

FOREVER AND EVER?

TEXT: NINA SCHICK

Democracy can be abolished through democratic means. This lesson from the Weimar Republic has not seemed as relevant as it does today for several decades. To what extent can laws protect democracy, and where are their limitations? Researchers from the Max Planck Law network explore the need for statutory regulations and how they function.

The door in the wood paneling opens, and eight people in red robes enter, each of them wearing an equally red cap on their head and a white jabot on their chest. When they walk in procession below the mighty carved federal eagle, almost everyone in Germany knows what is happening: The Federal Constitutional Court is convening and will deliberate on or announce a ruling. The next sentence in the media report about the event will most likely mention Karlsruhe. This provincial city in southwest Germany was appointed as the seat of the country's most important court in 1951. Here the judges work in an unpretentious, expansive, flat building made of lots of concrete and even more glass.

For some time now, it is not because of its decisions that Karlsruhe has been in the spotlight, but rather because of its special position in the constitution: does the court have to be protected against political influence? For instance, if there are large factions of anti-constitutional political parties in parliament? And if so, how? The Federal Ministry of Justice has drafted a bill concerning the protection of the Federal Constitutional Court in the German Basic Law. The federal states and the left-wing party Die Linke have also created a draft. Now multipartisan discussions are being held.

- 28 A look at other countries demonstrates the central role the judicial system, and particularly constitutional courts, play in the autocratic restructuring of states. In Poland, the national conservative party PiS restructured the country's judicial system over a period of eight years, the effects of which will long outlive the change in policy begun in October 2023. Immediately after he was first elected in Hungary in 2010, Viktor Orbán reduced the authority of the Hungarian constitutional court and staffed the courts with people who were loyal to his party. In the United States, the judges Donald Trump appointed to the Supreme Court are impacting its current rulings during Joe Biden's term of office. The list goes on.

Can Germany learn how democracies are damaged by autocratic endeavors based on these examples – and take necessary countermeasures in time to make a difference? All Max Planck Institutes that work with the law are connected through the Max Planck Law network. They share their knowledge on socially relevant topics through research projects, identify regulatory gaps, and develop solutions at events such as their annual symposium. What defines democracy and how it can be protected was the focal

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FLORIAN KRIENER

topic this year and in 2023. Florian Kriener works as a senior research fellow at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. One of his main research topics is the promotion of democracy. “Autocracies don’t take shape overnight,” he says. “Instead, they often develop through the law.”

SUMMARY

The judicial system plays an important role in transforming democracies into autocracies. It is often the first place autocrats begin making changes. A functioning judicial system can slow down autocratic aspirations, but one that has been restructured by autocrats can accelerate the autocratic transformation of a country.

Lessons from the Weimar Republic and the Nazi regime were incorporated into the German Basic Law. It contains the eternity clause concerning human dignity, democratic form of government, and democratic rule of law. It features various instruments that are intended to protect democracy from its enemies, such as the party ban and forfeiture of basic rights.

Mechanisms that protect democracy limit it at the same time. That is why they must be used with caution, carefully structured, and well-balanced.

The rise of right-wing populist parties across Europe was demonstrated by more than just the European elections in June 2024. National conservative parties are also enjoying great popularity in Germany. In the state elections in the Federal State of Saxony, Brandenburg, and Thuringia in September, the AfD could receive up to 30 percent of the vote and become the strongest party. Even if the AfD did not become part of the state government, the party would still have considerable influence – despite the fact that AfD state associations in the Federal State of Saxony, Saxony-Anhalt, and Thuringia have been classified as confirmed right-wing extremist movements by the respective state offices for the protection of the constitution. These associations are suspected of being extremist movements in Brandenburg and four other federal states. A new evaluation issued by the Federal Office for the Protection of the Constitution may soon classify the entire AfD as a confirmed right-wing extremist party.

What happened in Poland shows just how quickly democracies can be dismantled. “The constitutional court

was politically instrumentalized within a few years. Because of politicized judges in the highest courts and a politicized state president, it is yet to completely return to a democratic rule of law despite the change of government,” Kriener says. Germany is also facing the question of whether it must better protect its constitution, and if so, how? Does the country need new laws? There are already specific considerations regarding



the Federal Constitutional Court. “The judicial system is usually one of the first institutions autocrats begin manipulating, because the constitutional courts are the ones that can prevent an increase in autocracy. Conversely, a re-structured judicial system can accelerate the implementation of autocratic aspirations,” explains Kriener.

The German Basic Law has few provisions regarding the Federal Constitutional Court. Only Articles 93 and 94 stipulate details concerning the “guardian of the constitution”. The Federal Constitutional Court Act, a law that can be amended via a simple majority in parliament, addresses all other matters. Amendments to the Basic Law, however, require a two-thirds majority. “It would make sense, for example, to safeguard the fact that there are two senates under constitutional law,” says Kriener. “That way, it would be impossible to create a third senate that would be responsible for all the important processes or allocated the ultimate decision-making authority.” Provisions regarding appointments and terms in office for judges, the organization of the court, and procedural law could all be incorporated in the Basic Law.

The Basic Law is now 75 years old and celebrated its “birthday” in May. Those who wrote it were fully aware that the Weimar Republic had failed; the National Socialists did

not come to power as the result of a revolution. They did not even need an absolute majority. The Nazi Party received 33.6 percent of the vote during the last Reichstag election in November 1932, before Adolf Hitler was appointed Reich Chancellor on January 30, 1933. Half a year later, Germany was a single-party state. The National Socialists used the means provided by the constitution, especially the strong role of the President of the Reich, and the ability to issue emergency directives without the involvement of the parliament.

Lessons from Weimar

Weimar is not an outlier: democracy carries in itself the seeds of its own dissolution. When applied to legislation, “Democracy means that the sovereign people can, in principle, enact and repeal laws without restrictions,” says Marietta Auer, Director at the Max Planck Institute for Legal History and Legal Theory in Frankfurt on the Main. A constitution thus not only guarantees, but also restricts democracy. “The Basic Law restricts the freedom that is inherent in democracy,” says Auer. The lessons from the Weimar Republic resulted in what is referred to as the “eternity clause” in the Basic Law. Article 79 Paragraph 3 exempts the guarantee of human dignity,



State and constitutional law: Florian Kriener researches at the Max Planck Institute for Comparative Public Law and International Law in Heidelberg and at the Humboldt University in Berlin (photo).

form of government, and the core of democratic rule of law from constitutional amendments. In the end, legislation that can change the constitution is also legitimized by the constitution. This does entail a certain circular reasoning, but at least it guarantees one thing: the constitution cannot be disestablished in a constitutional manner.

At the Max Planck Institute for the Study of Crime, Security and Law in Freiburg, Jakob Hohnerlein researches basic rights in state and constitutional law. He says, “There are different ways of understanding democracy. However, it has basic standards that cannot be questioned.” Above all, the open nature of political processes. “Access to power must be available to all groups in fair elections, and minority positions must also be given a voice in political discussions. At the same time, individual people must have a secure legal status.”

Fortified democracy

In good times, democracy stabilizes itself through its institutions and open discourse. “Democracy has an immunizing force,” says Ralf Poscher, Director at the Institute in Freiburg. And for periods when this force diminishes, the Basic Law contains protective mechanisms within the scope of “fortified democracy” that were created in the wake of what happened to the Weimar Republic. “All of these mechanisms cut both ways. All of them intervene in democratic processes,” says Poscher. One of the mechanisms is the party ban, which is the subject of controversy now with regard to the AfD. Powers have shied away from using this mechanism thus far, even though some voices in the political discourse explicitly demand its implementation. The problem is that the AfD party program is not openly anti-constitutional. It does not suggest that the AfD aims to abolish basic standards of democracy. That is why the Federal Office for the Protection of the Constitution would have to make a case for anti-constitutionality based on many fragments of evidence. “The legal question here is: which statements made by individual politicians can be attributed to the party as a whole?” Jakob Hohnerlein explains.

This instrument has been used sparingly to date owing to its considerable encroachment upon basic rights. There have been two party bans in the history of the Federal Republic, both of them in the 1950s. Two proceedings were conducted against the NPD. The first failed, and the second established that the party was anti-constitutional but did not issue a ban owing to the lack of danger it posed. The second set of proceedings lasted four years. “A party ban cannot provide immediate help,” says Heidelberg law expert Kriener. “It would probably come too late for the state elections this year.” The same is true for the federal election in 2025.

At the individual level, the equivalent of the party ban is the forfeiture of basic rights as per Article 18 of the Basic Law. There have been four motions for this forfeiture in the history of the Federal Constitutional Court, all of them unsuccessful. They were all filed against Germans who were closely associated with National Socialist ideologies. “To date, Article 18 has been relegated to the shadows both in practice and in the study of public law,” says Hohnerlein. Now the article is being discussed for the first time in a long time. Some 1.7 million people have signed the petition “Wehrhafte Demokratie: Höcke stoppen” (“Fortified Democracy: Stop Höcke”). However, the number of signatures makes no difference. As per Article 18, the motion can

Basic researchers: What distinguishes democracies? At the Max Planck Institute for the Study of Crime, Security and Law in Freiburg, Jakob Hohnerlein explores the duties of basic rights in constitutions.



PHOTO: MARKUS HERB FOR MPG

“A lived system of checks and balances protects against autocracy. If too many players break rank, the law becomes powerless.”

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only be filed by the Bundestag, the federal government, or a state government. A massive encroachment on basic rights that would have one advantage over the party ban: the anti-constitutional effect of an individual person is considerably easier to judge than that of an entire party. And Björn Höcke, party and faction leader in Thuringia, is a man whose political relevance is indisputable, unlike the earlier respondents. However, no decision concerning forfeiture of basic rights could be expected soon, either. As part of its Thuringia project in April of 2024, the legal portal “On Matters Constitutional” recommended seven specific actions that should be taken to protect democratic institutions at the state level before the state elections in September. They concern protecting public broadcasting, the country’s Constitutional Court, and staffing certain functions, among other matters. Head Editor Maximilian Steinbeis’ team has identified “gateways” for authoritarian populist parties in the Thuringian constitution. The blog states that failing to close these gateways would be an act of negligence.

Clever consideration

The blog also maintains that not every authoritarian populist strategy can be weakened by changes to the constitution and laws. A look back at the possible safeguarding of the Federal Constitutional Court under the constitution shows that this task is by no means trivial. In some cases, a simple majority may be too low a hurdle for a decision with great consequences. On the other hand, requiring a two-thirds majority means the blocking minority is more quickly reached. A higher hurdle can thus make it easier for a 30-percent party to exert destructive effects through a blockade. Another important question is how judges would be appointed if the Bundestag were filled with people opposed to democracy. Should the other federal courts make that decision? Should the Bundesrat take over? Many questions are still open. Florian Kriener says, “It is necessary to be very careful and ensure provisions

are well balanced.”

After all, laws also harbor the risk of over-regulation. In his research, Kriener has critically examined the “Defense of Democracy Package,” which the EU Commission introduced as a reaction to the corruption scandal in the European Parliament known as “Qatargate.” “Transparency mechanisms can also be misused to control non-government organizations,” Kriener concludes. Transparency can also be at odds with the freedom of civil society. Kriener mentions one example: if every donation made to an organization must be approved, that means the organization is monitored, which impinges upon the freedom of association. “Making laws stricter is often a double-edged sword.”

Society counts

Even proponents of safeguarding the “guardian of the constitution” advise caution. “Precipitousness and over-constitutionalization only lead to damage,” according to former constitutional judge Ferdinand Kirchhof in a post for the portal “Legal Tribune Online”. He wants to close the “open flank” of the Federal Constitutional Court. However, he says, “Changing the Basic Law, which serves as a permanent framework for democracy and the democratic rule of law, or overburdening it with legal details as a result of current political fears would be fatal.” With all due caution and despite the need for action, Germany must not simply rely on (new) laws. Many forces work together here. Political decisions are among them, including the decisions that capitalize on the existing instruments of fortified democracy: a strong civil society and election decisions.

“No law in the world can completely prevent people from behaving illegally, just as no law in the world can, in itself, guarantee that it will be interpreted in only one specific manner,” says Svenja Behrendt. As a Junior Professor at the Max Planck Institute for the Study of Crime, Security and Law in Freiburg, she researches what stabilizes democracies from within and the role human rights play in that process. “A lived system of a separation of powers and checks and balances is essential. In the end, democracy depends on a large number of players making decisions that are conducive to a society based on solidarity and equal freedom. And for system-relevant decision makers, this is downright fundamental. This system becomes endangered when too many players break rank, because it is no longer possible to curb that with statutory regulations.” This system is complex, and laws are one of its elements. The network for legal and social studies will be exploring the other elements during its next annual conference in October. The topic of this symposium is “power.”

www.mpg.de/podcasts/recht-schafft-freiheit (in German)