Max-Planck-Institut für
ausländisches öffentliches Recht und Völkerrecht

Beiträge zum ausländischen öffentlichen Recht und Völkerrecht 188

Eibe Riedel · Rüdiger Wolfrum (eds.)

Recent Trends in German and European Constitutional Law

German Reports Presented to the XVII[th] International Congress on Comparative Law, Utrecht, 16 to 22 July 2006

Springer

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Herausgegeben von
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Band 188

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Springer
the language of science

ISSN 0172-4770
ISBN 3-540-34667-8 Springer Berlin · Heidelberg · New York

Bibliografische Information Der Deutschen Bibliothek

Die Deutsche Bibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.ddb.de> abrufbar.

Printed in Germany

Satz: Reproduktionsfertige Vorlagen vom Autor
Druck- und Bindearbeiten: Strauss Offsetdruck, Mörlenbach
SPIN: 11767435 64/3153 – 5 4 3 2 1 0 – Gedruckt auf säurefreiem Papier

Preface

The present volume compiles the German National Reports on Public Law that are to be presented at the XVIIth Congress of the International Academy of Comparative Law, which will take place from 16 – 22 July 2006 in Utrecht, the Netherlands. By publishing the conference report before the conference itself has taken place, we hope to enable interested scholars and practitioners to gain information in greater detail as it will be possible during the conference, and in this way to stimulate and inspirit the overall discussion. The Congress, like its predecessors, will bring together academics and practitioners from all over the world and thus offer an excellent opportunity for discussion and comparison on a wide range of current and interesting issues.

The articles of this volume map out the current situation and doctrinal ramifications of a specific comparative project, as designed by the Congress organisers. Each contributor provides both a full picture of the subject area and sets out his or her view on the topic, which will, given our experiences from the previous conferences, stimulate and enrich the discussions at this year's conference.

This volume contains eight reports focussing on specific topics of German Public Law and two dealing with questions of European Constitutional Law.

Two reports, by Armin von Bogdandy and Ralph Alexander Lorz, analyse new trends in European Constitutional Law. Jürgen Bast will take a look at the ever topical issue of legal positions of migrants in Germany. Markus Böckenförde analyses the relevancy of constitutional referenda. Thomas Fetzer addresses the recent issue of e-government, while Kristian Fischer carefully examines the phenomenon of Quangos in German law. Dirk Hanschel raises fundamental questions about progress and the precautionary principle in administrative law. Anja Seibert-Fohr concentrates on constitutional guarantees of the independence of the German judiciary, and, last but not least, Sebastian Graf Kielmansegg takes a close look at legal means for eliminating corruption in the public service, a topic which has gained increasing importance over the last years. Thilo Marauhn analyses characteristics of international administration in crisis areas from a German perspective with special focus on German participation.

Brought together, these articles will provide an overview over recent developments and new issues in both European Constitutional and German Public Law.

We are highly indebted to the authors of these reports for submitting their reports in time so that they may be available in published form at the Congress. They have already contributed significantly to the success of the conference through their careful research and thoughtful insights as contained in these reports. Sincere thanks go to Ms Katharina Engbruch, senior research fellow at the University of Mannheim, Christel Selzer, secretary at the chair of Eibe Riedel, Ms Angelika Schmidt and Birgit Jacob, Max Planck Institute for Comparative Public Law and International Law, Heidelberg, for their editorial assistance. We also wish to thank the Springer Verlag, Heidelberg, for publishing this volume.

Mannheim/Heidelberg, March 2006 Eibe Riedel/Rüdiger Wolfrum

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Constitutional Principles for Europe*

Armin von Bogdandy

I. General Issues

1. The Subject Matter

This contribution presents a doctrine of principles, that is a systematic exposition of the most essential legal norms of the European legal order. For these purposes it is not necessary to precisely define the concept "principle"[1] since the study will work with a broadly accepted minimal

* This contribution is based on *A. von Bogdandy*, Constitutional Principles, in: id/Bast (eds), Principles of European Constitutional Law, 2006.

understanding: principles are legal norms laying down essential elements of a legal order.[2] The purpose of this study is above all to identify and clarify these principles, in particular on the basis of further legal concepts, more specific norms, settled case-law as well as established constitutional theories and doctrines.[3]

The doctrine of principles presented here will not discuss all principles of primary law. Rather, this study is concerned with *founding* principles analogous to Art 20(1)[4] German Basic Law[5] or Art 1 Spanish Constitution.[6] Art 6 EU and Arts I-2, III-193(1) CT-Conv (Arts 2, 292 CT-IGC) are of great significance with regard to their identification.[7] They express an overarching normative frame of reference for all primary

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[1] For a good overview of the diverse understandings, *R. Alexy*, Theorie der Grundrechte, 1996, 71 *et seq*; *M.L. Fernandez Esteban*, The Rule of Law in the European Constitution, 1999, 39 *et seq*; *M. Koskenniemi*, General Principles: Reflexions on Constructivist Thinking in International Law, in: id (ed), Sources of International Law, 2000, 359; *R. Dworkin*, Taking Rights Seriously, 1977, 24 *et seq*.

[2] See, in more detail, *O. Wiklund/J. Bengoetxea*, General Constitutional Principles of Community Law, in: U. Bernitz/J. Nergelius (eds), General Principles of European Community Law, 2000, 119; on the status of principles within the hierarchy of Union law, see *J. Nergelius*, General Principles of Community Law in the Future, in: *ibid* 223, at 229 *et seq*.

[3] *E. Riedel*, Der gemeineuropäische Bestand von Verfassungsprinzipien zur Begründung von Hoheitsgewalt, in: P.C. Müller-Graff/E. Riedel (eds), Gemeinsames Verfassungsrecht in der Europäischen Union, 1998, 80 *et seq*, demonstrates that this is a "typical German" approach.

[4] The decisions concerning Article 20 German Basic Law are considered to be "fundamental statements with respect to the constitutional identity", "the normative core of the constitutional order", provisions determining the "character of the Federal Republic of Germany" and "blueprints"; for more details, *H. Dreier*, in: id (ed), Grundgesetz-Kommentar, 1998, vol II, Art 20 (Einführung), paras 5 *et seq*.

[5] For an English version, see <http://www.bundesregierung.de/static/pdf/GG_engl_Stand_26_07_02.pdf> (8 April 2004).

[6] For an English version, see <http://www.oefre.unibe.ch/law/icl/sp00000_html> (8 April 2004).

[7] *M. Scudiero*, Introduzione, in: id (ed), Il diritto costituzionale comune europeo. Principi e diritti fondamentali, 2002, ix. Neither Art 6 EU nor Art 2 CT-Conv (Art 2 CT-IGC) contain an exhaustive list of the founding principles. Of further significance – under current law – are in particular Art 2 EU and Arts 2, 5 and 10 EC.

law, indeed for the whole of the Union's legal order. Although Art I-2 CT-Conv (Art 2 CT-IGC) uses the term "value", the tenets it lays down can be considered as principles. Usually, principles are to be distinguished from values, the latter being fundamental ethical convictions whereas the former are legal norms. Since the "values" of Art I-2 have legal consequences (Arts I-1(2), I-3(1), I-18 CT-Conv; Arts 1(2), 3(1), 19 CT-IGC) they are legal norms and can be considered as principles.[8]

This study examines only the European Union's constitutional principles. Although European constitutional law is closely intertwined with the national constitutions, forming the "European constitutional space", principles of the national constitutions will not be discussed. To focus almost exclusively on the European level is justified by the concept of autonomy of European primary law, analytical necessities and limitations of space.

2. National and Supranational Principles: On the Question of Transferability

Many of the principles laid down in Art 6 EU are well-known from the national constitutions and have been the object of thorough research. A key question for a European doctrine of principles (and indeed for the whole of European constitutional law) is to what extent and with what provisos the relevant national jurisprudence can be used in order to develop the supranational principles.[9] More than a few scholars deny the possibility of such recourse by claiming that the new form of governance requires "unprecedented thinking".[10]

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[8] For the reasons why the term "value" might have been chosen, see *A. von Bogdandy*, Europäische Verfassung und europäische Identität, Juristenzeitung (2004) 53, at 58 *et seq*.

[9] In detail, *R. Dehousse*, Comparing National and EC Law, 42 AJCL (1994) 761, at 762 and 771 *et seq*.

[10] *G.F. Schuppert*, Anforderungen an eine europäische Verfassung, in: H.D. Klingemann/F. Neidhardt, Zur Zukunft der Demokratie, 2000, 249. Schuppert himself demonstrates the utility of comparative thought, see *G.F. Schuppert*, Überlegungen zur demokratischen Legitimation des europäischen Regierungssystems, in: J. Ipsen/E. Schmidt-Jortzig (eds), Recht – Staat – Gemeinwohl: Festschrift für D. Rauschning, 2001, 201, at 207 *et seq*. On the theoretical aspect, see *P. Zumbansen*, Spiegelungen von "Staat und Recht", in: M. An-

Yet this demand clashes with the very nature of legal thinking, which at its heart is comparative and dependent on the repertoire of established doctrines of viable institutions.[11] Nor is it necessary to renounce any such comparison since there is sufficient similarity between the supranational and the national legal orders. The Union's and Member States' constitutions confront the same central problem: the phenomenon of public power as the core of every constitutional order.[12] Most if not all constitutional principles are eventually concerned with this problem.[13] In view of this issue identity there is a sufficient degree of similarity to justify transferring the insights from the one order to the other.

Nevertheless, a simple transfer of concepts and insights from the national context in many instances will not be adequate for the issues that arise in the EU context. The transfer of constitutional concepts of any one single Member State is already prohibited by the principle expressed in Art 6(3) EU, namely the equality of the 25 national constitutions.

Nor is it possible to simply project a common European denominator of national concepts onto the Union.[14] Every analogy and transfer must reflect the fact that the Union is not – according to the prevailing and convincing view – a state, but rather a new form of political and legal order.[15] The structuring principles must reflect this. A doctrine of European principles must therefore purify the content of the principles known from the national constitutions from those elements which apply only to a state.

Quite significantly in this respect, national constitutional law exhibits a far greater degree of political unity – that is, those phenomena which are traditionally subsumed under the term "political unity" – than does

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derheiden et al (eds), Globalisierung als Problem von Gerechtigkeit und Steuerungsfähigkeit des Rechts, 2001, 13.

11 On the "memory function", *E. Schmidt-Aßmann*, Das allgemeine Verwaltungsrecht als Ordnungsidee, 2004, 4.

12 *N. MacCormick*, Questioning Sovereignty. Law, State, and Nation in the European Commonwealth, 1999, 138 *et seq*.

13 Moreover, the Union enjoys the power to impose duties on Member States, which is the core feature of federal constitutional law.

14 Yet a comparative approach is most useful in this respect; for a fine example, see *Scudiero* (note 7).

15 *J.H.H. Weiler*, Introduction: The Reformation of European constitutionalism, in: *id*, The Constitution of Europe, 1999, 221, at 221.

Union constitutional law, both conceptually and practically.[16] The exercise of power by the Union appears not as the will of a single sovereign, but rather as the common exercise of public power by various actors.[17] This idea underlies the very first normative enunciation of the Constitutional Treaty (Art I-1(1) CT-Conv; Art 1(1) CT-IGC): it founds a Union, "on which the Member States confer competences to attain objectives they have in common". Not only consensual and contractual elements and networks between various public authorities, but especially the prominence of the Member States and their peoples must decisively shape the understanding and concretisation of the structuring principles.

3. Constitutional Principles in View of Varying Sectoral Provisions

The principles set forth in Art 6(1) EU are valid for the whole of Union law. Yet numerous concretising figures are valid only in certain sectors, for instance the dual structure for democratic legitimation through the Council and Parliament. The Union's legal order reveals a significant fragmentation; the Constitutional Treaty mends this fragmentation to some extent (*eg* Art I-6 CT-Conv; Art 7 CT-IGC), but by no means in all areas.[18] This gives rise to doubts about the usefulness of an overarching doctrine of principles. It might even nurture the suspicion that a doctrine of principles is not the fruit of scholarly insight, but rather a policy instrument for more integration. Yet these doubts and suspicions are unfounded.

As the principles set forth in Art 6 EU apply to all areas of Union law, an overarching doctrine of principles built on Art 6 EU encompassing the entire primary law is a logical consequence. Unless *mis*interpreted as merely declaratory, the implementation of Art 6 EU in 1997 un-

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[16] On the development of this concept, *T. Vesting*, Politische Einheitsbildung und technische Realisation, 1990, 23 *et seq*; *C. Möllers*, Staat als Argument, 2000, 230 *et seq*.

[17] This may explain the renaissance of contractual thinking in constitutional theory. See *G. Frankenberg*, The Return of the Contract, 12 King's College Law Journal (2001) 39; *I. Pernice/F.C. Mayer/S. Wernicke*, Renewing the European Social Contract, 12 King's College Law Journal (2001) 61.

[18] At a less abstract level, there are significant differences between individual sectors in all legal orders. See *A. Hanebeck*, Die Einheit der Rechtsordnung als Anforderung an den Gesetzgeber, 41 Der Staat (2002) 429.

avoidably requires its own expansion into a general doctrine of principles against which all areas of Union law and in particular the older layers of Community law must be assessed. Art 6 EU declares that the Union is "founded" on these principles. This contains an ambitious normative programme, the details of which probably only legal science and the courts are able to develop although the mentioned limitations of a doctrine of principles as applied to a concrete legal situation must be respected.

In view of the fragmentation within primary law it might appear problematic to determine which provisions may be understood as concretising abstract principles. Theoretically, both the co-decision procedure under Art 251 EC as well as the Council's autonomous decision-making competence under the requirement of unanimity (*eg* Art 308 EC) can be understood as realisations of the principle of democracy. Yet the co-decision procedure, conceived as the "standard" by the model of supranational federalism,[19] applies to ever more situations.[20] The Constitutional Treaty backs this thesis in Arts I-19(1), I-33(1) CT-Conv (Arts 20, 34(1) CT-IGC).

An overarching doctrine of principles targeted in this "standard" manner must not, however, downplay sectoral rules which follow different rationales. To do otherwise would infringe upon an important constitutional principle: Art 6(3) EU in conjunction with Art 48 EU clearly shows that the essential constitutional dynamics are to remain under the control of the respective national parliaments.[21]

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[19] On the model of supranational federalism in detail, *A. von Bogdandy*, The European Union as a Supranational Federation, 6 Columbia Journal of European Law (2000) 27.

[20] See also *K. Lenaerts*, in: Sénat et Chambre des représentants de Belgique (eds), Les finalités de l'Union européenne (2001) 14, at 15.

[21] Opinion 2/94, *ECHR* [1996] ECR I-1763, paras 10 *et seq*; Case C-376/98, *Germany v Parliament and Council* [2000] ECR I-8419.

II. Founding Principles of Supranational Authority

1. Equal Liberty

Art 6(1) EU names liberty as the first of the principles upon which the Union is founded.[22] This principle must transcend the various specific freedoms if it is to have an independent normative meaning, since the latter can be fully inferred from the words "respect for human rights and fundamental freedoms, and the rule of law", which appear later in this provision.[23] The fact that liberty is named separately should be understood as meaning that "liberty" is a principle which goes beyond the others. It cannot be reduced to the mere rejection of a social order based on privilege or of repressive forms of government, such as National Socialism, fascism, communism or other forms of authoritarianism. That would be a minimal reading.

Rather, it can be understood as a declaration that the liberty of the individual is the starting and reference point for all European law: everyone within the EU's jurisdiction is a free legal subject and all persons meet each other as legal equals in this legal order.[24] Conceptually it leads to an individualistic understanding of law and society.[25] This understanding of a person is by no means imposed by nature, but is rather the most important artefact of European history, fundamental for the self-understanding of most individuals in the Western world.

One may object that this liberty is the universal principle *par excellence*. This may well be. Yet, one must admit that this principle has by no means found a footing in all legal orders. And the law of the European Union is the only transnational legal order that effectively realises this principle in concrete legal relations on a broad scale.

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[22] Art I-2 CT-Conv (Art 2 CT-IGC) places human dignity before liberty. According to a Kantian understanding, the latter is the immediate characteristic of the former and is sometimes even used as a synonym thereof. See *W. Kersting*, Wohlgeordnete Freiheit, 1993, 203 *et seq*.

[23] An independent meaning is not rarely disputed. See *S. Griller et al*, The Treaty of Amsterdam, 2000, 186.

[24] *G.F.W. Hegel*, Rechtsphilosophie, 1821, edn Moldenhauer and Michel 1970, § 4; *L. Siedentop*, Democracy in Europe, 2000, 200 *et seq*.

[25] *I. Kant*, Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis, in: I. Kant, Kleinere Schriften zur Geschichtsphilosophie, Ethik und Politik, 1964, ed by K. Vorländer, 67, at 87; *E. Gellner*, Nationalismus und Moderne, 1983, reprinted 1991, 89.