

§ 3 The European free and democratic constitutional state (1): fundamental constitutional decisions

I. Significance and kinds of fundamental constitutional decisions

1) Decisions on fundamental values and ideas defining 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.
- The fundamental decisions are usually anchored in several *fundamental norms of the state*, mostly in the form of *fundamental constitutional principles*.

2) Classical fundamental decisions and decisions on the political system

a) Classical fundamental decisions

- largely free from political ideology
- the decision for *sovereign statehood*
- the decision for a *republican or monarchical system*
 - republic: head of state elected for limited term
 - monarchy: office of head of state hereditary and for life
- the decision for *unitarianism or federalism*
 - unitary state: one level of statehood with ultimate control and responsibility
 - federal state: two independent levels of statehood within one sovereign state
 - invented in the U.S.A 1787/88; in Europe: Germany, Austria, Switzerland, Belgium, Russia
 - basic idea: *unity in diversity*
 - *two concepts of statehood*: in the sense of public intern. law (sovereign state - the federation) and of state law (non-sovereign state within a state - the federated states)
 - federated states have own constitutions; autonomy, competences and basic finances guaranteed in the national constitution

b) Fundamental decisions on the political system

- determine the type of constitution (see supra, § 2 I)
- different fundamental constitutional principles in the free and democratic constitutional state and other constitutional systems

II. Fundamental constitutional decisions as implementation of the common European 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; see infra, § 6 III)

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. 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) or the first articles (e.g. in Germany (art. 1(2)), Italy (art. 2))

2) Human dignity as a constitutional value (→ rejected in U.S.A.)

- in Germany even the supreme and absolute constitutional value (cf. art. 1(1) BL)
- rooted mainly 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"
 - example: no legal authorisation to shoot down passenger aircrafts abused by terrorists as deadly weapons if this would kill innocent passengers

IV. The principle of democracy

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
 - democracy without pluralism is not possible - *enemies of pluralism are enemies of society!*
- 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 discourse by bots and fake news

2) Variations

- representative and plebiscitary democracy
 - problem: plebiscitary democracy and populism
- parliamentary, presidential and semi-presidential democracy
 - important role of the parliament even in presidential systems, due to principle of statutory reservation
- the different role and status of political parties
 - political parties as intermediaries between state and society (cf. art. 21 BL)
 - more important in parliamentary than in presidential systems
 - classical problems: funding of political parties; prohibition of political parties

3) 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))

V. The principle of the rule of law

- see detailed presentation in **Diagram 2**
- 1) Fundamental idea and historical foundations
 - 2) "Rechtsstaat", "État de droit", "rule of law" and "general principles of law"
 - 3) The various elements of the rule of law (overview)

VI. The principle of separation of powers

- division of state activity into three blocks (legislature, executive, judiciary) and allocation to different institutions or groups of institutions
- idea: to secure freedom and *moderate state power* by *separation and interlocking of powers*
- requirements:
 - functional, organisational and (partly) personal separation of powers
 - safeguard of the of constitutional balance of powers
 - absolute protection of the core area of each power (German doctrine)
- in federal states complementation of the horizontal by a vertical separation of powers
- in the European Union no separation of powers but a principle of institutional balance (European Court of Justice, case 138/79, Roquette Frères / Isoglucose)

VII. The principle of solidarity, social justice and cohesion (→ rejected in U.S.A.)

- the fundamental idea of *fraternité* [brotherhood] of the French Revolution
- solidarity/social security, social justice and social cohesion as a common European value
 - cf. art. 2, 3(3) EU Treaty, Title IV EU Charter of Fundamental Rights, European Social Charter of 1961/1996
- implementation via social fundamental rights (e.g. Spain) or a social state principle (Germany)