

## § 4 The significance of the fundamental constitutional decisions

### I. The need to decide about the fundamental values and ideas of the state

- As basic legal order, the constitution must give the state a basic political-philosophical orientation and therefore comprise the *fundamental decisions about the fundamental values and ideas* on which it shall be based.

### II. Fundamental decisions, constitutional identity and types of constitution

- These decisions constitute the *unchangeable core of the constitution*. They define the *identity of the constitution* and the *constitutional identity of the state*.
  - This allows to classify the constitution with regard to the various types of constitution (→ see § 7).
- According to democratic constitutional theory, only decisions adopting the fund. values and ideas of the free and democratic constitutional state are legitimate but the creators of the constitution may choose others.

### III. The legal anchoring of the fundamental decisions in fundamental constitutional principles

- These decisions are usually anchored at the beginning of the constitution in several *fundamental norms of the state* [Staatsfundamentalnomen, norma fundamental negara], mostly in the form of *fundamental constitutional principles* in the variations of *state objectives* [Staatsziele, e.g. democracy] and *state structural principles* [Staatsstrukturprinzipien, e.g. principle of the unitarian/federal state].

### IV. The concretisation of the fundamental decisions in state organisation law

- These decisions are also implemented and concretised in the constitutional provisions on the organisation of the state, its institutions and procedures.
  - Those provisions are relevant for understanding the principle in the context of the given constitution. For example, democracy can be concretised in numerous variations of presidential, semi-presidential and parliamentary democracy.

### V. The complementation of the fundamental constit. principles by others

- examples: centralism, decentralisation or local autonomy; pluralism, role of political parties; religious neutrality of the state, laicism or commitment to religion, environmental and animal protection; national independence, peacefulness, openness for geo-regional integration; budgetary principles
- those can only be realised within the limits set by the fundamental constit. principles
  - example: In Germany, under human dignity as highest constit. value (art. 1(1) BL), the principle of animal protection (art. 20a BL) cannot justify the prohibition of cruel animal tests if they are necessary to find a cure against COVID-19

### VI. Fundamental constitutional decisions and constitutional amendment

#### 1) The theory of the Weimar constitutionalists CARL BILFINGER and CARL SCHMITT<sup>1</sup> on the inherent limits to constitutional amendment

- The *unchangeable core of the constitution*: The decisions on the fund. values and ideas cannot be changed by constitutional amendment, even if there is no explicit limit.
  - identity and continuity of the constitution as a whole must be retained
  - fund. decisions a matter of the *pouvoir constituant*, not of the *pouvoir constituant constitué*

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<sup>1</sup> Carl Bilfinger, *Verfassungsumgehung* [Evasion of the Constitution], *Archiv des öffentlichen Rechts* 50 (1926), p. 163 ff.; Carl Schmitt, *Verfassungslehre* [Constitutional Theory], 1928, p. 26, 102 ff.; see also William L. Marbury, *The limitation upon the amending Power*, *Harvard Law Review* 33 (1919/20), p. 223 ff. See for the discussion Yaniv Roznai, *Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers*, doctoral thesis London 2014, [http://etheses.lse.ac.uk/915/1/Roznai\\_Unconstitutional-constitutional-amendments.pdf](http://etheses.lse.ac.uk/915/1/Roznai_Unconstitutional-constitutional-amendments.pdf); Thomas Schmitz, *Integration in der Supranationalen Union* [Integration in the Supranational Union], 2001, p. 209 ff.

## 2) The explicit protection of the fundamental constitutional decisions against constitutional amendment in modern constitutions<sup>2</sup>

- examples: Italy (art. 139), Germany (art. 79(3)), France (art. 89(5)), Greece (art. 110(1)), Portugal (art. 288), Romania (art. 148(1.2)), Czech Republic (art. 9(2)), Russian Federation (art. 135(1)), Timor Leste (art. 156)

## 3) The inherent limits of constitutional amendment as essential element of modern constitutional theory

- a consequence of the constitution's function to achieve stability (in terms of its Staatsfundamentalnormen), CONTROVERSIALLY DISCUSSED in several constitutional states
- Any change affecting the core/identity of a constitution is a *revolution*. It is possible - but not in the legal way of constit. amendment.
  - example: In Indonesia, a general introduction of the Sharia (which is incompatible with Pancasila), could only be achieved by a revolution replacing the Constit. of 1945 by an Islamic one.
  - This will usually be the result of an *institutional interpretation* (→ the constit. as legal institution) as part of a teleological interpretation of the constitution. It does not apply if the constitution explicitly allows and regulates the amendment of fundamentals.
- Constit. amendments may be declared void by the constit. court in the way of constit. review.
  - Since (in most countries) they will be considered void *ex tunc*, there will be no "unconstitutional constitutional law".

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<sup>2</sup> See the comprehensive overview at Yaniv Roznai (note 1), p. 243 ff.