Unit D 15: Human rights, fundamental rights and constitutional state

1. Summary

Democracy in today's sense means "rule by the people. This can take different forms. Democracy shows itself as rule of the majority. But this rule is never absolute - in any case it is not above human rights, even if today some want to construct a contradiction between human rights and international law on the one hand and constitutional fundamental rights - which are nothing else than positivized or concretized human rights - on the other hand.

As a rule, the most important human rights are enumerated in the catalog of fundamental rights of (Western) constitutions, including the Swiss Federal Constitution of 1999. Fundamental rights such as human dignity, equality of rights, prohibition of arbitrariness, right to personal freedom, protection of privacy, freedom of marriage, freedom of religion - or as it is written in the Swiss Constitution: freedom of faith and conscience - freedom of expression and information, right to free assembly and economic freedom belong to the most important human rights.

2. Democracy

Archibugi and Held (1995:3) have pointed out the paradox that, on the one hand, the number of countries governed according to democratic principles has increased in recent years, while at the same time the number of civil wars has multiplied-even in countries where armed internal conflicts were thought to have been overcome. What was true for the 1990s is even more true since the turn of the millennium.

As the word implies, "democracy" means "rule of the people," where "demos" stands for people, and "kratein" refers to the rulers (see Arndt 2014:15).

However, one should not fall into the mistake of "projecting one's own zeitgeist (along with one's own ideals) into the ancient world" (Haarmann 2013:15). All too often, in fact, an ideal of democracy was interpreted into the Athenian city-state that had little or nothing to do

with reality. Thus, Haarmann (2013:15) concludes, not entirely without reason: "We live with a kind of myth of the phenomenon we call democracy, and we look at antiquity with a mythically transfigured gaze."

Therefore, we should be aware that our viewing optics of democracy is a (post-)modern one and was essentially shaped by the Enlightenment.

Democracies have mostly emerged from social crisis situations.

> "The democracies we know from history did not have an easy birth. In each case there were considerable complications. These complications were the conflict situations from which the striving for democratic order emerged as a manifestation. The conflicts that fed the rebellion of the ruled against domination by others resulted either from conditions of previous misrule (the model of democracy in the Athenian state) or from situations of external threat (the medieval republic of Novgorod)."
> Source: Haarmann 2013:16.

2.1 Democracy as the Rule of the Majority

Clucas and Valdini (2015:13) have pointed out that since the 18th century, the idea that the majority should rule in a democratic state has been undisputed. However, there is also a broad consensus among most political thinkers that minorities must have their rights protected. However, opinions vary widely as to what rights minorities should have. While some go so far as to grant minorities a veto right - that is, the right that a rejection of a majority decision by the minority in question automatically means that this majority decision is not valid - in certain fundamental decisions, others see such a veto right in effect as the government of a minority (cf. Clucas/Valdini 2015:14). In contrast, Lijphart (1984 and 1999) suggested that governments should seek the broadest possible majority decisions. After that, as many votes as possible should be won for a majority.

Samuel Salzborn (2012:17/18) has outlined the development of modern understandings of democracy as follows:

	Political core demand	**Targets**
Protective state	Security	- Protection from external attacks - Peacekeeping at home - Guarantee of the property order
Rule of law state	Freedom	- Legal and constitutional order - Human and civil rights - Legal security instances (courts)
Welfare state	Solidarity	- Social participation - Socio-economic justice - Welfare order - Granting of social rights
Democratic state	Equality	- Popular sovereignty - Universal and free suffrage - Permeability of political offices - Vertical and horizontal participation opportunities
Cultural state	Education	- Education for all citizens - Promotion of research - Justice in the international context (peace, ecology, etc.)

Source: Salzborn 2012:17/18.

Wolfgang Merkel (2015:10-14) has distinguished three groups of understandings of democracy: **first,** a **minimalist (electoral) model**; **second**, **an intermediate (proceduralist) model**; and **third**, **a maximalist (substantialist) model**.

The minimalist model of democracy goes back to the economist Joseph A. Schumpeter and sees democracy as a kind of market on which the parties offer their programmatic products, for example, every four years in elections. Civil society restrictions or compensations as well as direct democratic controls are considered incompatible with this model of democracy.

One argument against the minimal democracy model is that participation research has shown that social and economic inequality translates into political inequality (see Wessels 2015:88). Lehmann et al. (2015:177/178) have also found in their studies that the social lower classes are worse represented than the middle and upper classes in all countries studied. Thus, additional equalizing mechanisms are needed to enforce equal political rights for all in practice as well.

For this reason, among others, the middle democracy concept considers Schumpeter's minimal model too thin. Accordingly, the spheres of the rule of law-especially guaranteed fundamental rights-and horizontal checks and balances are added to the democratic core (elections). Additional instruments to elections are referenda, civil society activities and public discourse. Intermediate conceptions of democracy base democracy on norms, principles and procedures that structure the democratic decision-making process.

The maximalist model of democracy goes even further and also assumes that collective goods such as internal and external security, economic welfare, welfare state safeguards and the fair distribution of basic goods - for example, in the form of income equalization, equal opportunities, etc. - are part of the democratic understanding.

The concrete democratic rules of the game depend on the understanding of democracy chosen and applied in a particular country.

Depending on this, direct - and correspondingly also indirect - democracy is viewed very differently. Pelinka/Varwick (2010:30), for example, consider direct democracy to be utopian and unrealistic:

Direct and indirect democracy
"Direct democracy corresponds to the word understanding of democracy: democracy consists in the fact that the people rule directly and without interposition of any representatives of the people. Direct democracy is the utopian core of the concept of democracy.
Indirect democracy is the result of an insight into realities that cannot be overridden even by the formulation of utopian goals. These realities are the manifold forms of social division of labor - especially in modern society not all citizens can decide on all problems by themselves. The people, in order to rule, need representatives. Indirect democracy is the synthesis of democratic utopia and social reality".
Source: Pelinka/Varwick 2010:30.

In contrast, supporters of direct democracy - in Switzerland, for example - would object that the population at large can very well decide on complex issues - and, conversely, elected

representatives can also be overwhelmed by a substantive issue. Both are shown by the example of Switzerland.

Pelinka/Varwick have summarized the most important plebiscitary (direct democracy) and representative (indirect democracy) elements as follows:

The most important plebiscitary elements	**The main representative elements**
Plebiscite (referendum); the citizens decide on the matter themselves, without the intervention of an intermediate body (people's representation).	**Parliamentarism;** the assembly of the people's representatives (parliament) and the other constitutional bodies associated with parliament (government, administration).
Popular initiative (referendum); the citizens formulate a proposal on which the people's representation has to vote.*)	**Parties;** parts of the people's representation, based on certain common interests and values, interpose themselves between the electorate and the elected as electoral groups.
Elections; citizens directly elect their representative, the parliament (possibly also the president).	**Associations;** the organization of common interests to exert pressure on the people's representation, the other constitutional organs and the parties - associations also interpose themselves between the people and the people's representation, admittedly not in connection with elections. **)
Demoscopy (public opinion research); the opinions of the electorate, collected using the methods of empirical social research, influence the policies of the parties (government and opposition), although in most cases the public is not or only partially informed about the results of the public opinion research.	**Neo-corporatism (social partnership);** the interaction of associations representing basic economic interests with constitutional bodies - an interaction that often complements and competes with parliamentarism.***)

Source: Pelinka/Varwick 2010:31, lightly edited by CJ. In addition, the following notes:
*) In Switzerland, citizens vote directly on popular initiatives which, if accepted, become directly part of the constitution (constitutional initiative), without the intervention of an intermediate body.
**) The latter is not so certain: associations (and companies!) not only finance voting campaigns (direct democracy) but also support parties with money, and there is little doubt that their representatives in politics and in the parties do influence the nomination of candidates - which is their right as party members.
***) In Switzerland, for example, employers' and employees' associations negotiate collective bargaining agreements for companies or groups of companies, which the Federal Council (national government) can declare mandatory for all industry members.

2.2 Democracy and power

Friedrich J. Arndt (2014:25) has proposed to distinguish two concepts of power in relation to the connection between power and democracy: First, power in the sense of "domination/control" ("power over") and power in the sense of "empowerment/enablement" ("power to"). In the sense of Max Weber (1972:28), power is "any chance to assert one's own will within a social relationship even in the face of resistance, regardless of what this chance is based on." Thus, Max Weber already understood power as a component of social relations, as an expression of different and unequally distributed grounds of freedom in action, and even as an expression of conflict and "struggle." Seen in this way, Weber moves in the area of the concept of power as "power over", but certainly also in the sense of "power to".

In the sense of Michel Foucault (1977:113), power is relational and denotes a "multiplicity of power relations" (see also Arndt 2014:31). In his later work, Foucault (2005:900) circumscribed three levels in his analysis of power: "strategic relations, techniques of government, and states of domination" (cf. Arndt 2014:31). While the first level involves the free play of relational power relations, for Foucault states of domination (third level) are, so to speak, "coagulated power relations of permanent superordination and subordination" (Arndt 2014:31). In contrast, the second level consists in the "leading of leaderships" (Foucault 1994:255, cf. also Arndt 2014:31). Here, for Foucault (1993:103f.), governmental techniques lead to a kind of flow equilibrium:

> "In the broader meaning of the word, government is not a way of forcing people to do what the governor wants; rather, it is always a moving equilibrium with complements and conflicts between techniques that ensure coercion and processes by which the self is constructed or modified by them."
> Source: Foucault 1993:103f.

2.3 Immanent contradictions in the concept of democracy

Oliver Hidalgo (2014:65) has identified six principal antinomies - that is, immanent contradictions - of democracy:

1) Freedom and simultaneity,
2) popular sovereignty and representation,
3) quantity and quality,
4) Homogeneity and plurality
5) individual and community, and
6) universality and particularity.

The concepts of freedom and equality are antinomic, i.e., incompatible in principle: freedom implies inequality (everyone should be happy according to his own fancy), because freedom implies the right to inequality. Conversely, the concept of equality reduces (personal) freedom, because if everyone is equal, they cannot follow individual preferences and thus differences. It was not until the French Revolution, in its motto "Liberté, égalité, fraternité," that the two principles were put on the same level and implemented politically.

As Hidalgo (2014:73) writes, "While the 'ideal' pairing between the two opposing principles may necessarily fail, liberty and equality must obviously exist in some form of combination so as not to end in either anarchy or dictatorship. But if two sides contradict each other and, moreover, are equally well founded, so that no clear priority can be deduced, then there is that state of affairs which we defined above: an "antinomy".

The second antinomy, namely the relationship between popular sovereignty and representation, is somewhat less simple to understand. In fact, through the social contract (Rousseau), power, that is, sovereignty is in fact transferred to political bodies - the state - making the contract theory a purely theoretical option. It is not for nothing that Rousseau resolutely opposed any political representation of the volonté générale - he was rather a representative of the uncompromising identity between ruler and ruled (cf. Hidalgo 2014:121). This is why Rousseau called his position republican rather than democratic.

It was only with the emergence of the modern concept of representative democracy that the obvious opposition between popular sovereignty and representation - that is, the proxy concept - could be overcome. In the process, popular sovereignty was linked to the principle of representative democracy - Hidalgo (2014:122) refers to this as an "antinomian link": "In

the sense of modern democracy, since then, the people 'rule' precisely when they are sovereign and allow themselves to be represented" (Hidalgo 2014:122).

A third antinomy of democracy is that quantity stands-or can stand-above quality: "The lack of confidence in the expertise, skills, and judgment of the popular mass, easily seduced in the eyes of its skeptics, acting rashly and with little respect for lawful procedure, has accompanied the debate about democracy since its inception" (Hidalgo 2014:156). This problem is particularly evident in directly democratic states such as Switzerland, where many substantive decisions are made at the ballot box via referendums: Thus, since 2007, the popular sovereign in Switzerland has decided in many cases in a less than appropriate manner, starting with the ban on minarets, which is clearly contrary to fundamental rights and thus unconstitutional, with the immigration initiative of the SVP, which called into question essential achievements of the open and liberal Switzerland (free movement of persons and market access to the EU), and ending with the Ecopop initiative, which - although clearly rejected with 74% no votes, was nevertheless supported by a minority of 26% (cf. Gemperli in Neue Zürcher Zeitung of 1.12.2014:7) - wanted to reduce immigration to 0.2% of the population, which clearly contradicts the right to migration and free settlement to be strived for. But even states with representative democracy are not immune to wrong decisions, as for example the Enabling Act of the Weimar Republic - when democracy abolished itself, so to speak, and gave free rein to the Nazi dictatorship - or the recent burqa ban in France showed.

The fourth antinomy in the sense of Hidalgo (2014:198ff.) is the contradiction between homogeneity and plurality. Already Machiavelli in his "Repubblica" based his state system on the balance between these two principles, i.e. unity and ideological divergence.

It is interesting that Hidalgo (2014:206) sees a "paradoxical double movement" in the development of social antagonisms in the development of democracy: "On the one hand, the dissolution of the basic (vertical) conflict between the upper and the lower, the nobles and the multitude, corresponded with the shift of social differentiation to the **horizontal** level, which was reflected in the form of social division of labor, specialization of skills, the individualization of lifestyles, and the formation of personal idiosyncrasies. This was

accompanied by the loss of importance of the old social binding forces such as religion, the guild and guild system, and the family village environment. On the other hand, the process of social and functional differentiation of society was accompanied by phenomena of **de-differentiation**, the standardization of ideas of norms and conformity of lifestyles, and, in the political sphere, by the monopolization of central state power" (Hidalgo 2014:206). Tocqueville had already attributed this double tendency to changing fashions and social dynamics on the one hand and pressure to conform on the other (cf. Hidalgo 2014:206/207). Hidalgo (2014:209) formulated the fourth antinomy of democracy as follows: "**Democratic thinking** is quite obviously characterized by the endeavor **to maintain** the emerging tension between social differentiation and de-differentiation, multiplicity and **unity, plurality and homogeneity**. Neither a reversion to pre-modern notions of unity exaggerating homogeneity is sought, nor a resolution of the potential for conflict inevitably associated with heterogeneity of interests" (Hidalgo 2014:209). In this context, it is worth recalling that Niklas Luhmann (2007:35-45) argued that the differentiation of highly complex social systems in modernity was almost bound to lead to the formation of democracies (see also Hidalgo 2014:223). With regard to his systems theory, Luhmann believes that it "can make comprehensible why and in what sense democracy becomes the norm, especially in the case of high complexity" (Luhmann 2007:35), although at the same time Luhmann formulated doubts about the possibilities of democracy (cf. Luhmann 2007:42-44). In this process, a kind of "recoding of political power" occurs, whereby government and opposition can refer to the same - constitutional - canon of values.

The fifth antinomy of democracy in Hidalgo's sense (2014:239ff.) is the opposition between the individual and the collective. Here, too - and the intellectual debates about concepts of individualism and collectivist views showed this again and again - it is a matter of balancing these two human aspects, one could also call them "anthropological constants". However, the extremely different cultural formations of "individual" and "community" vary more than in any other area of human life forms - and while individual societies emphasized the individual, other societies emphasized collective aspects of being human.

With regard to the sixth antinomy of democracy - namely universality versus particularity - Hidalgo (2014:299) warns against the "self-exaggeration" that is "inherent in every democratic project in theory and practice" (Hidalgo 2014:299). Even if Jean-François Lyotard, in his study "La condition postmoderne" published in 1979 (:7, cf. also Lyotard 2005:14), declared the project of modernity and, in particular, the "meta-narratives" it represented to have failed, the fact remains that democracy has not been replaced by any other form of state that is both widely accepted and functions in a reasonably sustainable way.

Following Hans Kelsen, Hidalgo (2014:181) formulated two questions: first, whether democracy can still be ascribed normative character today and, second, how the question of militancy is to be decided against this background. Or formulated against the background of developments since 9/11: To what extent can or may the democratic state restrict or even abolish fundamental rights against the background of the threat of terrorism?

Paul Lucardie (2014:7) has suggested that democratic projects or democratic practice should be judged by five criteria:

1. Do people possess opportunities to make all or most decisions about important matters?
2. Are decisions made after sufficient public discussion, without manipulation by elites or demagogues, and in accordance with people's needs and interests?
3. Are the decisions enforced?
4. Are all healthy adult inhabitants of a country understood as "the people," or are dissidents, ethnic minorities, immigrants, or other groups explicitly or clandestinely excluded?
5. What is the relevance of theory and practice to the socio-cultural conditions of life in democracy, such as fundamental rights, equal rights for all, social equality, citizenship and effectiveness?

2.4 Fundamental rights as a basis

People's rights and freedoms can be classified very differently. Otfried Höffe (1999:68), following Hohfeld (1966:35ff.), has distinguished four types of rights: On a first level, so-

called claims ("entitlements"), freedoms ("liberties"), and on a second level, powers ("powers") and protection against interference by others ("immunities"). In any case, it is clear that liberties for some always imply duties to others - namely, respect for the liberties of others. This is exemplified by human rights.

Human rights represent a coherent body of thought and are basic human rights that are "positivized" (Hafner 1992:19) or "operationalized" (Hafner 2011:129) in the form of fundamental rights and enshrined and guaranteed in constitutions and by state institutions. In order for human rights not to remain on the level of - more or less non-binding - appeals or postulates, they require, according to Hafner (1992:19), "positivization and guarantee within the framework of state law. Human rights integrated into the state legal order can - legally - be called fundamental rights (cf. Hafner 1992:20). For this reason, many constitutions - including Switzerland's - contain a binding catalog of fundamental rights. However, if human rights lack an anchoring in state law, their validity and enforcement is endangered or deficient (cf. Hafner 1992:20). In such a case, human rights become normative, but exclusively in the moral-political or rhetorical-appealing instance, without legal instruments to enforce their validity.

Niklas Luhmann's theory of fundamental rights (cf. Augsberg 2013:88) involves "guaranteeing the autonomy of the various social spheres" (Augsberg 2013:88). This includes the development of internal reflection structures and mechanisms at the subsystem level. In this process, the system environment - i.e., everything that does not belong to the system - is reflected from the respective internal view of the system. In this context, the question arises whether the secular state is to be understood as a subsystem alongside others - e.g. religious communities - or as a higher-level reference system and secular law as the corresponding state reference code (cf. Jäggi 2009). In the second case, the secular state is clearly superior to the religious communities. Depending on the case, the consequences are completely different, even contradictory. In the first case, the solution consists in a negotiation process between partners who are equal in principle; in the second case, the religious subsystem has to make adaptations to the state reference system - for example, by adopting and enforcing fundamental rights internally.

The business ethicist Peter Ulrich (2016:261) distinguishes three groups of universal fundamental rights:

1. Fundamental rights of inviolable personal freedom without regard to the person. These include freedom of opinion, belief and action, as well as the protection and defense against unjustified encroachments on the rights of freedom.
2. Fundamental rights of participation and involvement in democratic, political decision-making processes, such as political participation rights and citizenship rights.
3. Basic rights to minimum protection against existential hardship, social discrimination and the right to decent living conditions.

Although - according to the German jurist Stefan Huster (2002:107) - fundamental rights can be restricted according to the understanding of liberal fundamental rights theory, such restrictions must meet certain requirements, such as transparent justification or proportionality.

The current Swiss Federal Constitution of 1999 guarantees, among other things, human dignity (Art. 7 BV), equality of rights (Art. 8 para. 1 BV), equality of men and women (Art. 8 para. 3 BV), protection against arbitrariness (Art. 9 BV), the right to life and personal liberty (Art. 10 BV), protection of privacy (Art. 13 BV), the right to marriage and family (Art. 14 BV), the freedom of faith and conscience (Art. 15 BV) - usually called freedom of religion -, the freedom of opinion and information (Art. 16 BV) and the freedom of the media (Art. 17 BV) furthermore the freedom of art (Art. 21 BV) and the freedom of assembly (Art. 22 BV).

It happens again and again that individual fundamental rights are in conflict with each other, or that individual state tasks collide with fundamental rights. A classic example of a conflict of fundamental rights in Switzerland are the two swimming rulings of the Swiss Federal Supreme Court in 1993 and 2008: While in the first ruling a Muslim father was granted the right to exempt his daughter from swimming lessons for religious reasons (higher weighting of freedom of religion), in 2008 the Federal Supreme Court overturned its practice and gave higher weight to freedom from discrimination and the equal right to education of girls and boys (for more details, see ► Unit D 18: "State and Religion Today"). Another example of a conflict between fundamental rights and state duties exists when, in the case of a terrorist

attack or hostage-taking, the competent authorities must decide whether a fatal shot against the attacker is permissible in order to save other lives. Thus, in a self-defense situation, a targeted killing of another person may be in accordance with human rights (cf. Jirát in WochenZeitung, 5.2.2015:3).

2.4.1 Human Dignity

Jörg Paul Müller (1999:1) has emphasized that the guarantee of human dignity "represents that normative core which every person can demand in terms of respect and protection ... without preconditions". Accordingly, according to Müller/Schefer (2008:1), the protection of human dignity can be understood as a "core of the other fundamental rights and a guideline for their interpretation."

The German understanding of law emphasizes human dignity even more strongly. Heiner Bielefeldt (2013:30), for example, understands human dignity as a "comprehensive content and status" in the sense of a "basic norm" that "underlies the [German, note CJ] legal system as a whole and, in particular, underpins human rights."

This means: human dignity is attributed a subjective-legal content, which is secured, among other things, via the constitutional protection of personality and via the prohibition of discrimination (cf. Müller 1999:2).

Art. 7 of the Swiss Federal Constitution: Human Dignity
Human dignity is to be respected and protected.

Violations of human dignity become apparent, among other things, whenever people are no longer treated as subjects but as objects or items. If a person loses the right to act as a subject in a self-determined and autonomous manner, this is a violation of his or her human dignity.

Fundamental rights experts Jörg Paul Müller and Markus Schefer (2008:1) have emphasized that the right to human dignity is not only listed at the top of the 1999 Federal Constitution's

list of fundamental rights, but that "Switzerland ... thereby expresses the attachment of its own tradition and its own institutions to a central content of Western culture, which commits the constitution to something universal."

According to Müller/Schefer (2008:2), human dignity can already be violated by ridiculing someone because he or she belongs to a minority or because he or she is dependent on the state, for example as a prisoner or as a welfare recipient.

In the following, I will single out and discuss some of the fundamental rights that are particularly relevant to our question.

2.4.2 Protection of personality

One of the most important fundamental rights is **"personal freedom",** which according to federal court practice and doctrine protects fundamental aspects of human existence (cf. Müller 1999:7). Müller (1999:7) refers to this fundamental right as "constitutional protection of personality". This fundamental right applies **to all people regardless of nationality** - thus also to foreigners - or age (cf. Müller 1999:8). In contrast, legal persons - such as **religious communities** - **cannot invoke it in principle**. In addition to personal freedom as a "garantie générale et subsidiaire" (BGE 123 I 296ff. (Kopftuch): 301, cf. also Müller 1999:8, footnote 7), there are specific fundamental rights which protect certain sub-areas of the individual personality, such as the guarantee of property (Art. 26 BV) or procedural guarantees of courts and administration (Art. 29 BV). After the Federal Constitution of 1874 had not yet contained an explicit guarantee for a protection of personality and the practice of the Federal Supreme Court was limited to the application of the cantonal fundamental rights for the protection of personality until the 1960s, the Federal Supreme Court formulated in 1963 for the first time a "guarantee of 'personal freedom' as an unwritten fundamental right of the then Federal Constitution" (Müller/Schefer 2008:39; BGE 89 I 92 E3 98). Just one year later, the Federal Supreme Court extended the fundamental right to the protection of personality to include psychological integrity (BGE 90 I 29 E3a 36; cf. also Müller/Schefer 2008:39). In principle, this also applies in the religious context, for example with regard to

psychological dependence and the appropriation of members of new religious movements or rigorist currents in the major religious communities.

According to Müller (1999:9), the "broad scope of application of the constitutional protection of personality" means that it is less precisely circumscribed than the scope of application of the individual, specific fundamental rights guarantees. Beyond the "inviolable core content," the constitutional guarantee of personality "protects against any encroachment on bodily integrity, whether painful or painless, serious or harmless, dangerous to health or even curative" (Müller 1999:25). Therefore, state interventions in these areas are only allowed if they are firstly in the public interest, secondly provided for by law and thirdly proportionate (Müller 1999:25).

In principle, the right to protection of personality (Art. 10 para. 2 BV) guarantees individuals "to shape the essential aspects of their lives themselves and, in doing so, to establish personal relationships as they choose" (Müller 1999:42). Especially against the background of religious and ideological communities, this is of great importance.

Art 8 of the European Convention on Human Rights describes a comparable claim: According to the case law of the European Court of Human Rights ECtHR, the guarantee of respect for private life and the right to develop one's personality also include the right "to enter into and develop relationships with other people" (cf. Müller 1999:43 and especially footnote 5).

Fundamental rights have thus long outgrown their original function as subjective defensive rights of citizens vis-à-vis the state and have an effect "as basic constitutional decisions on all third areas of public and private law" (Loretan/Weber/Morawa 2014:40).

Within the framework of the protection of personality, there are - according to Müller 1999:9 - the following specific areas of protection:

- Right to life,
- Right to physical integrity,
- Right to psychological integrity,
- right to freedom of movement and

- Protection of individual self-determination.

In the Federal Constitution of 1999, the right to personal freedom is formulated in Article 10 as follows:

Art. 10 of the Swiss Federal Constitution: Right to life and to personal liberty
1 Everyone has the right to life. The death penalty is prohibited.
2 Everyone has the right to personal liberty, in particular the right to physical and mental integrity and to freedom of movement.
3 Torture and any other form of cruel, inhuman or degrading treatment or punishment are prohibited.

Various aspects of the protection of personality are also guaranteed at the level of international law (cf. Müller 1999:10), such as in Art. 2 European Convention on Human Rights ECHR the right to life and in Art. 3 ECHR the protection against torture and against inhuman and degrading treatment. Thereby - according to Müller 1999:21 - the prohibition of torture "is one of the few undisputed human rights contents on the international level". Other components of the ECHR are in Art. 4 ECHR the prohibition of slavery and forced labor, in Art. 8 ECHR the protection of private and family life as well as correspondence and in Art. 12 ECHR the right to found a family. In addition, there is the right to "liberty and security" in Article 5 ECHR, which primarily refers to procedural safeguards in the event of interference with freedom of movement (cf. Müller 1999:10).

2.4.3 Personal self-determination

An essential component of personal freedom is the self-determined development of the personality (cf. Müller/Schefer 2008:138). However, according to Müller/Schefer (2008:138), the Federal Constitution does not refer to a general, comprehensive right to individual self-determination in all areas of personal and social life, but rather "only those aspects that are of elementary importance for the development of the personality of the person concerned" (Müller/Schefer 2008:138). According to Müller/Schefer (2008:143ff.), sexual self-determination is also to be seen as a component of the right to self-determined development and personality. This also includes sexual orientation (e.g. homosexuality). Particularly in view of the fact that quite a few religious communities have very rigid sexual

norms, such as the rejection of premarital sexual intercourse, the requirement of virginity as a condition for marriageability, the strict rejection of homosexuality or sexual abstinence as a condition for certain offices (compulsory celibacy for Catholic priests!), the question of lived and freely determined sexuality is likely to contain considerable explosive power for the ability and conformity to fundamental rights of individual religious communities.

2.4.4 Prohibition of Arbitrariness

The prohibition of arbitrariness is also important.

Art. 9 of the Swiss Federal Constitution: Protection against arbitrariness and the preservation of good faith.
Everyone has the right to be treated by state authorities without arbitrariness and in good faith.

According to Müller/Schefer 2008:5, "arbitrariness" is understood to mean "incomprehensible and incomprehensible behavior on the part of the authorities that is not supported by any reasonable arguments". Often - but by no means always - arbitrariness is associated with abuse of power or usurpation of power (cf. Müller/Schefer 2008:5). The Federal Supreme Court considered - and still considers - acts to be arbitrary that "cannot be objectively justified [and] appear senseless and purposeless, blatantly violate higher-ranking law or run contrary to the idea of justice in a shocking way" (Müller/Schefer 2008:5). For example, the following decisions are to be considered arbitrary: Exclusion of an applicant who refused military service from a mountain guide course on the grounds that as a conscientious objector he was not fit to be a mountain guide (BGE 103 Ia 544ff. (Caminda); cf. also Müller/Schefer 2008:6), or the (actual) refusal to admit a conscientious objector to the land registry administrator examination (BGE 104 Ia 187ff.; cf. also Müller/Schefer 2008:6), a threatened penalty for not depositing identification documents which the person concerned had already deposited elsewhere (BGE 37 I 28 E3 33f. (Honegger); cf. also Müller/Schefer 2008:6) or the imposition of the costs of a criminal trial on an acquitted person due to improper behavior of relatives (BGE 37 I 238ff. (Dupasquier); see also Müller/Schefer 2008:6). As a general rule, a justification is to be understood as extraneous and arbitrary "if it has no relevant connection to the concrete problem and the area of

responsibility of the deciding state organ" (Müller/Schefer 2008:6). In addition, an authority applying the law behaves arbitrarily if it violates "a legal norm in a blatant manner" (Müller/Schefer 2008:12), but not if an authority "merely" misinterprets a legal norm (Müller/Schefer 2008:12) or gives incorrect reasons for doing so (Müller/Schefer 2008:14).

2.4.5 Freedom of Marriage

Especially in migration contexts, the right to freedom of marriage also deserves special attention. Freedom of marriage means that, on the one hand, the state cannot force anyone to enter into marriage and, on the other hand, it cannot abolish the institution of marriage (cf. Müller/Schefer 2008:225).

Art. 14 of the Swiss Federal Constitution: Right to Marriage and Family
The right to marriage and family is guaranteed.

Furthermore, the right to marriage and family also protects against a ban on marriage. Accordingly, state restrictions on the right to marriage - for members of certain minorities or religions, for example - are prohibited. However, the question also arises as to the legitimacy of religion-specific restrictions on the right to marriage. For example, it is questionable whether Catholic compulsory celibacy for priests is compatible with the fundamental right to marry. The same applies to the prohibition under religious law in some religious communities - such as Muslimas - to marry spouses of other religions, or to the prohibition of marriage for apostates (= those who have allegedly apostatized from the faith, as in the example of the Egyptian Abu Zaid.

There is also the question of the extent to which the right to marriage also applies to same-sex couples. Worth mentioning in this context is recent practice of the European Court of Human Rights ECtHR, according to which freedom of marriage cannot be linked to biological factors alone (cf. Müller/Schefer 2008:227). In addition, the European Court of Justice ECtHR, referring to the ECtHR practice, considered a law as inadmissible that denied marriage and pension rights to transsexuals (cf. Müller/Schefer 2008:227). However, whether this means a right of same-sex partners to marry remains controversial.

2.4.6 Freedom of Religion

Another fundamental right is freedom of religion, which is called freedom of faith and conscience in the Swiss Federal Constitution.

Art. 15 of the Swiss Federal Constitution: Freedom of Faith and Conscience
1 Freedom of faith and conscience is guaranteed.
2 Everyone has the right freely to choose his or her religion or belief and to manifest it alone or with others.
3 Everyone has the right to join or belong to a religious community and to follow religious instruction.
4 No one may be compelled to join or belong to a religious community, y, to perform a religious act or to follow religious instruction. religious instruction.

Jörg Paul Müller has recently brought freedom of conscience - which, according to Schefer (2005:53), was for a long time hardly perceived as an independent fundamental right in Swiss legal doctrine - close to human dignity as a guarantee of personal and moral integrity. Only recently have fundamental rights aspects of freedom of conscience been discussed in depth in Switzerland (cf. Müller/Schefer 2008:259).

In this context, there is an important difference in Switzerland compared to Germany: various authors - for example, Felix Hafner 2011:136; 138 - have pointed out that fundamental religious rights do not occupy a privileged position in Swiss constitutional law. In principle, all constitutionally enshrined fundamental rights and their respective areas of protection are on the same level (cf. Hafner 2011:136/137). However, Hafner (2011:137) believes that the ideational fundamental rights, and thus also the religious ones, are to be weighted somewhat more heavily according to the practice of the Federal Supreme Court. This can be seen, for example, in the case of advertising by religious communities on public property. In the doctrine, the position is taken "that the idealistic fundamental rights, namely the protection of personality and the fundamental rights of communication 'have a certain priority in the intensity of protection'" (Hafner 2011:137).

However, it is not enough to limit the safeguarding of fundamental rights to a state renunciation of prohibitions and commandments (cf. Saladin 1982:295 and Grotefeld 2000:118/119). Rather, according to Saladin 1982:295, the entire legal system must be geared to ensuring the realization of fundamental rights (cf. Saladin 1982:295). Accordingly, according to Saladin (1982:295), "fundamental rights are not to be understood as isolated individual claims, but rather as principles that determine entire sets of norms with the aim of implementing their inherent (liberty-personality) ideas for legal reality." For this reason, fundamental rights are not merely subjective defensive rights (against the state), but "objective fundamental norms" (Grotefeld 2000:119). For religious freedom at the level of the constitutional state, this means that the religious and ideological neutrality of the state is to be regarded as its very core (Grotefeld 2000:119). However, despite this fundamental neutrality, the state is entitled to "support religious communities in the sense of promoting the exercise of positive religious freedom" (Grotefeld 2000:119).

However, this probably does not mean the introduction of "denominational articles of exception," such as the bishopric article or the Jesuit ban at the time, which were only abolished in a referendum on May 20, 1973 (cf. Stüssi 2012:74) - or the ban on minarets in Art. 72 para. 3 of the Federal Constitution, which was introduced by the adoption of a corresponding popular initiative in 2009. Just as an aside: the fact that the ban on minarets in the constitution stands exactly in the place of the former confessional exception article prohibiting the founding of new bishoprics is not without irony - and should also give the proponents of this article food for thought....

2.4.6.1 Freedom of Religion and Neutrality of the State Towards Religious Communities

But is it permissible for the (neutral) state a) to view churches and religious communities positively and b) to adopt a more benevolent attitude toward individual religious communities or churches than toward other religious communities?

Non-denominational and radical secularists may deny question a) in principle. But this attitude is unlikely to be shared by the majority of the population.

The former president of the Swiss Federal Supreme Court, Giusep Nay (2012:10), once clearly stated: "In our understanding in Switzerland, the state's neutrality requirement does not have the purpose of completely excluding the religious from its sphere. It therefore does not require a strict separation of state and religion in the sense of secularism, but allows a positive attitude towards religious forces, in that churches and other religious communities can also be promoted and supported in their work" (Nay 2012:10).

In doing so, however, it was necessary for the state to "follow the principle of equal treatment of religious members and religious communities" (Grotefeld 2000:119). Giusep Nay (2012:10/11) put it even more pointedly in an interview: "It is the absolute duty of the democratic constitutional state to treat all religious communities equally and thus to take account of the constitutionally enshrined freedom of religion."

This brings us to question b).

Quite a few lawyers take a less strict stance on this. They do not see the neutrality of the state **as absolute equal treatment of the individual religious communities**; rather, practice and doctrine have shown great reluctance towards ideas of absolute equal treatment of religious communities (cf. Hangartner 2005:106).

However, it is **extremely problematic** to justify and legitimize this relative, not absolute, equal treatment with a (positive) **Christian cultural reservation**, as Cardinal Ratzinger - later Benedict XVI - did, for example. Thus, the former German federal judge Ernst-Wolfgang Böckenförde (in Neue Zürcher Zeitung, July 23/24, 2007:28) recounted an exchange of letters with Joseph Ratzinger. In it, Ratzinger advocated a general headscarf ban against Muslims and a Christian cultural reservation. He justified this by saying that the Christian roots of the secular state justify granting certain privileges to the Christian religion. Otherwise, the Sunday privilege would also have to be abolished.

In my opinion, however, a distinction must be made between whether certain Christian forms of organization or temporal structures have been incorporated into the state organization over the course of time, and whether advantages or disadvantages for

individual religious communities are derived or justified on this basis. Probably no one wants to abolish the work-free Sunday; rather, it is a matter of granting functionally analogous rights to the other religious communities - rights that can certainly be concretized in analogs to historically evolved conditions.

One problem is that many citizens perceive certain religious communities as being "closer to the culture" than others. However, it must be borne in mind that "culture as such is not protected by basic law" (Kälin 2000:30). Accordingly, according to Kälin (2000:30), a "right to recognition of one's own ethnicity" is also missing. Therefore, any discrimination can be more easily defined in terms of (emotionally charged) religious symbols and practices than in terms of ethnicity - or to put it differently: Positive discrimination for some means negative discrimination for others - and this also applies to religious communities and their believers. It should be borne in mind that the scope of religious freedom is formulated relatively broadly (for a detailed discussion of the significance of religious freedom in the relationship between state and religion, cf. ► Unit D 18: "State and Religion Today").

Part of religious freedom is also the right not to profess any religion or to leave any - any! - religious community. In Switzerland, in the case of leaving a religious community or church, only a (written) declaration of will may be required from the religious communities, stating that the person concerned no longer wishes to belong to the religious community in the future. More - for example, a statement of reasons for leaving - may not be demanded by the religious community (cf. Loretan 2010b:72).

Not entirely unimportant is the question of whether someone can leave the church community - i.e. the public-law corporation - without leaving the church. Originally, the Federal Supreme Court held in two different rulings that a person who leaves the national church in the canton of Zurich or in the canton of Lucerne not only terminates membership in the state-church-law body, but also leaves the religious community or church itself (BGE 52 I 119 and BGE 98 Ia E. 2 407; see also Loretan 2010b:75). This was "until recently" (Loretan 2010b:75) the case law of the Federal Supreme Court. In 1997, church and state church law expert Adrian Loretan (cf. 2010b:76) suggested: "One cannot leave the church qua corporation under public law without also leaving the church as a community of faith.

This should be clarified by appropriate amendments to the relevant norms in the cantonal church statutes." On November 16, 2007 (cf. BGE 134 I 75 as well as Kosch in Schweizerische Kirchenzeitung of 7.7.2011:456), the Federal Supreme Court returned to its previous case law and changed its previous position, according to which it was not possible to resign from the corporation under state church law and nevertheless remain a member of the Roman Catholic Church (confessional community) (cf. Loretan 2010b:89 and Friederich in Schweizerische Kirchenzeitung of 19.3.2009:208-211). In the corresponding judgment, the Federal Supreme Court criticized the action of the synodal council in the canton of Lucerne, which demanded a declaration from a believer leaving the public-law body that the person also no longer wished to belong to the Roman Catholic Church, i.e. the denomination and the religious community. The Federal Supreme Court now held that the individual freedom of religion (individual right) was to be valued higher than the freedom of organization of the church (institutionality; cf. Friederich in Schweizerische Kirchenzeitung of 19.3.2009:209). The court held that a declaration that the person leaving no longer belonged to the Roman Catholic denomination could no longer be required for a resignation from the public corporation (cf. Loretan 2010b:89).

2.4.7 Freedom from discrimination

Another important aspect for our question is the protection against discrimination, which also concerns religious communities and their members.

According to Stephan Rixen (2013:133), protection against discrimination is "part of the ideological 'brand core' of the EU." For example, Article 10 TFEU states the intention to "combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." This "combat mandate" (Rixen 2013:133) is supplemented on the one hand by a fundamental right prohibition of discrimination and on the other hand by "authorization to pursue an active anti-discrimination policy (Art. 19 TFEU)" (Rixen 2013:133).

In Switzerland, the anti-racism article of the BV explicitly stipulated a prohibition of discrimination also on religious grounds.

Art. 8, para. 2 of the Swiss Federal Constitution.
No one shall be discriminated against, in particular on the grounds of origin, race, sex, age , language, social status, way of life, religion, ideology, religion or belief, religious, philosophical or political convictions, or on account of a physical, mental or physical, mental or psychological disability.

Accordingly, the cantons must ensure that the relationship between the state and religious communities defined in the cantonal constitutions - or, if necessary, in the corresponding laws - does not contain any discrimination or disadvantages against individual religious communities. As far as I know, this aspect has hardly been discussed in the fight against racism and discrimination in Switzerland. This is surprising insofar as racism also includes attributions of privileges, preferences or special rights or - individual or structural - disadvantages and legal restrictions along ethnic and religious lines (cf. Jäggi 2009:45 as well as 61ff.).

Rixen's (2013:136-137) argumentation with regard to the equality requirement of fundamental rights and to religion-specific deviations from it is quite uncompromising. Because his argumentation applies mutatis mutandis - even if not legally - also to Swiss conditions, I reproduce the whole section below: "If, however, this expansive equality principle, which relies on inclusion, is part of written and lived EU law, then EU religious law cannot remain unaffected by it. Thus, Article 17 (1) and (2) TFEU cannot be left untouched by the general principle of equality and anti-discrimination, as expressed in particular in Article 10 TFEU. The more the core area of this principle of equality is affected, the less attention will have to be paid to the self-image of a religious community, for example, in the weighing of interests within the framework of Article 17 (1) and (2) TFEU. If, for example, a religious community attaches massive legal disadvantages to sexual orientation ('sexual orientation', cf. Art. 10 TFEU) because, for example, it considers homophobia to be a religious commandment (however subtle and euphemistic the justifications may be), then it cannot hope to be accepted, at least from the perspective of EU (primary) law, for which the 'fight against gender discrimination [...] is a high-value topos' (Söbbeke-Krajewski ..., p.361) cannot hope for acceptance. An EU directive that should leave loopholes for legally secured

discrimination in this respect is therefore questionable when measured against EU primary law" (Rixen 2013:136/137).

In other and more general terms, if religion-specific norms or laws contradict the core of fundamental rights, this is very problematic from a fundamental rights perspective. This raises the question of how to deal with this from the perspective of the state and the judiciary, but also from the perspective of the religious community in question. In addition, it would have to be clarified what should happen in the case of "minor" violations or effects of religion-specific law against the idea of fundamental rights - and last but not least - what is to be counted as the core of fundamental rights. In the EU area, there is also the fact that - according to Rixen (2013:137) - there is a "primary law equality system that is pushing for constant expansion" which, "however the secondary law currently in force (namely the directive law) is structured, provides options for optimized anti-discrimination that can only become topical in the future" (Rixen 2013:137). Rixen (2013:137/138) concludes from this: "The conventional view that a church, by virtue of its right of self-determination, defines the relevance of an activity for the proclamation mission itself and cannot merely claim a gradualizable protection of tendencies, thus comes under pressure". This is even more true for Muslim religious communities.

Söbbeke-Krajewski (2006:346) has pointed out that in the EU, priority fundamental rights - such as the "realization of equal treatment in employment and occupation" (Söbbeke-Krajewski 2006:346) - can be restricted by derogations in secondary law. In this sense, under EU law, national provisions can be introduced or maintained which constitute unequal treatment but not discrimination (Söbbeke-Krajewski 2006:355). Yes, the EU has gone even further: Discrimination on religious-ideological grounds is possible in certain cases. In the draft directive COM (1999) 565 final, OJ 2000 C 177 E, p. 42ff, there Art 4 II states: "Member States may provide, in respect of public and private organizations which directly and predominantly pursue a particular philosophical aim in the fields of religion or belief, education, reporting and expression, and within such organizations in respect of specific occupational activities which directly and predominantly serve that aim, that a difference of treatment shall not constitute discrimination where it is justified by a particular characteristic related to religion or belief and where, by reason of the nature of those

activities, that particular characteristic constitutes a genuine occupational requirement" (cited in Söbbeke-Krajewski 2006: 349).

However, "Art. 4 II p. 2 ... [also] provides that discrimination on a ground other than religion or belief is not justified" (Söbbeke-Krajewski 2006:358). In other words, an exception to the anti-discrimination principle is possible for religious and ideological organizations only if the "activities in question, or the circumstances in which they are carried out, constitute an essential, legitimate and justified occupational requirement in view of the ethos of the organization" (Söbbeke-Krajewski 2006:355). In this regard, according to Söbbeke-Krajewski (2006:355), "the question remains whether a gradation according to the proximity of the activity to the core of preaching or according to theological relevance is warranted."

The question remains whether discrimination "on the basis of a characteristic related to religion or worldview is permissible" (Söbbeke-Krajewski 2006:361). Söbbeke-Krajewski (2006:361) speaks of the example of homosexuality when it is prohibited by a religious community or church. "It is questionable in such a case whether an employee's heterosexuality constitutes an 'essential and decisive occupational requirement' in this context" (Söbbeke-Krajewski 2006:361). According to the understanding of fundamental rights under European Union law, the religious community is entitled to make such an assessment according to its own standards (Söbbeke-Krajewski 2006:346). But the possible consequences are serious: What if a religious community - for example, a Muslim community - prohibits apostasy, i.e., apostasy from the faith, although the right to freely choose one's faith and religion, and thus also to leave the religious community, is one of the constitutional fundamental rights? Obviously, such a position leads to a dead end.

Particularly, but not only in the context of Muslim communities, there is the problem that on the one hand the cantons - for example in the field of education - have a supervisory duty, while on the other hand the religious communities and churches insist on the right of self-determination within the framework of cooperative religious freedom. For example, § 127 para. 3 of the Basel-Stadt cantonal constitution states: "The government council shall grant approval [for recognition under public law, note CJ] if neither federal law nor cantonal law is in conflict." This dilemma is also expressed by § 2 of the Basel Church Law:

Excerpt from the Church Law of the Canton of Basel-Stadt
"§ 2 para. 1 Church Law:
'The churches under public law arrange their relations independently within the framework of the regulations of the Confederation and the canton.'
§ 2 para. 2 Church Law:
'The enactment and amendment of their church constitutions shall, in order to be binding, require the consent of the majority of the voting church members and the approval of the government council. Approval shall be granted if neither federal law nor cantonal law is violated.'"
Source: Kirchengsetz vom 8.11.1973, cf. also Nolte 2002:113.

The question here is when a religious or church constitution is deemed not to conform to federal or cantonal law - and when it is not. Is the refusal in principle to ordain women to the priesthood in the Catholic Church in conformity with federal law and fundamental rights or not? Does the bishop's authority to dismiss a parish employee for dissent violate Swiss law? Does the earlier age of marriage in, say, Muslim law or canon law violate federal law or the UN Convention on the Rights of the Child?

Marriage age in Islam and Catholic law:
According to Rohe (2013:24/25), the minimum age of marriage in Islamic law is at the onset of puberty: "According to the traditional view, the minimum age of marriage is widely set at the onset of puberty between 9 and 12 (lunar) years for boys and at 9 years for girls; at 15, majority was presumed" (Rohe 2013:24/25).
Catholic canon law (can. 1083, para. 1) states, "The man cannot contract a valid marriage before reaching the age of sixteen, and the woman before reaching the age of fourteen"- that is, subsequently, it can. However, canon. 1072: "Pastors are to be concerned that young people are kept from marrying until they have reached the age at which marriage is customary in the country. The question, however, is whether, on the basis of can. 1072 can be used to prevent a marriage in cases of doubt - for example, if the country in question has a higher minimum age for marriage.

Do Islamic or Baha'i inheritance laws, which grant women a smaller share of the inheritance than men, contradict fundamental rights? Is the bride price prescribed among the Baha'i (see, for example, Bahá'u'lláh 2000:51 and 165/166) - and the repayment demanded after the wife has been found to have had premarital sexual intercourse with her husband - in conformity with fundamental rights?

In any case, Nolte (2002:115) rightly concludes that implicit or explicit supervision by the state - as in the canton of Basel-Stadt - limits and should limit the right of self-determination

of churches and religious communities. However, this can legitimately **only be done by a democratic state**, which is either **directly or indirectly authorized** to do so **by the population.**

Therefore, the question arises as to what is meant by a democratic constitutional state.

2.5 What kind of democratic state?

In his essay "Colpo die Stato permanente" (= "Permanent Coup d'Etat"), Paolo Becchi (2014) argued that the Italian state had undermined or abolished crucial constitutional rights through tacit constitutional amendments in parliament - without any public discussion. On April 17, 2012, for example, articles 81, 97, 118, and 119 were tacitly amended by a two-thirds majority in parliament and a constitutional revision provided for in article 138 was circumvented via a corresponding referendum (cf. Becchi 2014:21). Becchi speaks in this context of a "coup d'état by the majority." In this way, the Italian parliament had, as it were, abolished an economic theory - Keynesianism - by law and adapted the orders of supranational institutions in Brussels, Frankfurt and Berlin (cf. Becchi 2014:22).

If democracy is understood as the rule of the people, the question arises as to what criteria must be met in order to speak of a democracy.

In a democracy in the modern sense, both the constitution and the political system, the law and the right, as well as the fundamental rights of all people living here, are based on one or more acts of resolution. Whether the affected people themselves - for example in a referendum - could take a position on this or whether delegates elected for this - for example of a constituent assembly or a parliament - is of secondary importance for the time being.

What is important, however, is that there was not only formal approval, but also approval in terms of content, i.e. approval after a process of democratic debate.

In this context, it is crucial that all persons and groups residing in the territory in question were able to participate in this process on as equal a footing as possible.

But a one-time decision-making process is not enough to legitimize a democratic state: Regular political negotiation processes involving all population groups, conducted according to clear and transparent rules of the game, are needed for a democratic system to continue to function and to have lasting legitimacy. If population groups are excluded from these negotiation processes - for example, because they do not have the right to vote or to be elected - the democratic system is riddled with holes.

Just as important as equal participation in all allocation, distribution and negotiation processes, however, is that all groups have an interest in and support for a common state.

2.6 Forms of state

The question arises how sovereignty, i.e. the exercise of rule, is understood and legitimized, i.e. justified. Schuppert (2014:292) has schematically depicted the three most important concepts of sovereignty of the 20th century:

State Thinker	Hans Kelsen (1881-1973)	Carl Schmitt (1888-1985)	Hermann Heller (1891-1933)
Main work	Das Problem der Souveränität (1921)	Die Diktatur (1921) Politische Theologie (1922)	Die Souveränität (1927)
Most important statement	A world legal order stands above the states	Sovereign is who decides on the state of emergency	Sovereign is the state as the highest decision-making and effective unit

Source: Schuppert 2014:292.

Clearly democratic positions are held by Kelsen and Heller, while Schmitt is known to have embraced National Socialism and the Führer cult in the 1930s.

Anna Gamper (2010:86) distinguished the following models of federal states according to the criterion of statehood and, derived from it, sovereignty:

- Monistic federal state theories: Only the state as a whole possesses sovereignty. The constituent states neither possess statehood nor are they sovereign.
- Dualistic federal state theories: This variant is the most common worldwide. The federal state is composed of (member) states - such as Germany of the federal states, or Switzerland of the cantons. These constituent states have partial sovereignty - in contrast to the municipalities, which have no statehood. This division of sovereignty usually plays out in such a way that the federal state has external sovereignty, while the constituent states have "internal" sovereignty.
- Trialist theories of the federal state: These include, for example, Kelsen's three-circle doctrine. Here, the federal legal system and the constituent legal systems are on equal footing and are, as it were, under the "umbrella" of the state as a whole (cf. Gamper 2010:87).

3. Control Questions

1. What does "democracy" literally mean?
2. How did most democracies come into being?
3. Why is democracy a rule of the majority?
4. What five types of (democratic) states does Salzborn name and what are their characteristics?
5. Which three concepts of democracy does Wolfgang Merkel distinguish?
6. Why do Pelinka/Varwick call direct democracy utopian?
7. Name the four most important plebiscitary and the four most important representative elements of democracy according to Pelinka/Varwick.
8. How did Max Weber define "power"?
9. How did Michel Foucault describe power?
10. Which six antinomies (= internal contradictions) of democracy did Oliver Hidalgo describe, and how do they show up in detail?
11. What five criteria did Paul Lucardie propose for judging a democracy?
12. To what extent do fundamental rights form the basis of a democratic state?

13. What are the five most important fundamental rights in your opinion and what do they consist of?
14. How does Paolo Becchi justify his opinion that there is a "permanent coup d'état" in Italy?
15. Explain what "monist" and "dualist" federal states are and distinguish them from each other.

4. Links

Menschenrechte – Grundrechte – Bürgerrechte
Text von Hans-Otto Mühleisen
http://www.efms.uni-bamberg.de/pdf/integration/Links/Menschenrechte_Grundrechte_B%FCrgerrechte.pdf

Definition von Demokratie
http://demokratie.geschichte-schweiz.ch/definition-demokratie.html

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