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The problem of uniform democratic standards in heterogeneous European surroundings

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THE PROBLEM OF UNIFORM DEMOCRATIC STANDARDS IN HETEROGENEOUS EUROPEAN SURROUNDINGS

LUKAS BAUER

I. The Problem

The starting point of this article is a conflict at the Council of Europe (COE) concerning the compliance with democratic standards by certain Member States. While discussing democratic standards on a European level some Member States were accused of ignoring these democratic standards and they were asked to comply with existing European standards of democracy. The trigger for the debate about democratic standards of the COE and its Member States was amongst others the constitutional reform of Liechtenstein in 2003.¹ After a motion of critical institutions of Liechtenstein² this constitutional reform was analyzed by the COE. There was a concern about the breach of democratic standards of the COE by reforming the existing constitution of Liechtenstein.³ After legal and political discussions about the necessity of a monitoring procedure to control the compliance with democratic standards⁴ the conflict was terminated in 2005.⁵ The con-

¹ G. Winkler, Die Verfassungsreform in Liechtenstein (2003) 37ff, 367ff; G. Winkler, The COE – Monitoring Procedures and the Constitutional Autonomy of the Member States (2006).

² See the opinion and the report of the „Demokratie-Sekretariat“ of Liechtenstein: www.dese.li.

³ For the chronology of the conflict between the Council of Europe and Liechtenstein see also G. Winkler, Council of Europe, 1ff.

⁴ M. Toberer, Die Überwachung der Mitgliedstaaten durch den Europarat (2004); G. Winkler, Ein Monitoring des Europarates gegen das Volk von Liechtenstein? in FS H. Batliner, Liechtensteinisches Stiftungs- und Verfassungsrecht im Umbruch (2004) 10 (10ff).

⁵ See the following documents of the COE dealing with the conflict between Liechtenstein and the COE: (Opinion of the Venice Commission) Opinion on the amendments to the constitution of Liechtenstein proposed by the princely house of Liechtenstein, European Commission for Democracy through Law (Venice Commission) 16.12.2002, Opinion no 227/2002, CDL-AD (2002) 32. ([http://www.venice.coe.int/docs/2002/CDL-AD\(2002\)032-e.asp](http://www.venice.coe.int/docs/2002/CDL-AD(2002)032-e.asp)); (Resolution Draft of the Political Affairs Committee of the Parliamentary Assembly) Proposal from the Princely House of Liechtenstein for amendments to the Liechtenstein Constitution, Parliamentary Assembly, Political Affairs Committee, Restricted AS/Pol (2003) 02, 25.1.2003; (Report of the Monitoring Committee) Committee on the Honouring of Obligations and Commitments by Member States of the COE (Monitoring Committee) Parliamentary Assembly, Confidential AS/Mon (2003) 29, 18.8.2003.

sideration of all relevant democratic standards by all Member States will be controlled by the COE within the next years in the course of special monitoring procedures.⁶

In consideration of European criteria of democracy the young democracies in Eastern Europe also have to be mentioned. After the fall of the Iron Curtain democratic systems were established in these former communist states. Some of these countries are currently still in a stadium of democratic development. A European standard of democracy that is not determined by nationally shaped concepts of democracy and its criteria is of major impact for the democratic involvement of these new democracies.

The fundamental problem of democratic standards is the conception of a consistent collective term without pointing out and defining several criteria to demonstrate which elements of a democracy are essential to a European democratic standard. The constitutional problems in conjunction with consistent standards of democracy occur on an international level while trying to harmonise the nationally different standards of democracy in heterogeneous surroundings such as international organisations. The presentation and enforcement of detailed democratic standards when defining democratic principles in a heterogeneous European environment is a major international constitutional problem for international institutions. Democratic standards from a constitutional point of view are often perceived as an indifferent collective term – a split-up in several democratic standards is hardly ever carried out. On closer inspection of the criteria of democracy it becomes obvious that there are major national differences as a consequence of the particular cultural background. It is an aim of this article to fan out and explicate several democratic standards in their particular constitutional context. It seems especially interesting to analyse the possibility of consistent standards of democracy in an international correlation. Especially on a European level there are a number of states appearing as a harmonic legal entity in different European institutions. These institutions postulate democratic elements that are common for all Member States and that are used as an international constitutional basis for political democratic matters on a European level. By using the generic term “democratic standards” all possible differences that may occur through the differentiated national constitutional conceptions of several democratic standards are concealed. National differences of democratic standards and the insufficiency

⁶ See the actual documents of the Parliamentary Assembly concerning these monitoring procedures: Revision of the terms of reference of Assembly committees, Resolution 1425 (2005); AS/Mon/Inf (2006), 17.8.2006.

of a national conceptual comprehension only appear by discussing the detailed definition of contents of such a democratic standard in a European context.

II. Theories of democracy & Standards of democracy

It seems of a constitutional interest to differentiate and analyse several standards of a democracy in consideration of the different development of some democracy standards in an international context.⁷ In the course of time different theories of democracy as forms of government have been developed and it is to question if the relevant standards of democracy change according to the applied theory of democracy.

Legal, political and philosophical history since ancient times has generated several theoretical concepts of democracy. This plurality of historical theories shall not be analysed in detail. It seems more relevant to discuss current theories of democracy of the 20th and 21st century. The development of the concept of democracy and of the resulting standards of democracy in the last 200 years was characterised by the enlargement of state tasks. So far there can be distinguished five chronological stages of development concerning modern theories of democracy:⁸

- State sovereignty and internal peace-keeping - security as main aspect of democracy development
- Constitutional state, separation of powers and human rights - liberty aspects of democracy
- Equality as a new aspect and standard of democracy
- Social state - aspects of solidarity as new democratic concepts
- State with ecological duties - health and sustainability as criteria of a modern democracy

This progress in the definition of democracy and its theories indicates the development and changing of democratic standards in the course of time. Marching lock-step with the increase of state duties in a democracy the expectations for democracy – i.e. standards of democracy – have reached a new level. The complexity as well as the content of democratic standards depend on the legal, political and social development of the concept of democracy and are subject to a permanent change and advancement. Standards of democracy that were re-

⁷ In this context the focus will be on a European level. See also *T. Fleiner/L. Basta-Fleiner, Allgemeine Staatslehre*³ (2004) 418ff.

⁸ *W. Marxer, Demokratie? Erscheinungsformen einer Idee* (2004) 3f.

garded as state of the art 100 years ago are unsuitable in the 21st century and are not adequate to describe the level of democratisation of a state or a European institution.

Standards of democracy do not only differ in a chronological context with the theories of democracy but they can also be differentiated by the orientation of the relevant theory. According to the legal, political and philosophical focus of the democratic concept standards of democracy show remarkable differences in their contents and extents. Theories of democracy can be divided into various historical, legal, political, economic and philosophical ideologies. These arrangements coming from political science can be useful in a context under constitutional law to reveal the consequences for the definition of democratic standards. The following theories of democracy can be differentiated:⁹

– *Traditional-liberal theory of democracy (Bagehot, Mill)*¹⁰

This theory describes the Anglo-Saxon type of representative democracy and marks a separation between state and society. The ruling of the government is characterised by strong political responsibility of the rulers. The participation of the people is limited to elections as a temporary delegation of power.

– *Elitist theory of democracy (Weber, Schumpeter, Sartori)*¹¹

It is a basic element of this theory to declare that even in a democracy political decisions are made by a small group of persons: the elite. The elite perform political tasks as a representative for the majority of the people. Democracy is concentrated on choosing and authorising decision-makers.

– *Economic theory of democracy (Downs)*¹²

This economically focused theory emanates from the transfer of economic market decisions on political decisions. Democracy is focussed on economic rational thinking and acting.

⁹ See also B. Guggenberger, Demokratie/ Demokratietheorie, in Nohlen (Hrsg), Wörterbuch Staat und Politik⁵ (1998) 80 (80ff); D. Held, Models of Democracy² (2002); M. Schmidt, Demokratietheorien – eine Einführung³ (2000).

¹⁰ W. Bagehot, The English Constitution (1867); J.S. Mill, Considerations on Representative Government (1861).

¹¹ M. Weber, Wirtschaft und Gesellschaft (1922); J. Schumpeter, Kapitalismus, Sozialismus und Demokratie (1950); G. Sartori, Demokratietheorie (1992).

¹² A. Downs, Ökonomische Theorie der Demokratie (1968).

– *Pluralistic theory of democracy (Dahl, Fraenkel)*¹³

According to this system the manifold single interests are balanced through democracy. The political decision making is the compromise between the divergent interests. The diversity of political parties is especially important in this theory.

– *Socialist theory of democracy (Lenin, Held, Hirst)*¹⁴

Democracy as well as the capitalist society is only a passing phenomenon setting the frame for the class struggle between bourgeoisie and proletariat. Equality and social base rights are of major importance in this socialist ideology.

– *Critical theory of democracy: Participatory democracy (Macpherson, Bachrach)*¹⁵

This concept of democracy regards the participation of the people in political decision making as a major asset. It is also important to democratise all areas of life that are marked by any kind of governance.

– *Critical theory of democracy: Deliberative democracy (Fishkin, Habermas)*¹⁶

The deliberative element of this theory describes the political autonomy as ambition of democracy. By downsizing governance political decisions shall be made in a free process of communication. The participation of the individual in political decision making is of major importance for this concept.

– *Complex theory of democracy (Scharpf)*¹⁷

This theory regards the encouragement of disadvantaged population groups to participate in the democratic political process as an important element of democracy and demands the democratisation of relevant areas of life. The enlargement of participating population groups shall lead to more political activism and intensive democratisation. In this concept it seems also important to have narrow political majorities and an active political public.

¹³ R. Dahl, *Polyarchy. Participation and Opposition* (1971); E. Fraenkel, *Deutschland und die westlichen Demokratien* (1964).

¹⁴ P. Hirst, *New Forms of Economic and Social Governance* (1994); W. Lenin, *Staat und Revolution* (1918); D. Held, *Prospects for Democracy* (1992).

¹⁵ P. Bachrach, *Die Theorie demokratischer Elitenherrschaft* (1970); C.B. Macpherson, *Democratic Theory* (1973).

¹⁶ J. Habermas, *Die Einbeziehung des Anderen. Studien zur Politischen Theorie* (1999); J. Fishkin, *Democracy and Deliberation* (1991).

¹⁷ F. Scharpf, *Demokratiethorie zwischen Utopie und Anpassung* (1970).

– *Democratic theory of systems (Luhmann)*¹⁸

This democratic concept splits up society in several areas – i.e. systems. Democracy is reduced to capacities and procedures of the system. Base rights, elections, direct democracy etc are only maintaining elements of the system.

– *Performance orientated theory of democracy*

This theory focuses on the performance of a democratic system. Possible criteria are political stability, problem solving competences, methods of resolution of social needs or satisfaction with the system. The manner of the performance of services is of less importance.

This theoretical previous understanding is crucial for the debate about criteria of democracy in a national context and the importance of a European level of democratic standards. The typology of these theories of democracy reveals that standards of democracy are geared to a particular theory. According to the applied theory of democracy several democracy standards are weighted differently. There are remarkable differences in the manner as well as the content of democratic standards concerning the particular democratic concepts. While some standards can be regarded as common among most theories of democracy other standards are of major importance or are not mentioned at all.

From this it follows that there are different standards of democracy depending on the democratic theory. Several states are based on different concepts of democracy and are organised differently. From this point of view of different theories of democracy it is difficult to constitute standards of democracy on a European level with the present national concepts.

III. Standards of democracy in European institutions

Standards of democracy are not only relevant on a national constitutional level. From an international constitutional perspective there is a special interest in the clash of different national democratic standards on an international or supranational level of European institutions. Democratic standards and their contents are often picked out as a central theme by international and supranational organisations. On a European level there can be mentioned the European Union (EU), the Organisation for Security and Co-Operation in Europe (OSCE) and the COE. These European institutions postulate the democratic principle as one of their basic principles and they have defined some democratic standards in their charters, articles of agreements etc. These criteria shall be used as a benchmark on a European level for the definition of standards of democracy in the Member States. Within these European institutions the democratic standards consist of

¹⁸ N. Luhmann, *Komplexität und Demokratie*, PVS 10, 1969, 314ff.

the characteristic constitutional elements and principles of the politically, legally and economically most important Member States or the original states of the particular organisation.

As for the OSCE there is a catalogue of principles in the first section of the Helsinki Final Act also containing basic democratic standards. The EU constitutes the principle of democracy in Art 6 EU. The interpretation of this European concept of democracy provokes discussions in academic literature.¹⁹ The principle of democracy of the EU has to be regarded in consideration of the particular national understanding of democracy and has to be linked with legal particularities of Community Law. Primary Community Law also contains concrete democracy criteria such as the significance of the plurality of parties on a European level in Art 191 EC. In this context it seems interesting to refer to "Governance" and the White Paper of the Commission "European Governance"²⁰ from 2001 which deals with aspects of "Good European Governance" in a European multilevel system. From this European Governance point of view there can also be a focus on European democratic standards:²¹ The aspects of "good Governance" such as participation, transparency, efficiency, accountability or equity can be regarded from a perspective of democratic criteria for Europe. The COE defines general democratic principles in Art 1 and 3 of the charter and codifies the rule of law and the defense of fundamental freedom. Even the European Court of Human Rights (ECHR) gives an opinion on European standards of democracy: the ECHR regards especially the plurality of political parties and the guarantee off political base rights such as the freedom of assembly, the freedom of opinion and the freedom of press as crucial criteria of a (European) democracy.²²

There is a derivation of democratic standards from the programmatic phrased principles of the mentioned European institutions and the compliance with these standards by the Member States as a condition of participation. This conjunction raises a problem because the term "standards of democracy" is often used as an undefined collective term. It is not legally clarified on a European level which concrete democratic criteria have to be considered by the Member States. Another difficulty has to be faced because the Member States of the mentioned European institutions are part of different legal traditions. As a consequence

¹⁹ For the discussion in German-speaking states see *B. Beutler*, in *H. Von der Groeben/J. Schwarze* (Hrsg), *Vertrag über die Europäische Union und Vertrag zur Gründung der Europäischen Gemeinschaft. Kommentar*⁶ (2004) Art 6 EU Rz 27ff, mwN.

²⁰ See KOM (2001) 428.

²¹ See in detail *H. Eberhard/C. Konrath/R. Trattnigg/S. Zleptnig*, *Governance – zur theoretischen und praktischen Verortung des Konzepts in Österreich*, JRP 2006, 35ff, mwN.

²² EGMR *Refah Partisi*, 41340/98, 41342/98, 41343/98, 41344/98; EGMR *Vereinigte Kommunistische Partei der Türkei ua*, 19392/92; EuGRZ 2003, 206ff.

there are different national benchmarks to judge European standards of democracy. However a European standard of democracy cannot completely deny the state democratic standards of the Member States because the formation of a European democratic standard is associated with the development of national democratic criteria. When defining a standard of democracy on a European level the particularities of a supranational or international system have to be taken into consideration. In terms of a flexible system²³ different state concepts of democracy can be confronted to compare national systems of democracy and to get to a new and wide international constitutional concept of a European standard of democracy.

IV. The problem of uniform democratic standards in a heterogeneous European environment

In conjunction with the conflict on the violation of European democratic standards of the COE it seems interesting to question which standards of democracy of the COE have to be respected by the Member States in consideration of the problem of the consistency of the applied standards. The COE demands the compliance of democracy standards in his documents concerning Liechtenstein without defining which standards of democracy are meant concretely and without determining how to establish these European standards. The charter of the COE simply codifies the general need for all Member States to comply with the rule of law. Beyond this regulation there are no more detailed standards of democracy that could be realised by the Member States. This lacking determination of concrete standards is a consequence of the international constitutional problem to define consistent standards of democracy for all members of the COE: Which concrete standards of the Member States shall be part of a European index of democratic standards? In default of an explicit enumeration of democratic standards in the charter, the relevant criteria can only be won out of the constitutions of the Member States. As these national constitutions postulate different standards of democracy because of the diverse state systems and the different cultural environment it seems legally and politically problematic to define a uniform index of democratic standards at the level of the COE.²⁴

²³ See also *W. Wilburg*, *The Development of a Flexible System in the Area of Private Law* (2000); zur Anwendung des beweglichen Systems im Verfassungsrecht vgl. *K. Korinek*, *Das Bewegliche System im Verwaltungs- und Verfassungsrecht*, in *F. Bydlinski, H. Krejci, B. Schilcher, V. Steininger* (Hrsg.), *Das Bewegliche System im geltenden und künftigen Recht* (1986) 243ff.

²⁴ See also *G. Winkler*, *Council of Europe*, 483ff.

When analysing the constitutions of the members of the COE from a legal perspective there are major differences concerning democratic standards between old and new Member States. The Western European original states and the early Member States of the COE were actively involved in designing the legal and political expectations of democratic standards on a European level. These states usually have an extensive catalogue of constitutional standards of democracy. After the fall of the Iron Curtain numerous Eastern European states joined the COE that did not meet the material criteria of a membership at the time. The COE established monitoring procedures to control the required constitutional and political reform measures in these states from a democratic perspective.²⁵ The democratic elements of these young Eastern European democracies are part of a development process and partly they do not yet show the extent and the concentration of democratic standards in older Western European Member States.²⁶

Furthermore there are differences of democratic standards between states with different forms of government. The dissimilarities are especially apparent with the state systems republic and monarchy. These two forms of government are sometimes based on different standards of democracy. There are remarkable divergences concerning the election and the competences of the head of state as well as concerning the process of legislation. Variations can also exist due to different forms of organisation of a state: Federally organised states are characterised by other standards of democracy than centralised states. These different criteria of democracy appear at the definition of direct and indirect elements of democracy. The constitutional divergences concerning the relevant standards do not show any qualitative valuation for the definition of a benchmark to compile a European index of democratic standards.

The numerous legal and cultural differences between European states lead to different criteria for the orientation of the particular democratic system. Depending on the criteria to compare the national definition of democratic standards there is a variation of common and different standards of democracy. From a constitutional perspective of serious national differences of the particular democratic orientation it is not leading to the goal to create a uniform European catalogue of democratic standards based on a narrow state characterised benchmark. The functions of democratic criteria are rather to be seen in their national constitutional and cultural context and should be connected to a broader European un-

²⁵ A. Drzemczewski, *The prevention of Human Rights violations: Monitoring Mechanisms of the COE*, Revised Paper for the International Colloquy, The Prevention of Human Rights, Panteion University Athens (1999); A. Steenbecker, *Politisches Monitoring im Europarat*, in U. Holtz (Hrsg), *50 Jahre Europarat* (2000) 171 (171ff).

²⁶ G. Winkler, *Council of Europe*, 506f.

derstanding of democracy. This approach allows the consideration of national particularities when discussing European standards of democracy.

V. Standards of democracy – a who is who

In habitual language use democratic standards are often used as a collective term for all premises and criteria that a democratically designed system has to meet to be called a democracy. The existence as well as the concrete design of democratic standards is subject to national particularities so that an enumeration or explanation of concrete democratic standards brings up difficulties. Despite the existing differences caused by the national characterisation of democratic criteria it is – in consideration of the cultural environment and supranational particularities – possible to elaborate standards of democracy on a European level.

The governance by the people and the constitutional determination that law has to come from the people can be regarded as major standard of democracy.²⁷ Because a modern democratic state is not able to guarantee direct governance by the people most democracies have a representative character. This representative element of democracy in terms of a parliamentary and indirect democracy results in another important standard of democracy: The right to elections of representatives (parliament) by the people. This democratic criterion is completed by the following guarantees of electoral law:

- General right to vote: It is a generally accepted democratic standard that the active as well as the passive right to vote are rights of all citizens having reached a certain age.²⁸
- Equal right to vote: Every valid vote has the same counted measurand. It is a violation of this democratic standard to evaluate the counted measurand of a vote according to criteria such as tax payments, education or family status.
- Confidential right to vote: The voting has to happen under circumstances making it impossible for the authorities or other persons to find out who received the vote. This element shall prevent any exercise of influence on voting behaviour and election results.
- Free right to vote: This element shall guarantee the freedom of vote advertising and the freedom concerning voting behaviour.

These democratic standards are of major importance for the existence and the functional efficiency of a modern governance of the people in terms of a repre-

²⁷ See i.e. Art 1 B-VG; Art 20 GG; Art 2 und 3 französische Verfassung; Art 1 italienische Verfassung; Art 1 spanische Verfassung.

²⁸ See also the jurisdiction of the ECHR *C. Grabenwarter*, Europäische Menschenrechtskonvention² (2005) 278f.

sentative democracy. Even the limitation of single elements destabilises the system of governance by the majority of the people.

It is generally accepted under constitutional law that a democracy in terms of governance by the people should not only be formed indirectly but should also contain direct democratic elements. The exercise of direct democracy – i.e. the immediate participation of the people in governance and legal and political decision-making – lately was the initial point for discussions about the improvement of democratic standards on a European level.²⁹ The relation between direct and indirect democracy is dependent on the orientation of the particular state system and is characterised by national divergences within Europe. In conjunction with the standard of direct democracy there is a discussion about the following issues:

- Referendum in case of grave legal changes such as extensive changes of the constitution or matters of special legal or political interest.
- Possibility to initiate legal changes by the people.
- Participation of the people in jurisdiction – lay jurisdiction.

A democratic standard regarding direct and indirect elements of democracy on a European level cannot be based on a narrow definition. Depending on the orientation of the state organisation and the democratic system different forms of direct and indirect democracy are applied on a national level. From the perspective of a European standard of democracy a European democracy should contain direct democratic elements as well as indirect democratic elements whose extent makes allowance to national constitutional and cultural particularities.

Another democratic criterion concerning the governance of the people in a pluralistic Europe is the diversity of political parties. The existence, the plurality and the public activity of numerous political parties can be regarded as a standard of a lived and pluralistic democracy on a European level. In conjunction with this pluralism of parties there can be mentioned some „political base rights“ that can be considered a European criterion of democracy. For the public exercise of democracy it is indispensable to guarantee democratic elements such as freedom of assembly, freedom to found associations, freedom of press and freedom of opinion.³⁰

When applying a broader understanding the concept of democratic legitimation can be seen as a democratic criterion. The indirect legitimation of a democratic

²⁹ See the following documents of the COE challenging the improvement of direct democracy: Motion for a resolution, "Future of democracy" Doc. 9113, 06.06.2001; Report, "Future of democracy: strengthening democratic institutions" Doc. 9951, 01.10.2003; Resolution 1353, "Future of democracy: strengthening democratic institutions", 25.11.2003.

³⁰ See in detail C. Grabenwarter, *Menschenrechtskonvention*², 231ff.

system and its institutions through the majority of the people can be regarded as a European standard of democracy.

These concrete standards of democracy represent a catalogue of criteria that are met by all democratically organised states of Europe. Democratic standards offer differences on a national level that are characteristic for the particular state systems. When searching for common democratic standards on a European level there is no space for narrowly defined and state characterised concepts and criteria. There should rather be applied a broader European standard that leaves national concepts behind and leaves space for national particularities concerning a concrete standard of democracy. The implementation of democratic criteria on a European level can only be effected in consideration of national legal and cultural differences.

VI. Conclusion

The standards of democracy show a correlation with different concepts to define a modern democracy in the 21st century. The particular theories of democracy have a different approach to explain and legitimate a democratic system. These different methods of resolution also have a backlash under constitutional law on the definition of democratic standards. On a national level there is a connection between the particular organisation of a state and the relevant democratic theory as well as the resulting democratic standards so that there is a multitude of different national perceptions of democracy and their criteria on a European level.

In international or supranational organisations the term „standards of democracy“ is often used as a little detailed collective term. Despite significant national differences concerning the definition of these standards there can be identified concrete criteria that are common for European states when applying a broader comprehension of democratic standards. The presented standards of democracy have a national perspective as well as a significant European perspective. There are numerous European institutions such as the COE, the EU or the OSCE using the term European standards to communicate their Member States a European level of basic democratic elements. As criteria of a European perception of democracy there can only be considered concepts under constitutional law that can satisfy a European dimension of democratic standards. It seems impossible in a heterogeneous constitutional environment of Europe to postulate uniform – i.e. of consistent content and extent – democratic standards in terms of a narrow and state characterised perception under constitutional law. European standards of democracy have to be based on a broad comprehension concerning their importance and range. The necessity of such a perception of democratic criteria re-

sults from national legal and cultural differences regarding the definition of the particular democratic system and the resulting different democratic standards. Nationally characterised standards of democracy show numerous points of contact and interception. Taking as a basis a broad international understanding under constitutional law of democratic criteria these common aspects can be regarded as standards of democracy on a European level.

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