

Defensive Democracy in Germany - Precautions and Instruments in Constitutional and Administrative Law to prevent Authoritarianism

I. Democracy, human rights, rule of law: three fundamental concepts of modern constitutionalism under permanent threat

- democracies are not stable: in history, most have turned once or several times into authoritarianism
- the enemies of democracy never stop fighting it:
 - corrupt former elites thriving to regain their unjustified privileges
 - political and religious extremists of all kinds trying to impose their totalitarian ideology and to eliminate freedom
 - ultra-conservatives defending "traditional" (= anti-democratic & anti-human rights) values
- the classical ways to abolish democracy: coup d'état and revolution
- the modern way to abolish democracy: winning elections with populist policies and undermining democracy from within
 - see for examples and methods my practical instruction "How to become a dictator"?² from my courses

II. The concept of *defensive democracy* [wehrhafte Demokratie]

- also called "militant democracy" ["streitbare Demokratie"]
- first developed in 1937 by the originally German scholar KARL LOEWENSTEIN, who had emigrated to the USA, in reaction to the downfall of the democratic Weimar Republic
- basic idea: *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 will perish*
- nowadays implemented in numerous democratic countries
- a concept to protect a functioning democracy against abuse, not to compensate for the flaws of a dysfunctional political system under a poorly conceived constitution

III. The role of constitutional and administrative law in the defence of democracy

- most precautions and instruments involve sensitive restrictions of political rights and therefore necessitate an explicit or at least clear *constitutional basis*
- while they are provided for in the constitution, they need to be *regulated in detail in ordinary laws*, which form part of the *state organizational law or of administrative law*
- the respective constitutional and ordinary law must be seen as a unity, the latter interpreted and applied strictly in line with the constitution; this may leave little room for genuine administrative law concepts

IV. The implementation of the concept of defensive democracy in the German constitutional and administrative law

1. A constitution learning from the failures of its predecessor
 - the Basic Law of the Federal Republic of Germany of 1949 - an innovative constitution, avoiding in many aspects the flaws of the Weimar Constitution of 1919, which led to National Socialist rule, successfully organizing a stable, capable and defensive democracy
2. A system building primarily on the effective control of public power by the independent judiciary
 - most important for the defence of democracy is the *judicial defence against authoritarian measures*
 - powerful courts, incl. specialised administrative courts, with judges enjoying judicial independence (art. 97 BL), and a *fundamental right to effective legal protection against public authority* (cf. art. 19(4) BL) shall prevent any authoritarian measures that would violate political freedoms or other fund. rights
 - *fundamental rights as directly binding law* (art. 1(3) BL) mandate every court, within its jurisdiction, to defend them
 - a Federal Constitutional Court (FCC) with comprehensive jurisdiction, especially abstract and concrete constitutional review of laws and to consider individual constitutional complaints, shall prevent authoritarian laws that violate democratic principles, the rule of law or fund. rights
 - the risk of judges colluding with an authoritarian government is low, since court decisions violating fund. rights would be challenged before the FCC by constitutional complaint
 - judicial control has a *double function*: to protect against authoritarian measures but also against abusive or excessive measures of defensive democracy which would constitute a threat to democracy themselves
 - essential pre-legal condition: the *professionalism and integrity of the judges* and the *trust of the citizens in the courts*
 - judges in Germany highly qualified, not corrupt, show high professional ethics and enjoy high reputation
 - judges not only legally but also intellectually independent, having no regard for the will of state or religious authorities, social pressure groups or the population
 - in particular strict political neutrality of constitutional judges

¹ DAAD Lecturer in Law at Universitas Gadjah Mada, Yogyakarta; Außerplanmäßiger Professor (adjunct professor) at the University of Göttingen; www.thomas-schmitz-yogyakarta.id, www.jura.uni-goettingen.de/schmitz; E-Mail: tschmit1@gwdg.de

² Underlined text passages indicate links to relevant internet resources. Just click on the link in the pdf file!

3. The individual precautions and instruments to defend democracy

- *high protection against abuse*: where the following instruments require a *decision of the Federal Constitutional Court*, it must be taken by *two-thirds majority* (sect. 15(4) phrase 1 FCC Act)
- a) Prohibition of political parties seeking to undermine or abolish the free and democratic basic order (art. 21(2, 4) BL, sect. 13 no. 2, 43 et seq. FCC Act, sect. 32 et seq. Political Parties Act)
 - such parties can be *declared unconstitutional* by the Federal Constitutional Court on application of 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
 - the Federal Constitutional Court requires sound evidence that the party pursues its goal in an *actively militant aggressive manner* (cf. BVerfGE 5, 85, 141³); 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 (cf. BVerfGE 107, 339)
 - 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* (cf. BVerfGE 144, 20⁴); scholars object that this makes the instrument almost inoperable
- b) Exclusion of such parties, if not prohibited, from public party funding (art. 21(3, 4) BL, sect. 13 no. 2, 43 et seq. FCC Act, 18(7) phrase 2 Political Parties Act)
 - a new instrument introduced in reaction to the FCC's controversial decision of 2017
 - if unconstitutional parties cannot be prohibited, they shall at least not profit from the partial funding of political parties by the state
 - the declaration of the exclusion is again reserved to the Federal Constitutional Court
 - in 2019, an application was filed against the right-wing extremist party NPD
- c) Prohibition of associations whose aims or activities are directed against the constitutional order (art. 9(2) BL, sect. 3 et seq. Associations Act)
 - only if aim is pursued in an actively militant aggressive way
 - by the Federal Ministry of the Interior and Community (transregional associations) or Land authorities (local & regional associations)
 - usually combined with seizure and confiscation of the association's assets
 - extends also to substitute organisations (difficult to determine in practice)
 - attempts to maintain and continue the banned association are punishable
 - between 1964 and 2021 FMI banned 20 right-wing, 1 left-wing and 15 Islamist extremist groups
 - not a controversial instrument but also not so effective, since extremists can easily regroup and also nowadays tend to organize not in larger organisations but in decentralised networks
- d) Loyalty to the constitution and willingness to defend it as basic requirements for being a civil servant
 - confirmed by the Federal Constitutional Court (BVerfGE 39, 334⁵) as one of the traditional principles of professional civil service (cf. art. 33(5) BL), regulated by civil service law (sect. 33(1) Civil Servant Status Act, sect. 7(1) no. 2 Federal Civil Servants Act and corresponding Land law)
 - only those may be appointed as civil servants who *offer the guarantee of standing up at all times for the free and democratic basic order*
 - active supporters of extremist ideologies fighting this order are denied access to or excluded from the civil service
 - often relates to teachers, professors, police officers and soldiers
 - affects traditionally communists, fascists and Islamists, but recently new kinds of extremists have been identified among civil servants ("Reichsbürger", "Selbstverwalter", extremist "Querdenker", esotarians and anti-vaxxers)
 - the conditions in detail have always been and are still controversial
 - practice has changed significantly over time, often focusing biasedly rather on left-wing than right-wing extremists
- e) Declaration of forfeiture of certain fundamental rights (art. 18 BL, sect. 13 no. 1, 36 et seq. FCC Act)
 - whoever abuses the freedoms to express his opinion, of the press, of academic teaching, of assembly and of association, the privacy of correspondence, posts and telecommunications or the rights of property or asylum to combat the free and democratic basic order, forfeits these rights
 - the Federal Constitutional Court, on application of the German Bundestag, the Federal Government or a Land government
 - declares the forfeiture, may limit it (to at least one year) and specifies the forfeited rights
 - may impose specified restrictions, which will allow authorities to intervene without further legal basis
 - may also deny the right to vote and stand for election and the capacity to hold public office during the forfeiture
 - instrument *never applied in practice* but an important *reserve weapon* for future battles to preserve democracy
- f) Forced transfer or retirement of judges violating the principles of the Basic Law or the constitutional order of a Land (art. 98(2) BL and corresponding Land law, sect. 13 no. 9, 58 et seq. FCC Act)
 - by the Federal Constitutional Court, on impeachment by the German Bundestag
 - only in case of violation of core principles of the constitution; DISPUTED if only in case of militant aggressive attitude of the judge
 - instrument *not yet used in practice* but currently discussed in the case of a right-wing extremist judge in Saxony

³ Entscheidungen des Bundesverfassungsgerichts [Decisions of the Federal Constitutional Court], vol. 5, p. 85 ff., cited passage at p. 141; excerpts in English translation at *Christian Bumke; Andreas Voßkuhle*, German Constitutional Law. Introduction, Cases and Principles, 2019, no. 1510 ff.

⁴ English translation available at <https://germanlawarchive.iuscomp.org/?p=2250>.

⁵ Excerpts in English translation at *Christian Bumke; Andreas Voßkuhle* (note 3), no. 1799 ff.

- g) Impeachment of the Federal President for intentional violation of the Basic Law (art. 61 BL, sect. 13 no. 4, 49 et seq. FCC Act)
- by the German Bundestag or the Federal Council (with two-thirds majority), before the Federal Constitutional Court
 - not yet used in practice
- h) Defence of the constitution by specialised domestic intelligence services [Verfassungsschutz] (art. 73(1) no. 10, 87(1) BL, Federal Act on the Protection of the Constitution, Constitution Protection Acts of the Länder)
- not regulated but assumed in the Basic Law, which grants the Federation the competence to regulate the cooperation between the Federation and the Länder for the protection of the free and democratic basic order
 - a German domestic intelligence community for the protection of the constitution [Verfassungsschutzverband] with the mission to collect, analyse, evaluate and report information about any anti-constitutional endeavours, consisting of
 - a *Federal Office for the Protection of the Constitution* [Bundesamt für Verfassungsschutz] and
 - constitution protection authorities of the Länder
 - the agencies may use intelligence means (confidential informants, undercover agents, observation, visual and audio surveillance etc.) but have *no police powers* and no authority to issue instructions
 - the collected intelligence is presented to policymakers and authorised authorities to be used for the purposes of the other instruments of defensive democracy
 - furthermore, each agency publishes an *annual report on the protection of the constitution*
 - all agencies are submitted to comprehensive *administrative and parliamentary oversight and judicial control*
 - for a long time, civil society organisations have reproached the agencies for being "blind in the right eye"; the former president of the Federal Office, Hans-Georg Maaßen, turned out to be a right-wing radical himself
- i) Exclusion of untrue allegations of facts from the scope of protection of the freedom of opinion (art. 5(1) phrase 1 BL)
- in Germany, the freedom to express one's opinions relates to *opinions* (= value-judgements); statements of facts are only protected because - and insofar as - they are a prerequisite for the formation of opinions
 - proven false or deliberately untrue allegations of facts cannot contribute constructively to this process and therefore are a priori not protected by this freedom⁶
 - a "right to lie" only exists under the general freedom of action (art. 2(1) BL), which can be restricted much more easily in pursuit of any public interest or to protect the rights of others
 - this allows the public authorities to *easily combat the spread of fake news*, and thus, disinformation campaigns that can destabilize democracy - if they want and have the necessary resources
- j) A special fundamental right to resist against attempts to abolish the free and democratic basic order (art. 20(4) BL)
- a reaction to the missing resistance of the German citizens against the tyranny of the National Socialists
 - a fund. right which may include the right to violence, even to serious violence!
 - however, only if no other remedy is available, in particular legal remedies to the courts and the Federal Constitutional Court are not any more available or unlikely to succeed
 - thus, an important symbol but for most citizens in case of need a rather theoretical option

V. Conclusion

- a rich set of precautions and instruments that need to be used but not abused, prudently and moderately but consistently and without bias against all kinds of extremism which really constitute a threat to democracy - a difficult tightrope
- an important role of judicial control - but also of the control by the public in the democratic process

Further Reading

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⁶ Established jurisprudence of the Federal Constitutional Court, cf. BVerfGE 85, 1 (15); 54, 208 (219); 61, 1 (8); 90, 241.