NomosEinführung

Robbers

An Introduction to German Law

8th Edition

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Foreword to the eigth edition

The law is a topic for ongoing discussion. Its development, formation and application are constantly debated in the interests of attaining agreement and acceptance. This debate is open to an international audience, and it is part of the general democratic process. Such debate can only be fruitful if it does not lose itself in the details, if it preserves the wider perspective. This general introduction aims to contribute to the attainment of that wider perspective and does not claim to provide an exhaustive and penetrating analysis of the intricacies of the law. This aim is perhaps also sufficient justification for my boldness in going beyond the limits of my own area of specialisation. The diverse help and intensive advice of colleagues and co-workers has made this project possible. The translation into English is originally the work of Michael Jewell, revisions and updates had been translated by Nina and Oliver Windgätter, those for this edition have been inserted by the author.

The eighth edition has been extensively revised and updated. It has been expanded to include separate chapters on European law and international law in order to take even greater account of the continuing and growing importance of these areas of law for German law. Overall, this introduction is at the level of March 2023.

Trier, March 2023 *Gerhard Robbers*

Translator's Note

Accurate translation of a legal text is a difficult task. On the one hand terminology must be chosen which makes it easy for the reader to relate the topic under discussion to similar ideas in his or her own legal system. On the other hand the danger of ignoring subtle differences in meaning must be avoided. In addition, a translator into English has to consider the fact that there are many countries in which legal business is conducted in English and that in the various countries different terms may be used to describe the same concept.

My approach has been to attempt to use the terminology of England wherever this is compatible with German thinking. I have done so for two reasons. The first is that England, as a country of the European Union, will presumably be the main market for this translation. The second is that the English system, being the original source of the common law, will hopefully be the most commonly accessible of the English language systems for other English speaking lawyers, whether in the Commonwealth, the United States or in countries where English is the main foreign language.

I have included key German terms in brackets for the benefit of those who already have some knowledge of German legal terminology or wish to acquire it.

Michael Jewell

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I. History of Constitutional and Administrative Law

77 After the Frankish Empire had been divided into three parts the German Empire gradually developed out of its Eastern part in a process which took place mainly in the 10th century. Its leaders understood it to be the successor to the Roman Empire, and its kings were crowned as Roman Emperor. The empire thus called itself the "Holy Roman Empire". From the late 15th century onwards the name "Holy Roman Empire of the German Nation" became current, thus giving recognition to the formation of a national identity which had become apparent in the intervening period.

78 Formally speaking the Empire was an elective monarchy. The German kings were elected by the Elector Princes. Nevertheless, dynasties were able to establish themselves in certain periods, some of considerable duration. The most important of these were the Habsburgs. The elective king was generally crowned emperor. Sovereign power was in the hands of the Emperor and Parliament (*Reichstag*) who had to work together in certain important matters. The *Reichstag* was formed of the most important bearers of authority, the estates. These were the electoral princes who formed the College of Electoral Princes who elected the king; the Princes of the Empire, and lastly the imperial cities, although the membership and powers of the latter were a subject of disagreement. Some of the great princes of the church who were also territorial rulers were part of the electoral college. These were the Archbishops and Elector Princes of Trier, Mainz and Cologne. The others were part of the College of Princes of the Empire.

79 Already in the time of the Holy Roman Empire there were certain fundamental principles, the so-called *leges fundamentales,* which today would be described as constitutional law. These included the Golden Bull of 1356, in which the procedure for the election of the king was laid down. It also specified which princes were members of the electoral college. There were originally seven of them, but this was later repeatedly amended. Also regarded as *leges fundamentales* were the Decree of Augsburg of 1555 and the Peace of Westphalia of 1648 which ended the Thirty Years War of 1618–1648. Typical of the whole history of this empire was the constant conflict between the central imperial authority and the princes in their territories who were asserting claims to independence. With the Thirty Years War and the Peace of Westphalia, the central authority was permanently weakened. The formation of modern, absolutist states took place at the level of the territories, the predecessors of the modern federal states. The courts of the Empire, particularly the *Reichskammergericht*, did, however, continue to be of some importance.

80 The Reformation, which is especially attributed to *Martin Luther* and is often regarded to have started in 1517, was probably the most significant event for the constitutional development up to the present day in many respects. It led to a series of armed conflicts culminating in the Thirty Years War. Parallel events and developments can be observed particularly in England and France. In Germany the Catholic and Protestant confessions ended up equally strong and equally exhausted by the conflict. The constitutional consequences were multi-faceted. The final collapse of religious unity left a political and ideological vacuum which was filled by the development of the modern, centralised, sovereign and, essentially, secular and thus not religiously founded state. State neutrality, philosophical enlightenment and a reliance on reason

as opposed to theological arguments developed against this background. Too much emphasis was placed on the idea of the state. The consequence was a secularisation of the whole of the law relating to the state. The results of the military conflict favoured and accelerated the development of the national state. The destruction of property and social bonds created conditions in which the idea of equality could grow. The equilibrium of the confessions in Germany led to a specifically institutional and group-oriented concept of equality.

81 The absolutist state, which had been developed during the religious wars, particularly in France, was able to establish itself in Germany, especially in Prussia and in Austria, which at that stage was still one of the states of the Empire. In this form of government the territorial ruler, in his or her capacities as supreme legislator, supreme judge, and supreme executive authority, united all sovereign power in his or her person. The ruler was not subject to the law of the land (*legibus solutus*) and was answerable only to God. For the administration, which had previously been the business of the various noblemen and estates, this meant a largely centralised, essentially hierarchical restructuring aimed at complete rationalisation and efficiency. It also meant that all fields of life were subject to the power of the monarch. The demand for division of powers and the recognition of human rights was the obvious, if not inevitable, reaction to this situation.

82 The French Revolution at first also encouraged further demands for reform and ideas about rights in Germany. The military successes of France against the German Empire led to a last great reform of its structure in the resolution (*Reichsdeputationshauptschluß*) of 1803 compensating various princes for the territories which they had lost to the French. Many of the smaller independent territories were absorbed by the bigger states. The principalities ruled by the church were almost completely dissolved and, in a continuation of this process, most of the lands of the Catholic Church were secularised, in other words, expropriated.

83 The creation of the Federation of the Rhine, a union of west and south German territories, by *Napoleon* led to the dissolution of the Empire. In 1806 Emperor *Franz II* abdicated as emperor and discharged the estates from their duties to the Empire. This step was technically unconstitutional, but it led to the factual end of imperial authority and thus ended the Holy Roman Empire of the German Nation.

84 Only after the defeat of *Napoleon* was an attempt made to re-organise Germany at the Congress of Vienna in 1815. The place of the Holy Roman Empire of the German Nation was taken by the German Confederation (*Deutscher Bund*), an association of sovereign princes in Germany. Constitutional development now took place predominantly at the state level. The various states received constitutions, starting in 1818, with a second wave in 1830, and finally in the aftermath of 1848 (for example, in Prussia).

85 These were generally seen as having been conferred on the people by the ruler, and were generally imposed from above. Not the sovereignty of the people, but the sovereignty of the prince, the monarchic principle, lay at their root. Most of these constitutions entrusted the power to make laws to the monarch in co-operation with parliament. Voting rights were limited. Most of the constitutions guaranteed certain rights, but these were seen as the rights of the subject (as opposed to human rights), and were confined to the citizens of the particular state in question.

86 The middle-class revolution of 1848 with its ideas about Fundamental Rights was a failure, and was unsuccessful in its attempt to unite Germany in a new empire, which now was to exclude Austria. However, to this day its democratic constitution, the *Paulskirchenverfassung*, which played a foundational role for the Fundamental Rights, remains a crystallisation point for positive constitutional developments in Germany.

87 The German Confederation lasted until 1866, when Prussia, under its Prime Minister *Bismarck*, founded the North German Confederation (*Norddeutscher Bund*), a strong empire with a centralist structure. After the Franco-German war of 1870/71 the South German States, with the exception of Austria, acceded to the North German Federation, thus creating the German Empire (*Deutsches Reich*) of 1870/71 – Bismarck's Empire. Its constitution was based in essence on that of the North German Federation, with a relatively strong central government and the King of Prussia as the hereditary German Emperor. A feature of this constitution is that it contained no express provisions on Fundamental Rights, largely for reasons relating to competence. However, significant aspects of Fundamental Rights were incorporated in the ordinary statutory law of the Empire. For example, due process (procedural fairness) was guaranteed in the Imperial statutes on the administration of justice, i. e., the Criminal Procedure Act (*Strafprozessordnung*), the Civil Procedure Act (*Zivilprozessordnung*); and the Law on the Constitution of Courts (*Gerichtsverfassungsgesetz*). Economic freedom was provided for in the Civil Code (*Bürgerliches Gesetzbuch*), another law of this period. From the point of view of international law the German Empire of 1870/71 is the same entity as today's Federal Republic of Germany.

88 Defeat in the First World War (1914–1918) led to revolution. The monarchy was toppled and the Weimar Republic was established. It was based on the recognition of the sovereignty of the people and guaranteed numerous Fundamental Rights; these were, however, partly comprehended as mere guidelines for the legislature and not as law to be directly in force. The President, who was directly elected by the people, played the key role in any political conflict. He appointed the Chancellor (*Reichskanzler*) entirely at his own discretion and was empowered to rule without reference to parliament by means of emergency decrees.

89 The lack of co-operation between the democratic parties who at first dominated the scene, and particularly the Great Depression after 1930, led to the seizure of power by the National-Socialists (Nazis) who were organised in the National-Socialist German Worker's Party (*Nationalsozialistische Deutsche Arbeiterpartei,* abbreviated *NSDAP*). In the brown-shirted stormtroopers (*Sturmabteilung, SA*), the *SS* (*Schutzstaffel*) and later the *Gestapo* (*Geheime Staatspolizei,* secret police) they possessed the machinery to terrorise their opponents, and made every use of it. The National-Socialists, who at least initially had the support of a substantial part of the German population, disregarded, abused and destroyed the legal principles and constitutional structures which had gained binding force over a long period of time. They brought upon the world the disaster of the Second World War and, in a perfidiously systematic way, set about murdering the Jewish and other elements of the population which they considered to be "non-Aryan".

90 Only the complete victory of the Allies and the unconditional surrender of Germany in 1945 put an end to their appalling destruction of law, justice and culture. The experience of National Socialism and the determination to prevent anything like it from happening again is the strongest influence on the law of the Federal Republic of

Germany to this day. The Basic Law, which came into force in 1949, is thoroughly pervaded by this desire. These experiences are, however, also fundamental to the internal self-understanding of Germany. Its political debates, their high points and weaknesses cannot be understood without bearing this background in mind.

91 The victorious powers at first divided Germany into four zones of occupation, after first giving the various eastern parts of the country to Poland and the northern part of East Prussia to the Soviet Union. As the tensions between the West and the Soviet Union increased, the zones of occupation of the three Western powers (Britain, France and the USA) drew closer together. In 1949 they were consolidated as the Federal Republic of Germany (*Bundesrepublik Deutschland*) and in the same year the "German Democratic Republic" (*Deutsche Demokratische Republik,* abbreviated *DDR*) was created in the Russian zone.

92 On 8 May 1949 the Parliamentary Council (*Parlamentarischer Rat*), consisting of members of the newly elected State parliaments, passed a constitution, which was called the "Basic Law" because it was hoped that the division of Germany would soon end, allowing a permanent constitution for the whole country to be created. After adoption by the State parliaments and approval by the Western occupation powers it came into force at midnight on 23 May 1949. Although it was originally conceived as a short-term temporary measure, it was soon accepted by the people, and today it can fairly be described as a centre of identification for the German people.

93 The socialistic constitution of the DDR of 1949 was replaced by a new constitution in 1968 which in turn was fundamentally revised in 1974 by the removal of all references to a possible reunification of Germany.

94 Only with the end of the confrontation between West and East was it possible to achieve German unification on the 3 October 1990. The details are contained in the Two-plus-four treaty between the victorious powers (Britain, France, the Soviet Union and the USA) on the one hand, and the Federal Republic of Germany and the German Democratic Republic on the other hand. A number of additional international treaties, for example, with the Republic of Poland, complete the arrangement. In terms of the treaty the responsibility of the victorious powers for Germany is ended. The two German states agreed on the terms of unification in the unification treaty of 31 August 1990. With this treaty an era had ended. The confrontation between East and West, the Cold War and the division of Germany had deeply influenced the legal thinking. After some uncertainties in the beginning, Germany today has grown together again; certain and sometimes important differences remain. New challenges arise also for the legal system, especially the preservation and development of the European unification and the integration of new, especially Muslim parts of the population, but with Russia's war of aggression against Ukraine also again the winning and securing of peace in Europe.

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II. Constitutional Law

1. General

a) Concept, Nature and Function of the Constitution

95 The Basic Law is the constitution of the Federal Republic of Germany. This means that Germany has a written constitution, codified in a single document. This is the constitution in the formal sense. Each of the States also has a State constitution which is in part closely modelled on the Basic Law, and in part establishes an identity of its own. The Principle of Homogeneity, which is laid down in article 28 para. 1 GG obliges the state constitutions, like all other state law, to comply with the fundamental principles of the Basic Law. In addition, there are important rules of federal constitutional law which have a direct effect on the constitutions of the States and which thus form part of the constitutional law of the States themselves.

96 The Basic Law (*Grundgesetz*) has been designed so as to be particularly difficult to change. The aim is to ensure that there is a broad consensus supporting any change, and to remove the constitution as far as possible from the influence of short-term political tendencies. It can only be changed if two thirds of the members of the parliament (*Bundestag*) and two thirds of the members of the Federal Council (*Bundesrat*), which together make up the core of the legislature, vote in favour. A change can only be made by express alteration of the text of the Basic Law.

97 Certain fundamental positions are not subject to change at all. Article 79 para. 3 GG says: "An alteration of this basic law which would affect the division of the Federation into states, the basic principle that the States should play a part in the legislative process, or the fundamental principles set out in articles 1 and 20, is not permissible." This so-called "guarantee of eternity" (*Ewigkeitsgarantie*) applies to the federal structure of Germany, the protection of and respect for human dignity as well as certain central structural principles such as constitutional government under the rule of law, democracy and the sovereignty of the people, the social state and the principle that it must take a republican form. Through the principles contained in article 1 of the Basic Law the essence of other Fundamental Rights is protected against abolition by way of constitutional amendments as far as this essence is an expression of human dignity. By the internal logic of the provision, article 79 para. 3 itself also cannot be abolished. Isolated modifications of the basic principles named in this provision are, however, allowed if they are "immanent to the system". What this means, in sum, is that the essential identity of the constitution may not be changed. This does not prevent the replacement of the constitution by a new constitution, a possibility expressly provided for in article 146 GG, but it does prevent the deformation of the fundamental structures of the constitution by a process of creeping subversion.

98 Apart from the constitution in the formal sense, i. e., the constitutional document which is the Basic Law, a great deal of constitutional law in the material sense is contained in ordinary statutes which directly implement and concretise the Basic Law and provide detailed rules for the functioning of the organs of the constitution. To name but a few, these include the Citizenship Act (*Staatsangehörigkeitsgesetz*), the electoral laws, the Deputies Act (*Abgeordnetengesetz*), the Federal Ministers Act (*Bundesministergesetz*), the Political Parties Act (*Parteiengesetz*), The Federal Constitutional Court Act (*Gesetz über das Bundesverfassungsgericht*), and the standing rules of the various constitutional organs. From the point of view of legislative procedure these laws do not differ in any way from ordinary parliamentary statutes. The only difference is that the standing rules of the various constitutional organs are generally made by these bodies themselves and can be changed more easily, which is justified by the fact that they merely regulate the internal functioning and organisation of these bodies and do not have any direct effect outside of the body in question. In particular it should be noted that Germany no longer uses the otherwise common idea of entrenched legislation (*organisches Gesetz*), i. e. legislation of particular significance which can only be passed or amended by a qualified majority.

99 A most important issue, which has effects reaching right down to the level of finding solutions to individual factual problems, is the general understanding of the essential nature and function of the constitution. Here there are two, essentially opposite, views. One school understands the constitution essentially as a choice, as a line of demarcation between those who form the constituted community on the one hand, and those who stand outside of it on the other hand. This view was first propounded by the constitutional scholar *Carl Schmitt* (1888–1985) in the period of the Weimar Republic. Constitution is in this sense a part of the fundamental difference between friend and foe. In terms of this theory certain norms which are of particular importance for the drawing of the line of demarcation possess a greater weight than other provisions of the constitution. The fact of a fundamental decision which cannot be substantiated any further is of central importance to this theory. Under the current constitutional circumstances, the tendency and general result of this theory is to lead its supporters to view democracy as the value-neutral legal and constitution-making authority of the people. It also leads to an emphasis on the sovereign power of parliament, in effect to a type of social Positivism.

100 Another approximately equally strong school of thought, which, however, was for a long time the dominant view in jurisprudence of the Federal Constitutional Court, was first put forward by *Rudolph Smend* (1882–1975) who also developed his theory in the Weimar period. This theory sees the constitution as a legal medium for integration. Particularly the Fundamental Rights are an expression of a community of culture and values. Such integration in principle takes in all people living within the area in which the constitution is in force. In this view the constitution is not a line of demarcation, but a basis for unity, and must itself be understood and interpreted as a unified whole. It must therefore also be understood as imposing an obligation to realise its postulates. Here the tendency is rather towards the preservation of general principles of law which precede the constitution and take the form of constitutional government under the rule of law. It also tends to bind the constitution-making power of the people to cultural values which have developed over time.

101 Initially the Federal Constitutional Court viewed the constitution in general and the Fundamental Rights in particular as a complete value system. This provided the basis for arguments in favour of a comprehensive protection of individual freedoms. Later, without abandoning its emphasis on the protection of individual freedom, the idea of a closed system was broken open and the court spoke of Fundamental Rights merely as fundamental principles determining the values of the system (*wertentscheidende Grundsatznormen*).

b) Territorial Applicability

102 The Basic Law applies in the area of the Federal Republic of Germany and other areas of equivalent status, for example, on German ships on the high seas. All state officials are bound by the Basic Law, even if they are acting in or on behalf of foreign countries. After the unification of 1990 all further territorial claims are completely excluded. Agreement on this point was the basis for numerous alterations to the constitution (Preamble, article 23, article 146 GG).

103 From a personal point of view the decisive factor is not citizenship, which is regulated by the Citizenship Act (*Staatsangehörigkeitsgesetz*). Rather, the concept of a "German" is of prime importance. This applies both to entitlement to Fundamental Rights, which to some extent applies only to Germans, as well as to the right to vote. The concept of a "German" is defined in article 116 GG and is wider than the concept of German citizenship. A German, in terms of the Basic Law, is any person who has German citizenship or who is of German origin and, as a refugee or expellee, had taken refuge in the area of the German Empire as defined by the borders of 31.12.1937. It further includes the spouse or descendant of any such person. More detailed provisions are contained in the Federal Act on Expellees (*Bundesvertriebenengesetz*) which defines what constitutes German nationality as well as what is meant by a refugee or expellee. In practice these terms cover German emigrants to certain areas of Eastern Europe and China and their descendants who are returning to the Federal Republic. The fact that someone falls within these definitions in itself does not give them a claim to anything. Legal consequences only arise when such a person comes to Germany.

104 German citizenship is primarily acquired by birth. The principle of *ius sanguinis* is applied. This means that a child acquires German citizenship if one of his or her parents is a German citizen. German citizenship can also be acquired by adoption. A child of foreign parents acquires German citizenship by being born in Germany if one parent has been a legal permanent resident for eight years and has a consolidated resident status (§ 4 StAG).

105 A foreigner can also acquire German citizenship. In principle, this requires that the foreigner pledges allegiance to the free democratic basic order, is legally resident in Germany, has a clean record, has been able to find accommodation, and is in a position to support his or her dependants. It is easier for the spouse of a German citizen to acquire citizenship. In addition, the Citizenship Act (*Staatsangehörigkeitsgesetz*) provides for a claim for naturalization under certain conditions (§§ 10 ff. StAG). An effort is still made to prevent dual nationality from arising wherever possible, although additional exceptions to this rule have been created in the last few years. This is especially true for European Union citizens, who can obtain dual citizenship without any impediments (§ 12 StAG).

2. Fundamental Rights

a) General Principles

106 The Basic Law puts the Fundamental Rights in the first chapter, right at the start of the constitution. In doing so it is emphasising the fundamental importance of the rights of the individual, which are of foundational importance for the state and constitution. This is in deliberate contrast to the dominant constitutional tradition in the period preceding the Basic Law and is a reaction to the contempt for these rights which was shown by the National Socialists.

107 Taking human dignity as its starting point (article 1 para. 1 GG), the Basic Law guarantees numerous specific rights. This positions it in the European-North American tradition of human rights thinking. In so far as specific rights are guaranteed in the first chapter of the constitution, they are referred to as Fundamental Rights (*Grundrechte*). Other rights, which are scattered throughout the constitution, are called Quasi-Fundamental Rights (*grundrechtsgleiche Rechte)*.

108 The rights can be classified either as freedom rights or as equality rights. Article 2 para. 1 GG protects the free development of the personality. This Fundamental Right functions as a general freedom right. To some extent it is a catch-all right which operates whenever the numerous individual freedom rights are not applicable.

109 The general equality guarantee is contained in article 3 para. 1 GG, which guarantees that all people are equal before the law. This Fundamental Right is once again a catch-all behind a number of specific equality provisions such as the guarantee of equality of men and women (article 3 para. 2 GG), or the equality of voting rights (article 28 para. 1, article 38 para. 1 GG). Thus, article 2 para. 1 GG and article 3 para. 1 GG together provide for the comprehensive protection of freedom and equality.

110 In German thinking the Fundamental Rights are of considerable importance. They are indeed the centre and axis on which all legal thinking turns. The functions which are ascribed to them are correspondingly numerous. Fundamental Rights are first of all defensive rights. Particular emphasis has been placed on this function since the 19th century. This means that the state may not interfere with the legal position of the individual unless there is special reason to do so. Unjustified infringements can be blocked by the individual. This means that he or she has legal remedies against unjustified detention, against the confiscation of his or her property, or against the banning of a particular point of view.

111 Apart from their defensive function, the Fundamental Rights also traditionally involve the right to participate in the democratic political process. Particularly in the case of rights such as freedom of assembly, freedom of the press and of opinion and the right to vote this aspect is prominent.

112 To a very carefully limited extent a certain positive dimension entitling to services from the state (*Leistungsfunktion*) is also recognised. In so far as this is practical, the state has a duty to ensure that circumstances conducive to the exercise of the Fundamental Rights are created. For example, the right to freely choose one's career and the associated course of education obliges the state to make available a reasonable (*angemessene*) number of places in educational institutions insofar as such a course of studies is a legal requirement for the exercise of the profession or trade in question.

113 Closely related to this positive dimension entitling to services are the Fundamental Rights as a protective duty of the state to act. Thus, the state is not only required to respect the right to life and physical integrity in its negative defensive sense by not infringing on this right itself. It is also obliged by article 2 para. 2 sentence 1 GG to actively intervene to protect these rights against infringements by third parties or other sources of danger. Thus, for example, the state is responsible for ensuring a healthy natural environment insofar as this is practical.

114 Lastly, the Fundamental Rights are also a guarantee of organisation and procedure. The state must provide appropriate (*angemessene*) organisational and procedural structures to ensure the prompt and effective protection of Fundamental Rights. Thus, administrative officials planning a road-building operation must accord reasonable (*angemessene*) consideration to the rights of owners of neighbouring property by informing them properly and giving them an opportunity to give their views on the subject.

115 These five functions, which the Fundamental Rights are recognised as having, make clear the two dimensions of these rights. Firstly, they are the subjective rights of the individual and of legal persons. However, they simultaneously form a sphere of the objective law. Thus, for example, the free, democratic political process as such is protected. Fundamental Rights also often guarantee specific legal institutions: Marriage (article 6 para. 1 GG), property (article 14 GG), contract (article 2 para. 1 GG), a free press (article 5 para. 1 GG) the structures for regulating industrial disputes (article 9 para. 3 GG). This objective dimension of the Fundamental Rights serves to reinforce the rights of individuals, but is independent of any attempt by a specific individual to enforce rights in a specific instance. Particularly here the state appears in its role as the guarantor of freedom.

116 The Basic Law distinguishes between Human Rights (*Menschenrechte*), which apply to every human being, and Fundamental Rights which are reserved for Germans only, the so-called "Germans' Rights" (*Deutschenrechte*). Examples of general Human Rights are freedom of belief or freedom of opinion. Examples of Germans' Rights are freedom of assembly and association and the freedom to choose one's career. This by no means leaves foreigners entirely without protection as far as these aspects are concerned. In connection with such situations of life they can instead rely on the general Fundamental Right to the free development of the personality laid down in article 2 para. 1 GG. This right can, however, be limited more easily than the more specific rights. The question whether or not the validity of "Germans' Rights" should be extended in certain situations which are characterised by European Union law to citizens of the European Union's member states is controversial, but should be answered in the affirmative. This holds true especially where the freedom to choose one's career is concerned.

117 It is private persons, bearers of Fundamental Rights, who derive rights from the Fundamental Rights. Private persons are first and foremost individuals. Legal persons, i. e., entities such as associations or companies which are constituted as bearers of legal rights by the legal system are also bearers of Fundamental Rights, insofar as the particular right in question is of such a nature that it can be applicable to them (article 19 para. 3 GG). A legal person can have property and is thus entitled to the protection of article 14 para. 1 GG. It cannot, however, have a conscience, and therefore cannot make any claims based on the freedom of conscience guaranteed in

article 4 para. 1 GG. The applicability of Fundamental Rights to foreign legal persons is anachronistically limited by article 19 para. 3 GG. However, they are entitled to base a claim on the procedural rights such as the right to a hearing before a court (article 103 para. 1 GG) and the right to have a case tried by a judge whose identity is established before the trial (article 101 para. 1 sentence 2 GG).

118 State institutions are essentially not bearers of Fundamental Rights. The main aim of Fundamental Rights is to protect against impermissible acts on the part of the state, not to strengthen the position of public institutions. Only isolated procedural guarantees like article 103 para. 1, article 101 para. 1 sentence 2 GG and the general prohibition of arbitrary action (*Willkürverbot*) are also applicable in favour of the state. However, in many fields of life there are state institutions which are designed precisely to make the exercise of the freedom rights organisationally possible. The most important of these are the state universities and the state-run radio and television corporations. These may rely on the particular fundamental right on which they are based. For the public radio and television corporations this is the right to freely transmit programmes derived from article 5 para. 1 GG and for the universities the freedom of research and teaching, academic pursuits and the arts guaranteed in article 5 para. 3 GG.

119 The state in all its forms is bound to uphold the Fundamental Rights. The Fundamental Rights bind the legislature, the executive and the judiciary as law which is automatically in force without the need for any implementing legislation (article 1 para. 3 GG). Private persons, on the other hand, are essentially not bound by the Fundamental Rights – they are intended to create rights for the individual, not duties. The only situation in which private persons are directly bound by Fundamental Rights (so-called direct horizontal effect, in German *unmittelbare Drittwirkung*) is set out in article 9 para. 3 GG which guarantees the freedom to form coalitions. (The term "horizontal application" is in contrast to the "vertical application" between state and individual). The right to form associations for the protection and promotion of working and economic conditions is guaranteed for every person and for all trades and professions. Agreements which attempt to limit or hamper the exercise of this right are void, and measures with such an object are illegal. This right is particularly relevant to the formation of trade unions and employers associations, the organisation of industrial action and the conclusion of agreements regulating wages and working conditions. Article 9 para. 3 GG thus directly forbids an employer from making it a condition for employment of a worker that the worker should belong to a particular union or that the worker should not belong to a union. Otherwise there is no direct horizontal application of the Fundamental Rights. At very most the prohibition of any action to hamper an attempt to gain election to the federal or state legislatures contained in article 48 GG can also be considered to fall within this category.

120 On the other hand, the idea of indirect horizontal application (*mittelbare Drittwirkung*) has been accepted. The Fundamental Rights permeate all areas of the law because they represent a constitutional decision in favour of certain values. In the interpretation and application of the ordinary law, in other words all laws inferior in status to the constitution, the value judgements contained in the Fundamental Rights must be given effect. Human dignity may also not be injured, freedom and equality must be respected, and this also applies to relations between private individuals. However, in this situation different Fundamental Rights which are in principle of