

Expounding the Unwritten Constitution

Principles and Values in Constitutional Adjudication in Germany, France and Israel

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Abstract

The unwritten constitution figures as an important normative source in the constitutional jurisprudence of many legal systems. Examining the constitutional adjudication of Germany, Israel and France, this thesis explores the different doctrinal approaches Courts from the respective jurisdictions have taken in constructing and assessing the unwritten aspects of the constitution. Special emphasis is placed on the question of how appealing to the unwritten constitution allows for the introduction of teleological legal assessments. This thesis takes a terminological perspective in examining the role the notions of “value” and “principle” assume in constitutional litigations of fundamental rights issues. While these notions are commonly used synonymously in contemporary constitutional literature, this thesis builds on the theoretical assumption that principle-based legal reasoning mainly operates on a deontological basis whereas value-based assessments are associated with teleological claims. A closer look on the three jurisdictions confirms that the unwritten constitution is the theoretical centerpiece for justifying teleological legal assessments, especially with respect to the curtailment of fundamental rights. In Germany, unwritten fundamental values derived from the “objective value system” play a significant role in introducing policy orientation into constitutional jurisprudence. In the Israeli legal system, both fundamental principles and values are invoked in order to justify a policy oriented adjudication by the Israeli Supreme Court. Differentiating between unwritten principles and unwritten objectives of constitutional value, French constitutional doctrine provides the clearest terminology in distinguishing between principle based and teleological reasoning by invoking the unwritten constitution. Especially the French approach may serve a guideline for constitutional practice and scholarship to conceptualize the relationship between the written and the unwritten constitution.

1) Introduction: Constitutions and constitutional documents

The constitution is not identical with the written provisions of the constitutional document. It is no exaggeration to say that this claim is acknowledged by most constitutional courts and constitutional scholars. Although it is still customary to refer to the constitutional document as the Constitution, calls for a more sensitive terminological approach have resonated. For instance, attention has been drawn to the uncoded customs that constitute essential elements of the constitutional framework of a jurisdiction. Even with respect to countries lacking a constitutional document, scholars assert the absence of a *codified* constitution instead of denying the existence of a constitution.

The unwritten dimension of the constitution may assume importance when questions concerning the constitutional identity of a country arise. Among constitutional courts it is a common practice to invoke the supra-positive foundation of a constitution in order to deal with delicate matters. This invocation may serve to resolve issues that are not properly covered by positive law, to decide a case in which principles with equal constitutional value collide or to overrule the positive law when the court sees need for constitutional change, just to name a few scenarios.

Courts often draw on specific doctrines in order to legitimise supra-positive outreaches of this kind. Historical antecedents of these doctrines may be found in theoretical disputes among constitutional scholars of the Weimar republic. When positivism increasingly came under attack in early 20th century, Carl Schmitt's credo that a nation's constitution should not be confused with its constitutional law resonated profoundly.¹ Even if Weimar scholars could not agree on the nature of the constitution, the assumption that the actual "soul"² of the constitution may not be found in the individual constitutional provisions, was widely shared. For instance,

¹ Carl Schmitt, *Constitutional Theory* (Durham, London: Duke University Press, 2008) [1928], p. 57.

² *Ibid.*, p. 58.

Schmitt identified the constitution in the fundamental decision of a political unity, the bearer of the constitution-making power, to form a polity and to adopt a written constitution.³ Rudolf Smend, Schmitt's opponent in many respects, pursued a rather spiritual approach by construing the constitution as an ideational system of meaning (*ideelles Sinnsystem*) or community of values (*Wertgemeinschaft*) which exercise an integrative function in society.⁴

Many constitutional courts follow the doctrine that the constitutional provisions are not explicable out of themselves. The written constitution presupposes a supra-positive framework against which its provisions may be assessed. Commonly, echoing the theoretical framework of Smend, this supra-positive entity is construed as a uniform whole which produces a unifying effect on the disjointed provisions of constitutional and ordinary law.

The different doctrines constitutional courts and scholars invoke by drawing on the unwritten foundation of the constitution, entail specific terminologies. The key focus of this thesis lies on this terminological aspect. Encircling the supra-positive dimension of the constitution requires broad and indeterminate notions that simultaneously allow for the derivation of more specific standards. Judging by the jurisprudence of numerous constitutional courts, the notions of principle and value have met these criteria. In different legal context, unwritten constitutional principles and values are introduced when the scope of the written constitution is not broad enough for the issue at stake. Similarly, constitutional scholarship often relies on these notions to designate the supra-positive aspects of a given constitutional framework.

Remarkably, the notions of value and principle are often employed synonymously. As illustrated in the next chapter, it is a common practise among constitutional scholars to use either term to identify the unwritten elements of a constitution. One of the main goals of this thesis is to criticize this common terminological practice. Building on theoretical groundwork

³ Ibid., p. 77.

⁴ Rudolf Smend, *Verfassung und Verfassungsrecht* (Berlin: Duncker & Humblot, 1928), pp. 77, 40.

laid by Ronald Dworkin and Jürgen Habermas, I will argue that principle-based and value-based adjudication constitute two different types of legal reasoning. The notion of value includes a teleological element not shared by the notion of principle. Clearly distinguishing between both notions thus harbors the theoretical potential of separating legal assessments that are usually perceived as identical.

Taking a comparative angle, this thesis examines the extent to which this potential has been acknowledged by the constitutional jurisprudence in Germany, Israel and France. The thematic scope is narrowed down to cases in which unwritten principles or values of constitutional status play a crucial role in justifying the curtailment of fundamental rights. Therefore, this study pursues two questions. First, how does invoking the unwritten constitution benefit teleological reasoning allowing for the curbing of fundamental rights? Second, how is this judicial teleology reflected on the terminological level with respect to the notions of principle and value? Particularly in Germany and Israel, the examined cases mostly relate to legislation concerning internal national security whereas in France, due to a broader conception of fundamental rights, a variety of legal issues fall under this category.

Due to disparate constitutional traditions, the notions at issue are handled differently in the respective legal contexts. Furthermore, echoing the common usage in constitutional scholarship, constitutional courts often fail to treat values and principles as distinct legal categories. Nonetheless, despite the linguistic, historical and cultural differences, a fruitful comparison of the three jurisdictions may effectively be carried out. By invoking unwritten values and principles, the respective constitutional courts respond to very similar issues and problems. As will be demonstrated, in all three jurisdictions, the unwritten constitution is regularly invoked in order to justify teleological assessments, particularly with respect to security interests. From a terminological perspective, the French constitutional doctrine has the greatest potential to designate this judicial teleology as such.

Questions concerning the legitimacy of invoking the unwritten constitution will not be addressed in this thesis. For decades, constitutional scholarship has been shaped by debates on the compatibility of the model of representative democracy with a judiciary carrying out constitutional change by relying on supra-legal standards drawn from morality and value-based beliefs. Rather than focusing on the legitimacy of supra-positive outreaches performed by the judiciary, this thesis examines the terminological framework constitutional courts apply when the unwritten constitution assumes a crucial role in litigating fundamental rights issues. This perspective goes beyond a pure analysis of semantics. As will be shown in the course of this comparative examination, the manner in which a constitutional court phrases the appeal to the unwritten constitution is deeply connected to the court's style of argumentation in assessing fundamental rights. For instance, the enforceability of an unstipulated fundamental right depends not least on whether this right is being referred to as a value or as a principle.

2) Principles and values in constitutional scholarship

2.1) The common theory of unwritten values and principles

Among legal scholars and judges, there is no consensus regarding the conceptual scope of the notions “principle” and “value”. As a matter of fact, many courts and scholars use these terms synonymously or at least do not draw a clear conceptual line between them. In contemporary constitutional scholarship, there is a tendency to disregard the conceptual disparity in which the unwritten constitution may be invoked in a legal rationale. This point shall be illustrated by taking a closer look at the manner constitutional scholars Aharon Barak and Jeffrey Goldsworthy apply these notions.

By addressing the tasks of *The judge in a democracy*, Barak touches upon the extra-legal conditions of every legal system:

“Fundamental principles (or values) fill the normative universe of a democracy. They justify legal rules. They are the reason for changing them. They are the spirit (*voluntas*) that encompasses the substance (*verba*). Every norm that is created in a democracy is created against the background of these values.”⁵

Barak thus equates principles with values, pointing to their non-textual nature. These principles and values form the “normative umbrella”⁶ of the legal system, providing the “framework for interpreting all legal texts”.⁷ Judges are supposed to take these unwritten rules into consideration in their decisions. On a regular basis, fundamental principles and values such as “justice”, “morality”, “public safety”, “fairness” and “human rights”⁸ must be applied along with the written provisions of the legal textbooks. Whereas these aspects appear to indicate the stabilizing function of unwritten values and principles, Barak, at the same time, puts special emphasis on the unstable nature of fundamental principles and the ensuing difficulties for constitutional interpretation: “Fundamental principles do not live forever. New fundamental

⁵ Aharon Barak, *The judge in a Democracy* (Princeton: Princeton University Press, 2006), p. 57.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid., p. 58.

principles come into the system, while outdated ones leave the system. [...] The judge is faced with the difficult and complex tasks of recognizing new fundamental principles and removing outdated ones from the system.”⁹ Principle-based interpretation thus allows for the implementation of new values into the constitutional framework of the judicial system, enabling a constant adjustment of judiciary and society.

Jeffrey Goldsworthy has similar perspective of this issue. Examining different national traditions of constitutional interpretation, the author comes to the conclusion that “unwritten principles” have been increasingly invoked in the constitutional jurisprudence of many jurisdictions, even in systems with a strong legalist tradition like Australia and the United States.¹⁰ He puts the label of “normativism” on this school of thought which he defines as follows: “By ‘normativism’, I mean a holistic conception of a constitution as more than the sum of its written provisions: as a normative structure whose provisions are, either explicitly or implicitly, based on deeper principles, and ultimately on abstract norms of political morality that are the deepest source of its authority.”¹¹ As Goldsworthy further explicates, these unwritten principles “can change according to the judges’ impressions of contemporary values or their personal values”.¹² Value-oriented and principle-based reasoning are thus considered as elements of the normativist approach which finds its resources in the unwritten moral foundation of the legal system. Just as in the examples considered above, normativism is seen as a strategy to facilitate constitutional change, to react to the “felt necessities of the time”.¹³

These examples represent a line of thought that could be described as the common theory of values and principles. Both terms, being used more or less synonymously, comprise the legal system’s normative resources which lie beyond the written provisions of the constitution.

⁹ Ibid., p. 59.

¹⁰ Jeffrey Goldsworthy, ‘Conclusions’, in Jeffrey Goldsworthy (ed): *Interpreting Constitutions. A Comparative Study* (New York: Oxford University Press, 2006), p. 345.

¹¹ Ibid., p. 322.

¹² Ibid., p. 323.

¹³ Ibid., p. 343, Goldsworthy is hereby quoting Oliver Wendell Holmes’ *The Common Law* (1881), p. 1.

Values and principles are both described as moral norms which complement and consolidate the stipulated constitution.¹⁴ This underlying morality is supposed to fulfil two opposing functions, simultaneously serving “as an anchor for the law”¹⁵ and enabling constitutional evolution by introducing new moral beliefs into the constitutional jurisdiction.

2.2) Challenges for the common theory of values and principles: Dworkin and Habermas

In conceptions emphasizing the unwritten foundations of the legal system, Ronald Dworkin usually figures as one of the main authorities. Effectively, Dworkin’s criticism of legal positivism, as elaborated in *Taking rights seriously*,¹⁶ constitutes an undeniable challenge for the legalist school of thought in highlighting the moral dimension of every legal system. However, it is revealing to take a closer look at the actual manner Dworkin’s approach is referred to. Barak for instance invokes Dworkin’s theory by explicitly dropping one of the latter’s key conceptions, namely the distinction of “principle” and “policy”. Dworkin conceives of these terms as follows:

“I call ‘policy’ that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political or social feature of the community [...]. I call a ‘principle’ a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.”¹⁷

Policy-based rationales are essentially teleological by pursuing certain goals and interests, whereas arguments of principle operate on a deontological basis by securing individual or group rights.¹⁸ For Dworkin, this distinction is crucial in order to forestall the accusation of

¹⁴ To cite another example, consider the following approach taken by Will J. Waluchow. Similar as Barak and Goldsworthy, Waluchow stresses the necessity of complementing positive constitutional law and ordinary statutes with a moral dimension. Henceforth, focusing on the relation between law and morality, unwritten principles, rules and values are considered as ‘moral norms’ which lie beyond the system of stipulated law; Will J. Waluchow, ‘Constitutional Morality and Judicial Review’ in András Sajó/ Renáta Uitz (eds), *Constitutional Topography: Values and Constitutions* (The Hague: Eleven International Publishing, 2010), p. 9.

¹⁵ CA 7325/95, *Yediot Aharonot Ltd. v. Kraus*, (Cheshin, J., dissenting).

¹⁶ Ronald Dworkin, *Taking rights seriously* (London: Bloomsbury Academic, 2013) [1977].

¹⁷ Ibid., p. 39.

¹⁸ Ibid., p. 107.

calling on judges of assume legislative functions, an objection inevitably attracted by every doctrine drawing on the moral resources of the legal system. As Dworkin explicates, any legalist approach reaches its limits confronted with hard cases which are not properly covered by the provisions of a legal system. Rejecting the positivist theory of judicial discretion, the author thus calls for the judge to examine the legal system's underlying rules and morality in order to develop the standard that should be applied in the case at issue. As Dworkin emphasizes on numerous occasions, judicial decisions dealing with hard cases should only be generated by principle and not by policy.¹⁹ Deciding a difficult matter, the judge is thus prompted to leverage the system's comprehension of its own underlying moral standards and not to aim for desirable goals. Dworkin displays a high degree of scepticism vis-à-vis propositions to facilitate constitutional change through result-oriented adjudication.

By stating that a judge cannot merely rely on the written provisions of a legal system, Barak clearly invokes Dworkinian thought. However, after elaborating on the scope of fundamental values, Barak specifies that these values "constitute both the principles and the policies of the legal system" and declares that, in contrast to Dworkin, he does not insist on distinguishing between principle and policy.²⁰ By renouncing on this central theoretical piece, Barak's reference to Dworkin is to a certain extent lopsided. Whereas Dworkin expressly rejects the idea of policy-oriented adjudication of hard cases, Barak clearly embraces this possibility. Barak's concept of purposive interpretation²¹ may be considered as the epitome of the divergent theoretical perspectives of the two authors. According to Barak, judicial interpretation, whether on the level of ordinary or constitutional adjudication, should always aim at the social purpose of the constitution. This purpose cannot be determined by exclusively examining the constitutional text or by referring to the intentions of the constitutional authors. Even though

¹⁹ Ibid., pp. 108, 141.

²⁰ Aharon Barak, *The judge in a Democracy* (Princeton: Princeton University Press, 2006), p. 58.

²¹ Aharon Barak, *Purposive Interpretation in Law* (Princeton: Princeton University Press, 2005).

these sources should be properly considered, they may defer to the purpose defining forces of contemporary values: “when judges consult objective purpose at higher levels of abstraction, they deal with values and principles that change over time.”²² In contrast to Dworkin, Barak puts special emphasis on the aspect of change enabled by principle-based interpretation. The objective purpose is construed as “a legal construction that reflects the needs of society”.²³ Hence, result-oriented reasoning figures as an essential element of judicial adjudication, hereby significantly extending the traditional scope of judicial interpretation.²⁴ This theoretical framework does not allow for a distinction between principle-based and policy-driven judicial interpretation. In fact, this conceptual differentiation is levelled as a direct consequence of Barak’s broad understanding of fundamental principles.

In certain respects, the differentiation between principle and value has suffered a comparable fate. Contrary to the common theory of principles and values, there are compelling reasons to draw a clear line between both terms. Philosopher Jürgen Habermas gives account of the divergent conceptual scope of both notions:

“Principles or higher-level norms, in the light of which other norms can be justified, have a deontological sense, whereas values are teleological. Valid norms of action obligate their addressees equally and without exception to satisfy generalized behavioral expectations, whereas values are to be understood as intersubjectively shared preferences.”²⁵

There is thus a considerable conceptual overlap between the notions of policy and value. Arguments based on policy or value contain a teleological element that principles lack completely. It is therefore no coincidence that Barak levels both conceptual oppositions by favouring a broad concept understanding of “principle” that includes policies and values.

²² Ibid., p. 351.

²³ Ibid., p. 148.

²⁴ As Stanley Fish critically remarks with respect to Barak’s approach, charging judicial interpretation with the task of satisfying current societal needs might transcend the very concept of interpretation. Stanley Fish, ‘Intention Is all There Is: A Critical Analysis of Aharon Barak’s Purposive Interpretation’, *Cardozo Law Review*, Vol 29:3 (2008), p. 1145.

²⁵ Jürgen Habermas, *Between Facts and Norms* (Cambridge, Mass.: MIT Press, 1996), p. 255.

It might be useful to call attention to the different theoretical traditions that may be invoked by referring to either principles or values. Considerations of value have a historical lineage with Aristotelian ethics and the pivotal question of the good life.²⁶ Aiming for a desired good is different from following a norm in the strict sense. Values express preferences with diverse levels of intensity and may compete against other preferences.²⁷ Principles in contrast carry a sense of obligation and unconditionality and therefore cannot be arranged on a sliding scale of preferences.²⁸ Principle-based rationales appeal to Kantian deontology which's emphasis on moral duty fundamentally opposes teleological ethics:

“Moral commands are categorical or unconditional imperatives that express valid norms or make implicit reference to them. The imperative meaning of these commands alone can be understood as an ‘ought’ that is dependent on neither subjective goals and preferences nor on what is for me the absolute goal of a good, successful, or not-failed life. Rather, what one ‘should’ or ‘must’ do has here the sense that to act thus is just and therefore a duty.”²⁹

At this juncture, the reader might raise the question: Cui bono? Even if there are compelling philosophical reasons to distinguish between principles and values, we have seen above that leading constitutional scholars do not share this understanding and favour a more general conception of principle. What is the point of invoking the legal philosophies of Dworkin and Habermas in order to criticize the terminological imprecision of the common conception of principles and values?

This objection misses the fact that in the field of jurisprudence theoretical questions are intrinsically connected to legal practise. The issue at hand is not merely of conceptual nature. Assimilating the notions of value and principle might exert influence on the process of judicial argumentation. For instance, referring to human dignity as a principle in the strict sense differs from invoking human dignity as a value or as a principle in the broad sense. Whereas the first

²⁶ Jürgen Habermas, *Justification and Application* (Cambridge, Mass.: MIT Press, 1993), p. 4.

²⁷ Jürgen Habermas, *Between Facts and Norms* (Cambridge, Mass.: MIT Press, 1996), p. 255.

²⁸ Ibid.

²⁹ Jürgen Habermas, *Justification and Application* (Cambridge, Mass.: MIT Press, 1993), p. 8.

interpretation calls for the unconditional respect of a protected right, the second approach cherishes dignity as desirable good that is competing against other goods and interests. Labelling both types of argumentation as principle-based interpretation thus equates two different types of adjudication.

The following chapters will explore whether and to which extent the terminological frameworks of German, Israeli and French constitutional doctrine acknowledge this conceptual distinction. The different cultural, historical and societal conditions are to be taken into consideration in order to explain the respective doctrinal approaches.

3) The “objective value system”: Teleology in German constitutional law

3.1) Antipositivism in German post-war jurisprudence

In German jurisprudence of the immediate post-war period, it was a common pattern to hold the positivistic school of thought accountable for the failure of the legal system to prevent the Nazis from implementing their policies. Allegedly, the formalistic ideology of positivism does not provide material safeguards against the promulgation of unjust and immoral law.³⁰ For this reason, numerous legal scholars of the post-war period pushed to overcome formalistic legal theory by advocating substantial approaches to legal justice.³¹ Gustav Radbruch’s suggestion to found the legal order on the prelegal standard of material justice epitomizes this general attitude:

“the conflict between justice and the reliability of the law should be solved in favour of the positive law, law enacted by proper authority and power, even in cases where it is unjust in terms of content and purpose, except for cases where the discrepancy between the positive law and justice reaches a level so unbearable that the statute has to make way for justice because it has to be considered ‘erroneous law’.”³²

This test, which became later known as the “Radbruch formula”, is embedded in larger considerations regarding different constitutional values. According to Radbruch, in every legal system there are two essential values that need to be weighed against each other, legal certainty and material justice.³³ Facing the threat of totalitarian instrumentalisation, the value of legal certainty must defer to the supra-positive value of material justice.

³⁰ This argument has been vehemently criticized. As argued by legal philosopher Ingeborg Maus, the *rejection* of positivism rather than its affirmation has paved the way towards National Socialism; Ingeborg Maus, *Rechtstheorie und politische Theorie im Industriekapitalismus* (Munich: Fink, 1986), p. 43.

³¹ Ulfried Neumann, ‘Rechtsphilosophie in Deutschland seit 1945’ in Dieter Simon (ed), *Rechtswissenschaft in der Bonner Republik. Studien zur Wissenschaftsgeschichte der Jurisprudenz* (Frankfurt: Suhrkamp, 1994), p. 148; Frieder Günther, *Denken vom Staat her. Die bundesdeutsche Staatsrechtslehre zwischen Dezision und Integration, 1949-1970* (Munich: Oldenbourg, 2004), p. 57.

³² Gustav Radbruch, ‘Gesetzliches Unrecht und übergesetzliches Recht’, *Süddeutsche Juristenzeitung* (1946), Jahrg. 1, Nr. 5, p. 107, for translation of this passage see: https://en.wikipedia.org/wiki/Radbruch_formula.

³³ Ibid.

This mindset has been crucial for the jurisprudence of the Federal Constitutional Court (FCC). From the very beginning, the Court stressed the supra-positive dimension of the Constitution which resulted in the recognition of an objective system of values as an inherent part of the German Constitution in the *Liith* decision of 1958. Initially, however, the Court did not invoke a value theory in order to demonstrate the supra-positive foundation of the legal system. The Court did not employ a uniform terminology by emphasizing the unwritten aspects of constitutional law. Making no clear distinction between values and principles, the Court referred to both notions in an interchangeable way.

For instance, in the *Südweststaat* case of 1951, the Court acknowledges the existence of supra-positive law that is binding for ordinary law and even for the provisions of the Constitution.³⁴ These supra-positive provisions are being referred to as fundamental principles (*elementare Grundsätze*) which comprise the principle of democracy, the federal principle (*das bundesstaatliche Prinzip*) and the principle of rule of law (*das rechtsstaatliche Prinzip*).³⁵

In two early decisions issuing party bans, the FCC employs a different terminology. In 1952 and 1956, the FCC declared unconstitutional the Socialist Reich Party (SRP) and the German Communist Party (KPD), respectively. Referring to the totalitarian past of the Republic, the Court maintains Art. 21 Abs. 2 GG which allows for the prohibition of extremist parties if certain conditions apply. The principles of the liberal state, which allow for the association of political parties regardless of the promoted beliefs and opinions, may temporally be put aside if a party openly rejects the liberal democratic order (*freiheitlich demokratische Grundordnung*) of the state.³⁶ The Court thus takes a similar approach as Radbruch by highlighting the necessity of suspending the normal functioning of the liberal state under exceptional circumstances. In the *KPD* case, the Court refers to the “value system”, “absolute

³⁴ *Südweststaat*, BVerfGE 1, 14 (18).

³⁵ *Ibid.*

³⁶ *KPD-Verbot*, BVerfGE 5, 85 (85).

values” and “untouchable fundamental values”³⁷ in order to legitimize the concept of “militant democracy” (*streitbare Demokratie*)³⁸ which allows for the prohibition of parties considered as fundamentally undemocratic.

In both decisions, the Court not only refers to values for highlighting the supra-positive dimension of the Constitution. In fact, the Court invokes a variety of notions. “Democratic fundamental principles” (*demokratische Grundprinzipien*)³⁹, “liberal democratic order”⁴⁰ (*freiheitliche demokratische Ordnung*), “elementary constitutional principles” (*elementare Verfassungsgrundsätze*)⁴¹ and the highest principles (*obersten Grundsätze*)⁴² figure as the sources of the unwritten Constitution. Hence, principles and values are used interchangeably in order to designate the supra-positive dimension of the Constitution.

In this early period, even though the FCC does not commit to a uniform terminology, the Court is quite specific on the legal philosophy it opposes, namely the ideology of value-neutral positivism. In a case dealing with gender equality in marital relationships, the Court explicitly refers to the Radbruch formula and underlines its commitment to uphold material justice.⁴³ In accordance with the narrative mentioned above, the Court stresses the necessity to implement material safeguards in order to prevent totalitarian movements like National Socialism.⁴⁴ In this assessment, the Court does not elaborate on the specifics of such an ethical review. Nevertheless, it offers a glimpse of the potential weight this substantial standard might carry in the adjudication process. For, as the Court emphasizes, not only the legislator may be overruled by the supra-legal standard of material justice:

“The unconditional recognition of the principle [...] according to which the constitutional legislator may arrange all matters according to his will, would mean the relapse into the

³⁷ *KPD-Verbot*, BVerfGE 5, 85 (139).

³⁸ *Ibid.*

³⁹ *SRP-Verbot*, BVerfGE 2, 1 (73).

⁴⁰ *SRP-Verbot*, BVerfGE 2, 1 (1); *KPD-Verbot*, BVerfGE 5, 85 (102).

⁴¹ *KPD-Verbot*, BVerfGE 5, 85 (141).

⁴² *SRP-Verbot*, BVerfGE 2, 1 (14); *KPD-Verbot*, BVerfGE 5, 85 (140).

⁴³ *Gleichberechtigung*, BVerfGE 3, 225 (236).

⁴⁴ *Gleichberechtigung*, BVerfGE 3, 225 (232).

attitude of a value-neutral positivism [*wertungsfreien Gesetzespositivismus*], which attitude has been overcome in legal science and practice for a long time.”⁴⁵

It is remarkable how broadly the FCC interprets its competence of judicial review already at this early stage of its existence. As suggested, judicial review applies not only for ordinary legislation, but also for the constitutional document itself. At least in this assessment, material justice figures as the measure for both ordinary and constitutional law. In this decision, the Court does not effectively perform an ethical review. However, the Court targets very specifically its concept of the enemy, i.e. the doctrine of *value-neutral* positivism.

3.2) The “objective value system”

In the course of time, the Court’s rejection of value neutrality transformed into a solid doctrine of value-based adjudication. In the *Lüth* decision of 1958, for the first time the Court referred to the “objective order of values”⁴⁶ as a legal source of constitutional status.⁴⁷ In this decision, the introduction of the notion was of vital importance since, also for the first time, the Court acknowledged the horizontal effect the Constitution may exert on the sphere of civil law. Invoking the objective value system strengthened the Court’s case to repeal a libel judgement against the applicant Erich Lüth who had called for the boycott of movies directed by Veit Harlan due to the latter’s past affiliations with the Nazi regime. Building on the value based nature of the Constitution, the Court legitimizes Lüth’s actions.

From this point on, the “objective value system” has been established as a proper constitutional doctrine which has been invoked on numerous occasions. Remarkably, this doctrine gained independence from the original narrative which views value based adjudication as a necessary corrective against totalitarian instrumentalisation.

⁴⁵ *Gleichberechtigung*, BVerfGE 3, 225 (232), translated by the author.

⁴⁶ *Lüth*, BVerfGE 7, 198 (198).

⁴⁷ Udo di Fabio, ‘Zur Theorie eines grundrechtlichen Wertesystems’, Detlef Merten/Hans Jürgen Papier (eds), *Handbuch der Grundrechte*, Band II (Heidelberg: C.F. Müller, 2006), p. 1032.

As regards this independence, consider for instance the *Soraya* judgement of 1973. In this case, the Court deals with the question if a violation of personality rights within the sphere of civil law entitles the affected person to demand material compensation. A German newspaper, *Das Neue Blatt* had printed a fictitious interview with the Persian Shah's divorced wife Soraya Esfandiari Bakhtiari who then successfully sued the publisher for damages. In fact, at that time, the civil law did not provide any provision such damage claims could rely on.⁴⁸ However, in this case as well as in several other instances, the German Supreme Court, the *Bundesgerichtshof* (BGH), granted compensation entitlements, invoking the "value decision of the Basic Law" (*Wertentscheidung des Grundgesetzes*)⁴⁹ to justify these decisions, despite the lacking legal basis. In its assessment, the FCC justifies this approach by providing general outlines regarding the nature of the German Constitution:

„The law is not identical with the entirety of its written provisions. In relation to the positive provisions of the state power, there are possibly additional legal sources [*Mehr an Recht*] which possess its sources in the constitutional legal order as a meaningful whole [*Sinnganzen*] and which can operate as a corrective against the written law.”⁵⁰

The Court thus reaffirms the supra-positive foothold of the legal system. This assessment transcends the Dworkinian criticism of positivist ideology. According to the Court, additional legal sources (*Mehr an Recht*) not only step into the breach by resolving hard cases that are not covered by positive law. Rather, they constitute a *corrective* that in certain times must be applied even against the positive law. As the Court specifies, it is the judge's duty to invoke these extra-legal standards whenever necessary:

“The jurisdictional task may require to unveil values that are an inherent part of the constitutional order but appear only incompletely in written statutes or do not appear at all, in an act of valuing recognition not lacking intentional elements and to implement these values into decisions.”⁵¹

⁴⁸ *Soraya*, BVerfGE 34, 269 (273).

⁴⁹ *Soraya*, BVerfGE 34, 269 (274).

⁵⁰ *Soraya*, BVerfGE 34, 269 (287), translated by the author.

⁵¹ „Die Aufgabe der Rechtsprechung kann es [...] erfordern, Wertvorstellungen, die der verfassungsmäßigen Rechtsordnung immanent, aber in den Texten der geschriebenen Gesetze nicht oder nur unvollkommen zum

Values thus form the foundation of the extra-legal corrective towards which the judge should be oriented. In this assessment as well as in numerous other cases, the “objective value system” (*objektive Wertordnung*)⁵² figures as the central point of reference. The FCC attaches an enormous significance to this value system by stressing that “as a constitutional basic decision, it [the objective value system] applies to all areas of law.”⁵³ Reinforcing the adjudication of the BGH, the FCC thus acknowledges the emanating effect (*Ausstrahlungswirkung*) the Constitution produces on the civil law, corroborating the stance it already took in the *Lüth*-case. Given this ample influence the objective value system exerts even on civil law issues, the doctrine of value-based adjudication has clearly transcended the original narrative according to which constitutional values constitute a material safeguard against totalitarian policies.

The practice of founding adjudication on the supra-positive and nonspecific notion of “objective value system” inevitably attracts the accusation of judicial activism and arbitrariness. In the passage quoted above, the Court palpably attempts to dismiss these accusations. Supposedly, the values are an *inherent* part of the constitutional system. Furthermore, the judge is required to refrain from arbitrary interpretation and to determine the values in a rational way.⁵⁴ Almost poetically, the Court charges the judge with the fastidious – if not impossible – task to unveil the hidden values in an “act of valuing recognition” (*Akt des bewertenden Erkennens*).

It is questionable if the doubts concerning the Court’s activism are entirely dispelled by this assessment. Among legal scholars it is highly contested if the values that have been applied over the years are an inherent part of the constitutional system and if their “deduction” has

Ausdruck gelangt sind, in einem Akt des bewertenden Erkennens, dem auch willenhafte Elemente nicht fehlen, ans Licht zu bringen und in Entscheidungen zu realisieren.“ *Soraya*, BVerfGE 34, 269 (287); translated by the author.

⁵² *Soraya*, BVerfGE 34, 269 (280).

⁵³ *Ibid.*, translated by the author.

⁵⁴ *Soraya*, BVerfGE 34, 269 (287).

effectively been carried out on a rational basis.⁵⁵ The values the Court derived from the objective value system are manifold, palpably transcending constitutional issues concerning horizontal effect. By this route, notions like “Social welfare” (*Sozialstaatlichkeit*),⁵⁶ „militant democracy“,⁵⁷ „operability of the Federal Armed forces“⁵⁸ and “security of the state”⁵⁹ have entered the jurisprudence of the FCC and other courts. Strikingly, in many instances values have been invoked in order to justify the limitation of fundamental rights. As I would like to demonstrate using two cases, the invoking of values allows for a teleological reasoning in line with the theoretical considerations outlined in the second chapter.

3.3) Fundamental rights and the “objective value system”

The two cases deal with conflicts between fundamental rights and public security interests. In 1970, in the *Dienstpflichtverweigerung* verdict (official duty refusal), the FCC had to decide over the constitutionality of military measures penalizing a soldier refusing to serve by invoking his fundamental right of conscientious objection. In 1978, the Court responded to a constitutional complaint against a law allowing for the temporary prohibition of communication (*Kontaktsperre*) between incarcerated terrorists and their lawyers. This law had been passed at the peak of the so-called German autumn as a reaction to the abduction of Hanns Martin Schleyer by RAF terrorists. In both instances, the Court enhanced security interests

⁵⁵ For critical perspectives, see: Jürgen Habermas, *Between Facts and Norms* (Cambridge, Mass.: MIT Press, 1996), p. 253; Jürgen Forsthoff, *Rechtsstaat im Wandel. Verfassungsrechtliche Abhandlungen 1950-1964* (Stuttgart: Kohlhammer, 1964), p. 147; Carl Schmitt, *Die Tyrannei der Werte* (Berlin: Duncker & Humblot, 2011) [1960], p. 46; Ulrich Preuß, *Die Internalisierung des Subjekts. Zur Kritik der Funktionsweise des subjektiven Rechts* (Frankfurt: Suhrkamp, 1979), p. 151.

⁵⁶ Debates over the constitutional origin of the social welfare principle still continue. In a decision of 1964, the Supreme Social Court (*Bundessozialgericht*) justified its commitment to this principle by pointing to the value decision of the Basic Law; BSGE 20, 169 (171). Today, the principle usually is conceived of as a fix provision in the Basic Law (Art. 20 Abs. 1, Art. 28 Abs. 1 Satz 1 GG), *Gesetzliche Krankenversicherung*, BVerfGE 115, 25 (41). For discussion over the origin of the principle, see Thorsten Kingreen, ‘Rule of Law versus Welfare State’, in Hermann Pünder, Christian Waldhoff (eds): *Debates in German Public Law* (Oxford: Hart, 2014), pp. 97-116; Jörg Müller-Volbehr, ‘Der soziale Rechtsstaat im System des Grundgesetzes’, *JuristenZeitung* (1984), Jg. 39, pp. 8-11.

⁵⁷ *KPD-Verbot*, BVerfGE 5, 85 (139).

⁵⁸ *Dienstpflichtverweigerung*, BVerfGE 28, 243 (261).

⁵⁹ *Kontaktsperre-Gesetz*, BVerfGE 49, 24 (56).

against fundamental rights. In assessing these cases, the Court takes a deep look at the status of fundamental rights within the constitutional framework.

In German law, conscientious objection to military service is a fundamental right protected by Art. 4 Abs. 3 GG. Accordingly, the Court precisely designates the legal sources that are substantive for deciding the issue at hand: “Only wording and meaning of Art. 4. Abs. 3 GG regarding its purpose and its position within the value system of the Basic Law may be relevant for the decision.”⁶⁰

The Court engages in a two-step procedure. If it were simply a matter of textual provisions, the issue at hand would be undisputed. Art. 4 Abs. 3 GG “comprises a directly effective fundamental right that does not need to be actualized by ordinary law.”⁶¹ As the Court further explicates, no provision assuming a lower normative status than the constitution may infringe on the fundamental right of conscientious objection. This text-oriented approach thus supports a strong protection of fundamental rights: “The wording of Art. 4 Abs. 3 Satz 1 – considered in isolation – leaves no room for interpretation which may postpone the legal force of the right to conscientiously object to military service until the recognition process becomes final.”⁶²

The Court thus moves on to the discussion of superior norms:

“With respect to the unity of the constitution and to the constitutionally protected value system, only conflicting fundamental rights of third parties and other legal values endowed with constitutional status are exceptionally capable to limit unrestricted (*uneinschränkbar*) fundamental rights in certain matters.”⁶³

The Court’s two stepped line of argumentation palpably demonstrates from which point the appeal to values becomes essential. It is by invoking constitutional values that the infringement of a fundamental right may be legitimate. Only now the objective value system assumes a

⁶⁰ *Dienstpflichtverweigerung*, BVerfGE 28, 243 (259), translated by the author.

⁶¹ *Ibid.*

⁶² *Dienstpflichtverweigerung*, BVerfGE 28, 243 (260), translated by the author.

⁶³ *Dienstpflichtverweigerung*, BVerfGE 28, 243 (261), translated by the author.

crucial role in the Court's rationale. For, the fundamental right of conscientious objection that was qualified as unconditional in the first step of the Court's line of argumentation, may now be weighed against other values of public concern: "The interest of the conscientious objector who is not yet recognized as such is opposed by the necessity of the operability of the Federal Armed forces as well as by the need for maintaining the discipline until the decision over the recognition is finalized."⁶⁴ In contrast to the first step of argument, conscientious objection now figures as a mere *interest* competing against other interests. The logic of argumentation has fundamentally changed. The Court's assessment has thus turned into a teleological balancing. The Court may now choose between two different societal *goals*, i.e. the personal interest of a conscientiously objecting soldier and the broader goal of a functioning military. It is by invoking the fundamental value system that the operability of the army comes into play and that the fundamental *right* of conscientious objection is being degraded to a mere *interest*. In this assessment, the necessity of the operability of the army outweighs the opposing interests. In the *Kontaktsperre*-decision, the Court proceeds almost similarly. Basic rights are invoked as "constitutionally protected legal goods" (*verfassungsrechtlich geschützte Rechtsgüter*)⁶⁵ that compete against different goods. As the Court states, none of these goods are protected against a potential suspension by a competing good.⁶⁶ The balancing must be carried out against the background of the value system:

"Pursuant to the settled case law of the Constitutional Court, it is to be assumed that the constitutional order [verfassungsmäßige Ordnung] constitutes a meaningful whole [Sinnganzes] and that a conflict between constitutionally protected interests [Belangen] is to be resolved according to the constitutional value order and according to the unity of this constitutional value system. In this framework, even unlimitable basic rights may experience limitations; plainly unlimited rights cannot be recognized by a value-based order."⁶⁷

⁶⁴ *Dienstpflichtverweigerung*, BVerfGE 28, 243 (261).

⁶⁵ *Kontaktsperre-Gesetz*, BVerfGE 49, 24 (55).

⁶⁶ *Ibid.*

⁶⁷ *Kontaktsperre-Gesetz*, BVerfGE 49, 24 (56); translation by the author.

Analogically to the case discussed before, the Court examines the issue at hand against the background of a holistic understanding of the Constitution. In proximity of the Schmittian distinction between constitutional law and the Constitution, the Court conceives of a constitutional moment that lies beyond the written provisions of the constitutional document. This constitutional moment harbours the unitary value order in light of which fundamental rights are to be interpreted. The resulting consequences for the enforceability of fundamental rights are considerable. The openly paradoxical fashion in which the FCC phrases these consequences cannot be appreciated enough. *Unlimitable* fundamental rights may be *limited* as a direct consequence of the value-based nature of the Constitution.

In both cases, the actual way in which the Court attains the standard setting values, remains enigmatic. The Court does not perform a deduction in the strict sense. Rather, it introduces “the operability of the army”, „security of the state“⁶⁸ and „security of the population”⁶⁹ as constitutional community values against which individual rights, reduced to mere goods of constitutional value, occasionally have to stand back. Value-based adjudication allows for a teleological reasoning by introducing certain state goals surpassing fundamental rights.

3.4) Further development

Even though the notion of “objective value system” figured as a conceptual centerpiece in several important decisions, it has not been established as a constant point of reference in the jurisdiction the FCC. Already in a time when the “value doctrine” was invoked on a regular basis, the Court has applied diverging terminologies with respect to issues very similar to those discussed above. In 1978, for instance, legitimizing the horizontal effect basic rights may exert on the sphere of civil law, the Court draws on “principles carrying the Basic Law” and “functioning of basic rights as objective principles”.⁷⁰ Following this terminology, the supra-

⁶⁸ *Kontaktsperr-Gesetz*, BVerfGE 49, 24 (56).

⁶⁹ *Kontaktsperr-Gesetz*, BVerfGE 49, 24 (57).

⁷⁰ *Mitbestimmung*, BVerfGE 50, 290 (336-337).

positive dimension of the Constitution is marked by principles rather than by values. As concerns the FCC's justification of horizontal effect of basic rights, invoking the latter's objective dimension has been established as the principal terminological approach.⁷¹ Nevertheless, the Court's rooting in its former value-based case law is manifested by references to the *Lüth*-decision⁷² as well as in its explicit rejection of value neutrality with respect to the interpretation of the Constitution.⁷³ Despite the fact that the objective value system has not explicitly been invoked in recent decades, leading constitutional scholar Udo di Fabio still stress the value-centered character of the German legal system.⁷⁴

Similar tendencies may be observed with respect to legal rationales justifying the encroachment on fundamental rights. Even though limitations of basic rights are not based on the doctrine of the "objective value system", they are justified on similar grounds. On a regular basis, the FCC introduces certain community goods or constitutional values in order to legitimize the curtailment of basic rights. Particularly by assessing cases concerning national security, for instance telecommunication surveillance, dragnet investigation and remote forensic search of computers, the Court resorts to constitutional values and community goods such as "public security" and "protection of body, life and freedom" against which fundamental rights are to be balanced.⁷⁵

Now, in contrast to the cases discussed in the previous sections, the Court does not engage in long considerations regarding the holistic and value-oriented nature of the German Constitution. The introduction of high-ranking goods of constitutional value is not embedded

⁷¹ Axel Tschentscher, 'Interpreting Fundamental Rights – Freedom versus Optimization', in Hermann Pünder, Christian Waldhoff (eds): *Debates in German Public Law* (Oxford: Hart, 2014), p. 45; see for instance *Handelsvertreter*, BVerfGE 81, 242 (255).

⁷² For instance *Mitbestimmung*, BVerfGE 50, 290 (337); *Handelsvertreter*, BVerfGE 81, 242 (254).

⁷³ BVerfGE 81, 242 (254).

⁷⁴ Udo di Fabio, 'Zur Theorie eines grundrechtlichen Wertesystems', Detlef Merten/Hans Jürgen Papier (eds), *Handbuch der Grundrechte*, Band II (Heidelberg: C.F. Müller, 2006), p. 1032.

⁷⁵ *Telekommunikationsüberwachung I*, BVerfGE 100, 313 (382); *Rasterfahndung II*, BVerfGE 115, 320 (346); *Online-Durchsuchungen*, BVerfGE 120, 274 (319).

in discussions of long-standing constitutional doctrines. As a result, superior community goods are introduced rather abruptly in the assessments. As stressed by Oliver Lepsius who evaluates the FCC's cautious reaction to legislation dramatically enlarging the scope of federal surveillance of telecommunication: "Security purposes are no longer subject to constitutionally normative justifications; rather, they enter into the weighing process as self-evident factually important purposes."⁷⁶

As discussed above, deducing constitutional goods from a supra-positive value system already poses great problems on its own. With respect to the FCC's recent jurisprudence on security matters, it appears as if the Court even renounces to a disguised deduction of the goods by which fundamental rights are measured. The Court's practice of invoking unwritten goods and values of constitutional rank has stabilized in a way that further explanations and deductions have become superfluous. Particularly as concerns the FCC's jurisprudence of matters related to national security, teleological reasoning drawing on unwritten constitutional law has become quite customary.

3.5) Principle-based adjudication in the *Aviation Security Act* Case

Against the backdrop of the value-oriented and teleological jurisprudence of the FCC, one cannot overemphasize the significance of the Court's assessment in the *Luftverkehrsgesetz* (Aviation Security Act, ASA) judgement of 2006. Partly drawing on Art. 1 Abs. 1 GG which proclaims the inviolability of human dignity, the Court struck down a statute allowing for the shooting down of a passenger aircraft kidnapped by terrorists. Some commentators have portrayed this judgement and its focus on the ethical notion of human dignity as a symptom of teleological adjudication. As stated by Vicki Jackson and Jamal Greene:

„The Court's recent decision finding invalid a statute [...] authorizing the shooting down of hijacked civilian aircraft, as inconsistent with the human dignity of its innocent

⁷⁶ Oliver Lepsius, *The relationship between security and civil liberties in the federal republic of Germany after September 11* (Baltimore: The Johns Hopkins University, 2002), p. 21.

passengers, is an example of the power of this normative value [with respect to human dignity; K.P.] in the highly teleological German jurisprudence.”⁷⁷

At first glance, a semantic analysis of the judgement appears to corroborate this position. The Court engages in long philosophical considerations with respect to the scope of human dignity, which could be interpreted as detrimental to the principle of legal certainty.⁷⁸ Furthermore, the Court refers to human dignity as a “superior constitutional value”⁷⁹ and thus employs a terminology associated with teleological reasoning.

However, the Court’s opposition to governmental security concerns fuels the presumption that the Court takes a different stance in comparison with the cases discussed in the previous sections. In one of the most moral assessments the FCC has delivered so far, neither the objective value system nor its conceptual equivalents play any leading role. The Court does not draw on unwritten constitutional law in order to declare the ASA unconstitutional. It can rely on a written provision of the Basic Law, i.e. the human dignity clause. Even though it is remarkable that the FCC thoroughly elaborates on the fundamental value this provision carries with respect to the Basis Law, this assessment may not be labelled as teleological. Enlarging on the value the dignity clause constitutes for liberal democracies and for individual freedom merely confers special emphasis on Art.1 GG. In contrast to cases like *Kontaktsperre* and *Dienstpflichtverweigerung* in which the Court applied teleological standards that could not be derived from the written Constitution, it explicates the underlying motives which moved the constituent power to include human dignity in the core of the Basic Law.

The philosophical component by which the judgement is characterised does not owe to utilitarian value theory but rather to deontological moral theory in the tradition of Kant.⁸⁰ The

⁷⁷ Vicki C. Jackson, Jamal Greene, ‘Constitutional interpretation in comparative perspective: comparing judges or courts?’ in Tom Ginsburg, Rosalind Dixon (eds), *Comparative Constitutional Law* (Cheltenham: Elgar, 2011), p. 607.

⁷⁸ *Luftsicherheitsgesetz*, BVerfGE 115, 118 (152).

⁷⁹ Ibid.

⁸⁰ Claus Roxin, ‘Der Abschuss gekaperter Flugzeuge zur Rettung von Menschenleben’, *Zeitschrift für Internationale Strafrechtsdogmatik* (2011), Vol. 6, p. 557.

second formulation of the categorical imperative commanding to treat a human being “never merely as a means to an end, but always at the same time as an end”⁸¹ is echoed in the Court’s critical assessment that the statute at issue transforms the human being into a mere object of the state.⁸² By applying a principle-based rationale aiming at protecting the individual from governmental intrusion, the Court teaches a lesson in deontological ethics that should suit the taste of Dworkin and Habermas.

It is the government that applies teleological rationales by arguing its case in the oral proceedings. By stressing its protective duties,⁸³ the government draws on the objective dimension of fundamental rights, emphasizing its own function for realizing the framework of a secure environment. The Right to life is perceived as a “legal good”⁸⁴ which both the passengers of a kidnapped airplane and the civilians potentially targeted by a terrorist attack are entitled to.

Given the widespread approval with which antiterrorist legislation has been met by the judiciary in many legal systems, including Germany, the Court’s stance in ASA case is remarkable. Those who think that this judgement was inevitable in light of the eternally entrenched dignity clause should be reminded of the Court’s assessment in *Kontaktsperre*: “plainly unlimited rights cannot be recognized by a value-based order.” Carrying the doctrine of the objective value system to its logical conclusion, there is no intrusion on fundamental rights that may not be justified under certain circumstances. The concept of “militant democracy” which the Court neither invoked nor discussed in this judgement could have served as a legal mechanism in order to uphold the Aviation Security Statute.⁸⁵ In this spirit, the

⁸¹ Immanuel Kant, *Grounding for the Metaphysics of Morals* (Indianapolis: Hackett 1993) [1785], p. 36.

⁸² *Luftsicherheitsgesetz*, BVerfGE 115, 118 (153).

⁸³ *Luftsicherheitsgesetz*, BVerfGE 115, 118 (131).

⁸⁴ *Ibid.*

⁸⁵ As highlighted by Markus Thiel, the concept of militant democracy has not only been applied to internal enemies, as put into practice in the party banning from the 1950s, but also to external enemies; Markus Thiel, ‘Zur Einführung: Die “wehrhafte Demokratie” als verfassungsrechtliche Grundentscheidung’, in Markus Thiel (edt), *Wehrhafte Demokratie* (Tübingen: Mohr Siebeck, 2003), p. 1.

Luftsicherheitsgesetz verdict has been criticized by legal scholars that sided with the government. Otto Depenheuer, for instance, opts for the revalorization of the civil victim (*Bürgeropfer*) by pointing to the superiority of elementary community goods. According to Depenheuer, the common good ranks higher than individual interests.⁸⁶ The scholar thus follows up on teleological rationales the FCC itself applied in verdicts like *Dienstpflichtverweigerung* and *Kontaktsperre*.

3.6) Concluding remarks: Terminological plurality in assessing the unwritten Constitution

The unwritten Constitution figures as an essential point of reference in the jurisprudence of the FCC. The model of value-based adjudication constituted the focus of this chapter. However, the fact that unwritten *principles* of constitutional value play an essential role in German constitutional jurisprudence should not be ignored. As mentioned above, the FCC also invokes fundamental *principles* for indicating the supra-positive foundation of the legal system. Occasionally, the Court draws on the general notion of liberal democratic order (*freiheitlich demokratische Grundordnung*) in order to contextualise the codified legal system within a greater normative framework. Furthermore, other unwritten guidelines of constitutional status, most prominently the doctrine of federal loyalty (*Bundestreue*) which the FCC refers to as a constitutional principle,⁸⁷ have not been expanded upon in this chapter.

Nevertheless, unwritten values of constitutional rank may be considered as a central conceptual pillar in German constitutional jurisprudence. From the outset, the FCC has rejected value-neutrality in addressing constitutional issues. This rejection of value-neutrality has evolved into the doctrine of the objective value system which has been applied in a variety of issues. Remarkably, value-based adjudication has completely emancipated from the original narrative

⁸⁶ Otto Depenheuer, *Selbstbehauptung des Rechtsstaates* (Paderborn: Schöningh, 2007), pp. 96-99.

⁸⁷ 2. Rundfunkentscheidung, BVerfGE 31, 314 (354-356).

ascribing the necessity of a value-oriented judiciary to the potential threat of totalitarianism. Thus, the objective value system has been invoked to curtail constitutionally protected fundamental rights and to give orientation to civil right disputes that allegedly are not properly covered by existing law. Even though the FCC has ceased to invoke the objective value system, the Court still refers to the leading cases, most prominently the *Lüth*-decision, in which this doctrine has been applied. By this means, teleological rationales are introduced into constitutional adjudication to this day.

4) Balancing Principles and Values: Teleology in Israeli Constitutional Adjudication

4.1) Constitutional jurisprudence in Israel: A special case

With regard to Israel, exploring the unwritten foundations of the constitution is a curious endeavour. In contrast to Germany and France, Israel does not dispose over a written constitution in the strict sense. The constitution-giving process as envisioned by the Harari decision which charged the Knesset with the stepwise adoption of Basic Laws has never been completed. It thus appears as if the frictions between the written and unwritten elements of the constitution which may be observed in German and French constitutional adjudication do not occur within the Israeli framework.

However, the absence of a codified constitution renders the Israeli case particularly interesting. The Israeli Supreme Court (ISC), besides its role as the highest Court of Appeal, acts as the High Court of Justice and, in this capacity, has constituted an important check on the government since the early days of the State of Israel.⁸⁸ Even before the Knesset enacted Basic Laws protecting certain fundamental rights in 1992 and before the *Bank Mizrahi* decision of 1995 which revolutionized the Israeli constitutional framework by introducing the Court's right to judicially review legislation against the Basic Laws, the Court assumed an active role in curtailing governmental overreach. While the principle of parliamentary supremacy remained undisputed until 1995, the Court had developed a "judicial bill of rights"⁸⁹ by which the executive branch has been held in check.⁹⁰ Administrative actions have been reviewable for a much longer time than statutes passed by the Knesset. The ISC thus had to proceed creatively in order to assume this active role. "Starting from scratch in a total textual void, from day one,

⁸⁸ Suzie Navot, *The Constitution of Israel. A Contextual Analysis* (Oxford: Hart, 2014), p. 196.

⁸⁹ Baruch Bracha, 'The Protection of Human Rights in Israel', in Yoram Dinstein (ed), *Israel Yearbook of Human Rights*, Vol. 12 (Tel Aviv: Nijhoff 1982), p. 114.

⁹⁰ Eyal Benvenisti, 'The attitude of the Supreme Court of Israel towards the implementation of the international law of human rights', Benedetto Conforti/Francesco Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (The Hague: Martinus Nijhoff Publishers, 1997), p. 215.

Israeli judges had to sharpen their skills at spinning gold out of straw.”⁹¹ In the absence of a codified Bill of Rights, the ISC heavily relied on unwritten constitutional law by which it measured administrative actions. The next sections will examine the specifics of the rationales and of the terminologies the Court has employed by establishing this constitutional footing.

The ISC’s case law before the enactment of the Basic Laws in 1992 is thus of particular interest for the issue under examination. Furthermore, we also look into the question if the constitutional changes this enactment has brought did significantly change the Court’s attitude toward unwritten constitutional law.

Apart from the absence of a written constitution, there are other factors contributing to the special nature of constitutional jurisprudence in Israel. First, due to the existential threats the State of Israel has been facing since its foundation, the state of emergency that has been declared in 1948 has never been abolished.⁹² As a consequence of this permanent emergency situation, the government has been granted wide discretionary power which naturally exerted considerable consequences on the constitutional adjudication of fundamental rights. Second, in contrast to other jurisdictions, the verdicts issued by the highest Israeli Court bear to a great degree the hallmark of the delivering judge. This characteristic is aggravated by the fact the ISC’s major decisions are only rarely held unanimously. The expansiveness and theoretical depth by which the concurring and dissenting opinions are often characterized enable the judges to spread out their respective theoretical and terminological approaches. The ISC’s case law thus provides for a colorful arsenal of different doctrines and terminologies judges may follow up on depending on their taste. For this reason, it is extremely difficult if not impossible

⁹¹ Sharon Weintal, ‘The Inherent Authority of Judges in a Three-Track Democracy to Recognize Unenumerated Constitutional Rights: The Israeli Story of a Judicial Mission’, in Gideon Sapir et al. (eds), *Israeli Constitutional Law in the Making* (Oxford: Hart, 2013), p. 286.

⁹² Daphne Barak-Erez, ‘The National Security Constitution and the Israeli Condition’, in Gideon Sapir et al. (eds), *Israeli Constitutional Law in the Making* (Oxford: Hart, 2013), p. 434.

to identify a uniform and coherent approach with respect to the notions of “value” and “principle”.

These special features of Israeli constitutional jurisprudence should be kept in mind by examining the ISC’s attitude towards the unwritten constitution.

4.2) The balancing doctrine

As mentioned above, the absence of a written bill of rights has not prevented the ISC from protecting human rights against administrative abuses of power. When the government formally has not breached the law by infringing on human rights, the Court necessarily has to resort to unwritten standards in order to repeal an intrusive administrative act. Balancing public interests against basic rights has been established as the key strategy of the ISC dealing with fundamental rights issues. Proportionality has prevailed as the constitutional doctrine based on which these balancing processes have been carried out.⁹³

From the outset, the ISC has proceeded very creatively in order to secure a constitutional footing by overruling administrative acts.⁹⁴ The Court has deployed the “widest possible range of sources and ideas upon which to base fundamental rights protection”.⁹⁵ Consider for instance the *Kol Ha’am* decision from 1953,⁹⁶ widely considered as one of the most important human rights decisions in early Israeli case law. Relying on a press ordinance stemming from the

⁹³ Mordechai Kremnitzer, ‘Constitutional Proportionality: (Appropriate) Guidelines’, in Gideon Sapir et al. (eds), *Israeli Constitutional Law in the Making* (Oxford: Hart, 2013), p. 225.

⁹⁴ In the Israeli constitutional discourse, there is a widespread narrative according to which constitutional adjudication has followed a formalistic approach until the late 1970s and has then adopted an anti-formalist position in the 1980s. This narrative which may be traced back to publications of Menachem Mautner, has been plausibly challenged by Joshua Segev who points out that a formalistically proceeding constitutional jurisprudence presupposes a codified constitution. Even though the ISC has increasingly assumed a more active role over the decades by dramatically expanding its scope of justiciability, as we will discuss below, the Court’s characterization as formalistic might be misleading. Menachem Mautner, ‘The Decline of Formalism and the Rise of Values in Israeli Law’, *Tel Aviv University Law Review*, 17 (1993) (in Hebrew); for English coverage see Menachem Mautner, *Law and the Culture of Israel* (Oxford: Oxford University Press 2011); Joshua Segev, ‘The Changing Role of the Israeli Supreme Court and the Question of Legitimacy’, *Temple International and Comparative Law Journal*, Vol 20 (2006), p. 11.

⁹⁵ Allen Zysblat, ‘Protecting Fundamental Rights in Israel without a Written Constitution’, in Itzhak Zamir/Allen Zysblat (eds), *Public Law in Israel* (Oxford: Clarendon Press, 1996), p. 50.

⁹⁶ H CJ 73/53, ‘*Kol Ha’AM’ Company Limited v Minister of the Interior*’.

British Mandate, the Minister of the Interior imposed the temporary prohibition of the publication of two communist newspapers which had critically reported about the government's military ties to the US.

Freedom of expression and state security figure as the competing values that are weighed against each other in this decision delivered by Justice Agranat. In contrast to jurisdictions featuring a codified constitution in which the appeal to unwritten constitutional law often is accompanied by theoretical reflections on the nature and the sources of the unwritten constitution, no similar considerations may be found in *Kol Ha'am*. Both freedom of expression and state security are introduced rather abruptly without being formally derived from any constitutional foundation. This illustrates the high degree of interpretational leeway the absence of a codified constitution may grant to a constitutional court. The ISC compensates the lack of evidentiary constitutional sources by extensively discussing the legal standards applied. By referring to legal and political philosophy and by opulently quoting from American and British case law, the Court elaborates on the underlying values and the scope of the principle of freedom of expression.⁹⁷ Justice Agranat hereby contends that this principle may not be understood as absolute: „In order to set limits on the use of the right to freedom of speech and the press, we weigh various competing interests in the balance and, after reflection, select those which, in the circumstances, predominate.”⁹⁸ Heavily drawing on American jurisprudence, the Court adopts a variation of the doctrine according to which the expression of speech may only be limited if it constitutes a clear and present danger. By balancing freedom of expression

⁹⁷ As demonstrated by Iddo Porat, the absence of a written constitution facilitates the use of foreign case law for two reasons. First, the main objection to such a practice, i.e. loyalty to the constitutional text, does not apply in the Israeli framework. Second, foreign law provides a natural source for designing a corpus of fundamental rights. Iddo Porat, 'The Use of Foreign Law in Israeli Constitutional Adjudication' in Gideon Sapir et al. (eds), *Israeli Constitutional Law in the Making* (Oxford: Hart, 2013), pp. 157-158.

⁹⁸ HCJ 73/53, '*Kol Ha'AM*' *Company Limited v Minister of the Interior*, p. 11 (page number referring to case document available at Versa Cardozo Project).

against state security Justice Agranat concludes that the administration had exceeded its competences in the issue at hand.

Since the Court lacks the competence of invalidating existing law, it interprets the Press Ordinance on which the Minister of the Interior relies in a rather lenient manner. As stressed by legal scholar Baruch Bracha, the content of the press ordinance granting vast discretionary powers to the Minister of the Interior in suspending the publication of newspapers has been significantly altered by the Court's adoption of the "clear and present danger" doctrine.⁹⁹ Justice Agranat justifies this judicial transformation of the ordinance by highlighting the importance of contemporary values and beliefs for interpreting existing law: "it is a well-known axiom that the law of a people must be studied in the light of its national way of life."¹⁰⁰ This interpretational approach which has become canonical in the ISC's jurisprudence has endowed the Court with the flexibility to give new meaning to existing statutes and ordinances.¹⁰¹

As mentioned, both freedom of expression and state security are introduced without being deduced in any manner. Initially, freedom of expression is referred to as a principle whereas state security is constantly invoked as an interest.¹⁰² In the process of balancing, however, both notions are brought to the same logical level by being referred to as competing interests.¹⁰³ In the German case *Dienstplichtverweigerung* discussed above, a similar strategy could be observed. In both cases, the terminological adjustment may be indicative of the conceptual awareness that strictly principle-based adjudication is hardly reconcilable with a more

⁹⁹ According to the ordinance, the Minister of the Interior has the right to suspend the publication of a newspaper, if, in his opinion, the public peace is endangered by a matter appearing in this newspaper; see Baruch Bracha, 'The Protection of Human Rights in Israel', in Yoram Dinstein (ed), *Israel Yearbook of Human Rights*, Vol. 12 (Tel Aviv: Nijhoff 1982), pp.115-117.

¹⁰⁰ HCJ 73/53, *'Kol Ha'AM' Company Limited v Minister of the Interior*, p. 18.

¹⁰¹ Especially Aharon Barak's theoretical approach builds on this formula: "One of the most important rules of interpretation to aid the judge in this situation is that a statutory enactment is to be interpreted against the background of the accepted values of the system and in such a way as to further them." Aharon Barak, *Judicial Discretion* (New Haven: Yale University Press, 1989), p. 65.

¹⁰² *Ibid.*, pp. 6,14.

¹⁰³ *Ibid.*, p. 11.

pragmatic approach in which fundamental rights figure as mere interests or values that may be overshadowed by competing interests.

In the case of Israeli constitutional adjudication, however, this terminological strategy cannot be observed on a regular basis. In comparison to decisions of constitutional courts of other jurisdictions, the ISC's judgements ostentatiously bear the mark of the judge delivering the decision. As a consequence, there is no uniform terminological approach as concerns the appeal to unwritten rights and goals of constitutional status. Both constitutional rights and goals are referred to as principles, values and interests throughout the history of the Court's case law. Some judges, most prominently Aharon Barak, use these terms synonymously, as will be demonstrated below.

The balancing approach the ISC takes in *Kol Ha'am* constitutes the blueprint for the Court's general treatment of fundamental rights issues. In Israeli constitutional adjudication, fundamental rights may always be subject to processes of weighing. As Aharon Barak emphasizes in a verdict, directly referring to *Kol Ha'am*: "A social value, such as freedom of expression, does not have 'absolute weight.' The weight of any social principle is relative. The status of any fundamental principle is always assessed in relation to that of other principles with which it is likely to conflict."¹⁰⁴ The notions of "value" and "principle" are used interchangeably according to the account given by Barak. Throughout the history of the ISC's jurisprudence, a variety of unwritten principles and values has been balanced. Along with the doctrine of proportionality, the concept of reasonableness has been employed in order to assess the constitutionality of administrative acts.¹⁰⁵ The issues the Court dealt with in this manner cover all sorts of fundamental rights issues, ranging from minor disputes to more serious violations of basic rights. For instance, the refusal of a burial society to inscribe a gravestone

¹⁰⁴ CA 105/92 *Re'em Engineers and Contractors Ltd. v. Municipality of Upper Nazareth*.

¹⁰⁵ Itzhak Zamir, 'Unreasonableness, Balance of Interests and Proportionality', in Itzhak Zamir/Allen Zysblat (eds), *Public Law in Israel* (Oxford: Clarendon Press, 1996), p. 328.

in Latin characters lead to a judgement in which the ISC balanced human dignity against the value of the Hebrew language.¹⁰⁶ Likewise, the Court has weighed the values of freedom of expression and state security in a case concerning military censorship.¹⁰⁷ Even major fundamental rights issues have been dealt with in a similar way. In a case regarding the deportation of dangerous individuals, the ISC balanced the right to a fair hearing against the value of state security.¹⁰⁸

The frequent appeal to unwritten principles and values helped the Court to increasingly assume the active role it is known for today. Until the late 1970, the Court differentiated between security authorities and other administrative authorities and was rather reluctant to review matters of national security.¹⁰⁹ In the 1980s, the Court has considerably largened the scope of justiciability, thus reducing the list of issues that is unchallengeably left for the executive branch to decide upon.¹¹⁰ In the *Ressler v. Minister of Defense* decision from 1986, Justice Barak provides the prospect of unrestricted justiciability by approaching this contested issue from a conceptual perspective. Barak hereby distinguishes between “normative justiciability” and “institutional justiciability”, claiming that from a purely normative point of view, there is no dispute that may not be subject to judicial review: “The law spans all actions.”¹¹¹ According to Barak, assessing fundamental principles and values may help to determine the constitutionality of every act: “In the absence of legislative guidance, the court must turn to the fundamental values of the nation, to its ‘credo’ [...], or to its ‘national way of life’ [...] and to ‘the sources of national consciousness of the people in whose midst the judges reside’.” Clearly, Barak is not referring to a historic set of values which has shaped a constitutional

¹⁰⁶ CA 294/91 *Jerusalem Community Jewish Burial Society v. Kestenbaum*.

¹⁰⁷ HCJ 680/88 *Schnitzer v. Chief Military Censor*.

¹⁰⁸ HCJ 5973/92 *Association for Civil Rights in Israel v. Minister of Defence*.

¹⁰⁹ Baruch Bracha, ‘Judicial Review of Security Powers in Israel: A new Policy of the Courts’, *Stanford Journal of International Law*, Vol 28 (1991), p. 42; Daphne Barak-Erez, ‘Broadening the Scope of Judicial Review in Israel: Between Activism and Restraint’, *Indian Journal of Constitutional Law*, Vol. 3 (2009), p. 119.

¹¹⁰ Menachem Mautner, *Law and the Culture of Israel* (Oxford: Oxford University Press 2011), p. 58.

¹¹¹ HCJ 910/86, *Ressler v Defense Minister*, P. 36.

moment in the past and which has, for example, found its expression in the Israeli declaration of independence. Rather, by invoking the *Kol Ha'am* decision, Barak charges the judge of considering a variety of values and principles, including contemporary views and beliefs and to acknowledge current needs of society.¹¹² Barak thus evinces an extremely broad understanding of unwritten values and principles, encompassing a sheer endless number of values and societal beliefs that may enter constitutional adjudication.

Even though Barak acknowledges limitations to institutional justiciability, the strategic thrust of this judgement is obvious. Theoretically, almost every administrative act should be reviewable.¹¹³ The Court has considerably broadened its scope of justiciability over the past decades, even though practically a certain number of issues still remains out of reach of judicial review.¹¹⁴

At first glance, the process of balancing rights and state interests appears to be identical to rationales observed in German constitutional case law. Considering the underlying legal doctrines, however, there is a crucial difference between the two approaches. In Israeli constitutional adjudication, value-based adjudication is deeply connected with interpretational problems stemming from the absence of a codified constitution: „The court was expected to express the shared values of society and use them as an aid both in interpreting laws and providing solutions when there were no applicable statutory rules.”¹¹⁵ Until the revolutionizing *Bank Mizrahi* verdict from 1995, the absence of legislation or at least statutory ambiguity is perceived as a necessary condition for overruling administrative actions. As phrased by Baruch Bracha in 1982: “The supremacy of the Knesset is the cornerstone of the Israeli legal

¹¹² HCJ 910/86, *Ressler v Defense Minister*, P.40.

¹¹³ Daphne Barak-Erez, ‘Broadening the Scope of Judicial Review in Israel: Between Activism and Restraint’, *Indian Journal of Constitutional Law*, Vol. 3 (2009), p. 120.

¹¹⁴ *Ibid.*, p. 136.

¹¹⁵ Daphne Barak-Erez, ‘From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective’, *Columbia Human Rights Law Review*, Vol 26 (1995), p. 341.

system.”¹¹⁶ As a consequence, the ISC was reluctant to invalidate fundamental right abuses that were explicitly corroborated by the Knesset.¹¹⁷ In this respect, the German doctrine of value-based adjudication differs from its Israeli counterpart. As epitomized by the Radbruch Formula, value-based adjudication constitutes not least a safeguard against unjust legislation. As insinuated by the FCC, even provisions of the original constitution may be invalidated if they are in conflict with fundamental ethical values.

4.3) The “constitutional revolution”: The Basic Laws from 1992 and the *Bank Mizrahi* verdict

In light of the absence of a written bill of rights, it is understandable that the ISC resorts to unwritten principles and values in order to ward off administrative infringements on human rights. How has this practice been affected by the enactment of the Basic Law: Freedom of Occupation and the Basic Law: Human Dignity and Liberty? For, in the *Bank Mizrahi* verdict of 1995, the Court recognized the constitutional superiority of these fundamental rights over ordinary legislation, reserving the right to annul legislation violating the Basic Laws.¹¹⁸ Did this constitutional revolution render the appeal to unwritten principles and values superfluous?

For four reasons, this has not been the case. First, the Basic Laws of 1992 have been phrased in a manner that encourages value-based adjudication rather than the contrary.¹¹⁹ Key passages of both Basic Laws refer to general values that are highly open to interpretation and therefore require judicial specification when applied at court. The first paragraph of Basic Law: Human Dignity and Liberty reads as follows: “The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a

¹¹⁶ Baruch Bracha, ‘The Protection of Human Rights in Israel’, in Yoram Dinstein (ed), *Israel Yearbook of Human Rights*, Vol. 12 (Tel Aviv: Nijhoff 1982), p. 111.

¹¹⁷ Ibid. p. 121.

¹¹⁸ Past legislation has been excluded from judicial review, see Daphne Barak-Erez, ‘From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective’, *Columbia Human Rights Law Review*, Vol 26 (1995), p. 354.

¹¹⁹ Ibid., p. 342.

Jewish and democratic state.” The Knesset has not provided legislative guidance on the scope of Jewishness and democracy as constitutional values. It is by no means evident which values and principles are comprised by this provision. As will be shown in the next section, these values often oppose each other which necessitates balancing processes as described in the previous section. Furthermore, the Basic Laws both feature limitation clauses which provide that the protected human rights may be violated "by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required."¹²⁰ Hence, the possibility to violate fundamental rights covered by the Basic Laws is certainly not obviated. As stipulated by the Basic Laws, such a violation must be legitimized against the backdrop of certain national values that, once again, are not specified. Deciding the question if the Knesset has met the requirements in order to pass legislation infringing on human rights, thus necessarily involves value based assessments.

Second, examining the Court’s general line of argumentation in *Bank Mizrahi*, as expressed in the majority opinion delivered by Barak, one is little inclined to consign value-based adjudication to history. Indeed, this judgement is rightly perceived as revolutionary in acknowledging the Basic Laws as superior written law on the basis of which ordinary legislation may be annulled. For this reason, this decision has been compared to *Marbury v. Madison*, a comparison Barak himself evokes in the judgement at hand.¹²¹ However, the common ground between these judgements may be thinner than assumed. While the revolutionary character of this decision remains undisputed, the rationales underlying the two landmark decisions differ to a significant extent. Whereas Justice Marshall justifies the Supreme Court’s competence of substantially reviewing legislation by syllogistically building on the apparent contradiction of simultaneously accepting both a written constitution as

¹²⁰ See Section 8 of Basic Law: Human Dignity and Liberty. Basic Law: Freedom of Occupation features a similar limitation clause.

¹²¹ CA 6821/93, *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*, P. 75 (opinion Barak).

paramount law and ordinary statutes violating the constitution, Barak approaches this issue from a broader angle.¹²² While similar rationales can definitely be found in *Bank Mizrahi* as well,¹²³ Barak leads us to understand that the Basic Laws are not the only standards for judicially reviewing legislation:

“Declaring a law unconstitutional is a serious matter. Such a declaration would seem to undermine the will of today’s majority. It may be justified by the supremacy of the constitution and its values. The justification applies when the judiciary gives expression to the values of society as they are understood by the culture and tradition of the people as it moves forward through history.”¹²⁴

In his assessment, Barak clearly leaves behind textualistic approaches according to which exclusively the written constitution may serve as the standard for annulling legislative acts. On the contrary, Barak suggests that a broader cultural background is to be taken into consideration by reviewing laws passed by the Knesset. As emphasized by Barak, the fundamental values by which a society is characterized not necessarily have to find their expression in a written document:

“The fundamental values and basic human rights are so deep and so important that the courts of various countries are prepared – without any constitutional text – to negate parliamentary power to infringe those values. Indeed, in a number of common-law legal systems the recognition is slowly developing that certain fundamental values cannot be infringed by the legislature, even in the absence of a written constitution.”¹²⁵

With respect to the competence of judicially reviewing legislative statutes, the *Bank Mizrahi* decision clearly surpasses *Marbury v. Madison*. According to the majority opinion, not only the newly enacted Basic Laws serve as the judicial guideline to review legislation. Rather, the Court suggests to rely on unwritten values and principles to hold the Knesset in check.

¹²² As observed by Joshua Segev, Barak relies on a variety of arguments for legitimizing judicial review over primary legislation; Joshua Segev, ‘Justifying Judicial Review: The Changing Methodology of the Israeli Supreme Court’, in Gideon Sapir et al. (eds), *Israeli Constitutional Law in the Making* (Oxford: Hart, 2013), p. 114.

¹²³ CA 6821/93, *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*, P. 78 (opinion Barak).

¹²⁴ CA 6821/93, *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*, P. 81.

¹²⁵ CA 6821/93, *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*, P. 47.

Considering this rationale, the enactment of the Basic Laws of 1992 was not likely to have an attenuating effect on the use of unwritten principles and values in constitutional adjudication.

The third reason why the enactment of the two Basic Laws has not led to the decline of value-based adjudication in Israeli constitutional jurisprudence stems from the limited scope of these laws. Essential fundamental rights, such as equality, freedom of expression and freedom of religion are not covered by the Basic Laws of 1992.¹²⁶ The ISC, which showed no sign of playing a less protective role with respect to fundamental rights not covered by the Basic Laws, thus found itself in a similar situation as before 1992. Being impelled to find creative ways to constitutionally protect these unenumerated rights, unwritten principles and values once again play a decisive role in the Court's jurisprudence, as the next section will illustrate.¹²⁷

Fourth, the state of emergency under which the Israeli legal system has been operating since the very beginning, has not been abandoned along with the enactment of the Basic Laws. Since the emergency provisions grant the government a wider margin of appreciation in curtailing basic rights, the balancing doctrine remained to be a suitable approach to deal with fundamental right disputes.

These reasons may explain why the constitutional revolution which constituted the enactment of the two Basic Laws of 1992 and the *Bank Mizrahi* verdict has not lead to essential differences in the ISC's general style of reasoning. As Barak noted already in 1993:

„Indeed, the revolution is not one of content so much as one of force. With the enactment of the Basic Laws, these fundamental rights have become ‘inscribed in the book. From now on, they bind not only the citizens and residents, and not only the administrative authorities, such as the government and local authorities. From now on, they bind the Knesset itself.’”¹²⁸

¹²⁶ Suzie Navot, *The Constitution of Israel. A Contextual Analysis* (Oxford: Hart, 2014), p. 61.

¹²⁷ Sharon Weintal, ‘The Inherent Authority of Judges in a Three-Track Democracy to Recognize Unenumerated Constitutional Rights: The Israeli Story of a Judicial Mission’, in Gideon Sapir et al. (eds), *Israeli Constitutional Law in the Making* (Oxford: Hart, 2013), p. 286.

¹²⁸ Aharon Barak, ‘A Constitutional Revolution: Israel's Basic Laws’, *Faculty Scholarship Series, Yale Law School* (1993), p. 83.

Even though essential fundamental rights are not protected under the newly enacted Basic Laws, Barak does not detect a content-related shift in the Court's stance on protecting fundamental rights. Expanding its reviewing competence over the legislature represents the innovative core of the constitutional reforms of 1992 and 1995. This perspective may explain why the Court's general approach towards adjudicating fundamental rights issues was not very likely to dramatically transform in the first place.

4.4) The balancing doctrine in the wake of the “constitutional revolution”

In Israeli constitutional adjudication, as discussed above, invoking foreign law serves as a compensation for the lack of written sources of constitutional value. Those who think that this practice has declined as a consequence of the *Bank Mizrahi* decision are mistaken: “Even after the constitutional revolution, the Court's interpretative means of including human rights that have not been explicitly anchored in basic laws under ‘human dignity’ have been constantly accompanied by extensive reference to foreign law.”¹²⁹ The immense role foreign law is still playing in Israeli constitutional jurisprudence may be read as an indication that the general argumentative approach of the ISC has not dramatically changed. Equally, unwritten principles and values of constitutional status have been invoked on a continuous basis: “In many respects, [...] after 1992 Israeli constitutional law continued the tradition of building up constitutional rights by judicially made law, rather than by basing them on text.”¹³⁰

Consider for instance the *Horev v. The Minister of Transportation* decision of 1997 which blatantly shares the characteristics of the pre-1992 case law discussed above. In this verdict, the ISC invalidates an administrative action ordering the closure of a much-frequented road in central Jerusalem on Sabbats and Jewish holidays during times of prayer. In the conflict at issue, religious sensibilities are opposed by the right of free movement.

¹²⁹ Suzie Navot, *The Constitution of Israel. A Contextual Analysis* (Oxford: Hart, 2014), p 68.

¹³⁰ Iddo Porat, ‘The Use of Foreign Law in Israeli Constitutional Adjudication’, in Gideon Sapir et al. (eds), *Israeli Constitutional Law in the Making* (Oxford: Hart, 2013), p. 160.

The manner in which these opposing legal values are being addressed in this decision is quite revealing with respect to the general attitude of the ISC. The Court approaches the legal conflict in the same spirit it approached similar issues before the “constitutional revolution” of 1992, i.e. by balancing different values and principles against each other. Remarkably, the Court straightforwardly takes up on its pre-1992 case law,¹³¹ failing to point to possible adjustments that are to be taken in the wake of the constitutional transformations that happened only recently before. For, one could argue that the normative status of the right to freedom of movement has changed as a direct consequence of these transformations. Since this right is not explicitly featured in the Basic Laws, one could expect some argumentative effort in order to secure the constitutional footing of this right. Such an effort may not be found in this decision. Discussing the right’s substance, the Court holds that “it is sufficient that we establish that freedom of movement—the right being violated—is one of the most basic rights.”¹³² Drawing analogies to the right to freedom of expression, the Court refers to freedom of movement as a “natural right, recognized as self-evident in every country boasting a democratic regime”¹³³ Whereas this rationale appeals to natural law, at a later point of the judgement the Court declares freedom of movement as an essential part of human dignity. Without giving evidence on how the right to freedom of movement may be derived from the principle of human dignity, the Court thus endows this right with constitutional status in a declaratory manner. Ascribing fundamental rights that are not covered by the Basic Laws to the principle of human dignity in order to secure their constitutional footing has been established as a common strategy deployed by the ISC. Most of the time, as critically observed by Tamar Hostovsky Brandes, “little or no

¹³¹ HCJ 5016/96, *Horev v. Transportation Minister*, P. 49 (majority opinion Barak).

¹³² HCJ 5016/96, *Horev v. Transportation Minister*, P. 60.

¹³³ Ibid.

explanation was offered for *why* particular rights were perceived as ‘natural’ part of the right to human dignity.”¹³⁴

The opposing value protecting the religious sensibilities of the Jewish-orthodox community is being dealt with in a similar way. While in contrast to the right to freedom of movement, religious interests may comprehensively be derived from the Basic Law: Human Dignity and Liberty which enshrines the character of Israel as a Jewish and Democratic state, the Court’s line of argumentation clearly does not depend on this concurrence. At most, a value is given special emphasis due to its codification in a Basic Law.¹³⁵ In this respect, the Court provides absolute clarity:

“Ever since the Knesset enacted the Basic Laws, the interpretation of legislation does not depend on whether the relevant legislation precedes or antecedes the Basic Laws. Likewise, whether the violation relates to rights ‘covered’ by the two Basic Laws or not is equally irrelevant”¹³⁶

According to the Court, the question if a constitutional value or principle is written or unwritten is of minor importance. By seamlessly continuing the path laid out by the pre-1992 case law, the Court is willing to address a variety of values, interests and principles, whether entrenched in written documents or not. Remarkably, the “constitutional revolution” of 1992 has left no clear mark in the ISC’s general argumentative approach.

Similarly, the right to equality has been protected by the ISC despite the fact that this right had not been included in the Basic Laws. Hereby, the Court has resorted to two different strategies. In two cases dealing with exemptions of the ultra-orthodox Yeshiva students from military service, the Court found infringements on the right to equality. Whereas in the first verdict,

¹³⁴ Tamar Hostovsky Brandes, ‘Human Dignity as a Central Pillar in Constitutional Rights Jurisprudence in Israel: Definitions and Parameters’ in Gideon Sapir et al. (eds), *Israeli Constitutional Law in the Making* (Oxford: Hart, 2013), p. 272.

¹³⁵ “Consideration of religious feelings was recognized in the past as being commensurate with the values of the State of Israel as a democratic state. The validity of this consideration is now further reinforced by the values of the State of Israel as a Jewish state.” H CJ 5016/96, *Horev v Transportation Minister*, P. 48 (majority opinion Barak).

¹³⁶ H CJ 5016/96, *Horev v Transportation Minister*, P. 54.

Movement for Quality Government in Israel v. the Knesset,¹³⁷ the Court establishes the infringement on equality as constitutional,¹³⁸ it comes to a different conclusion several years later in *Ressler v. Knesset*.¹³⁹ Barak who delivers the majority opinion in *Quality Movement* bases his assessment on the notion of dignity, arguing that central elements of equality are covered by human dignity and that exactly these elements have been violated in the conflict at issue.¹⁴⁰ Comparable to the strategy applied in *Horev*, Barak thus gives a generous interpretation of human dignity in order to grant constitutional protection to the unenumerated right to equality. In a concurring opinion, Justice Cheshin does not resort to human dignity, but simply invokes equality as a fundamental and overarching principle of the State of Israel.¹⁴¹ In a similar way, the majority in *Ressler v. Knesset* acknowledges the right to equality as a fundamental right, establishing this right as “one of the cornerstones of the Israeli system of government, even before the enactment of Basic Law: Human Dignity and Liberty.”¹⁴² The fact that equality rights are not protected by any Basic Law is not considered problematic. The ISC takes the same protective stance towards unwritten fundamental rights as it has done before the constitutional changes that have occurred in 1992.

However, this is only one side of the story. The outlined approach has not proven successful with respect to all unenumerated rights. In *Adalah v. The Interior Minister*, for instance, the majority challenged the paradigm which declares the ISC as the unrestrained protector of unenumerated fundamental rights. By a slim majority, the Court approved of a legislative

¹³⁷ HCJ 6427/02 *Movement for Quality Government in Israel v. the Knesset*. Since *Quality Movement* has not been translated into English, I mostly rely on the detailed accounts given in *Ressler v. Knesset* and on the secondary literature on this case.

¹³⁸ The Court temporarily accepted the respondent’s position but called upon the Government to take legislative adjustments; Suzie Navot, *Constitutional Law of Israel* (Alphen aan den Rijn: Kluwer Law International, 2007), p. 74.

¹³⁹ HCJ 6298/07 *Ressler v. The Knesset*.

¹⁴⁰ Barak’s line of argumentation is presented in HCJ 6298/07 *Ressler v The Knesset*, P. 10 (majority opinion Beinisch).

¹⁴¹ As quoted in HCJ 6298/07 *Ressler v The Knesset*, P. 54 (majority opinion Beinisch); see also Tamar Hostovsky Brandes, ‘Human Dignity as a Central Pillar in Constitutional Rights Jurisprudence in Israel: Definitions and Parameters’ in Gideon Sapir et al. (eds), *Israeli Constitutional Law in the Making* (Oxford: Hart, 2013), p. 278.

¹⁴² HCJ 6298/07 *Ressler v The Knesset*, P. 54 (majority opinion Beinisch).

prohibition of granting residency permits for persons living in the occupied territories for the purpose of family unifications. Building on the principle of human dignity, Barak, writing for the minority opinion, derives the “right of establishing the family unit and continuing to live together as one unit”,¹⁴³ thus endowing the principle of family life with constitutional value. On the other side, Justice Cheshin, delivering the opinion of the majority, criticizes Barak for his expansive interpretation of the principle of human dignity. Cheshin who accepts to include fundamental values like equality into the corpus of protected fundamental rights displays nevertheless a high degree of skepticism towards attempts to judicially extend the scope of Basic Laws as demonstrated by Barak. Justice Cheshin particularly problematizes the limitation of scope of the legislator’s power the judicial activism championed by Barak necessarily entails.¹⁴⁴ Explicitly enlarging on the constitutional change the enactment of the Basis Laws of 1992 has brought, the Judge rejects the view according to which the right to family life may be derogated from the principle of human dignity.¹⁴⁵ As a consequence, Cheshin refuses to grant the right to have a foreign spouse immigrate into the State as a constitutional principle. Thus, the expansion of constitutionally protected rights beyond the scope covered by the Basis Laws provokes criticism from judges of the ISC itself. There is an opposing narrative sceptics of the activist approach advocated by Barak and others may follow up on.

4.5) Concluding remarks: *Wertjurisprudenz* in Israeli constitutional jurisprudence

Since the establishment of the ISC, the Court’s jurisprudence has heavily relied on unwritten constitutional law. Invoking supra-positive or natural law has always been perceived as a valid response to interpretational difficulties linked to the absence of a codified constitution. As

¹⁴³ HCJ 7052/03, *Adalah Legal Centre for Arab Minority Rights in Israel and others v. 1. Minister of Interior*, P. 34 (minority opinion Barak).

¹⁴⁴ HCJ 7052/03, *Adalah Legal Centre for Arab Minority Rights in Israel and others v. 1. Minister of Interior*, P. 37 (majority opinion Cheshin).

¹⁴⁵ HCJ 7052/03, *Adalah Legal Centre for Arab Minority Rights in Israel and others v. 1. Minister of Interior*, P. 49 (majority opinion Cheshin).

phrased by Justice Menachem Elon: „We have an important rule that a legal system cannot sustain itself on the body of the law alone. The body of the legal system needs a soul, and perhaps even a super-soul. The legal system will find this soul in the character and image of various value norms.”¹⁴⁶ This supra-positive foundation has been conceived as the “normative umbrella”¹⁴⁷ serving as the interpretative guideline for the judiciary. As discussed above, the enactment of Basic Laws protecting fundamental rights and their recognition as superior written law by the ISC has not considerably hampered the Court to invoke unwritten constitutional law. Balancing different values and principles, whether written or unwritten, constitutes the Court’s main approach in dealing with legal conflicts between public interests and fundamental rights.

More than most other constitutional courts, the ISC, particularly under the presidency of Aharon Barak, has defined its role as political. As revealingly phrased by Barak in a verdict of 1999: “We prefer the jurisprudence of interests (*Interessenjurisprudenz*) and the jurisprudence of values (*Wertungsjurisprudenz*) [sic] in which an “ideological” decision is required.”¹⁴⁸ Admittedly, the Court’s decisions often are policy driven. Barak clearly embraces the idea of an ideological Supreme Court which takes part in shaping the political reality of Israel. Remarkably, the Judge invokes the German notions of *Interessenjurisprudenz* and *Wertjurisprudenz* for describing the general attitude of the ISC. Establishing a connection between the ISC’s jurisprudence and two schools of thought which were striving during the Weimar Republic strikes as surprising. By invoking the legacy of Rudolf Smend, Barak adopts a theory of value-based adjudication in a similar way the FCC has done in numerous litigations, as discussed in the previous chapter.¹⁴⁹ In contrast to Germany, however, the ISC is only partly restrained by a written Constitution. Claiming the labels of *Interessenjurisprudenz* and

¹⁴⁶ Quoted via Aharon Barak, *Judicial Discretion* (New Haven: Yale University Press, 1989), pp. 66-67.

¹⁴⁷ Aharon Barak, *The judge in a Democracy* (Princeton: Princeton University Press, 2006), p. 57.

¹⁴⁸ CA 6024/97, *Shavit v. Rishon Letzion Jewish Burial Society*, P. 21 (opinion Barak)

¹⁴⁹ Menachem Mautner, *Law and the Culture of Israel* (Oxford : Oxford University Press 2011), p. 54.

Wertjurisprudenz thus appears extraordinary since the ISC has an enormous power in determining the values and interests deemed constitutional. Barak's concept of "Purposive Interpretation in Law" epitomizes this interpretational power. According to this concept, fundamental values which are external to the constitution and which are reflecting contemporary needs may help the interpreting judge in order to determine the purpose of the constitution.¹⁵⁰ A judge who by litigating fundamental rights disputes takes societal values and contemporary needs into consideration naturally loses sight of the textual basis. Balancing different values, interest and principles of constitutional status, commonly irrespective of the question if they have a textual basis, is thus established as the main approach.

In Israeli constitutional jurisprudence, there is little room for principle-based adjudication in the strict sense. This owes mainly to the fact that the Israeli legal system has always been operating under a state of emergency. Fundamental rights and principles have the legal status of interests and values despite the fact that they are sometimes being referred to as principles. There is virtually no fundamental right that cannot be balanced against another public value or state interest: „Just as no man lacks a shadow, there is no principle without weight.”¹⁵¹ This credo echoes the approach taken by the FCC in the *Kontaktsperre*-verdict in which the Court holds that plainly unlimited rights cannot be recognized by a value-based order. Even in cases dealing with torture and degrading treatment, the ISC has not taken an absolute stance. In *Public Committee Against Torture v. Israel* from 1999,¹⁵² for instance, even though the Court prohibits the use of certain physical interrogation techniques, the reasoning is based on ordinary statutory law and not on the Basic Law: Human Dignity and Liberty as some petitioners had hoped for.¹⁵³ Instead, avoiding to give any normative guidance, the Court invites the Knesset

¹⁵⁰ Aharon Barak, *Purposive Interpretation in Law* (Princeton: Princeton University Press, 2005), p. 381.

¹⁵¹ HCJ 399/85, *Member of Knesset Rabbi Meir Kahane and the 'Kach' Movement v The Executive Board of the Broadcasting Authority and others*, P. 24 (opinion Barak).

¹⁵² HCJ 5100/94, *Public Committee against Torture v Government of Israel*.

¹⁵³ Matthew G. St. Amand, 'Public Committee Against Torture in Israel v. The State of Israel et al: Landmark Human Rights Decision by the Israeli High Court of Justice or Status Quo Maintained?', 25 *North Carolina Journal of International Law and Commercial Regulation*, Vol 25:3 (2000), p. 677.

to legislate on this issue. The Court reminds the legislator of the requirements for constitutionally limiting basic rights, thus insinuating that the interrogation techniques at issue may be permitted under the requirements laid out by the limitations clauses of the Basic Laws.¹⁵⁴ Furthermore, the Court explicitly states that it wishes not to negate the possibility for an investigator to invoke the ‘necessity’ exception which allows for the application of physical interrogation methods for the purpose of life-saving information.¹⁵⁵

The tendencies of value-based adjudication that could be detected in German constitutional adjudication may thus be found in a more pronounced version in Israeli constitutional jurisprudence. Value based assessments, even if it comes in various terminological shapes depending on the terminological usage of the ruling judge, are the centerpiece of the balancing approach the ISC pursues in litigating fundamental right issues. As concerns the line of argumentation, verdicts protecting fundamental rights from governmental overreach do not structurally differ from rationales fostering public interest over basic rights. Both sides of the scale are conceived as desirable objectives which the Court chooses from on a case-by-case basis. The ISC thus protects fundamental rights in the same manner it protects state interests. In a legal system where no principle is without weight, principle based adjudication as illustrated by the *Luftsicherheitsgesetz* decision is hardly conceivable. Since judicially protecting and infringing on fundamental rights follows the same type of legal rationale, Israeli constitutional jurisprudence undermines the difference between principle-based adjudication and teleological adjudication as outlined in the second chapter. Dealing with fundamental rights issues, the Court’s jurisprudence is teleological *per se*, regardless of the outcome of the decision. The semantic convergence of “value“ and “principle” is the terminological symptom of this general approach.

¹⁵⁴ HCJ 5100/94, *Public Committee against Torture v Government of Israel*, P 39.

¹⁵⁵ HCJ 5100/94, *Public Committee against Torture v Government of Israel*, P 40, see also Suzie Navot, *The Constitution of Israel. A Contextual Analysis* (Oxford: Hart, 2014), p. 254.

5) Between principles and objectives of constitutional value: Teleological reasoning in French constitutional adjudication

Due to several reasons that will be explored in this section, France assumes a peculiar position among the jurisdictions examined in this thesis. In contrast to Germany and Israel, values (*valeurs*) do not play a decisive role in French adjudication drawing on the unwritten foundations of the constitution. Nevertheless, French Courts invoke supra-positive aspects of the constitution on a regular basis in order to legitimize a teleological reasoning. Based on the French doctrine of the *Bloc de Constitutionnalité*,¹⁵⁶ rationales of this kind are based on unwritten principles and objectives of constitutional value. From a comparative perspective, the significance of principles in French teleological adjudication might seem as surprising. This significance stems back to special features of French constitutionalism that will be examined in the next section. As will be argued below, due to the constitutional reform of 2008, the importance of constitutional principles for teleological adjudication might decline in the future.

5.1) The teleological dimension of rights and principles

The above-mentioned significance of principles in French constitutional adjudication may be traced back to two major reasons. First, due to the special nature of French constitutional history, constitutional rights and principles encompass much broader functions than in the Anglo-American parlance. Second, the fact that until recently the *Conseil Constitutionnel*'s (CC) reviewing powers have been very limited may have contributed to the Conseil's ample conception of principles.

As regards the first point, the peculiarity of the French situation partly stems back to the specific nature of French constitutionalism that has triumphed during the revolutionary era. In contrast to the ideals of the American revolution, according to French constitutional theory, fundamental rights need to be institutionally realised. As convincingly demonstrated by Jürgen

¹⁵⁶ John Bell, *French Constitutional Law* (Oxford: Oxford University Press, 1992), pp. 68-73.

Habermas, the American Bill of Rights represents the common sense of a society that to a high degree consists of proprietors, whereas the French *Déclaration des Droits de l'Homme et du Citoyen* must be seen as an audacious philosophical project destined to shape the *opinion publique*.¹⁵⁷ According to American constitutionalism, fundamental freedoms were conceived as freedoms *from* the state. The entry into society thus does not represent the positivation of natural law, but rather serves to limit the political power to protect the natural rights of the individual.¹⁵⁸ In contrast, the French revolutionists perceived the state of society as a radical emancipation from the natural state. Following this conception, rights and freedoms must be realized *through* the state.¹⁵⁹ The American Bill of Rights thus features pre-state rights, whereas in the French constitutional tradition human rights are only conceivable as civil rights. In the French context, fundamental rights thus never had the exclusive status of negative rights. Whereas in other jurisdictions the objective dimension of fundamental rights was acknowledged in a long historical process, the active part the government plays in the realization of fundamental freedoms was recognized from the early beginnings of modern French history.

This special character of the French constitutional experience is palpably reflected on the terminological level of French jurisprudence, especially with respect to the notions of right and principle. From the Anglo-American point of view, these notions assume rather peculiar functions in French constitutional texts and rulings.

In 1793, the French *Déclaration* was expanded and subsequently included certain positive obligations for the state, such as the obligation to provide for work and public subsidy¹⁶⁰ or the obligation to provide for public education.¹⁶¹ At this juncture, these obligations are not labelled

¹⁵⁷ Jürgen Habermas, *Theorie und Praxis* (Frankfurt: Suhrkamp, 1978), p. 97.

¹⁵⁸ *Ibid.*, p. 100.

¹⁵⁹ Michel Troper, 'Constitutional Law', in George Berman & Etienne Picard (eds), *Introduction to French Law* (Alphen aan den Rijn: Kluwer Law International, 2008), p. 16.

¹⁶⁰ French Constitution 1793, Art. 21.

¹⁶¹ *Ibid.*, Art. 22.

as rights. Nevertheless, the mere fact that these provisions follow seamlessly the catalogue of fundamental rights of the first *Déclaration* is indicative of the further terminological development. In central constitutional texts of the 20th and 21th century, these state obligations are explicitly conceived as social participation *rights*. In the Preamble of the French Constitution from 1946, negative rights in the tradition of liberal constitutional theory are being mixed with positive rights. For instance, after reaffirming the rights of the *Déclaration* of 1789, the preamble proclaims the “right to obtain employment”. This provision, phrased as an individual right, clearly represents an obligation that is to be carried out by the state. The Preamble features numerous state obligations, most remarkably the following: “It [the nation] guarantees to all, and notably to the child, the mother and the aged worker, health protection, material security, rest and leisure.” In contrast to the aforementioned provision, this positive obligation is not phrased as an individual right. However, there is no qualitative difference between the two. Hence, it should come as no surprise that the CC explicitly construes this provision as a “right to rest”.¹⁶²

A similar picture emerges from the Environmental Charter from 2004. The Charter features rights, obligations and objectives that are not clearly distinguished on a terminological level.¹⁶³ As Art. 1 of the Charter states, “[e]veryone has the right to live in a balanced environment which shows due respect for health”. Similar to the Preamble of the Constitution of 1946, the Charter transcends the classic understanding of individual rights.

Naturally, even in the French legal context, constitutional scholars may emphasize the importance of distinguishing between subjective and objective rights.¹⁶⁴ Whereas subjective rights constitute individualized zones of protection, objective rights like “the right to work”,

¹⁶² C cons no 2009-588 DC, 6 August 2009.

¹⁶³ Pierre de Montalivet, ‘Les objectifs de valeur constitutionnelle’, *Cahiers du Conseil constitutionnel* Nr. 20 – (2006).

¹⁶⁴ See for instance Bertrand Mathieu, Michel Verpeaux, *Contentieux constitutionnel des droits fondamentaux* (Paris: Librairie Générale de droit et de Jurisprudence, 2002), p. 435.

“the right to live in a balanced environment” and “the right to rest” represent societal goals that are to be carried out by the state. In the French constitutional setup, however, this distinction to a large extent remains analytical. For, from the terminological point of view, fundamental rights clearly encompass a teleological dimension that put policy obligations on the state.

A similar terminological particularity applies with respect to the notion of principle. Let me remind the reader of the meaning principles in the strict sense assume in the context of Anglo-American constitutional theory, especially in the account given by Dworkin. Following this conception, principles totally lack a teleological dimension. Instead, they assume a crucial role in the protection of individual or group rights.¹⁶⁵

In French constitutional adjudication, principles are also closely tied to rights. As rights transcend the classical conception of liberal constitutional theory, so do principles. On the one hand, constitutional principles that have been referred to in French adjudication have the character of classic principles and rights, such as the “freedom of association”¹⁶⁶, “right to defence”¹⁶⁷, “individual freedom”¹⁶⁸ and “freedom of conscience”¹⁶⁹. On the other hand, principles are endowed with a much broader meaning. The Preamble of the Constitution of 1946, for instance, refers to all rights, obligations and objectives that are listed in this document as “political, economic and social principles”. Accordingly, referring to the Preamble, the CC has invoked the “principle of weekly rest”.¹⁷⁰ Similarly, the Council invokes the right to strike as a principle of constitutional value.¹⁷¹

Hence, principles and rights share the same fate in the French constitutional context. Even though they may assume the meaning they carry in liberal constitutional theory, this meaning

¹⁶⁵ Ronald Dworkin, *Taking rights seriously* (London: Bloomsbury Academic, 2013) [1977], p. 107.

¹⁶⁶ C cons no 71-44 DC, 16 July 1971.

¹⁶⁷ C cons no 76-70 DC, 2 December 1976.

¹⁶⁸ C cons no 76-75 DC, 12 January 1977.

¹⁶⁹ C cons no 77-87 DC, 23 November 1977.

¹⁷⁰ C cons no 2009-588 DC, 6 August 2009.

¹⁷¹ C cons no 79-105 DC, 25 July 1979.

is widened on numerous occasions, especially due to the inclusion of teleological aspects. Instead of referring to a general interest of society, the CC enhances the legitimacy of the state goals it pursues by pointing to their constitutional status.¹⁷²

The second major reason for the broad conceptual scope of constitutional principles in French constitutional adjudication may be found in the limited role the CC has assumed over the decades. Such role goes back to, again, cultural reasons, namely the traditional mistrust the French public places on the judicial branch. Not least because of this mistrust, the CC began only in 1971 to perform a priori judicial review from a fundamental rights perspective. Furthermore, until 2008 the legal system of France did not dispose of a proper constitutional court that was allowed to rule on the constitutionality of law once it had entered into force. From a formal perspective, the CC, initially conceived as a check on parliament,¹⁷³ figured as a mere council and was therefore part of the legislative process. Originally, the CC was thus considered as a political body whose personnel and resources of argumentation not necessarily differed much from the Parliament. Possibly, the members of the Conseil showed little reluctance to introduce policy-based adjudication by using the same terminology as their political colleagues as a direct result of this political self-understanding.

A legal framework in which the competence of the highest Court is limited to such an extent exerts little pressure to scrutinize the standards applied in constitutional adjudication. As will be discussed below, the CC's gradual evolvement to a proper constitutional court with full reviewing powers may have influenced the Council's general terminological approach. A too broad notion of principle, encompassing societal objectives and the social participation rights, would render the process of constitutionally reviewing existing statutes according to constitutional principles somewhat unintelligible. Full reviewing competences thus provide the

¹⁷² Olivier Dutheillet de Lamothe, 'Les principes de la jurisprudence du Conseil constitutionnel en matière sociale', *Nouveaux Cahiers du Conseil constitutionnel* Nr. 45 (2014).

¹⁷³ Sophie Boyron, *The Constitution of France. A contextual analysis* (Oxford: Hart, 2013), p. 151.

incentive to distinguish between constitutional standards existing statutes have to meet and broader constitutional values which may not be invoked in order to invalidate existing law. Since initially the constitutional review of statutes against fundamental rights and freedoms was beyond the competence of the CC, the Court faced no burdens that might have spoken in favour of a narrow conception of rights and principles. The Court could take up on a broad understanding of fundamental rights and principles since these rights were not enforceable against existing legislation.

The broad meaning principles have assumed due to these reasons might at least partly explain why values do not carry great importance in French constitutional adjudication. *Valeur* is usually referred to as a qualifying attribute, marking goods as “protection of health” and “the right to work” as principles of constitutional value. This terminology provides little incentive to establish constitutional values as a distinguished constitutional category.

5.2) Implicit/unwritten principles of constitutional value

The 1958 Constitution does not feature a Bill of Rights. Comparable to the constitutional experience in Israel, unwritten aspects of the constitution have been of decisive importance in order to secure the judicial protection of fundamental rights in France. In this regard, the CC’s decision of 16 July 1971 was ground-breaking.¹⁷⁴ The Council not only began reviewing proposed bills from a fundamental rights perspective by invoking the Preamble of the 1958 Constitution which explicitly alludes to the Preamble of the 1946 Constitution and to the *Déclaration des droits de l'homme et du citoyen* of 1789. Referring to the Preamble of 1946, the CC also acknowledged the “fundamental principles recognized by laws of the Republic” as constitutionally binding. Hence, by indirect means, important statutes of the Third Republic,

¹⁷⁴ C cons no 71-44 DC, 16 July 1971.

such as the “right to association”, have been introduced into the French catalogue of constitutional norms.

The notion of principle is of decisive importance for introducing unwritten aspects of the Constitution into French adjudication. According to the doctrine of *Bloc de Constitutionnalité* which identifies all norms of constitutional value, there are three ways for invoking the supra-positive dimension of the constitution.¹⁷⁵ “Fundamental principles recognized by laws of the Republic” constitute the first source of unwritten/implicit constitutional norms. Secondly, the CC has identified “unwritten principles of constitutional value”. Thirdly, the Council invokes “objectives of constitutional value” on a regular basis. Leaving aside the last source, which will be discussed further below, principles are thus invoked in order to endow norms not explicitly mentioned in the constitution with constitutional value.

As mentioned above, many principles French Courts invoke have the character of classic principles and rights. This applies as well for unwritten principles. In this respect, the jurisdiction of the Supreme Administrative Court, the *Conseil d’État* (CdE), deserves a special mention. Remarkably, it was the highest administrative Court that constituted the only effective judicial protection of individual rights vis-à-vis the government for many years. Whereas the CC assumed the competence to effectively review legislation rather belatedly, the CdE reviewed executive degrees already during the Third republic. Fundamental rights protection has thus developed similarly as in comparison with Israel. From a doctrinal point of view, the CdE proceeded quite creatively in order to restrain the executive. “General principles of law” were invoked for the purpose of developing standards by which administrative acts could be measured.¹⁷⁶

¹⁷⁵ John Bell, *French Constitutional Law* (Oxford: Oxford University Press, 1992), pp. 68-73.

¹⁷⁶ For a perspective from 1966, see George D. Brown, ‘DeGaulle's Republic and the Rule of Law: Judicial Review and the Conseil d'Etat’, *Boston University Law Review*, vol. 46 (1966), p. 473.

As a response to the strengthened role the executive obtained in the wake of the establishment of the Fifth Republic, the general principles assumed crucial importance in the jurisdiction of the *Conseil d'État*. In *Syndicat général des ingénieurs conseils* the CdE firmly stresses its competence to review administrative acts by applying general principles of the law.¹⁷⁷ The principles the CdE bases its assessments on often have the character of classic principles and rights. In *Syndicat*, for instance, the CdE refers to the principle of “freedom of commerce and industry”. In a similar fashion, the CdE upholds the “rights and guarantees of defense” against a presidential decree which established military courts that violated procedural justice.¹⁷⁸

As emphasized by commentators, in many cases the CdE does not identify the sources from which it “deduces” the principles applied by reviewing administrative acts. Often there is no clear linkage between a principle and a constitutional provision at all.¹⁷⁹ The CdE thus endows unwritten principles with a quasi-constitutional value. When the CC started reviewing legislation from a fundamental rights perspective, it basically followed up on the jurisprudence of the CdE by invoking unwritten principles such as “freedom of association”¹⁸⁰, “right to defence”¹⁸¹, “individual freedom”¹⁸² and “freedom of conscience”¹⁸³.

Both the CdE and the CC have invoked unwritten principles that clearly transcend the meaning of rights and principles in the liberal sense. The CdE has reviewed administrative acts against second-generation rights such as the “principle of the right to a normal family life”¹⁸⁴ and the principle of “prohibition to dismiss a pregnant employee”.¹⁸⁵ These principles, if any, have a rather loose foundation in the constitutional documents of France. Similarly, the CC has

¹⁷⁷ CE no 92099, 26 June 1959.

¹⁷⁸ CE no 58502, 19 October 1962.

¹⁷⁹ Benoit Jeanneau, ‘La théorie des principes généraux du droit à l’épreuve du temps’, *Conseil d’État, études et documents, 1981-1982* (1981), p. 35.

¹⁸⁰ C cons no 71-44 DC, 16 July 1971.

¹⁸¹ C cons no 76-70 DC, 2 December 1976.

¹⁸² C cons no 76-75 DC, 12 January 1977.

¹⁸³ C cons no 77-87 DC, 23 November 1977.

¹⁸⁴ CE no 10097 10677 10679, 8 December 1978.

¹⁸⁵ CE no 80232, 8 June 1973.

expanded the traditional scope of principles by invoking the “independence of university professors”¹⁸⁶ and the introduction of “Juvenile criminal justice”¹⁸⁷ as principles of constitutional value. Hence, invoking unwritten principles has allowed for the introduction of teleological reasoning in constitutional adjudication.

5.3) Clashes of principles

As we have seen, fundamental rights and principles, whether codified or uncoded, possess a broad conceptual scope, encompassing both a subjective and an objective dimension. Due to this constellation, conflicts of interests often appear as clashes of different constitutional principles/rights, most prominently between socio-economic rights and liberal subjective rights.¹⁸⁸ As stressed by Sophie Boyron, there is no strict hierarchy of constitutional rights and principles, leading to the consequence that “most rights and freedoms encounter some limitations at one time or another.”¹⁸⁹ In contrast, jurisdictions in which a narrow conception of rights and principles prevails are less likely to face conflicts among rights/principles on a regular basis.

Hence, the conflict of two different state goals may be framed as a conflict between two principles. In 1980 for instance, the CC had to decide if a proposed statute regulating the protection and control of nuclear material violated the right to strike.¹⁹⁰ The law proposal at hand features a provision which sanctions any disruptive conduct by the personnel responsible for the supervision of nuclear material, de facto prohibiting any sort of strike. As stated by the Court, two constitutional principles were colliding in the issue at hand, i.e. “the protection of health” and “the right to strike”. As the Court emphasizes, both principles may be subject to

¹⁸⁶ C cons no 83-165 DC, 20 January 1984.

¹⁸⁷ C cons no 2002-461 DC, 29 August 2002.

¹⁸⁸ Michel Villey, *Le droit et les droits de l'homme* (Paris: PUF, 1983), p. 13.

¹⁸⁹ Sophie Boyron, ‘Constitutional Law’, in John Bell, Sophie Boyron, Simon Whittaker (eds), *Principles of French Law* (Oxford, New York: Oxford University Press, 2008), p. 162.

¹⁹⁰ C cons no 80-117 DC, 22 July 1980.

limitations. Balancing both principles, the Court assumes that in the issue at hand the principle of strike must step back behind the principle of protection of health. In a similar case, the CC had to weigh the principle of strike against the unwritten “principle of the continuity of the State and of public service”.¹⁹¹ In this decision, the Court took a rather strong stance in order to protect the right to strike.

In a similar manner, conflicts between subjective rights and state goals may emerge as a conflict of principles. In two cases, the constitutional principle of “freedom of enterprise” has been balanced against the principle of weekly rest and against the right to work.¹⁹² As the CC states with respect to the second case, a statute may infringe on the principle of freedom of enterprise by reducing the maximum of permitted weekly working hours to 35 hours in order to protect the constitutional right to work.¹⁹³

As we have seen with respect to the German jurisprudence, the FCC has employed the “strategy” to degrade fundamental rights to mere values in order to balance these values against opposed constitutional values the Court deems superior. What appears as a conflict of values in German constitutional jurisprudence may emerge as a conflict of principles in the French legal system. In the French context, no “terminological trick” needs to be applied in order to promote teleological reasoning infringing on fundamental rights. From the outset, the state goal on the one side and fundamental rights and freedoms on the other side are on the same terminological level.

5.4) Unwritten constitutional objectives

Considering the doctrine of *Bloc de Constitutionnalité* in its entirety, the picture presented in the previous sections becomes more complicated. As mentioned above, apart from fundamental principles recognized by the laws of the republic and unwritten principles of constitutional

¹⁹¹ C cons no 79-105 DC, 25 July 1979.

¹⁹² C cons no 99-423 DC, 13 January 2000; C cons no 2009-588 DC, 6 August 2009.

¹⁹³ C cons no 99-423 DC, 13 January 2000.

value, the CC endows certain objectives with constitutional value. Following this terminology, unwritten principles are clearly distinguished from unwritten state objectives. The CC invoked constitutional objectives for the first time in 1982¹⁹⁴ and, since then, has identified numerous state goals, for instance “Protection of public order”,¹⁹⁵ “The fight against fiscal fraud”¹⁹⁶ and “Financial balanced social security”,¹⁹⁷ to name only a few. As highlighted by commentators, it proves as difficult to identify a content-related commonality between these objectives.¹⁹⁸ From a more formal perspective, the teleological nature of all goals may be identified as the common denominator.¹⁹⁹

It might come as a surprise that the CC distinguishes between unwritten constitutional principles and unwritten constitutional objectives. As shown above, in the French constitutional context, already the notions of right and principle occasionally assume a teleological function. Hence, an important addition has to be made with respect to the previous section. Teleological conflicts may also be expressed as conflicts between principles and objectives or as conflicts between objectives.

The CC thus displays an unexpected clarity in separating principles and state objectives. From a general perspective, these notions clearly represent different types of legal argumentation. Furthermore, it is quite common for objectives to run against protected rights and principles. In fact, the first time objectives of constitutional value were mentioned by the CC, the objectives “protection of the public order”, “respect of others freedoms” and “preservation of

¹⁹⁴ C cons no 82-141 DC, 27 July 1982.

¹⁹⁵ C cons no 82-141 DC, 27 July 1982.

¹⁹⁶ C cons no 99-424 DC, 29 December 1999.

¹⁹⁷ C cons no 2002-463 DC, 12 December 2002.

¹⁹⁸ Marie-Anne Frison-Roche, William Baranès, ‘Le principe constitutionnel de l’accessibilité et de l’intelligibilité de la loi’, *D., chron.* (2000), p. 362.

¹⁹⁹ Pierre de Montalivet, ‘Les objectifs de valeur constitutionnelle’, *Cahiers du Conseil constitutionnel* Nr. 20 – (2006).

pluralism of different socio-cultural expressions” were in conflict with the fundamental right of free communication.²⁰⁰

Especially in light of the French Constitutional tradition, the CC could have employed a different strategy in resolving issues like these. Instead of referring to *objectives* of constitutional value, the conflicts at hand could have been presented as clashes of different constitutional *principles* and/or *rights*. By this way, the suspension of fundamental principles through constitutional objectives could have been concealed rather easily. Instead, at least in the case of non-written constitutional norms, the CC took the terminological decision to sharply separate constitutional principles from constitutional state objectives.

However, for reasons presented in the preceding sections, French constitutional adjudication fails to live up to the clarity this terminology may suggest. As we have seen, teleological elements already constitute a considerable part of constitutional rights and principles. Hence, reconsidering the distinction between unwritten principles and objectives of constitutional value, state objectives may be found on both sides of the distinction. For this reason, the manner in which constitutional principles and objectives have been allocated by French Courts occasionally appears somewhat arbitrary. For instance, it is unintelligible why the “continuity of the State and of public service”²⁰¹ constitutes an unwritten *principle* of constitutional value, whereas the “protection of public order”²⁰² represents a constitutional *objective*. In addition, the French Courts have not always been consistent in terms of allocating principles and objectives. “Protection of health” which figured as a constitutional *principle* in a ruling delivered by the CC in 1980,²⁰³ returned as an *objective* of constitutional value in a judgement by the same institution 13 years later.²⁰⁴ Furthermore, the question could be raised why the CC

²⁰⁰ C cons no 82-141 DC, 27 July 1982.

²⁰¹ C cons no 79-105 DC, 25 July 1979.

²⁰² C cons no 82-141 DC, 27 July 1982.

²⁰³ C cons no 80-117 DC, 22 July 1980.

²⁰⁴ C cons no 93-325 DC, 13 August 1993.

recognizes a *principle* of weekly rest whereas decent housing is referred to as a constitutional *objective*, even though both principles/objectives assume an equal role in the Preamble of the Constitution from 1946. Therefore, it is perfectly understandable that the legal literature on this topic speaks of a “right to decent housing”²⁰⁵ even though this right/principle has not explicitly been acknowledged as such.

Considered in this light, the terminological precision of differentiating between constitutional principles and objectives could be a source of confusion rather than transparency. However, especially against the background of the constitutional reform of 2008, the importance of this distinction may be reassessed. Since the competence of the CC now includes a posteriori judicial review (QPC review), the Court had to scrutinize the standards according to which past statutes may be evaluated. Judging by its jurisprudence of recent years, a statute’s disregard for an *objective* of constitutional value has not given cause to overrule this statute in a QPC decision.²⁰⁶ In contrast, the Court has invoked constitutional principles, whether written or unwritten,²⁰⁷ in QPC decisions, for instance the “principle of independence of university professors”.²⁰⁸ The Court thus puts limits on its competence by excluding constitutional objectives from its reviewing repertoire, a comprehensible measure considering the traditional mistrust the French public places on the judiciary.²⁰⁹ Seen in this perspective, the fact that the

²⁰⁵ Sophie Boyron, *The Constitution of France. A contextual analysis* (Oxford: Hart, 2013), p. 163.

²⁰⁶ For instance C cons no 2010-3 QPC, 28 May 2010; C cons no 2010-4/17 QPC, 22 July 2010; C cons no 2015-465 QPC, 24 April 2015.

²⁰⁷ Bertrand Mathieu, Dominique Rousseau, *Les grandes décisions de question prioritaire de constitutionnalité* (Paris: L.G.D.J., Lextenso éditions, 2013), p. 193.

²⁰⁸ C cons no 2010-20/21 QPC, 6 August 2010.

²⁰⁹ However, the CC has not lived up to this clear differentiation. When, in 2016, the CC was asked to rule on the constitutionality of the 1955 statute on the state of emergency, the CC referred to the constitutional objective of securing the public order for legitimizing the contested statute. The Conseil has thus confirmed the suspicion of constitutional scholars Bertrand Mathieu and Dominique Rousseau that have claimed earlier that due to the Court’s ambiguous wording, the possibility of invoking constitutional objectives in QPC decisions has not absolutely been dismissed. Maybe the Court will circumvent this problem in the future by invoking “public security” as a constitutional principle instead of an objective of constitutional value. In my opinion, it is rather astonishing that the CC has not done so in this judgement given that the Court has performed such rebranding before. Nevertheless, one may appreciate the conceptual honesty of referring to „state security” as a constitutional goal. Bertrand Mathieu, Dominique Rousseau, *Les grandes décisions de question prioritaire de constitutionnalité* (Paris: L.G.D.J., Lextenso éditions, 2013), p. 190 ; C cons no 2016-536 QPC, 19 February 2016.

CC transmuted “protection of health” from a constitutional principle into an objective of constitutional value, appears rather consequent. If one had to make predictions for the future, the Court might reallocate some constitutional rights and principles to the category of constitutional objectives. For instance, the principle of weekly rest may well be transformed into an objective of constitutional value. The CC’s transformation into proper constitutional court calls for terminological adjustments.

Admittedly, since the notion of objectives of constitutional value was introduced into French constitutional jurisprudence already in 1982, the constitutional reform of 2008 cannot be the only reason for its appearance. Probably, a certain awareness of the different logic behind principle-based and objective-based adjudication has originated from the jurisprudence of the CdE which has been dealing with issues concerning judicial review much longer than the CC. Already in 1981, for instance, constitutional scholar Benoît Jeanneau criticized the CdE’s willingness to include second generation rights into the category of constitutional principles, thus favouring a narrower understanding of principles.²¹⁰

5.5) Concluding remarks: Dworkinian aspects of French constitutional doctrine

Remarkably, French constitutional jurisprudence bears great resemblance to Dworkin’s account of adjudication of hard cases, as outlined in the second chapter. According to Dworkin, the judge, confronted with a case only ambiguously covered by positive law, necessarily relies either on unwritten principles or unwritten policies in order to rule on the matter. By differentiating between unwritten principles and objectives of constitutional value, French constitutional doctrine establishes the same conceptual distinction, clearly identifying policy considerations that enter judicial assessments. Answering the call made by Dworkin, French Courts have invoked unwritten principles of constitutional value particularly in order to protect

²¹⁰ Benoît Jeanneau, ‘La théorie des principes généraux du droit à l’épreuve du temps’, *Conseil d’État, études et documents, 1981-1982* (1981), p. 45.

subjective fundamental rights. Similar as in the German and Israeli jurisprudence, unwritten law may also be invoked in order to legitimize teleological reasoning. In contrast to the former two systems, the French terminological framework allows for a clear distinction between principle-based and teleological judicial assessments. This conceptual clarity may not least be attributed to the absence of the notion of “value” which largely contributes to conceptual overlaps of principle-based reasoning and teleological assessments in the other two systems. Furthermore, in contrast to German and Israeli approaches, French Courts never conceive the unwritten constitution as the underlying soul or spirit of the legal system. The formalistic style of reasoning French jurisprudence is known for may have a rationalizing effect with respect to the judicial treatment of the unwritten constitution.

On the substantive level, this clear terminology is partly undermined by unintelligible allocations of principles and objectives of constitutional value, mostly stemming from the broad conceptual scope fundamental rights and principles have traditionally assumed in French constitutional history. Nevertheless, the terminological framework employed by French Courts bears the potential to render appeals to the unwritten constitution more transparent. Surprisingly, of all constitutional systems examined in this thesis, Dworkin’s account on adjudicating unwritten constitutional law may best be observed in French constitutional jurisprudence.

6) Conclusion: Terminology matters

The unwritten constitution figures as an important concept in the constitutional jurisprudence of all jurisdictions examined in this thesis. In different ways, supra-positive aspects of the different constitutions provide constitutional footing for the judiciary both to protect fundamental rights and to justify infringements on them. In all jurisdictions, unwritten values and/or principles have proven to be the key notions on which the respective constitutional courts terminologically build their supra-positive outreaches, even though the specific way these notions are being applied differ from one legal system to another.

Thus, it is true: The Constitution is more than the sum of its written provisions. This insight is not of pure theoretical nature, exclusively preoccupying the legal and philosophical minds of the Weimar Republic, but rather describes the reality of contemporary constitutional jurisprudence. Against this backdrop, it is interesting to reconsider the theoretical implications of the common theory of principles and values, as represented by Aharon Barak and Jeffrey Goldsworthy. Both scholars stress the importance of unwritten values and principles for rightfully interpreting ordinary and constitutional law. Employed synonymously, both values and principles provide the moral superstructure of the legal system. Goldsworthy construes “normativism” as the constitutional doctrine that acknowledges this moral superstructure as an interpretative guideline.

Considering this definition, the label of constitutional normativism as conceived by Goldsworthy applies to all three jurisdictions examined in this thesis. Naturally, there are considerable differences. Whereas in German and Israeli jurisprudence, the unwritten constitution is occasionally invoked as the unifying soul and spirit of the written constitution, holistic descriptions of this kind may not be found in French constitutional adjudication, owing to the formalistic style of reasoning in French jurisprudence. Nevertheless, deeper principles and abstract norms of political morality may be found in all jurisdictions.

As outlined in the second chapter, the theoretical approaches of Ronald Dworkin and Jürgen Habermas may be perceived as challenges for the common theory of values. Goldsworthy's concept of "normativism" levels the conceptual difference of value-driven and principle-based adjudication. Whereas value-oriented adjudication pursues teleological aims, principle-based rationales in the strict sense operate on a purely deontological basis. The conceptual approaches of Dworkin and Habermas thus raise awareness for the fact that the unwritten constitution may serve as the normative source for two completely different legal rationales.

Remarkably, among the legal system examined, this conceptual difference is most acknowledged by the terminology employed in French constitutional jurisprudence. By dividing the unwritten constitution into principles and objectives, French Courts draw a conceptual line between legal rationales relying on principles and teleological assessments targeting a specific state goal. In French constitutional adjudication, uncoded goals and policies are labeled as what they effectively are, i.e. *unwritten objectives* of constitutional status. Particularly the *Conseil d'État* has applied Dworkinian thought in protecting fundamental rights not stipulated in the constitution against administrative acts. On the substantive level, the picture is more complicated since the manner in which norms and state goals have been allocated among unwritten principles and unwritten objectives of constitutional value is not always comprehensible. However, there are indications that the *Conseil Constitutionnel's* recent endowment with broader reviewing powers may exert pressure on the Court to shape this allocation more intelligibly.

In the German legal system, the objective value system figures as the essential doctrine through which the unwritten constitution has entered constitutional jurisprudence. In the past, this doctrine has allowed to introduce policy-orientation into the Federal Constitutional Court's assessments, particularly with respect to public security interests. Constitutional values derived from the objective value system provide the legal foundation to overtrump fundamental rights.

Value-based adjudication fundamentally changes the argumentative way, fundamental rights are referred to in legal assessments. In an early critique of the Court's inclination towards value-driven adjudication, Ernst Forsthoff claims that fundamental rights are being transferred into a new logical dimension if they are conceived as a realization of a system of values.²¹¹ Similarly, Habermas formulates with respect to German constitutional litigation of fundamental rights: „The conceptual transformation of basic rights into basic goods means that rights have been masked by teleology, concealing the fact that in contexts of justification norms and values take on different roles in the logic of argumentation.“²¹² This transformation of fundamental rights into values could be observed in the *Dienstpflichtverweigerung* verdict. While the right to conscientious objection first is recognized as a fundamental principle, it is then degraded to a simple value which may be balanced against competing values. The Court thus indirectly recognizes the logical difference between invoking principles and values, proving Forsthoff's and Habermas' point. However, the conceptual transformation of fundamental rights into values has not been entirely completed. As illustrated by the *Luftsicherheitsgesetz* verdict, there is still room for principle-based adjudication in German constitutional jurisprudence. In this decision, the Court does not balance two different values, but sharply designates the sphere of freedom enjoyed by every human being and which the legislator is not allowed to overstep. In German constitutional adjudication, there is still some sense of the difference of value-based and principle-based assessments.

In Israeli constitutional jurisprudence, the transformation of fundamental rights into values has been completed. In a legal system in which no principle, right or value is without weight, principle-based adjudication as demonstrated by the *Luftsicherheitsgesetz* decision is impossible. On the terminological level, this approach is reflected by the conceptual levelling

²¹¹ Jürgen Forsthoff, *Rechtsstaat im Wandel. Verfassungsrechtliche Abhandlungen 1950-1964* (Stuttgart: Kohlhammer, 1964), p. 157

²¹² Jürgen Habermas, *Between Facts and Norms* (Cambridge, Mass.: MIT Press, 1996), p. 257.

of “principle” and “value”. Both notions encompass fundamental rights, state goals and societal interests. Broadly speaking, referring to human dignity as a principle or as a value does not exert any influence on the Supreme Court’s line of argumentation. In substance, the Court pursues the model of value-based adjudication. This doctrine is particularly strong manifested in the opinions of Justice Barak who explicitly invokes the tradition of German *Wertjurisprudenz*, thus embracing a teleologically oriented jurisprudence.

Analogically to the approach taken by Gustav Radbruch, contemporary proponents of value-based constitutional adjudication often point to the advancement of human rights in order to substantiate their position. According to constitutional scholar Will Waluchow, for instance, the judicial appeal to the community’s morality benefits the protection of minorities: “Judges who decide on the *principles* and *values* of the community’s constitutional morality *in reflective equilibrium* will almost always be led to protect minorities [...]”²¹³ As demonstrated by constitutional jurisprudence in Germany and Israel, the ideal of a reflective equilibrium in which value-based assessments usually serve the protection of fundamental rights is either hard to achieve or overoptimistic. In German jurisprudence, unwritten constitutional values are especially invoked to justify the overruling of fundamental rights. In Israeli constitutional adjudication, unwritten values and principles equally benefit fundamental rights as well state and security interests. As these examples demonstrate, it is worth reconsidering the common belief that a value-based footing of the legal system necessarily works in favor of the protection of fundamental rights.

As discussed in the respective chapters, the general societal framework of the different jurisdictions needs to be taken into consideration in order to explain the approaches taken by the Courts, respectively. The practice of value based adjudication in German jurisprudence

²¹³ Will J. Waluchow, ‘Constitutional Morality and Judicial Review’ in András Sajó/ Renáta Uitz (eds), *Constitutional Topography: Values and Constitutions* (The Hague: Eleven International Publishing, 2010), p. 17.

must be read in context with the palpable urge in German post-war jurisprudence to install moral safeguards in order to counter totalitarian challenges. The mistrust by which the judiciary is traditionally met with by the French public may have pressured French courts to clearly lay out their argumentative sources, thus leading to the conceptual differentiation between unwritten principles and unwritten objectives of constitutional value. In Israel, the absence of a constitution and the permanency of the state of emergency have largely contributed to the Supreme Court's value-laden and policy-driven doctrine of balancing.

Despite these different cultural and political frameworks, the constitutional jurisprudences examined above share the characteristic of regularly invoking the unwritten constitution for similar reasons. Teleological reasoning figures as one of the key purposes to resort to the supra-positive foundations of the constitution. But similar issues may be expressed in different terminologies. Only in the French system there are clear tendencies to explicitly disclose teleological rationales as such on the terminological level. Conceptually differentiating between unwritten principles of constitutional value and unwritten objectives of constitutional value may thus be helpful to distinguish between two legal rationales that follow a different logical approach. Principle-based protection of fundamental rights and policy-driven goal pursuance represent distinct types of legal reasoning.

Note that this thesis does not make a case for or against teleological reasoning in constitutional adjudication. Rather, this is a case for conceptual clarity. Particularly by building on the conceptual vagueness of the notion of "value", constitutional courts have insinuated that pursuing a value is similar to interpreting or applying a norm, whether written or unwritten.²¹⁴

But not only constitutional courts have blurred the conceptual difference between principle-

²¹⁴ As contended by András Szigeti, the notion of value is not purely teleological but also carries non-teleological aspects. Nevertheless, as shown with respect to the cases of German and Israeli jurisprudence, values are often invoked in order to teleologically balance between different desirable goods; András Szigeti, 'Constitutionalism and Value Theory', in András Sajó/ Renáta Uitz (eds), *Constitutional Topography: Values and Constitutions* (The Hague: Eleven International Publishing, 2010), pp. 22-27.

based adjudication and teleological assessments. Constitutional scholarship has its part in this concealment as well. Putting the label of “normativism” on every legal rationale drawing on unwritten aspects of the constitution equates two entirely different legal rationales. The term “normativism” is over-inclusive by ignoring the different argumentative functions the appeal to the unwritten constitution may serve. This over-inclusiveness is reflected in the somewhat contradictory manner in which the common theory of principles and values describes the function of invoking the unwritten constitution. Serving simultaneously as the moral anchor of the legal system and as the facilitator of constitutional change, the unwritten constitution is thus charged with two irreconcilable demands.

The terminological choices courts make may have considerable consequences on their type of judicial reasoning. Terminology matters with respect to fundamental rights protection. As stressed by Habermas, referring to basic rights as values may exert great influence on the line of argumentation courts employ in litigating fundamental right cases. This influence may be observed in German and Israeli constitutional jurisprudence. In Israeli jurisprudence, this process has been carried so far that the conceptual scopes of “principle” and “value” have been completely levelled. Not only with respect to German and Israeli constitutional jurisprudence, it is worth reconsidering the different conceptual scope of the notions of “principle” and “value” by practically and theoretically expounding the unwritten Constitution.

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