

INTRODUCTION TO THE GERMAN CONSTITUTION PROTECTION LAW (VERFASSUNGSSCHUTZRECHT)

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Abstract

The German constitution protection law represents the entirety of legal norms, which aim towards the protection of the free democratic fundamental order of Germany and towards the existence and security of the federation or of a land. The article represents a short introduction to this law domain and details its fundamentals and its actual regulation. As early as 1952 the Federal Constitutional Court of Germany defined the expression “free democratic fundamental order of Germany” as being one of the main objects of protection and defense of the German offices for the protection of the constitution. Handling with this subject has a specific importance, because Germany (as well) is one democratic state that adopted in the constitution a “democratic anti-extremist ideology”. The principle of militant democracy (wehrhafte Demokratie) was adopted by the constitutional legislator as a solution to the “democratic dilemma” of the 1920s, when the constitutionalists of the time asked themselves, if a democracy should have the right to dissolve itself through a democratic procedure. In this way, Germany created after the Second World War the offices for the protection of the constitution.

Keywords: *german law; protection of the constitution; Verfassungsschutzrecht; constitutional law; free democratic fundamental order of Germany; democracy; introduction; The German Federal Office for the Protection of the Constitution; Bundesamt für Verfassungsschutz*

“Democracy is the form of government that defends itself the least against its enemies. It seems like her tragic destiny, its neediness to feed also its biggest enemy at her own breast. In order to stay faithful to its ideals, she can also tolerate a movement directed against her and give her the same possibilities of development like to any other political movement. And so we see the weird drama of democracy, the thing, that she should be suppressed in its original form, in the moment when the people asks for the

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abolition of their own rights, that it itself gave, because one understands that the biggest enemy of a people is its own right”². A democracy is thus very hard to defend: on one hand, one has to guarantee the rights and the liberties of the citizens; on the other hand, these have to be protected against those citizens that would like the abolition of these rights. How may one achieve a perfect and just balance between the two?

After the Second World War, the so-called “Zero Hour” – the year 1945 – represented a new beginning for Germany. “The parents” of the German constitution had lived not only the national socialist dictatorship, but also the fall of the Weimar Republic. The experiences and the historical mistakes in the construction of the German constitutionalism played a very big part in the creation of the actual German Constitution³. The so-called “democratic dilemma” of the 1920s, when the constitutionalists of the time asked themselves the question, if a democracy should have the right to dissolve itself through a democratic procedure, was resolved by the new born Federal Republic of Germany through the concept of “militant democracy” (*wehrhafte Demokratie*)⁴. Nor being an exclusively anti-fascist instrument neither an exclusively anti-communist one, the principle of militant democracy was installed in post-war Germany as a “democratic anti-extremist ideology”, following the example of other western democracies⁵.

Within the frames of the numerous political discussions regarding the new constitution of Western Germany, the military governors of the Allied occupied zones sent a letter to the Parliament of the German Federal Republic regarding the German constitution (the so-called *Polizeibrief*). Through this letter it was permitted to the federal government to establish an office for the collection and transmission of information regarding internal movements against the German government – an office which would later be known as the “Federal German Office for the Protection of the Constitution” (*Bundesamt für Verfassungsschutz*)⁶.

Other democracies of the time didn’t set up such an office – the principle of militant democracy was not only defended, but also strong criticized and even described as being anti-democratic⁷. The German Federal Office for the Protection of the Constitution proved however at the beginning of the 1990s its important role in the fight against right wing extremism. Today, the necessity of observing and fighting the Islamic terrorism continuously reaffirms the importance of the offices for the protection of the constitutional order.

² Kelsen, *Verteidigung der Demokratie*, in: Jestaed/Lepsius (Hrsg.), *Verteidigung der Demokratie*, Tübingen, 2006, p. 237.

³ Grumke/Hüllen, *Der Verfassungsschutz*, Berlin, 2016, p. 13.

⁴ Grumke/Hüllen, pp. 14-15.

⁵ Grumke/Hüllen, p. 17.

⁶ Dorn, *Das Trennungsgesetz in verfassungshistorischer Perspektive*, p. 110.

⁷ Günther/Hölter/Kutscha/Landwehr/Renz-Polstorff, in: Kutscha/Paech (Hrsg.), *Im Staat der “inneren Sicherheit”*, Frankfurt am Main, 1981, p. 66.

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How may one achieve the security of freedom through the shrinking of the freedom? The Constitution of Germany tried, as every other democratic constitution, to find an optimal relation between security and freedom and to set up specific instruments to defend the democracy. The German Federal Office for the Protection of the Constitution was created after the coming into effect of the German constitution in 1949 as an instrument of a militant democracy. The German constitution protection law is the branch of the law that bases itself on this constitutional principle of militant democracy.

1. Legal base of the German constitution protection law

The constitution of Germany mentions the expression “constitution protection” in two places. In the Article 73 para. (1) nr. 10 letter b) GC⁸ it offers the federation a legislative competence regarding the collaboration between the federation and the lands in the domain of the protection of the constitution. Through Article 87 para. (1) s. 2 GC it is allowed to the federation to set up central organs for the collection of information regarding the protection of the constitution.

In the Article 73 para. (1) nr. 10 letter b) GC the expression “protection of the constitution” is legally defined as being the protection of the free democratic fundamental order, of the existence and of the security of the federation or of a land. Article 87 para. (1) s. 2 GC sets up a connection with the aforementioned article and allows the federation to create central organs with the purpose of collecting information for the protection of the constitution, therefore for the protection of the free democratic fundamental order, of the existence and of the security of the federation or of a land.

Based on these constitutional rules, one can identify three different meanings of the expression “protection of the constitution”. It firstly denotes a constitutional obligation of the state, that to protect the constitution. Secondly, it describes an activity of the state, that to collect information for the protection of the constitution. Last, but not least, it points out a specific state office, that undertakes activities to collect information with the purpose of protecting the constitution.

The protection of the constitution defined as a “state activity” or as a “state office” represents specific aspects. Seen as a “constitutional obligation”, the protection of the constitution represents the basis of legal norms that have the specific purpose the protection of the free democratic fundamental order, of the existence and of the security of the federation or of a land.

⁸ Constitution of Germany – Grundgesetz für die Bundesrepublik Deutschland, BGBl. III 100-1, with its last modification through Article 1 of the Law from 23rd December 2014 (BGBl. I P. 2438).

2. Definition of the German constitution protection law

The German constitution protection law represents thereby the entirety of legal norms, which have as purpose the protection of the free democratic fundamental order, of the existence and of the security of the federation or of a land. Comparing it to the German state protection law, which comprises the entirety of legal norms referring at the protection of the existence of the state and of its fundamental institutions against internal and external attacks, the German constitution is referring only to the protection of some specific elements. Regarding this matter, the object of the protection of the constitution comprises according to the definition three specific elements: the free democratic fundamental order, the existence of the federation or of a land and the security of the federation or of a land.

“The free democratic fundamental order” does not have a specific legal definition in the constitution of Germany; however in 1952 the Federal Constitutional Court of Germany, in a decision regarding the ban of the Reich’s Socialist Party⁹, gave the following definition to the expression: “it is an order, that represents the authority of the rule of law and bases itself on the self-determination right of the people, accordingly to the respective will of the majority, on freedom and on equality, while excluding any form of tyranny and despotism”¹⁰. The Federal Constitutional Court of Germany specified at the time the following principles as being the essence of the free democratic fundamental order: the fundamental rights (especially the right to life – Article 2 para. (2) s. 1 GC – and the right to the free development of the personality – Article 2 para. (2) GC), the sovereignty of the people [Article 20 para. (2) s. 1 GC], the separation of powers in the state [Article 20 para. (2) s. 2 GC], the accountability of the government, the lawfulness of the administration [Article 20 para. (3) GC], the independence of the courts [Article 19 para. (4), Article 20 para. (3), Article 101 para. (1) s. 1 GC], the political pluralism [Article 21 para. (1) s. 2, Article 21 para. (2) GC] and the chance equality for all parties and their right to establish and run a form of opposition in accordance with the constitutional order [for example, Article 42 para. (1), Article 63 para. (2) s. 1, Article 67 par. 1 GC and others]¹¹. The Federal Constitutional Court of Germany developed later the catalogue of the elements that are comprised by the expression “free democratic fundamental order” and added to the aforementioned also the free speech, the open and free process of the formation of the will of the people, the liberty of information, of press and of radio, the responsibility of state regarding religious neutrality and life philosophies and the liberty of religion¹². In January 2017 the Federal Constitutional Court revised its opinion, stating that the definition of the expression “free democratic fundamental order” in the sense of Article 21 para. (2) GC

⁹ BVerfGE 2, 1.

¹⁰ BVerfGE 2, 1, p. 12.

¹¹ See also Droste, *Handbuch des Verfassungsschutzrechts*, Stuttgart, 2007, p. 197.

¹² See, for example, BVerfGE 7, 198; BVerfGE 44, 125; BVerfGE 77, 65; BVerfGE 27, 195; BVerfGE 137, 273.

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through a big catalogue of elements is too inaccurate¹³. Taking this into account, the defining elements for the free democratic fundamental order of Germany would be the human dignity [Article 1 para. (1) GC], the principle of democracy and the principle of the rule of law¹⁴.

The expression “existence of the federation or of a land” implies the territorial integrity and the state independence. When one is talking about “security of the federation or of a land” in the sense of Article 73 para. (1) nr. 10b GC, one is referring itself at the safety of the institutions of the federation and of the lands, at their administration and at the free and peaceful cohabitation of the citizens¹⁵.

The Constitution of Germany and the German constitutional jurisprudence offer as a conclusion numerous hints regarding the constitution protection law and its objects. Since, as we have seen, these serve major interests, the legal norms with the purpose to protect the free democratic fundamental order, the existence and the security of the federation or of a land can be found in all major branches of German law.

3. Branches of the German constitution protection law

Firstly, one can talk about the existence of a “constitutional constitution protection law”, which comprises as well other constitutional norms, not only those aforementioned, for example: the procedure of banning associations in Article 9 para. (2) GC, the procedure of the Federal Constitutional Court to declare the loss of some fundamental rights by the persons that use them against the free democratic fundamental order (Article 18 GC), the declaration of unconstitutionality of some parties in Article 21 para. (2) GC, the replacement of judges that act against the constitutional order by the Federal Constitutional Court according to Article 98 para. (2), (5) GC or the requisition and the intervention of the police and of the German Federal Border Force in internal urgent matters (Article 91 GC).

The administrative constitution protection law specifies the constitutional law¹⁶ and regulates especially the organization of the Federal Office for the Protection of the Constitution, its responsibilities, competencies, definitions of the to-be-protected objects and the general function of the Office. The most important law regarding these things is the Federal Constitution Protection Law (*Bundesverfassungsschutzgesetz*). According to § 3 BVerfSchG¹⁷ the responsibilities of the German offices for the

¹³ BVerfG, Decision from 17 Januarie 2017 – 2 BvB 1/13 –, juris Rn. 535.

¹⁴ BVerfG, Decision from 17 Januarie 2017 – 2 BvB 1/13 –, juris Rn. 538 ff.

¹⁵ Sanwald, in Schmidt-Bleibtreu/Hofmann/Hopfauf, *GG – Kommentar zum Grundgesetz*, Köln, 2011, Article 73, Rn. 128.

¹⁶ Ibler, in Ibler (Hrsg.), *Verwaltung, Verfassung, Kirche. Konstanzer Symposium aus Anlass des 80. Geburtstages von Hartmut Maurer*, München, 2012, pp. 1-16.

¹⁷ Federal Constitution Protection Law – Bundesverfassungsschutzgesetz from 20th December 1990 (BGBl. I P. 2954, 2970), with its last modification through Article 4 of the Law from 4th of November 2016 (BGBl. I P. 2473).

protection of the constitution are the collection and the transmission of information, particularly communications, news, messages or documents regarding things or persons, over: 1) movements, that are directed against the free democratic fundamental order, against the existence or the security of the federation of a land or that have as purpose the lesion of the administration of the constitutional state offices of the federation, of a land or of one of its members; 2) secret activities of a foreign power or activities that endanger security in the activity domain of this law; 3) movements in the activity domain of this law, that endanger the external interests of the Federal Republic of Germany through use of force or through actions that prepare this thing; 4) movements in the activity domain of this law, that are directed against the reciprocal understanding of the people of the world [Article 9 para. (2) GC], especially against the peaceful cohabitation of the people of the world [Article 26 para. (1) GC]. The German Federal Office for the Protection of the Constitution and the land-offices for the protection of the constitution represent in this sense the specific state offices with direct responsibilities in the area of constitution protection.

The criminal constitution protection law regulates several offences that can either be carried on by the citizens that act against the free democratic fundamental order (for example, § 80 StGB¹⁸ – “Preparing of a war of aggression”; § 80a – “Instigation to a war of aggression”; § 81 – “High Treason against the State”) or by the employees of the offices for the protection of the constitution (for example, § 201 StGB – “Violation of confidentiality”; § 202 StGB – “Violation of the privacy of correspondence”). The criminal procedural constitution protection law comprises diverse articles regarding the transmission of personal data (ex. § 474 para. (2) StPO¹⁹).

The civil and procedural civil constitution protection law regulates especially the ways in which the citizens can obtain reparations from the offices for the protection of the constitution, for example in case of inadmissible or incorrectly collecting, editing or using personal data (§ 7 BDSG²⁰).

4. Final exposition

The present constitution of Germany, the result of the German constitutional history, contains the principle of militant democracy as a part of a state democratic anti-extremist ideology and requires the creation of certain instruments to protect the specific forms of the fundamental order of the Federal Republic of Germany. In this sense, the German constitution protection law represents the entirety of legal norms,

¹⁸ The Criminal Code of Germany (BGBl. I S. 3322), with its last modification through Article 2 para. (4) of the Law from 22nd of December 2016 (BGBl. I S. 3150)(StGB).

¹⁹ The Criminal Procedure Code of Germany (BGBl. I S. 1074, 1319), with its last modification through Article 3 para. (5) of the Law from 23rd December 2016 (BGBl. I S. 3346)(StPO).

²⁰ German Federal Law regarding Protection of Data, BGBl. I S. 66, with its last modification through Article 1 of the Law from 25th February 2015 (BGBl. I S. 162).

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which serve the purpose of protecting the free democratic fundamental order, the existence and the security of the federation or of a land.

The constitution of Germany is the only constitution in the world that contains legal norms regarding an intelligence office²¹. The protection of the constitution through the constitution is not only legitimized by some legal norms, but also by the essence of the constitution, seen as a unitary whole. Only then, when the free democratic fundamental order as an essence of the constitution is protected, one may guarantee the citizens a life in dignity, liberty and equality. That is why the protection of the constitution as a “constitutional obligation” does not only need to be particularized in the big branches of German law; it also has to be assumed by the state offices, within the frames of a political protection of the constitution.

²¹ Droste, *cited paper*, p. 602.