BVerfGE 84, 212 and 228 et seq. – Labour disputes; A. Söllner, "Der Richter als Ersatzgesetzgeber" (1995) 8 Zeitschrift für Gesetzgebung(ZG) 1 and 14 et seq.

velopment of the law in conformity with the Constitution ("verfassungskonforme Rechtsfortbildung"). The second Senate of the Federal Constitutional Court would like to draw the boundaries imposed on the lawfulfurther development of the law regardless of whetherthird-party fundamental rights are encroached. In contrast to this, the first Senate considers the further development of the law to be impermissible, when third-parties are affected but no constitutional facts supporting the further development of the law can be provided.In the view put forward here, the further development of the law is permissible,if this is the only way to prevent grievous violations of the fundamental rights of the person concerned.

e) The boundary of the further development of the law is however reached if this constitutes a massive impairment of third-party fundamental rights. Then, the boundaries of a lawful further development of the law are exceeded (*contra legem*).

Abstract

In many states, the constitution is the most powerful source of law. Norms violating the constitution can be null and void. To avoid the nullification, the norm needs to be interpreted in the light of the constitution (favor legis). However, little has been done to clarify boundaries and the scope of this obligation. The Constitution can be considered in the interpretation of non-constitutional norms in three ways: constitutionally-orientated interpretation, interpretation in conformity with the Constitution, and development of the law in conformity with the Constitution ("verfassungskonforme Rechtsfortbildung"). It is highly controversial between two Senates when the Federal Constitutional Court may exceptionally override the wording and the will of the historical legislature.