

Fostering Constitutional Resilience: The Concept of Defensive Democracy in the Basic Law

I. The fragility of democracy

1. Democracy, human rights, rule of law: three fundamental concepts of modern constitutionalism under constant 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
 - authoritarian leaders undermining the separation of powers in order to evade democratic and judicial control
 - 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 promising methods my practical instruction "How to become a dictator"² from my courses
2. The current crisis: democracy in decline worldwide
 - a) The global rise of anti-democratic populism
 - populist movements, parties and politicians trying to destroy democracy from within
 - culminates in the tendency of right-wing populists, triggered by Donald Trump, to accept election outcomes only if they win (USA 2020, 2022 and 2024, Brazil 2022/23)
 - a serious threat to democracy worldwide, also in Southeast Asia and Europe and even in states with long democratic tradition, such as USA or France
 - especially - but not only - a crisis phenomenon of the West
 - b) The often short way from democracy to autocracy under a populist government
 - Turkey, Hungary, Slovakia, Poland, Philippines, attempts in Slovenia, Brazil and the USA (under Donald Trump)
 - latest: project 2025 (elaborate plans of a thinktank behind Donald Trump)
 - c) Russia's and China's war on democracy
 - Russia's successful systematic support of far-right populists in Europe and North America
 - Russia's war on Ukraine and threats against other East European democratic states - a war against the basic concepts of democracy and self-determination of peoples
 - China's crackdown on democracy in Hong Kong, threats against democratic Taiwan, support of autocratic rulers in Southeast Asia (Myanmar, Cambodia) and propagation of the "superior" totalitarian Chinese system of rule
 - d) Other factors destabilising democracy
 - the return of the *dominance of lie and propaganda* in the public discourse, in particular in the digital media
 - ending a period of decades of more mature, fact-oriented public discussion in many democratic states
 - distorting the public discourse and devaluing it in its essential role for a functioning democracy
 - the growing *polarisation* of democratic societies
 - the *new specific threats for democracy in the era of digitalisation*
 - e) Important backgrounds
 - the *legacy of 30 years of neoliberalism*, neglecting social cohesion and the interests of ordinary people
 - the *side effects of globalisation*, which produces everywhere not only winners but also losers
 - *angry old (white) men, defending their unjustified privileges*, unwilling to adopt to the changing world
 - not only *white* men are the problem...
 - the destructive influence of the still largely *untamed social media*

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 from inside or outside, even if this entails restrictions of fundamental freedoms; democratic systems not taking precautions will perish***
- nowadays implemented in numerous variations 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

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

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

- most precautions and instruments involve sensitive restrictions of political rights and therefore require a *constitutional basis*
- while they are provided for in the constitution, they need to be *regulated in detail* in ordinary laws; some of those form part of the *state organizational law*, others 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

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

1. A constitution learning from the failures of its predecessor
 - the *Basic Law of the Federal Republic of Germany* (= *BL*) of 1949 - an innovative constitution, avoiding in many aspects the flaws of the Weimar Constitution of 1919, which led to the National Socialist rule
 - successful for 70 years in organizing a stable, capable and defensive democracy, but increasingly challenged today
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 with independent judges (art. 97 *BL*) and a *fundamental right to effective legal protection against public authority* (art. 19(4) *BL*) shall prevent authoritarian measures that would violate political freedoms or other citizens' rights
 - *fundamental rights are directly binding law* (art. 1(3) *BL*); this mandates every court, within its jurisdiction, to defend them
 - a *Federal Constitutional Court (FCC) with comprehensive jurisdiction* (incl. 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
 - currently discussed: constit. amendment to protect the Court against the risk of politicisation
 - difficult to find the right solution, since measures could also backfire in case of a crisis
 - at the time of this lecture: plans to enshrine in the Basic Law the Court's organisation into 2 senates, each of 8 judges with a 12 years term, the Court's autonomy to determine its rules of procedure and the binding force of its decisions
 - 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, intellectually independent, with high professional ethics and reputation
 - but the alarming example of the decline of the once highly respected US Supreme Court starts to raise doubts...
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
 - not easy: 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 *possible that the party's actions against the free and democratic basic order could be successful* (cf. *BVerfGE* 144, 20)
 - scholars object that this makes the instrument almost inoperable
 - all in all, this instrument proves *ineffective because* the *obstacles* set in the FCC's jurisprudence are *too high*
 - therefore so far no measures against the powerful far-right extremist party "Alternative für Deutschland" (AfD), although the constitution protection authorities repeatedly warn against it
 - b) **Exclusion of such political parties, if not prohibited, from public party funding** (art. 21(3, 4) *BL*, sect. 13 no. 2, 43 et seq. *FCC Act*, sect. 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 January 2024, the FCC excluded the former party NPD (now: "Die Heimat") for six years from public party funding (cf. *BVerfG*, 23.01.2024, 2 *BvB* 1/19)

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.

- c) **Prohibition of associations** whose aims or activities are directed against the constitutional order (art. 9(2) BL, sect. 3 et seq. Associations Act)
- of any kind of associations (also companies)
 - only if aim is pursued in an actively militant aggressive way
 - by the Federal Ministry of the Interior and Community (prohibition of transregional associations) or Land authorities (prohibition of 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
 - latest: ban of the right-wing extremist Compact magazine company in July 2024
 - 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 civil servants** (cf. art. 33(5) BL, sect. 33(1) Civil Servant Status Act, sect. 7(1) no. 2 Federal Civil Servants Act and corresponding Land law)
- confirmed by the Federal Constitutional Court (BVerfGE 39, 334⁴) as one of the *traditional principles of professional civil service* (art. 33(5) BL), regulated by civil service law
 - civil servants must *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 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
 - in 2024 a petition signed by 935,000 (later 1,600,000) citizens urged the German Bundestag to use this instrument against the prominent "proven right-wing extremist" AfD leader Björn Höcke
- 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 if core principles are violated; DISPUTED if only in case of militant aggressive attitude of the judge
 - instrument *not yet used in practice* but discussed in the case of a right-wing extremist judge in Saxony who was later retired under another legal basis in the German Judiciary Act
- 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)
- a German domestic intelligence community for the protection of the constitution [Verfassungsschutzverbund] 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

⁴ Excerpts in English translation at *Christian Bumke; Andreas Voßkuhle* (note 3), no. 1799 ff.

- 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 freedom⁵
 - a "right to lie" only exists under the general freedom of action (art. 2(1) BL), which can be restricted 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 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: Enough to secure democracy effectively in these troubled times?

- 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
- the use of these instruments cannot only protect but also harm democracy, but the current *reluctance to use them*, even in the present serious crisis situation, *may cause greater damage than a possible abuse would cause*
- to prevent abuse, *judicial control is crucial* - but also the control by the public and the media in the democratic process
 - to ensure effective judicial control in the future, constitutional amendments may be necessary to protect the independence and functioning of the courts, esp. the FCC, against possible attacks by a populist government or legislator
- moreover, *international control mechanisms* based on an *international treaty on cooperation in the defence of democracy* should be introduced, since in the heated atmosphere of internal conflicts an unbiased assessment is easier from the outside
 - e.g. judicial review of certain measures to defend democracy by an international court (in Europe: the ECtHR)
 - e.g. domestic constitutional review by an expanded constitutional court with participation of foreign constitutional judges
 - within the European Union, the *ineffective control mechanism of the "art. 7 procedure"* must be replaced by an effective one that entitles the European Court of Justice, on application of the European Commission or the European Parliament (acting with qualified majority) and/or the qualified majority of the member states, to suspend the rights of "fallen" member states and their citizens and allow for further sanctions
- outlook: the need to *further develop the concept* of defensive democracy in the fight against the serious challenges caused by the new threats to democracy in the era of digitalisation
- The next generations will pass judgement on us: will we take all necessary measures to effectively safeguard democracy in the era of populism and neo-authoritarianism?

Relevant Legislation

- Basic Law for the Federal Republic of Germany of 1949 (= BL) - the Constitution
- Federal Constitutional Court Act (= FCC Act)
- Political Parties Act
- Law Regulating the Public Law on Associations (= Associations Act)
- Federal Act on the Protection of the Constitution (and Constitution Protection Acts of the Länder)
- Law Regulating the Status of Civil Servants in the Länder (= Civil Servant Status Act)
- Federal Civil Servants Act (and Civil Servant Acts of the Länder)

Excerpt from the Basic Law for the Federal Republic of Germany of 1949 (= BL)

Art. 9(2)

[Freedom of association]

(2) Associations whose aims or activities ... are directed against the constitutional order ... shall be prohibited.

Art. 18

[Forfeiture of fundamental rights]

Whoever abuses the freedom of expression, in particular the freedom of the press ..., the freedom of teaching ..., the freedom of assembly ..., the freedom of association ..., the privacy of correspondence, posts and telecommunications ..., the rights of property ... or the right of asylum ... in order to combat the free democratic basic order shall forfeit these basic rights. This forfeiture and its extent shall be declared by the Federal Constitutional Court.

⁵ Established jurisprudence of the Federal Constitutional Court, cf. BVerfGE 85, 1 (15); 54, 208 (219); 61, 1 (8); 90, 241.

Art. 20(4)
[Right to resist]

- (4) All Germans shall have the right to resist any person seeking to abolish this constitutional order if no other remedy is available.

Art. 21(2 - 4)
[Prohibition of political parties]

- (2) Parties that, by reason of their aims or the behaviour of their adherents, seek to undermine or abolish the free democratic basic order ... shall be unconstitutional.
- (3) Parties that, by reason of their aims or the behaviour of their adherents, are oriented towards an undermining or abolition of the free democratic basic order ... shall be excluded from state financing. If such exclusion is determined, any favourable fiscal treatment of these parties and of payments made to those parties shall cease.
- (4) The Federal Constitutional Court shall rule on the question of unconstitutionality within the meaning of sect. (2) of this article and on exclusion from state financing within the meaning of sect. (3).

Art. 61
[Impeachment of the Federal President]

- (1) The Bundestag or the Bundesrat may impeach the Federal President before the Federal Constitutional Court for intentional violation of this Basic Law ... The motion of impeachment must be supported by at least one quarter of the Members of the Bundestag or one quarter of the votes of the Bundesrat. The decision to impeach shall require a majority of two thirds of the Members of the Bundestag or of two thirds of the votes of the Bundesrat. The case for impeachment shall be presented before the Federal Constitutional Court by a person commissioned by the impeaching body.
- (2) If the Federal Constitutional Court finds the Federal President guilty of a wilful violation of this Basic Law ..., it may declare that he has forfeited his office. ...

Art. 98(2)
[Forced transfer or retirement of judges]

- (2) If a federal judge infringes the principles of this Basic Law or the constitutional order of a Land in his official capacity or unofficially, the Federal Constitutional Court, upon application of the Bundestag, may by a two-thirds majority order that the judge be transferred or retired. In the case of an intentional infringement it may order his dismissal.

Further Reading

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