Special Issue: The Basic Law at 60

The Basic Law at 60 – Identity and Change

By Dieter Grimm [*]

A. Constitutional Change

The Basic Law, whose 60th anniversary we celebrate today, is not identical with the Constitution that was enacted on 23 May 1949. In the sixty years of its existence, it has been amended fifty-four times. Further amendments are under way. Many amendments concerned more than just one article. A little more than half of the 146 articles of the original text still read as they were framed in 1949. However, twenty-six of these unchanged articles are part of the "Transitional and Concluding Provisions." A number of them were limited to one singular act of application, such as Art. 136 I ("The *Bundesrat* [Federal Council] shall convene for the first time on the day the *Bundestag* [national parliament] first convenes."), and lost their normative value with the completion of the given act. A little less than half of the original articles, and the Preamble, have been subject to amendments; some of them several times. The forerunner is Art. 106 (apportionment of tax revenue), with six amendments. In addition, forty-seven articles have been added to the original text, some of which were repealed later.

If the identity of a constitution depends on whether its text has remained the same over time, then Germany today has a constitution different from the one adopted in 1949. However, it seems doubtful whether this would be a notion of identity adequate to a constitution. Constitutions entrench the principles of the political and societal order and shield them from rapidly changing majorities and situations. Rather, they provide the lasting structures and guidelines under which an adaptation of the legal system to new challenges or altered preferences can take place. Yet constitutions are themselves not immune to challenges, in particular if the text of the constitution is as detailed as is the case with the Basic Law. Constitutions that resist such adaptations are in danger of losing their legal relevance and of being circumvented. This is why the possibility of change must be recognized when the identity of constitutions is considered.

This is not to say, however, that amendments to a constitution are always identity-neutral. The Weimar Constitution was not abolished after the National Socialists took over in 1933.

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It was partly suspended and partly changed according to the conditions the Constitution itself had laid down for amendments. But these amendments left little of what had been the Weimar Constitution. The changes, radical in substance but legal in form, were possible because the Weimar Constitution had refrained from establishing substantive barriers to constitutional amendments, and the majority of constitutional law scholars had interpreted the provision as an unlimited mandate, provided an amendment reached a two thirds majority. The Basic Law reacted to this in Art. 79 III, which protects the fundamental principles of the Constitution from abolition. Art. 79 III thus guarantees the identity of the Basic Law. If "identity" refers to the core of the Constitution as secured by Art. 79 III, we still live under the same Basic Law although much has changed in the penumbra.

It would be insufficient, however, to limit the notion of constitutional change to formal amendments to the text. Constitutional change occurs outside textual change as well. This is the case when a different or a new meaning is attributed to the text by way of interpretation. Constitutions as well as laws in general are drafted under certain historical circumstances to which they explicitly or implicitly refer. Therefore, a legal provision cannot be fully understood if isolated from this context. It is in this context where the legal norm shall reach its purpose. The context is, however, not immune against change - technological change, economic change, demographic change, value change, etc. Contextual change may have an impact on the ability of the norm to reach its purpose. If interpreted regardless of the change it may miss the purpose or produce dysfunctional results. Hence, when we ask how the Basic Law of 2009 differs from the one enacted in 1949, changes by interpretation have to be taken into account in addition to changes by amendments.

B. Changes by Amendments

The many amendments that have changed the text of the Basic Law are unevenly distributed among the various parts of the Constitution.

I. Basic Principles

The basic principles in Art. 1 and Art. 20, which are protected from abolition or diminution by Art. 79 III, have remained almost unchanged. The consensus as to the foundational value of human dignity and the commitment to republicanism, democracy, rule of law, and the social state never eroded, and only federalism met criticism from time to time. A right to resistance against attempts to overthrow the constitutional order was added to Art. 20 along with the introduction of emergency provisions in 1968. A new state obligation concerning the protection of the environment (Art. 20a) was enacted after long controversies in 1994.

II. Fundamental Rights

The number of amendments concerning the Bill of Rights has been small. No completely new right was introduced, but some of the rights existing from the beginning were subject to change. Some amendments extended, some curtailed the constitutional protection. An extension of the scope took place in the equal protection clause of Art. 3. Gender equality, guaranteed from the beginning, was supplemented by a duty of the state to promote factual equality among men and women, and a prohibition to discriminate against disabled persons was added, both in 1994. Restrictions sometimes concerned the scope of the right, sometimes the limitation clause. A restriction of scope occurred when the right to asylum was reformulated after long and severe controversies in 1993. The power of the legislature to limit fundamental rights was enlarged in Art. 10 (privacy of correspondence, mail and telecommunication) in 1968 and in Art. 13 (inviolability of the home) in 1998. How sensible these amendments were can be seen from the fact that they were challenged as unconstitutional amendments under Art. 79 III. Yet, the Federal Constitutional Court did not find a violation of Art. 79 III, while a minority of the justices saw the constitutional limits to amendments transgressed.

III. Governmental Structure

The vast majority of the amendments concerned the structural parts of the Basic Law. Out of the total of fifty-four amendment laws, five can be called major interventions into the original structure of government. Two of them filled gaps in the Constitution which resulted from the fact that in 1949 West Germany was still under the control of the allied powers who had reserved some sovereignty rights for themselves. The disarmed country did not need rules concerning war powers and armed forces. When West Germany's rearmament was decided, amendments to the Basic Law became necessary and were adopted in 1956. The second amendment that filled a gap in the original text introduced emergency rules and was adopted during the short period of the first Grand Coalition in 1968. Both amendments were heavily contested: the rules concerning rearmament because of fear that this might cement the division of the country and create a situation where Germans would have to fight against Germans; the emergency rules because the memory of the detrimental role the emergency powers had played in the Weimar Republic was still vivid, and many were afraid that new emergency provisions might be the first step to turn West Germany into an authoritarian system.

Three further amendments of major impact did not complete the Basic Law but changed its organizational structure. The first one of 1969 concerned the federal system and the financial relations between the Federation and the *Länder* (German states). It transformed the original dualistic federalism into a cooperative federalism. The second package of amendments came as a consequence of Germany's reunification in 1990. Some amendments were necessary to prepare this event. Others followed, among them a provision that was not directly related to unification but reacted to the progress of

European integration. The new Art. 23 laid down the conditions under which Germany can participate in further integration steps and regulated the internal decision making process regarding European affairs. A big package of amendments followed in 1994. It can be understood as a substitute for the new constitution that Art. 146 in its original form had promised for the historical moment of unification – a promise that the majority of West German politicians were unwilling to keep. The last of the major constitutional reforms was another shift in the federal structure adopted under the second Grand Coalition in 2006 (and meanwhile – 2009 – completed by a reform of the financial system).

Between the adoption of the Basic Law and Germany's reunification, an unsuccessful attempt to a total revision of the Constitution was made. In 1970, the *Bundestag* established a commission composed of politicians and experts to work out recommendations. Yet, when the commission after six years presented its report, two volumes of recommendations, a need for a total revision was no longer felt. The veneration of the Basic Law in the West German society had begun. Three years later, Dolf Sternberger coined the term "constitutional patriotism."

Most of the amendments within the organizational parts of the Basic Law concerned the relationship between the Federation and the *Länder*, while the institutions and procedures on the federal level remained almost untouched. The division of powers between the Federation and the *Länder* had already been an object of deep controversy in the Parliamentary Council that drafted the Basic Law. Likewise, it was this part of the draft constitution that caused interventions by the allied forces, who were in favour of a system more friendly to the *Länder*, whereas the majority of the Parliamentary Council would have preferred a more unitary state. The pressure on the drafters was mainly exercised by the two allied powers that showed no interest in federalism at home: France and Great Britain. In their view, a federal state was a weak state, and the more federal it was, the weaker it would be. Federalism was intended as a means to prevent a strong West German state from emerging.

However, the development of German federalism went in a different direction. The federal structure as designed by the Parliamentary Council soon entered into conflict with the social and economic dynamics. Rapid economic recovery and technological progress resulted in an increase of problems that could not be solved within the narrow framework of the *Länder*, but required national (if not international) solutions. Yet, even in policy fields where uniformity of the law was not required, the post-war population showed more interest in equal conditions of life everywhere in the Federal Republic than in maintaining regional diversity. The fact that the majority of the *Länder* were artificially created entities may have contributed to this attitude, as well as the mobility caused by the war and even more so by the expulsion of millions of Germans from their homes in the Eastern provinces after World War II. An additional factor was the development of political parties. The national organizations soon took the lead over the party structure in the *Länder*.

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Thus, long before the first major reform of the constitutional system in 1968, the federal structure had deeply changed. The Federal Republic made ample use of its power to regulate the subject matters within the category of concurrent legislation, with the effect that the *Länder* were barred from legislating in these fields. A number of new legislative powers were attributed to the Federation, such as environmental law or the rules concerning the use of atomic energy. The Federal Republic contributed to financing certain tasks of the *Länder* and thereby gained influence on the fulfilment of tasks that the Constitution had reserved for the *Länder*. Finally, the *Länder* themselves entered into agreements for uniform legislation and administration in subject matters within their competency, the most conspicuous example being education. As early as 1962 Konrad Hesse could characterize West Germany in the title of his influential book as a "Unitary Federal State" (*Der unitarische Bundesstaat*).

Yet, a need for thorough constitutional reform was felt only when West Germany faced its first economic crisis in 1966/67. The fact that this crisis led to the fall of Chancellor Ludwig Erhard and to the formation of the first Grand Coalition facilitated the constitutional reform. Together the coalition parties disposed of the necessary majority. It was a general assumption that a successful crisis management required an active counter-cyclical policy which in turn seemed possible only if the national and the regional governments acted in concert. The consequence was a transformation of the federal system. The *Länder* gave up a considerable part of their independence and accepted a large number of constitutional amendments in 1969 that introduced more cooperative forms of government. No other year saw more amendment laws than 1969, eight altogether. The *Länder* lost their fiscal autonomy and had to coordinate their budgets with the federal budget. Since the planned boost in public investment exceeded the resources of the *Länder*, a new category of joint tasks was established, accompanied by a cost sharing system.

The downside of this reform later became apparent. Already before 1969, the Federation had paid a price for the transfer of legislative powers to the national level: the number of federal laws that required the consent of the *Bundesrat*, the representation of the *Länder* governments, increased as well. The constitutional reform of 1969 once more augmented the power of the *Bundesrat*. After this reform almost two-thirds of all federal laws depended on the approval of the *Bundesrat*. This created a particular problem in periods where divergent majorities existed in the *Bundestag* and the *Bundesrat*. The *Bundesrat*, whose decisive role in the legislative process had originally been limited to federal laws that affected the interests of the *Länder* directly, now became an instrument in the hands of the opposition parties at the federal level. As a consequence, the elected majority in the *Bundestag* was no longer able to carry out its political program. It needed the consent of the opposition that formed the majority in the *Bundesrat*.

The consequence was a tacit transformation of the political system from a deliberative into a negotiating democracy. This entailed a lack of transparency. Negotiations are conducted behind closed doors. It delayed, often prevented and always diluted reforms that

everybody regarded as being necessary. In addition, it made it impossible to attribute the responsibility for success or failure of a measure to the government. Government and opposition claimed a success for themselves and blamed the other side for every failure. This in turn devaluated elections. In retrospect, it was difficult to judge the accomplishment of the government. Prospectively, the voter no longer decided who would govern with which agenda. Joint tasks were by their very nature designed for negotiation. The necessity to reach unanimity among, at that time, eleven *Länder* and the Federation, made the decision making process cumbersome. Solutions were mostly reached according to the least common denominator. If they turned out to be ill-designed, it was almost impossible to reverse them. The costs in terms of democracy and efficiency were obvious.

All this was well known after Fritz Scharpf had published his analysis "*Politikverflechtung*" in 1976. However, no consequences arose. Each of the two major political parties complained about the system when forming the national government, and each party made use of the possibility to blockade government measures as soon as it found itself in the minority. A willingness to consider changes grew only after the pressure for reform had dramatically increased because of the globalization tendencies after the end of the East-West divide. The inability of the political parties to cope with the challenges began to threaten their legitimacy. The public was put into a mood of expectation because of constant evocations about a need for action by the parties. Subsequently, they were not able to satisfy the expectations they themselves had aroused because the high barriers prevented a consensus. As such, the parties surpassed each other with accusations on who was responsible for the blockades. Eventually, the final result, if any, was a compromise that nobody found helpful. In the end, none of the parties profited from the mutual accusations, but the whole political system was discredited. Such was the situation at the turn of the 20th to the 21st century.

This is the rare case of a problem that has its roots in the Constitution. It was therefore much easier to solve than those problems whose source lies in external conditions. Thus, a constitutional amendment was necessary. Still, until 2001 the problem was not taken up. Since the main reason for the difficulties lay in the increase of legislative powers vested in the *Bundesrat* and in the joint tasks of Federation and *Länder*, a reduction of these powers and dissolution of joint tasks was offered for adoption in order to re-establish efficiency and accountability. The fact that it nevertheless became difficult to find a solution was due to the decision not to include the financial question into the agenda, and in the attitude of the *Länder* to request a compensation for the abandonment of every single legislative power of the *Bundesrat*. One possibility would have been to strengthen the legislative powers of the *Länder*. But in the deliberations of the commission it soon turned out that it was not easy to find enough subject matters that could reasonably be left to regional legislation. The way out was a new type of legislation that did no longer require the consent of the *Bundesrat*, but, in compensation for the loss, entitled the *Länder* to deviate from federal laws. In addition, a new case of mandatory *Bundesrat* approval was introduced for those federal laws that create tasks of the *Länder* for which fulfilment costs

money. The compromise failed in the last meeting of the commission, but was later revived with minor changes when the Christian Democratic Union (CDU) and the Social Democratic Party (SPD) formed a second Grand Coalition.

It is too early for an evaluation of this new change of the federal structure. The problems that the amendment may entail remain latent as long as the Grand Coalition, with its comfortable majority in *Bundestag* and *Bundesrat*, exists. My presumption is, however, that old mistakes have been cured by new ones, so that a reform of the reform will soon become necessary.

C. Amending the Amendment Process

Before turning to changes by interpretation I would like to leave my subject for a moment in order to insert a brief remark about the practice of constitutional amendments in Germany. One feature is obvious: The amendments have made the Basic Law more voluminous. Art. 13 is now four times as long as before the amendment. The new provision on asylum, Art. 16 a, is forty times as long as its predecessor. Art. 106, which underwent already six amendments, grew from about ninety to about seven-hundred and fifty words. Political actors confronted with this development easily concede that most amendments did not enhance the beauty of the text. But this is not the point. To discuss the development in terms of constitutional aesthetics is to play it down. Rather, it affects the function of the constitution. A constitution determines the principles and procedures for political decisions. It does not contain these decisions, which would may politics superfluous. Political decisions are made on the basis and within the framework of the constitution on a day-to-day-basis, and according to the preferences of those who have won elections. If the citizenry is dissatisfied with the result, it gives the opposition a chance in the next election.

This shows that constitutionalism lives on a differentiation between the constitutional level and the level of ordinary law. Fundamental rights can illustrate this. They describe which individual behaviour or which social function ought to be free, and determine under which circumstances the freedom may be limited. The limitation itself is the business of ordinary legislation and can be decided by a simple majority. Some of the amendments to fundamental rights mentioned above anticipate ordinary legislation and sometimes even include provisions that one would expect in an ordinance, not in a law. The space for political decisions is thereby reduced. What has been determined on the constitutional level is no longer open for political decision. In the end, policy changes require a prior constitutional amendment. If this cannot be attained, the system ends up in immobility or the constitution is circumvented.

How could this happen? The answer is that the rules for constitutional amendments favour this practice. The power to amend the constitution is vested in the *Bundestag* and the *Bundesrat*. These are the same actors that conduct the daily political business.

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Amendments are enacted by way of legislation. This also means that the procedure is the same as in the daily business. The only difference consists in the requirement of a two-thirds majority. But this is no longer exceptional. In all cases where the majority can legislate only with the consent of the opposition, a *de facto* supermajority is required. Again, since no political party in Germany ever disposed of the supermajority, negotiations are the logical consequence. In these negotiations, every side tries to realize as many of its own ideas as possible, and to prevent those of the adversary. The goal is to narrow the political space for the other party, should it win the next election. This is detrimental on the legislative level, but even more so on the constitutional level. In a constitution the people determine the conditions for political action. The people draw the framework in which politics can act. If politicians can decide on the framework in the same way they are allowed to act within the framework, the difference between constitution making and law making, and the difference between the conditions for political decisions and these decisions themselves, disappears. The constitution loses its function.

In order to prevent this from continuing, the Federal Republic should amend its amendment process. Constitution making should differ from law making not only in terms of the quorum, but also in terms of actors and procedures. It would, however, be an illusion to assume that such an amendment could easily be reached, since those who draw a short term profit from the existing rules are the same whose vote is necessary to change them.

D. Changes by Interpretation

The way in which and the degree to which a constitution shapes the political and social structure of a country and influences the behaviour of political actors is not determined with the enactment of the text. The text is in need of application to concrete issues, and the gap between the general and abstract terms of the text and the concrete situation to which it is to be applied is bridged by interpretation. It would be a mistake to understand interpretation as a neutral operation to discover a pre-established meaning of the norm. Interpretation of the general law with regard to a concrete problem always contains an element of constituting the meaning, and this is the more so the older and more abstract the text is, and the more the context has changed since its enactment. Interpretation precedes implementation. Both are not necessarily in the same hands. Implementation depends on the willingness to comply with the order derived from the text by way of interpretation.

This is true for all legal norms, not only for constitutional norms. But there is also a fundamental difference between constitutional law and ordinary law. The laws are made by the state and bind the people. In cases of conflict, the state can enforce them. It disposes of the coercive means to overcome resistance on the part of the addressees of the law. The constitution is made by or attributed to the people and binds the state, in particular the supreme powers of the state. This means that here the addressee of the

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rules is at the same time their implementor. This explains the specific weakness of constitutional law. Constitutional courts can only mitigate but not solve this problem, for the coercive means of the state are not in the hands of the judges, but in the hands of the government.

The interpretation does not give the interpreter any power over the text itself but only over the meaning of the text. However, quite often a change in the meaning is just as important as an amendment to the text itself. In this case we speak of constitutional change by way of interpretation. Regarding the Basic Law, one may even come to the opinion that the changes brought forth by interpretation were more important than the changes brought forth by textual amendments.

While the subject of constitutional amendments was mostly the organizational part of the Basic Law, the subject of constitutional change by way of interpretation was predominantly the Bill of Rights. Fundamental rights had long been marginalized in German constitutionalism. The early constitutions that were enacted in the first half of the 19th century had failed to equip the fundamental rights with derogatory force. New laws had to comply with fundamental rights. Old laws did not lose their legal force if they contradicted fundamental rights. The revolutionary assembly that drafted the first constitution for Germany as a whole in 1848 set out to change this situation, but the revolution failed and with it the Paulskirche Constitution, which had given full primacy to the Bill of Rights.

In the second half of the 19th century, a process of liberalization of the legal order began, and with its progress the middle classes gradually lost interest in fundamental rights, fearing that they might serve the working classes as a basis for constitutional claims. The Constitution of the German Empire of 1871 did not contain a Bill of Rights, and the fundamental rights contained in the state constitutions remained without significant importance. The treatment of fundamental rights by the constitutionalists of the Empire is an impressive example of the role which interpretation can have. Since fundamental rights were subject to limitation by law, the legal science concluded that they ranked not above but below the law. Their impact was thus reduced to a prohibition of infringements without a legal basis. However, this was regarded as an essential element of the rule of law, so the constitutionalists concluded that fundamental rights were superfluous. Nothing would change, was the prevailing opinion, if they were completely absent in the text of a constitution.

In spite of this doctrine the drafters of the Weimar Constitution put great emphasis on fundamental rights, and even added a number of social and economic rights to the classical liberties. Regardless of the National Assembly's insistence on fundamental rights, the legal science continued to interpret them in the old manner, placing the liberties below the legislature, and declaring the new social and economic rights as mere proclamations of political intent without any legal value. This is not to say that the Weimar Republic was an

illiberal state, but its liberalism lacked constitutional protection. It was only under the Nazi-regime that individual liberty was completely rejected as a legal bond to state power.

The Basic Law reacted to the historical deficits of fundamental rights as well as to their total neglect between 1933 and 1945. As a symbolic act intended to underscore the importance that the Parliamentary Council wanted to attribute to the Bill of Rights, they were moved from the end - their place in the Weimar Constitution - to the beginning. In addition, all rights contained in the Bill were founded in a new "mother right" in order to prevent once and for all attacks on human beings like those committed by the National Socialists. The constitutional provisions start with the sentence: "Human dignity is inviolable." The text of Art. 1 continues by stating that the fundamental rights bind all state power including the legislature, thereby rejecting the old doctrine that fundamental rights rank below the law. Furthermore, they are declared directly applicable, thus making it impossible to deny certain rights the quality of legal norms. Limitations of fundamental rights are themselves limited. Under no circumstances may the very core of a right be touched by a legal limitation, whereas the earlier doctrine had been of the opinion that fundamental rights were open to whatever limitation the legislature deemed necessary. Finally, the eternity clause of Art. 79 III protected Art. 1 against any abolition, and thus guaranteed a system with fundamental rights, although not every single right in the Bill of Rights.

Much uncertainty about the validity of fundamental rights was thus eliminated, but not all. The rest was addressed step by step by the Federal Constitutional Court, perhaps the most effective innovation of the Basic Law. The way the Court understood, developed and applied fundamental rights is a stunning success story which can be told here only by mentioning the most important steps.

Beginning in 1953, two years after its establishment, the Court developed the idea that the high rank attributed to fundamental rights in the Basic Law required a further limitation to restrictions by the legislature. The result was the principle of proportionality. In addition to what the Basic Law explicitly says regarding the limitation of rights, the Court ruled that only proportional limitations are constitutional. The degree to which fundamental rights protected individual liberty was thereby greatly enhanced. Today, the principle of proportionality carries the main burden of freedom protection, and in addition it has become Germany's most important export article in constitutional doctrine, copied in all parts of the world.

In 1957, the Court closed the gaps between the various fundamental rights by interpreting Art. 2 I, which guarantees everybody the free development of his or her personality, as a residual freedom that covers any individual behaviour not protected by a special guarantee. Fundamental rights protection thus became complete; any state action that prevents a person from acting as he or she chooses can be reviewed from a constitutional perspective.

One year later, in 1958, the Court rendered the most important decision of its existence: the *Lüth*-judgement. The *Lüth* case raised the question of horizontal application of fundamental rights, *i.e.*, the question whether they protect the individual only against the state or also against fellow citizens. Before *Lüth*, fundamental rights were regarded as subjective rights, having vertical application only and functioning as negative rights, meaning that they obliged the state to omit certain actions. In *Lüth*, the Court ruled that fundamental rights are primarily subjective rights of the individual against the state. But, it added that they are more than this, namely objective principles and as such the highest norms of the whole legal order. If this was true, they could not be limited to vertical application; they also had to play a role in the horizontal dimension. But this role differs from the one in the vertical dimension. Since the Basic Law clearly says that fundamental rights bind all state powers, but only state powers; they cannot directly affect private law relationships. But, they have an indirect effect in so far as private law provisions whose application entails a limitation of a fundamental right are to be interpreted "in the light" of this right. Fundamental rights thus develop a "radiating effect."

Again, the consequences are grave. Before *Lüth*, the influence of fundamental rights ended when a legal norm was found to be constitutional. The interpretation and application of ordinary law was exclusively a matter of ordinary law and outside the range of constitutional law. Correspondingly, the role of the Constitutional Court ended with the review of a law as to its constitutionality. The rest was the business of the ordinary courts. By way of the radiating effect, the interpretation and application of ordinary law was influenced by the constitution and the decisions of the ordinary courts came under control of the Constitutional Court. The historical effect was a modernization of the legal order whose most important codes still dated from pre-democratic times.

Lüth put an end to the traditional view that fundamental rights are mere subjective rights and have an impact only on the relationship between citizen and state. The question that the *Lüth* case left open was whether fundamental rights remained purely negative rights. The answer to this question was given in the first abortion decision of 1975, and it was once again derived from the legal nature of fundamental rights as values and objective principles. In this capacity they protected individual freedom not only against menaces emanating from the state but likewise against menaces emanating from fellow citizens or societal forces. But once again, because of the clear formulation in Art. 1 III, this did not mean that fundamental rights were directly applicable among citizens. Yet, the objective content of the right imposed a duty on the state to intervene as soon as a liberty guaranteed by a fundamental right was threatened by a third party.

Here, too, the consequences were grave. The state's duty to respect fundamental rights is fulfilled by omitting certain acts that would constitute a violation of the fundamental right. The duty to protect rights is fulfilled by taking action in favour of the threatened liberty. Consequently, the legislature was no longer free to decide whether or not to legislate. If a fundamental right was threatened, the legislature had an obligation to legislate. Hence, a

law could not only violate the constitution if it went too far in limiting a right, it could also be unconstitutional if it did too little to protect it. This duty is enforced by the Constitutional Court, which, according to this understanding of fundamental rights, gained the power to obligate the legislature to make laws.

There are more consequences of the objective value jurisprudence of the Constitutional Court that cannot be expounded here. Nor do I have the time to show how the scope of the various fundamental rights was expanded, their regulatory force intensified and new rights were derived from existing guarantees by the jurisprudence of the Court. But the examples given suffice to show that the growth in importance of the fundamental rights by way of interpretation can hardly be overestimated.

All this was only possible because the Constitutional Court distanced itself from the method of interpretation that prevailed during the Empire and during the Weimar Republic, namely juridical positivism. Positivism as a methodology starts from a one-dimensional understanding of legal norms. A legal norm is identical with its text. The text is the sole object of interpretation. The only admissible instruments to determine the meaning of a law vis-à-vis a concrete issue are grammar and logic. To the contrary, the *Bundesverfassungsgericht* (Federal Constitutional Court) understands constitutional rights as legal expressions of values, and these values guide the determination of the meaning of a legal norm. They point the interpreter to the purpose of a constitutional norm or the function it is to fulfil. This is already a two-dimensional understanding of a legal norm. However, the purpose ought to be fulfilled in the real world, and this world is constantly changing. The goal of interpretation is to fulfil the purpose of the norm to the utmost extent under changing conditions. This means that the segment of social reality in which a constitutional norm shall take effect must be taken into account. It becomes an integral part of interpretation. The consequence is a three-dimensional understanding of constitutional norms: text plus purpose plus context. Analysis of the social reality to which a norm applies is part of the determination of its meaning. All this gives constitutional interpretation its dynamic character. The Court is able to react to changing conditions of the realization of freedom, and it uses this ability in the creation of new fundamental rights.

E. Changes by EU Law

Constitutional interpretation as practised by the Federal Constitutional Court has almost invariably enlarged and intensified the influence of the Basic Law. Restrictions of its claims are rare. But there is also a countermovement that increasingly limits the impact of the Basic Law. This movement does not have an internal, but an external source. It is a consequence of Germany's membership in the European Union. It therefore does not only affect the Basic Law, but the constitutions of the member states in general. Yet, it may be more noticeable in Germany than elsewhere since no other member state has attributed a

similar level of importance to its constitution. "Constitutional Patriotism" is a German phenomenon.

When the European Communities were established more than fifty years ago, the repercussion on national constitutions was neither intended nor foreseen. The Community was created by an International Treaty, just as other international organizations, although from the very beginning the European Communities had more powers and a much denser organizational structure than ordinary international organizations. Yet, it was not meant to reduce the importance of the member states' constitutions. The basis for this effect was laid down when the European Court of Justice (ECJ) ruled in the famous decision *Costa v. ENEL* in 1964, that Community law enjoys primacy over national law including the highest law of the member states - their constitutions - and that the citizens can invoke the primacy vis-à-vis their national government. With this judgement, a development started that was later described as the "constitutionalization" of Community law.

In the context of this lecture, the question is neither whether the judgment of the ECJ was justified nor whether the development initiated by it deserves applause or criticism. What matters is that it gave a new legal quality to European Community Law and thereby diminished the impact of domestic law. In the beginning this effect was not clearly visible. As long as the European Treaties were interpreted narrowly and as long as the enactment of secondary European Law required a unanimous decision of the member states' governments, which in turn were bound by their domestic constitutions, no member state was subjected to rules without its consent. This changed, however, when the majority vote was accepted by the Single European Act of 1987. From that moment on, legal rules which a member state has rejected and which are not in compliance with the requirements of its domestic constitution can nevertheless claim validity on its territory. The consequence is that the domestic constitution can no longer fulfil its claim to comprehensively regulate acts of public authority on domestic territory. The national constitutions are still relevant when a state transfers powers to the EU, but once they are transferred, their exercise is no longer determined by the national constitution.

Moreover, because of the primacy of EU law, the domestic constitution, and its agent, the Constitutional Court loses its exclusive power to determine the validity of domestic law. In the Basic Law, the power to determine whether a law is unconstitutional and therefore null and void is vested in the Constitutional Court (Art. 100). It has the so-called *Verwerfungsmonopol* (monopoly over rejection of acts and norms). According to the Basic Law, no ordinary court and certainly no administrative agency is entitled to refuse the application of a domestic law because its constitutionality is doubtful. Art. 100 BL no longer holds true. Every judge, even every civil servant can disregard a law enacted by the democratically elected national parliament if she deems it incompatible with EU law.

The consequence for domestic constitutions would be less grave if EU law and national constitutional law were guided by the same values and principles. This is the case on a

rather abstract level. On a more concrete level, the harmony is shrinking. The mechanism at work here does not always get the attention it deserves. In the EU, the Treaties fulfil the function fulfilled in member states by their constitutions. They are higher law. Yet they differ from the national constitutions in an important respect. While the national constitutions content themselves with setting the rules and principles according to which ordinary law is made, the European Treaties contain complete regulations of whole legal areas, such as competition law, that would be left to ordinary law within the member states. Consequently, these rules participate in the quasi-constitutional rank and can be enforced by the Commission without the involvement of the Council and the European Parliament.

After the completion of the Common Market, the Commission has achieved this by interpreting the Treaties in favour of liberalization and deregulation. This deprives the member states of the right to decide which activities they leave to market regulation and which they reserve for the public service. Of course, the member states can sue the Commission for an untenable interpretation of the Treaties or even a transgression of its powers. But the Commission can usually count on the backing by the ECJ. It is in this context that the value differences become apparent. For the EU the four economic freedoms enjoy the highest priority, whereas in the Basic Law and in the constitutions of many other member states, economic rights are the weakest. The Basic Law regards human dignity as an absolute right, and personal, communicative and cultural rights usually prevail over mere economic interests. This is different on the European level. While the national constitutions give much leeway for regulating the economy in the interest of other constitutionally protected values, the Treaties - as interpreted by the Commission and the Court - impose strict limits on the domestic parliaments. The ECJ even requires that human dignity be balanced against entrepreneurial freedom. Since there is hardly any legal matter that does not have an economic aspect, the EU has a tool to extend its powers into fields that, according to national constitutional law, should not be guided by economic rationality. It is through this backdoor that national constitutions such as the Basic Law are most endangered.