

## GOVERNMENT UNDER LAW IN GERMANY

by

Hans G. RUPP (\*)

The concept of the Rechtsstaat as it has been given expression in the Constitution ("Grundgesetz" = GG) of the German Federal Republic of 1949 has borrowed heavily from the 19th century version of that idea. But still, "Rechtsstaat" today does not only mean "a state in which the activities of the executive are permanently subject to legal rules which are implemented and safeguarded by independent and impartial courts of law"<sup>1</sup>, although this aspect - "Gesetzmässigkeit der Verwaltung" - is yet very important. The Weimar Republic undoubtedly was a Rechtsstaat, although this term is not found in the constitutional document. The Grundgesetz (GG) uses the term Rechtsstaat expressly once, in Art. 28 sect. 1, and gives a definition of some of its basic features in Art. 20. According to Art. 28 sect. 1 GG the constitutional order - "verfassungsmässige Ordnung" - in the several states of the Federal Republic shall embody the principles of the republican, democratic and social Rechtsstaat as understood by this Constitution (-"Die verfassungsmässige Ordnung in den Ländern muss den Grundsätzen des republikanischen, demokratischen und sozialen Rechtsstaats im Sinne dieses Grundgesetzes entsprechen"-). Art. 20 sect. 2 GG provides that the Government in the Federal Republic is a Government by the People which is exercised by separate departments of the legislature, the executive

---

(\*) Associate Justice, Federal Constitutional Court of Germany; Honorarprofessor, University of Tübingen.

1) *Finer, The Theory and Practice of modern Government*, 1932, I, 141.

and the judiciary (-"Alle Staatsgewalt geht vom Volke aus. Sie wird vom Volke in Wahlen und Abstimmungen und durch besondere Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtsprechung ausgeübt"-). According to sect. 3 of Art. 20 GG the legislature is limited by the constitutional order, the executive and the judiciary are subject to law (-"Die Gesetzgebung ist an die verfassungsmässige Ordnung, die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden"-). In addition, Art. 79 sect. 3 GG expressly prohibits any constitutional amendment encroaching upon the principles enumerated in Art. 20 GG.

## II.

### 1. "Sozialer Rechtsstaat:

The Grundgesetz sets up a government of a democracy limited by the respect for the Rechtsstaat, and therefore not absolute. The mere establishment of majority rule would, by itself, not guarantee a government under law. The legislature representing the will of the people is not absolved from the limitations by the concept of the Rechtsstaat.

Some writers have stated that a "sozialer Rechtsstaat" is a contradiction in itself because a state promoting actively social welfare in the modern sense would necessarily come into conflict with the liberalistic concept of the Rechtsstaat going all the way in protecting individual liberty and individual interests<sup>2</sup>.

But the Federal Constitutional Court (= FCC) in several decisions has taken the view that a "sozialer Rechtsstaat" is not a contradiction in itself, but that the "Sozialstaatsprinzip" carries an obligation to the legislator and at the same time should guide the

---

2) F. Klein, Bonner GG und Rechtsstaat, Z.f.d. ges. Staatswiss. Bd. 106 (1950), 390, 404; Forsthoff, Begriff und Wesen des sozialen Rechtsstaats, Veröff. d. Vereinig. deutscher Staatsrechtslehrer, Heft 12 (1954), 8, 9 ("Der Rechtsstaat ist in seinen Institutionen auf Freiheit angelegt, der Sozialstaat auf Teilhabe").



executive and the judiciary to such an interpretation of individual liberty which aims at the common good of all<sup>3</sup>

2. As the particular aspects of the Rechtsstaat one may mention the following:

- a) A Constitution with a high degree of stability,
- b) constitutional guaranty of individual rights (Grundrechte),
- c) statutes passed by the legislature -Gesetze-, besides keeping in line with the formal rules of the written constitution should meet a certain standard of justice,
- d) The executive should act only on statutory authority and within constitutional limitations,
- e) separation of powers,
- f) an independent judiciary,
- g) judicial review of executive and legislative action.

In other words: the Rechtsstaatsprinzip requires that any form of governmental action should be predictable and be relied upon by the individual.

3. **The Constitution.** It has been justly said that one of the reasons for the "Krise des Rechtsstaats" is the abandonment of general legal precepts in a constitution in order to be prepared to deal with changing political situations ("Abbau der rechtlichen Verfassung")<sup>4</sup>.

The Grundgesetz tries to fend off this danger in several ways:

- a) Certain basic principles of the GG are exempt from amendment and can therefore never be changed or impaired (Art. 79 sect. 3 GG). Among them is the Rechtsstaatsprinzip (Art. 20

3) Entscheidungen des Bundesverfassungsgerichts (Decisions of the Federal Constitutional Court (=BVerfGE) 3, 377, 381; 4, 96, 102; 5, 85, 198.

4) Kaegi, Die Verfassung als rechtliche Grundordnung des Staates 1945, 94 ff.

GG) and the constitutional guaranty of individual liberty (Art. 1 GG).

b) Insofar as amending the constitution is not prohibited, the amendment must be carried by a 2/3 rds majority of the membership of the Bundestag and 2/3 of the votes of the Bundesrat. Moreover, the amendment must expressly change the wording of the constitutional document (Art. 79 sect. 1 GG) This makes impossible the procedure which was often resorted to under the Weimar Constitution: the statute which would otherwise have violated the constitution was simply passed by the 2/3 majority required for constitutional amendments ("Verfassungsdurchbrechung").

c) Even an amendment adopted according to the requirements of Art. 79 sect. 1 GG may be questioned with regard to its validity, if it has the sole purpose to deal with a singular, ad hoc situation. When for instance the Federal Constitutional Court on January 17, 1957 had declared unconstitutional a statute providing a joint income tax assessment for husband and wife, the advisory council of the Federal Ministry of Finance publicly endorsed a plan calling for a temporary constitutional amendment which would have suspended the effect of the Courts decision until the Bundestag could pass a new statute in accordance with the decision. But the general public, the legal profession and the Bundestag strongly opposed the proposal, because it was felt that such scheme was against the dignity of the constitution and so the plan was dropped<sup>5</sup>.

Similar objections have been raised against Art. 142 a GG which was adopted on March 26, 1954 and which simply declared that no provision of the Grundgesetz was violated by the coming into force of the — now obsolete — treaty on the European Defense Community of May 26/27, 1952<sup>6</sup>.

d) The experiences during the Hitler era have shown that

5) BVerfGE 6, 55; O. Bachof in Juristenzeitung 1957, 272

6) Forsthoff, Über Massnahmen-Gesetze, Gedächtnisschrift für Walter Jellinek 1955, 221, 226.



a statute passed in accordance with constitutional procedure need not be "law" in the higher sense of giving effect to justice and that a positivistic and formalistic interpretation actually is a disservice to justice. So the Federal Constitutional Court has held that in extreme cases it could even declare void an explicit provision in the constitution itself, if it violated fundamental principles of justice<sup>7</sup>.

This would make it possible to give effect to the principle of Rechtsstaat even against and above the constitutional document.

4) Constitutional guaranty of individual rights (Grundrechte). If the dignity of man is to be the prime value in politically organized society (Art. 1 sect 1 GG), the constitution has to establish certain guaranties to protect his personal sphere against impairment by the government. To achieve this purpose the GG in Art. 1-17 has set up a Bill of Rights (Grundrechte) which contains all the traditional civil rights, as equal protection of the law (Gleichheit vor dem Gesetz), freedom of religion, freedom of speech, right of peaceful assembly, right of petition etc. The provisions of the Bill of Rights are self-executing and binding upon legislature, executive and judiciary (Art. 1 sect. 3 GG). Art. 1 GG cannot be abolished or impaired by constitutional amendment. These fundamental rights may be abridged only as far as provided by the constitution itself and then only by a general statute. But such statute must not impair the essence of the right protected. A person may forfeit a constitutionally guaranteed civil right only by an order of the Federal Constitutional Court in case of abuse (Art. 18 GG). In addition to the Bill of Rights in Art. 1-17 the Grundgesetz also protects the rights of the individual to be brought to trial in a court whose jurisdiction has been previously determined by a general statute (Art. 101 GG) — "Recht auf den gesetzlichen Richter" —. Also safeguarded is the right to a fair hearing in court (Art. 103 GG) and it is provided that no person shall be deprived of personal liberty except by authority of a statute and by order of a court (Art. 104 GG).

7) BVerfGE 3, 225, 232.

5) *Statutes.*

a) The principle of the Rechtsstaat requires a statute to give expression to the will of the legislator clearly and unequivocally. The citizen should exactly be told what the law wants him to do or not to do<sup>8</sup>.

b) For the earlier Rechtsstat a statute —Gesetz— was a *general rule* (“generelle Norm”), not an individual, specific order (“Befehl”); the legislature issues general rules, where as the executive issues specific orders according to those general rules. General rules in the form of statutes give in a high degree effect to the principle of legal security and of predictability of the law and of possible executive action; this also is in accordance with the principle of separation of powers. This distinction is only possible where state and autonomous society are separated from each other. But in modern times the legislator sometimes cannot content himself with issuing general rules for the conduct of individuals and for executive action but has to act on the spot himself to deal with an *ad hoc*-situation especially with respect to the economic life of the nation. This emergency produces statutes which do not contain general rules at all but are “rule” und “rule enforcement” in one (—“Maßnahmengesetze”—)<sup>9</sup>.

Maßnahmengesetze are expressly prohibited by the Grundgesetz in one instance: Where the Grundgesetz allows a civil right to be impaired by a statute, the latter must be generally applicable and not only aimed at a singular case (Art. 19 sect 1 GG). Beyond this, the Federal Constitutional Court passed upon one Maßnahmengesetz and has adjudged it valid<sup>9a</sup>.

The statute in question was the “Gesetz über die Investition-

8) BVerfGE 1, 14, 45; 5, 25, 31.

9) Forsthoff op. cit.; Bericht über die Tagung der Staatsrechtslehrer in Mainz v. 11/12.10.1956. Die Öffentliche Verwaltung (DÖV) 1956, 658; E. R. Huber, Der Streit um das Wirtschaftsverfassungsrecht (Schluss), DÖV. 1956, 200, 204; Haussleiter, Massnahmenrecht und Dauerrecht auf dem Gebiet der wirtschaftspolitischen Verordnungs- und Gesetzgebung, DÖV 1956, 143.

9a) BVerfGE 4, 7, 18.



shilfe der gewerblichen Wirtschaft" of January 7, 1952 which assessed on German business enterprises a levy of 1 billion DM to be invested in the basic industries (so called "Grundstoffindustrien", producing coal, steel and electric power). The Court has said that Maßnahmengesetze, too, have to pass the test of equal justice. Legal writing on the subject tends toward admitting the necessity of Maßnahmengesetze but wants to have established certain safeguards. For instance Maßnahmengesetze cannot be upheld if they encroach upon the jurisdiction of courts ("gesetzlicher Richter"). The legislator also must not by such a statute change existing rules of law nor assume powers given by such rules to other departments of government. To achieve its end, a Maßnahmengesetz may only provide such means which are "necessary and proper" and not excessive or arbitrary<sup>10</sup>.

c) *Retroactive effect.* The Federal Constitutional Court has held that with the exception of a statute providing punishment for a criminal offense a statute may give itself retroactive effect<sup>11</sup>.

In an obiter dictum it has stated that such a statute would be unconstitutional for violation of the Rechtsstaatsprinzip if it impaired accrued rights with retroactive effect from a date at which the person concerned could not have reasonably expected this<sup>12</sup>.

## 6) Separation of Powers.

One of the main pillars of the Rechtsstaat is the existence of three separate departments of government (Art. 20 sec. 2 GG). It will be sufficient to mention under this heading the problem of delegation of legislative power and the position of the judiciary within the framework of the Grundgesetz.

a) *Delegation of legislative power.* Mindful of the great dangers of unlimited legislating by executive order and of the experiences with Nazi-"Ermächtigungsgesetze", the GG provides in

10) Cf. Leitsätze zum Bericht von C. F. Menger "Das Gesetz als Norm und Massnahme" Veröffentlichung der Vereinigung der Deutschen Staatsrechtslehrer Heft 15 (1957) p. 33.

11) BVerfGE 2, 237, 265; 3, 4, 12, 58, 150, 288; 352.

12) BVerfGE 1, 264, 280.

Art. 80 sect. 1 that a statute may authorize the Federal Government to make law by executive order. But the policy to be put into effect by the intended executive order as well as extent and limits of the delegation are to be determined by the enabling statute ("Dabei müssen Inhalt, Zweck und Ausmaß der erteilten Ermächtigung im Gesetz bestimmt werden."). The Federal Constitutional Court enforces this constitutional limitation upon the delegation of legislative power very strictly and has in several instances declared delegating statutes unconstitutional on the ground that the extent of the power delegated was too vaguely described in the statute to make it possible to foresee all cases in which it would be used<sup>13</sup>. It goes without saying that a delegation of legislative power *in toto* would clearly violate Art. 20 sect. 2 GG and therefore be unconstitutional.

b) *Independent judiciary.* The Grundgesetz has strengthened the judicial Power to a considerable extent. It reserves the judicial function ("Rechtsprechende Gewalt") to the judges and provides that this function is exercised by the Federal Constitutional Court, the higher federal Courts enumerated in the constitution (Art. 96 sect. 1: Federal Courts for civil and criminal appeals, for tax appeals, for administrative cases, appeals in labor and in social security cases) and the state courts (Art. 92 GG). The judges are independent and subject only law (Art. 97 sect. 1 GG); this article safeguards the *judicial function* against any influence by the two other departments of government. The *personal* independence of the judges is guaranteed by Art. 97 sect. 2 GG which provides that no judge against his will and before the end of this tenure may be removed from office or transferred to another office except by impeachment.

The constitution not only safeguards judicial independence, it also wants to avoid the development of a "judicial bureaucracy" which might show a tendency of sitting in an ivory tower. Certain experiences with the judiciary during the Weimar Republic have caused this distrust against the judge being only a learned technician of the law and living in a political vacuum. For this reason,

13) BVerfGE 1, 14, 60; 2, 307, 334; 4, 7, 21; 5, 71; 76.



the GG has entrusted the selection of the federal judges not to the traditional head of the judicial bureaucracy, the Minister of Justice, but to a judges selection committee (Richterwahlausschuß) consisting of the Federal Minister of Justice and the Ministers of Justice of the states and an equal number of persons elected by the Bundestag (Art. 96 sect. 2 GG). A similar solution has been found for the selection of the judges of the highest federal court, the Federal Constitutional Court: they are elected by Bundestag and Bundesrat (1/2 by each) (Art. 94 GG). The same purpose, protecting the judiciary against antidemocratic influences, is served by Art. 98 sect. 2,5 GG which provides for the impeachment of federal judges before the Federal Constitutional Court on a motion by the Bundestag, on the ground that they have violated the basic principles of the GG, no matter whether acting in a judicial capacity or not.

#### 7) J u d i c i a l R e v i e w.

a) The classical theory of the Rechtsstaat had already recognized that executive action could effectively be kept within the limits of statutory authority ("Gesetzmäßigkeit der Verwaltung") only, if it was subject to the control of independent and impartial courts. This, in the latter part of the 19. the century, has led to the establishment of a system of independent administrative courts in the German states (Verwaltungsgerichte), which today have jurisdiction over practically all acts of the executive. Beyond this, the GG guarantees the fullest possible protection against unlawful government action through the sweeping clause of Art. 19 sect. 4 which states, that any person whose rights have been impaired by government action ("durch die öffentliche Gewalt") may start an action in an ordinary court of law, unless other judicial relief e.g. in a Verwaltungsgericht - is available.

b) But not only are the activities of the executive subject to law — especially to the statutes passed by the legislature —: executive and legislative power both are subject to the rules of the constitution. Thus, the effectiveness of the Rechtsstaat will depend upon the extent of judicial control over the constitutionality of statutes and executive acts.

Judicial review of legislative and executive action is nothing novel to German constitutional law. Already during the period of the Weimar Republic, the courts successfully assumed the power to declare federal and state statutes inapplicable on constitutional grounds, although the constitution had not expressly given them the power to do so. Today, the ordinary and the administrative courts still exercise this authority. But the final say has been entrusted by the GG to one single court, the newly established Federal Constitutional Court, which is the apex of the judicial pyramid (Art. 92, 93, 94, 99, 100 GG). The Federal Constitutional Court passes upon the constitutionality of federal and state legislation in different ways. During the Weimar days, no uniformity of decisions on the constitutionality of a statute could be achieved, because an appeal to the then highest court, the Reichsgericht, did not lie in all cases. The GG does not impair the power of the state and federal judges to declare a federal or state statute *to be constitutional* and therefore apply it to the case at bar, but it requires them to refer the question of constitutionality to the Federal Constitutional Court in case they deem the statute *repugnant to the constitution* and therefore inapplicable ("negatives Entscheidungsmonopol des Bundesverfassungsgerichts"). The Federal Constitutional Court does not act in a truly appellate function: it does not review the case at bar; it does not decide whether A may recover 100 Marks from B, it decides only in abstracto whether the statute on which A eventually bases his claim is constitutional or not. After this decision, which is final and binding on all courts and government agencies, has been handed down by the Federal Constitutional Court, the court before which the case is pending resumes proceedings and renders judgment. Such question may be referred to the Federal Constitutional Court directly from a municipal magistrate as well as from one of the higher federal Courts.

The question of constitutionality of legislative action may also be brought before the Court in abstracto on a motion by the Federal Government, a state government or one third of the members of the Bundestag.



The GG has also made the Federal Constitutional Court the sole arbiter in disputes between the federal legislative and executive departments (Bundespräsident, Bundesregierung, Bundestag, Bundesrat) concerning their respective powers under the constitution. Moreover, it has jurisdiction over constitutional disputes between the federal government and a state and between several states.

The scope of the Courts jurisdiction is, however, not limited to constitutional questions referred to it by the other departments of government, the states or the lower courts: any person may apply directly to the Court for relief on the ground that his constitutional individual rights (Grundrechte) have been violated either by a federal or a state statute, by executive action or by a final judgment of a court (Verfassungsbeschwerde). The Federal Constitutional Court also has jurisdiction to impeach the President of the Republic and the federal judges. Moreover a court order is required to outlaw a political party on the ground of subversive activity and again only the Federal Constitutional Court may deprive a person of his constitutional rights in the ground that he has abused them.

It has been said that the ascendancy of the judicial power in the GG has changed the "Rechtsstaat" into a "Justizstaat" and in the end will lead to a "Government by courts" which would cripple all government activity in the modern welfare state. Much, of course, will depend upon how the Federal Constitutional Court makes use of its sweeping "power to destroy" i.e. to enjoin executive action and to nullify legislation. But if the Court does not invade the province of legislative and executive discretion, provided that this is not used arbitrarily, and keeps away from purely political questions, judicial control will further government under law.

#### 8) T h e L a w o f N a t i o n s :

The Rule of Law as a governing principle has also found its expression in the attitude which the GG has taken towards the rules of the Law of Nations. According to Art. 25 GG the general

rules of the law of nations are part of the law of the land. They take precedence over statutes and create rights and duties for the inhabitants of the Federal Republic without the intermediary of a municipal statute.

---