

# § 4 Germany as a free and democratic constitutional state

## I. Theoretical background: How fundamental constitutional decisions on the fundamental values and ideas define the constitutional identity of the state

- The constitution must comprise the fundamental decisions about the *fundamental values and ideas* on which the political community shall be based.
- These fundamental decisions constitute the *unchangeable core* of the constitution. They define the *identity of the constitution* and, thus, the constitutional identity of the state.
  - this allows to classify the constitution with regard to the various types of constitution (cf. supra, § 2 I)
  - a *shift to other fundamental values* and ideas of the state is of course possible but *requires* to adopt a *new constitution*, which would constitute a revolution from the legal perspective
- The fundamental decisions are usually anchored in several *fundamental norms of the state*, mostly in the form of *fundamental constitutional principles*.

## II. European background: Fundamental decisions in European constitutions as implementation of the European common fundamental values

### 1) The common European fundamental values - a historical heritage

- roots: philosophy of the enlightenment, French Revolution (not: Christianity)

### 2) The Council of Europe as promotor of the European fundamental values

- a very active special international organisation for the promotion of human rights, democracy and rule of law; has prepared numerous international treaties
- the *Venice Commission* of the Council of Europe: a multinational authentic authority on questions of up-to-date free and democratic constitutionalism

### 3) The fundamental values clause of the European Union (art. 2 EU Treaty)

- the most up-to-date formulation of the fundamental values and ideas of free and democratic constitutionalism and the basis for European integration
- directly binding law, with which all EU institutions and member states must comply

#### Art. 2 of the Treaty on European Union (EU Treaty)

(originally art. I-2 of the Treaty establishing a Constitution for Europe, which has not entered into force)

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.

## III. Human dignity as supreme constitutional value

- a European common value, usually a fundamental right, but in Germany the *supreme and absolute constitutional value* (cf. art. 1(1)).
  - immune to constitutional amendments
  - must be respected and protected by the state (→ duties of protection)
  - has inspired introduction of new rights (esp. personality rights) by judicial development of law
  - constitutes itself a special fundamental rights immune to restrictions
- rooted in the philosophy of IMMANUEL KANT (the human being as autonomous, self-determined being) with further historical roots in the Christian imago dei doctrine

- human dignity is the *self-determination of the free and equal humans* under respect for the *intrinsic value of every human being*
- according to the *object formula* of the Federal Constitutional Court, no human being must "be made a mere object of state power", his "quality as a subject" must not be "basically called into question"
  - examples: no cruel, inhuman or degrading punishment, no torture (under no circumstances!)
  - no legal authorisation to shoot down passenger aircrafts abused by terrorists as deadly weapons if this would kill innocent passengers (FCC, BVerfGE 115, 118<sup>1</sup>, Aviation Security Law)

#### IV. The decision for sovereign statehood in a republican system (art. 20(1) BL)

- if Germany wants to join a future European federal state, and thus abandon its legal status as state under public international law, it must first adopt a new constitution authorising that
- republican system: head of state must be elected for a limited term

#### V. The principle of democracy (cf. art. 20(1) BL)

##### 1) Foundations

- derivation of all public power from the people (*sovereignty of the people*)
  - requires an *uninterrupted chain of legitimacy* for all acting of public institutions
  - problem: foreign long-term residents as part of the "people" in local elections?
- *regular elections* with a real choice for the voter
- *majority rule, protection of minorities and pluralism*
  - legitimacy and authority of the majority decision (even if it is wrong...)
  - guarantee of the chance of the minority to become the majority in future fair elections
  - cultivation of a *pluralistic culture*, bringing together different political approaches and stakeholders in a constructive debate
- publicity and transparency of the decision-making; broad public discourse
  - therefore, special importance of the communicative freedoms
  - problem: the derationalisation and rise of hate speech in public debates
  - problem: the manipulation of the public discourse by bots and fake news

##### 2) The decision of the Basic Law for representative democracy

- no elements of plebiscitary democracy at the federal level (but in the Länder and communes)

##### 3) The decision of the Basic Law for parliamentary democracy

- a distinct parliamentary governing system, with a clear dominance of the Bundestag
- therefore, German doctrines concerning the relations between the state institutions can usually not be transferred or serve for inspiration in countries with a presidential system, such as Kazakhstan

##### 4) The prominent role of the political parties (art. 21 BL, Political Parties Act)

- principle of participation of political parties in the formation of the political will of the people (art. 21(1))
  - political parties as *constitutional institutions* with the function of *intermediaries between state and society*
  - free establishment, but parties must not seek to undermine or abolish the free and democratic order (art. 21(2))
- principle of equal chances for political parties (art. 21(1), 38(1) BL)
- prohibition of political parties only by the Federal Constitutional Court (art. 21(2), 4)
  - only if they fight the free and democratic constit. order; high requirements (only two successful cases)
  - such parties can also be excluded from public funding (art. 21(3), 4)
- complicated system of combined private and public party funding
  - with strict but often violated rules and numerous scandals in recent German history

---

<sup>1</sup> Federal Constitutional Court, judgement of 15.02.2006, 1 BvR 357/05, Aviation Security Law, BVerfGE 115, 118 (= Entscheidungen des Bundesverfassungsgerichts [Decisions of the Bundesverfassungsgericht], vol. 115, p. 118 ff.)

## 5) The concept of defensive democracy

- democracy must protect itself against those who want to destroy it, or it will perish
- precautions and instruments for the protection of democracy in the German Basic Law
  - prohibition of political parties seeking to undermine or abolish the free and democratic constitutional order (art. 21(4))
  - declaration of forfeiture of certain fundamental rights (art. 18)
  - defense of the constitution by specialised intelligent services
  - impeachment of judges and the Federal President in case of intentional violation of the constitution (art. 98(2), 61)
  - loyalty to the constitution as requirement for being a public servant
  - a *fundamental right to resist* against attempts to abolish the free and democratic constitutional order (art. 20(4))

## VI. The principle of separation of powers (art. 20(2) phrase 2 BL)

- in Germany - unlike in most constit. states - considered an element of the rule of law (see infra, § 5)
- see Diagram 3, F.III.

## VII. The decision for federalism (art. 20(1) BL)

### 1) The model of the federal state: two independent levels of statehood within one sovereign state

- a new model, introduced in 1788 with the conversion of the USA from a confederation to the first federal state
- based on a theory of federalism established by "THE FEDERALISTS" 1787/88 and developed particularly in USA, Germany, Switzerland
- basic idea: *unity in diversity*
- *two concepts of statehood: in the sense of public intern. law* (sovereign state - the federation) *and state law* (non-sovereign state within a state - the federated states/Länder)

### 2) Formative elements of the German federalism

#### a) Special constitutional status of the Länder

- ordinary and independent own public power under the Basic Law
- own legislative, executive and judicial competences under the Basic Law that are exercised autonomously
- constitutional autonomy and autonomous self-organisation
  - own state institutions (Land government, parliament, constitutional court etc.), regulated in Land law
- financial resources guaranteed by the federal financial constitution (art. 104a et seq. BL)

#### b) Distribution of competences between the Federation and the Länder by the Basic Law

- technically, state functions are allocated to the Länder insofar as the Basic Law does not otherwise provide or permit (cf. art. 30, 70, 83 BL), but detailed regulations grant important competences to the Federation
- *far-reaching legislative powers of the Federation* (cf. art. 71 et seq. BL), but *participation of the Länder in the federal legislation via the Bundesrat* [Federal Council] (art. 50, 76 et seq. BL)
- as a general rule, the Länder execute the federal law as their own business (art. 83 BL)

#### c) Primacy of federal law over Land law (art. 31 BL)

#### d) Principle of federal loyalty

- obligation of mutual consideration and solidarity between the Federation and the Länder

## VIII. The social state principle (art. 20(1) BL)

- the German implementation of the common European value of solidarity/social security, social justice and social cohesion (cf. Title IV of the EU Charter of Fundamental Rights)
  - philosophical-historical background: the fundamental idea of *fraternité* [brotherhood] of the French Revolution
- objective law approach: no social rights but a social state principle
  - a constitutional mandate to actively shape the social conditions
  - can justify encroachments on fund. rights or unequal treatment in support of disadvantaged groups of persons
- the problem of the vagueness of the concept
  - high margin of appreciation of the legislator
  - lack of exact legal criteria that can be applied precisely and are suitable for judicial review

## § 5 In particular: the principle of the rule of law [Rechtsstaatsprinzip]

- see Diagram 3