Konrad-Adenauer-Stiftung e.V.

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SÜDOSTEUROPA

DR. GÜNTER KRINGS, MDB

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Commemorating 60 Years of the German Basic Law

Ladies and gentlemen,

As a former scholarship holder of the Konrad Adenauer Foundation, I am delighted to have been invited to this alumni meeting, and I would like to express my sincere thanks for the invitation. When Dr Roos asked me whether I would be interested in giving a speech on the occasion of the 60th anniversary of the Basic Law, I was so carried away with enthusiasm that I agreed to do it on 23 May. However, I have now been informed that I was supposed to be voting for the Federal President on this day. But today I am here, and I am especially looking forward to the discussion with you afterwards about the anniversary of my German constitution and your assessment of this German constitutional document, which may have also had a certain indirect relevance to the drafting of new democratic constitutions in some of your home countries.

"Commemorating 60 years of the German Basic Law" – this is a topic in which my political, academic and professional interests come together. As Legal Advisor of the CDU/CSU Parliamentary Group in the German Bundestag, I am responsible for constitutional issues; as research assistant at Cologne University, I dealt with our Basic Law in essays and in my doctoral thesis for half a decade. And now for almost just as long, I have been teaching students in issues that are so central to our Basic Law such as federalism and the constitutional stipulations of the legislative process.

Introduction

At 60, people generally tend to become more tempered. One is not yet truly "old", yet the "roughest" periods are pretty much over.

Is the same true of constitutions?

Constitutions may not be people, but they only rarely outlive them. The constitution that beats them all is probably that of the United Kingdom, where important elements of an unwritten constitutional culture from medieval times are still applicable law. The oldest written constitution still in force today is the constitution of the United States of 1787. In continental Europe, on the other hand, most constitutions did not survive the upheavals of the Second World War or even of the First World War; the Basic Law, too, has its origins in the period immediately following the Second World War.

The 60th Anniversary of the Basic Law

Reaching the mature age of 60 does not mean that things get easier, or that the Basic Law no longer faces any challenges: the 60th birthday of the Basic Law next Saturday comes at a difficult time. Germany, like the rest of the world, is deeply affected by the financial crisis, and international terrorism threatens the Western world.

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Of course, I have vivid memories of the 50th anniversary 10 years ago. At that time, the context was somewhat different: the economy was booming in Germany, the stock markets were positively exploding, and we Germans really only associated terrorism with the long-past attacks of the Red Army Faction in the 1970s and 1980s. It was a time in which an American historian, Francis Fukuyama, saw the arrival of "The End of History", and we Germans now saw ourselves "surrounded [only] by friends". And even the reunification of Germany, which was then barely 10 years old, already appeared in large areas to be a great success, with many hurdles overcome.

The Success Story of the Basic Law

As a consequence, you could hear people rejoicing nearly in unison, claiming the Basic Law was a success story, the best constitution we Germans ever had, the Basic Law would last for decades to come. In fact, all the cheering was justified – and it still is!

Nevertheless, it must today overcome a certain amount of disharmony, reaching all the way to the top levels of the SPD side of the ruling coalition. There are some, like SPD Chairman Müntefering, who now suddenly see it as a shortcoming that the Basic Law has been in effect for 60 years and was not replaced by a new constitution 19 years ago with the German unification. I will go into the ridiculousness and danger of such arguments a little later.

The story of the success of the Basic Law begins in 1945 in a devastated Germany which had caused the Second World War, and ends in the unified, democratic and peaceful Federal Republic of Germany. It is almost a fairy-tale rise to success – like that from Cinderella to Queen.

The Basic Law: How It All Began

When the German Basic Law came into force 60 years ago on 23 May 1949, it was actually only intended to be an interim solution. Germany was to become a democratic state, with the legal foundation being laid to make the country quickly governable again after the end of the Third Reich and the Second World War.

In 1948, the Western Allies gave the Minister-Presidents of the *Länder* in the western occupation zones the task of drafting a constitution. The Allies had laid out their idea of what the essential elements of the new constitution should look like in the first of what became known as the "Frankfurt Documents": the goal was to establish "*a governmental structure of federal type […] which will protect the rights of the participating states, provide adequate central authority, and contain guarantees of individual rights and freedoms.*."

The Minister-Presidents, however, were reserved about the creation of a constitution. They feared it would cement the division of Germany and wanted, at most, a provisional arrangement, which is why the term "constitution" was avoided.

It was these reservations that German emigrant Hans Simons found disappointing. In the opinion of Hans Simons, who was a son of Walter Simons, the former president of the Supreme Court of the German Reich, and who was brought in by the Americans to provide advice and guidance to the German Minister-Presidents and party chairmen on the drafting of the new constitution, the German politicians were acting like a girl who is willing but afraid to say so, while still demanding assurance that she will not get pregnant.

Not entirely without justification, Simons pointed to the great opportunity provided by this constitution: by not only permitting this step, but expressly demanding it, the West-

ern Allies allowed at least the western part of Germany to regain a place among the European nations – much earlier than the Germans really could have expected after the war they instigated. Particularly for the Americans, goals such as guaranteeing human rights or establishing democracy were less of a priority than the economic realization that Europe could not recuperate with an ailing Germany at its centre. And what is more: the brewing Cold War made it necessary to eliminate a weak point and political vacuum in the centre of Europe.

The German politicians, however, could only accept the idea of a constitution by looking at it as only a temporary solution. Indeed, at the time, the span of the provisional solution was viewed to be rather short.

In addition, certain important controversial political issues of the time were left aside: in areas where the Parliamentary Council could not agree, either abstract language was used or the matter was left to the future law-making body to work out. After all, the Federal Republic that was to be founded was only an emerging nation with limited sovereignty.

But, as everyone knows, provisional arrangements sometimes prove to be especially stable and durable. At any rate, this interim solution that is our Basic Law turned out to be a stroke of luck in German history, not least due to its adaptability which made the German unification possible more than 40 years later.

Unlike other countries such as France, Germany experienced a true break in the constitutional law, which is no wonder after the disastrous developments leading from the Weimar Republic to the Third Reich. In the constitutional discourse today, the Weimar Constitution today is largely irrelevant. As far as constitutional law is concerned, it is as if everything was "reset" in 1949. Even if naturally some elements and, above all, terminology were taken from the Constitution of the German Reich, 1949 was not only politically, but also with respect to the constitutional law, a true zero hour, or *Stunde null*.

The Basic Law – a Stroke of Luck

Among all experts who carry out serious work on constitutional law and constitutions, the Basic Law – unlike the Weimar Constitution of 1919 – is considered to be a stroke of luck.

In 1949, however, only a few people saw it that way. And scarcely anyone at the time could have ever imagined the success that was to come.

On the contrary: in March 1949, 40% of the people in West Germany claimed to be indifferent to the nascent constitution, and another 30% were only "slightly interested"; only a fifth of the people said they were "very interested". And in the mid-1950s, when asked whether they were satisfied with the Basic Law, over half of the citizens of the Federal Republic responded by saying, "I don't know about this constitution".

And even the fundamental decision for democracy and liberty of the Basic Law was far from representing a common social understanding in the years immediately following the war. Reading the reports by an American journalist about discussions he had with German students in 1948 still causes one to shudder: there were admonitions about demonizing Hitler, his agenda was praised at least in part, the German responsibility for the war was disputed and hope was expressed for a new party that would fight against all the others, do away with them, or fuse them into one.

Nevertheless, the past 60 years have evidently eliminated the doubt and obstacles that existed in the beginning. Politics are carried out within the limits imposed by the constitution, and there has been no serious

breakdown of law and order in Germany. Unlike the Weimar Constitution, the Basic Law has managed to attain the standing of a common understanding in the political discussion. All relevant political and social forces today argue with the constitution – almost never against it.

And it is also no coincidence that democratic constitutions from around the world today look to the Basic Law as an example.

Crucial Aspects of the Basic Law

One reason for its success was the fact that the Basic Law allowed the Parliamentary Council to dissolve the previous accumulation of power in the hands of the Reich President. It was this accumulation of power that once made it easier for the Parliament and the Parties to abdicate from their responsibility. This was because the Reich President, who was elected by the people, could form the government in virtually dictatorial fashion, dissolve the Parliament and issue emergency decrees.

The Basic Law put a stop to this: government formation and legislation today are concentrated within the Parliament, to prevent it from abdicating from its responsibility. The Parliamentary Council designed the system to be expressly representative by restricting the people to the election of the Parliament (with the exception of the reorganization of the *Länder*).

To preclude competition between the Parliament and the head of state, a decision was made against direct election of a Federal President; the president, too, receives his authority from the parliaments. The head of government – the Federal Chancellor – is elected only by the Parliament, and the stability of the government is maintained by ensuring that the chancellor can only be removed by simultaneously electing a successor.

In addition, there are very strict limitations on the conditions for dissolving the Parliament. The political parties so important to the political system were integrated into the constitutional law and obliged to conform to democratic principles.

Human Dignity

Another reason for the success of the Basic Law is that democracy and the majority rule cannot be abolished by way of majority decision. The entire order was founded on human dignity. Democracy, therefore, is not simply a process to make collectively binding decisions. Democracy derives its purpose from human dignity, and the respect for human dignity cannot be circumvented by a majority decision. Even a two-thirds majority sufficient to amend the constitution cannot abolish these basic principles of the constitutional order.

Fundamental Rights

The fundamental rights, which – for the first time in a constitution – are found at the very beginning of the Basic Law, put human dignity in concrete terms, and they are directly applicable law, binding all state authority. In the Weimar Republic, they constituted a purely programmatic approach. And the majority of these fundamental rights are applicable – another difference to the Weimar Republic – for all people in Germany (not just for German citizens). Unlike the Weimar Constitution, the Basic Law thus prevents the splitting of the catalogue of fundamental rights into a legally binding part and a simply programmatic part, while expanding the scope to also include the legislature, and not just the executive bodies. As a result, even an act of parliament can be deemed invalid if it violates a fundamental right.

The Federal Constitutional Court

The Parliamentary Council, however, did not want to rely solely on the good will of the organs of state to actually adhere to the new rules. That is why it created a true "guardian of the constitution": the Federal Constitutional Court.

The binding application of a constitution before all other laws and acts of state authority always requires, as a practical result, a constitutional court.

For this reason, the Federal Constitutional Court, the highest German court, is vested with an almost unparalleled abundance of competencies, which include, above all, control of the democratic law-making body.

Nothing comparable existed in the world before. The Constitution of the German Reich of 1871 had no provision for a constitutional court, and the 1919 Weimar Constitution introduced only a limited constitutional court: the *Staatsgerichtshof* for the German Reich.

Of all the precautions taken by the Parliamentary Council to prevent the Basic Law from suffering the same fate as the Weimar Constitution, the creation of the Federal Constitutional Court has turned out to be probably the most important. The constitutional law is always faced with the precarious problem of implementation, because those who are supposed to adhere to the rules and those who are responsible for ensuring that the rules are adhered to are one and the same: the state.

Even more important than the actual control function of the constitutional court is, for the law-making body, the ever-threatening sword of the Federal Constitutional Court, which maintains at all times a sharp focus on the fundamental rights as the measure of the legality of the laws. The constitutionality of legislative projects, therefore, plays a role very early in the legislative process.

The Basic Law as a common political understanding continues its stable existence also because the Federal Constitutional Court has so far been successful in making decisions independently of the current political majority. As a result, the Basic Law has attained a position to which no other German constitution before it has been able to lay claim.

The Development of the Basic Law

Without a doubt, the Basic Law has proven its resiliency over the last 60 years, even though it has already been amended 52 times. It would seem that amendments to the Basic Law are nothing unusual. Appearances, however, are deceptive: In fact, there have only been very few truly major changes.

The major changes include a defence amendment, which laid the constitutional foundation for the rearmament of Germany, and the addition of emergency laws in 1968. The first was undoubtedly a milestone on the road to completely re-attaining Germany's sovereignty.

Noticeable changes in the Basic Law were brought about by the financial reform of 1969. It was, among other things, a reaction to the first economic recession in postwar Germany in 1966-67, and laid the ground for the transition from a dual federalism to a more strongly cooperative federalism.

In the last three years, we have again redefined major parts of the Basic Law with the introduction of two further reforms of federalism. I participated in both reforms as a member of the respective preparatory commissions. It was an exceptionally exciting – albeit not easy – task. As six decades ago an entirely new constitution was created in a new state, the famous "veil of ignorance" articulated by the legal philosopher John Rawls still hung over the undertaking for everyone involved. For example, it was not clear how certain concrete decisions in the distribution

of competencies and financial sources would affect the individual *Länder*. Today, however, when constitutional reforms are considered within the sphere of the Federal Government and the *Länder*, the participants sit with their calculators under the table and know exactly which constitutional language will benefit or harm them. In a way, the business of constitutional legislation is more difficult today than it was when the Federal Republic of Germany came into existence.

Fundamental Rights

I have already mentioned the revaluation of fundamental rights in the Basic Law as the reaction to their disregard in the Weimar Republic. Given that the catalogue of fundamental rights is the core element of our constitution, I would like to put that in more concrete terms. One could even say that, with the placement of fundamental rights at its beginning, the Basic Law revolutionized the constitution.

First of all, the fundamental rights are the individual's rights of defence vis-à-vis the state. And those who want to protect the freedom of the individual are well advised to continue to focus on this core function of the fundamental rights and not allow themselves to be led astray by new, but nevertheless only supplementary, fundamental rights functions that are directed at welfare-state services or democratic participation.

The Federal Constitutional Court took the revaluation of fundamental rights to an even higher level by inferring from the fundamental rights – through the protection of general personal freedoms in Article 2 of the Basic Law – an extensive system of freedom protection in which every conceivable limitation of freedom may be reviewed in terms of the constitution.

Proportionality

In addition, the binding force of fundamental rights is once again enhanced by the Federal Constitutional Court through the principle of proportionality, for which there is actually no provision in the Basic Law. In the case of some fundamental rights, the Basic Law itself is content with legal provisos and the restriction that the essence of a fundamental right may not be infringed upon.

The principle of proportionality, on the other hand, permits limitations of fundamental rights only to the extent essential to the protection of other legally protected rights. As a consequence, the Federal Constitutional Court almost always decides on the constitutionality of an interference with fundamental rights in balanced consideration of the restricted fundamental right and the right that this limitation is to serve. This instrument shifts the interference restriction for fundamental rights a great deal forward, and almost always obviates the need to fall back on the principle that the essence of a fundamental right may not be infringed upon.

Objective Substance of Fundamental Rights

Fundamental rights today are not just rights of defence against excessive interference by the state; they also have substance under objective law and, thus, are the basis for governmental obligations to act, while additionally displaying a certain effectiveness for the social order.

However, this does not mean that a private person can rely directly upon fundamental rights vis-à-vis another private person. Nevertheless, fundamental rights now pervade all of private law, ensuring that private law is interpreted in line with fundamental rights. As a result, fundamental rights also play a major role in all areas of law and in all judicial systems.

Thanks to the notion of the objective substance of fundamental rights, the law-making body derive from them, and address, numerous undertakings for the protection of freedom from social threats, procedural maxims and, in some cases, even direct benefit and participation claims of the individual against the state.

The idea behind this perception of governmental protection obligations derived from fundamental rights is that, in a modern society, numerous freedoms and life opportunities cannot be enjoyed by the individual unless the state has established the preliminary inputs and institutions for doing so. That does not mean, however, that fundamental rights confer to the individual enforceable rights to social benefits, for example, or other rights, or at least not as long as a certain minimum of legal protection and material assistance is provided. The multitude of options for action and the scarcity of resources mean that the state encounters only few limitations in the fulfilment of its protection obligations.

Problem Areas and Erosion of the Constitutional Law

After these remarks on the status quo of the Basic Law – which, of course, could only be roughly outlined here – I would now like to turn to the "combat zones" into which the Basic Law is currently being drawn.

Terrorism and Fundamental Rights

In recent years, the Basic Law – just as the constitutions of other countries as well – has been confronted with entirely new challenges: in the face of global terrorism, we in Germany have been the next to pose the question of a "state of emergency". Indeed, some have even broached a taboo subject, taking the question one step further: can the greatest good of the Basic Law, human dignity, remain protected – untouched by qualifications and restrictions?

The freedom of the individual should be protected not only from governmental interferences, but also from terrorists. This results in the state having to control threats before they ever become severe. The lawful exercise of freedom by the individual is monitored out of concern for attacks in instances where one would actually rather be left undisturbed.

EU

In addition, we pose to ourselves the question of the relationship to the legal system of the European Union spanning the constitutional orders of the EU Member States. In the Member States of the European Union, the national law is increasingly permeated or even replaced by European law – coupled with the loss of a portion of national sovereignty.

After the Czech Senate voted in favour of the Lisbon Treaty, the German Constitutional Court and its still pending decision on this treaty are practically the last hurdle – alongside the problem of the referendum in Ireland – standing before the new phase of the European integration process. And the German Constitutional Court takes the balance between a favourable disposition to integration and the defence of national sovereignty rights very seriously – it is significant that the constitutional courts of many countries regularly look at the judgements of the German court on this matter.

Private Law-making

A challenge for the Basic Law is also posed by the numerous new legal systems that have not been created by any democratically legitimated authority and yet are gaining ground internationally. I am thinking, for example, of the rules governing trade developed by large global law firms, of the codes

of conduct on the Internet or of the rules of international organisations such as the WTO or the UN.

Is the Constitutional State eroding?

In addition to these issues, I have noted in Germany that the relationship of the Germans to their constitution has also changed. Time and again, the words "erosion of the constitutional state" are used to make clear that the Basic Law's best days are behind it. In this connection, I remember many debates that we have had in recent years – for instance, on the repeatedly bemoaned undermining of data protection, genetic engineering, asylum laws, the fight against international terrorism and, more recently, the unbridled forces of the globalised world of business and finance.

These lamentations reveal a discrepancy between harsh reality and the text of the Basic Law which seems like a well-ordered universe.

Polls of voters in Germany show time and again that the overwhelming majority are satisfied with the Basic Law. Many, however, are in much less agreement with what policy-makers are doing with it.

We should also be concerned about an evidently growing number of Germans who are turning away from democracy. The have no confidence in the capability of the constitutional bodies to find adequate solutions to the country's problems. In the new *Länder* – that is, the former GDR – the sceptics of democracy even represent the majority. However (fortunately), scarcely anyone seems to be yearning for a revolution.

The difficult relationship of us Germans to the nation and patriotism since the Hitler dictatorship gave rise to what we refer to as "constitutional patriotism". Once frequently used, the term is now heard less often. *Der Spiegel*, a major German newsmagazine, branded the Basic Law as "antiquated" some years ago on its cover because, according to the magazine, it obstructed reforms.

No Alternative to the Basic Law

I believe it is absurd to conjure up the end of the Basic Law. There are no better alternatives anywhere in sight. No serious proposals have been made of what a new constitution might look like and, above all, what it would do better. Nor does the European Union offer an alternative with its own constitution. The once so promising European Constitution has simply not managed to win the hearts of the Europeans.

And because this is the case, I consider the demands cited at the start for a new constitution for a unified Germany to be, in the end, irresponsible. Aside from the fact that, after two decades of reunification, our Basic Law has long since become a constitution for all of Germany, the citizens of the GDR did not want to join just any West German state in 1989 and 1990, but rather explicitly the state of the Basic Law. It is precisely this state and its judicial system that stood then, and stand today, for prosperity, free choices about one's own life and a stable, tolerant democracy. Those who want a different constitution in Germany must first offer prove that, with it, they can achieve these very goals at least equally as well. No one, however, has managed to do this so far. For this reason, playing with the notion of a new constitution is a dangerous game in which we have considerably more to lose than to gain.

Conclusion

The Basic Law does not suffer from not being able to tackle the challenges of the 21st century. On the contrary, both major reforms of the Basic Law of the last three years have shown that the Basic Law can be continually adapted to meet changing requirements.

For the rest, the point of a liberal constitution is, first of all, to make changes possible and not to constantly change itself. Constitutions should be open to development for political changes – which the Basic Law undoubtedly is.

I believe that the criticism of the constitutional reality today evinces above all a longing for the time in the first four to five decades of the Federal Republic when the Basic Law still permeated all spheres of life and the individual state with all of its social achievements was in its full bloom.

Times have become harder with the fading of the might of the nation state, the pressure of globalisation and international terrorism. However, this does not have anything to do with a failure of the Basic Law.

Even if the former ideal of the liberal, democratic constitutional state of a nation is now becoming frayed at the edges, the pivotal system decisions, direction-settings and fundamental rights of the Basic Law are still very modern, and I can not imagine that they will ever go out of fashion.

I am certain that, as long as there is the Federal Republic of Germany, there will also be the Basic Law.

Fortunately, this statement is also valid the other way around: as long as the Basic Law exists and remains the standard against which public action is measured in Germany, I have no worries about the stability of our liberal democracy!

Thank you very much!

And now, I look forward to a lively discussion.