

The principle of democracy as a fundamental value and constitutional principle and the role of the electoral law in a democratic constitutional state

I. Democracy as one among several fundamental values and ideas in the modern constitutional state

- the enshrining of fundamental values and ideas in fundamental constitutional principles defining the identity of the constitution
- the principle of democracy as a common fundamental constitutional principle in modern constitutions
- other common fundamental values and ideas (separation of powers, rule of law, protection of human rights, social justice/solidarity, human dignity, principle of the federal/unitary state etc.)
- the need to reconcile democracy with other constitutional values
 - in particular: Democracy cannot legitimise violations of human rights or the rule of law!

II. The vague politico-philosophical concept of democracy

1) Historical backgrounds

- Greek city-states and Roman Republic
- the French and the American Revolution
- the long and often interrupted way towards the modern democracy

2) Backgrounds in the history of ideas

- ARISTOTELES (Politeia, 4th century b.c.)
- JEAN-JACQUES ROUSSEAU (Du contract social ou Principes du droit politique, 1762)
- ABBE SIEYES (Qu'est-ce que le Tiers État?, 1789)

3) A still vague theoretical concept further developed by practice

- different concretisations of the same fundamental idea in different states under different constitutions
- the need to interpret the principle of democracy in the national constitution in the context of this constitution
- the distinction between core elements and marginal elements of democracy in the general theory of state

4) Democracy under the German Basic Law of 1949: the rule of the free and equals

- a close connection between democracy and the fundamental value of *human dignity*, understood as the self-determination of the free and equal
 - a strong influence of the philosophy of IMMANUEL KANT
- democracy as *identity of the rulers and the ruled*
 - rule of the entirety, not of an individual (monocracy) or of a few (oligarchy)

III. Fundamentals of democracy

1) The requirement of an uninterrupted chain of legitimation for all acting of public institutions

- even of the acting of the lowest officer in the least important agency

2) The derivation of all public power from the people (sovereignty of the people)

- problem: a plurality of peoples in multilevel systems such as the EU?
 - Can there be a European Union people besides the peoples of the member states? What would be its role in the adoption of a European constitution?
 - Can there be a regional people inside the people of the state in federal states or in autonomous regions in unitary states?
- problem: Who belongs to the people?
 - PART OF DOCTRINE/POLITICIANS: also long-term foreign residents with the center of their life in the country (generous, social concept of people)
 - GERMAN FEDERAL CONSTITUTIONAL COURT (BVerfGE 83, 37): only those with national citizenship; participation of foreign residents requires particular constitutional basis (narrow concept of people)
 - the right of EU citizens to vote and to stand as a candidate in the member state of their residence in municipal elections and elections to the European Parliament (art. 22 FEU Treaty; see for Germany also art. 28(1) phrase 3 BL)

3) The requirement of regular elections

- elections with a real choice for the voter
- regular elections: the term of office of all elected persons must be limited

4) The principle of majority rule

- includes the legitimacy and authority of any majority decision - even if it is stupid or wrong (no rule of elites!)

5) Protection of minorities and pluralism

- guarantee of the right of the minority to assemble, organise and articulate
- guarantee of the chance of the minority to become the majority in future fair election
 - this is in particular the role of the electoral law in a democratic state
- maintenance and promotion of a *pluralistic culture*, bringing together different fundamental political approaches and different stakeholders in a constructive debate
 - therefore, in any democratic state, *enemies of pluralism are enemies of society!*

6) Publicity and transparency of the decision making; broad public discourse

- therefore, the protection and enforcement of all fundamental rights guaranteeing free communication is vital in a democratic state
- problem: the need of a cross-language discourse in a supranational democracy
- problem: the derationalisation and the rise of hate speech in public debates
- problem: the manipulation of the public debate by bots and fake news - a world-wide threat for democracy

IV. Direct (representative) and indirect (plebiscitarian) democracy

1) The two ways of practising democracy

- direct democracy as "natural" way to practice democracy
 - people's assemblies in ancient Greek, of Germanic tribes, indigenous people etc.
- the need to complement direct democracy by representation from the beginning

2) The decision of modern constitutions for representative democracy

- impossible to run a state on a predominating concept of direct democracy
- sovereignty of the people does *not* mean that all important decisions are taken by the people
- fair elections in an orderly procedure as essential acts of democratic legitimisation

3) The risk of distortions in a system of representative democracy

- the risk of people's representatives taking extremely unpopular decisions
- the risk of complicated compromises with a result that nobody really wanted
- the risk of alienation of the people from the concept of democracy
 - in particular: the risk of *populism* leading to authoritarian systems

4) The complementation of representative democracy by elements of plebiscitarian democracy in modern constitutional systems

- instruments: popular initiatives, popular petitions, referenda, consultative referenda etc. (inconsistent, varying terminology)
- the reluctance of most modern constitutions to allow plebiscits
 - however, strong, living tradition of plebiscits in some smaller countries (in particular Switzerland)
- problem: introduction of plebiscitarian elements without particular constitutional basis?
 - the risk of a distortion/breach of the constitutional distribution of powers
 - special problem: consultative referenda without particular constitutional basis?
- the need to regulate elements of plebiscitarian democracy in detail in elaborated laws

V. Parliamentary and presidential democracy

- the distinction between presidential systems (e.g. U.S.), semi-presidential systems (e.g. France) and parliamentary systems (e.g. U.K., Germany)
- the important role of the parliament even in presidential systems, due to the principle of statutory reservation, which requires a legal basis for any restriction on fundamental rights
- different basic concepts for the electoral law in parliamentary and presidential systems?
- YOUR CONTRIBUTION: the characteristics of the Indonesian system:

VI. The role of political parties in the democracy

- the concept of political party
- the emergence and development of political parties
- the functions of the political parties
 - in particular the function as intermediaries between state and society (emphasized in Germany in art. 21 BL and sect. 1 of the Political Parties Act)
- the legal status of the political parties
 - in particular: political parties as constitutional institutions
 - in particular: obstacles to the prohibition of political parties
- the role of the political parties in the parliamentary and presidential elections
- the *principle of equal chances for political parties*
 - implemented in particular (but not only) in the electoral law

VII. The protection of democracy against its enemies

1) The concept of the "defensive democracy" ["wehrhafte Demokratie"]

- first developed by the German-American scholar KARL LOEWENSTEIN after the downfall of the democratic Weimar Republic in 1933
- democracy must protect itself against those who want to destroy it, whether from inside or outside the system, even if this entails restrictions of fundamental freedoms
- democratic systems not taking precautions against possible threats will perish

2) Precautions and instruments for the protection of democracy

- numerous examples in the German Basic Law of 1949 as reaction of the downfall of the democratic Weimar Republic in 1933
- the prohibition of associations whose aims or activities are directed against the constitutional order (see for Germany art. 9(2) BL)
- the declaration of the forfeiture of certain basic rights (see art. 18 BL; only by Federal Constit. Court)
- the defense of the constitution by specialised intelligence services (in Germany a Federal Office and State Offices for the Protection of the Constitution)
- the forced transfer or retirement of judges (intentionally) violating the constitution (see, for example, art. 98(2) BL)
- impeachment of the President of the State for (intentional) violation of the constitution (see, for example, the impeachment of the German Federal President before the Federal Constit. Court, art. 61 BL)
- *loyalty to the constitution and willingness to defend the constitution as basic requirements for being a public servant* (see for Germany BVerfGE 39, 334)
- the special *fundamental right to resist* against attempts to abolish the free and democratic constitutional order (see, for Germany, art. 20(4) BL; this right may include the right to use violence!)

3) In particular: the prohibition of anti-democratic political parties

(→ presented by the example of Germany, cf. art. 21(2, 4) BL, sect. 13 no. 2, 43 et seq. FCC Act)

- political parties seeking to undermine or abolish the free and democratic constitutional order can be *declared unconstitutional*
- to avoid abuse, the power to do so is reserved to the *Federal Constitutional Court*
 - applications can be submitted by the German Bundestag, the Federal Council, the Federal Government or, if the party is limited to a Land, the Land government
- the declaration of unconstitutionality entails the party's dissolution and the prohibition to establish substitute organisations; party members lose their seats in the parliaments and local councils
- to prevent even the appearance of abuse, the Federal Constitutional Court requires sound evidence that the party pursues its goal in an *actively militant aggressive manner*; therefore, applications need long, thorough preparation
 - so far *only two successful cases* in 1952 and 1956
 - in 2003, an attempt to prohibit the right-wing extremist party NPD failed because state undercover agents and investigators had infiltrated and were influencing the party's executive committees
 - in 2017, a second attempt failed, although the Court assessed the party as unconstitutional, because it now required that it is at least possible that the party's actions against the free and democratic basic order could be successful; scholars object that this makes the instrument almost inoperable
- résumé: an important, useful instrument, but it must not be weakened by a too restrictive jurisprudence of the Constitutional Court

VIII. The special problem of maintaining and implementing democracy within the process of supranational European integration

- problem: the tendency of governmentalisation and deparliamentarisation in the process of European integration
- warning of the German Federal Constitutional Court of threats to democracy on the national and European level (BVerfGE 89, 155 - Maastricht judgement; BVerfGE 123, 268 - Lisbon judgement)
- a shame but reality: until today no unitary European electoral law (but a cacophony of 27 different national laws) for the election of the European Parliament