The Influence of Constitutional Objectives on Constitutional Interpretation: Some Propositions Based on the Brazilian and German Cases

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Abstract: Constitutional objectives are often general and vague. They constitute future-oriented norms that usually have a high political content and are binding on all branches of the state, despite not providing exhaustive clarifications about who is to implement which aspects of their contents. Therefore, the interpretation of these objectives by constitutional courts tends to be crucial both for the separation of powers and for determining the role of constitutional jurisdiction in dealing with teleology in law. Against this background, this paper aims to make four propositions about the influence of constitutional objectives on constitutional interpretation, based on experiences of the Brazilian and German constitutional law in dealing with constitutional objectives. The thesis is that these four propositions elucidate potentialities and limitations to the judicial application of constitutional objectives. The subject will be pursued through the examination of concrete jurisprudential understandings and decision-making practices of both the Brazilian Federal Supreme Court and the German Federal Constitutional Court. The propositions concern possible influences of constitutional objectives on the proportionality analysis, on teleological constitutional interpretation, on the constitutionalization of central principles of ordinary law, and on metanormative preconceptions for constitutional interpretation. Finally, a few general remarks will be made about law and politics, constitutional contexts, and the role of legal scholarship in shaping constitutional doctrine.[1]

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1 This paper aims to further develop and systematize certain aspects of a previous work, upon which this paper is largely based on *Diego Platz Pereira*, Die Bindung der Verfassungsgerichtsbarkeit an die Verfassungsziele: Bedingungen der Verfassungskonkretisierung durch das Bundesverfassungsgericht und das Supremo Tribunal, Jahrbuch des öffentlichen Rechts der Gegenwart 72 (2024). I would also like to express my gratitude to Oliver Lepsius, Henning Ahlers, Michaela Hailbronner, Thomaz Pereira, Michael Riegner, Conrado Hübner Mendes, and the anonymous reviewer for valuable discussions on issues related to this work and for comments on earlier drafts of this paper.

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A. Introduction

Constitutional objectives are future-oriented norms with constitutional status that usually have a high political content and are binding on all branches of the state.[2] They assume a non-realized state of things and set norms with a prospective character, aiming to provoke various kinds of transformation in society, political reality, and economy. Not rarely, they are understood as mandatory constitutional norms, having more than a declaratory or programmatic nature, despite of primarily not guaranteeing subjective rights.[3]

The possibilities of their concretization by constitutional jurisdictions are, however, limited. Constitutional objectives are often comprehended as norms that must be shaped by the legislature and are not subject to judicial enforcement.[4] Indeed, they tend to differ significantly from other constitutional norms that are applied by constitutional jurisdictions, as they contain particular final content that goes beyond norms with primarily conditional content.[5] Constitutional objectives often lack clear guidance on their implementation,

2 Most papers in English deal with similar norms by using the term "directive principles", mainly because they discuss and have in mind constitutional orders – such as the Indian one – that have established constitutional goals by using this nomenclature. However, since this paper will focus on the Brazilian and German constitutional law, as I will justify further, I will use the term "constitutional objectives", which is used explicitly by the Brazilian Constitution in its Article 3 and is arguably closer to the German term "Staatszielbestimmungen" (literally, state objective provisions). Other constitutional orders also refer to objectives of the constitution or of the state: See e.g. Article 2 of the Colombian Constitution, Article 9 of the Bolivian Constitution, and Article 63, No. 5 of the Portuguese Constitution. For a use of the term "directive principles" (principios rectores) by a country with a civil law tradition, Chapter 3 (Articles 39 ff.) of the Spanish Constitution.

3 For example, *Lael K. Weis*, Constitutional Directive Principles, Oxford Journal of Legal Studies 37 (2017), p. 920; and *Karl-Peter Sommermann*, Staatsziele und Staatszielbestimmungen, Tübingen 1997, p. 5. For a critical account see *Fábio Corrêa Souza de Oliveira*, Eficácia Positiva das Normas Programáticas, Revista Brasileira de Direito 11 (2015).

4 See *Jeffrey Usman*, Non-Justiciable Directive Principles: A Constitutional Design Defect, Michigan State Journal of International Law 15 (2007); *Weis*, note 3, pp. 933 ff.; and *Joseph Minattur*, The Unenforceable Directives in the Indian Constitution, Supreme Court Cases 1 (1975). That is, however, not always the case, especially when directive principles are applied in combination with other constitutional rights, see *Ulrike Davy*, Southern Welfare: From Social Insurance to Social Security, in: Ulrike Davy / Albert H. Y. Chen (eds.), Law and Social Policy in the Global South: Brazil, China, India, South Africa, Abingdon 2023, pp. 242 ff.; *James Fowkes*, Normal Rights, Just New: Understanding the Judicial Enforcement of Socioeconomic Rights, American Journal of Comparative Law 68 (2020), p. 736; and *Oliveira*, note 3.

5 About norms in law with final content, see *Marcelo Neves*, A Constitucionalização Simbólica, São Paulo 1994, p. 102; *Niklas Luhmann*, Positives Recht und Ideologie, Archiv für Rechts- und Sozialphilosophie 53 (1967), pp. 557 ff.; and *Sommermann*, note 3, pp. 356 ff.

leaving significant room for interpretation by those responsible for carrying them out. Additionally, there is often ambiguity regarding the extent to which each branch of the state should be involved in the implementation process.

Against this background, a great concern in developing connections between constitutional objectives and judicial interpretation lies in the danger of an overjudicialization of constitutional objectives. Submitting the implementation of constitutional objectives to judges could be problematic for constitutional democracies given the restricted capacity of political accountability of constitutional jurisdictions.[6] Besides, ruling based on constitutional objectives might mean ruling in issues that go beyond guaranteeing individual rights and opens a significative margin of interpretative possibilities due to the special final content of constitutional objectives.

These concerns could hypothetically become even more worrisome in countries with strong constitutional courts. However, powerful constitutional courts do not necessarily assume a protagonist role in the implementation of constitutional objectives. This has to do both with the influence of legal-political and legal-doctrinal expectations on the decision-making practices of a constitutional court as well as with institutional settings and practices.

Among countries with a civil law tradition[7], such an influence of expectations can be exemplified based on the Brazilian and German cases. While a large part of the Brazilian legal doctrine and jurisprudence tends to hold the judiciary responsible for the implementation of constitutional objectives through constitutional interpretation, it prevails the idea in Germany that the judiciary should carefully intervene in the implementation of constitutional objectives (Staatszielbestimmungen) by the legislature, which is mostly understood as responsible for the concretization of these constitutional norms.[8] Although

6 See e.g. *Weis*, note 3, p. 921.

7 In common law countries, debates about the judicial implementation of "constitutional objectives" are prevalent especially in constitutional orders that have followed the Irish initiative of systematically codifying directive principles, see *Usman*, note 4, p. 643f.; and *Tanurabh Khaitan*, Directive Principles and the Expressive Accommodation of Ideological Dissenters, International Journal of Constitutional Law 16 (2018), p. 391, fn. 6. In these contexts, the influence of directive principles on judicial interpretation has been apparently mostly discussed with focus on possibilities of judicial application of fundamental or socio-economical rights taking directive principles in both their constraining and constructive interpretative functions into consideration. Cf. diverse approaches in this sense in *Atudiwe P. Atupare*, Reconciling Socioeconomic Rights and Directive Principles with a Fundamental Law of Reason in Ghana and Nigeria, Harvard Human Rights Journal 27 (2014), pp. 74 ff.; *Gautam Bhatia*, Directive Principles of State Policy, in: Sujit Choudhry / Madhav Khosla / Pratap Bhanu (eds.), The Oxford Handbook of the Indian Constitution, Oxford 2016, pp. 644 ff.; *Usman*, note 4; and *Gerard Hogan*, Directive Principles, Socio-Economic Rights and the Constitution, Irish Jurist 36 (2001), pp. 175 ff. Also discussing this subject, despite denying possibilities of judicial enforcement, see *Weis*, note 3.

8 See *Pereira*, note 1, pp. 686 ff. This does not negate the importance of the implementation of constitutional objectives by the public administration, but rather point to a possible deficiency of both the Brazilian and the German constitutional doctrine in analyzing the binding of the public administration to constitutional objectives. An early example of this approach in the Indian context can be

these expectations do not clarify much about how constitutional objectives are factually applied by these jurisdictions, it does indicate a relevance of different experiences and concepts about the juridification of political processes, which in turn shape the treatment of constitutional objectives by constitutional courts.[9]

In terms of institutional settings and decision-making practices, Brazilian and German constitutional law offer good examples of different perspectives on the codification and on the judicial enforcement of constitutional objectives. On the one hand, the developments of the Brazilian Federal Supreme Court (STF) are based on an implementation model of constitutional objectives that is strongly characterized by a wide-ranging, broadly conceived (and often vaguely articulated) balancing of constitutional principles as well as by the assumption that virtually every case can involve reasoning in connection with the human dignity,[10] On the other hand, the approach of the German Federal Constitutional Court (FCC) is characterized by the allocation of greater leeway to the legislature, but with a clear preservation of the court's power to determine the core content of constitutional objectives.[11]

These different approaches to constitutional objectives tend to produce specific effects on constitutional interpretation. Diverse institutional arrangements and decision-making

found in *Dattareya Gopal Karve*, Public Administration & the Directive Principles of the Constitution, Indian Journal of Public Administration 11 (1955). For an example of a German approach, see *Eberhard Schmidt-Aßmann*, Das allgemeine Verwaltungsrecht als Ordnungsidee: Grundlagen und Aufgaben der verwaltungsrechtlichen Systembildung. Heidelberg 2006, pp. 154 ff.

9 About bad experiences with political processes and their following "legalization", see *Christoph Möllers*, Legality, Legitimacy and Legitimation of the Federal Constitutional Court, in: Mathias Jestaedt / Oliver Lepsius / Christoph Möllers / Christoph Schönberger (eds.), The German Federal Constitutional Court: The Court Without Limits, Oxford 2020, p. 145.

10 *Luís Roberto Barroso*, Curso de Direito Constitucional Contemporâneo: Os conceitos fundamentais e a construção do novo modelo, São Paulo 2018, pp. 134 ff.; *Enzo Bello* / *Gilberto Bercovici* / *Martonio Mont'Alverne Barreto Lima*, O Fim das Ilusões Constitucionais de 1988? Revista Direito e Práxis 10 (2019), pp. 1801 ff.; and *Marcelo Neves*, Os Estados no Centro e os Estados na Periferia: Alguns problemas com a concepção de Estados da sociedade mundial em Niklas Luhmann, Revista de Informação Legislativa 206 (2015), pp. 123 ff. These practices might be potentialized through numerous possible assumptions of connections between prospective norms and constitutional rights through the text of the Brazilian Constitution. Such assumptions can be also ascertained, in part, in the Portuguese (Article 63, No. 5; Article 67, No. 2, b); Article 69, No. 1, e etc.) and in the Colombian (Article 44; Article 46, 2 etc.) constitutions.

11 This leeway consists in particular in the court's interpretative competence to determine the substantive legal core content of the constitutional objectives, and this is precisely where it is also casuistically controversial due to its not predetermined scope. For examples of critiques about the court's interpretative practices. See *Oliver Lepsius*, The Standard-Setting Power, in: Mathias Jestaedt / Oliver Lepsius / Christoph Möllers / Christoph Schönberger (eds.), The German Federal Constitutional Court: The Court Without Limits, Oxford 2020, pp. 93 ff.; and *Robert Christian van Ooyen*, Hüter von Staat und Volk – in Karlsruhe nicht Neues: die Lissabon-Entscheidung, in: *Robert Christian van Ooyen* (ed.), Die Staatstheorie des Bundesverfassungsgerichts und Europa: von Solange über Maastricht und Lissabon zur EU-Grundrechtecharta und EZB, Baden-Baden 2022, pp. 122 ff.

practices may lead to various forms of dealing with constitutional objectives and, consequently, to various forms of influence of constitutional objectives on constitutional interpretation. In that sense, how and to what extent courts may participate in the implementation of constitutional objectives are questions that may become clearer once possible applications of constitutional objectives are deepened in different constitutional contexts.

Therefore, this paper aims to explore possible legal understandings of constitutional objectives by making four propositions about their influence on constitutional interpretation through exemplifications based on Brazilian and German constitutional law. The primary intention of the paper is conceptual: To contribute to a typification of uses of constitutional objectives that influence interpretative practices of constitutional jurisdictions.[12] These typifying propositions can serve as tools to help distinguish how constitutional objectives are used in constitutional reasoning. Illustrating these conceptual typifications based on Brazilian and German constitutional law serves two main purposes. The first is to exemplify how constitutional contexts corroborate for the development and applicability of different uses of constitutional objectives by constitutional jurisdictions and, consequently, for the emergence of varieties of constitutionalism. The second is to discuss some aspects specifically of the German and Brazilian experiences with constitutional objectives, which are rather scarcely addressed in a conceptual way as a main subject in English-language publications.[13] The thesis is that the four presented propositions elucidate potentialities and limitations to the judicial application of constitutional objectives.

12 For an influence of constitutional objectives on judicial decision-making practices that goes beyond an influence on constitutional interpretation: *Diego Platz Pereira*, A integração jurídica latino-americana: possibilidades de seu fomento na Constituição Federal brasileira por meio de Comparação Constitucional, Anuario de Derecho Constitucional Latinoamericano 29 (2023), pp. 469 ff..

13 For an example of an exception, see *Guilherme Camargo Massaú* / *André Kabke Bainy*, The Role of the Fundamental Objectives of Brazilian Federal Constitution: The Dialetics System-Problem, Rechtstheorie 51 (2020). For other publications in English, which mention German or Brazilian constitutional objectives, without having them necessarily as a main subject, e.g. *Ryan Kraski* / *Marek Prityi* / *Saskia Münster*, Constitutional Provisions, in: Kirk W. Junker / M. C. Mehta (eds.), Environmental Law Across Cultures: Comparisons for Legal Practice, London 2020; *Karl-Peter Sommermann*, Constitutional State and Public Administration, in: Sabine Kuhlmann / Isabella Proeller / Dieter Schimanke / Jan Ziekow (eds.), Public Administration in Germany, Cham 2021; *Jorge V. B. de Andrade et al*., Constitutional Aspects of Distributed Generation Policies for Promoting Brazilian Economic Development, Energy Policy 143 (2020). A rather more common approach in reference to German and Brazilian constitutional objectives is to address problematics surrounding a specific constitutional objective. Although this might also be realized conceptionally, it is, differently to this paper, restrained to one or more specific constitutional objective(s), e.g. *Claudia E. Haupt*, The Nature and Effects of Constitutional State Objectives: Assessing the German Basic Law's Animal Protection Clause, Animal Law 16 (2010); *Petra Minnerop*, The 'Advance Interference-Like Effect' of Climate Targets: Fundamental Rights, Intergenerational Equity and the German Federal Constitutional Court, Journal of Environmental Law 34 (2022); *Eduardo Scheiner Lesch*, Environmental Courts and Tribunals in Brazil and Bolivia: A Comparative Analysis Between Institutional Systems of Environmental Protection, DPCE Online 58 (2023);

These four propositions should not be understood as abstract rules, applicable to any constitutional order that has established constitutional objectives.[14] Instead, the propositions explore possibilities for the influence of constitutional objectives on constitutional interpretation on the basis of concrete constitutional orders, so that the spectrum of application of the propositions and of reflection on them must be considered contextually. Nonetheless, they can be insofar useful and applicable to other constitutional systems besides the Brazilian and the German ones, as they may correspond to a greater or lesser degree to pertinent constitutional circumstances of such constitutional systems. Furthermore, they intentionally address methodological issues of constitutional interpretation that can be as well relevant for other constitutional contexts.[15] While the first proposition will have essentially a normative character, the following three will have primarily a descriptive one.

Moreover, I assume in the propositions that the constitutional jurisdiction is bound by constitutional objectives. "Constitutional binding" will be understood broadly in this work by neither assuming the exclusivity of a constitutional binding through the constitutional text nor through case law. The "binding" of the constitutional jurisdiction will rather partly refer to a dichotomy: What courts are sometimes "supposed" to do as a result of being bound will be hard to separate from what courts "can" do at all within the constitutional structure.[16] In that sense, the paper's mentions to "constitutional interpretation" will also refer only to judicial interpretation. Given that constitutional objectives often contain both final and conditional normative contents, I will consider that especially the former can be realized to a greater or lesser degree, instead of with an all-or-nothing logic.[17]

and *Carlos Eduardo Artiaga Paula* /*Ana Paula da Silva* / *Cléria Maria Lôbo Bittar*, Expansion of the judiciary in the Brazilian public health system, Revista Bioética 27(2019).

14 Some of them may even be better suited to either the German or the Brazilian constitutional context.

15 In this sense, the enforceability or non-enforceability of constitutional objectives by their own normative effects will not be a subject of this article, which will pursue much more methodological and interpretative effects of constitutional objectives. Thus, the approach does not establish primarily a relation to the so-called "interpretation approach" to constitutional objectives, which have been shortly explored in *Weis*, note 3, pp. 931 ff.

16 See also *Pereira*, note 1, pp. 667 ff.

17 This assumption might be confused with the wide-spread definition of legal principles of *Alexy*, according to which – in its first formulation – principles are optimization commands: See *Robert Alexy*, Theorie der Grundrechte, Frankfurt am Main 1986, pp. 75 ff. However, I do not presuppose *Alexy*'s model of principles application for the application of constitutional objectives in this paper. Although the focus of this paper will not be distinguishing constitutional objectives as principles from other constitutional principles, I do assume that constitutional objectives have special features especially because of their distinct final content in comparison to other constitutional principles. Furthermore, I also assume that the normative application of constitutional objectives can reach beyond principles balancing, as the four following propositions will clarify. For a supposition that the "theory of principles" of *Alexy* should be rather grasped and reformulated as a "theory of optimization commands", which could be valuable for deepening characteristics of constitutional objectives that come closer to optimization commands than other constitutional principles: *Ralf Poscher*, Resuscitation of a Phantom? On Robert Alexy's Latest Attempt to Save His Concept of

The paper is structured as follows. Initially, there will be made some preliminary remarks about constitutional objectives in Brazil and Germany, in which I will clarify what I mean by referring to "constitutional objectives" in these constitutional orders. Subsequently, the four propositions will be presented briefly and with support from concrete experiences of the Brazilian and the German constitutional law.[18] They will address, respectively, nuances of the legitimate purpose of the proportionality analysis in light of constitutional objectives, conditioning circumstances of teleological interpretation through constitutional objectives, the influence of constitutional objectives on principles of specific fields of ordinary law, and the possibility of constituting interpretative metanorms through features and practices based on constitutional objectives. Finally, a summarization of the four propositions will be accompanied by a few general remarks about law and politics, constitutional contexts, and the role of legal scholarship in shaping constitutional doctrine.

B. Preliminary remarks about constitutional objectives in Brazil and in Germany

The conceptual locus communis of the Brazilian discussion on constitutional objectives is rather to be found in the broad concept of "programmatic norms", which would encompass a large number of norms of the Brazilian Constitution.[19] According to a traditional Brazilian doctrine, these norms would be constitutional norms that are binding on all branches of the state and seek to achieve social goals through prospective constitutional change.[20]

Principle, Ratio Juris 33 (2020), pp. 146 ff. For a systematization of the "three-rounds" of the Alexy-Poscher debate, *Rafael Giorgio Dalla-Barba* (ed.), The Alexy-Poscher Debate on Legal Principles, Oxford 2025 (forthcoming). For further reflections about these issues, *Fernando Leal*, Ziele und Autorität: Zu den Grenzen teleologischen Rechtsdenkens, Baden-Baden 2014, p. 202 ff.

18 These propositions are based on *Pereira*, note 1, pp. 690 ff.

19 The main foreign influences for the development of this concept in Brazil might have been the doctrines of V. Crisafulli and of J. J. G. Canotilho (referring to a directive constitution), see *Carlos Eduardo Nobre Correia*, Eficácia das Normas Constitucionais Programáticas, Master's Thesis, São Paulo 2012, pp. 35 ff.; *Paulo Roberto Lyrio Pimenta*, A Eficácia das Normas Constitucionais Programáticas da Constituição Federal de 1988 em seu Vigésimo Aniversário: os avanços da jurisprudência do Supremo Tribunal Federal, Revista do CEPEJ 11 (2009), pp. 29 ff.; and *Regina Maria Macedo Nery Ferrari*, Normas Constitucionais Programáticas: Normatividade, operatividade e efetividade, Doctoral Thesis, UFPR, Curitiba 2000, pp. 97 ff. Many authors also mention the influence of the Weimar Constitution (1919) and of the Mexican Constitution (1917) on the social-programmatic character of the Brazilian Constitution: See e.g. *Denise Auad*, Os direitos sociais na Constituição de Weimar como paradigma do modelo de proteção social da atual Constituição Federal Brasileira, Revista da Faculdade de Direito da USP 103 (2008), pp. 344 ff.; *Marcelo Neves*, Constituição de Weimar, presente!, Zeitschrift des Max-Planck-Instituts für europäische Rechtsgeschichte 27 (2019), pp. 444 ff.; and *André Ramos Tavares*, Influência de 1917 na doutrina e nas constituições econômicas brasileiras, in: Hector Fix-Zamudio / Eduardo Ferrer Mac-Gregor (eds.), Ciudad de México 2017, pp. 721 ff.

20 *José Afonso da Silva*, Aplicabilidade das normas constitucionais, São Paulo 1998, p. 138; and *Raul Machado Horta*, Estrutura, natureza e expansividade das normas constitucionais, Revista da Faculdade de Direito da UFMG 33 (1991), pp. 5 ff. On the discussion of emerging subjective rights with

However, this ideal concept has been harshly criticized for contrasting with reality. Some argue that programmatic norms have a "hypertrophic symbolic" or "dead word" character, as they do not pursue a radical-structural transformation of Brazilian social and political conditions.[21] Based on these characteristics, one could argue that the ongoing Brazilian debate on programmatic norms and constitutional objectives involves a complex relationship between doctrinal concepts and the practical implementation of constitutional law.

Despite sharing a basis with programmatic norms, constitutional objectives constitute arguably a specific normative category in Brazilian constitutional law: They are a subcategory of programmatic norms and a higher category for the "fundamental" constitutional objectives listed in Article 3 of the Brazilian Constitution[22], as well as for other constitutional objectives. The objectives of the Brazilian Constitution differ from (primarily) right-guaranteeing, state-structuring and competence norms[23], as well as from constitutional commands to legislate, because constitutional objectives are binding on all branches of the state.[24] Furthermore, constitutional objectives are norms with a fundamentally legal-objective, future-oriented, and final character – although they may contribute to the establishment of subjective rights and to norms with a conditional character.[25]

negative or positive character from programmatic norms, *Barroso*, note 10, pp. 127 ff.; and *Oliveira*, note 3, pp. 35 ff.

21 *Neves*, note 5, pp. 102 ff.; and *Bello et al.,* note 10, pp. 1802 ff. Differently in: *Barroso*, note 10, pp. 134 ff.

22 Article 3 of the Brazilian Federal Constitution states: "Article 3. The fundamental objectives of the Federative Republic of Brazil are: I – to build a free, fair and solidary society; II – to guarantee national development; III – to eradicate poverty and marginalization and to reduce social and regional inequalities; IV – to promote the well-being of all, without prejudice as to origin, race, sex, color, age and any other forms of discrimination".

23 For a similar categorization of constitutional norms, albeit without specifying "constitutional objectives" as a constitutional category, *Luís Roberto Barroso*, A efetividade das normas constitucionais revisitada, Revista de Direito Administrativo 197 (1994), pp. 37 ff. For criticism about this categorization of *L. R. Barroso*, which, however, do not affect the merely purpose of differentiating constitutional objectives from the mentioned kinds of constitutional norms, see *Oliveira*, note 3, pp. 36 ff.; and *Christian Edward Cyril Lynch* / *José Vicente Santos de Mendonça*, Por uma história constitucional brasileira: uma crítica pontual à doutrina da efetividade, Revista Direito e Práxis 8 (2017), pp. 982 ff.

24 Bonavides has similarly written on what he called "programmatic norms in stricto sensu", *Paulo Bonavides*, Curso de Direito Constitucional, São Paulo 2004, p. 250.

25 For possible connections of constitutional objectives with subjective individual rights and even social rights, see *Oliveira*, note 3, pp. 39 ff.; *Barroso*, note 10, pp. 127 ff.; *Ana Paula de Barcellos*, O mínimo existencial e algumas fundamentações: John Rawls, Michael Walzer e Robert Alexy, Revista de Direito Público Contemporâneo 1 (2017), p. 9; and *Andreas J. Krell*, Realização dos direitos fundamentais sociais mediante controle judicial da prestação dos serviços públicos básicas (uma visão comparativa), Revista de Informação Legislativa 144 (1999), p. 255. The future-oriented and final character of constitutional objectives distinguishes them from the constitutional fundaments and the constitutional principles for international relations, as outlined, respectively, in Articles 1 and 4, all sections, of the Brazilian Constitution. Although this is only a provisional and exemplary "catalog", norms in the Brazilian Constitution that are to be considered constitutional

The German basic concept of constitutional objectives (Staatszielbestimmungen) is relatively comparable to the Brazilian one: Constitutional objectives are applicable objective constitutional norms that legally bind all state to pursue specific goals without guaranteeing subjective rights.[26] Nonetheless, the (well-established) German doctrine on constitutional objectives assumes that they have a special binding effect on the legislature, without excluding their guiding interpretative effect on the executive and the judiciary.[27] Almost all German constitutional objectives – which are less numerous than the Brazilian ones – have been incorporated into the Basic Law by constitutional amendments[28] and are found only scattered throughout the constitutional text.

objectives, at least in part, and that go beyond the fundamental constitutional objectives of Article 3 of the Brazilian Constitution can arguably be found in Articles 4, sole paragraph; 144, caput; 170, sections I to IX; 193; 194, sole paragraph and sections I to VII; 196; 201, caput; 203; 204; 205; 215 to 218; 225; 227, paragraph 1; and 230 of the Brazilian Constitution, as discussed in *Pereira*, note 1, pp. 683 ff.

26 *Sommermann*, note 3, p. 5; *Harmut Maurer* / *Kyrill-Alexander Schwarz*, Staatsrecht I: Grundlagen, Verfassungsorgane, Staatsfunktionen, München 2023, pp. 128 ff.; *Stefan Korioth* / *Michael W. Müller*, Staatsrecht I: Staatsorganisationsrecht unter Berücksichtigung europäischer und internationaler Bezüge, Stuttgart 2022, pp. 116 ff.; *Christoph Degenhart*, Staatsrecht I: Staatsorganisationsrecht, Heidelberg 2022, p. 106. This conception has been early influenced by a noteworthy article of Scheuner, see *Ulrich Scheuner*, Staatszielbestimmungen, in: Joseph Listl / Wolfgang Rüfner (eds.), Staatstheorie und Staatsrecht: Gesammelte Schriften, Berlin 1978, p. 224 ff.; and *Sommermann*, note 3, p. 349. The first use of the terminology "*Staatszielbestimmung*" is often associated to a speech of H. P. Ipsen, see *Hans Peter Ipsen*, Über das Grundgesetz: Rede gehalten anlässlich des Beginns des neuen Amtsjahres des Rektors der Universität Hamburg am 17. Nov. 1949, Hamburg 1950, pp. 14 ff.; *Heinz-Christoph Link*, Staatszwecke im Verfassungsstaat – Nach 40 Jahren Grundgesetz, Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 48 (1990), p. 18; and *Daniel Hahn*, Staatszielbestimmungen im integrierten Bundesstaat: Normative Bedeutung und Divergenzen, Berlin 2010, pp. 63 ff. Ipsen himself would have used the terminology from the doctoral thesis of *K. Wilk* and have applied it to the context of the year 1949, *Hans Peter Ipsen*, Das große „Staatsrecht" von Klaus Stern, Archiv des öffentlichen Rechts 103 (1978), pp. 423 ff.

27 This has also been strongly influenced by the results of the expert commission "Staatszielbestimmungen / Gesetzgebungsaufträge", formed by the German Federal Ministries of the Interior and of Justice in 1983, relatively short after other European constitutions (such as the Greek from 1975, the Portuguese from 1976, the Spain from 1978, and even the of the Swiss Canton Aargau from 1980) had established similar norms: Report of the Experts Commission "Staatszielbestimmungen / Gesetzgebungsaufträge", Bonn 1983; *Peter Häberle*, Die Kontroverse um die Reform des deutschen Grundgesetzes, Zeitschrift für Politik 39 (1992), pp. 235 ff.; *Sommermann*, note 3, pp. 349 ff.; and *Link*, note 26, p. 48.

28 An exception is the social state's principle (Article 20 of the Basic Law), which is largely considered as a constitutional objective in Germany and was already established in the original version of the German Basic Law, e.g. *Roman Herzog*, Staatszielbestimmungen, in: Rainer Pitschas / Arnd Uhle (eds.), Wege gelebter Verfassung in Recht und Politik: Festschrift für Rupert Scholz zum 70. Geburtstag, Berlin 2007, p. 220. The German discussion on the nature of the social state normativity is, however, considerably plural, as it has been described not only as a constitutional objective, but instead also as a constitutional task (Verfassungsauftrag), general legal principle, state-structural principle, or even as no legal concept. For a detailed overview of diverse approach-

Furthermore, the German conceptualization of constitutional objectives encompasses a remarkable and particular imprint of German constitutional doctrine (Verfassungsdogmatik), which makes itself felt especially in detailed conceptual distinction between constitutional objectives and other constitutional categories. For instance[29], constitutional objectives differ particularly from the categories of implicit constitutional or state objectives[30], general state-structural principles[31], constitutional tasks[32], social rights[33], and specific constitutional commands to legislate.[34]

In light of this, it is evident that the Brazilian Constitution and the German Basic Law – originally and also after constitutional amendments – posed different challenges to the concretization of constitutional objectives. The "festive loading" of the Brazilian

es, see *John Philipp Thurn*, Welcher Sozialstaat?: Ideologie und Wissenschaftsverständnis in den Debatten der bundesdeutschen Staatsrechtslehre 1949-1990, Tübingen 2013.

29 For detailed categorical differentiations of constitutional objectives to other kinds of constitutional norms, *Hahn*, note 26, pp. 66 ff.; *Scheuner*, note 26, pp. 227 ff.; *Jakob Michael Stasik*, Staatszielbestimmung im Grundgesetz zugunsten des Sports?, Hamburg 2017, pp. 14 ff.; and *Nicolai Müller-Bromley*, Staatszielbestimmung Umweltschutz im Grundgesetz?, Berlin 1990, pp. 35 ff.

30 For a differentiation between explicit and implicit constitutional objectives of the German Basic Law, see *Pereira*, note 1, fn. 7.

31 While constitutional objectives substantively direct state action, state-structural principles define the forms and modus operandi by which state action and constitutional objectives are to be concretized in the constitutional order, see explicitly *Sommermann*, note 3, pp. 372 ff.; and *Hahn*, note 26, p. 80. This differentiation is especially debatable in the case of the social state, which could fit (simultaneously) into both categories, see note 28.

32 It has been historically controversial in German constitutional doctrine whether constitutional tasks (Verfassungsaufträge) are to be understood as more concrete or more general than constitutional objectives (*Sommermann*, note 3, pp. 364 ff.). According to the former view, tasks could be established by means of constitutional objectives (e.g. *Link*, note 26, p. 19). The latter argues that a broad concept of constitutional tasks would be able to encompass the totality of constitutional norms with a final character (e.g. *Hahn*, note 26, p. 79; and *Christian Walter*, "Offene Staatlichkeit" als Verfassungsauftrag: Wie Völkerrecht und Verfassungsrecht zur Bewältigung globaler Gemeinwohlherausforderungen zusammenwirken, Jahrbuch des öffentlichen Rechts der Gegenwart 72, Tübingen 2024, pp. 293 ff.).

33 The approximation of constitutional objectives to social rights is a topic that has often been discussed in Germany. This discussion has focused on instances where social rights are enshrined in the form of constitutional rights without a subjective and justiciable character. However, this possibility of implementing social rights in a subjective or objective manner, along with the requirement of a specific social orientation, has served to distinguish both, see *Jörg Lücke*, Soziale Grundrechte als Staatszielbestimmungen und Gesetzgebungsaufträge, Archiv des öffentlichen Rechts 107 (1982), pp. 18; *Sommermann*, note 3, pp. 371 ff.; and *Hahn*, note 26, p. 76.

34 *Scheuner*, note 26, pp. 230 ff.; *Sommermann*, note 3, pp. 362 ff.; and *Hahn*, note 26, pp. 66 ff. For a prominent article about specific constitutional commands to legislate, see *Peter Lerche*, Das Bundesverfassungsgericht und die Verfassungsdirektiven: Zu den „nicht erfüllten Gesetzgebungsaufträgen", Archiv des öffentlichen Rechts 90 (1965).

constitutional text[35] was aimed at an ambitious and holistic transformation of the Brazilian life reality. In comparison, the establishment of constitutional objectives in the Basic Law has been more gradual, leaving a large scope for action to the federal legislation and to the federated states. State action has been redirected over time on some central matters through the adoption of new constitutional objectives, but without the same holistic textual ambition as the Brazilian constitution.

Nevertheless, as shown above, their basic conceptions of constitutional objectives are comparable. Hence, discussing possibilities of judicial application of constitutional objectives based on Brazilian and German constitutional law means also discussing different developments of a comparable concept.

C. Proportionality Test, Legitimate Purpose and Constitutional Teleology

The judicial interpretation of constitutional law in Brazil and in Germany is methodologically marked by the pregnant presence of the proportionality test. Especially in the German application of proportionality, teleology and final content play an interesting role, as the first step of the proportionality test is usually the proof of a legitimate purpose.[36] Accordingly, the state measure to be proven by the proportionality analysis must pursue a constitutionally legitimate purpose. By legitimate understands the FCC "a purpose not prohibited by the Constitution. No additional element, such as a 'sufficient importance' or 'pressing need', is required".[37]

Determining what is the legitimate purpose of a particular state measure is not merely a factual issue, however, but first and foremost a matter of legal interpretation.[38] The Court often has the power to construct the legitimate purpose of a state measure, rather than simply discovering it. This is because a law or its creators, e.g., may name multiple purposes for the measure.[39] With the definition of the legitimate purpose the Court can

35 *Rainer Schmidt*, Verfassung und Verfassungsgerichtsbarkeit: Deutschland und Brasilien im Vergleich, in: Rainer Schmidt / Virgílio Afonso da Silva (eds.), Verfassung und Verfassungsgerichtsbarkeit: Deutschland und Brasilien im Vergleich, Baden-Baden 2012, p. 145.

36 Especially the considered inaugural decision of the Federal Constitutional Court regarding prportionality, BVerfGE 7, 377, para. 87 – Pharmacies Case (1958). For clarification, see also *Dieter Grimm*, Proportionality in Canadian and German Constitutional Jurisprudence, University of Toronto Law Journal 57 (2007), pp. 387 ff.; *Andrej Lang*, Proportionality Analysis by the German Federal Constitutional Court, in: Mordechai Kremnitzer / Talya Steiner / Andrej Lang (eds.), Proportionality in Action: Comparative and Empirical Perspectives on the Judicial Practice, Cambridge 2020, p. 37.

37 *Grimm*, note 36, p. 388.

38 *Oliver Lepsius*, Chancen und Grenzen des Grundsatzes der Verhältnismäßigkeit, in: Matthias Jestaedt / Oliver Lepsius (eds.), Verhältnismäßigkeit: Zur Tragfähigkeit eines verfassungsrechtlichen Schlüsselkonzepts, Tübingen 2015, p. 38.

39 Ibid.

pre-structure the balancing regarding whether the purpose of the state measure to justify a certain intervention in the scope of protection of a fundamental right.[40]

Notwithstanding the purposively highly loaded characteristics of constitutional objectives, these norms are, in the jurisprudence of the FCC, usually neither used more frequently than other constitutional norms to justify constitutionally legitimate purposes (quantitatively), nor are they treated differently than other norms that provide grounds for legitimate purposes, despite their noteworthy purposive contents (qualitatively).[41] Therefore, it is questionable whether there is a legal relevance for the proportionality test not only in the judicial determination of what is the purpose pursued by a state measure[42], but also in the determination of on what legal basis this state measure can be considered as "legitimate".[43]

In view of that, my first proposition is that the purpose of a state measure that is considered "legitimate" on the basis of a constitutional objective may require a specific treatment in the sequence of the proportionality analysis.

Several factors could speak in favor of a differentiated treatment by the Federal Constitutional Court of a pursued purpose that can be justified as "legitimate" on the basis of a constitutional objective. First, constitutional objectives have a special binding final and directive content on state measures in comparison to other constitutional norms. Second, compared to other constitutional norms, there is a particularly wide scope for the legislature to determine the mode of implementation of constitutional objectives in the German context, which could play a role for a distinct treatment especially of the reasonableness[44] (fourth step of the proportionality test).[45] Third, this differentiated consideration of constitutional objectives could also be important for the further proportionality test in the question of whether the intervening measure can be supported by a core content

40 Ibid.; *Grimm*, note 36, p. 388. The balancing is the last step of the German proportionality test and is often reached in cases judged by the FCC.

41 Indications about the quantitative aspect can be seen in *Christoph Engel*, Das legitime Ziel in der Praxis des Bundesverfassungsgerichts: Eine quantitative Analyse der Entscheidungen des Jahres 2011, in: Matthias Jestaedt / Oliver Lepsius (eds.), Verhältnismäßigkeit: Zur Tragfähigkeit eines verfassungsrechtlichen Schlüsselkonzepts, Tübingen 2015, pp. 117 ff. The qualitative aspect, on the other hand, can be asserted through the conspicuous doctrinal lack in addressing such a differentiation when systematizing the application of proportionality in consideration of the FCC's jurisprudence, e.g. *Thorsten Kingreen* / *Ralf Poscher*, Grundrechte, Staatsrecht II, Heidelberg 2024, pp. 405 ff.; *Niels Petersen*, Deutsches und Europäisches Verfassungsrecht II: Grundrechte und Grundfreiheiten, München 2022, pp. 29 ff.; *Gerrit Manssen*, Staatsrecht II: Grundrechte, München 2024, pp. 80 ff.; *Friedhelm Hufen*, Staatsrecht II: Grundrechte, München 2023, pp. 114 ff.; and *Jörn Ipsen*, Staatsrecht II: Grundrechte, München 2019, pp. 49 ff.

42 *Lepsius*, note 38, p. 38.

43 *Sommermann*, note 3, p. 423.

44 For different translations of the fourth step of the proportionality test in Germany. see *Lang*, note 36, p. 37.

45 The relevance of considering the legislative scope for decision-making purpose analysis has also been discussed by Schlink, *Bernhard Schlink*, Abwägung im Verfassungsrecht, Berlin 1976, p. 152, 180.

of a constitutional objective, which might deserve a special judicial protection, or only by a statutory regulation of a constitutional objective. Finally, it could be considered to what extent the Federal Constitutional Court should in a specific case possibly participate in the implementation of a pursued purpose that is perceived as legitimate based on a constitutional objective. This hypothesis does not assume unreflective judicial activism, but rather explores possibilities for integrating the complexity of constitutional objectives into the treatment of collisions between constitutional norms in the proportionality analysis.

Basically, the same problem could be discussed in the Brazilian constitutional law. However, it is important to bear in mind two particularities: First, the Brazilian legal doctrine does not give much importance to a clear definition of legitimate purposes of state measures. This tendency is prevalent in the current constitutional doctrine, where the relationship between ends and means is often blurred between the criteria of suitability, necessity and proportionality in the strict sense or reasonableness.[46] Second, it could be questioned to what extent a categorical and differentiated consideration should be made between the purposes pursued by state measures that are linked to the fundamental objectives (Article 3 of the Brazilian Federal Constitution) and those that cannot be linked to them. In any case, this line of thought stands in contrast to the constitutional objectives of the German Basic Law. In other words, should the special categorization of fundamental objectives give rise to particular concerns when determining the legitimate purposes of state measures in comparison to other constitutional objectives?

D. Constitutional Objectives and Interpretation Based on Teleology

Besides the proportionality test, the FCC and the STF frequently use teleology itself as a method to interpret and apply constitutional law.[47] Constitutional teleology is used both retrospectively and prospectively. The former is the case through constitutional interpretations based on the purpose of the constitutional text or on the purpose of the constitutional

46 *Humberto Ávila*, Teoria dos Princípios: da definição à aplicação dos princípios jurídicos, São Paulo 2005, pp. 116 ff.; *Gilmar Ferreira Mendes* / *Paulo Gustavo Gonet Branco*, Curso de Direito Constitucional, São Paulo 2021, pp. 439 ff.; *Virgílio Afonso da Silva*, O proporcional e o razoável, Revista dos Tribunais 798 2002, pp. 34 ff. A critical account can be found in *Dimitri Dimoulis* / *Leonardo Martins*, Teoria geral dos direitos fundamentais, São Paulo 2014, pp. 182 ff.

47 *Dieter Grimm*, Verfassung, Verfassungsgerichtsbarkeit, Verfassungsinterpretation an der Schnittstelle von Recht und Politik, in: Dieter Grimm (ed.), Verfassungsgerichtsbarkeit, Berlin 2021, p. 168; *Michaela Hailbronner* /*Stefan Martini*, The German Federal Constitutional Court, in: András Jakab / Arthur Dyèvre / Giulio Itzcovich (eds.), Comparative Constitutional Reasoning, pp. 376 ff.; *Rodrigo Brandão* / *André Farah*, Consequencialismo no Supremo Tribunal Federal: uma solução pela não surpresa, Revista de Investigações Constitucionais 7 (2020); *Fernando Leal*, Juízes Pragmáticos São Necessariamente Juízes Ativistas?, Revista Brasileira de Direito 17 (2021), pp. 6 ff.

legislators.[48] Second is the case by diverse considerations of consequences of judicial decisions.[49]

Both have been subject of judgment of the STF in the writ of injunction (MI) No. 4.733[50]. The Brazilian Association of Gays, Lesbians and Transgenders (ABGLT) filed this writ against the Brazilian National Congress in order to obtain the specific criminalization of all forms of homophobia and transphobia, since there was no statutory regulation in this sense and the exercise of constitutional rights by the LGBT population would have been severely restricted due to the high degree of violence and discrimination against the LGBT population in society[51]. In face of that, the Court judged considering different dimensions of the constitutional objective of promoting the well-being of all, without prejudice or forms of discrimination of any kind (Article 3, section IV of the Brazilian Constitution).

In this context, my second proposition is that constitutional objectives are able to bind teleological interpretations of constitutions in a deontological dimension and/or in a teleological dimension in the strict sense.[52] I will clarify this and then return to the judgment of the MI 4.733, which I will use to exemplify this dimensional differentiation of constitutional binding and to propose an interpretation of some aspects of this judgment.

The deontological dimension concerns above all the question whether the constitutional objectives may influence any teleological interpretation of constitutional norms, insofar as

48 For discussions on the so-called "objective" and "subjective" approaches to teleological interpretation, see *Thomas Wischmeyer*, Zwecke im Recht des Verfassungsstaates: Geschichte und Theorie einer juristischen Denkfigur, Tübingen 2015, pp. 342 ff.; *Aharon Barak*, Purposive Interpretation in Law, Princeton / Oxford 2005, pp. 120 ff. and 148 ff.

49 Brandão / Farah, note 47; *Wolfgang Hoffmann-Riem*, Innovation und Recht – Recht und Innovation: Recht im Ensemble seiner Kontexte, Tübingen 2016, pp. 88 ff.; and *Philipp Lassahn*, Rationalität und Legitimität der Folgenberücksichtigung, Archiv für Rechts- und Sozialphilosophie 99 (2013).

50 STF, MI 4.733/DF, Pleno, Rel. Min. Edson Fachin, pub. in 06.13.2019. The guarantee of writs of injunction is especially regulated in Article 5, section LXXI of the Brazilian Constitution, which states: "a writ of injunction shall be granted whenever the lack of regulatory provisions hinders the exercise of constitutional rights and liberties in addition to the prerogatives inherent in nationality, sovereignty and citizenship".

51 Ibid., pp. 5 ff.

52 This categorial distinction is based on a similar differentiation of Habermas in *Jürgen Habermas*, Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats, Frankfurt am Main 1994, pp. 255, 310 ff.,562, see also: *Pereira*, note 1, pp. 692 ff. This proposition does not presuppose a general teleological thinking of constitutional objectives, which would necessarily and systemically influence all cases of a certain constitutional jurisdiction. Such an assumption can lead not only to a generalization of the content of constitutional objectives, but also to an essentially rhetorical effect in constitutional reasoning, which can be marked by confusion and imprecise mixtures of the content of different constitutional objectives. The proposition pertains rather to the influence of constitutional objectives on the purposive interpretation in its dimensions as practice, approach, and method of constitutional interpretation. Such a general teleological thinking is assumed by *Massaú / Bainy*, note 13, pp. 374 ff.

they are shown to be relevant in view of the circumstances of the specific case in question. The admission of a deontological dimension would merely mean that in constitutional teleological interpretation, related constitutional objectives would have to be taken into account for the determination of the concrete telos of constitutional norms (primarily retrospective use of constitutional objectives)[53]. By taking their normative content into account when determining constitutional teleology, the normative promotion of the constitutional objectives would then be present in interpretative practices of constitutional courts.

The teleological dimension in the strict sense concerns more the question of how the constitutional objectives influence the teleological interpretation of constitutional norms. Assuming that constitutional objectives bind teleological interpretations in the strict sense, is to assume that a constitutional interpreter is obliged in a specific case to choose the interpretation that not only better accommodates the relevant constitutional objective in comparison to all other possible interpretations, but also best optimizes its factual effect (primarily prospective use of constitutional objectives).[54] This dimension goes beyond the deontological dimension by assuming that the respective constitutional court is capable of both knowing and autonomously determining the best possible way of implementing constitutional objectives in a specific case. Although the deontological dimension also empowers a court to assume the normativity of constitutional objectives, it is limited to processing the influence of constitutional objectives on the teleological interpretation in a normative framework, as opposed to an optimizing framework, which would characterize the teleological dimension in the strict sense[55].

The admission of only a deontological dimension of influence of constitutional objectives on constitutional teleological interpretation would mean that judicial decisions could only diverge in their telos from the relevant constitutional objectives to the specific case by specific reasoning that addresses this issue. Otherwise, it would be binding to choose interpretative possibilities that do not undermine the relevant constitutional objectives to the specific case and, where possible, promotes them. Even by leaving aside the teleological aspect in the strict sense, a minimum level of reasoning would be deontologically required,

53 For specific issues arising from this assumption, such as possible normative collisions between different constitutional objectives, the influence of implicit constitutional objectives and the teleological content of constitutional norms that are not primarily to be regarded as constitutional objectives, *Sommermann*, note 3, pp. 411 ff.; *Klaus Günther*, Der Wandel der Staatsaufgaben und die Krise des regulativen Rechts, in: Dieter Grimm (ed.), Wachsende Staatsaufgaben – sinkende Steuerungsfähigkeit des Rechts, Baden-Baden 1990, pp. 63 ff.

54 See e.g. *Barcellos*, note 25, pp. 9 ff.; *Eros Roberto Grau*, Das Verhältnis der Richterschaft zum Recht: Auslegung und Anwendung des Rechts und der Rechtsgrundsätze, Baden-Baden 2019, pp. 93 ff.

55 For accounts on deontology and optimization in constitutional law in general, e.g. *Günther*, note 53, pp. 63 ff.; *Habermas*, note 52, pp. 309 ff.; *Alexy*, note 17, pp. 75 ff.; *Sommermann*, note 3, pp. 355 ff.; *Ernst-Wolfgang Böckenförde*, Grundrechte als Grundsatznormen: Zur gegenwärtigen Lage der Grundrechtsdogmatik, Der Staat 29 (1990), pp. 17 ff.; *Ronald Dworkin*, Taking Rights Seriously, Cambridge 1978, pp. 22 ff.

not in order to determine the best way to implement the constitutional objective, but rather to justify why the decision furthers the applicable constitutional objectives to some extent, or at least does not violate them normatively.[56]

Many opinions of the Supreme Court's judges in the MI 4.733 argued based on the constitutional objective of well-being of all and non-discrimination of Article 3, section IV of the Brazilian Constitution.[57] At issue in the case was not only the declaration of a lack of regulatory provision towards the legislature with the fixation of a deadline for filling this legal gap, but also the application of Federal Law No. 7.716 against homophobia and transphobia until the legislature would enact a legal provision[58]. This Federal Law defines crimes of discrimination and prejudice due to race, color, ethnicity, religion, or national origin. In face of that, some judges have argued that not only the acknowledgment of a lack of regulatory provision, but also a provisional application of this criminal law to discrimination towards homosexuals or transsexuals could mean a furthering of Article 3, section IV and of Article 5, section XLI[59] of the Constitution[60] – despite jeopardizing the principle of legality in criminal law (Article 5, section XXXIX of the Brazilian Constitution[61]).

A division of binding effects of constitutional objectives on teleological interpretation in a deontological dimension and a teleological dimension in the strict sense could have the following consequences for the comprehension of this concrete case. First, based on Article 3, section IV of the Brazilian Constitution, one could say that a deontological dimension led to a rejection of interpretative possibilities that would maintain an unreasonable differentiation of state punishment of multiple forms of discrimination regulated in the Federal Criminal Law No. 7.716 in comparison to state punishment of discrimination due to sexual identities or preferences. Teleologically, the legislative omission (and the legislative delay) in regulating this punishment could by no means further a general well-being combined with the rejection of all forms of discrimination. That is perceptible both retrospectively and prospectively, i.e., the omission could neither correspond to argued intentions from the constitutional norm nor contribute to any form of furthering the realization of the constitutional objective of Article 3, section IV of the Constitution.

Second, the admission of a teleological dimension in the strict sense led to the possibility of a provisional application of the Federal Criminal Law No. 7.716 also to homophobic

56 *Pereira*, note 12, pp. 468 ff.

57 STF, MI 4.733/DF, note 50.

58 Ibid., p. 6.

59 According to Article 5, section XLI of the Brazilian Constitution: "the law shall punish any discrimination that may attempt against fundamental rights and liberties".

60 STF, MI 4.733/DF, note 50, pp. 112 ff., 147 ff. and 190 ff. (respectively, opinions of Judges Rosa Weber, Luiz Fux and Cármen Lúcia). Differently in the short, decontextualized and virtually rhetoric reference of Judge Dias Toffoli to Article 3, section IV of the Constitution, Ibid., 280.

61 "There is no crime unless a prior law defines it, nor is there a punishment unless a prior law so provides" (Article 5, section XXXIX of the Brazilian Constitution). See also the dissenting opinion of Judge Ricardo Lewandowski in STF, MI 4.733/DF, note 50, p. 235 ff.

and transphobic discrimination until there would be another regulation by the legislature. Even though the Court argued that this would be justified by an "interpretation in accordance with the constitution"[62], the fact is that the judges opted for choosing what they held for the best means for guaranteeing the sought protection against discrimination. This would, teleologically, further the constitutional objective of guaranteeing the well-being of all, without any discrimination (Article 3, section IV of the Constitution) in the best possible way for the circumstances of the case at least until further regulation by the legislature – also considering the skepticism of the Court that the conservative Brazilian Legislature would take action in regulating this matter.[63]

E. Constitutional Law and Ordinary Law

My third proposition is that constitutional objectives may provide a textual basis for defining and interpreting important legal principles in various fields of ordinary law.

This is particularly evident in German environmental law. The only provision in the Basic Law that directly provides legal protection to the environment through substantial constitutional law is in Article 20a,[64] This provision is considered a constitutional objective in Germany[65] and calls for state protection of the natural foundations of life and animals,

62 STF, MI 4.733, note 50, pp. 26 and 99 ff. See also the concurring opinion of Judge Luís Roberto Barroso in Ibid.., p. 79 ff., in which he proposed an interpretation in accordance with the constitution of qualifying and aggravating criminal rules relating to frivolous or torpid motives, in order to include in them offenses based on homophobic and transphobic motivation.

63 STF, MI 4.733, note 50, pp. 75 ff., 128 ff. and 245 ff.

64 According to Article 20a of the German Basic Law: "Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order". Other articles of the Basic Law secure a legal protection of the environment especially by defining competence norms, e.g. Article 72, paragraph 3, No. 2; and Article 74, paragraph 1, No. 15 and No. 29 of the German Basic Law. The substantial constitutional protection of the environment has been also justified based on other constitutional norms, that are not specifically designed for environmental protection, such as (controversially) the human dignity (Article 1, paragraph 1 of the Basic Law) and the general freedom of action (Article 2, paragraph 1 of the Basic Law), BVerfGE 157, 30, para. 113 ff. and 182 ff. – Climate Ruling (2021). For controversies in Germany about an ecological minimum level of existence based on human dignity and the right of life, see *Christian Calliess*, Das "Klimaurteil" des Bundesverfassungsgericht: "Versubjektivierung" des Art. 20a GG?, Zeitschrift für Umweltrecht 6 (2021), p. 357; *Wolfgang Kahl* / *Klaus Ferdinand Gärditz*, Umweltrecht: Ein Studienbuch, München 2023, pp. 61 ff.; *Andreas Voßkuhle*, Umweltschutz und Grundgesetz, Neue Zeitschrift für Verwaltungsrecht 32 (2013), p. 6; *Sabine Schlacke*, Umweltrecht, Baden-Baden 2021, p. 70.

65 *Christian Calliess*, Rechtsstaat und Umweltstaat: Zugleich ein Beitrag zur Grundrechtsdogmatik im Rahmen mehrpoliger Verfassungsrechtsverhältnisse, Tübingen 2001, pp. 74 ff.; *Peter Badura*, Staatsrecht I: Systematische Erläuterung des Grundgesetzes für die Bundesrepublik Deutschland, München 2018, pp. 419 ff. For possible new developments from Article 20a of the Basic Law, based on the BVerfGE 157, 30 – Climate Ruling (2021), that would go beyond of traditional doctrinal features of Staatszielbestimmungen, see *Lorenz Lang*, Art. 20a GG in der Hand des Bun-

while also being mindful of its responsibility towards future generations. This appears to have the consequence that some central normative contents of environmental protection law are concentrated in Article 20a of the Basic Law, such as the precautionary principle (Vorsorgeprinzip) and the sustainability principle.[66] As a result, it seems that for constitutional interpretation the constitutional objective of Article 20a of the Basic Law provides the foundation for much of the argumentation and interpretation of environmental law on a constitutional level by giving it a textual background.[67]

In the Brazilian case, social security and tax laws are guided by the principles of solidarity and national development, which are based on the fundamental constitutional objectives outlined in Article 3, sections I and II of the Brazilian Federal Constitution. These principles can have various legal consequences.[68] In this sense, these constitutional objectives serve to condition constitutional interpretations related to these fields of law by subjecting them to a textual ground from which they can be argued in constitutional terms.

These two examples suggest possibilities of how constitutional objectives may serve as a measure of plausibility in the acceptance and development of specific content of central legal principles of ordinary law. Since the constitutional status of some of these principles are acknowledged and developed by the legal doctrine through the support on constitutional objectives that have been explicitly included in a constitutional text, it can be also said that constitutional objectives may as well affect interpretations of constitutional law that are related to specific fields of law which have been themselves influenced by these constitutional objectives.

Nevertheless, legal constructions based on vague and broad constitutional objectives can often be difficult to distinguish from rhetorical uses of them in constitutional reasoning.[69] This is particularly salient in the Brazilian case. However, despite dangerously blurring the legal content of constitutional objectives, such misuses do not diminish possibilities of defining and interpreting the scope of constitutionalized legal principles of

desverfassungsgerichts: Potential für einen Anspruch auf Gesetzgebung?, Natur und Recht 44 (2022); *Calliess*, note 61.

66 See especially *Calliess*, note 65, pp. 153 ff.; *Kahl / Gärditz*, note 64, pp. 93 ff., 100; *Schlacke*, note 64, pp. 52, 56.

67 See references to these principles of environmental law in BVerfGE 157, 30, para. 229 ff. – Climate Ruling (2021), see also *Kahl / Gärditz*, note 64, pp. 93 ff.

68 *Pereira*, note 1, pp. 680 ff. See also: STF, RE 381.367/RS, Pleno, Rel. Min. Marco Aurélio, pub. in 10.26.2016, 476 ff.; STF, RE 290.079-6/SC, Rel. Min. Ilmar Galvão, pub. in 10.17.2001, 1047; and STF, ADC 41/DF, Pleno, Rel. Min. Roberto Barroso, pub. in 06.08.2017, 39 ff. For an account in English of further applications of the Brazilian solidarity's principle, *Massaú / Bainy,* note 13, p. 372 ff.

69 About rhetoric uses of principles in the constitutional reasoning of the STF, see *Marcelo Neves*, Constitutionalism and the Paradox of Principles and Rules: Between the Hydra and Hercules, Oxford 2021, pp. VII-VIII; *Karina Nathércia Sousa Lopes*, Princípio da Proporcionalidade: questionamentos sobre sua consistência e riscos do uso retórico do STF, Master's Thesis, UnB, Brasília 2015, pp. 78 ff.

various fields of ordinary law on the basis of constitutional objectives. It "just" misguides them.

F. Metanorms in Constitutional Interpretation?

Finally, my fourth proposition is that constitutional objectives may give rise to metanormative preconceptions in constitutional interpretation.

In a previous occasion, I raised the hypothesis that the principle of Europarechtsfreundlichkeit (literally, friendliness towards European law), which is based on the constitutional objective of Article 23, paragraph 1, part 1 (in connection with the preamble) of the German Basic Law[70], may have been used in part as a metanormative predefinition for the constitutional interpretation.[71] Interpreting as "friendly" or "not friendly" towards European law has been presupposing a predetermination or a prior understanding of constitutional interpretation itself. Even suppressing European law-friendliness in specific cases sometimes does not lead directly to a legal consequence, but only confronts the interpreters with the possibility of interpreting the constitution without this prior understanding.[72]

In the Mangold / Honeywell ultra vires review decision, e.g., the Second Senate of the Federal Constitutional Court held that the ultra vires review may only be exercised in a manner that is friendly to European law.[73] Thereby, the Court rejected other possible

70 The first part of Article 23, paragraph 1 of the Basic Law states: "With a view to establishing a United Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to democratic, social and federal principles, to the rule of law and to the principle of subsidiarity and that guarantees a level of protection of basic rights essentially comparable to that afforded by this Basic Law". According to the first and second part of the Preamble of the Basic law: "Conscious of their responsibility before God and man, inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law".

71 *Pereira*, note 1, pp. 676 ff. For an overview in English about the principle of "Europarechtsfreundlichkeit", see *Jacques Ziller*, The German Constitutional Court's Friendliness Towards European Law: On the Judgment of Bundesverfassungsgericht over the Ratification of the Treaty of Lisbon, European Public Law 16 (2010).

72 Although it must be also acknowledged that leaving aside European law-friendliness aside in concrete cases may have to do with interpretative or argumentative strategies of reinforcing the sovereignty or autonomy of the German state before to the European Union under specific circumstances. Furthermore, it may be related to concurrent relations between the German Federal Constitutional Court and European Courts, such as the European Court of Human Rights and the European Court of Justice. About these matters, *Robert Chr. van Ooyen*, Die Staatstheorie des Bundesverfassungsgerichts und Europa: Von Solange über Maastricht und Lissabon zur EU-Grundrechtecharta, Baden-Baden 2022; *Dieter Grimm*, Die Rolle der nationalen Verfassungsgerichte in der europäischen Demokratie, in: Dieter Grimm (ed.), Verfassungsgerichtsbarkeit, Berlin 2021.

73 BVerfGE 126, 286, para. 58 ff. – Ultra Vires Ruling Honeywell (2010). The Court based the acknowledgment of Europarechtsfreundlichkeit on the argumentation of the Lissabon Ruling, see BVerfGE 123, 267, paras. 225 ff. – Lisbon Ruling (2009). According to Article 79, paragraph 3 of the Basic Law: "Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation in principle in the legislative process, or the principles laid down in Articles

interpretations of the facts of the case that were not in line with European law. On another account, in the second judgment on the European arrest warrant, the Federal Constitutional Court justified not only the non-application of the principle of the primacy of Union law (Anwendungsvorrang des Unionsrechts), but also the principle of European law-friendliness. The Court reviewed the extent to which the transfer of sovereign rights to the European law is permitted by the Basic Law, taking into account the constitutional identity of the Basic Law as outlined in Article 79, paragraph 3 in connection with Article 1, paragraph 1 of the Basic Law.[74] In this context, the use and the limits of *Europarechtsfreundlichkeit* can be understood as metanormative preconceptions for constitutional interpretation in specific cases.

G. Conclusion

The normative content of constitutional objectives remains often underexplored, especially when it comes to the ways in which they may be applied by constitutional jurisdictions. In light of this, this paper explored various ways of understanding the judicial implementation of constitutional objectives in a broad sense by making four propositions about possible influences of constitutional objectives on constitutional interpretation. These propositions concerned possible effects of constitutional objectives on the proportionality analysis, on teleological constitutional interpretation, on the constitutionalization of central principles of ordinary law, and on metanormative preconceptions for constitutional interpretation.

Finding a balance between ensuring possibilities for concretization of constitutional objectives by the judiciary and securing discretion for the other branches of the state in the implementation of constitutional objectives may not be easy. Nevertheless, it could be said that one of the best chances for pursuing this balance lies in developing and clarifying conditions for a rational application of constitutional objectives by the judiciary. This task requires careful consideration and analysis of the concrete circumstances under which constitutional objectives are established and applied. Legal scholarship can and should support this task through creative, constructive and analytical approaches while remembering that constitutional contexts matter.

1 and 20 shall be inadmissible". Article 1, paragraph 1 of the Basic Law in turn states: "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority".

74 BVerfGE 140, 317, paras. 40 ff. – European Arrest Warrant II (2015). The argumentation has also considered the jurisprudence of the Federal Constitutional Court in the Lisbon Ruling, BVerfGE 123, 267, paras. 348 ff., 402 – Lisbon Ruling (2009). A critical account can be found in: *Christoph Schönberger*, Karlruhe: Notes on a Court, in: Matthias Jestaedt / Oliver Lepsius / Christoph Möllers / Christoph Schönberger (eds.), The German Federal Constitutional Court: The Court Without Limits, Oxford 2020, pp. 28 ff.