By DR. JUR. KLAUS KAMMERER

Column 2

The first question that arises is: What do we understand by the term and phenomenon of **"constitutional reality"**?

1. The constitutional historical starting point in Germany

The Basic Law of the Federal Republic of Germany is unusual in its origins, with its exemplary regulations and its understandable language. This is because this constitution was created under the impression of the monstrous crimes of the National Socialist regime that had become apparent. The efforts of the Parliamentary Council to create a Basic Law as a provisional constitution for the western occupied zones were therefore under the "supervision" of the victorious Allied powers. It was to apply until reunification with the occupied zone of East Germany, which was under the rule of the Soviet Union at the time.

The constitutional policy requirement was to avoid the - apparent - design flaws of the so-called Weimar Constitution, which had been legally repealed by the National Socialists. The Western Allies saw these flaws in the plebiscitary elements of this constitution, in the popular election of the Reich President and the plebiscitary forms of referendums and popular initiatives.

The Basic Law applicable to the occupied zones of West Germany, later to become the Federal Republic of Germany, was therefore intended to be completely free of citizens' participation rights in the sense of direct democracy. *(However, the federal states later - an irony of constitutional history - incorporated such participation rights in their constitutions in the federal system of their areas of responsibility, albeit with thematic and procedural requirements, such as the possibility of referendums and popular votes. The same applies to the*

municipal constitutions with - as examples - the direct election of the mayor, the personalized municipal right to vote, the citizens' petition and the right to ask questions in public meetings of the municipal counci)l.

Scientists have already begun their criticism of the process of the creation of the Basic Law. The Parliamentary Council was not a constitutional assembly with elected representatives; its members - women and men - were only appointed representatives.

Another point of criticism is directed against the design of the Bundesrat as a second chamber. The Federal Republic was deliberately designed as a federal state, with a decentralized distribution of tasks and responsibilities according to the federal principle and with the Bundesrat as a counterweight. In this respect, the constitutional legislators took up the historical development of the German Empire, which was originally characterized by small states, and decided against a centralized state.

The federal states are represented in the Bundesrat by their governments, which are often supported by the parties that form the opposition in the German Bundestag (the first chamber) with politically changing majorities in their state parliaments. The Bundesrat thus becomes - as the past and present show - a party-political instrument of the opposition with the aim of significantly changing the laws passed by the government majority in the Bundestag and considered to be of major importance by means of objections or by calling on the Mediation Committee, or even of overturning laws that require approval under the Basic Law (Article 77 of the Basic Law)

This second chamber therefore has no representatives elected by the people, no senators directly elected according to the Senate principle. The Basic Law therefore differs from the Senate constitution of other democratic countries, for example the USA, Italy and France, according to which the senators are directly or at least indirectly elected by the people. (The House of Lords in Great Britain, however - in the tradition of a corporate state - only has appointed members and no elected ones.)

This is an important part of Germany's constitutional reality.

Another criticism, taken up by scientists and the public - especially in the federal states that joined after reunification - is directed against the "failure" to create a new "all-German" constitution, passed by the electorate through a direct vote, as a result of reunification, in order to re-legitimise the Basic Law in a modified form. The Basic Law states:

Article 146
This Basic Law, which applies to the entire German people after the completion of the unity and freedom of Germany, loses its validity on the day on which a constitution comes into force that has been freely decided upon by the German people.

To date, neither the German Bundestag nor the Bundesrat as the chamber of states have complied with this mandate. This is also an essential part of constitutional reality and the subject of some fierce criticism.

However, it should be noted that Article 23 of the Basic Law - which has since been repealed - specified which (West German) federal states the Basic Law passed in 1949 claimed to apply to. On the other hand, this article stipulated that the Basic Law "should be put into effect in other parts of Germany after their accession". This happened with a vote of the People's Chamber of the GDR (German Democratic Republic) in August 1990 in the course of German reunification.

The Georgian constitution, in Article 37, declares its commitment to the two-chamber system - albeit only with the formation of a unified state after the complete integration of the "for the time being lost territories". The first chamber is then the Council of the Republic, the second chamber the Senate. The members of both chambers are elected directly "by means of proportional representation", and some of the members of the Senate - five members - are "appointed" by the president.

After the restoration of territorial unity and a corresponding constitutional amendment, the regulation of the respective responsibilities of both chambers remains the preserve of an organic law - i.e. a substantively supplementary constitutional law (Article 77, paragraph 5 of the Constitution of Georgia).

2. The “constitutional reality” as the subject of scientific disciplines

(The presentation follows the scientific contribution of the political scientist and constitutional lawyer von Arnim, "The key role of political institutions", 1999)

Since the end of the 1990s, scientific disciplines in the economic and social sciences, as well as political science, sociology, constitutional political economy and new political economy, as well as legal sciences – primarily the science of constitutional law – have increasingly dealt with what we describe thematically as constitutional reality.

The subject of scientific research is the criticism of democratic institutions, their "condition" and above all their functioning, the rules and the "game" of their interaction, and finally their growing persistence. The forms of party-political vested interests and the dominance of the personal interests of elected officials and functionaries are examined, which contradict the constitutional postulate that political action is tied to the common good. The same applies to the organization, characteristics and influence of freely acting interest groups, lobby organizations and their significant influences on politics, and finally to forms of "party book economy" in the media, judiciary and administration.

These branches of science not only diagnose and describe negative conditions and influences on democratic institutions, but also "evaluate" these phenomena - in a conscious departure from legal positivism and social science positivism - under the constitutional requirement of a defensive, contentious and vibrant democracy. The criticism of the institutions must therefore be substantially determined by "values", the science-specific formulation, differentiation and classification of which, bound to the constitution, is seen as the primary task of legal and constitutional policy.

This criticism calls for constitutional policy consequences by raising the fundamental questions about the need for reform and the willingness of the institutions to reform, and in particular the further question of what power-political counter-control is needed to balance the criticized "imbalances", to resolve the forms of bureaucratic rigidity that have arisen, to initiate reforms and to provide further political counter-impulses, and whether - in principle and in an effective form, as comparative legal studies can demonstrate - elements and forms of direct democracy need to be installed and mobilized for this purpose.

This goes far beyond institutionalized forms of participation guaranteed by the constitution, such as referendums and popular initiatives. Direct democracy as a necessary option for

correcting democratic institutions in actions and modes of functioning that have become politically and bureaucratically questionable, against the rigidity of politics, against the consolidation of institutions based on interests, and generally against the inability and unwillingness to reform, requires the commitment of the entire civil society - in a variety of forms and in all conceivable, democratically "recognized" organizational forms, up to the formation of citizens' initiatives and the - even spontaneous - exercise of the fundamental right to freedom of opinion and assembly on "given occasion". The fundamental value of "self-determination" expressed in this, or at least of "co-determination" of citizens, has its basis directly in the principle of democracy as a component of the written constitution.

It goes without saying that the financial resources required for the establishment, organization and political agitation of such civil society initiatives must first be laboriously raised through appeals for donations. The state does not finance its critics. Wealthy democracies have it easier in this respect than in young, democratically constituted countries, where such resources cannot easily be raised economically. This is the reason why such social initiatives are formed along the lines of recognized non-governmental organizations (NGOs) and are therefore dependent on the support of other democratic partner countries, in particular the EU member states.

Anyone who tries to denounce this as foreign interference is failing to recognize the fundamental task and original responsibility of civil society organizations. Their legitimacy arises directly from the fundamental rights of freedom of expression and assembly and - here in particular - from the principle of participation in forms of direct democracy and their guarantee laid down in the constitution of Georgia itself (see constitutional articles 17, 21 and 22, also article 24 no. 1 sentence 1 - referendum, article 45 no. 1 sentence 1 - legislative initiative, article 77 no. 1 - constitutional amendment).

In the next column, I would like to present to you a current example from constitutional reality that is controversially discussed in Germany. It deals with the guarantee of electoral equality through electoral law.

In 2023, the incumbent federal government, consisting of a multi-party coalition, launched an electoral amendment law that was passed by the Bundestag and aims to reduce the number of elected members of the Bundestag to its original size. The state government of the federal state of Bavaria has filed a lawsuit against this. Two parties represented in the Bundestag and individual members of parliament have joined the lawsuit.

The Federal Constitutional Court ruled on the lawsuits on July 30, 2024. With regard to the constitutional requirement of equality and the immediacy of the election, the reasons for the judgment show in an exemplary manner the tension that exists between the constitutional requirement and constitutional reality, namely as a result of the design options that the constitution allows the legislature for the electoral law itself and its later adjustments to changing needs - and which, on the other hand, it does not.

(signed) Dr. Kammerer