

CONCEPT OF SPECIAL PROTECTION FOR CERTAIN ELEMENTS AND PRINCIPLES OF THE CONSTITUTION AGAINST AMENDMENTS AND ARTICLE 79 (3), BASIC LAW OF GERMANY

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Highlighting the European tradition of providing special protection against amendments of basic principles of the Constitution, I will dwell upon the application and interpretation of that tradition in the German Constitution with a view to help in the understanding of the basic structure doctrine of the Indian Constitution.

I. HISTORY AND THEORY

Europe provides several precedents of constitutions having provisions that were not supposed to be amended by the amending provision of the constitution. The first French Constitution established after the revolution towards the end of the 19th century, intended the republican form of government to be one of the principles that could not be changed through an amendment to the Constitution.¹ Much before that, the Republic of Venice was mandated by its Constitution to preserve its identity and stability over times and changes.² Even in the 17th century the first modern elementary core of a constitution, the Instrument of Government of 1653, sought to secure the Protectorate as the form of government as a continuously guaranteed structure of the Constitution.³ Further, the

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¹ See, e.g., Articles 1 and 39 of the Constitution de la République Française of 24 June 1793, reprinted in STAATSVORFASSUNGEN 372 (G. Franz, ed., 1964) which speaks of the republic being “une et indivisible” and of the legislative body as being “un, indivisible et permanent”.

² Compare CH. DIEHL, LA RÉPUBLIQUE DE VENICE, 103, 117 (1985).

³ See Article 24 of the Instrument of Government, at the end and for the supremacy of that Constitution Article 38 Compare the reprint in THE CONSTITUTIONAL DOCUMENTS OF THE PURITAN REVOLUTION 405, at 413 (S. R. Gardiner, ed., 1906 reprinted 1968). This hint to early but failed constitutionalism is to be found in H. Drei-er, in GRUNDGESETZ-KOMMENTAR, Vol. 2, (H.

Constitution of Norway of 1814, which is still in force, states in its Article 112 (1) 3 that amendments to the Constitution should not contradict its basic principles.⁴

Currently Switzerland and Austria have undertaken complete revision of their respective national Constitutions, which is, however, expected to preserve the identity of the existing Constitutions. The tradition of such preservation recognised since the Constitution of Norway of 1814 finds explicit mention in the said process.⁵

In Germany, the idea to grant permanent and immutable force to some elementary principles of the Constitution emerged towards the end of the Weimar Republic. The emergence of National-Socialism to power in 1933 destroyed the constitutional structures at the national as well as state levels. The idea of non-amendable features of the Constitution, therefore did not gain any practical relevance in Germany in the later years. However in retrospect, the concept of differentiating between different elements of the Constitution, i.e., the ones that could be changed and the others that could not be changed by amendment or by emergency decrees of the President of the Republic, is attributed to Carl Schmitt.⁶ In fact, Carl Schmitt proposed to distinguish between ‘constitution’ and ‘constitutional law’. He intended to use this distinction to get rid of the written constitution and to replace it by the *de facto* constitution created at that time by numerous non explicit changes. Therefore, the concept of preservation of an existing written constitution against subsequent changes through amendments could not be attributed to Carl Schmitt.

As it is well known, the National Socialist government brought many informal and latent changes in the Weimar Constitution which ultimately lost its identity. After the end of World War II in 1945 when the task of establishing new constitutions at the states and national levels was undertaken, the distinction between the constitution and constitutional law became relevant because neither the Allies in West Germany nor the German members of the constituent body, i.e.,

Dreier, ed., 2006) Article 79 III, Rn. 1, *supra* note 1; *Id.*, “Gilt das Grundgesetz ewig?” / (“The Basic Law – everlasting?”), lecture at the Carl Friedrich von Siemens-Foundation in Munich, in: *Frankfurter Allgemeine Zeitung*, 24 November 2008, 36; *See* C. Vismann, *Reihe Alternativkommentare in KOMMENTAR ZUM GRUNDGESETZ* (E. Denninger, ed., 2002) with comments on Art. 79 III GG for another set of annotations.

⁴ *Compare* text under www.scanpress.de. *Compare also* T. Andenaes, Ed., *DIE VERFASSUNG NORWEGENS* 47 (1964) *quoted in* D. Conrad, *Collected Papers, Zwischen den Traditionen, Probleme des Verfassungsrechts und der Rechtskultur in INDIEN UND PAKISTAN, GESAMMELTE AUFSATZE AUS DEN JAHREN 1970-1990*, 50 (J. Luett & M. P. Singh, eds., 1999).

⁵ *See, e.g.*, E. Wiederin, *Gesamtaenderung, Totalrevision und Verfassungsgebung, in STAAT UND RECHT IN EUROPAEISCHER PERSPEKTIVE, Festschrift für Heinz Schaeffer* 961, at 973 (M. Akyurek, G. Baumgartner et al., eds., 2006) with a listing of the situation in several member states of the European Union.

⁶ *Compare, e.g.*, C. Schmitt, *VERFASSUNGSLEHRE* 103 (1928). *Compare also* S. Verfassungsrechtliche Aufsätze, *LEGALITÄT UND LEGITIMITÄT* (1932) *in* *STAAT UND RECHT*, *supra* note 5, 263, 327.

'*pouvoir constituant*' (constituent power), trusted the then reached consensus to accept western constitutional traditions. Therefore, they looked for a tool to protect the national Constitution they had drafted against contravening developments. Hence, the '*pouvoir constituant*' of the day introduced Article 79 (3) in the Basic Law or the written Constitution of the Federal Republic of Germany which was put into force in May 1949. Clause (1) of that article states that a change of the Constitution by amendment can only take place explicitly, i.e., by changing its wording. Secondly, Clause (2) of the article mandates the quorum of a two-thirds majority of the members in both chambers of the legislature to conduct an amendment process. Finally, Clause (3) states that certain basic elements of the Constitution are not to be changed at all.⁷

II. CONCEPT, NOVELTY, RELEVANCE

Article 79 (3) of the German Basic Law refers to two elements of the federal structure and to fundamental principles contained in Articles 1 and 20 of the Basic Law.

A unique wording is to be found in Article 79 (3) in so far as it refers to the federal structure of Germany as a State and to the participation of the several states of that federation in the decision-making process of legislation on the one hand, and to the principles contained in Articles 1 and 20 on the other hand. It is arguable that they are meant to guarantee stability and transparency, so as to safeguard identity⁸ and continuity⁹ of the Basic Law.

The novelty of this provision vis-à-vis similar earlier precedents in the constitutions mentioned above is that it expressly subjected the amending power, which is a constituted power ('*pouvoir constitué*'), laid down in Clause 2 of Article 79, to definite new limitations or restrictions. As law in general, and constitutional law in particular, is exposed to interpretation, this novelty has gained additional contents and impacts the understanding of the Basic Law in several respects. These consequences have been enhanced by the fact that the Basic Law not only provides for comprehensive judicial review, but also establishes an independent and separate Federal Constitutional Court to interpret and apply the Basic Law.

⁷ See Annexure, *infra* for the text of the article. The latest large publication on these basic principles is K.-E. Hain, DIE GRUNDSÄTZE DES GRUNDGESETZES, EINE UNTERSUCHUNG ZU Article 79 Abs. 3 GG(1999). In Germany, there is a tradition of annotating constitutions and other codes in voluminous commentaries which usually are not to be found in the libraries in common law countries. See the annotations in H. D. Jarass & B. Pieroth, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (2007) under Article 79 (3) GG for the latest version of such a shorter commentary.

⁸ See Dreier, *supra* note 3, Rn. 57.

⁹ K. Hesse, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND (1999) Rn. 700.

Litigation on the relationship of Article 79 (3) of the Basic Law to its other provisions arose soon after its commencement which shed light not only on the matter in hand but also on its other provisions. This was especially the case when amendments touching upon principles covered by Article 79 (3) were questioned in the Constitutional Court. Such questions continue to come to the Court even today especially in the context of terrorism and European integration requiring transfer of powers to the European Union under the Maastricht Treaty of 1992 and to the European Community under the Treaty of Rome in 1957.

Finally, the concept of restricting the '*pouvoir constitué*' drew attraction as a tool to preserve constitutional government. Though there is no explicit mention of this concept in the text of the Constitution of India, its Supreme Court took up the idea nonetheless. If I understand it correctly, in the context of the amending power under 'this' Constitution in its Article 368, the Constitution has to remain 'this' Constitution when interpreting its language either by formal amendment or through judicial interpretation or executive action.¹⁰ Thus, there is a similar interest in developing such a tool as in the German Constitution. This interest is promoted by the fact that the Supreme Court of India cited a German scholar – Dieter Conrad, an expert on Indian law.¹¹

III. ARTICLE 79 (3) AND ITS CONTENT IN THE CONTEXT OF THE BASIC LAW

While taking a glance at the relevant article, one must attempt to decipher its content. This can be accomplished by looking at its text and the related norms as well as by coordinating such norms by defining their applicability to specific situations of the Constitution.

A. TEXT, TERMS AND CONTENT

The text of Article 79 (3) does not use a term such as 'basic structure' or 'basic features' of the Constitution as has been judicially created in India, though not used in the text of the amending provision of the Indian Constitution. It speaks of '*Grundsätze*' i.e. 'principles' referred to in other articles as basic to the Constitution. It does so even though there are similar terms in the Constitution, like '*verfassungsmaäßige Ordnung*', which may be translated as 'constitutional

¹⁰ Compare M. P. Singh, CONSTITUTION OF INDIA 892 (2001) with reference to D. Conrad, BASIC STRUCTURE OF CONSTITUTION AND CONSTITUTIONAL PRINCIPLES, 479 (1996) in: id., Collected Papers, as quoted above note 4. See also S. R. Bommai v. Union of India, (1994) 3 SCC 1 and M. P. Singh, Ashok Thakur v. Union of India – A Divided Verdict on an Undivided Measure of Social Justice, 1 NUJS L. Rev. 193 (2008).

¹¹ See ZWISCHEN DEN TRADITIONEN 47 (J. Luett & M. P. Singh, eds., 1999) for some of the relevant writings of Dieter Conrad. See also D. Conrad, GANDHI UND DER BEGRIFF DES POLITISCHEN – STAAT, RELIGION UND GEWALT (B. Conrad-Luett ed., 2006) posthumously published.

order', or '*freiheitliche demokratische Grundordnung*', which again may be translated as 'free democratic basic order'. Thus, Article 79 (3) requires an authentic interpretation of its own and for its own purposes. This fits into the experience of German constitutional history after 1949 which led to varied interpretations of these terms depending on their respective constitutional contexts. Hence, the absence of a term like 'basic structure' is pregnant with meanings. The pertinent question in this regard is to ask: what are the 'principles' of certain articles or parts of the Constitution that are sought to be given a permanent nature?

The text reflects the interest of the several states of the federation to gain special protection. These states through their participation – firstly, as a part of the federal structure and secondly, in the legislation through their presence in the upper chamber of the legislative body at the federal level, succeeded on two points. Firstly, the status of Germany as a federal state is rendered permanent. This might appear to reflect the American idea of 'federalism'. Secondly, such states permanently remain participants in the decision-making process of future federal legislation. This may be viewed in the light of the initial debates in the '*pouvoir constituant*' as to the composition of the upper chamber and the proposal that the decision making power in the legislature should rest not with the states, but with the elected members chosen by an independent mandate of the republic as a whole. The said proposal has not been implemented till date though sending state senators with an independent mandate and vote to a federal senate as upper chamber would be acceptable.

Besides protection of the states in the federation, the content of Article 79 (3) creates other problems of interpretation. At first glance, it seems to be absolutely clear. It refers to two articles – Articles 1 and 20 – and to the principles these articles express. But what are these principles?

To begin with, Article 20: Firstly, an amendment to this Article in the 1960s added a right to resist abuse of power by any public authority. There seems to be a general consensus that all that has been added to the said article does not comprise its principles but spells out its details. The Article undoubtedly refers to the republican form of government, democracy, rule of law, division of powers, full judicial review and last but not the least, the "Social Federal State" which includes some solidarity between all levels of society as well as other basic elements of modern constitutions.

Also, Article 79 (3) refers to the principles laid down in Article 1. This Article speaks of the dignity of man, of human rights and of basic rights binding all three branches of government without any further details. What comprises the dignity of man? Clearly in the modern world it includes liberty, equality and some sort of solidarity between human beings.

Also the word 'dignity' in Article 1 as we will see, implies such matters as neutrality of the state in religious and ideological matters, tolerance towards deviant thought and behaviour, secularism in the interest of freedom

of belief, ‘*Weltanschauung*’, a broad world view, thought, communication and acts of participation.

By referring to the principles of Article 1 explicitly, Article 79 (3) most likely does not include all basic rights enumerated in the Basic Law as expressed in Article 1 (3) and listed in the subsequent provisions. But some scholars assume that it does include them to some extent. If so, to what extent does Article 79 (3) petrify the Basic Law? Therefore, such an extension should be limited to cases in which the very essence of such rights is affected. This would be consistent with Article 19 (2) which states that “in no case [...] the essence of a basic right (may) be affected” by restrictions of such rights. This provision, of course refers to legislation and not to amendments. Moreover, some of these rights may somehow be linked to human dignity in a way which puts their essence under the umbrella of that concept. Since the content of the first chapter of the Basic Law containing its basic rights was clearly not intended to be ‘petrified’, one can say that only a few of these rights, touching upon personal autonomy, general equality and guarantees for such rights are covered by the protection of Article 79 (3).

B. ELEMENTS OF THE ‘BASIC STRUCTURE’ IN ARTICLE 79 (3)

The principles contained in Article 79 (3) are:

1. Dignity and Fundamental Rights

Dignity of the human being has been interpreted not just as a principle of abstract character in a sense that the human being comes before the state and not the other way around. Thus as a principle, it cannot be given up in favour of such propaganda phrases like “*Du bist nichts, Dein Volk ist alles*” (“You are nothing, your nation is everything”), which were part of National Socialist Party propaganda before 1945. Therefore, a draft for a later national Constitution of 1948 expressly stated that the state is for man and not the other way round.¹²

Dignity is seen as including life, integrity, liberty, equality and free communications as well as a core or minimum of liberal basic rights, and includes social rights to cover basic needs like a minimum of welfare payments, housing of a minimum standard and some share of participation in the life of a civil society. As to the power to define such entitlements and their reach, the administrative courts imply judicial review, while the Federal Constitutional Court tends to give the legislature considerable discretion. However, both sides of the argument agree that this power is not any more part of discretionary powers of the executive or the administration at a local level. Even if dignity was not linked to fundamental rights, Article 1 (2) included in Article 79 (3) still acknowledges human rights as the basis of any human society, of peace and of justice in the world and therefore, a core

¹² Ch. Enders, *Die Menschenwuerde in DER VERFASSUNGSORDNUNG*, 404 (1997) for the historical background.

collection of these rights is implied as being an unchangeable part of those principles. Besides that, human rights today imply equality and equality is linked to a right to dignity for men and women. Dignity has been the basis of entitlements for basic needs. Also it has been, and is the basis for integration of an individual into society, who may be an inmate having served or still serving his sentence, or a foreigner who seeks safe conditions for his life and his family.

In general, Article 1 (3) speaks of ‘the following basic rights’ implying protection of these rights under Article 79 (3). The interpretation of this provision assumes that it does not exclude any change in the chapter on fundamental rights of the Basic Law, but a core set of such rights is protected against amendment.

2. Judicial Review and Protection by Law

Dignity has to be protected by law, and the basic rights are directly binding on all branches of government as Article 1 (1) states. Therefore, law must assure that dignity and such minimum or standard rights are protected. Such an assurance is granted by Article 19 (2) which provides that the essence of such rights should never be affected by restrictions. While there is a justified assumption that Article 79 (3) does not protect each right and its essence, the essence of strictly basic and therefore necessary rights is included. Further, it impliedly protects the access to court concerning dignity and such rights, as indicated in Article 19 (4). Both of these articles are covered by Article 79 (3).

3. Forms of Government, Rule of Law and Division of Powers

Furthermore, the reference to Article 20 in Article 79 (3) makes clear that basic principles cannot be changed by amendment. This is the case with the forms of government such as republicanism¹³ and democracy.¹⁴ However, it is also the case with the substance behind the form, like the social welfare state which claims to stand for the establishment of solidarity between different groups in society and some sort of redistribution in favour of the less privileged people in it. The social welfare state is part of what is protected by Article 79 (3).

4. Further Concepts included in Article 20

The idea of a ‘welfare state’ enshrined in Article 20 (1) in the words ‘social...state’, also found in Article 28 (1) as ‘*sozialer Rechtsstaat*’, has materialized through the interpretations given to dignity – a whole set of entitlements to the

¹³ The older concept of republican form of government considered constitutional monarchy as a form of republican government, especially in England. Since this perception never was established in the German legal thought in general, monarchy cannot return, not even in forms of constitutionalism.

¹⁴ See *Demokratie in EUROPA*, (H. Bauer et al., ed., 2005) for some connotations what democracy means.

individual who needs protection because he belongs to the poor and uneducated levels of society. Here the doctrine sticks to the idea that legislature has spelled out by legislation the reach of such entitlements in day-to-day life. Thus, in this regard, one can truly say that only principles, but no details are safeguarded by the protection against amendments and sometimes, mere details seem to be at stake. This might partly be so because in the area where the state gives and does not take the structural guidance from law is less dense.

The German approach to 'rule of law', i.e. '*Rechtsstaat*', protects against the intrusions of the state. It contains a bundle of principles and patterns. Thus, it implies a lot and in much detail. Major features of criminal procedure and administrative law like the presumption of innocence, the principle of proportionality and others are placed under this heading. Mainly, they relate to the implementation of law. However, they may also be used to define what law can possibly be enacted. Therefore, these elements which were initially developed in the matter of application of law, have also gained relevance in the making of law. This is mainly caused by Article 20 (2) since these elements were upgraded to be part of constitutional law and thus part of the 'constitutional order'. The elevator to take this route was provided by the '*Rechtsstaat*' which was also stuffed with ideas to make dignity the basis for entitlements, which was until then administrated under discretionary powers of local governments. It became necessary to upgrade statutes so that they provided proper structures, not only in substance but in procedure as well. This again shows that there might be a constant change through legal developments.

C. NEIGHBOURING CLAUSES AND THEIR COORDINATION

The main competitor of Article 79 (3) is Article 146 in its old as well as present versions which imply that the '*pouvoir constituant*' is the sleeping lion under the throne of the Constitution. Therefore, the relationship between '*pouvoir constitué*' (constituted power) and '*pouvoir constituant*' is the other end limiting the scene. On the one hand, the '*pouvoir constitué*' is restricted by Article 79 (3) and on the other hand, it might be emancipated from such restrictions if it deploys itself after a metamorphosis towards the status of the '*pouvoir constituant*'. Or to put it in a different way, Article 79 (3) cannot bind the '*pouvoir constituant*' of the German people as such, though it might be able to bind its exercise if carried out not by revolution in the streets but by the regular procedure of peaceful elections to a National Assembly. Nevertheless, no constitution can authorise law replacing it completely by a new constitution if such a constitution is based on the '*pouvoir constituant*'. Thus, Article 79 (3) is not able to bind later generations if they make up their mind to rearrange things. Therefore, the famous statement of Thomas Jefferson that you cannot bind later generations, remains true.¹⁵

¹⁵ Jefferson expressed this opinion several times up to the end of his long life. See, Letter of 6 September 1789 to James Madison, for an early example in times of constitutional change in France while he was heading the American mission in Paris Th. Jefferson. Compare BASIC WRITINGS OF TH. JEFFERSON, 588, at 591 (Ph. S. Foner, ed., 1944). James Madison did not

As the original version of Article 146 referred to the unification of Germany in a different way than it does now after the unification, one may ask why there was no replacement of the Basic Law by a new constitution in the process of unification as originally envisaged by the makers of the Basic Law. Well, there was another available way of unifying the nation which was the procedure of accession. Therefore, the treaty of unification in fact is a treaty of accession. This was possible under the old, now repealed, version of Article 23. It has been repealed because there is no further aspiration that any other former German territory might join by accession. So basically, Poland and Russia can feel free from such aspirations of a neighbouring nation or its populace.

Some other articles of the Basic Law explicitly refer to Article 79 (3) which may be mentioned. Firstly, Article 143 (1), which refers to Article 79 (3), indicates that while there were different laws still in force in the former East German territory, such laws could not remain in force if they were in conflict with Article 19 (2) or Article 79 (3). There was no case decided on that basis declaring any Eastern German law void because either they expired or were replaced by new laws. The reason for this clause could be found in the fact that at the time of unification, different laws on abortion existed in the two parts of Germany – East and West. While in the West, restrictions of abortions were based on Article 1 (1), mentioned in Article 79 (3), the East still wanted the liberal abortion law of the German Democratic Republic to stay in force for some time.¹⁶ Some other similar clauses served to defend the status quo at the time of unification. Thus, expropriations and other takings, as happened under the regime of occupation and socialist rule, were left undisturbed, which resulted in major legal battles in the Federal Constitutional Court of Germany and the European Court of Human Rights. These battles resulted in judgements upholding such restrictions.¹⁷

exactly share that perception of Jefferson. *Compare* his contribution of February 2, 1788 to the *Federalist* in its No 49, in (A. Hamilton, J. Madison, J. Jay, *The Federalist*, eds.) by J. E. Cooke, Cleveland & N. Y. 1961, 338 at 340, where he argues against a more detailed proposition of Th. Jefferson in Query XIII of his Notes on the State of Virginia, published anonymously in Paris 1784 & in London 1787, reprinted in *THE LIFE AND SELECTED WRITINGS OF TH. JEFFERSON*, 1944, 187 at 228 (A. Koch et al., eds.). Jefferson's concern originally was the question how to justify the constitutional changes in the colonies in times of declaring independence and after; he supposed that a majority of two thirds in two branches of government should be able to call a convention which then would be empowered to draft a 'new' constitution, but only for the purpose of 'correcting breaches' of the present one.

¹⁶ See J. Wieland, Article 143 Rn. 21 in *GRUNDGESETZ-KOMMENTAR*, Vol. 3, (H. Drier ed., 2000).

¹⁷ See, e.g., 112 BVerfGE 1, Decree of 26 October 2004, with a well put dissenting opinion, while concurring in the result, by Lady Justice Luebbe-Wolff. Earlier European Court on Human Rights, Judgement of 30 March 2005, No 71916/01, 71917/01 and 10260/02 – v. Maltzan et al., v. Zitzewitz et al. v. Germany in *NEUE JUSTIZ* 2005, at 325 for expropriations of the the Soviet Military Administration of Germany in the Russian Zone after the end of World War II between 1945 and 1949; also, see for administrative decisions of the German Democratic Republic recently BVerfG Decree of 27 February 27, 2007 – 1 BvR 1982/01 – stating that such administrative decisions of that state which do not violate fundamental principles of the rule of law are not to be treated or declared as void; thus also, they must not be revoked.

Secondly, the new Article 23 (1) relates to Article 79 (2) and (3); the latter are supposed to offer the framework, under which the establishment of the European Union and changes in its contractual foundations by treaties and comparable regulations that amend or supplement this Basic Law, or make such amendments or supplements possible, can be achieved.¹⁸ This clause has been added by an amendment to the Basic Law, replacing the restrictive text in the old Article 23.

Another question is answered by systematic interpretation. The question is whether the content of Article 79 (3) is fixed or may change with time. This question might find some response in the fact that the Basic Law itself has been tolerating exceptions from some principles contained in Article 79 (3) for quite some time. As mentioned earlier, equality seems to be part of human dignity and as such, is an element protected by restriction on the exercise of the '*pouvoir constitué*'. Equality of men and women is stated in Article 3 (2) but Article 117 (1) states that for the first four years of the Federal Republic, old laws violating the normative statement of equality of men and women could remain in force. The same could be said of equality of illegitimate children, as shown in Article 6 (5) which has no deadline. In both cases, the Federal Constitutional Court has pushed forward appropriate legislation when legislature failed to act in due time and the Court still does so if social changes require a change in law to comply with the principle of equality in related fields of law.

Similarly, the Basic Law states in Article 102 that death penalty is abolished. If any majority in both houses of the legislature would try to change that, it would be a violation of a principle contained in Article 1 (1) if human dignity implies that there should be no death penalty. This might be the case because the Federal Constitutional Court has laid down the requirement for any penalty that it must be limited in the light of the dignity of man. Not only no one can ever be treated as a pure object of sanctions or actions of the state but also every offender has to have a realistic chance to return to society as a regular member of it after having served an appropriate sentence. For obvious reasons, death penalty is not compatible with this view of the essence of dignity in that area of law.¹⁹

Also, Article 79 (1) might be relevant, since it allows changes of the Constitution by ratification of treaties without changing the text of the Constitution as provided by Article 79 (1). This might lead to hidden changes which also would imply amendments that as such would not be admissible under Art.79 (3). Therefore, this, rather unclear, clause of Article 79 (1) has to be given restrictive interpretation.

¹⁸ Compare the annotations by I. Pernice, in H. Dreier, Ed., GRUNDGESETZ-KOMMENTAR, Vol.1 (2006), Art. 23.

¹⁹ This is spelt out in my notes on death penalty which were the basis of a speech at the National University of Juridical Sciences, Kolkata in March 2007.

IV. ALTERNATIVES TO INTERPRETATION IN CONSTITUTIONAL LAW

Whatever one may think of the extensive application of Article 79 (3), the developments so far indicate that its content and meaning can change. This could happen because of changes in the perception of the contents of the principles stated to be unchangeable in that article. These changes would not be astonishing at all since any part of a given written constitution implies changes in its meaning, reach and content. The main question, however, is: what is the basic function of the given text?

There has been a general debate on how to interpret constitutional law in Germany. This is because, the wide judicial review established by the Constitution gave a lot of opportunities to deal with cases which had to be based on elements of constitutional law. Also the question arose whether constitutional law can bring about changes while being spelt out in the same words as before. As there was a tradition of methodology in civil, criminal and administrative laws, the question was if the methods applicable to constitutional law were to be very different. Quite a few scholars approved that idea mainly because constitutional issues are always not only to be dealt with on substance but very often also imply questions of procedure at the same time. Even beyond that, the effect of an interpretation on the functioning of government is considerable. Thus, functional or function-oriented interpretation gained ground. This made it possible to integrate such ideas as judicial restraint or political question doctrines as well as concepts of preferred freedoms into the process of interpretation. As for Article 79 (3), the Court very clearly stated that its content can change in course of time, at least to some extent. These ideas fit into the structure of constitutional law. Beyond the clauses dividing powers between the federal and the state levels or defining other empowerments, its clauses tend to be open ended. This allows adjustment of their interpretation to changes in general. Otherwise they would petrify a given status of law without adding any flexibility to it.

As mentioned at the very beginning, the constitutional history of a few countries such as Norway and France furnish a tradition of clauses relating to the protection of the 'basic structure' established by the '*pouvoir constituant*'. In India, where the Supreme Court invented such a concept by using some ideas from the German or other examples,²⁰ some conflict with other branches of government may emerge. Assuming that the '*pouvoir constitué*' consisting of both houses of the legislature would hold against it and enact contravening amendments, then there is no mediator but the '*pouvoir constituant*' to decide if the concept should or should not be there.

²⁰ See D. Conrad, *supra* note 4, p. IX.

To add such a concept to a constitution already in force by amendment initiated by the '*pouvoir constitué*' would be doubtful as well. It would be an act of self-limitation, trying to bind later generations of the '*pouvoir constitué*' itself. The binding force of enacting a 'basic structure' into the constitution through an amendment creates similar problems as an introduction of it by the judiciary: it can be disputed by other branches of government or law making bodies.

In Germany, the scope of Article 79 (3) has changed basically through widening its applicability. Firstly, this happened by interpreting the content of human dignity and the protection of life in a very broad manner. Secondly, this was brought about by widening the purpose of Article 79 (3) which was originally meant to protect against the subversive handling of lawful instruments of change, like the amending power within the setting of the constitutional law of Germany. Again, it was also considered to be applicable, not only to the Constitution but also to the sovereignty of the nation when the state seemed to be endangered. Such dangers might arise when powers are transferred to European institutions, a transfer which the Basic Law of Germany allowed and still allows.

In this process of widening the applicability of Article 79 (3), the German Federal Constitutional Court played the decisive role. Therefore, like in India, in Germany too, one has to take recourse to judicial decisions if one wants to follow these developments.

V. GERMAN EXPERIENCES WITH ARTICLE 79 (3)

One might definitely doubt if the earlier interpretation of Article 79 (3) is convincing. Let us look at the court's decisions which had to cope with live problems. Some insight might also be drawn from constitutional amendments or practices of law-making even at lower levels like in the case of ratifications of treaties or other ordinary legislation.

A. HANDLING OF CHANGES WITHIN THE GERMAN CONSTITUTIONAL FRAMEWORK OF POST-WAR CONSTITUTIONALISM

One of the most important case decided by the Federal Constitutional Court related to an amendment of the Basic Law, taking away judicial review in wiretapping cases completely and handing such review over to a parliamentary commission without access for the person concerned and without giving notice to him or her. The Court stated that such amendments of the text of the Constitution in Articles 19 (4) and 10 (2) are only compatible with Article 79 (3) if they are narrowed by interpretation so that they allow room for control and review by courts and their regular judges, at least after the measure has been lifted. Thus, the court against the intention and the wording, used a loophole in the wording of Article 10 (2) by a narrow 'interpretation' and reopened judicial review for the period after the measure was lifted. Thus, the Court saw no violation

of the basic principle, as contained in Article 1 (1) of the Constitution, which says that human beings should never be treated like pure objects of the state.²¹

The high density of protection of life as the basis of human dignity repeatedly was a topic of decisions of the Federal Constitutional Court and so it linked life to dignity in a way which made it necessary to protect unborn life by means of law,²² and to reconsider life imprisonment.²³ The formula of human dignity as a constitutional principle reappears in the latest leading case on the application of electronic devices to control organized crime by the modern variations of wiretapping. There again, restrictions on the integrity of human dignity and privacy along with a change in the balance of the concept of ‘my home is my castle’ on one side, and of public interest in prosecution of crimes on the other side were at stake. Again, like in the earlier case dealing with the amendment of Article 19 (4) and 10 (2), the majority of the Justices again tried to use a narrow interpretation of the amendment to make it compatible with Article 79 (3) and its rigid protection of dignity as such.²⁴

The main point in those judgments which were accompanied by major dissents of three or two Justices is that the method applied by the majority leads to take away the bite from Article 79 (3). To put it clearly, the majority as the dissenting opinions felt, gave the amendment another content and after having done this, it measured the new content under Article 79 (3). The new content it shapes in advance is in the light of the requirements of Article 79 (3). Thus, the Court replaces the content of Article 79 (3) by one which was not in the minds of the framers of that amendment in the ‘*pouvoir constitué*’. Therefore, the argument goes that the ‘*pouvoir constitué*’ is not placed under and guided by Article 79 (3) but the Court repairs its errors without the verdict relating to its true meaning. It is clear from the following decision of the Court.

The latest decision dealing with the basic principle of protection of human dignity and life of 15 February 2006 deals with conflicts in times of terrorism which in the case of hijacking a civilian plane might lead to the death of those civilians as much as of its crew when intentionally shot down by a military aircraft. A statute providing for such a shoot down was found to be void by the Court not only for reasons of distinction between the police powers and war powers of the state in the Constitution, but also because of Article 1 (1) of the Basic Law. Without quoting Article 79 (3), the statement of the Court on the interpretation of the Basic Law clearly implied that such empowerment is not permissible.²⁵

²¹ See 30 BVerfGE 1, 40, Judgement of 15 December 1970, dissenting opinion of three out of eight Justices, quoting several older judgements.

²² Compare 39 BVerfGE 1, 42, Judgement of 25 February 1975.

²³ See 72 BVerfGE 105, 115, Decree of 24 April 1986.

²⁴ Compare 109 BVerfGE 279, 311, Judgement of 3 March 2004, with a dissenting vote by Lady Justices Jaeger and Hohmann-Dennhardt.

²⁵ See 115 BVerfGE 118, 152, Judgement of 15 February 2006, also repeating a hidden quotation of H. Goerlich, WERTORDNUNG UND GRUNDGESETZ, 78 (1973) as already to be found in 39 BVerfGE 1, 42.

B. HANDLING EUROPEAN INTEGRATION AND CHANGES IN THE PROCESS OF GERMAN UNIFICATION

Amendments of the constitution getting into conflict with its basic structure were necessary in other situations, too:

Firstly, as soon as the process of European integration started, the question was raised if Article 79 (3) would also protect against the transfer of state functions to the European institutions. In fact, this was a question of coordination and conciliation between Article 24 (1) and Article 79 (3) of the Basic Law. Some leading scholars also doubted if this was a matter of a change of the basic structure under Article 79 (3) at all.²⁶ Against such a treatment of questions of continuity of the state, it defends basic principles of the constitution independent of the question if the state shares public authority with some other institutions. These problems are not of much interest in the Indian context because they are unlikely to occur. Even questions of integration into an organisation like the WTO have not yet arisen even though there is a quest for supremacy of the new international law created and administered by such institutions.

Secondly, there was, as already mentioned, a conflict of basic principles of traditional Western understanding of law by constitutionalism in the process of unification of Germany: The ideas of the protection of human dignity, life and liberty, the protection of property and the rule of law were not as settled and relevant parts of law in the socialist East. Therefore, acts of the state or of the administration in East Germany which had to continue to be in force in the future could have been incompatible with Article 79 (3). But again, this is not a matter of interest for India.

Originally, Article 79 (3) was intended to put limits to changes of the Basic Law originating from the political forces in Germany. It aspired to guarantee the identity and continuity of the Constitution. It did not relate to other changes affecting the Constitution, mainly because they could not be conceived at that time. The Basic Law from the very beginning, however, conceived transfer of powers to international institutions in view of Article 24 (1).

The amount of transfer of powers to the European Community (EC) and to the European Union (EU) had two implications which caused the amendments of new Article 23. Firstly in the initial years, the treaties of the Community did not contain an explicit declaration of rights. Therefore, the supremacy of the EC law over the member states' national law including their national constitutions was not accepted by the Federal Constitutional Court as long as there was no equivalent to the basic rights of the Basic Law.

²⁶ Compare early variations in H. P. Ipsen, BVerfG versus EuGH - "Grundrechte" in: 10 *Europarecht*, 1 (1975); and lately Dreier, *supra* note 3, Rn. 57.

The Federal Constitutional Court withdrew from that agenda as the European Court of Justice found such rights in the required detail and clarity.²⁷

Further, the Federal Constitutional Court asserted that as long as the democratic structures are not established at the European level, ratifications of treaties enlarging the transfer of powers to that level are in danger of being invalidated. The major defects in that respect are that the voting rights to the European Parliament are not equal in weight because there are reserved seats for smaller nations as compared to larger populated members of the Union. The powers of the European Parliament are not equal to the powers of a sovereign national parliament. This argument has led to an enlargement of the powers and functions of the European Parliament. Also, it pressed to create a European Constitution. The project has failed so far, since popular votes in France and the Netherlands gave no majorities to the Treaty for a Constitution of the European Union, as signed in Rome in October 2004. Therefore, the quest is open as to how in future, these matters will be handled, both at the national German level and the European level. So far the judgment combines continuity of statehood as part of the protection granted by Article 79 (3) with its doubtlessly intended and clearly implied protection of democratic processes, as it relates to principles contained in Article 20.²⁸ This combination of statehood and democracy is heavily criticised by an outstanding young scholar who considers the democratic structures to be part of the game, most probably resulting in requirements for clear and distinct transfer of power to the European level and in an enhancement of democratic elements on the European level as mentioned above.²⁹

Further, violations of the rule of law might occur when European law is implemented by German legislation. This seemed to be the case when the national statute implementing the 'European warrant' was before the Judges of the Federal Constitutional Court. Such a warrant can be based on crimes which exist in Germany and not on crimes which exist only in the criminal code of other states of the European Union. Otherwise a person could be extradited under that warrant to another state of the Union, even though his act was lawful in Germany. Therefore, in the long run, the European warrant will lead to uniform legislation in substantive criminal law in the member states, if not to the emergence of a homogeneous European Criminal Law. While the majority invalidated the whole national statute ratifying the European warrant, one Judge voted in favour of declaring void only those clauses of that statute which were incompatible with the rule of law in the sense mentioned above.³⁰

²⁷ Compare 102 BVerfGE 147 seqq. Decree of 7 June 2000 – relating to the regulation putting limitations on trade with bananas protecting former colonies of certain member states of the EEC. For some background see H. Goerlich, *The Role of the Constitutional Court in the Resolution of Constitutional Disputes – A Critical Outline Guided by the German Example*, 44 JILI 1, at 23 (2002).

²⁸ See 89 BVerfGE 155, Judgement of 12 October 1993, relating to the Treaty of Maastricht.

²⁹ See CH. MOELLERS, STAAT ALS ARGUMENT 376 (2000).

³⁰ Compare 113 BVerfGE 273, Judgment of 18 July 2005, with dissenting opinion by Lady Justice Luebbe-Wolff. Early in May 2007 the press reported that the European Court of

As already mentioned, at the time of the reunification of Germany, there was a conflict between the basic principles of traditional Western understanding of law on the one hand and the necessity to uphold a wide range of law and administrative decisions of the German Democratic Republic on the other. This implied the dangerous possibility to violate ideas of the protection of human dignity, life and liberty as they had been spelt out in the rulings of the courts and in academic writing in West Germany and beyond. Also, the rule of law was to some extent endangered by this necessity. As mentioned above, clarifications were somewhat insufficient, but the courts did not step in, and with the passage of time the agenda has changed.

VI. FINAL REMARKS

The broad interpretation of human dignity and its link to life will cause further problems of adjustment with modern developments in medicine and biology, as much as it has already done in the area of self-determination at the eve of life. As these developments cannot be stopped by law, law has to cope with them. Similarly, as the end of traditional statehood in Europe is perceived, the law has to take account of it and find appropriate solutions. Even if a narrow interpretation is given to dignity, most of the human rights will remain untouchable, at least to the extent of core protection they provide to the individual. The same could be said for judicial review, democracy, rule of law, welfare, separation of powers, responsibility of government, free public opinion as basis of human rights and human dignity, and free personality.

As a whole, the concept of identity and continuity of a constitution, by giving its basic structure a safe status, is a success. It is an idea from the very beginning of constitutionalism in the Western world of Europe which can also be seen in Asia today.³¹

Conflicts with other concepts of constitutionalism such as '*pouvoir constituant*', majority rule, democracy, limits to supremacy of a given constitution, supremacy of supranational law in Europe, the transfer of powers from member states to that level, can be resolved through interpretation. In principle there is no tendency against the concept of 'basic structure' as such and the judicial practice has been able to handle all practical problems that have arisen so far.

Justice in Luxembourg has stated that the European warrant is structured according to the requirements of the European treaties as paramount European law of the European Union – ECJ Judgement of 3 May 2007, C-303/05.

³¹ D. Conrad, *supra* note 4, 479, listing how the idea was spread in Asia.

ANNEXURE

Excerpts of the Basic Law of the Federal Republic of Germany of 23
May 1949

Art. 79

(1)[...]

(2) Amendments of the Basic Law shall require two thirds of the Members of Parliament and two thirds in the Upper House.

(3) Amendments to this Basic Law affecting the division of the Federation into States, their participation on principle in the legislative process, or the principles laid down in articles 1 and 20 shall be inadmissible.

Art. 146 (old)³²

This Basic Law shall cease to be in force on the day on which a constitution adopted by a free decision of the German people comes into force.

Art. 146 (new)

This Basic Law, which since the achievement of the unity and freedom of Germany applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect.

Art. 1

(1) Human Dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and justice in the world.

(3) The following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law.

(Art.2 personal freedom, integrity, life, liberty etc.)

Art. 3

(1)[...]

(2)Men and women are equal. [...] (later amendment of 15 November 1994 by a sentence added, relating to affirmative action)

Art. 13 (old)

(1) The home is inviolable.

(2) Searches may be ordered only by a judge or, in the event of danger in delay, by other organs as provided by law and may be carried out only in the form prescribed by law.

(3) In all other respects, this inviolability may not be encroached upon or restricted except to avert a common danger or a mortal danger to individuals, or pursuant to a law, to prevent imminent danger to public safety and order, especially

³² Effective until 29 September 1990.

to alleviate the housing shortage, to combat the dangers of epidemics or to protect endangered juveniles.

Art. 13 (new)³³

(1) The home is inviolable.

(2) Searches may be authorized only by a judge or, when time is of the essence, by other authorities designated by the laws, and may be carried out only in the manner therein prescribed.

(3) If particular facts justify the suspicion that any person has committed an especially serious crime specifically defined by a law, technical means of acoustical surveillance of any home in which the suspect is supposedly staying may be employed pursuant to judicial order for the purpose of prosecuting the offence, provided that alternative methods of investigating the matter would be disproportionately difficult or unproductive. The authorization shall be for a limited time. The order shall be issued by a panel composed of three judges. When time is of the essence, it may also be issued by a single judge.

(4) To avert acute dangers to public safety, especially dangers to life or to the public, technical means of surveillance of the home may be employed only pursuant to judicial order. When time is of the essence, such measures may also be ordered by other authorities designated by a law; a judicial decision shall subsequently be obtained without delay.

(5) If technical means are contemplated solely for the protection of persons officially deployed in a home, the measure may be ordered by an authority designated by a law. The information thereby obtained may be otherwise used only for purposes of criminal prosecution or to avert danger and only if the legality of the measure has been previously determined by a judge; when time is of the essence, a judicial decision shall subsequently be obtained without delay.

(6) The Federal Government shall report to the Bundestag annually as to the employment of technical means pursuant to section 3 and, within the jurisdiction of the Federation, pursuant to section 4 and, insofar as judicial approval is required, pursuant to section 5 of this Article. A panel elected by the Bundestag shall exercise parliamentary control on the basis of this report. A comparable parliamentary control shall be afforded by the Laender.

(7) Interferences and restrictions shall otherwise only be permissible to avert a danger to the public or to the life of an individual, or, pursuant to a law, to confront an acute danger to public safety and order, in particular to relieve a housing shortage, to combat the danger of an epidemic, or to protect young persons at risk.

Art. 117

Law that is inconsistent with section 2 of article 3 of this Basic Law shall remain in force until adapted to that provision, but not beyond 31 March 1953.

Art. 20

(1) The Federal Republic of Germany is a democratic and social welfare state.

(2) All state authority is derived from the people. It shall be exercised by the people

³³ Effective in this version are Sections 2-4 since 28 March 1998.

through elections and other votes and through specific legislative , executive and judicial bodies.

(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

(4) All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available. (this section being added by amendment June 28, 1968)

Art. 19

(1)[...]

(2) In no case may the essence of a basic right be afflicted.

(3)[...]

(4) Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction is established, recourse shall be to the ordinary courts. The second sentence of section 2 of article 10 shall not be affected by this section.³⁴

Art. 10

(1) The privacy of correspondence, mail and telecommunications shall be inviolable.

(2) Restrictions may be ordered only pursuant to a law. If the restriction serves to protect the free democratic basic order or the existence or security of the Federation or of a state of the Federation, the law may provide that the person affected shall not be informed of the restriction and that recourse to the courts shall be replaced by a review of the case by agencies and auxiliary agencies appointed by the legislature.

Art. 143

The law in the territory specified in article 3 of the Unification Treaty may deviate from provisions extending no later than 31 December 1992 insofar and so long as disparate circumstances make full compliance impossible. Deviations may not violate section 2 of Article 19 and must be compatible with the principles specified in section 3 of Article 79.

Art. 23 (old, out of force since 29 September 1990, at the eve of unification), permitting accession of other, then still separated parts of Germany)

Initially, this Basic Law is effective in the territories of the Laender Baden, Bavaria, Bremen, Greater-Berlin, Hamburg, Hesse, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Schleswig-Holstein, Wuerttemberg-Baden and Wuerttemberg-Hohenzollern. In the other parts of Germany it has to be enforced after their accession.

Art. 23 (1) 3 (new)

The establishment of the European Union, as well as changes in its treaty foundations and comparable regulations that amend or supplement this Basic Law, or make such amendments or regulations possible, shall be subject to sections 2 and 3 of article 79.

³⁴ Inserted on 28 June 1968. Art. 10 (2) 2 of the Basic Law was also inserted on the same date.

