

BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY AND ITS ROLE IN THE DEVELOPMENT OF EUROPEAN CONSTITUTIONALISM

(Presentation on adoption of Basic Law of the Federal Republic of Germany,
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Dear participants of the Anniversary Conference,
Dear Mrs. Ambassador of the Federal Republic of Germany,
Ladies and Gentlemen,

On behalf of the Constitutional Court of the Republic of Armenia I would like to congratulate all participants of the Conference on the 60th anniversary of adoption of the Basic Law of the Federal Republic of Germany. On May 23, 1949, the Parliamentary Council of Germany confirmed that the Basic Law, adopted by the Council on May 8, was approved by 2/3 of national representatives of the Lands on May 16-22. A specific legal act came to life that day which has had an exceptional role and importance not only in renaissance and development of the German society but also in the further formation of the European constitutionalism. A lot has been spoken and written about the Basic Law of the Federal Republic of Germany. It has been evaluated from different points of view. My today's brief analysis will be recurrence to a limited number of issues, which are urgent for nowadays and serve as corner stone of the formation of constitutionality of each country.

The Basic Law of the Federal Republic of Germany **first strikes an eye because of value basis and complicity of systemic regulation of constitutional-legal relations.** In its essence it is not a so called “model” **Constitution** typical for the international constitutional development during the last decades and has been built not on the import and transplantation of constitutional values, but **is the logical summary of historical developments and social agreement of values which have become rules in the process of time and experiences.**

The contemporary German constitutionalism is based on the German philosophical rich heritage of state and law. Simultaneously, possessing the influence of the progressive European constitutional idea, the post-napoleon period of the German constitutional developments (especially after signing the act on creation of German Union of June 15, 1815) the liberation-

democratic qualities became typical which created the basis for the further development of constitutionalism¹.

The significant phase of the theoretical philosophical comprehension and legal interpretation of law started all over Europe in the middle of 17th century. One of the typical peculiarities of that period was the fact that the most complete ideology was created and so-called feudalistic legal ideology denied. The carriers of these new concepts were N. Machiavelli (1469-1527), H. Grotius (1583-1645), B. Spinoza (1632-1677), T. Hobbs (1588-1679), G. Loc (1632-1704), Sh. – L. Montesquieu (1689-1755), J.-J. Russo (1712-1778), T. Jefferson (1743-1826), T. Pane (1737-1809), E. Kant 1724-1804), G. Hegel (1770-1831) and so on. Particularly, they found that the natural law derives from the essence of the human being, which impels him to mutual relations. The recognition of the natural law conveys scientific nature to the legal science. The law established by will was not able to reach its scientific roots².

The development of the economic relations, creation of free and competitive field, **acceptance of human rights as standards of restriction of power**, as well as the gradual introduction of other elements of liberal value system in the recent 300 years crystallized in such constitutional norms and principles which at the second decade of the twentieth century have become not only the slogan but also living values. As Yu. A. Tikhomirov mentioned XVII century brought the idea of natural law, XVIII century the necessity of liberal state in accordance with Russo's democratic representation and Montesquieu's concepts of separation of powers and in first third of XIX century the theory of legal state arose in Germany³.

The human dignity, rights and freedoms, guarantee of rule of law and liberal legal relations based on establishment of legal state are the grounds for the German constitutionalism. The main attribute of the liberal constitutionalism is that the individual with her/his rights and freedoms, his/her prerequisites of self-manifestation become the criteria of all social and political events⁴.

Often the German constitutionalism is characterized as radical liberal⁵. The foundation is that the rule is given not to the role of the state but to human rights and freedoms. However, this is a deep and value systemic orientation which has become not only the axis of development of modern European constitutionalism but also typical peculiarity of the whole European law.

¹ See В.Г. Баев, Европейский конституционализм после Наполеона (на примере Германии) // Журнал Российского права, 2005, N7, с. 113-124.

² Ἄδῆ ὀέέ Ἄόἰ Ἀά Ἄδῆ ἰ ὀ. Ἰ ἰ δᾶᾶ ἄἰ εἰ ὕ ἐ ἰ ἐδᾶ // Ἄἰ ὀἰ εἰ ἄεῦ ἰ ἐδῆ ἄἰ εἰ ἰ δᾶἰ ἄἰ εἰ ἰ ὕἡἔ. Ὀ. III. Ἰ ., 1999, ἔῃῃ 21-26:

³ Тихомиров Ю.А. Теория компетенции. М., 2004, ἔῃ 10:

⁴ Мишел Розенфельд, Андраш Шайо, Распространение либерального конституционализма: изучение развития права на свободу слова в новых демократиях // Сравнительное конституционное обозрение. 2007, N1, с. 103.

⁵ See Теория конституционализма и философия государства в ФРГ // Закон и право, N5, 2001, с. 41.

Although, the German constitutionalism has not appeared isolated, but also managed to involve all progressive generalizations of the western legal conceptions and also kept its originality. This, first, concerns the constitutional initial principals.

If first in many countries the human rights have not become the subject of constitutional regulation but were set forth in later laws (bills), in Germany we have to deal with another quality; the first part of the Basic Law is dedicated to Human Rights. This is not only symbolic and structural method but serious value systemic orientation.

Point 1, Article 1 of Basic Law of the Federal Republic of Germany stipulates that human dignity shall be inviolable. Its defense and respect is the duty of every state authority. Point 2 of the same Article defines that the German people acknowledge **inviolable and inalienable** human rights as the basis of every community, of peace and of justice in the world. Point 3 accomplishes the conceptual approach stipulating that the basic rights shall **bind the legislature, the executive, and the judiciary as directly applicable law**.

Restriction of the authority by law is the main characteristics of a state governed by rule of law. For the first time this fundamental principal stipulated in the Basic Law of the Federal Republic of Germany has become the corner stone of the European constitutionalism. The Constitution can become into a collection of nice words if in the chain of **the constitutional principle – law – authority** there is not harmonic inter-connection and inter-supplement with the help of which **the power of authority becomes guarantee of law**. The constitutions are brought to life for the implementation of three main missions:

- to guarantee the human rights and freedoms,
- to restrict the power and actions of its executives,
- to define the principles of the state order and regulate the implementation of the power functions.

The following summarized by legal philosophical indisputable veracities have become starting points of German constitutionalism:

- Human being, as a social creature, enters into social relations by his/her natural and inalienable rights,
- the state shall recognize the human rights as a supreme and inalienable value, as directly acting constitutionally stipulated rights,
- each law derives from those rights, defend those rights, restricts only by as much as it is necessary for the recognition and guarantee of others rights, for social harmonic community,

- human natural rights lie in the basis of implementation of power by the people and state. The power is restricted by law, and not the law by power⁶,
- the direct application of the constitutional rights of a person is guaranteed by the Constitution, laws and law-enforcement practice.

The emphasis of the fundamental rights in the Basic Law is so definite and unequivocally (as mentioned, it is one of the unique constitutions where the first chapter is dedicated not to the principles of constitutional order, but to human rights) that some specialists of constitution consider the Basic Law of the Federal Republic of Germany from the point of view of “stipulating egoism legislatively”⁷.

The Constitution stipulates a definite methodological approach towards recognition and defense of human rights which legislatively predicts its essence materialization, institutional provision and systemic guarantees. The Constitution itself shall not become a brake for full and direct execution of the principle of rule of law.

One of the peculiarities of German constitutionalism is that the rights are considered in dynamics, in completeness of its development tendency and responsibility of guarantee. From this point of view, the constitutional recurrence of abuse of rights is also worth consideration which is rare in the European practice but concludes great preventive power and deserves attention. Article 18 of the Basic Law is considered which defines that “Whoever abuses the freedom of expression, in particular the freedom of the press (paragraph (1) of Article 5)⁸, the freedom of teaching (paragraph (3) of Article 5), the freedom of assembly (Article 8), the freedom of association (Article 9), the privacy of correspondence, posts and telecommunications (Article 10), the rights of property (Article 14), or the right of asylum (Article 16a) in order to combat the free democratic basic order shall forfeit these basic rights. This forfeiture and its extent shall be declared by the Federal Constitutional Court”.

Although such an approach can be conditioned with historical lessons and experiences of public life, is a signal that in the public relations the measure and harmony are correlated events and with their help the accumulations of negative social energy and formation of its critical mass and social disasters can be prevented.

⁶ As mentions the academician V. Nersisyan “...law (which is defined as positive law) may either correspond or contradict the right. **Law is only the way of expression of right.** ... Not the right is the cause of official-power obligation but vice versa...” (See, Nersisyan V.S., Theory of right and state, Yerevan, “Nairi”, 2001, pages 41-43).

⁷ Теория конституционализма и философия государства в ФРГ // Закон и право, N5, 2001, с. 42.

⁸ It must be mentioned that the American constitutionalism has adopted more liberal approach on this issue. Particularly it has been envisaged in the first amendment of the American Constitution, that the Congress shall not pass laws restricting freedom of expression and press.

For the first time, the constitutional principles of restriction of basic rights were constitutionally stipulated in Germany (Article 19). Later, this approach has become a starting point for the complete theory of restriction of rights and for the definition of the so called three golden rules. These are: restriction of rights only by law, proportional restriction, exclusion of obstruction or such a restriction which does not distort the essence of right.

Human rights have had also starting importance for the Constitutional Court of the Federal Republic of Germany. The axis for legal opinion of the latter is the fundamental principle that all legal norms shall possess and derive from the principle of rule of law. The Basic Law obliges each state institution to respect and defend human dignity as a supreme and inalienable value, as a law in force. The last circumstance possesses exceptional importance for nowadays and, unfortunately, is not deeply valued and comprehended in the changing legal systems.

We can summarize **without a doubt that at the first third of XIX century in Germany a complete and scientifically based theory on a state governed by rule of law was born and later, in 1949 constitutionally stipulated in the Basic Law which in the present inflexion of development of civilizations has become a non alternative highway of social progress.**

The civil society's typical values, the qualities of democratic state governed by rule of law have developed during the centuries but have become systemic regulators of the social life especially at the last few decades of the previous millennium. Actually, since 1950s the common democratic values and rule of law state principles have found their most systemic and concrete expressions in the constitutional solutions of the European countries by considering the numerous peculiarities of that system. As D. Howard mentions the constitutionalism, democracy and rule of law have become ruling in the Western Europe after the World War II⁹.

Summarizing, we can say, that, although, the rich legal culture of Greek-Roman, English, German, French and a number of European countries, such as 1791 Poland and France, 1814 Norway, 1831 Belgium, 1866 Sweden, 1868 Luxembourg, 1874 Switzerland, 1901 Australia and later adoption of the constitutions by other countries, the majority of which is in force till now and has formed stable constitutional customs, have become the basis for the contemporary European constitutional culture, for Europe which has seen two world wars in the XX century and taken certain lessons from it, for Europe democracy and rule of law have become the corner stone as a general principle, **the main slogan for the constitutional culture have become the point that law and state shall be governed by rule of law and guarantee the equality, freedom and justice the value system of which is the human dignity, the rule of his inalienable**

⁹ Ховард Д. Конституционализм и развивающаяся демократия // Конституционное правосудие, 2004, N 3, т2 20:

rights¹⁰. Meanwhile, the legal system is complete and viable, when these values become constitutional values, accept constitutional guarantees of recognition and defense. And the role of the Basic Law of the Federal Republic of Germany is non-renounceable.

Another important issue too. It is known that among XVII-XVIII century theorists John Loc, Montesquieu, Jean-Jack Russo, later Kant and others not only the rule of law, comprehension of substance of natural law received a new quality running all through that the **statute shall be the embodiment of law**, but also the idea of separation of powers was distinctly differentiated.

Later, the American constitutional idea conveyed new quality to the practical implementation of the theory of separation of powers. The elaboration of the acting system of checking and balances and providing dynamic balance to constitutional separation of powers has become the axis of the American constitutionalism. Taking into consideration this rich heritage, a number of theoreticians of contemporary constitutional law (particularly the German specialist on statehood K. Hesse) consider the main characteristics of the principle of separation of powers the cooperative activity and discipline of people, definition of the executive competences of separate branches of power, the specification of their competences and restriction, general regulation of labour, the balance of state bodies' competences and as a result, unity of limited state power¹¹: The problem is that in the circumstances of liberal legal relations the case of separation of powers is not absolute. The given principle assumes also cooperation and balance of different branches of the united power empowered with executively specified and independently realized competences. In this sense, in the international practice an attempt is made to set forth constitutionally the limitations of power, create co-linked, "obliged" agreement of activities (confirmation of the government's programme by the parliament, the right of president's veto, the right of parliament to overcome the president's veto, the parliament's right to express censure to the president, etc.) between the powers. In its turn, the availability of acting system of revealing, evaluation and rehabilitation of constitutional competences of state powers are the most important conditions for keeping the balance of power. And this is possible only in the case when each of three powers possesses at least the same power which will ensure the manifestation of its essence.

Thus, the next essential circumstance, which we would like to draw your attention to, is that the Basic Law of the Federal Republic of Germany is the first the most complete constitutional act which comprises an acting system for guaranteeing the rule of Constitution and

¹⁰ See Политико-правовые ценности: история и современность /Под. ред. В.С. Нерсесянца. М., 2000, т.2 стр 5-29:

¹¹ See Öaññã Ê. Î ñí î âû kí í ñòèòóöèí í í î ãî ÿ ðààà ÔÐÃ. Ì ., 1981, т.2 237:

revealing, evaluating and rehabilitating the violated constitutional balance¹². Although, more than one separate presentation could be dedicated to the systemic peculiarities of constitutional justice of Germany, for revealing the model role and importance of that system in the present haven of international developments of the constitutional control. Meanwhile, we would like to highlight one issue, which, according to us, possesses exceptional importance and is not well comprehended among us.

The formulation of Point 1, Article 93 of the Basic Law of the Federal Republic of Germany by its deepness and comprising solution of the issue is unsurpassed till now. It defines that “The Federal Constitutional Court shall rule on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal body or of other parties vested with rights of their own by this Basic Law or by the rules of procedure of a supreme federal body”.

Points 2-4 of the same Article 93 of Basic Law involved all kind of constitutional disputes the jurisdictional solution of which is the most important pledge of dynamic and stable development of the country. It concerns also the guarantee of harmony and stability of the country especially with federative structure.

For the first time, the important principle, that, inside the state any political dispute shall receive its jurisdictional solution concerning the principles of statehood, was stipulated constitutionally and stood the test. Not the legal disputes shall be solved in political stage, but the political disputes in the legal stage. This is the essential attributes of the legal state, one of the main prerequisites of ensuring of rule of Constitution. It has become another important investment of the German constitutionalism in the European constitutional development. The essential peculiarities of the German constitutionalism are that the guarantee of rule of Constitution has become a classical example for other countries in the sense of systemic completeness. The golden rule stroke roots according to which all constitutional institutes, as well as each person has become a fully-ledged subject who can approach to the court, and legal acts of all constitutional institutes have become the object of constitutional control. It has aided to the solve the triple unity task, to insure constitutionalism of legal acts, to defend the constitutional rights of a person, as directly acting right, and solve the disputes aroused between the power bodies on constitutional competencies. All these compose the essence and contents of guarantee of rule of Constitution. Without exaggeration it could be recorded that in this sphere

¹² In 1951, 481 appeals were logged in the Constitutional Court of Germany, in 1955 594 appeals, in 1960 1382, in 1970 1677, in 1980` 3107, in 1990` 3400, in 2000 4831, in 2005` 5105 appeals.

what Germany achieved in 1949 by the adoption of the Basic Law and by further amendments, particularly in 1969, is an implemented and an unsurpassed in systemic sense model for each country which has chosen the way of rule of law state establishment. The constitutional solutions of the Federal Republic of Germany proved that such precedents of inter constitutional stability are necessary which will guarantee capability of solid legal system to reveal, evaluate and rehabilitate the balance of constitutional violations, will provide the constitutional order with more viable “**immune system**” providing special importance to the right to constitutional justice within human rights.

Summarizing, I would like to emphasize **that as a result of such constitutional solutions the present day German society is notable for its incompatibly high level. The constitutional values have deep roots in the public life; the Basic Law has become not only a living reality but a great power which combined people. This is an instructive example especially for the countries and people which living in public transformation.**

Once again, I congratulate all of us with the 60th anniversary of the Basic Law which has huge investment in the world constitutionalism and wish the German people further prosperity.