

§ 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 of the political community that define the state's constitutional identity

- the *unchangeable core* of the constitution
- usually anchored *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*
- 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; examples: Germany, Austria, Switzerland, Belgium
 - basic idea: *unity in diversity*
 - federated states have own constitutions and guaranteed autonomy, competences & basic finances, but only the federation is a sovereign state in the sense of public intern. law

b) Fundamental decisions on the political system (determine type of constitution, see § 2 1)

- different in the free & democratic constit. 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
- its Venice Commission: a multinational authentic authority on questions of up-to-date free & democratic constitutionalism

3) The fundamental values clause of the European Union

- most up-to-date formulation, basis for European integration and directly binding law

Art. 2 of the Treaty on European Union

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*
- *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" not be "called into question"
 - example: no legal authorisation to shoot down passenger aircrafts abused by terrorists as weapons if this kills innocents

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 approaches & stakeholders in a constructive debate
- publicity and transparency of decision-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) Variations

- representative and plebiscitary democracy
 - problem: plebiscitary democracy and populism
- parliamentarian, presidential and semi-presidential democracy (see infra, §§ 5, 6)
- the different role and status of political parties
 - political parties as intermediaries between state and society (cf. art. 21 BL)
 - 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 presentation in **Diagram 2**
- essential institutional prerequisite: *powerful and truly independent courts* with highly qualified judges who enjoy the trust of the other state institutions and the population
 - given in most but not all European Union member states
 - see the example of the German judiciary
 - not given in the member state Hungary, which has de facto abandoned the rule of law
 - seriously endangered under the former government of the PIS party in Poland
- in particular, realisation of the full potential of the constitution through well-developed constitutional jurisdiction
 - a decisive factor: the constitutional review of laws

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 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)

VIII. Outlook: towards the downfall of free and democratic constitutionalism in Europe?

- a rise of authoritarian populist parties, hostile to the modern open society and all kinds of minorities (muslims, jews, foreigners, LGBT, ecologists etc.), in almost all EU member states
- the intimidation of politically active women by cyberbullying and cyberintimidation
- the massive intervention of Russia and the new Trump government in the USA into domestic politics in Europe to support the authoritarian populist parties
 - large-scale *disinformation & hate campaigns* via public media and social media (Russia Today, X, Facebook etc.)
 - *open support of right-wing extremist politicians* by Putin, Trump, Vance and Elon Musk
 - *threats* against the European Union and democratic governments
- the fight of democratically elected authoritarian governments against the rule of law and the independence of the judiciary (Hungary, Poland, Slovakia)
- the lack of vigorous resistance against the rise of anti-democratic authoritarianism: *the failure of the concept of defensive democracy*
 - the powerful instruments of defensive democracy can only preserve democracy if they are actually used...