

## The Basic Law at 60 – Introduction to the Special Issue

By Susanne Baer, Christian Boulanger, Alexander Klose and Rosemarie Will\*

### A. Introduction

For Germany 2009 was a year of constitutional anniversaries: the first democratic constitution (Paulskirchenverfassung of 1849) was promulgated 160 years ago; the 1919 Weimar Constitution would have turned 90; and finally, the country celebrated 60 years of the Basic Law, which was proclaimed and signed in Bonn on 23 May 1949. Despite its birth in the midst of economic and political turmoil and widespread disillusion with politics, the Basic Law has come to be regarded as a “success story.” As is well known, it was never meant to last – the very term “*Grundgesetz*” (basic law) indicated that it was intended to serve as a temporary constitutional framework until the enactment of a new constitution for the whole of Germany. Yet the Basic Law outgrew its provisional character. Today, not only the political establishment is united in praising the *Grundgesetz*. The scholarly assessment also has been mostly positive. The constitutional bargain struck in 1949 has been able to achieve what no previous German constitution had managed. The right and the left of the German political spectrum fashioned an enduring compromise that combined democracy, federalism and the welfare state. It is part of the story that the old anti-liberal and nationalist elite had been thoroughly delegitimized by losing the war. Also, the Allies gave the effort an additional nudge. The progressive changes could then be implemented quite effectively by relying on the juristic culture of the *Rechtsstaat* that dates back to the bureaucratic legacy of, among others, the Prussian state.

However, the political system based on the Basic Law, and the jurisprudence of the Constitutional Court, which claims to be the sole authoritative interpreter of the Constitution, has often met with intense criticism. But except for attacks from the extreme right and left fringes of post-War German society, the Constitution has never faced an existential crisis. Those who insisted on a more federalist division of powers in the early days had their hopes dashed. It survived radical criticism of the 1968 period, and it will surely survive the threats posed by neo-fascist groups today. Overall, the Basic Law has proven to be comprehensive enough to cover broadly differentiating ideological views and

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political agendas.

A lecture series sponsored by the German civil rights organization Humanist Union<sup>1</sup> and the Law and Society Institute at Humboldt University's Faculty of Law,<sup>2</sup> which took place in Berlin throughout 2009, took stock of six decades of the German Basic Law with commentary from academia, politics and the media. Employing perspectives from legal doctrine, the humanities, or the social sciences, the lecture series attempted to contrast the normative claim of the constitutional text – mirrored in the current public law doctrinal debate – with empirical or critical consideration of contemporary German society. This special issue of the *German Law Journal* publishes a selection of these lectures.

### **B. Interdisciplinarity and “Law in Action” in a Changing World**

The lecture series was the result of a fruitful cooperation between a civil rights organization and a university research institution. Both the Humanist Union (HU) and the Law and Society Institute Berlin (LSI Berlin) share the vision that law is not to be found solely in the books, but is a distinct phenomenon in social reality. Since its establishment in 1961 HU initiatives have focused on the protection and the implementation of human rights and civil liberties in all spheres of society in West Germany. The HU recognizes that a far reaching and sustainable realization of human rights and freedoms is based on certain terms and conditions, such as democracy, the rule of law and the recognition of societal pluralism. As a civil rights organization the HU actively intervenes in the political debate and in policy-making and legislative processes in order to ensure that the civil rights enshrined in the constitution are respected. It, thus, also initiates and supports litigation before the Federal Constitutional Court. The Law and Society Institute Berlin, in contrast, focuses on theoretical and applied research. It is a young institute with a daring agenda, namely, to analyse legal practices in legislation, jurisprudence and legal mobilization as well as their social and cultural consequences. It strives to understand law as a phenomenon in its social, economic, political and cultural contexts. The LSI's aim is to offer a place for inter- and transdisciplinary research with an international and a comparative perspective.

Both the HU and the LSI Berlin are pleased to be able to publish some of the results of this joint project in the *German Law Journal*, which shares their multidisciplinary and transnational agenda.

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<sup>1</sup> See <http://www.humanistische-union.de>.

<sup>2</sup> See <http://www.lsi-berlin.org>.

### C. Lessons of the Past

The 1949 Constitution was a legal instrument to give a framework to Western Germany's political, economic and social reconstruction after Germany's total political defeat and widespread socio-economic breakdown. But it also was a symbolic document, an ostentatious break with the past, which included a failed democracy – the Weimar Republic – and a morally repugnant political regime – National Socialism – from which the nascent state had to distance itself. The central importance of the basic rights provided by the Basic Law serve as perhaps the most clear and visible reaction to this past. While the 1787 American Constitution features some human rights as amendments, the Basic Law places them at the beginning. What is more significant is that the Basic Law establishes a hierarchy of rights, with human dignity – a concept not explicitly present in the U.S. Constitution – as the document's first provision, followed by liberty (in the form of general self-determination) and equality. A long list of other, differentiated freedoms follows these three core protections. In contrast, the Weimar Constitution of the first German democracy contained constitutional rights but they were accorded a merely programmatic and declaratory nature and did not have any binding effect on state authority. In 1948, against the background of the appalling human rights violations of the previous regime, the framers of the Basic Law found it necessary to declare the inviolability of human dignity, and to understand rights not as entitlements accorded by the state but as inherent in human nature and constituting limits on the state itself. As **Matthias Mahlmann**, professor of law at University of Zurich, explains in his paper entitled "Human Dignity and the Culture of Republicanism", this new value-laden constitutionalism has since been criticized not only by conservatives or legal-positivists who fear the "Trojan horse" of constitutional law. What, the critics have asked, does the intrinsically vague concept of "human dignity" offer beyond "seductive pathos"? Against this scepticism, Mahlmann argues that the idea of human dignity, reconstructed as the "idea of human beings as ends-in-themselves," presents a "workable legal concept," which, as the example of Germany shows, can be "applied successfully in legal daily work." Mahlmann presents us, on the one hand, with a historical-philosophical reconstruction of human dignity. On the other hand, he proposes an approach for applying, in real life, a specific concept of dignity to pressing ethical questions of torture and bioethics. Human dignity, he argues, is not an idiosyncratic German idea that Germany must pursue and promote as a result of its particularly barbarous past. Instead, Mahlmann argues, it is part of cosmopolitan legal culture, based on anthropological foundations.

#### D. A Changing Constitution ...

**Dieter Grimm**, a former Constitutional Court Justice and now law professor at Humboldt-University, argues in his contribution entitled "Identity and Change" that one major function of constitutions is to withdraw certain principles of social and political organization from the sometimes rapid change of political majorities and from the passions of the day. At the same time, a constitution must be flexible enough to respond to social change and the sustained change in constitutional policy. Unlike the U.S. Constitution, which is very difficult to modify and thus has seen very few amendments over the last 223 years, the Basic Law has been amended 55 times in the 60 years since its enactment. As Grimm explains, only half of the articles of the Constitution look exactly as they were drafted and enacted in 1949. Most of the changes to the constitutional text concerned organizational questions such as federalism issues. Yet many of them implemented hotly contested questions, such as emergency regulation, secret surveillance, or the right to asylum. However, the most important changes the constitution has undergone cannot be found in the text. Instead, it was the Federal Constitutional Court's basic rights jurisprudence that has most changed the meaning of the constitution as an instrument to constrain political actors, which is an aspect also emphasized in the contribution of former Federal Minister of Justice, Brigitte Zypries. In particular, the Court's use of the proportionality principle has opened a way from traditional legal positivism to a method of interpretation that makes it possible to bring constitutional principles to bear on the life-world of the ordinary citizen. As a former Constitutional Court Justice, Grimm ends with a skeptical look to Brussels and wonders whether the Basic Law can remain a powerful instrument, given the ever-increasing influence of European Union law.

**Hubert Rottleuthner**, renowned German legal sociologist from the Free University in Berlin, adds a sociological view to the analysis of constitutional change and development. As a social scientist Rottleuthner is interested in the relationship between written law and observable behavior. He notes how difficult it is to make informed assumptions on the degree to which a constitution actually is observed. But Hubert Rottleuthner also is interested in looking in the opposite direction. Given the numerous amendments of the constitutional text, does this textual change tell us something about changes in German society? According to Rottleuthner the theoretical basis for such an assumption can be found in the work of Emile Durkheim, one of legal sociology's founding fathers, who argued that the law mirrors society's "morality," by which he meant the dominant norms and values that guided social behavior. A change in the law, in this view, always has the potential to indicate changes in a society's moral fabric. Rottleuthner traces the amendments to the Basic Law over the years and tests the "Durkheim hypothesis". His conclusion is clear. Looking at the amendments only, we get a very inadequate and sketchy picture of the real issues in post-War Germany history. In contrast, he supports Grimm's thesis that the main constitutional change has been wrought by the decisions of the Federal Constitutional Court. Its decisions, Rottleuthner argues, are a much better mirror of modern Germany's fundamental sociopolitical cleavages and processes.

### E. ... And a Changing Society

Hubert Rottleuthner's initial sociology-of-law question – what role do legal texts play in actually determining social behavior – is an important one, which, applied to German constitutional law, is still under-studied. In most cases it is simply assumed that the new values enshrined in the 1949 text found their way into social practice over time. However, **Susanne Baer**, the current director of the Law and Society Institute at Humboldt-University, argues in her contribution entitled “Equality and Difference” that equal rights for women were enshrined in the Basic Law against the bitter resistance of conservative actors and that their actual enforcement has required a major struggle against a variety of reactionary forces across the political spectrum. Baer uses the hypothetical image of the Basic Law’s 60<sup>th</sup> birthday party and calls on readers to decide who should be invited. This allows her to discuss contributions to constitutional history from a critical perspective on the actors involved in drafting, interpreting and implementing it. She points to the stories told – and offers some stories yet rarely conveyed – around Article 3 of the German constitution, the equality clause. She adds perspectives beyond sex equality to consider other inequalities, like sexual orientation, ethnicity, or disability. Baer proposes that we look at Article 3 of the Basic Law as an object of socio-legal analysis, which allows us to study an “instance of blatant performative self-contradiction” and to see how far “social realities may be removed from what a Constitution promises.” While assembling the guest list for the birthday party, Baer walks us through 60 years of German constitutional history and discusses not only the Founding Mothers, but also different actors from political parties, the academic community, administration, and civil society. She highlights what has already been achieved but reminds us how much there is still left to do in terms of dealing with discrimination.

Not only society changed, but also the political and legal culture that tried to manage the post-War social change. It is no exaggeration to attribute, as Grimm does, a sizeable part of this change to the Federal Constitutional Court, which, based on creative interpretation of often ambiguous constitutional provisions, transformed the legal system from a legalistic to a value-based regime; and the political system from one based on parliamentary or executive sovereignty to one characterized by “governing with judges.” Former Minister of Justice **Brigitte Zypries** contributes her view on the relationship between the government and “Karlsruhe,” a reference to the city in which the Federal Constitutional Court is located. Zypries points us to the fact that, unlike previous political regimes where all constitutional issues were power issues, in post-War German history all power issues have become constitutional issues. Interestingly, Zypries, together with a majority of German politicians, sees “no fundamental problems in the relationship between politics and the Constitutional Court” and is not of the opinion that the Constitutional Court oversteps the boundaries of its jurisdiction or that it can be accused of undemocratic “judicial activism,” even though the Court's decisions have often been painful for the executive, for example in rulings on tax policy. On the contrary, Zypries thinks that criticism of the Court can be damaging to

“constitutional culture.” She also rejects the notion that the justices of the Court should undergo a more competitive selection process, such as a public hearing before their election.

#### F. Global and European Challenges

2009 has seen two more anniversaries, which were not constitutional but of a world-historical nature: 70 years ago, 1939, Germany launched the attack on Poland that started the Second World War. 20 years ago, in 1989, the Berlin Wall fell, ushering the demise of the German Democratic Republic. This, in turn, opened the way for the reunification of Germany. However, this process did not lead to the replacement of the Basic Law with a new Constitution of the reunited Germany, as its Article 146 had originally intended. This has been deplored as a missed opportunity to allow the unification of the two Germanys on a more equal footing. Others have rejected the idea that a new constitution was necessary, precisely because of the Basic Law’s “success story.” However, most will agree that the true challenge of the upcoming years will be to harmonize the conflicting demands of an integration-friendly, but nonetheless sovereignty-bound, Basic Law with the needs and effects of the ever-deepening European integration. A process that has not only helped to bring about economic prosperity on the European continent, but also arguably has prevented the return of violent conflict between the Member States.

**Juliane Kokott**, Advocate General at the Court of Justice of the European Communities and distinguished professor of international law, in some sense responds to Grimm's scepticism about the increasing role of Community law in German constitutional law. For her “the Basic Law calls for integration.” Germany’s integration into the European community of states was at the heart of the constitutional founding moment and a constitutive part of the constitutional order. Thus, it is not surprising that Kokott does not fully agree with the Federal Constitutional Court’s recent decision in the *Lisbon Case*.<sup>3</sup> It may further “a more lively debate on European affairs” but may also “serve as a basis for lawsuits against European integration as it developed up until now”. This, Kokott concludes, confers great responsibility on the Federal Constitutional Court since it may also serve as an example for the Constitutional Courts of some other Member States, threatening the uniform application of Community law.

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<sup>3</sup> Lisbon Case, BVerfG, 2 BvE 2/08, from 30 June 2009, available at: <http://www.bverfg.de/entscheidungen/es20090630>. See the special issue of the *German Law Journal*, Volume 10, Number 8.

**G. Conclusion**

The lecture series offered several other interesting perspectives on constitutional law and politics in Germany. Hopefully, this resulting collection of papers shows that the interdisciplinary debate on German constitutionalism is worth pursuing. We hope that these voices can also contribute to the debate on comparative “constitutional cultures” and we look forward to a continuation of this discussion in the *German Law Journal*.