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CONSTITUTIONAL MEANS FOR THE PROTECTION OF THE POLITICAL ORDER IN GERMANY

An analysis of the Basic Law for the Federal Republic of Germany (*Grundgesetz*) paying special attention to the proposed measures for the (co-)governance of the state, substantiates the description of the German constitution as a political offer to each citizen. Apart from various proposals for forms of participation in the democratic process, those which support a wide range of freedom and civil rights for individuals can also be found. If therefore the picture is filled out with a guarantee of both individual and collective rights and freedoms, it must be admitted that the German constitution presents itself not only as a repository of some more or less ringing phrases, but also as a substantial legal instrument for implementing political measures. It must at the same time be admitted with some embarrassment that this noble sounding constitutional openness contains the germ of potential danger for the order that it represents. The legal seizure of power with its subsequent dismantling of the democratic state of law by the National Socialists in Germany was a clear example showing how the enemies of an order based on a foundation of freedom and equality can make use of democratic constitutional tools for the most undemocratic governmental goals directed against freedom and individual rights.

DEFENSE OF THE BASIC LAW BY SELF-REGULATION

The historical lesson learned from the way that the National Socialists destroyed the Weimar constitutional order, set the creators of the new German constitution in 1949 the task of building a system, which by definition would be resistant to various temptations and – to be honest – challenges to the political order. In retrospect, it should be admitted that the founders of the post-war federal order did not spare any effort, through constitutional means, in foreseeing, frustrating and preventing attempts to use democracy against itself. It has, so far, achieved this goal, which is the stability of the German constitutional order. The numbers confirm this in a completely impartial way. Germany, governed by the current Basic Law has existed for over 66 years, almost five times longer than the Weimar constitution.

Mathematics, however, does not produce any clues indicating how this was possible. The interest of a careful observer of German constitutional history then must be piqued as to the cause of the longevity of the post-war governmental system status quo. The question that must be pondered is which newly introduced or newly defined governmental institutions this can be attributed to. If only constitutional provisions are relied on, then at once it becomes clear that the intention of the founders was to protect the substance of the Basic Law through security measures built into it. These include:

a) a prohibition against amendments which do not change or supplement the constitution in a clear way (*Verbot der Verfassungsdurchbrechung*; art. 79 par. 1 sentence 1 BL),
b) the clarifying clause ((*Klarstellungsklausel;* art. 79 par. 1 sentence 2 BL),
c) difficulties in effecting amendments or changes to constitutional provisions (*erschwerte Abänderbarkei*t; art. 79 par. 2 BL), and
d) a guarantee of the immutability of the provisions laid out in art 1 and 20 of the Basic Law (*Ewigkeitsklausel;* art. 79 par. 3 BL).

According to article 79 paragraph 1 sentence 1 of the Basic Law, the constitution "can only be changed by a law, which clearly changes or supplements the wording of the Basic Law". Even the first constitutional solution shows, in the aspect under consideration here, what kind of answer the lawmakers found to the lessons learned from the fall of the Weimar Republic. The constitution of that time, allowing amendments to constitutional law, restricted only the form of legislation, taking no notice of the contents that were carried within it.[1] The textbook example is the introduction by the National Socialists of the Authorization law *Ermächtigungsgesetz*), which not only allowed, in addition to the then accepted method of enacting laws by parliament, the option of laws originating from the government of the Reich. It even allowed for laws to deviate from the constitution, as long as they did not concern the constitution of the *Reichstag* and *Reichsrat.*[2] With the additional information that the acceptance of the Authorization Law took place with the required two thirds majority of votes from the *Reichstag*, then the picture of political suicide from the side of the latter is all too painfully clear. This is why post-war lawmakers allowed changes to the Basic Law only when the condition of changing the required wording is met.

Another constitutional solution has already lost so much in terms of its political relevance that Jörn Ipsen does not hesitate to call for lawmakers to eliminate it from the text of the Basic Law.[3] It is worth, however, examining it (as it is still in force) in order to see what types of constitutional paths German lawmakers trod. This is because the clarifying clause in article 70 paragraph 1 sentence 2 of the Basic Law in

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[1] Cf. art. 76 par. 1 sentence 1 Verfassung des Deutschen Reichs from 11 August 1919, [in:] RGBl. No. 152 (1919), p. 1383.

[2] Cf. art. 1 and art. 2 Gesetz zur Behebung der Not von Volk und Reich from March 24, 1933, [in:] RGBl. I, No. 25 (1933), p. 141.

[3] Cf. Jörn Ipsen, *Staatsrecht I*, München 2013, No. 1036, p. 285.

and of itself is a political curiosity,[4] if the fact is taken into account that it came into being as a result of an amendment to the Basic Law as a (political) necessity of the moment and not due to any political calculations.[5] It was the intention of lawmakers for the supplement to serve the contention, which had come under question, that the integration of Germany into western structures on the basis of the treaty from May 26, 1952[6] was compatible with the constitution. At the time only the Federal Constitutional Court was empowered to render a verdict on compatibility with the Basic Law (art. 93 par. 1 pt. 2 BL). In this case, the regulation of article 70 paragraph 1 sentence 2 of the Basic Law is either unnecessary or contradictory to the Basic Law. There is no other option – *tertium non datur*.

The Basic Law, like all laws, can be changed. But this can open on through the legislative path outlined in articles 76-78 BL. The fundamental difference between changing the constitution and changing a regular law is the higher number of necessary hurdles to be cleared in order for a change to the constitution to be passed. In contradistinction to the simple majority needed to amend ordinary laws (art. 77 par. 1 sentence 1 together with art. 42 par 2 sentence 1 BL), a change to constitution is only possible with the support of a two thirds majority of members of the *Bundestag* as calculated by article 121 of the Basic Law.[7] The legal founders linked this first condition with a second necessary to change the Basic Law, namely the support of two thirds of the members of the *Bundesrat* (*doppelt qualifizierte Mehrheit* – double qualified majority) (art. 79 par. 2 BL).

The reason for raising these hurdles does not need to be sought for in mathematics but rather in politics. Obtaining such high support for changes to the constitution means finding support not only, as would be obvious, among the ranks of a single party (or maybe a coalition) but above all requires the coalescence of a political consensus that includes opposition parties. Amending the constitution then becomes the job not only of the governing party, but crucially most parties represented in parliament and so, as can be surmised, according to the rules of representative democracy, the voters themselves.

The best testament to the appropriateness of this path are statistics. Since the passage of the Basic Law in 1949 it has been amended 60 times.[8] A simple calculation confirms the rightness of the characterization of the German constitution as

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[4] Cf. Gesetz zur Ergänzung des Grundgesetzes from March 26, 1954, [in:] BGBl. I, nr 6 (1954), p. 45.

[5] Cf. H. Dreier, *Art. 79 GG*, [in:] H. Dreier (Hrsg.), *Grundgesetz Kommentar*, Tübingen 2006, vol. II, No. 5, p. 1763.

[6] Cf. Vertrag über die Beziehungen zwischen der Bundesrepublik Deutschland und den Drei Mächten from May 26, 1952, [in:] BGBl. II, No. 8 (1955), p. 305.

[7] The statutory number of MPs in the *Bundestag* as the basis for establishing a parliamentary majority is calculated according to § 1 par. 1 sentence 1 and § 6 Bundeswahlgesetz (BWahlG) from July, 23 1993, [in:] BGBl. I, No. 39 (1993), p. 1288, 1594 (correction).

[8] The most recent amendment to the Basic Law from December 23, 2014, [in:] BGBl. I, No. 64 (2014), p. 2438.

a construction of an elastic nature, since changes are made to it on an average of once a year.

Nonetheless the question of what the reason was for making changes to the constitution so difficult cannot be avoided. That is, the purpose it serves should be ascertained. Within the doctrine of governmental law it is widely accepted that this particular defense mechanism for the defense of the contents of the constitution results from the fact that it contains standards which are especially important for a system of government. This is, however, a conclusion which obtained a place in German jurisprudence only after the last war. A historical and legal query will show then that for Paul Laband,[9] Georg Jellinek[10] and Gerhard Anschütz[11] the constitution may indeed contain regulations that are difficult to change but which for this reason do not deserve to be considered as more important than other legal regulations.

The argument has been made that both constitutional law like basic law is an expression of will of the same legislative authority. To put it simply the constitution remains a particular kind of legal act which differs from others only in that it is much more difficult to change. From a contemporary viewpoint, however, this argument cannot be regarded as sufficient. There is no doubt that the difficulty in introducing changes assures the previously mentioned norms of durability within a longer time perspective and through this stability to the governmental order, which is, *eo ipso* or in and of itself, the goal of every lawmaking authority.

A particular kind of longevity for the norms of the Basic Law is guaranteed by article 79, paragraph 3, according to which a change to the constitution is unacceptable if it violates the separation of the country into federal states, limits their participation in the legislative process or violates the principles laid out in articles 1 and 20 of the Basic Law. The intent of article 79 paragraph 3 BL cannot be called anything but the removal of the ability for lawmakers to amend the constitution in terms of the basics of the governmental system of the Federal Republic of Germany. Therefore, while discussing hypothetical situations in which the constitution is changed it should be stressed that this is only possible in two scenarios, revolution or military conquest.

Guided by the ruling of the Federal Constitutional Court,[12] it is possible to repeat after Michael Sachs, in an abbreviated form, that the law which contains specified

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[9] Cf. P. Laband, *Das Staatsrecht des Deutschen Reiches*, Tübingen 1877, vol. II, p. 38. „Die in der Verfassung enthaltenen Rechtssätze können zwar nur unter erschwerten Bedingungen abgeändert werden, aber eine höhere Autorität als anderen Gesetzen kommt ihnen nicht zu". [emphasis in original].

[10] Cf. G. Jellinek, *Allgemeine Staatslehre*, Berlin 1914, p. 534. „Das wesentliche rechtliche Merkmal von Verfassungsgesetzen liegt ausschließlich in ihrer erhöhten formellen Gesetzeskraft".

[11] Cf. G. Anschütz, *Die Verfassung des Deutschen Reichs vom 11. August 1919. Ein Kommentar für Wissenschaft und Praxis*, Berlin 1933, p. 401. „Die Verfassung steht nicht über der Legislative, sondern zur Disposition derselben, mit der Maßgabe, daß die Legislative gegebenenfalls verpflichtet ist, die für Verfassungsänderungen vorgeschriebenen besonderen Formen zu wahren".

[12] Cf. judgment of the Federal Constitutional Court from April 23, 1991, [in:] BVerfGE 84, 90, 120.

guarantees guards its own existence.[13] In order to insure article 79 paragraph 3 of the Basic Law against change in an additional way would be equivalent to *regressus ad infinitum* or infinite regress, because the content of this regulation would have to be (again) guaranteed by another law. Together all of this makes it possible to call this, if the query is not in error, a unique constitutional construction in the world, a summary lesson in government taken from the fall of the Weimar Republic.

DEFENSE OF THE BASIC LAW FROM INTERNAL THREATS

Locating the systematic/political source of threats to the constitution in its formal sense does not require any special effort (they are – potentially – MPs themselves), but determining the source of danger to the constitutional order internally is an undoubtedly difficult task. It demands reference, to varying degrees, to the imprecise term of loyalty to the constitutional order both from broadly defined government (public administration) and from citizens (individually and collectively). Accepting the criterion of faithfulness (loyalty) to one and the other with regard to the constitutional order of the state as the touchstone of this relationship makes it necessary to point out that in the Basic Law there is no regulation speaking of an obligation to maintain this faithfulness. Nonetheless, it is possible to introduce this in the case of public administration in an indirect manner from article 33 paragraph 5 of the Basic Law in which lawmakers refer to the fixed features of the professional state of officials (*Berufsbeamtentum*). The Federal Constitutional Court has also issued instruction on this.[14]

In accordance with the wording of article 33 paragraph 4 of the Basic Law, it is the will of lawmakers to entrust tasks to public employees who remain not only in a public-legal relation but also one of loyalty (faithfulness – *Treueverhältnis*) with the state. This category includes professional officials and judges. In terms of defending the constitutional order, of special interest here, it should be added that in connection with this the state (federal or regional) as a potential employer has the right to take the party allegiance of a person employed into consideration. The job candidate in public service must therefore promise to remain in all circumstances on the side of "the free and democratic constitutional order as outlined in the Basic Law."[15]

In the case of judges, it must be pointed out that from the point of view of protecting the constitutional order this class of public servants make use not only of

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[13] Cf. M. Sachs, *Art. 79 GG*, [in:] M. Sachs (Hrsg.), *Grundgesetz. Kommentar*, München 2014, No. 80, p. 1647.

[14] Cf. resolution of the Federal Constitutional Court from May 22, 1975, [in:] BVerfGE 39, 334, 347.

[15] Cf. § 60 par. 1 Bundesbeamtengesetz (BBG) from February 5, 2009, [in:] BGBl. I, No 7 (2009), p. 160. Not unlike the resolution of the Federal Constitutional Court from May 22, 1975, [in:] BVerfGE 39, 334, 359.

(professional) privileges[16] but are also subject to (professional) restrictions. On the one hand, judges cannot, without their consent, be removed from their position, be suspended permanently or temporarily while in office, be moved to another office or position or be forced to retire (art. 97 par. 2 BL). On the other hand, violations by judges of the rules of constitutional order constitute grounds for initiating proceedings (*Richteranklage*) before the federal (or national) constitutional court. In the case of being found guilty, the judge is sent into forced retirement or, in the case of proven intentional action, they can even be dismissed (art. 98 par. 2 BL).

The category presented also contains a procedure for the declaration of a willful violation of the Basic Law or other federal statue by the President of the Republic (*Präsidentenanklage*, art. 61 BL). Because the founders did not foresee the possibility of recalling the head of state before the end of term as may happen in the case of the Chancellor (constructive vote of no confidence) in its place the above constitutional construction appears. Only in the case of a two thirds majority vote by the *Bundestag* or *Bundesrat* can a resolution accusing the president of willful violation of the law be adopted. It is worth pointing out the same majority is necessary to amend the Basic Law. Proceedings are carried out in the Federal Constitutional Court, which, in the case of confirming the violation, may (but does not have to) make a ruling on removing the President of the Republic from office (art. 61 par. 2 BL). There is no need for a broader description of the solution, which in essence is also a lesson taken from the fall of the Weimar Republic. It must, however, be said that the lack of a political institution for recalling a president makes the introduction of institutional corrective mechanisms in the parliamentary system necessary.[17] It should be immediately added that so far no recourse to this in practice has taken place in the German governmental system.

The list of internal threats to the constitutional order should be expanded by those which may result from the (in)direct action of citizens. Lawmakers who are aware of such a threat cannot stop at the creation in the Basic Law of institutions which safeguard the constitutional order only from potential threats arising from the broadly understood state apparatus but must also find solutions that protect it from the unwanted actions from individuals or groups within society. Three different constitutional regulations refer to such cases: article 9 paragraph 2, article 18 and article 21 paragraph 2 of the Basic Law.

The first of these solutions concerns the prohibition on the existence of organizations (*Vereinsverbot*), whose activity is in conflict with the order laid out in the Basic Law (art. 9 par. 2 BL). The word "activity" draws attention since the reason for the prohibition cannot be merely the rejection of the constitutional order by a given organization but only the goal that its actions would bring about.[18] Therefore the prohibition against such an organization's actions does not occur *ipso iure* (by opera-

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[16] Cf. resolution of the Federal Constitutional Court from July 8, 1992, [in:] BVerfGE 87, 68, 85.

[17] Cf. M. Nierhaus, *Art. 61 GG*, [in:] M. Sachs (Hrsg.), *Grundgesetz. Kommentar*, München 2014, No. 4, p. 1395.

[18] Cf. W. Höfling, *Art. 9 GG*, [in:] M. Sachs (Hrsg.), *Grundgesetz. Kommentar*, München 2014, No. 38-39, p. 466.

tion of law), but rather must be a decision taken by the appropriate administrative authorities, that is the national or federal Minister for Internal Affairs.[19] Unlike the case of prohibiting particular political parties (to be discussed) this does not require action by the Federal Constitutional Court. As this type of decision is an administrative act, it can be challenged in administrative courts, where if the prohibition was issued by the federal ministry of internal affairs, then both the first and final instance is the Federal Administrative Court (*Bundesverwaltungsgericht*, BVerwG).[20]

The subject of the second solution is the loss of the right to utilize the basic rights guaranteed in the Basic Law (*Verwirkung von Grundrechten*) if they are used "in a struggle against the free and democratic constitutional order (art. 18BL) .[21] Deserving of attention is the fact that the founders do not stop only at the general statement "against the free and democratic constitutional order", but describes it in more detail, elaborating the respect for fundamental rights that is particularly important for democracy. These rights include freedom of expression in speech, writing and imagery (art. 5 BL), freedom of the arts, sciences, research and teaching (art. 5 par. 3 BL), the right of assembly (art. 8 BL), the right of association (art. 9 BL), the right to privacy in correspondence and communication (art. 10 BL), property rights (art. 14 BL) as well as the right to political asylum (art. 16a BL). Although the sequence of the regulation suggests the these are provisions effective by the operation of law (*ipso iure*), this would be completely mistaken. The loss of the above mentioned rights can occur only through a judgment by the Federal Constitutional Court (art. 18 sentence 2 BL as well as § 13 pt. 1 in combination with §§ 36-41 BverfGG[22]).

Finally, there is the third solution, which raises many political emotions. It concerns the prohibition on political parties (*Parteiverbot*), whose goal is to "undermine or overthrow the free and democratic political order, or which threaten the existence of the Federal Republic of Germany" (art. 21 par. 2 sentence 1 BL).[23] Similarly to the case of organizations, here as well a mere hostile stance of a given party toward the political order is not enough. According to a judgment by the Federal Constitutional Court there must be "a much more active, combatively aggressive posture toward the existing [constitutional] order."[24] The difference, however, is that the incompatibility

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[19] Cf. § 3 Gesetz zur Regelung des öffentlichen Vereinsrechts (Vereinsgesetz, VereinsG) from August 5, 1964, [in:] BGBl. I, No. 42 (1964), p. 593.

[20] Cf. § 50 par. 1 pt. 2 Verwaltungsgerichtsordnung (VwGO) from March 19, 1991, [in:] BGBl. I, nr 18 (1991), p. 686.

[21] Art. 18 of Basic Law from May 23, 1949, [in:] BGBl. I, No. 1 (1949), p. 1. „(…) zum Kämpfe gegen die freiheitliche demokratische Grundordnung mißbraucht, verwirkt diese Grundrechte".

[22] Cf. Gesetz über das Bundesverfassungsgericht (Bundesverfassungsgerichtsgesetz, BverfGG) from August 11, 1993, [in:] BGBl. I, No. 45 (1993), p. 1473.

[23] Art. 21 par. 2 of the Basic Law from May 23, 1949, [in:] BGBl. I, No. 1 (1949), p. 1. „(…) die freiheitliche demokratische Grundordnung zu beeinträchtigen oder zu beseitigen oder den Bestand der Bundesrepublik Deutschland zu gefährden, (…)".

[24] Cf. judgement of the Federal Constitutional Court from August 17, 1956, [in:] BVerfGE 5, 85, 85, LS 5. „(...); es muß vielmehr eine aktiv kämpferische, aggressive Haltung gegenüber der bestehenden Ordnung hinzukommen".

of a given party's actions with the Basic Law is judged exclusively by the selfsame court (art. 21 par. 2 sentence 2 BL), and not, as happens with organizations, defined administrative authorities. This discrepancy is, however, easy to explain if article 21 paragraph 1 sentence 1 of the Basic Law is taken into account. It says that parties participate in articulating the political will of the nation. Nonetheless, the regulation mentioned does not stand in the way of the proper administrative authorities being able in their publications of defining one party or the other as "extremist" or "radical."[25]

According to § 43 par. 1 BverfGG, at the national level only the *Bundestag*, *Bundesrat* and the federal government are allowed to submit an application to review the actions of a given party as being potentially in conflict with the Basic Law. In the case of parties whose range is limited to a single federal state, then the government of that state can also submit an application (§ 43 par. 2 BVerfGG). Regulation § 43 paragraph 2 BVerfGG) speaks of a right, however, and not of an obligation (*kann gestellt werden*). This makes it possible to write that each of the named applicants maintains the possibility of evaluating (*Ermessen*) whether the actions of a given party are in conflict with the constitutional order. It should be repeated that this evaluation is not, however, a judgment. This remains exclusively within the competency of the Federal Constitutional Court. In the literature, however, a thesis that has been gaining followers is that the authorized actor is required to make application as soon as there are enough indications.[26] Since, however, at this stage there is only suspicion, an important role is played by the preliminary proceedings (*Vorverfahren*) (§ 45 BVerfGG), which give the party under investigation the right to make a statement on the accusations of actions in conflict with the Basic Law.

The picture presented of preventative means of protecting the constitution would not be complete without the additional instrument, which is criminal law (*Strafrecht*). Even a superficial reading of the criminal code (*Strafgesetzbuch*, StGB)[27] shows in the first chapter under the title "Preparation of a war of aggression, treason and threat to the free and democratic political order" a special series of criminal acts which can be described as political (however that is understood). Passing over treason (*Hochverrat*), a number of other terms are found for criminal acts such as: continuing political engagement with a political party deemed to be unconstitutional (§ 84 StGB), violating a prohibition of association (§ 85 StGB), using symbols of organizations deemed to be unconstitutional (§ 86 StGB), sabotage (§ 88 StGB), slandering the state or its symbols or authorities (§ 90a and § 90b StGB). Also wor-

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[25] Cf. resolution of the Federal Constitutional Court from October 29, 1975, [in:] BVerfGE 40, 287, 291.

[26] Cf. J. Ipsen, *Art. 21 GG*, [in:] M. Sachs (Hrsg.), *Grundgesetz. Kommentar*, München 2014, No. 175, p. 917. *Ibid*. further literature.

[27] Cf. Strafgesetzbuch (StGB), consolidated text from November 13, 1998, [in:] BGBl. I, No. 75 (1998), p. 3322.

thy of note are additional amendments to the criminal code[28] which recognize the preparation of violent felonies that threaten the state (§ 89a StGB) or inducement to carrying out such acts (§ 91 StGB). The question of whether the fall in the number of politically motivated acts can be attributed to this or whether that is only a transitory tendency remains unanswered.

Year	Number of politically motivated criminal acts
2001	26.520
2002	21.690
2003	20.477
2004	21.178
2005	26.401
2006	29.050
2007	28.538
2008	31.801
2009	33.917
2010	27.180
2011	30.216
2012	27.440
2013	31.645
2014	32.700

Source: http://www.bmi.bund.de/SharedDocs/Downloads/DE/Nachrichten/Pressemitteilungen/2015/05/pmk-2014.pdf?__blob=publicationFile

DEFENSE OF THE BASIC LAW AND STATES OF EMERGENCY

Apart from the material regulation in the area of protection of the constitutional order, the founders foresaw, in article 73 paragraph 1 point 10 letter b, the possibility of institutional protection of the Basic Law. According to this article, the federation possesses sole legislative competence in the area of cooperation between the federation and particular states in the area of the protection of a free and democratic constitutional order or the determination of the existence of threats to the country. Because the phrase "protection of the constitution" (*Verfassungsschutz*) appears in this regulation, the creation of a Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz*)[29] was no accident on the part of legislators. The

[28] Cf. Gesetz zur Verfolgung der Vorbereitung von schweren staatsgefährdenden Gewalttaten from July 30, 2009, [in:] BGBl. I, No. 49 (2009), p. 2437.

[29] Cf. Gesetz über die Zusammenarbeit des Bundes und der Länder in Angelegenheiten des Verfassungsschutzes und über das Bundesamt für Verfassungsschutz (Bundesverfassungsschutzgesetz, BVerfSchG) from December 20, 1990, [in:] BGBl. I, nr 73 (1990), p. 2954 (art. 1) and p. 2970 (art. 2).

founders at the same time clarify the jurisdiction of the executive side of the federation in a subsequent regulation, that is in article 87 paragraph 1 sentence 2 of the Basic Law. Among other tasks, the office is charged with collecting and evaluating information on attempts or intentions to threaten the constitutional order in Germany (§ 3 par. 1 BVerfSchG). The legislative branch outfitted the office with typical intelligence instruments (§ 8 par. 2 BVerfSchG). Observing, as can be surmised, the rules of the diversification of duties between different public services, however, the Office for the Protection of the Constitution did not receive powers characteristic of the police or the right to give the police orders (§ 8 par. 3 BVerfSchG).

Another type of role, doubtless fundamental for the existence of the state and the protection of its constitutional order must be played by the armed forces. It must be admitted with relief (also from the Polish point of view), that the post-war story of the relations between the German army and the state do not support the penetratingly astute observation of Hans Delbrück, who analyzing the role of the army in Prussia did not hesitate to state: "The history of the army is (...) simultaneously the history of the Prussian state."[30] Certainly nothing makes this historical change as visible as article 26 paragraph 1 and article 87a paragraph 1 sentence 1 of the Basic Law. The first reads: "Actions which serve to disturb the peaceful coexistence of nations or which are conducted with such an intention, especially the preparation of the conduct of a war of aggression, are inconsistent with the constitution and are punishable."[31] The second, much shorter, reads "The federation charges the armed forces with the defense of [the state]."[32] This is why the participation of the German armed forces (*Bundeswehr*) in other activities than the defense of the country is possible when the Basic Law permits (art. 87a par. 2 BL). Legislation allows this in article 24 paragraph 2 of the Basic Law conditioning it, however, upon the participation of Germany in a collective defense system such as NATO or, until it was dissolved in 2010, the Western European Union. Apart therefore from participation in international military missions under the flag of the UN, as a result of accepted resolutions, German soldiers take part in different kinds of military actions by NATO.[33] The authorization for this is found in article 87a paragraph 2 of the Basic Law, which, it should be stressed, does not extend to

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[30] H. Delbrück, *Geschichte der Kriegskunst im Rahmen der politischen Geschichte*, Berlin 1920, vol. IV, p. 281. „Die Geschichte der Armee (...) ist zugleich die Geschichte des preußischen Staates".

[31] Art. 26 par. 1 of the Basic Law from May 23, 1949, [in:] BGBl. I, No. 1 (1949), p. 1. „Handlungen, die geeignet sind und in der Absicht vorgenommen werden, das friedliche Zusammenleben der Völker zu stören, insbesondere die Führung eines Angriffskrieges vorzubereiten, sind verfassungswidrig. Sie sind unter Strafe zu stellen".

[32] Art. 87a par. 1 sentence 1 Gesetz zur Ergänzung des Grundgesetzes from March 19, 1956, [in:] BGBl. I, No. 11 (1956), p. 111. „Der Bund stellt Streitkräfte zur Verteidigung auf". The current, supplemented wording of this article is from the amendment of June 24, 1968, [in:] BGBl. I, No. 41 (1968), p. 709.

[33] Cf. judgement of the Federal Constitutional Court from July 12, 1994, [in:] BVerfGE 90, 286, 352.

participation in military, but only to humanitarian or logistic actions whose legal foundation is article 32 paragraph 1 of the Basic Law.[34] Nonetheless the participation of the German military in the mentioned out-of-area missions, especially in recent years, raises a question about the nature of the system, namely whether such action does (or does not) require the agreement of the *Bundestag* in relation of article 59 paragraph 2 sentence 1 of the Basic Law. The answer was given by the Federal Constitutional Court, according to which such agreement is not required if the military engagement is the result of fulfilling treaty alliance obligations.[35]

The above example-exception confirms the rule that however military engagement of the armed forces is defined, it requires the agreement of the *Bundestag* (*Parlamentsvorbehalt*). Mindful of historical experience, the legislators constructed all constitutional regulations concerning the armed forces (art. 45a, art. 45b, art. 87a par. 1 sentence 2 as well as art. 115a par. 1 BL) in such a way as to make it impossible for the army to take part in political games. Given this, the intentions of legislators to guarantee, through these regulations, a real influence by parliament on the armed forces are completely clear. In spite of this, the definition of the *Bundeswehr* as the army of the parliament (*Parlamentsheer*)[36] does not at all give the *Bundestag* the right to make decisions on the military engagement of the German armed forces outside the borders of the country. That is the sole prerogative of the federal government.[37] But also here great political caution is felt since the basic subject matter is regulated by a separate statute on parliament taking part in the decision making process concerning military actions outside the country.[38]

The participation of the armed forces in the defense of internal order is a completely different question from the point of view of constitutional law. The realization of this scenario on the one hand raises questions of the relevant authority, because this would mean the omission of characteristics of the federal states. On the other hand, however, it cannot be referred to as anything but the solution of political conflicts through the use of the military. Nonetheless, legislators foresaw such a possibility, although only in cases when the police force turns out to be insufficient (art. 87a par. 4 sentence 1 in connection with art. 91 par. 2 BL). In addition, the use of the military in such circumstances must be immediately halted at the behest of the *Bundestag* or *Bundesrat* (art. 87a par. 4 sentence 2 UZ). The situation is further complicated when defense against terrorist threats is taken into consideration. It is

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[34] Cf. D. Wiefelspütz, *Der Einsatz bewaffneter deutscher Streitkräfte im Ausland*, [in:] AöR No. 1 (2007), pp. 44-94. Here pp. 88-89.

[35] Cf. judgement of the Federal Constitutional Court from November 22, 2001, [in:] BVerfGE 104, 151, 199.

[36] Cf. resolution of the Federal Constitutional Court from March 25, 2003, [in:] BVerfGE 108, 34, 44.

[37] Cf. judgement of the Federal Constitutional Court from July 12, 1994, [in:] BVerfGE 90, 286, 381.

[38] Cf. Gesetz über die parlamentarische Beteiligung bei der Entscheidung über den Einsatz bewaffneter Streitkräfte im Ausland (Parlamentsbeteiligungsgesetz, ParlBG) from March 18, 2005, [in:] BGBl. I, No. 17 (2005), p. 775.s

not clear, whether, for example, anti-flight defense before the expected use of a hijacked airplane for an attack on a nuclear power plant fits (yet) into the area defined as defense by lawmakers. Indeed, the search for solutions to hypothetical problems in this judgment by the Federal Constitutional Court is conducted in vain.[39] Nonetheless the point can rightly be raised that in the literature concerning this topic, undertaking preventative measures is absolutely allowed if the provisions of article 35 paragraphs 2-3 of the Basic Law are taken into consideration.[40]

All the above presented doubts regarding the nature of the political system are a good introduction to reflections on what states of emergency are in a democratic legal state as well as, a matter of particular interest, in what manner legislators understood this. It should be said at once that this is not a question that is often addressed in German political science since the several current publications concerning the entirety of constitutional law contain almost no mention of states of emergency.[41] If a few more serious attempts in recent years to approach the problem analyzed are excluded,[42] then the only exceptions to this puzzling omission are the broad considerations of Zippelius and Würtenberg.[43] Meanwhile this is a question, *nolens volens* (whether they like it or not), of extraordinary importance for the government of the state, a test of its organization abilities or its ability to meet challenges which cannot (always) be foreseen and which the federal founders do (not always) have a ready response to.

In German constitutional law, the concept of state of emergency (*Ausnahmezustand*) is understood as a disturbance (disruption) of public life which cannot be removed through those measures foreseen in the constitution.[44] Although this same term does not occur *explicite* or explicitly in the text of the Basic Law, the equiva-

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[39] Cf. judgement of the Federal Constitutional Court from February 15, 2006, [in:] BVerfGE 115, 118, 142.

[40] For example, in chronological order: Ch. Gramm, *Der wehrlose Verfassungsstaat?*, [in:] DVBl. 11 (2006), p. 653-661; Ch. Hillgruber, *Der Staat des Grundgesetzes - nur „bedingt abwehrbereit"*?, [in:] JZ No. 5 (2007), pp. 209-218; M. Ladiges, *Die Bekämpfung nicht-staatlicher Angreifer im Luftraum*, Berlin 2007; R. Merkel, *§ 14 Abs. 3 Luftsicherheitsgesetz: Wann und warum darf der Staat töten?,* [in:] JZ No. 8 (2007), pp. 373-385; U. Palm, *Der wehrlose Staat*?, [in:] AöR No. 1 (2007), pp. 95-113; F. Winkeler, *Bedingt abwehrbereit? – Die verfassungsrechtliche Zulässigkeit von Gefahrenabwehrmaßnahmen auf Kosten Unschuldiger am Beispiel des Luftsicherheitsgesetzes*, Stuttgart 2007 and Ch. Gramm, *Die Stärkung des Parlaments in der Wehrverfassung*, [in:] DVBl. No. 23 (2009), pp. 1476-1480.

[41] Here, a number of frequently reprinted works should be mentioned. In chronological order they include: Ch. Degenhart, *Staatsrecht I. Staatsorganisationsrecht*, Heidelberg 2008; R. Schmidt, *Staatsorganisationsrecht sowie Grundzüge des Verfassungsrechts*, Grasberg/Bremen 2008; J. Ipsen, *Staatsrecht I*, München 2013; Ch. Gröpl, *Staatsrecht*, München 2014.

[42] Worthy of attention are: J. Isensee (Hrsg.), *Der Terror, der Staat und das Recht*, Berlin 2004; A. Jakab, *Das Grunddilemma und die Natur des Staatsnotstandes*, [in:] Kritische Justiz, No. 3 (2005), pp. 323-336; Ch. Enders, *Der Staat in Not – Terrorismusbekämpfung an den Grenzen des Rechtsstaats*, [in:] DÖV No. 24 (2007), pp. 1039-1046 and O. Depenheuer, *Selbstbehauptung des Rechtsstaates*, Paderborn 2007.

[43] Cf. R. Zippelius, T. Würtenberger, *Deutsches Staatsrecht*, München 2008, No. 1-32, pp. 586-590.

[44] *Ibidem*, p. 586.

lents of such a state of emergency (*Notstand*) are widely considered as being war as an external cause (*äußerer Notstand*) or internal factors (*innerer Notstand*) which include natural disasters or social or political disturbances. Legislation concerning a state of emergency (*Notstandsrecht*) refers then to threatening dangers (*drohende Gefahr*), as presented by legislators in different versions after amendments to the constitution in 1968.[45]

With regard to constant new threats, the question is justified whether given the lack of a definition of the law it is possible for the state to tap the legal instruments that extend beyond legislation for a state of emergency. If the conclusions drawn on the basis of commentary to the Basic Law are not wrong,[46] then the answer will be Janus like. The basis and justification for constructing state of emergency laws are at the same time the goal, which is assuring internal stability within the state and legal safety and the assurance of the free and democratic political order as outlined in the Basic Law.[47] On the other hand, the fact that even in emergency situations this goal cannot empower a democratic legal state to use instruments from the edges of or beyond the law cannot be passed over.

It is necessary to return to the amendment to the Basic Law mentioned, according to which the typology of types of states of emergency includes cases such as: self-defense (*Verteidgungsfall*), state of tension (*Spannungsfall*), the need for the *Bundestag* to agree to utilizing particular regulations in a crisis situation (*Zustimmungsfall*) as well as the realization of treaty obligations (*Bündnisfall*). The first case is regulated by article 115a paragraph 1 sentence 1 of the Basic Law. Although disputes remain about what is meant by the concept of direct threat of attack used in the test of the regulation there can be no doubt that the law opens the way to extraordinary powers.[48] Depending on the prerogatives foreseen in the constitution, proceedings in the case of recognizing a particular state as fulfilling the conditions of article 115a of the Basic Law belong first to the federal government and then the *Bundestag* and *Bundesrat* and finally to the President of the Republic in announcing the state in the Journal of Laws (art. 115a par. 3 sentence 1 BL). If there are obstacles that cannot be overcome (*unüberwindliche Hindernisse*) to assembling the parliament and/or the Federal Council and immediate measures need to be taken, then the declaration of a state of defense falls within the duties of the Joint Commission (*Gemeinsamer Ausschuß*), according to article 115a paragraph 2 of the Basic Law. All this must, however, create the unmistakable impression of

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[45] Cf. Siebzehntes Gesetz zur Ergänzung des Grundgesetzes from June 24, 1968, [in:] BGBl. I, No. 41 (1968), p. 709.

[46] Cf. H. D. Jarass, *Art. 115k GG*, [in:] H. D. Jarass / B. Pieroth, *Grundgesetz für die Bundesrepublik Deutschland. Kommentar*, München 2007, No. 3-6, pp. 1079-1080 and also K. Windthorst, *Art. 91 GG*, [in:] M. Sachs (Hrsg.), *Grundgesetz. Kommentar*, München 2014, No. 11-14, pp. 1895-1896 and No. 31-40, pp. 1899-1901.

[47] Cf. § 7 Bundespolizeigesetz (BPolG) (earlier, the Bundesgrenzschutzgesetz, BGSG) from October 19, 1994, [in:] BGBl. I, No. 72 (1994), pp. 2978, 2979.

[48] Cf. R. Zippelius, T. Würtenberger, *Deutsches Staatsrecht*, München 2008, No. 8, pp. 587-588.

a high degree of difficulty in a situation when, to put it plainly, the enemy is at the gate. Zippelius and Würtenberger are right when they write that the constitutional regulations in question "reveal in a dramatic way, just how difficult (and perhaps ineffective) the system is, which wants to maintain the format of parliamentarianism as long and extensively as possible when making decisions concerning a state of emergency."[49]

An even greater difficulty concerns the definition, or rather its lack, of the idea of state of tension. If supposition (once more) is not mistaken, then legislators were thinking of crisis situations which in an international environment create such anxiety that in the near future the need for self-defense could be expected. This is a difficult idea to quantify in political terms and the only restriction imposed on it is that a two thirds majority of the *Bundestag* must accept it (art. 80a par. 1 sentence 2 BL). A similar restriction occurs in the situation in which the *Bundestag* agrees to apply the relevant regulations in a crisis situation. This could take place, for example, when the formal announcement of a state of defense or tensions lead to a worsening of the internal or international situation. The question of whether in such a case all of the conditions foreseen for a state of defense or tension must occur remains open.[50]

A different construction is used, however, in order to carry out obligations to allies (art. 80a par. 3 BL). The fundamental difference with regard to cases mentioned earlier is that the lawmakers do not demand the co-participation of the *Bundestag*, *Bundesrat* and the Joint Commission in determining a state of emergency. The federal government is the sole addressee and also dispatcher in this situation. Appealing to the set of laws governing a state of emergency, it undertakes the appropriate actions within the framework of the treaty of alliance on the basis of a resolution by an international body. Being independent of the decisions made by parliamentary collegial bodies, this type of solution doubtless facilitates faster, than in the cases given above, reactions during times of threat. However, also here the participation of the armed forces in carrying out their duty requires authorization by the *Bundestag*.[51]

In all the cases given, the common factor is that in the moment that they are announced as coming into existence, the regulations concerning them come into force (art. 80a BL). Since without a doubt the most important of those presented is the case of defense, more attention will be given to it. The first element of its constitutional outline is taking control of the armed forces by the Chancellor (art. 115b BL: in times

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[49] Cf. R. Zippelius, T. Würtenberger, *Deutsches Staatsrecht*, München 2008, No. 10, p. 588. „(…) enthüllen in drastischer Weise, wie schwierig (und vielleicht auch nicht effizient) es ist, in einem System, das die Formen des Parlamentarismus so lange und soweit wie möglich erhalten will, Regelungen für den Ausnahmefall zu treffen".

[50] Cf. R. Zippelius, T. Würtenberger, *Deutsches Staatsrecht*, München 2008, No. 11-12, p. 588.

[51] Cf. judgment of the Federal Constitutional Court from July 12,1994, [in:] BVerfGE 90, pp. 286, 387.

of peace this is, according to article 65a BL, the authority of the Minister of National Defense). Particularly important, however, are changes concerning the operations of the governing bodies of the state. In the case where there are difficulties in the *Bundestag* assembling or adopting resolutions, the constitutional body in its place (and that of the *Bundesrat*) is the Joint Commission (art. 115e. par. 1 BL).[52] Its powers are not of an illusionary nature at all, which is born out not only by its ability to pass legislation but also to choose a new Chancellor (art. 115h par. 2 BL). Nonetheless, the state of defense does not entail dissolving either the federal parliament of those of the states; quite the opposite in that their terms continue and are extended for six months after the end of the state of defense (art. 115h par. 1 BL). The status of the Federal Constitutional Court is also maintained (art. 115g BL). However, the regulation of article 1151 paragraph 2 sentence 1 of the Basic Law is not entirely clear. It indicates that the end of the state of defense must end at the behest of the *Bundestag* and *Bundesrat*. The question this raises is how this is possible since these bodies exist *de nomine*, in name only, and are replaced by the Joint Commission.

There are other problems when declaring a state of emergency from internal causes is taken into consideration. The federal founders give two reasons, rather surprisingly, in two separate places in the Basic Law. Three reasons are enumerated in the regulation of article 35 of the Basic Law concerning the assurance of protection of public order in the case of natural disasters (*Katastrophenschutz*), and somewhat enigmatically defined, "particularly severe accidents" (*besonders schwere Unglücksfälle*), and threats to safety and public order (*Gefährdung der öffentlichen Sicherheit und Ordnung*). The third reason listed would maybe not be worth heightened scrutiny if it weren't for the fact that almost the same area is covered by article 91 of the Basic Law (defense of the free and democratic constitutional order). Both conceptual areas share an impressive total of 56 constitutional articles, but despite this, there is a very thin partition of political discretion which could become an unnecessary hotbed of political interpretational disputes.

A state of emergency is accompanied usually by the suspension (*Aufhebung*) or limitation (*Einschränkung*) of civil rights. The possibility is subject to restrictions, however, depending upon the type of state of emergency, to a few cases, precisely set out in the Basic Law.

- limiting the right to free movement (art. 11 par. 2 BL),
- the possibility of calling military age men, who had not been called to fight, to perform specified tasks (art. 12a par. 3 BL), as well as
- the possibility of establishing temporary compensation in the case of appropriation for goals of defense (art.115c par. 2 pt. 1 BL)

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[52] Accordingly, art. 53a BL and § 1 par. 1 of the Rules of the Joint Commission creates the committee in question proportionally to the party representation in the *Bundestag* with 32 MPs and 16 members of the *Bundesrat* (one from each Land), [in:] Geschäftsordnung für den Gemeinsamen Ausschuss from July 23, 1969, [in:] BGBl. I, No. 74 (1969), p. 1102.

This is really not very much. It is difficult then to overcome the impression that the creators of the current political system accept as given the inability of reconciling this type of limitation, which would be a denial of the sense of the protection of the democratic order, with ideas of freedom. It is possible to accept that clearly citizens understand this since they have so far never had to make use of the law giving them the right to resist all who would try to overturn the constitutional order of the Federal Republic of Germany (art 20 par 4 UZ). *Tú felix Germania!* Happy Germany!

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ABSTRACT

The durability of the German constitutional order established after World War II must arouse the curiosity of the careful observer of the history of German law. The question arises which new or newly defined institutions of the political system could ensure such stability. If only a reading of the constitutional regulations in this respect is relied on, then the intention of legislators to protect the substance of the constitution through built-in security measures immediately becomes clear. Apparently, this is effective, since Germans have lived under the current constitution for the last 66 years, close to five times longer than under the Weimar Constitution.