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The Future of Constitutional Law
—*A German Perspective*

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ABSTRACT

While the German constitution – the Basic Law – can look back on an impressive success story, German constitutional law today faces a number of serious challenges. These challenges – and also future prospects – are described in the following article. Relevant topics are the increasing fragmentation and polarisation of politics challenging parliamentary democracy, the progressive centralisation of decision-making questioning federalism in Germany, the ambivalent tendency towards direct horizontal effects of fundamental rights and the crisis of the binding force of law in the European Union and in the global community.

Keywords: German Constitutional Law, Basic Law, Parliamentary Democracy, Federalism, Fundamental Rights, European Integration

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Constitutional law legitimates and limits state power. Based on the will of a pouvoir constituant, constitutional law is country-specific. Nevertheless, it can be very fruitful to compare the constitutional law structures, contents and developments of different countries because constitutional law is confronted with similar or even the same questions and challenges all over the world. In the following article, some of the challenges and future prospects of German constitutional law[1] will be presented. This presentation is motivated by the hope that it might be of interest to constitutional lawyers from other countries.

I. THE GERMAN BASIC LAW – A SUCCESS STORY

In 2019, the German constitution, the Basic Law (Grundgesetz),[2] turned 70.[3] When the Basic Law was enacted in 1949, nobody could have foreseen the success story of this new constitution. In the wake of the disaster of the Second World War, the makers of the Basic Law drew heavily from the liberal (fundamental rights) elements of the Frankfurt Paulskirche constitution of 1848/49 that had never come into effect, and they aimed at overcoming the deficiencies of the Weimar Constitution of 1919 that had not been able to prevent the Nazi regime from rising. Therefore, they put the fundamental rights at the beginning of the constitution, starting with the guarantee of human dignity (Art. 1 sec. 1 Basic Law).They established a parliamentarian system of government. And they explicitly opened the constitution for international cooperation and integration.

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1 For an account of German constitutional law in English see Ulrich Karpen (ed.), The Constitution of the Federal Republic of Germany. Essays on the Basic Rights and Principles of the Basic Law, with a translation of the Basic Law, 1988; Donald P. Kommers, German Constitutionalism: A Prolegomenon, Emory Law Journal 1991, 837; David P. Currie, The Constitution of the Federal Republic of Germany, 1994; Sabine Michalowski/Lorna Woods, German Constitutional Law. The Protection of Civil Liberties, 1999; Werner Heun, The Constitution of Germany. A Contextual Analysis, 2011; Donald P. Kommers/Russell A. Miller, The Constitutional Jurisprudence of the Federal Republic of Germany, 3rd ed., 2012; Axel Tschentscher, The Basic Law (Grundgesetz) 2016, 4th ed. 2016; Gerhard Robbers, An Introduction to German Law, 6th ed., 2017.For an overview of some recent debates in German public law see Hermann Pünder/Christian Waldhoff (eds.), Debates in German Public Law, 2013. Interesting sources also are the following online publications: German Law Journal, Developments in German, European and International Jurisprudence (http://www.germanlawjournal.com/); Verfassungsblog. On Matters Constitutional (https://verfassungsblog.de/).

2 For an English translation see https://www.gesetze-im-internet.de/englisch_gg/.

3 Gertrude Lübbe-Wolff, The Basic Law – Germany's constitution, at 70, in: The German Times, April 2019 (http://www.german-times.com/the-basic-law-germanys-constitution-at-70/).

There are a number of factors responsible for the success of the Basic Law. Besides non-legal factors like the willingness of post-war German politics and society to finally emancipate themselves from the monarchical regime and the clear orientation towards the 'Western model' of government (democracy, freedom and a social market economy), there are important legal factors for this success. One factor was and is the distribution of powers[4] between parliament, the cabinet and the president on the federal level; in particular, the Basic Law refrains from granting the president the powers that had become very problematic in Weimar times, like the power to dissolve parliament at will. Another factor was the reestablishment of a strong form of federalism, in compliance with the will of the Allied Forces. Still another factor for the success of the Basic Law was the clarification of the supremacy and binding effect of all parts of the constitution – including the fundamental rights – for all branches of government (Art. 1 sec. 3 and Art. 20 sec. 3 Basic Law). Under the Weimar Constitution, it had – for example – remained controversial whether or not the legislative branch is bound by important fundamental rights like the right to equal treatment. The clear supremacy of the constitution further implies that under the Basic Law there may be no reservation of state power that is not 'constitutionalised'. In other words, all state power is legitimised and limited by the constitution. As long as there had been monarchies in the States of Germany (until the 19th and early 20th century), the concept of monarchical powers beyond the constitution had been commonplace.

The most important factor for the success of the Basic Law, however, was the installation of a powerful constitutional court, the Federal Constitutional Court of Germany (Bundesverfassungsgericht), and the establishment of various very effective constitutional court procedures like abstract and concrete judicial review (abstrakte und konkrete Normenkontrolle), dispute proceedings between supreme federal bodies and between the federal government and the states (Bundesorganstreitverfahren und Bund-Länder-Streit) and the constitutional complaint (Verfassungsbeschwerde).[5] The Federal Constitutional Court soon became very active. It interpreted and applied the constitutional provisions as legal norms, in particular the freedom rights and the equality rights. Some early court decisions became seminal, paving the way to what may be called the 'constitutionalisation' of the whole of German law, including civil law and criminal law. This constitutionalisation solidified the strong position of the Federal Constitutional Court in Germany and the significance of the Basic Law within the German legal order.

One Federal Constitutional Court decision that should be highlighted is the Elfes decision from 1957.[6] In this landmark case, the court held that under the principle of substantive rule of law everybody has the constitutional right to liberty in a wide sense (Art. 2 sec. 1 Basic Law). This implies that any state action burdening a person in any way may be challenged on the

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4 For an overview see David Currie, Separation of Powers in the Federal Republic of Germany, The American Journal of Comparative Law 1993, 201 ff.

5 The types of proceedings are presented in English on the homepage of the Federal Constitutional Court (https://www.bundesverfassungsgericht.de/EN/Verfahren/Wichtige-Verfahrensarten/wichtige-verfahrensarten_node.html).

6 BVerfGE 6, 32 (Elfes); see Axel Tschentscher, The Basic Law (Grundgesetz) 2016, 4th ed. 2016, 19 f.

grounds that this state action is not in coherence with the laws or that it violates the principle of proportionality. In other words, there is a constitutional right to challenge the legality and proportionality of any state action infringing on individual liberty in Germany. Another case of the highest importance is the Lüth case from 1958.[7] In this case, the Federal Constitutional Court decided that the fundamental rights of the Basic Law constitute an 'order of values' (Wertordnung) that has to be taken into account when interpreting civil law provisions applicable in the horizontal relationship between private persons. The civil law court involved was instructed by the Federal Constitutional Court to better consider the 'radiating' effect (Ausstrahlungswirkung) of the freedom of speech (Art. 5 sec. 1 Basic Law) in a situation in which a (former Nazi) film producer was suing the president of a press club (Mr. Lüth) for damages that had arisen because of a boycott call by Lüth against a movie produced by the film producer. The Lüth case stands at the beginning of an extensive application of fundamental rights in private law relationships. This effect of the fundamental rights is known as the indirect horizontal or third-party effect of the fundamental rights (mittelbare Drittwirkung der Grundrechte).

The Basic Law – as interpreted and applied by the Federal Constitutional Court in fundamental rights cases, but also in many cases involving disputes between federal organs or the federal government and the states – substantially helped the German people to find a new orientation after World War II, to find a new identity based on the values expressed in the constitution. In view of this, the political scientist Dolf Sternberger coined the notion of 'constitutional patriotism' (Verfassungspatriotismus)[8] which does indeed describe a general perception or attitude that has prevailed in Germany for decades.[9]

In total, the Basic Law has proven to be a very good and viable constitution, especially as it is open to societal and political change. The greatest challenge that the Basic Law has had to cope with – and did cope with in an impressive manner – was the reunification of East and West Germany in 1989/90. Even though there had been some discussion about enacting a new constitution for the united Germany at that time, unification was organised and dealt with under the existing Basic Law, by accession of the 'new' States to the Federal Republic of Germany (Art. 23 Basic Law). Some articles of the Basic Law were amended at the time in compliance with the unification treaty, but there is no doubt that the Basic Law turned out to be a suitable and generally accepted constitution for the whole of Germany.[10] After this had become clear, previous talk about a 'birth defect' of the Basic Law – so called because it had not been submitted to a referendum in 1949, but had been passed by representatives elected by the state parliaments (Parlamentarischer Rat) and then ratified by the state parliaments only (Art. 144 Basic Law) – ceased to be heard.

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7 BVerfGE 7, 198 (Lüth); see Peter E. Quint, A Return to Lüth, Roger Williams University Law Review 2011, 73 ff.

8 Dolf Sternberger, Verfassungspatriotismus, 1982.

9 Comp. Jan-Werner Müller/Kim Lane Scheppele, Constitutional patriotism: An introduction, International Journal of Constitutional Law 2008, 67 ff., on the role of Jürgen Habermas.

10 Comp. Rüdiger Voigt, German Constitutionalism after Reunification, Fulfilled and Unfulfilled Expectations, Bulletin of the Australian Society of Legal Philosophy 1992, 63 ff.

However, there are – of course – challenges to the constitutional structure of Germany and to the Basic Law today. In the following section, some of these challenges and corresponding future prospects will be addressed.

II. Current Challenges and Future Perspectives

1. *Parliamentary Democracy – Fragmentation, Polarisation and the Predominance of Government*

On the federal level, as well as on the state level,Germany is organised as a parliamentary democracy. On the federal level, the Federal Parliament (Bundestag) elects the Federal Chancellor (Bundeskanzler), who chooses the ministers of the cabinet and who is democratically responsible for all government action related to the Federal Parliament. The Federal President (Bundespräsident) is not directly elected by the people, but by a special body (Bundesversammlung). Given the history of the Weimar republic, the President has no substantive governmental powers, but rather serves a mainly representative role. For this reason, parliament is at the core of democratic legitimation of state power in Germany.

Therefore, the electoral system for parliamentary elections is of the highest importance. Interestingly, this system is not determined by the Basic Law itself, but – based on Art. 38 sec. 3 of the Basic Law – by a parliamentary law only (Bundeswahlgesetz). Since 1949, parliamentary elections on the federal level follow the concept of 'personalised proportional representation'.[11] Every voter has two votes. With the first vote,he or she votes for a 'direct candidate' from the constituency. Here, majority voting applies. With the second vote, he or she votes for a political party. The seats in parliament are then distributed according to the proportion of votes gained by the respective parties (proportional representation). The 'direct candidates' take the seats gained by the respective parties first, the remaining seats are filled with candidates from party lists. In order to secure adequate proportional representation, the effects of so-called 'overhang mandates' (more direct candidates from a party than seats in parliament) and other effects of the voting system are compensated by adding additional parliamentary seats.

Currently, the established political parties in Germany that are traditionally called 'people's parties' (Volksparteien: CDU and SPD) are dramatically losing support. Other, previously small or new parties are becoming rather successful. The political landscape appears increasingly fragmented. Apart from all the other implications and problems that this leads to, a consequence of this fragmentation is – due to many additional parliamentary seats thereby generated – a very big parliament (of more than 700 representatives). Because of this, a reform of the electoral system is indispensable, and it is currently being discussed. However, a solution is not in sight yet.

Like in many other countries worldwide, political fragmentation goes along with populism, polarisation and radicalisation in Germany. On the one hand, all political parties that are not prohibited by the Federal Constitutional Court (Art. 21 sec. 2 and 4 Basic Law)[12] have to be

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[11] For an overview, see – for example – https://www.deutschland.de/en/topic/politics/this-is-the-way-the-federal-elections-work or https://www.bundestag.de/en/parliament/elections/electionresults/election_mp-245694.

[12] For a recent case from January 2017 see BVerfGE 144, 20 (English translation at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/01/bs20170117_2

treated equally by the state. On the other hand, the apparent polarisation and radicalisation of the political discourse have to be dealt with by political institutions and also by the public media. It remains a big challenge to find the right balance between equal treatment and the idea of defensive democracy (wehrhafte Demokratie), in particular against the background of the Nazi past in Germany.[13]

Looking at the relationship between the Federal Parliament and the Federal Chancellor with the ministers (cabinet, commonly referred to as 'government'), the past years have shown an increasing predominance of government at the expense of parliament. This is due to a number of reasons, foremost among them being the importance of European and international cooperation and integration. On the European and international level, it is the Chancellor and the ministers who are in charge. The institutional role of the Federal Parliament is only to ratify what has been agreed upon by government beforehand (comp. Art. 59 sec. 2 Basic Law). New ways to involve parliament in effective decision-making in these contexts are being devised. For example, Art. 23 of the Basic Law contains new obligations of government to inform parliament about developments on the European level at an early stage and to take account of parliamentary opinions concerning such developments. Also, extended competences of parliament in the area of international treaties are currently being considered, among others a right of parliament to terminate international treaties. The more European and international cooperation and integration become important, the more the future of parliamentary democracy will depend on finding new mechanisms to involve national parliaments in decision-making in a meaningful way.

2. *Federalism – Centralisation and the Power of the 'Golden Reins'*

Germany has had a federal structure for a long time. It has always been a privilege of Germany to be able to profit from a diversity of states, from a fruitful competition of ideas implemented and tested in the individual states and also from political personnel trained at the state level. Federalism can strengthen democracy and freedom, in particular in combination with the concept of subsidiarity.

While the Allied Forces after World War II pressed for reinstalling a strong form of federalism in Germany in order to prevent a new centralised leadership from rising, the constitutional practise since 1949 has shown a constant trend towards increasing centralisation of legislative power and, to a lesser extent, executive power. Several attempts to revitalise the role of the states[14] have essentially failed. It appears that neither the politicians responsible in the German states nor the German people are interested in any form of significant regional decision-making and responsibility. There appears to be an insufficient sensitivity to the advantages of democratic freedom and competition inherent in a federal structure, and no

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bvb000113en.html).

[13] See, for example, a case on a derogatory statement by the Federal President: BVerfGE 136, 323 (English translation at https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2014/06/es20140610_2bve000413en.html); also BVerfGE 138, 102; 140, 225; 148, 11.

[14] See Arthur B. Gunlicks, German Federalism and Recent Reform Efforts, German Law Journal 2005, 1283 ff.

appreciation for the advantages of procedural justice. Instead, there is a strong belief in Germany in substantive justice and a strong tendency towards the concept of material equality. This goes along with favouringcentralised decision-making.

The federal government is willing to accept the power to decide instead of the states. It tends to offer the states money for the transfer of power, be it in a formalised way (by transforming constitutional competences) or in a more implicit way (by installing new, hybrid mechanisms aimed at governing in an area formally controlledby state competences). The commonlyused notion of financial or 'golden reins' (goldener Zügel) that the federal government uses describes the situation well: The reins are golden because the states are compensated with money; but still, reins in the hands of federal government curtail democratic freedom in the states.

Looking at the development of the Basic Law over the years, and at very recently inserted or modified provisions like Art. 104b, 104c and 104d of the Basic Law in particular, the magnitude of the problem is undeniable. The right balance between centralised decision-making in areas that demand uniform solutions and decentralised decision-making in other areas has to be found again. The potential that federalism offers should not be given up. A new awareness of this potential has to be created. The very recent reform of the land tax (Grundsteuer) in fall 2019[15] appears as a ray of hope. With this reform, the states were granted a new constitutional right to define their own tax base and tax rate in this area (Art. 72 sec. 3 no. 7 Basic Law).

3. *Fundamental Rights – Direct Effect in Horizontal Relationships?*

The fundamental rights traditionally only apply in the relationship between state power and the individual person subdued to this power. Some countries – like the United States, according to the state action doctrine[16] – still very much adhere to this concept. In Germany, the Lüth decision from 1958[17] paved the way to applying the value judgments underlying the fundamental rights in the interpretation of civil law provisions. The Lüth approach, which became rather prominent in the case law of the Federal Constitutional Court, extends the effects of fundamental rights to horizontal legal relationships governed by private law, referred to as the indirect horizontal effect of fundamental rights. Nevertheless, the approach does not depart from the idea that private persons are not directly bound by the fundamental rights. It is only the state legislating in the area of civil law and applying civil law (in the civil law courts) that is bound by the constitutional guarantees of freedom and equality.

In recent years, however, we have seen a clear tendency to at least implicitly extend the obligations arising from fundamental rights to private entities. When the state privatises its own activities by transferring them to companies operating under private law (while still being owned by the state), the obligation of such private companies to observe the fundamental rights

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[15] For a documentation of the reform process and its content see https://www.bundesfinanzministerium.de/Content/EN/Standardartikel/Topics/Taxation/Articles/german-property-tax-reform.html (in English).

[16] With a recent analysis: Jud Mathews, State Action Doctrine and the Logic of Constitutional Containment, University of Illinois Law Review 2017, 655 ff.

[17] See above at I.

is consequent and correct. The Federal Constitutional Court has confirmed this in the Fraport decision from 2011.[18] In other recent fundamental rights cases, on the contrary, privately owned companies were involved. In this kind of case, the Federal Constitutional Court sometimes makes the argument that the companies control resources that the public indispensably needs in order to exercise freedom and that therefore the companies have to respect the constitutionally protected freedom and equality rights of the citizens interested in using the resources. Despite all further distinctions, differentiations and formal reservations, the Federal Constitutional Court applies this approach in order to constitutionally bind private entities in cases related to so-called semi-public spaces (like shopping-malls),[19] in cases related to access to events with high cultural or societal significance (like a soccer game in a big stadium)[20] and in cases related to the protection of interests in infrastructure (such as that of important social media).[21]

To put it differently: With the increasing relevance of large private companies for the individual exercise of personal freedom, constitutional law in Germany tends to consider these companies as effectively being bound by fundamental rights. On the one hand, this development appears consistent with the aim of meaningfully protecting freedom and equality in society. On the other hand, this extension of constitutional obligations into the sphere of society and economy is rather ambivalent, because it does not only secure, but also jeopardises freedom. If fundamental rights obligations of private entities are extended too far, fundamental rights could transform into a justification for the state to regulate the exercise of freedom in a very intense and detailed way and eventually to define what a proper or good life has to look like.

Therefore, the traditional distinction between the state being bound by fundamental rights and the citizens holding fundamental rights remains crucially important for the preservation of a free society. Of course, the objective power of large multinational companies has to be limited; actual freedom to some extent does require the use of resources controlled by such companies. However, we should remain very careful when extending direct fundamental rights obligations to private entities. In general, the concept of indirect 'radiating' effects of fundamental rights in horizontal relationships between private persons and entities should be sufficient to effectively tackle the challenges of a world with an asymmetrical distribution of power in society and the economy.

4. *European and International Integration – The Idea of the 'Community of Law' (Rechtsgemeinschaft)*

From the time it began in the early 1950s, the process of European integration has been complex. It has been marked by many successes, but also setbacks. On the whole, the process has led to a very remarkable form of intensive economic, political and cultural integration that can be called unique in the world. For more than ten years, however, the European Union has been burdened by a severe crisis. On the surface, this crisis is a Euro-debt crisis. Looking at it more closely, it becomes obvious that the crisis was actually triggered and is being fuelled by

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18 BVerfGE 128, 226 (Fraport).

19 BVerfG, NJW 2015, 2485 (Flash Mob).

20 BVerfGE 148, 267 (Stadium Ban).

21 BVerfG, NVwZ 2019, 1125 (Network Enforcement Act).

the significant differences between the Member States with regard to their economies and their political culture. In the past, European policy makers may have had a tendency to lose sight of these differences. The European Union can be led out of the crisis if these differences are better recognised and if the Member States are given enough space to develop according to their respective needs and preferences. Political challenges of a union-wide dimension should be dealt with on the European level (security, climate, migration, energy etc.). But other political decisions should be reserved to the Member States in accordance with the idea of subsidiarity (comp. Art. 5 sec. 3 of the Treaty on European Union).[22]

The most important reason for the crisis of the European Union, however, is the fact that the treaty law that is at the basis of the Union is not sufficiently respected anymore. Walter Hallstein, one of the protagonists of the early European Communities, coined the notion of Europe being a 'community of law' (Rechtsgemeinschaft).[23] In the face of different languages and different political cultures, the European Union can only prosper as a 'community of law'. The treaty law is the common language of the Member States; it is the basis for trust and reliability in the European Union. Therefore, the Union and the Member States have to return to the idea of the binding character of the treaties. This is the key to the future of Europe.

The authority of international law is also being undermined. Just as the European Union will only prosper as a 'community of law', the further prosperous development of the global community will also fundamentally depend on the full recognition of the binding character of law.

On the level of European and international law, democracy remains difficult to implement. It still is the national governments as well as bodies constituted by representatives from national governments that are mainly in charge of policy- and law-making on this level. As long as there is no unified European or even international constituency, parliamentary conventions on the European and international level can only have limited legitimising effect. From the point of view of democracy, it will remain crucial to include national parliaments in the process of European and international policy- and law-making in intelligent ways.

While democracy is difficult to bring to life within supranational and international structures, these same structures have allowed fundamental rights to develop in a remarkable way. Looking at Europe, the European Convention on Human Rights has very successfully been interpreted and applied by the European Court of Human Rights in Strasbourg. While all Member States of the European Union are bound by the Convention, the European Union as such is still on the way to becoming a member of the Convention (see Art. 6 sec. 2 of the Treaty on European Union).[24] However, the European Union is bound by the Charter of Fundamental

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[22] Antonio Estella de Noriega, The EU principle of subsidiarity and its critique, 2002; Kees van Kersbergen/Bertjan Verbeek, Subsidiarity as a Principle of Governance in the European Union, Comparative European Politics 2004, 142 ff.

[23] See the references in European Parliament Research Service, The EU as a Community of Law, Briefing March 2017 (http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/599364/EPRS_BRI(2017)599364_EN.pdf).

[24] On the difficulties during the negotiations see Tonje Meinich, EU accession to the European Convention on Human Rights – challenges in the negotiations, The International Journal of Human

Rights of the European Union, which draws heavily from the Convention and which is binding for the European Union as well as its Members States when implementing EU law (Art. 51 sec. 1 of the Charter). Both the Convention and the Charter in many respects reflect the catalogues of fundamental rights in the constitutions of the states of Europe.

In total, we are confronted with an inflation of fundamental rights guarantees in Europe today – guarantees that often demand parallel application in similar cases. Regarding the contents of these guarantees, an interesting concordance can be observed, as the courts involved generally strive for consistency and harmony, which is very reasonable. Still, it would make life easier to further clarify the exact scope of applicability of the respective rights and also to better delineate the competences of the respective courts to interpret these rights. To this end, the provision of Art. 51 sec. 1 of the Charter of Fundamental Rights of the European Union in particular needs to be concretised in a clear and reliable way.[25] In Germany, the Federal Constitutional Court in a decision from November 2019[26] interestingly –and for the first time – decided that it will apply the guarantees of the Charter of Fundamental Rights of the European Union in its own cases to the extent that Art. 51 sec. 1 of the Charter opens up this possibility.[27]

The increasing significance of international and – for the case of Europe – in particular European fundamental rights guarantees will have a bearing on the understanding of fundamental rights in the individual states, among others the understanding of the horizontal effects of fundamental rights.[28] The European Court of Human Rights and the Court of Justice of the European Union in Luxemburg have developed their own concepts in order to deal with the question of horizontal effects.[29] Looking at these concepts, the horizontal effects of fundamental rights could further gain in importance, at least in the longer run.

III. Conclusion and Outlook

The idea of the constitutional state – a state legitimised and bound by a constitution – is very much alive. Developed and first implemented at the end of the 18th century in France and in the United States, the idea of the constitutional state builds on the fundamental insight that the individual person is vested with inalienable rights that constitute state power and that have to be respected by state power. The relationship between the individual and the state is conceived of as a principal–agent relationship, with the individual being the principal.

In the Western world, Germany was relatively late in transforming into a constitutional state in this sense. After long struggles in the 19th century, the Weimar Constitution from 1919 and the Basic Law from 1949 leave no doubt that the individual is vested with inalienable freedom and equality rights that the state has to observe and that the state is legitimised by the

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Rights 2019 (https://doi.org/10.1080/13642987.2019.1596893).

25 See ECJ, 26.2.2013, C-617/10 – Akerberg Fransson, ECLI:EU:C:2013:105.

26 BVerfG, NJW 2020, 314 (Recht auf Vergessen II).

27 Beforehand, the Federal Constitutional Court refrained from doing so based on its own procedural law that provides that the Court applies the Basic Law only; comp. Art. 93 and Art. 100 Basic Law.

28 See above at II.3.

29 For an overview see Charlotte L. Lane, The Horizontal Effect of International Human Rights Law: Towards a Multi-Level Governance Approach, 2018 (PhD thesis Groningen).

people. The Weimar Constitution did not have a real chance to succeed in the very difficult interwar period. The Basic Law, on the contrary, became a highly impressive success story. It put the fundamental rights at the beginning (Art. 1-19 Basic Law), installed a full-fledged parliamentary democracy and claims superiority without any exceptions. The Federal Constitutional Court enforced the Basic Law from the start and became a role model for many other constitutional courts.

Today, the Basic Law – just as with many other constitutions in the world – is confronted with serious challenges. For the case of Germany and the Basic Law, a number of challenges can be pointed out. The system of parliamentary democracy is currently threatened by an increasing fragmentation and polarisation of politics. This will require a reform of the electoral system, which was originally developed in the context of a small number of very large 'people's parties' (Volksparteien). Furthermore, it will be important to maintain the right balance between democratic openness to new and even radical opinions on the one hand and an effective defence of the democratic system as such on the other hand ('defensive democracy'; wehrhafte Demokratie). In the relationship between parliament and government, parliament is increasingly on the defensive as more and more political decisions are made in international and European institutions to which the government has access but not the national parliament. New mechanisms to share information and facilitate the participation of parliament will have to be found in order to democratically legitimise the decisions taken in these contexts in a sufficient manner.

The future of federalism concerns federal states only. For the case of Germany, the last decades and the last few years in particular have shown an increasing centralisation of decision-making and a corresponding marginalisation of the German states. The advantages that the system of federalism offers should not be given up. A reasonable vertical distribution of legislative and executive powers between the federal level and the state level can foster democracy and freedom on both levels (the idea of subsidiarity).

The fundamental rights have been interpreted and applied by the Federal Constitutional Court of Germany in a very extensive and successful way. The concept of the indirect 'radiating' effect of the value judgments underlying fundamental rights as developed in the Lüth case from 1958 (mittelbare Drittwirkung der Grundrechte) has led to an intensive indirect application of fundamental rights in civil law relationships. In recent years, however, the Federal Constitutional Court and other courts have been extending the binding effect of fundamental rights even further and now appear to be on the verge of considering (powerful) private companies as being directly bound by fundamental rights. This development is very ambivalent, as it protects, but also endangers freedom. Most of the problems of an asymmetrical distribution of power in society should be solvable by applying the proven concept of the indirect horizontal effect of fundamental rights.

With regard to the European Union, the recent crisis, which only on the surface is a Euro-debt crisis, can be overcome by better acknowledging the different profiles and political programs of the Member States. Most importantly, the European Union and the Member States have to return to the idea of a 'community of law' (Rechtsgemeinschaft). The law is the common language of the European Union; the EU Treaties are the basis for trust and reliability in Europe. Breaches of the EU Treaties – for whatever political reason – should therefore not be tolerated. The same holds on the global level. International law is binding and it remains the basis for a prosperous global development. Democracy, of course, depends on the existence of a

people; it is therefore difficult to implement democracy in supranational and international structures controlled by national government representatives. International and in particular European fundamental rights catalogues, on the contrary, have multiplied in an impressive way; in this regard, it will be crucial for a reasonable application of these catalogues to delineate scopes of applicability and spheres of competences.

Some of these observations on the challenges facing constitutional law are of global significance, some are specific to Germany or to European countries. Consequently, Asian countries are confronted with only some of the challenges sketched out above. But they also have their own specific challenges and perspectives due to regional or local circumstances.

Regardless of whether the challenges facing constitutional law appear universal or country-specific, it will always be right and helpful to maintain and value common dialogue.[30] Comparative constitutional law[31] permits a substantive reflection on constitutional law concepts and structures. It can open up new perspectives and even lead to legal transplants. But it can also raise awareness for elements of a state's own constitution that are worth preserving. With all this in mind, constitutional lawyers worldwide should talk and listen to each other.

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TESTIMONIAL

Taiwan can be proud of a constitution that guarantees democracy and fundamental rights. Taiwan's legal system, institutions and political practice may serve as a model for other Asian countries.

There is a long-standing tradition of very fruitful and inspiring dialogue between Taiwan and Germany on questions of constitutional law as well as many other areas of law. Heidelberg University runs a successful exchange program and invites Taiwanese faculty members, students and law practitioners to do research on German law in Heidelberg. For further information, please consult the university's homepage.

For anyone interested in German law, there is a wide variety of sources of information. With regard to constitutional law, accounts in English are provided by the books and articles cited in footnote 1 of my contribution in this issue of the *Taiwan Law Review*. For current topics and developments in the area of constitutional law, the following German law journals can be recommended (among others): "Archiv des öffentlichen Rechts", "Der Staat", and "Juristenzeitung". Additionally, there are a growing number of online resources like "Verfassungsblog" (https://verfassungsblog.de/) and "German Law Journal" (https://www.cambridge.org/core/journals/german-law-journal). The German Federal Constitutional Court (https://www.bundesverfassungsgericht.de/EN/Homepage/home_node.html) provides English translations of important decisions and press releases.♣

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[30] Donald P. Kommers, The Value of Comparative Constitutional Law, John Marshall Journal of Practice and Procedure 1975, 685 ff.

[31] For an interesting, recently published treatise on comparative (constitutional) law see Uwe Kischel, Comparative Law, 2019.

The Future of Contract Law

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作者資訊

ABSTRACT

Modern contract law is marked by differentiation between types of contract. In the United Kingdom, housing contracts, employment contracts and particularly consumer contracts are now governed by specialist regimes. Many of the consumer measures derive from European Union legislation but UK consumer protection often goes further and the measures are expected to survive Brexit. We can expect more differentiation with further legislation to deal with new issues. The same is probably the case in almost all jurisdictions.

The general law of contract is thus effectively confined to contracts between businesses and between private individuals. But on many key issues the national laws of contract differ markedly, especially as between civil law countries and traditional common law jurisdictions such as England and Wales, Hong Kong and Singapore. Now that both digital products and services are being supplied on an international basis and now that small businesses and consumers make transnational contracts, the question arises whether we can expect further attempts to reduce the costs of transnational contracting, for example by more harmonisation measures; by the expansion or revision of the Vienna Convention on the International Sale of

Goods or the adoption of other "optional instruments"; or by "soft law" principles encouraging a gradual convergence. In Europe convergence is happening, but only between "like-minded" systems; on the key issues the English common law remains quite different. This is because typically English law is dealing with high value contracts made by sophisticated players, often operating in volatile markets. These parties can be expected to look after their own interests. Other jurisdictions deal more with small businesses making low value contracts, when more protective rules are appropriate. Thus we can expect continued divergence. Jurisdictions thinking of modernising their law should consider what type of case their law will most often have to handle.

Keywords: Contracts, Transnational Contracts, Harmonisation, Optional Instruments, Convergence

CONTENTS

It is a great honour to be asked to contribute to the 300th issue of the Taiwan Law Review, and to be given the opportunity to speculate on the future of contract law. I will consider two issues: increasing differentiation between types of contract and differences between laws of contract.

I. DIFFERENTIATION INTO SEPARATE LAWS OF CONTRACT

Every field of law is dynamic, and this is no less true of contract law than of other areas of law. We can see this if we look back at developments over the last half century. At least in my jurisdiction, England and Wales, we have seen enormous changes. Perhaps the most striking change is the differentiation between different types of contract. Although in principle all contracts are still governed by the same general legal rules, we have developed almost separate regimes for, for example, residential tenancies, employment contracts and consumer contracts. In some cases it is the courts which have developed rules applicable to only one type of contract, for example the term now implied into contracts of employment that the employer

Commercial Law in an Age of Automation: Upstream Planning to Forestall Downstream Transaction Costs

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ABSTRACT

This article examines commercial law in transition as data analytics allows many evaluative and transactional processes to be automated. Based on research and interviews conducted in four financial centers, the article posits that both lawyers and financial professionals will engage more in more abstract, preparatory activity to construct the logical cores for algorithmically automated processes and spend less time performing the processes themselves. This move upstream away from direct contact with underlying data and clients will nudge the "liberal professions" toward the rational organizing principles of industry in general.

Keywords: Commercial Law, Fintech, Legaltech, Regtech, Data Analytics, Automation, Artificial Intelligence

International Judicial Cooperation in Criminal Matters
—*the European Path as a Model?*

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ABSTRACT

Criminal prosecution is faced with completely new challenges in the age of globalisation and digitisation. To overcome national borders, new solutions must be found that are nonetheless compatible with the rule of law. The European Union has based its judicial cooperation in criminal law on the principle of 'mutual recognition'. It has already adopted numerous important legal acts implementing this principle. The article focuses in particular on the European Arrest Warrant, the European Investigation Order and, in the area of 'e-evidence', the planned European Production and Preservation Order. The author not only describes the essential contents and advantages of these innovations, but also points out the problems arising from them. As a result, he believes that the principle of mutual recognition has an undeniable potential for improving judicial cooperation in criminal matters also for non-EU Member States seeking to support each other by providing legal assistance. Nevertheless, mutual recognition must be limited - in particular by inserting an ordre public-proviso for cases of serious fundamental rights violations.

Keywords: European Union, Mutual Recognition, Judicial cooperation, European Arrest Warrant, European Investigation Order, E-evidence, Fundamental Rights