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Constitutionalism and Globalization: Some Reflections

Rainer Arnold
University of Regensburg, Germany
rainer.arnold@ur.de

Abstract. The article refers to two concepts: constitutionalism and globalization, which, although often used, their content scope has not yet been clearly defined. The essence of the text, however, is to answer the question of what is the interrelation of these two concepts and what is the significance of the rule of law in this context. The article also refers to the impact of globalization on the future of constitutionalism. In the conclusion, the author points out that globalization, the need for which is evident, must not lead to the abandonment of the fundamental values of constitutionalism as they have developed in the state. The core elements are the guarantee of human dignity, the principle of freedom and the principle of equality. These anthropocentric fundamental values must be preserved in their functional core both within and outside the state, in the context of transnational activities.

Keywords: constitutionalism, globalization, rule of law, dignity, freedom, equality.

JEL Classification: K00, K10, K33.

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1. ON THE CONCEPT OF CONSTITUTIONALISM

The term constitutionalism, unlike the term constitutional law itself, is not firmly defined in German usage. It is known from the historical development of constitutions, especially in the 18th and 19th century in Germany (Hoke, 1996, p.320 et seq), and is more commonly used in this context than in contemporary constitutional law. In foreign usage, this term also appears much more frequently, and it will therefore be attempted to define it in more detail.

The term constitutionalism concerns ideas of order concerning the institutional structure and the values of a system, thus principles, rules and concepts of typical constitutional nature and the question whether and how they are realized in a political system, a state or a multi-state organization. These are the main examples. However, constitutionalism is also discussed in the sphere of subdivisions of a state (regions, member states of a Federation) or in the context of the constitutionalization of international law.

Constitutionalism comprises two questions, the one about the intensity of validity of constitutional elements of order in a given system (i.e. a vertical aspect) and the one about their breadth of validity (i.e. a horizontal aspect).

The first aspect concerns, for example, whether the text of the constitution is comprehensively designed, whether it is adequately interpreted, whether state practice faithfully implements the constitution, whether the population accepts constitutional concepts, and numerous aspects more.

The second aspect concerns the question of how the validity of the constitutional concepts extends, e.g. in the state from the narrower area of constitutional law into civil law and other areas of law or into areas outside the state, into the legal systems of other states or into communities of states, such as supranational and international organizations.

This is the formal dimension of constitutionalism, which describes the institutional process of transferring constitutional concepts. In addition, however, there is the material dimension of the substantive, value-based transfer as an essential element.

Early on, constitutionalism was used as a term for a limited exercise of public power, i.e., a statement characterizing a condition that had already led to a modern individual-based constitution. Thus, in view of the history of the origin of this diffuse term, constitutionalism is equated with the limitation of power (Waluchow & Kyritsis, 2023), without today's distinctive and comprehensive system of the liberal rule of law already being in mind. The conclusion to be drawn, however, is that constitutionalism today should be understood not only as a formal transfer of constitutional concepts, but also as a substantive statement of the basic values of the constitution (see also Arnold, 2021b).

2. GLOBALIZATION

The concept of globalization is also not clearly defined. This term is relevant to many areas of politics, the economy, culture, communication, the performance of tasks of various kinds (performed by international institutions), legal transactions in general, and also to the exercise of public power, which used to be concentrated with the nation state.

An indispensable feature of globalization is that the corresponding process has a cross-border character. This process potentially encompasses the entire globe, but it can also take place in more geographically limited areas. In this respect, a relativization of the term is appropriate.

The phenomenon of globalization means the internationalized fulfillment of tasks, be they tasks that used to be the responsibility of the nation-state or tasks that have newly emerged and have an international character. This can take many forms. Thus in a rather loose or also in an institutionalized cooperation with other states. The latter can take place through representatives sent by the states (or part of them) to the institutions in question, bound by instructions from their states of origin and responsible to them, or through institutionalized extra-state actors with autonomous status independent of the states of origin. The extra-state actors may be executive or parliamentary in nature, or they may be part of independent oversight bodies, especially international courts.

The globalization effect may then lie in the full or partial performance of tasks outside the state, and the outcome of this activity may be binding or merely recommendatory for the states concerned (Arnold, 2022a).

3. GLOBALIZATION *V.* CONSTITUTIONALISM?

The question now arises as to whether globalization is proceeding without constitutionalism, whether it is dispensable or even unrealizable in this context.

On the one hand, this question arises from the point of view that the performance of tasks outside the state is relevant for the state insofar as it restricts the rights of its citizens or, even without such a restriction taking place, substantially shapes their lives. On the other hand, this question also arises from the point of view that only the state itself, but not its citizens, is affected by the performance of tasks outside the state.

We can summarize: Is there a need for constitutionalism at the extra-state (transnational, supra- or international) level? If so, in what form (state-like, autonomous, state-like, or attenuated)?

Does this need exist only if it has implications for individuals in the states involved, or even without them?

This question must also be asked with respect to institutional actors at the transnational level, insofar as they are representatives of a state. When they act at the international level, are they, as representatives of a state, bound by that state's constitutional concepts, or must they be guided by the constitutional precepts of the international institution in which they operate?

Finally, the question arises whether the state, which is affected by the transnational performance of tasks itself or in relation to its citizens, must accept the result of this performance of tasks (e.g. the decision of an international organization) only if the constitutional frameworks at the transnational and national levels are congruent (Arnold, 2022a).

4. THE VALUE SYSTEM OF CONSTITUTIONALISM

It has just been established that constitutionalism is a broad concept that encompasses more than the concrete constitutional law of a legal system, namely also its interpretation and application in state practice, the attitude of the population toward it, indeed the constitutional culture as a whole. The core of constitutionalism, however, is the constitution of a state (or the basic order of the supranational community outside the state) and, in particular, its value system.

Already at this point it should be mentioned that such a constitutional value system is necessary whenever state power (i.e. power established by the people connected in the polity) is exercised against this polity, more generally against an individual belonging to this polity, and this means a restriction of freedom or, even without such a restriction, an essential life determination of the polity and thus of the individual. When public power intervenes, it must be legitimized by the anthropocentric order of values related to the human being. Public power may be exercised only in accordance with the law; but if the basic concern of the law is directed to the welfare of human being, to its protection and promotion, then the public power directed against it must also be in accordance with the law. The rule of law also and especially applies to the person who institutionally creates the law. Although the creator of law can change and repeal the law he has created, he is bound by the basic order, i.e. the constitution. The rule of law is rule of the constitution; the primacy of the constitution is an essential characteristic of it. The creator of the constitution, it should be noted here, is also himself bound to the order of values associated with being human, to the dignity of man and the consequences of the principle of freedom and equality that flow from it, that is, to these universal a priori values associated with the anthropological fact of man's existence (Arnold, 2022b).

5. THE RULE OF LAW AS MEDIATOR OF VALUES

The value order of the polity, as it is explicitly or implicitly contained in the basic order, i.e. the constitution, must be realized by the institutions of the polity. The obligation to realize them is all-encompassing; it applies to the polity as such and to the individuals belonging to it. But this obligation to realize values also exists in external relations, namely towards other communities and their members.

Public authority must recognize law as the sole standard of its actions, within the state and wherever public authority is exercised, as in the supranational community of the European Union or also at the level of international law in the interaction of different states or within the framework of international organizations.

However, the exercise of public authority is also necessarily linked to people-related values as the ideal and legitimizing basis of its exercise of power. The rule of law expresses this connection to the order of values. The concept of the rule of law conveys the values to the institutions, is, so to speak, a bridge between the values part and the institutional part of the basic order.

At the center of this value order is the human being, his or her dignity, necessarily linked to this his or her fundamental freedom, and equality, since it is due to every human being by virtue of being human. Freedom is concretized by the spectrum of written and unwritten fundamental rights. Freedom includes, in particular, the political self-determination of the individual, i.e. it is the fundamental basis of democracy. Freedom also presupposes the sufficient possibility of its exercise. Thus, the right to a subsistence minimum, which can be derived directly from human dignity, and also basic social security, whether through fundamental rights or through objective constitutional imperatives, are ultimately also anchored in the principle of individual freedom.

In order to give full effect to the constitutional order of values, it is necessary to understand fundamental rights not only as individual rights of defense against encroachments by public authority, but also as objective values that trigger a duty on the part of the holders of public authority to protect these values adequately by means of appropriate measures, especially laws.

The restriction of fundamental rights is an exception to the principle of freedom that requires legitimation and can only be permissible if it is necessary and proportionate for legitimate reasons of the community. It is also a necessary consequence of the principle of freedom that the essential content of a fundamental right is not affected (see also Arnold, 2021a).

6. THE TARGETS OF THE RULE OF LAW

It is clear from the foregoing that the value order of the Constitution is made binding on the actors of public authority by the principle of the rule of law. The value orientation of the rule of law principle is its main feature and characterizes its present form. Connected with this is the principle of constitutionality, i.e. the recognition of the primacy of the constitution over all expressions of public authority. This means, above all, that legislation must conform to the Constitution. The primacy of the Constitution also implies the binding nature of the value decisions explicitly or implicitly contained in the Constitution. The principle of legality concerns the executive and binds it to legislation; historically, this is the first step in the development of the rule of law, but today it is overridden by the principle of constitutionality, the rule of law. The general will, the will of the people as an expression of their sovereignty, the volonté générale, is no longer expressed solely through the law, the legal result of the political decision, but only through the law, which conforms to the constitution. Jean-Jacque Rousseau's dictum in the 1789 French Declaration of the Rights of Man and of the Citizen, "la loi exprime la volonté générale," has been replaced by the phrase coined by the French Constitutional Council, "la loi n'exprime la volonté générale que dans le respect de la Constitution" (Cfr. Décision n° 85-197 DC of 23 August 1985, Loi sur l'évolution de la Nouvelle-Calédonie, para. 27).

What is true of law is also true of the rule of law, the state based on the constitution (the "constitutional state"), and this is reflected in the structure of the constitution itself: the order dimension is expressed in the institutional system of the polity, the state, and the value orientation in the anthropocentric fundamental value system of the constitution. This has already been mentioned, but it should be emphasized here that the concept of the rule of law rests on two essential pillars:

(1) Law must be able to fulfill its function of order efficiently; in other words, it must be clear and unambiguous and exhibit stability. Otherwise, order is not guaranteed. Stability means legal certainty and is oriented toward those who benefit from the law: Protection of trust in the law, in its permanence. Legal positions, once obtained through the law, may not be called into question and withdrawn. This may only be done for compelling reasons of public interest and under narrow conditions, if necessary in connection with an obligation to compensate.

The ordering function of law also includes the duty to observe the order of precedence in the legal system. The primacy of the constitution is the basis and starting point, since the constitution, as the basic order, is naturally at the top of the legal order, which also means that all other public authority functions, legislation, administration and jurisdiction, must observe the constitution. Constitutionality, an expression of the primacy of the Constitution, has

already been mentioned. In addition, there is legality, which means that the administration is bound by the law, which in turn must be in conformity with the Constitution. Judicial review has the task of ensuring that the administration complies with the law.

(2) The value dimension of law, the second and most important pillar of the rule of law, is expressed primarily in the fact that the rule of law is functionally linked to the protection of fundamental rights. The protection of fundamental rights is a concretization of the principle of individual freedom, which is inseparable from the supreme value of human dignity. In addition, there is equality, as already emphasized above.

Linked to the principle of human freedom is the basic constitutional postulate of the separation of powers. This means limiting power by dividing the exercise of power among various organs and institutions that limit and control each other. The diversity of the distribution of tasks serves the appropriateness and efficiency of state action, also an aspect of the rule of law, but above all the separation of powers and thus the limitation of power, i.e. the safeguarding of freedom.

It is already clear at this point that the order dimension of law is functionally linked to the value dimension and that the two cannot be separated. Thus, the protection of trust and its important aspect of the fundamental prohibition of retroactivity of onerous laws is an aspect of order, but also an aspect of value. This functional link becomes even clearer in the principle of proportionality, which is important in terms of the rule of law and shows the boundary between the fundamental freedom of the individual and the necessary restrictability of freedom in the interest of the community. Finally, the fact that effective judicial protection, including constitutional jurisdiction over laws, safeguards the order of the community and guarantees freedom also documents the link between the two aforementioned poles of law.

These individual elements are regularly associated in case law and literature with the concept of the rule of law. It should be emphasized that these elements do not depend on the positive regulation in a particular legal system, but can be derived from the essence of the rule of law and thus have a general character.

The rule of law is not the sum of all those elements written down in a constitution that correspond to the above-mentioned elements, but in every authentic constitutional order the rule of law exists as a legal principle with a comprehensive character, regardless of whether it is explicitly identified as a principle in the constitutional text or whether it is implicit. Every authentic constitution oriented to human dignity would be fragmentary and also contradictory if it did not orient the organization and exercise of public authority to and build upon the constitutional order of fundamental values. It is quite consistent that case law in some states (Belgium, Luxembourg, Poland) has derived the rule of law as an implicit principle from the value of democracy or from fundamental rights (Alen & Verrijdt, 2023; Kruk, 2006; L'Etat de droit, 2017).

The aforementioned individual elements of the rule of law are also inherent in its nature: they can be derived from the concept of law in both instrumental and value terms.

It is worth emphasizing the difference between normative reality and the perception of this reality. The two can differ considerably. The former is the value order, which results from the anthropological fact of human being and its dignity and which is inherent in a constitutional order as a basic order. The ought-order of a constitution must be oriented to this fact, to this essence, and must make the regulations that are necessarily connected with it. But how this normative reality is understood, by the politics in a country, the legislature, the interpretation of the law, the execution by the institutions, the legal debate and even the constitutional text itself, is perception of reality. Ideally, it coincides with normative reality, but it can also deviate from it. This can happen in error (e.g. through an erroneous interpretation of the constitutional text) or intentionally (through a politically conscious deviation from normative reality).

It is possible that the divergence is corrected, so that a law that deviates from normative reality and is therefore unconstitutional is overturned by a constitutional court. However, it is also possible that the divergence is deliberately maintained to such an extent that one can no longer speak of the existence of an authentic constitutional order, but at best of a mere organizational statute.

The possible institutional variation in the realization of a concept that corresponds to normative reality must be distinguished from the divergence that has just been mentioned. Thus, the principle of democracy can be functionally realized through a parliamentary or plebiscitary form. Although the two variations differ institutionally, they are equivalent in function. This is therefore not a divergence in the above sense, but a perfectly possible institutional variation with (at least extensive) functional equivalence. Both forms, representative and plebiscitary democracy, are possible perceptions that both correspond to normative reality. This also applies to numerous other possible configurations.

7. RULE OF LAW IN THE SPHERE OUTSIDE THE STATE

Our considerations are related to the phenomenon of globalization. Political and legal globalization takes place primarily in regional spaces: in the supranational European Union, in the legal-cultural context of the Council of Europe, especially the European Convention on Human Rights, and in the (differently structured) Inter-American and African convention spaces. But even in the realm of universal international law, it is quite legitimate to raise the question of the meaning of the rule of law.

a) State-like globalization structure in the European Union

If we look first at the supranational community of the European Union, we find that it has a state-like structure with powers of intervention vis-à-vis the member states and also vis-à-vis natural and legal persons. The same need for the rule of law can readily be seen here as in the state itself. Indeed, already in the first phase of the existence of the European Coal and Steel Community and the European Economic Community, the European Court of Justice elaborated aspects of the rule of law as general legal principles of Community law and reinforced this orientation even later (Skouris, 2018, pp. 26-27). The Charter of Fundamental Rights of the European Union in force today, which applies to the institutions of the European Union itself and, insofar as they implement EU law, also to the Member States, also mentions the principles of democracy and the rule of law as its basis in its preamble. The same applies to the basic norm of Art. 2 TEU, which declares the rule of law to be a binding principle for the EU and the Member States. The importance of this Community rule of law requirement is demonstrated by the extensive case law of the EU Court of Justice on the situation in the Member States Poland and Hungary (Peter M. Huber, 2021, paras. 112-113).

Since the rule of law is a fundamental principle in all Member States (even if its political implementation is sometimes insufficient), the existence of the rule of law, i.e. the *community of law ("Rechtsgemeinschaft")*, today more aptly referred to as the *union of law ("Rechtsunion")*, is also a legal principle in the form of a general legal principle of EU law (Calliess, 2022, paras. 26-27). However, it must be clarified that this general legal principle is not the primary basis of the *union of law*, i.e. the *community/union of law* does not exist primarily because the rule of law is common to all Member States, but because the autonomous provisions of the EU, especially in Article 2 TEU and the canon of values of the EU Charter of Fundamental Rights, define its basic elements. All elements inherent to the rule of law are also found in the EU legal order, whether written, unwritten or jurisprudential.

The legal norms on the *union of law* are *constitutional* norms, i.e. they form the ideal basis of the European Union (and even earlier of the European Community). The ideal, value determination of the Union, along with the establishment of institutions, is the basis of its foundation and therefore of constitutional nature. The establishment of the *community/union of law* is part of the founding process of the EU and before that of the European Community.

Moreover, the norms of the rule of law of the EU are at the same time those of supervision over the Member States, i.e. norms of control. The hinge between the values of the European Union and the values of the Member States is Art. 2 TEU, which expresses the necessity of common ideal structures of the basic orders. Within this framework, the power of control lies with the institutions of the European Union; they also have the power of definition over the concept of individual values that are to be common. The requirement of common values does

not permit an autonomous definition competence of the individual member states. The functional core of these common values must be determined by the European Union, but the variation of the details that functionally correspond to this core of values must be left to the Member States.

In summary, however, it must be emphasized that all the elements of the rule of law as realized in the member states are also present in the law of the European Union.

b) The European Convention of Human Rights (ECHR)

Let us turn briefly to the European Convention on Human Rights. Unlike the Treaties on the European Union, this international treaty (which in substance has a functional constitutional character) is not a founding document for a separate multinational organization, but a guarantee document for the observance of the rule of law and human rights in the Member States of the Council of Europe. The binding of these states to the Convention is formally of an international law nature, but is functionally constitutional, as the fundamental rights of national constitutions are regularly interpreted in light of the Convention, and individuals have direct access to the European Court of Human Rights in Strasbourg after exhausting national remedies.

The European Convention on Human Rights was created in close alignment with the United Nations Universal Declaration of Human Rights of 1948, which in turn describes the anthropocentric fundamental values of human dignity, freedom, and equality as universally valid and is closely linked to the rule of law. In essence, human rights are protected by the rule of law. The rule of law is therefore rightly seen as the appropriate means of protecting the values. This linkage of the protection of fundamental and human rights with the rule of law continues in the European Convention on Human Rights; it is referred to in the preamble to the Convention, along with respect for freedom, as the "common heritage" of the signatory states.

It is a peculiarity of a supervisory document such as the Convention that it particularly emphasizes the importance of a state's commitment to the law and thus to the most important part of the legal order, the values concerning human beings. The same basic idea exists in general international law.

The Convention seeks to ensure respect for its values by the Member States of the Council of Europe and thus covers the value-related area of the rule of law in the Member States. It is part of the national rule of law, as the German Federal Constitutional Court stated in the Görgülü case (BVerfGE Oct. 14, 2004, 2 BvR 1481/04), among others, that international law is respected by state institutions within the framework of the ECHR. This legal obligation is a general element of the rule of law, encompassing not only domestic law but in general law binding on the state, including extra-state law. This is the external dimension of the rule of law, expressed in respect for the supranational law of the European Union, but also for general and special, universal and regional international law.

c) The Venice Commission checklist on the Rule of Law

The Venice Commission of the Council of Europe has drawn up a checklist of the essential points that must be fulfilled for the rule of law to be realized in a state (Rule of Law. Checklist, 2016). The individual points are: Legality, Legal Certainty, Prevention of Abuse of Power, Equality before the Law and Non-Discrimination, and Access to Justice. These five key concepts are explained in detail and provide adequate guidance to states. Combating corruption and conflicts of interest are highlighted as important individual cases.

This Venice Commission document is an important guide and contains numerous references to the jurisprudence of the European Court of Human Rights as well as to the documents of the Venice Commission and the Council of Europe itself.

d) Rule of law in universal international law

Let us now turn to universal international law. It is a legal system essentially based on coordination by sovereign states, which, as a legal system, does indeed immanently contain the obligation to apply law and to avoid arbitrariness and the use of force. International law is a peace order and has as its essential purpose to limit the actions of sovereign states and to subject them to rules which, after a long historical development, have now culminated in the prohibition of violence in the United Nations Charter, framed by numerous provisions on human rights protection, development aid, environmental protection and much more.

Insofar as treaty law exists, and this is increasingly the case, trust is placed in contractual promises, which become binding through the fundamental principle *pacta sunt servanda*. But even the original legal source of international law, customary law, is not a free arbitrary practice of states, but only arises when this practice is supported by legal conviction, i.e. has an essential connection to the field of law. In addition, it is evident that fundamental principles rise to norms of *ius cogens* character, i.e. a process of partial *constitutionalization* of international law takes place (Krajewski, 2017, pp. 265-338). This process is likely to intensify in the context of globalization.

Universal international law, just like regional international law (and think of the large number of conventions of the Council of Europe!), also has a - quite significant - supervisory and guarantee function for the internal state sphere through numerous human rights covenants.

8. GLOBALIZATION AND CONSTITUTIONALISM

a) Increasing transnationalization

Let us now turn to the future of constitutionalism and consider the influence of globalization.

Transnationalization is becoming more and more pronounced. Nation-states are less and less able to fulfill today's tasks efficiently on their own. The nature of the task already implies the need for transnational cooperation in various forms. External and also internal security, health protection, environmental protection etc. are areas that can only be fulfilled by opening up the state to the outside world. As a rule, optimal efficiency can no longer be achieved from a purely internal perspective. In addition, there is a heightened awareness of the need to make a decisive political commitment to peaceful cooperation with other states or even to political and economic integration.

This opening of the state has implications for the law. The current situation of the state's performance of its tasks is characterized in many areas by influence from outside the state. This may involve binding decisions or merely informative or advisory contributions based on plurinational expertise from outside state bodies. These bodies can be international organizations or agencies, but also private individuals, so that task fulfillment through sovereign state action is partly replaced by hybrid forms of decision-making. Often it is not a matter of decisions at all, but of recommendations, resolutions that have no legally binding effect, i.e. they are soft law. Nevertheless, they have an important function, they provide orientation through expertise and multinational acceptance and therefore often attract attention.

b) State constitutionalism and extra-state constitutionalism: a functional instead of an institutional perspective

There is the important question of whether the comparison between the legal system of the state, its constitutionalism, and that of the extra-state constitutionalism should be made from an institutional or functional point of view.

It seems adequate to focus in cross-border relations not on the nationally bound institutions, but on the teleologically relevant functions. The function should be able to be duly performed in the various relevant legal

systems, without regard to the legal system in which this occurs and even if there are institutional differences in the sphere of the function provider. Compared to the institutional approach, focusing on functionality offers flexibility, corresponds to a transnational perspective and promotes integration.

Constitutionalism has formed in its core in the *state* within clear constitutional circumstances. This core is the recognition of the three basic fundamental values which have already be mentioned: human dignity, the principle of freedom (concretized by written and unwritten fundamental rights) and equality. This triad of values also encompasses democracy as the political freedom and self-determination of the individual, and becomes a binding guide to action via the state's institutions under the rule of law.

The constitutional framework in the state is clear and different from the conditions that apply in extra-state cooperative relationships. In the state, there are precise competencies and functional allocations based on the separation of powers, as well as a hierarchical-vertical pattern of exercising public authority. Outside the state, there are complex structures of deliberation and decision-making based on coordination law, which, unlike in the form of laws, often have, as already mentioned, only a recommendatory character, soft law rather than hard law (Arnold 2022a, pp.101-117).

The only exception is the above- explained supranational legal system of the European Union, which is similar to a state in its organizational structure and therefore follows the state model to a large extent, but not completely.

c) The necessity of constitutionalism in case of impact on freedom and individual living conditions

Must constitutionalism be realized in the extra-governmental sphere as well? Completely or to a certain extent? And with the same institutional means as in the state, or does it only depend on the functional equivalent?

To give an answer to the common core of this question: insofar as activities in the extra-state, transnational sphere bring about interference with the freedom of individuals or, even if no such interference takes place, substantially influence and shape the living conditions of individuals in the state, the core of state constitutionalism is to be realized here as well. This core applies generally, universally and also outside the state. It is closely connected with man, has an anthropocentric reference.

It is also clear that guaranteeing this core of constitutionalism outside the state cannot be achieved by the same institutional means as in the state. However, that is not what matters. It is only a question of the *functional*, not the institutional guarantee of the basic elements of constitutionalism.

The guarantee of the most important basic element of constitutionalism, human dignity, is indispensable. This also underlies international human rights protection; conventions often refer to human dignity. However, where this is not the case, the guarantee of human dignity is undoubtedly implicit in these conventions. There is no human rights protection, even partial, without its starting point being the fundamental idea of human dignity. The same is true of the fundamental freedom of the human person, which is also covered by international human rights protection. What applies to the state domestically also applies at the international level. The exercise of public authority over human beings entrusted to the state is legitimate only if it is based on the recognition of human freedom as a *principle*. The exercise of public power that restricts freedom must therefore be considered an *exception* to this principle, which must be legitimized. The protection mechanisms at the international level are addressed to the state, which is authorized and thus legitimized as the exercising power by the Constitution. This idea of comprehensive and effective protection of fundamental and human rights must also be inherent in the instruments of international law, which, after all, guarantee protection against state violence. These conventions necessarily also contain the guarantee of a comprehensive fundamental freedom of the individual, even if this does not appear so in the text of the convention. But this is a basic general prerequisite for the specific guarantees mentioned in the convention.

The third element of anthropocentric constitutionalism, equality, is also included as a basic principle, explicitly or implicitly, in a human rights convention (Arnold, 2022b, pp. 41-56).

International protection of human rights, and other norms of international law apply to subjects of international law, especially to states, but they must also apply by analogy to alliances of states and international organizations with activities at the international level. International law cannot establish guarantees only against states, but would not be respected in their particular manifestations of international organizations or other entities connected to them. This would be an abuse of rights, a *venire contra factum proprium*.

Forms of transnational activity that do not fall under international law generate binding force according to the law of the respective states involved or, if the application of a certain legal order is provided for under the rules of conflict of laws, according to this. In this context, the figure of third-party effect is also significant, especially for private agents such as international companies, with regard to the human rights guarantees binding the state and the duty of protection incumbent on states, whether it is based on state constitutional law or on international law itself (von Arnauld, 2019, pp. 284-285).

If international law is relevant for the transnational activity and if there is conformity with international law, the state in question is also bound by international law. According to the thesis put forward here of the functional equivalence of the core of constitutionalism in international law and in state law (insofar as an authentic, i.e. liberal-democratic constitutional order exists in the latter), there is in principle no problem, even from the point of view of internal constitutionalism, for the state to be bound by it and for the introduction of the normatively binding results of this transnational activity into internal law.

With regard to transnational activities, which are not subject to international law, their normative binding to state law continues to exist, so that the question of the influence of state constitutionalism arises and takes place in the internal legal order.

If the transnational activity is compatible with the legal system relevant to it, whether international law or, in the case of activities not governed by international law, the relevant national law, there is usually no conflict between state and extra-state constitutionalism. If it is, however, the state will erect a barrier against the binding or internal effect of the transnational activity. Thus, it may refuse the national consent law before the conclusion of an international treaty, or, if the constitutionalism conflict arises only during the treaty's period of validity as a result of treaty-related developments that do not conform to the constitution, it may block the binding of that treaty on constitutional grounds. This is possible at least in some states, such as the Federal Republic of Germany (Schlaich & Korioth, 2018, paras 360 et seq). Therefore, the treaty dynamics must be foreseeable in their totality at the time of parliamentary approval.

In other cases, where no law of consent is passed, but nevertheless the binding and internal validity of the results of transnational activity are in question, as a rule their unconstitutionality can also be asserted in court as a legal obstacle.

A special situation arises when national representatives, bound by state constitutionalism, become active in extra-state organizations and bodies with binding effect vis-à-vis their state of origin. Are they bound by extra-state or national constitutionalism? The problem is defused if the concept of functional equivalence is regarded as decisive. The principle of an interpretation of state constitutional law that is friendly to international law can also provide assistance. Only if the external decision itself is not in line with its concept of conceptualism does it also diverge from that of the state of origin. It is then constitutionally legitimate for the latter to defend the core of its own constitutionalism and deny the binding effect of the external decision.

9. CONCLUSION

As a result, it must be noted that globalization, the need for which is evident, must not lead to the abandonment of the fundamental values of constitutionalism as they have developed in the state. The core elements are the guarantee of human dignity, the principle of freedom and the principle of equality. These anthropocentric fundamental values must be preserved in their functional core both within and outside the state, in the context of transnational activities. They are basic elements of the human condition, therefore universal and indispensable.

It is important to note that the criterion of functional equivalence must be decisive in the comparison of state and extra-state constitutionalism. It is important that the function of these basic values is maintained even in transnational activities, even if they are realized through institutional and instrumental mechanisms that differ from those of the state.

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