

§ 6 Fundamental decisions in the free and democratic constitutional state

- See for the most up-to-date formulation of the fundamental values and ideas of free and democratic constitutionalism the European fundamental values clause. It is directly binding law, with which all EU institutions and member states must comply:

Art. 2 of the Treaty on European Union (EU Treaty)¹

(originally art. I-2 of the Treaty establishing a Constitution for Europe)

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.

I. A multinational authentic authority on questions of up-to-date free and democratic constitutionalism: the Venice Commission of the Council of Europe

- the European Commission for Democracy through Law (Venice Commission) - an advisory body of the Council of Europe
- composed of *62 high profile constitutionalists* (profs, supreme/const. court judges, some MPs, public servants, 47 from CoE member states and 15 from other states)
- provides advice on European standards and international experience in the fields of constitutionalism, democracy, human rights and rule of law
- has published numerous reference documents, opinions and studies
- runs CODICES, a database on constitutional jurisprudence
- shares the European constitutional experience with non-European countries

II. The commitment to human dignity and human rights

1) The general commitment to human rights as universal fundamental values

- expressed in the preamble (e.g. in France), the first articles (e.g. in Germany (art. 1(2)) or Italy (art. 2); see also art. 2 EU Treaty) OR both (e.g. in South Africa)
- a commitment to the natural law idea of *human rights as universal human values*
- a complement to the fundamental rights provisions, important for the interpretation of constitutional and ordinary law and a guideline also for foreign policy

2) Human dignity as a constitutional value in Europe

- a European common value, usually a fundamental right (e.g. in Poland (art. 30), Spain (art. 10(1)), Belgium (cf. art. 23), see also art. 1 EU ChFR, in some countries even a fundamental constitutional value (e.g. in Romania (art. 1(3)))
- rejected in the U.S.A - Europe and the U.S.A do not share the same fundamental values!
 - this sometimes leads to tensions, in particular in the fields of criminal law and punishment
- in Germany the supreme and absolute constitutional value (cf. art. 1(1))
 - which is immune to constitutional amendments
 - which must not only be respected but also protected by the state (→ duties of protection)
 - from which the essence of most fundamental rights could be derived

¹ See also the preamble of the Charter of Fundamental Rights of the European Union (ChFR): "... the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law..."

- which has inspired the introduction of new rights by judicial development of law
 - in particular personality rights
- which constitutes itself a special fundamental right immune to restrictions
 - e.g. absolute prohibition of torture, under any circumstances
- 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*
 - example with regard to the present Indonesian discussion: human dignity requires that women and men are protected against sexual harassment but does not allow any restriction of free consensual sexuality among adults
- according to the *object formula* of the German 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"
 - therefore, no cruel, inhuman or degrading punishment, no torture, no absolute life imprisonment
 - no legal authorisation to shoot down passenger aircrafts abused by terrorists as deadly weapons if this would kill innocent passengers (FCC, BVerfGE 115, 118², Aviation Security Law)

III. The principle of democracy

1) Foundations of democracy

- a) **A vague political-philosophical concept**
 - ARISTOTELES, JEAN-JACQUES ROUSSEAU, ABBE SIEYES
 - democracy as *identity of the rulers and the ruled*
 - rule of the entirety, not of an individual (monocracy) or a few (oligarchy)
- b) **The derivation of all public power from the people (sovereignty of the people)**
 - problem: Are foreign long-term residents part of the "people"?
 - German FCC, BVerfGE 83, 37: (-), participation in elections only with particular const. basis
- c) **The requirement of an uninterrupted chain of legitimation for all acting of public institutions**
- d) **The requirement of regular elections with a real choice for the voter**
- e) **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
 - maintenance and promotion of a *pluralistic culture*, bringing together different political approaches and stakeholders in a constructive debate
 - therefore, in any democratic state, *enemies of pluralism are enemies of society!*
- f) **Publicity and transparency of the decisions making; broad public discourse**
 - problem: the derationalisation and rise of hate speech in public debates
 - problem: the manipulation of the discourse by bots and fake news

2) The decision for representative or plebiscitary democracy

- the two ways of practicing democracy
- the decision of modern constitutions for representative democracy, with *fair elections in an orderly procedure as essential acts of democratic legitimisation*
- the complementation of representative democracy by elements of plebiscitarian democracy
 - problem: even without a const. basis?

² 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.)

3) **The decision for parliamentary, presidential or semi-presidential democracy**

- three different models to implement democracy (UK, Germany / U.S.A, Indonesia / France)
- important role of the parliament even in presidential systems, due to the principle of statutory reservation

4) **Political parties**

- the function as intermediaries between state and society
 - emphasized in Germany in art. 21.BL and sect. 1. of the Political Parties Act
- the legal status of the political parties
 - in particular: political parties as constitutional institutions
 - in particular: obstacles to the prohibition of political parties
- the principle of equal chances for political parties
- the problem of fair and transparent funding of political parties

5) **The concept of defensive democracy**

- first developed by the German-American scholar KARL LOEWENSTEIN after the downfall of the democratic Weimar Republic in 1933
- democracy must protect itself against those who want to destroy it, whether from inside or outside the system - 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 and willingness to defend it as requirements for being a public servant (see FCC, BVerfGE 39, 334)
 - *fund. right to resist* against attempts to abolish the free and democr. const. order (art. 20(4))

6) **Democracy and supranational integration**

- problem: the tendency of governmentalisation and deparliamentarisation in the process of supranational European integration (and the - different - reactions of the const. courts)

IV. **The principle of the rule of law**

- see detailed presentation in Diagram 2

- 1) Fundamental idea and historical foundations
- 2) Different manifestations of the same fundamental idea in Europe: "Rechtsstaat", "État de droit", "rule of law" and "general principles of law"
- 3) The spreading of the idea in the wake of globalisation and development
 - a) A first triumph of the rule of law in the wake of democratisation in Europe
 - b) The rising popularity of the idea in countries with emerging economies
 - c) Recent threats to the rule of law by populism and extremism
- 4) Formal and material concept of the rule of law
- 5) The constitutional basis of the rule of law

- 6) The elements of the rule of law
 - a) The subjection of all activity of public institutions to the law
 - b) The principle of statutory reservation
 - c) The principle of proportionality
 - d) The principles of legal certainty and protection of legitimate expectations
 - e) The guarantee of effective legal protection
 - f) Principles in the fields of criminal and criminal procedure law
 - g) Principles of fair administrative procedure
 - h) State liability for illegal acts of public authorities

V. The principle of separation of powers

- the most important precaution to safeguard freedom in practice

1) Fundamental idea and philosophical foundations

- philosophical foundations: ARISTOTELES, JOHN LOCKE, CHARLES DE MONTESQUIEU
- definition: division of state activity into three blocks (legislature, executive, judiciary) and allocation to different institutions or groups of institutions
- objectives: securing freedom and *moderating state power by separation and interlocking of powers*; rational and functional organisation of state power

2) Separation of powers as a fundamental constitutional principle

- anchored explicitly (eg. in Germany (art. 20(2) phrase 2), Poland (art. 10), Estonia (§ 4)) or implicitly in the free and democratic constitution
- requires *functional, organisational and (partly) personal separation* of powers
- safeguard of the balance of powers: no power must obtain a dominating position not provided for in the Constitution
- according to German doctrine *absolute protection of the core area* of each power
- in the Socialist Republic of Vietnam no separation of powers but a principle of coordination and mutual control (art. 2(3))
- in the European Union no separation of powers but a principle of institutional balance (European Court of Justice, case 138/79, Roquette Frères / Isoglucose)

3) The realisation of the separation of powers by the constitutional arrangement of the state institutions

- in practice often not the separation but the interlocking of the powers is decisive

4) The complementation of the horizontal by a vertical separation of powers in federal states

- parliaments, courts, governments (and even police forces) on two levels...
- thus, a lower risk of dictatorship

VI. The principle of solidarity, social justice and cohesion

1) Fundamental idea and historical foundations

- the fundamental idea of *fraternité* [brotherhood] of the French Revolution
 - first implementation in Germany in the 1880s with BISMARCK's laws on social insurance
- social security, solidarity, social cohesion and social justice as constitutional values
- implies the constitutional *mandate* of the state *to actively shape the society*

2) **Solidarity and social justice as a common European (but not American) value**

- see art. 2 EU Treaty, preamble and Title IV EU ChFR
- see also the European Social Charter of 1961 (revised 1996)
- strong resistance against the idea of social responsibilities of the state in the U.S.A.

3) **The implementation via social fundamental rights or a social state principle**

- the subjective rights approach: social fundamental rights (e.g. in Spain (art. 39 et seq.) and Portugal (art. 58 et seq.), see also art. 27 ff. EU ChFR)
- the objective law approach: the principle of the social state in Germany (Art. 20(1))

4) **Problems resulting from 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

VII. **Towards a principle of climate and environment protection?**

- a first step: the principle of protection of the natural foundations of life in Germany (art. 20a)
- environmental protection as a fundamental right: art. 37 EU ChFR
- ambitious: the Charter for the Environment, which has been added to the *French Constitution* in 2018 (see preamble)
- the far-reaching consequences of climate and environment protection if inaugurated as a fundamental constitutional principle in a new constitution