

§ 3 The Basic Law for the Federal Republic of Germany of 1949

I. The making and development of the Basic Law

- 1945 - 1947 recreation of Länder (federated states) and Land constitutions in the Western occupation zones
- 1947 initiative of the Western Allies to prepare an interim constitution for West Germany
- 1948 preparation of a preliminary draft by a politically neutral committee of experts appointed by the Prime Ministers of the Länder, the *Herrenchiessee Constitutional Convention*
- 1948/49 elaboration of a draft Basic Law in Bonn by the *Parliamentary Council*
 - 65 members, elected by Land parliaments, some of them democratic politicians in the Weimar Republic
 - committed to create a solid, free and democratic, rule of law-based constitutional order for the interim period until German reunification
 - striving to avoid the mistakes of the past that had led to the failure of the democratic Weimar Republic
 - this led to a progressive, highly innovative draft constitution
- 05.1949 adoption of the draft by the Parliamentary Council and approval by the Western Allied military governors
- 05.1949 adoption of the Basic Law as constitution for West Germany by approval by two-thirds of the Land parliaments
 - *no direct approval by the people by referendum!*
- since 1949 frequent minor constitutional amendments on detailed issues
- 1968 controversial introduction of harsh special rules for the case of war, threat of war or imminent danger to the free and democratic constit. order (cf. art.115a, 80a, 87a, 91)
- 1990 maintenance of the Basic Law, now as all-German constitution, after German reunification
- 1994 minor reform of the Basic Law (based on the proposals of a constitutional commission)
- 2006 reform of the federal system
 - to counter long-lasting tendencies of unitarisation in the German federal state

II. The role of the Basic Law in German law, politics, public administration and society

- strong imprint of constitutional standards on the ordinary law
 - due to the primacy of constitutional law over ordinary law
 - in particular of directly applicable standards, such as constitutional principles and fundamental rights
 - *in all fields of law*; as a consequence, every lawyer needs to know well the constit. law relevant in his area of expertise
- strong influence of constitutional standards on the political discussion
 - solutions that would violate constit. standards will usually not be seriously discussed in the mainstream
- particularly strong influence on public administration
 - since the exercise of public power bears a particular risk of violating constit. standards (e.g. fund. rights)
 - therefore, civil servants need special in-depth training in the relevant areas of constitutional law
 - example: *You cannot be a good police officer without advanced knowledge of the fundamental rights!*
- great support of the Basic Law and its values in society from the beginning to present time
 - not least because of the continuous and consistent elaboration and communication of the const. values and standards in the jurisprudence of the Federal Constitutional Court
 - for more than 60 years a broad social consensus across all ideological boundaries, but now, as in most Western countries, threatened by the rise of right-wing extremist populism
- the phenomenon of German constitutional patriotism: identifying with the home country not because of the "nation" but because of the Constitution and its values
 - the extraordinary integrative power of the German Basic Law

III. The influence of the German Basic Law and constitutionalism on the development of constitutionalism in Europe and beyond

- the German Federal Constitutional Court as a model for the establishment of constitutional courts in Europe, Asia and Africa (see below, § 8 I)
- the jurisprudence of the Federal Constitutional Court as source of inspiration for the jurisprudence of other constit. courts
 - especially in the fields of constitutional principles (e.g. rule of law) and fundamental rights
 - sometimes other constitutional courts even refer explicitly to FCC decisions in their own reasoning
 - German scholarly constit. law doctrine also serves as a source of inspiration
- innovative elements in the Basic Law, the basic ideas of which have found their way into general constitutional theory
 - e.g. the principle that fundamental rights are directly binding law (art. 1(3) BL)
 - e.g. the idea that constitutional amendments meet their limits where they would affect the fundamental values and ideas that form/define the core/identity of the constitution (art. 79(3) BL)

IV. The German Basic Law and European integration

- a *decline of importance of the national constitutions* in the process of European integration, since the EU member states are bound by EU law, but the EU is not bound and cannot be bound by the law (even constit. law) of its member states
 - the primacy of European Union law over national law, an essential foundation of European integration
- the phenomenon of *Europeanisation of constitutional law*: even the constitutional law of the member states needs to adapt to the standards set by European Union law
 - example: in the case *Tanja Kreil* (ECJ, case C-285/98), Germany needed to give up its constit. ban on military service of women at arms because it was incompatible with an EU equal treatment directive
- a complicated, never-ending story: the resistance of the Federal Constitutional Court against the inevitable decline of importance of national constitutional law
 - extensive constit. jurisprudence on Germany's participation in the process of European integration
 - note that most other constitutional courts do not share the critical German approach!

V. Overview over the Basic Law

- note: when studying sources of law, always first study their structure and systematics, for better orientation!
- particularly interesting from comparative perspective: art. 1, 2 - 19, 20, 20a, 21, 33, 79, 93, 94, 97, 100, 101 - 104 BL