

# § 9 Basics of German public law

## I. Historical development and structure

- from 1648: establishment of numerous sovereign states with absolute rule of the prince or king on the territory of the Holy Roman Empire of the German Nation
- 1794: Allgemeines Landrecht für die Preußischen Staaten [General Land Law for the Prussian States]
  - a late-absolutist but natural-law orientated comprehensive codification
- 1806: dissolution of the Holy Roman Empire of the German Nation
  - in the wake of the Napoleon wars, after failure to carry out important reforms for 200 years
- 1849: Constitution of the German Reich (Frankfurt Constitution)
  - first free and democratic German constitution, for a democratic united Germany
  - but did not enter effectively into force and the German Reich was not established
- second half of 19<sup>th</sup> century: introduction of independent administrative courts
- 1871: Constitution of the German Reich (Bismarck Constitution)
  - constitution of the newly founded monarchical German Empire until 1919
- 1882: the famous Kreuzberg judgement of the Prussian Higher Administrative Court limits the police to the mission to prevent threats for public security and order
- from 1886: strong influence of French law-inspired scholar OTTO MAYER on the development of modern German administrative law
  - in particular on the development of the doctrine of the administrative act [Verwaltungsakt]
- 1919: Constitution of the German Reich (Weimar Constitution)
  - first German republican constitution and first fully democratic constitution effectively in force
  - destructive non-confidence votes and frequent dissolutions of the Reichstag (national parliament) caused instability
- 1933 - 1945: total decline of public law under the totalitarian rule of Adolf Hitler and the National Socialists
- 1949: Basic Law for the Federal Republic of [West] Germany
  - the present German constitution
- 1940 - 1990: German Democratic Republic
  - a totalitarian state under the rule of the communist Socialist Unity Party of Germany, de facto controlled by the Soviet Union until a peaceful revolution in autumn 1989
- 1951: establishment of the Federal Constitutional Court [Bundesverfassungsgericht]
- 1952: establishment of the Federal Administrative Court [Bundesverwaltungsgericht]
- 1976: Administrative Procedure Act [Verwaltungsverfahrensgesetz]
- from 1980s: Europeanisation of administrative and constitutional law
- 1990: German reunification through the accession of the newly formed East German Länder to the Federal Republic of Germany
- structure of German public law: (cf. supra, § 6.IV.)
  - distinction of constitutional law [Verfassungsrecht], administrative law [Verwaltungsrecht], social law [Sozialrecht] and tax law [Steuerrecht], each field with their own courts
  - constitutional law and administrative law on both, federal and Land level

## II. Constitutional law [Verfassungsrecht]

### 1) The German contribution to constitutional theory

- see special material from a course in Yogyakarta 2022 (for self-study)
- strong influence of German constitutionalists of the era of the Weimarer Republic on the development of constitutionalism in post-war Germany and Europe
  - esp. GEORG JELLINEK, CARL SCHMITT, RUDOLF SMEND, HERMANN HELLER
  - see also HANS KELSEN (Austrian)

- strong influence of the jurisprudence of the Federal Constitutional Court and the works of German scholars of post-war Germany on the development of constitutionalism in West Europe (since 1970s), East Europe (since 1990s) and beyond (South Africa, Korea, Taiwan etc.)
- strong contribution of German scholars to the debate about a European Constitution, the most advanced discussion in constitutional theory, since the 1990s

## 2) The Basic Law for the Federal Republic of Germany (= BL)

[Grundgesetz für die Bundesrepublik Deutschland]

- originarily meant as a temporary constitution for the West German state until reunification, but in force - since 1990 for the whole of Germany - for 75 years
- draft elaborated in 1948/49 in Bonn by a *Parliamentary Council*
- adopted in 1949 by approval by two-thirds of the Land parliaments (no referendum) after approval by the Western Allied military governors
- has influenced the development of constitutionalism in Europe and beyond
  - espec. by the institution of the Federal Constitutional Court, which served as a model for the establishment of constit. courts in other countries
  - by its innovative elements (e.g. the principle that fundamental rights are directly binding law, art. 1(3) BL)
  - via the jurisprudence of the Federal Constitutional Court, in particular on fundamental rights, which has inspired the jurisprudence of many other constit. courts
- one of the most successful constitutions in world history, but nowadays under threat
  - enjoyed *great support by the population for 70 years*
  - has strongly contributed to consolidate the Federal Republic of Germany
  - has anchored constitutional standards firmly in all public discourses
  - caused the phenomenon of German constitutional patriotism: citizens identifying with their home country not because of the "nation" but of the Constitution and its values
  - but in the 2020s, its concept of a free and democratic, rule of law-based constit. state is rejected by growing parts of the population, esp. in East Germany, who favour again authoritarian or totalitarian rule

## 3) Germany as a free and democratic constitutional state

### a) **Theoretical background: Fundamental values and ideas defining the constitutional identity of the state**

- the fundamental political-philosophical values and ideas, on which the political community shall be based, define the *identity of the constitution* and thus the *constitutional identity of the state*
- they constitute the *unchangeable core* of the constitution, which cannot be changed by constitutional amendment but only by adopting a new constitution (→ revolution)
  - in Germany, this is explicitly regulated in sect. 79(3) BL

### b) **European background: the European common fundamental values**

- the Basic Law follows the European common fundamental values, a historical heritage rooting in the *philosophy of the enlightenment* and the *French Revolution*
- they are the fund. values and ideas of the *free and democratic constitutional state, based on rule of law and social justice*
  - promoted by a specialised organisation, the Council of Europe
  - best defined in the fundamental values clause of the European Union (art. 2 EU Treaty):

"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."

- b) Human dignity as supreme constitutional value** (cf. art. 1(1) BL)
    - rooted mainly in the philosophy of IMMANUEL KANT
    - human dignity is the *self-determination of the free and equal humans* under respect for the *intrinsic value of every human being*
      - state must *never degrade* human beings to a *mere object* of state power (as in the Gulag)
  - c) The decision for sovereign statehood in a republican system** (cf. art. 20(1) BL)
    - republican system: head of state must be elected for a limited term
  - d) The principle of democracy** (cf. art. 20(1) BL)
    - all public power must derive from the people (sovereignty of the people)
    - regular general, direct, free, equal, secret and public elections with real choice (not as in Russia)
    - majority rule, protection of minorities and pluralism
    - prominent role of political parties (art. 21 BL, Political Parties Act)
    - concept of *defensive democracy*: precautions against attempts to destroy democracy
      - a powerful set of instruments, but insufficiently used against the current attacks on democracy
  - e) The principle of separation of powers** (art. 20(2) phrase 2 BL)
    - in Germany, unlike in other states, considered an element of the rule of law
    - basic idea of securing freedom and moderating state power by *separation and interlocking* of powers (but also of rational and functional organisation of state power)
    - division of state activity into three blocks (legislature, executive, judiciary) and allocation to different institutions
    - *core area* of each power absolutely protected against encroachments
  - f) The decision for federalism** (art. 20(1) BL)
    - a model invented in 1787/88 in the USA
    - *two independent levels of statehood* within one sovereign state
      - but only the Federation is state in the sense of public international law
    - special constitutional status of the Länder
      - constitutional autonomy and autonomous self-organisation
        - own constitutions, parliaments, governments, constit. courts
      - own legislative, executive & judicial competences under the Basic Law
      - financial resources guaranteed under the Basic Law
    - concept of *unity in diversity*
    - principle of federal loyalty
    - in case of conflict, primacy of federal law over Land law (art. 31 BL)
  - g) The social state principle** (art. 20(1) BL)
    - the German implementation of the European value of solidarity/social security, justice & cohesion (→ *fraternité*) by an objective principle of law
      - a constitutional mandate to actively shape the social conditions
- 4) In particular: Germany as a state based on the rule of law** [Rechtsstaat]
  - see Diagram 3
- 5) The German parliamentary governing system**
- a) General characteristics**
    - a distinct parliamentary governing system, in which
      - the decision in essential matters is reserved for parliament
      - the government is fully accountable to parliament (can be overthrown at any time)

- a federal system, in which the Länder do not only have their own competences but also participate through the Bundesrat [Federal Council] in the legislation and administration of the Federation and in matters concerning the European Union
- legal disputes between constitutional bodies can be settled in special proceedings before the Federal Constitutional Court (cf. art. 93(1) no. 1 BL)

## b) Constitutional organs

### aa) Bundestag

- the German parliament; most important constitutional organ
- adopts the federal laws (art. 77(1) BL), decides about federal budget (cf. art. 110 BL), ratifies by law international treaties (art. 59(2) BL), elects Federal Chancellor (art. 63, 64 BL), exercises parliamentary control

### bb) Bundesrat [Federal Council]

- a federal institution representing the Länder (→ not a second chamber of parliament)
- participates in federal legislation (art. 76 et seq. BL)
- needs to approve certain important political decisions and exercises certain control functions

### cc) Federal Government

- consists of Federal Chancellor and Federal Ministers (art. 62 BL)
- *Federal Chancellor* elected by Bundestag on proposal of Federal President (art. 63)
  - determines general guidelines of policy (art. 65 BL)
  - can only be overthrown by electing a new one (constructive vote of no confidence; art. 67 BL)
- participates in federal legislation (art. 76 et seq. BL)
- represents Germany in the European Union

### dd) Federal President

- not elected by the people (but by a Federal Convention, cf. art. 54 BL)
- only a "pouvoir neutre" with functions rather like those of a "state notary"
  - in particular: certifies and promulgates the federal laws (art. 82 BL)
  - some important functions around the election of the Federal Chancellor (art. 63, 68 BL)

### ee) Federal Constitutional Court (see infra, II.7)

## 6) Fundamental rights

### a) On terminology: the distinction between human and fundamental rights

- "human rights": the pre-legal (natural) rights of the human being (according to philosophical doctrine) and the rights guaranteed in human rights treaties (who reflect them)
- "fundamental rights": the legal positions created by the implementation of this doctrine into the (constitutional) law
  - note that the divergent terminology in some Asian constitutions can cause confusion!

### b) Fundamental rights as directly binding law

- *directly applicable norms*, addressing to all public institutions
  - first explicitly regulated in Germany in art. 1(3) BL, this is now a *key common acquis of general fundamental rights doctrine*, but
- public servants not allowed to execute orders or laws that contravene fund. rights
- enforcement a primary mission of the courts
- mandatory *interpretation and application of ordinary law "in the light of" (in conformity with) the fundamental rights*
  - among several options, authorities and courts must choose one that does not violate any rights
  - most laws allow that, by using indefinite legal terms or granting discretion
  - however, thus the *responsibility is shifted* from the legislator to the executive and judiciary
  - this requires thorough education of all officials in fundamental rights doctrine

**c) Types of fundamental rights**

- under the Basic Law *freedom rights* (and other *defensive rights*), *equality rights*, *institutional guarantees*, *justice rights* and other rights (e.g. regarding marriage and family), but no social rights (instead social state principle, cf supra, § 9 II.3.g)
- rights of man (= of all human beings) and citizens' rights

**d) Holders and addressees of fundamental rights**

- outdated: several rights are reserved to German citizens as citizens' rights
- public institutions are usually not holders (beneficiaries) but only addressees of (obliged by) the fund. rights
- fund. rights do not bind the citizen directly (no direct horizontal effect) but are taken into account as constitutional values in the making, interpretation and application of the law (indirect horizontal effect)

**e) Duties of protection**

- the state must not only respect fund. rights but also *intervene actively* to protect them against private encroachments or natural threats

**f) The dogmatic structure of (defensive) fundamental rights**

aa) Scope/sphere of protection [Schutzbereich]

- Is the right in question (a protected activity of a protected person) *concerned*?

bb) Encroachment/interference [Eingriff]

- Is the right actually *affected*?

cc) Fundamental rights' limits [Schranken] and limits of limits [Schranken-Schranken]

- Is the encroachment/interference *justified* by the right's limits?
  - those are usually regulated in a *limitation clause*
- In particular: Does it respect the *limits of limits*?
  - most relevant limit of limits: the ***principle of proportionality***
    - Is the encroachment *suitable, necessary and proportional in the strict sense* (not excessive) to achieve a *legitimate aim*?

**7) The Federal Constitutional Court** [Bundesverfassungsgericht]

- see for the details the Federal Constitutional Court Act (FCCA)

**a) Status, structure and organisation**

- both, court and constitutional organ (equal with all other constit. organs)
- highly respected among lawyers, politicians, in the population, and even among foreign constitutionalists
  - jurisprudence often referred to by other constit. courts
  - jurisprudence popular object for legal research of foreign scholars
- two *Senates* with each 8 constitutional judges, *President* and *Vice-President*
  - each Senate has several *Chambers* with each 3 judges which decide about admissibility of judicial referrals and admission of const. complaints
  - judges elected (half by Bundestag, half by the Bundesrat) for a 12 years term
  - each constitutional judge assisted by 4 highly qualified *scientific assistants* (but still too high workload)
- in 2024 discussion about a constitutional amendment to protect the court against the risk of sabotage or hostile takeover as it has happened in Hungary and Poland

**b) Types of proceedings**

- disputes between constitutional organs (art. 93(1) no. 1 BL)
- abstract constitutional review of laws (art. 93(1) no. 2 BL)
- concrete constitutional review of law (art. 100(1) BL)
  - can be initiated by any court who considers a law unconstitutional, if its decision in the given case depends on the law's validity

- constitutional complaints of citizens [Verfassungsbeschwerden] (art. 93(1) no. 4a BL)
  - against any act of public power, for alleged violation of complainant's fund. rights
  - can be filed by anyone directly concerned, when all legal remedies are exhausted (→ ca. 5.000 - 6.000 constit. complaints per year)
- federative disputes between Federation and Länder (art. 93(1) no. 3 BL)
- others

### III. Administrative law [Verwaltungsrecht]

- one of the most sophisticated administrative law systems in the world (besides French and American administrative law), with a rational structure and terminology
  - influenced at the end of the 19<sup>th</sup> century from French admin. law, profoundly modernised and expanded after World War II
- the important distinction from private law (see supra, § 6 IV.1.) can be difficult
- legal sources: differently from some other countries, and unlike ordinances (regulations), administrative provisions (internal regulations of the executive) are not a source of law, since they are not binding externally (and thus irrelevant for judges, scholars, students...)

#### 1) General principles and concepts of administrative law

- *principle of legality* of public administration
  - principle of the primacy of the law
    - the core element of the rule of law
    - includes *primacy of the constitution*
  - principle of statutory reservation
    - need for a legal basis in statutory law for all encroachments on fundamental rights and other decisions that are essential for the exercise or the realisation of fundamental rights
- primacy of the constitution has led to a *constitutionalisation of administrative law*
  - an essential consequence of taking the constitution seriously...
  - see the famous speaking of FRITZ WERNER 1959: "Administrative law is concretised constitutional law" ["Verwaltungsrecht ist konkretisiertes Verfassungsrecht"]
- distinction between exercise of *discretion* [Ermessen] and interpretation of *indefinite legal concepts* [unbestimmte Rechtsbegriffe]
  - the question of the scope for own decision-making of public administration and the limits of judicial review by the administrative courts
  - concerning the exercise of discretionary power (→ "the authority takes the appropriate measures to..."), judicial review is limited to certain cases of incorrect exercise of discretion [Ermessensfehler]
  - concerning the interpretation of indefinite legal concepts in the laws (e.g. → "public security", "public policy", "reliability"), there is full judicial review, except for a few case groups where a margin of appreciation of the admin. authorities is recognised (e.g. grading in exams)

#### 2) Administrative action

##### a) Overview over the forms of administrative action

- administrative act (measure to regulate an individual case)
- public-law contract (bilateral regulation constituting, amending or terminating a legal relationship under public law)
- ordinance and by-law (general regulation of administrative matters)
- real act (simple, non-regulatory administrative action)
- forms of action under private law (in particular private-law contract)
- internal administrative measures

##### b) The administrative act (= administrative decision)

- the by far *most important legal institution of administrative law*
- definition: a measure taken by a public authority to unilaterally regulate an individual case in the sphere of public law with external legal effect (→ sect. 35 Administrative Procedure Act)

- important distinction between expediency (usefulness) and legality of an administrative act
- see for the elements of the legality of an administrative act my special material from the course German Public Law (coming next semester)

### 3) Administrative procedure

- regulated in detail in an Administrative Procedure Act (= APA) of 1976
- protection of the citizen in the administrative procedure
  - *hearing of participants* (sect. 28)
  - allowing inspection of files by participants (sect. 29)
  - admission of representatives and advisors (sect. 14)
- no involvement of persons excluded or feared to be prejudiced (sect. 20 et seq.)
- *statement of reasons* (material and legal grounds) for the admin. act (sect. 39)

### 4) Special administrative law

#### a) A wide spectrum of fields of special administrative law

- many sub-fields have developed, in particular in the 1960s to 1990s, to independent fields of special administrative law with a high degree of specialisation of experts
- many fields have become a complicated mixture of federal law, Land law, European Union law and, in some cases, international law

#### b) The most important fields of special administrative law

- aa) Public security and order law [Recht der öffentlichen Sicherheit und Ordnung = Gefahrenabwehrrecht = Polizei- und Ordnungsrecht]
- the law governing the most classical mission of public administration: averting dangers [Gefahrenabwehr] for public security and order [öffentliche Sicherheit & Ordnung]
  - the *general public security and order law, including police law*, is regulated in laws of the Länder, which provide a general authorisation plus a number of special authorisations to the police and public security and order authorities for standardised measures to avert dangers
  - big parts of the *special public security and order law* have become independent fields of law and are now regulated in comprehensive special legislation
    - examples: the *law on public assemblies, industrial law, immigration law, infection protection law*
- bb) Local government law [Kommunalrecht]
- the law of local government by the *communes* [Gemeinden] & *counties* [Landkreise], who enjoy the right of local self-government (to regulate all local affairs on their own responsibility within the limits prescribed by the laws, cf. art. 28(2).BL)
- cc) Public construction and planning law [Baurecht & Planungsrecht]
- building regulations law, urban land-use planning law, other planning law
- dd) Environmental law [Umweltrecht]
- a complex multi-level system of global and geo-regional international law, European Union law and numerous federal and Land laws
- ee) Civil servants law [Beamtenrecht]
- characterised by the special status of the civil servant: a special relationship of service and loyalty under public law
- ff) School law and higher education law

## 5) Judicial control of public administration in Germany

- regulated in the Code of Administrative Court Procedure (= CACP)
- the German system of administrative courts
  - 51 *administrative courts* [Verwaltungsgerichte]
  - 15 *higher administrative courts* of the Länder [Oberverwaltungsgerichte, Verwaltungsgerichtshöfe]
  - Federal Administrative Court [Bundesverwaltungsgericht] (court of review on points of federal law)
  - a system building on the professionalism, integrity and independence of the judges
- limitation of judicial control to the protection of subjective rights
  - legal actions generally only admissible if plaintiff claims a violation of his own rights
- a system of legal protection based on different forms of legal action
  - with different requirements for the admissibility and well-foundedness depending on the form of action
  - most important: *action for annulment* of an admin. act and *action for the issue of an admin. act* (sect. 42 CACP)
- before judicial review of administrative acts administrative review (by public administration itself) in objection proceedings (sect. 68 et. seq. CACP)
  - review not only of the legality but also expediency of the admin. act
  - limited in some Länder to save time and financial resources
- a complicated but effective system of *interim legal protection* with *suspensive effect of objections and actions for annulment* against admin. acts (sect. 80 et seq. CACP)

## IV. The influence of German public law on the development of public law in Europe and beyond