

Principles of electoral law in a democratic state - the example of Germany -

Art. 38(1) phrase 1 of the German Basic Law:

Members of the German Bundestag shall be elected in general, direct, free, equal and secret elections.

See also Art. 22E(1) of the Constitution of the Republic of Indonesia of 1945:

General elections shall be conducted in a direct, general, free, secret, honest, and fair manner once every five years.

I. The legal significance of the principles of electoral law

- *constitutional principles*, directly binding but concretised and implemented by ordinary law
- constitutional *rights of the citizen* that he can enforce by constitutional complaint before the Federal Constitutional Court

II. The principle of general elections

- a special manifestation of the general principle of equality
- no exclusion of any sections of the population: all *German citizens* may participate as voters and candidates, irrespective of their sex, ethnical background, origin, income and property, education, status or religious affiliation
 - however, *foreigners* may only be admitted if there is a specific constitutional basis for it
- eligibility requires age of 18; disqualification from voting in case of custodianship, mental disease or of judicial decision after certain crimes against democracy

III. The principle of direct elections

- representatives are elected by the voters themselves - no "electors" or other intermediaries with own discretion
 - no electors as in Germany in the 19th century and no electoral college as for the presidential elections in the U.S.A.
- lists presented by the parties cannot be altered later
- successors in case of death must be determined before the elections (alternative solution in other democratic states: by-elections)

IV. The principle of free elections

- an essential requirement in a democracy: only free elections can provide legitimacy!
- voters must form their opinion and vote in an *open and free process without any pressure* or other undue external influence on their decision-making autonomy
 - important for the distinction between real democracies and authoritarian fake democracies (Russia, Turkey etc.)
- requires *protection* of the voter *against any pressure by private persons* (employers, husbands, parents, social or religious groups etc.)
- includes the freedom to decide not to vote - no compulsory vote (DISPUTED)
- includes the freedom to nominate candidates (no monopoly of the parties or certain parties)
 - this principle would not allow a "presidential threshold" as in Indonesia

V. The principle of equal elections

- a special, strictly formal manifestation of the general principle of equality
- all voters shall have the same influence on the election outcome; all candidates shall have equal opportunities
- does not apply to the elections for the European Parliament with regard to the citizens of the various EU member states, due to the degressively proportional representation of the citizens (art. 14(2) phrase 3 EU Treaty)

1) Equal "count value" of all votes

- strictly "one man one vote" (no three-class franchise system as in Prussia)

2) Equal "success value" of all votes

- requirements vary depending on the electoral system chosen by the legislator
- in case of majority voting, constituencies must be of the same size
- in case of proportional representation, any deviation from strict proportionality must be justified by *specific imperative reasons*
 - overhang mandates caused by the German special system of personalised proportional representation (with two votes) must be compensated by compensatory mandates for other parties
 - the election threshold of 5 % is considered justified for the national and regional elections but not for the multi-party European elections by the need to ensure the functioning of the parliament

VI. The principle of secret elections

- vital to ensure the freedom of the elections
- requires precautions of the state to ensure the secrecy of the vote in practice (in particular severe precautions in case of postal voting)
- prohibits any pressure of private persons on the voter in order to make him disclose his decision
- prohibits any taking of photos or videos in the polling booth (see § 56(2) Federal Elections Regulations)

VII. The principle of public elections

- derived by the Federal Constitutional Court from art. 38(1) BL and the fundamental ideas of democracy, republic and rule of law (art. 20 BL)
- imperative in any representative democracy in order to ensure *transparency* and, thus, the trust of the citizen in the integrity of the elections
- requires that all steps in the election process (except the voting itself), in particular the nomination of the candidates and the counting of the votes, are carried out in front of the public
 - this includes the right of the citizen to be present in the polling station during the poll and the counting of votes and while the election result is established
 - in case of the use of voting machines all relevant steps in the determination of the election result must be comprehensible for the voter

VIII. Honesty and fairness in German electoral law

- see the principles of free, equal, secret and public elections
- note that *bribing voters* is a crime in Germany - *for both sides!* (see sect. 108b Criminal Code)