Constitutional History as the History of Modern Constitutionalism: Germany since 1871[1]

HORST DIPPEL

Introduction

Three constitutions left their mark on Germany since 1871. The Constitution of the German Reich of 16 April 1871 (*Verfassung des Deutschen Reiches*; often referred to as Bismarck's Imperial Constitution, *Bismarcksche Reichsverfassung*, or BRV) remained in force until 1918. This was followed by the Constitution of the German Reich of 11 August 1919, commonly known as the Weimar Imperial Constitution (*Weimarer Reichsverfassung*, until 1933). Finally, the Basic Law of the Federal Republic of Germany (*Grundgesetz*) was introduced on 23 May 1949, and is still valid today. These three constitutions established three different states, each with different national territories, different political structures, different political, cultural, economic, social, and ethnic conditions, and different legal systems. The path led from an autocratic and militaristic empire with a parliament of limited powers (especially with regard to the military budget, which accounted to the lion's share of expenditure, largely beyond the reach of parliament[2]), to a radical republic with strong plebiscitary elements and a president whose strength relied on his direct election – praised as a «welldesigned constitutional creation» (*wohlgelungenes Gesetzgebungswerk*)[3] by contemporaries adhering to it – and finally to the Bonn Republic, eager to «learn from the mistakes of Weimar» (*aus den Fehlern von Weimar lernen*), thus limiting Parliament's power to overthrow the federal government by connecting the vote of non-confidence with a majority supportive of a new chancellor (*konstruktives Misstrauensvotum*) and abolishing any plebiscitary elements as well as the popular election and emergency powers of the president. The inner federal structure was maintained in all three constitutions, but the role and importance of the states (*Länder*) was always redefined. Their position was the weakest under the Weimar constitutional framework, denominated by the oxymoronic de-

scription of the «unitarian federal state» (*unitarischer Bundesstaat*)[4].

These constitutions – and this applies *mutatis mutandis* to national constitutions in general – have so far been examined in isolation, and only sometimes compared with each other. What is painfully lacking in all these analyses is not only the overcoming of the national (or even nationalistic) starting points. To be sure, there have repeatedly been approaches to comparatively examining constitutions in a transnational context. To cite just a few recent examples, Armin von Bogdandy has examined «comparative constitutional scholarship» from the perspective of the European Union[5]. Chris Thornhill has proposed an «anti-formalist theory of constitutional law» based on sociology[6], while Uwe Kischel has pleaded for the «typification» of «legal systems» and the division into «legal circles» (*Rechtskreise*)[7]. Only recently, Peter Häberle has put forward seven theses on «universal constitutionalism», under which the individual states figure with «national partial constitutions»[8]. Ran Hirschl has taken a more fundamental path by asking for a methodological underpinning and justification of comparative approaches in a world in which constitutions appear increasingly comparable[9].

This article does not compare the three German constitutions as such, which could be managed – given their great heterogeneity – only with reference to very limited questions. Rather, it looks into the substance of central constitutional issues themselves, and how they were understood and fixed at their respective epochs. Such questions should not be asked in national isolation, but in the awareness that modern constitutions have existed since the end of the eighteenth century though they may not have been readily available as blueprints at any specific moment. The most important constitutions, however, and their qualifying constitutional features, even in rudimentary forms or vaguely understood, had been engrafted in the minds of German constitution makers as well as of the informed general public. Constitutional historiography, so far, has largely ignored this phenomenon. But the "migration of constitutional ideas"[10] deserves more interest and research, and this article is an attempt to demonstrate this "migration of constitutional ideas" for Germany and its three constitutions in question.

The Origins of Modern Constitutionalism

The first modern constitutions of the end of the eighteenth century were the product of revolutions. But in reaction to them constitutions became also deployed in order to prevent revolutions[11]. Most prominent among the latter, not only in the nineteenth century, were the various iterations of the constitutions of the constitutional monarchy. A more liberal type of constitution, very strongly influenced by the English example, was the constitution of parliamentary monarchy. In some smaller rural cantons of Switzerland, direct democracy prevailed, whereas in the revolutions of the late eighteenth century, as in Pennsylvania in 1776 and in France in 1793 the radical democratic republic found its constitutional expression[12], short-lived in both cases though it was but mythologized by generations to come. Yet there were other constitutional ideas in circulation since this time, namely

those of modern constitutionalism. These inspired Carl von Rotteck, as they alone founded a «constitutional system» which, in his opinion, was «in agreement with the system of a purely reasonable state law» (*System eines rein vernünftigen Staatsrechtes*), just as it had developed «completely in theory, at least approximately in practice» «since the beginning of the American Revolution and – of particular relevance for Europe – the French Revolution». For Rotteck, these constitutional ideas included, among others, popular sovereignty, representative government, separation of powers, independence of the judiciary, civil rights, and accountability[13].

What Rotteck described with his «system of a purely reasonable state law» was precisely modern constitutionalism as it had come into being at the end of the eighteenth century in the form of a single written document containing fixed constitutional principles. Other than in Latin America, these constitutional ideas had only sporadic impact in Europe in the Restoration period and beyond. It was the revolution of 1848 to bring about the great turning point; though remaining an episode, it stimulated all these constitutional ideas including those of modern constitutionalism to be negotiated on the open market[14]. This plethora of ideas inspired a flood of new constitutions, so that modern constitutionalism achieved its most outstanding results with the Kremsier Draft Constitution of 4 March 1849 and the Constitution of the Roman Republic of 1 July 1849, in which all its constitutional principles appeared.

The history of modern constitutionalism came into being in the last quarter of the eighteenth century with the American and French revolutions[15]. Though it took many decades in both countries to get its ideas generally accepted – some resistance has not vanished even today – differences between both countries continue to exist as French constitutional thinking pursued its own evaluation of some of its principles until well into the 21st century. In spite of these nuances the history of modern constitutionalism has shaped the constitutional history of Europe and of both Americas in the nineteenth and twentieth centuries. The idea that constitutions should be based on a set of rational principles, well-balanced and consistent with each other to insure political and constitutional stability is today in theory accepted across the globe though political practice and ideology may provide different results, and conflicts, revolutions and authoritarian power to play out their roles as they used to do in the past. Nevertheless, with the exception of the United Kingdom, New Zealand, and Israel, each for its own reasons, all countries profess today to be legally founded on a constitution along the principles of modern constitutionalism.

This is not the proper place to spell out the history of modern constitutionalism. The focus of this article Germany in the first half of the twentieth century, and the question is how and to which degree modern constitutionalism gained ground here. This question, obviously, excludes the years of 1933-45 as the period of its absolute negation. It also excludes the constitutions of the German Democratic Republic, as the lip service their constitutions paid to modern constitutionalism does not really offer any contribution to the topic of this article. Only in admitting the European and international context a proper perspective on the three German constitutions may be attained and

an isolated focus on national sensitivities, still virulent in some quarters, be avoided[16].

Modern constitutionalism from its very beginnings demonstrated that the constitution as a written document was much more than the creation of a new organisational statute for a particular country. Rather, its constitutions all claimed a clearly-defined political purpose. This was made explicit by the famous art. 16 of the French Declaration of Human Rights of 1789: «Any society in which the guarantee of rights is not assured, nor the separation of powers determined, has no Constitution» (*Toute société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a point de Constitution*)[17]. This reads as a shorthand description of the core of Rotteck's theory, propagated first in America in 1776 and echoed in France in 1789: the task of a constitution is to permanently secure the rights of citizens. Therefore, so the initial argument, a declaration of rights is needed to fix the principles on which a constitution has to be based in order to effectively guarantee these rights. Such principles, as the citizens of Essex in Massachusetts formulated in 1778, must be unequivocally expressed in a «Bill of Rights, previous to the ratification of any constitution»[18]. In 1789, the citizens of Mont-de-Marsan in the southwest of France echoed this idea in their *Cahier de doléance*, that the country needed a constitution to guarantee the freedom of its citizens: «Les principes de cette constitution doivent être renfermés dans une déclaration des droits naturels de l'homme»[19].

The first document in conformity with these ideas and expressing those principles was the Virginia Declaration of Rights of 12 June 1776. It is the founding document of modern constitutionalism[20], standing as the model for a growing number of subsequent American declarations of rights and constitutions by containing those ten core principles which with minor enlargements and adaptations since then constitute modern constitutionalism: Sovereignty of the people (art. 2), human rights (art. 1) and universal principles (arts. 1, 15), limited power of government (art. 3), the constitution as the supreme law (preamble), representative system of government (art. 6), separation of powers (art. 5), accountability (art. 2), independence of the judiciary (art. 8) and the ability to amend the constitution with the participation of the people (art. 3)[21]. Subsequent American declarations of rights and constitutions increasingly took up these principles as constitutive, though there were of course local peculiarities; the Constitution of Louisiana of 1812, for example, did not state either the sovereignty of the people or human rights, and other reservations still exist today[22]. Even if autocrats in Europe, Latin America, and the rest of the world were generally only prepared to accept a constitution for the formal legitimisation of their rule, they were ultimately unable to halt the triumphal march of the principles of modern constitutionalism (notwithstanding their differentiation in terms of content) over the past two and a half centuries and thus the idea of a rationally founded and well-balanced constitution to secure the freedom of the citizen.

The Migration of Constitutional Ideas to Germany

Germany is no exception to this rule. Rather, it is an integral part of this global pro-

cess of the «migration of constitutional ideas» with the justification of a constitution not patterned after or copied from foreign models, but based on the «system of a purely reasonable constitutional law», as Rotteck put it, even as this process spelled out with the particularities of each country.

Popular Sovereignty

Let us first look at popular sovereignty: the «we the people», according to the American wording of 1787. Nothing the like was to be found in the German Imperial Constitution of 1871. Instead, the preamble stated that the Prussian king, in the name of the North German Confederation and the four South German princes, «shall conclude an eternal covenant for the protection of the federal territory and of the law valid within it as well as for the care of the welfare of the German people» (*…schließen einen ewigen Bund zum Schutze des Bundesgebietes und des innerhalb desselben gültigen Rechtes sowie zur Pflege der Wohlfahrt des Deutschen Volkes*)[23]. The princes had formed a covenant to preserve their thrones; accordingly, there was no mention of the people as having rights of their own. Although the Reichstag had retroactively agreed to the Constitution on 14 April 1871, the people were neither the author nor the constituent legitimizing basis of the Constitution. On the contrary, they were expressly excluded from the formation of this German Reich, since only the princes had concluded this covenant and the Reichstag had expressly refused to intervene in the content of the text submitted to it[24]. It is difficult to imagine a stronger expression of the rejection of the principle of popular sovereignty.

With the advent of the Weimar Constitution of 1919 this resistance was overcome. The Weimar preamble proclaimed that «The German people […] have given themselves this constitution» (*Das Deutsche Volk […] hat sich diese Verfassung gegeben*). Art. 1 immediately added: «The state authority comes from the people» (*Die Staatsgewalt geht vom Volke aus*)[25]. Beyond this basis of legitimisation, popular sovereignty was also an operative element of the Weimar Constitution, in that it designated a whole range of situations, from the legislative process to constitutional amendments, in which the Reichstag, Reichsrat, or Reichspräsident could bring about a referendum (arts. 73-77)[26]. This commitment to the sovereignty of the people appeared so uncontroversial that the Constitution did not set procedural conditions for the conduct of referendums and their validity in any place, but left them to statutory regulation[27].

With the breakthrough of 1919 with regard to the sovereignty of the people as a basis for legitimacy, the ground was laid for 1949. «By virtue of its constitutional power» (*[K]raft seiner verfassungsgebenden Gewalt*) the German people had given themselves the Basic Law. However, the just quoted second sentence of art. 1 of the Weimar Constitution is amended and supplemented in paragraph 2 of art. 20 Basic Law by the regulation of its exercise: «It is exercised by the people in elections and votes and by special organs of legislation, executive power and jurisprudence» (*Sie wird vom Volke in Wahlen und Abstimmungen und durch besondere Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtsprechung ausgeübt*)[28]. This addition was

deemed necessary to exclude the operative principle of popular sovereignty by means of Weimar referenda at the federal level; it was also intended as a means to avert East Berlin's intentions to play with the card of direct democracy in the West[29].

Human Rights

We may next turn to human rights as a further principle of modern constitutionalism. To make a long story short: the Empire's 1871 constitution contained neither provisions for civil nor human rights[30]. The subordinate status of individual rights corresponded to the fact that in the 1870s some rights of the citizen were introduced by simple legislation, generally with the proviso of a legal reservation[31]. Here, too, 1919 embodied a new approach, but the breakthrough in the recognition of human rights was not fully achieved. Following from the preceding set by the failed Frankfurt Imperial Constitution of 28 March 1849, the Weimar Constitution formulated a peculiar compromise for its comprehensive second part: the «Basic Rights of the German People» (*Grundrechte des deutschen Volkes*) of 1849 were accompanied by the novel «Basic Obligations of the Germans» (*Grundpflichten der Deutschen*)[32]. These rights were formulated as civil rights (*Staatsbürgerrechte*)[33], even if the constitutional legal scholar Gerhard Anschütz wanted to understand them as human rights[34]. Regardless of their deliberate verbal limitation, in which their applicability was specified in the text to apply specifically to «every German» (*Jeder Deutsche*) or «all Germans» (*Alle Deutschen*), contemporary interpretations stress the immanent moral appeal to interpret them as broadly as possible in any case of doubt[35]. However, this cannot hide the fact that the Weimar guarantees were – in the words of Hugo Preuß – rather «programmatic guidelines» (*[p]rogrammatische Richtlinien*)[36], which were intended to have a state educational effect instead of limiting state power. By no means were they construed as norms to be enforced against the state[37]. Therefore, art. 107 Weimar Constitution 1919 ordered administrative courts «for the protection of individuals against orders and decrees of the administrative authorities» (*zum Schutze der einzelnen gegen Anordnungen und Verfügungen der Verwaltungsbehörden*)[38]. But it failed to establish a constitutional court for the effective protection of the individual against the violation of his fundamental rights by the legislator. There is no concrete mention of human rights anywhere in the Weimar Constitution – even if some of the rights listed could have been understood in this way – and even though it was precisely in these years that the Paris Peace Treaties and the League of Nations explicitly advocated the protection of minority rights, especially in the new states of Central and South-eastern Europe[39].

It was not until 1949 that the Basic Law took the decisive step, which was the result of the devastating impact and legacy of Nazi barbarism, and the desire to avoid its resurgence. In the course of the deliberations of the Basic Law, at the second plenary session of the Parliamentary Council on 8 September 1948, Carlo Schmid claimed precisely what had been understood as the founding reason of modern constitutionalism on both sides of the Atlantic in the late eighteenth century: in order to per-

manently secure the rights of the individual, the constitution has to be preceded by a declaration of rights stating the principles of the constitution, or as Schmid put it: «Fundamental rights must govern the Basic Law» (*Die Grundrechte müssen das Grundgesetz regieren*)[40]. Consequently, the Basic Law not only begins with fundamental rights – thus adhering to the German terminology of *Grundrechte* introduced in the *Paulskirche* deliberations of 1848-9 – but its introductory provisions are also imbued with this conviction. Art. 1 starts with the famous statement: «The dignity of human beings is inviolable» (*Die Würde des Menschen ist unantastbar*)[41]. The second paragraph of the same article reads: «The German people are therefore committed to inviolable and inalienable human rights as the basis of every human community, peace and justice in the world» (*Das Deutsche Volk bekennt sich darum zu unverletzlichen und unveräußerlichen Menschenrechten als Grundlage jeder menschlichen Gemeinschaft, des Friedens und der Gerechtigkeit in der Welt*). Even if this sentence may cause headaches to legal minds, it is of fundamental importance as the defining determination of the Federal Republic's inalterable position on the question of rights, extending far beyond that which was achieved and envisaged in the *Paulskirche* a century earlier[42]. What follows are general human rights, together with a few civil rights. Accordingly, the articles begin either with «any» (*Jeder*), «all people» (*Alle Menschen*), «nobody» (*Niemand*) or the like. Furthermore, all these rights, according to art. 1 para. 3 Basic Law, are «directly applicable law» (*unmittelbar geltendes Recht*)[43]. This assertiveness, underlined by the Federal Constitutional Court and its decisions, has shaped the Basic Law as well as the history of the Federal Republic of Germany ever since.

Universal Principles

In contrast to the principle of popular sovereignty Germany had to wait until 1949 before being ready to adopt human rights as core principle of modern constitutionalism without restrictions. The same delay applies to its readiness to base the constitution on universal principles, rather than on local or national peculiarities which might tend to separate or exclude it from the global liberal community. The German constitutional period up to 1918, again, may be completely left out. Neither the preamble nor any other part of the Imperial Constitution of 1871 relied on any overarching, universal principles to legitimise it. The preamble of Weimar was less elusive, and saw the German people as «inspired by the will to renew and consolidate their territory in freedom and justice, to serve peace within and without, and to promote social progress» (*von dem Willen beseelt, sein Reich in Freiheit und Gerechtigkeit zu erneuern und zu festigen, dem innern und dem äußern Frieden zu dienen und den gesellschaftlichen Fortschritt zu fördern*)[44]. It still sounds rather self-reflective and lacks the necessary pathos to convincingly demand Germany's place within the international community with self-confidence and the willingness to take over responsibility.

Any comparison with 1949 makes the difference and the breakthrough to the level of modern constitutionalism obvious. The introductory passage of the preamble of the Basic Law clearly exclaims: «Conscious

of the responsibility before God and mankind, [and] inspired by the will […] to serve the peace of the world as an equal member in a united Europe» (*Im Bewußtsein seiner Verantwortung vor Gott und den Menschen, von dem Willen beseelt* […] *als gleichberechtigtes Glied in einem vereinten Europa dem Frieden der Welt zu dienen* […]). In the same tenor, the recourse to human rights «as the foundation of every human community, of peace and justice in the world» (*als Grundlage jeder menschlichen Gemeinschaft, des Friedens und der Gerechtigkeit in der Welt*) testifies to the Basic Law's commitment to universal principles. Several articles later, «[t]he peaceful coexistence of peoples» (*das friedliche Zusammenleben der Völker*) was established as the guideline of German foreign policy and on top of it enthroned the fundamental commitment to the general human dignity within Germany's constitutional identity[45].

Limited Powers

A further principle to be scrutinized is the limited powers of government. In England, this principle is known as «limited monarchy». The term is part of a centuries-old tradition and anchored in constitutional history; in particular, Sir John Fortescue's *De Laudibus legum Angliae* of around 1470 introduced the concept of *dominium politicum et regale*, which was henceforth translated as limited monarchy[46]. The Glorious Revolution took up this term in 1688-9 and, with the Bill of Rights, gave it its ever-present expression by depriving the king of certain rights and handing them over to Parliament. Since every constitution on the basis of modern constitutionalism is designed to secure the rights of citizens against encroachments of the governing part, each of these constitutions due to this transfer of power and as a matter of principle limits the power of the executive. Consequently, the decisive factor is not that the king (or similar head of state) has to share the power of legislation and taxation with parliament which constitutes a limited monarchy or a republican *limited government.* Rather the concrete legal limitation of the executive power in order to protect the rights and freedom of the citizens and balancing it with the two other powers is the essence of limited government. It is therefore misleading to describe the German Empire of 1871 as a «restricted monarchy» (*eingeschränkte Monarchie*)[47], as neither this principle was included in the 1871 constitution, nor did it contain any declaration of rights to be safeguarded. The Empire was supposed to be powerful, and the emperor was to be the embodiment of that imperial power. Thus he had the personal right at any time «to ensure that within the German army all parts of the troops are complete and in good condition for warfare» (*dafür Sorge zu tragen, daß innerhalb des Deutschen Heeres alle Truppentheile vollzählig und kriegstüchtig vorhanden sind*) (art. 63)[48], By contrast, a limited power to govern appeared to be synonymous with a weak state, the exact opposite of what the empire wanted to be and was meant to be.

The idea of limited government was also alien to the Weimar Constitution. Even though fundamental rights were declared in the constitution, it was impossible to sue for them against the state due to the absence of a constitutional court[49]. Nor did the Weimar Constitution explicitly oblige the state to

respect these fundamental rights, leaving the legislature with the power to intervene. Instead, there were explicit duties of citizens, including those which today seem surprisingly anachronistic as an obligation of the «acceptance of honorary activities» (*zur Übernahme ehrenamtlicher Tätigkeiten*) (art. 132), or «the providing of personal services to the state and the community» (*persönliche Dienste für den Staat und die Gemeinde zu leisten*) (art. 133)[50], even if they constituted a «mere memo item» (*bloßen Merkposten*) rather than a concrete right[51]. Ultimately, however, the operative principle of popular sovereignty mentioned above characterised the constitution, which by its very nature contradicted any limitation.

The Basic Law of 1949 also lacks a clear statement limiting state power. However, the principle of the limited government can be found with little difficulty. Already art. 1 para. 3 Basic Law with its dramatic increase in the importance of fundamental rights as compared with the Weimar constitution states: «The following fundamental rights bind legislation, administration and jurisdiction as directly applicable law» (*Die nachfolgenden Grundrechte binden Gesetzgebung, Verwaltung und Rechtsprechung als unmittelbar geltendes Recht*). Within a few years after the inactment of the Basic Law, the word «administration» (*Verwaltung*) in the mentioned art. 1 para. 3 Basic Law was replaced by «executive power» (*vollziehende Gewalt*), amounting to the version still valid today[52]. Furthermore, in contrast to 1919, a powerful constitutional court was established with the inauguration of the Federal Constitutional Court in 1951, which since then has considered the protection of citizens' rights against state interference as one of his central obligations. Finally, the 1949 text is distinguished by its famous eternity clause: «Any amendment to this Basic Law which affects the division of the Federation into *Länder*, the fundamental participation of the *Länder* in legislation or the fundamental principles laid down in articles 1 and 20 shall not be permitted» (*Eine Änderung dieses Grundgesetzes, durch welche die Gliederung des Bundes in Länder, die grundsätzliche Mitwirkung der Länder bei der Gesetzgebung oder die in den Artikeln 1 und 20 niedergelegten Grundsätze berührt werden, ist unzulässig*) (art. 79 para. 3)[53]. Thereby even without being expressly stated, the principle of limited government is firmly anchored.

The Constitution as Supreme Law

Constitutional precedence can be read in a similar fashion. In this case its *locus classicus* is the American Federal Constitution of 1787, which clearly states: «This Constitution […] shall be the supreme Law of the Land» (art. VI, 2)[54]. A comparable provision in German constitutional law is still sought in vain, both before and after 1919. The Württemberg jurist and constitutional theorist Robert von Mohl already stated in 1860 that «constitutional documents were drawn up only for the purpose of obtaining a firmer and more inviolable basis for the state, beyond the changeability and whim of the ordinary legislative power»[55]. But Paul Laband, who dominated the state law of the empire, countered a little later: «The legal principles contained in the Constitution can only be amended under restricted conditions, but they do not have a higher authority than other laws»[56]. Although the consti-

tutional reality changed dramatically in the Wilhelminian period and during the First World War, the prevailing positivism among the constitutional lawyers barred them from the awareness to provide the changed political practice and its institutions with constitutional legitimacy by amending the constitution accordingly[57]. This rather subordinate role of the constitution corresponded to the fact that the 1871 text had stipulated that the military – contrary to all constitutional struggles of the first half of the nineteenth century – was not sworn in on the constitution but on the emperor and was obliged to follow his orders with «unconditional obedience» (*unbedingte Folge zu leisten*) (art. 64)[58]. Lacking the emperor, the Weimar Constitution sought to correct this, stipulating in art. 176 that «[a]ll public officials and members of the *Wehrmacht* shall be sworn in on this Constitution» (*Alle öffentlichen Beamte und Angehörigen der Wehrmacht sind auf diese Verfassung zu vereidigen*)[59]. At the same time, the Weimar practice of constitution-breaking statutes (*verfassungsdurchbrechende Gesetze*)[60] demonstrated that the principle of the constitution as supreme law was still alien to German politics and public law[61].

The Basic Law of 1949 makes no *formal* exception here for the time being. There is no provision that expressly declares the constitution to be the supreme law of the Federal Republic. Even if this absence may have corresponded to the opinion of traditionally minded German public lawyers rejecting the idea in 1949, there are powerful arguments for seeing the precedence of the constitution «located» (*verortet*) in art. 20, art. 1 para. 3 and art. 93 Basic Law (on the jurisdiction of the Federal Constitutional Court)[62], though dissenting opinions have not entirely ceased to exist. Even in 1990, when the Basic Law was amended as the result of the reunification of Germany, the constituent authorities were unable to come to grips with anything more than the (mere) statement that the Basic Law now applies to the entire German people (*für das gesamte deutsche Volk gilt*) (art. 146)[63], This was hardly more than a matter of course expressing anew the process of reunification resulting in the extended area to which the Basic Law now applies[64].

If one asks for the reasons why German constitutional law is so shy to clearly state the constitutional precedence in the Basic Law, one has to refer to the nineteenth-century tradition of German state doctrine (*deutsche Staatslehre*), which, contrary to modern constitutionalism, adhered to the precedence of the state above the constitution – according to Klaus Stern a constitution is only a part of an all-comprising *Staatsrecht*[65]. Though the dogma of the state's pre-legal existence (*vorrechtlicher Existenz*)[66], is no longer compatible with a modern liberal-democratic constitution, the continued use of the term *Staatsrecht* for public law and *Staatsrechtlehrer* for public law professors demonstrates the endurance of these relics of the nineteenth-century German tradition.

Representative Government

The principle of representative government played a fundamentally different role in German constitutional law in the first half of the twentieth century. Certainly, before 1919 the emperor ruled. Although the Reichstag had become politically more

influential, the constitution set limits to its power. On the other hand and curiously enough, the constitution lacked any provision on the executive power. It was probably to be assumed by the Bundesrat, chaired by the emperor with the support of an imperial chancellor, who was appointed and dismissed by the emperor alone and without the participation of the Reichstag. With no further provision at hand, the chancellor as a «one-man government» (*Ein-Mann Regierung*)[67] commanded huge power as long as he was backed by the emperor while otherwise the emperor dominated the government if he chose to do so. There was no mention of any form of representation in this deliberately antiparliamentary construction. Therefore, Huber's assessment of the Reich as «monarchy and democracy united in the higher whole of the nation» (*Monarchie und Demokratie im höheren Ganzen der Nation verband*)[68] belongs to the realm of fables, even if he might have merely modified Laband's assertion that the Reich was not a «monarchy», but a «democracy»[69].

Weimar was to change all this. The emperor was replaced by the *Reichspräsident*, who was not to govern, but in cases of a national emergency had extraordinary powers that even exceeded those of the emperor, so called «dictatorial powers» (*Diktaturgewalt*)[70], again a constitutional feature intensely discussed in the *Paulskirche*. «If public safety and order in the German Reich are seriously disturbed or endangered, the President of the Reich may take the necessary measures to restore public safety and order and, if necessary, intervene with the aid of armed power» (*Der Reichspräsident kann, wenn im Deutschen Reiche die öffentliche Sicherheit und Ordnung erheblich gestört oder gefährdet wird, die zur Wiederherstellung der öffentlichen Sicherheit und Ordnung nötigen Maßnahmen treffen, erforderlichenfalls mit Hilfe der bewaffneten Macht einschreiten*) (art. 48 para. 2)[71]. Normally, the imperial government was designed to govern in cooperation with the Reichstag, which emerged from general, direct, equal, and secret elections. This corresponds to the principles of a representative system of government. Nevertheless, the Weimar Constitution confined itself to declaring the establishment of a republic in which all powers originate from the people (art. 1), which includes elements of direct democracy, such as the immediate popular participation in the legislative process (art. 73)[72]. The application of both the direct legislative participation of the people and the emergency decree law of the *Reichspräsident* deprived the principle of representative government of its exclusivity in the Weimar Constitution[73].

By 1949, the constituent assembly had evolved, and became clearly more outspoken. «The Federal Republic of Germany is a democratic and social federal state. All state power emanates from the people. It is exercised by the people in elections and votes and executed by special organs of legislation, executive power and jurisdiction» (*Die Bundesrepublik Deutschland ist ein demokratischer und sozialer Bundesstaat.- Alle Staatsgewalt geht vom Volke aus. Sie wird vom Volke in Wahlen und Abstimmungen und durch besondere Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtsprechung ausgeübt*) (art. 20)[74]. Though the term is not explicitly employed, the principle of a representative government system as a constitutional tenet is almost classically stated as the unavoidable correlate to popular sover-

eignty. The people are sovereign, but they do not govern themselves; this is done exclusively through elected representatives[75].

Separation of Powers

For traditional German political theory, the separation of powers had always been anathema, since it contradicted the uniformity of state power according to the so-called monarchical principle of the nineteenth century. In contrast to theory and for practical purposes, the German constitutions of the nineteenth century, however, distinguished between legislative and executive powers, while some even and somewhat hidden set a judicial power apart[76]. This inherent contradiction between theory and practice also characterizes the constitution of 1871, even as there was no expressly designated executive, but only the sections III and IV on the Federal Council (*Bundesrat*) and the presidency. Only the legislature had its own section, while the courts were parenthetically mentioned in arts. 75 and 76 of Bismarck's imperial constitution, which additionally conferred judicial competences to the Bundesrat beside its legislative and executive powers[77]. The Reichstag, however, was not vested with a general legislative power. According to art. 23, it had only «the right to propose bills on the federal level» (*das Recht, innerhalb der Kompetenz des Reichs Gesetze vorzuschlagen*). Therefore, the separation of powers was not a real goal of the constitution of 1871 but a few rudimentary traits crept into it for practical purposes.

In this sense, the Weimar Constitution changed little; art. 5 did not precisely commit the constitution to the separation of powers. Instead, it merely provided that «[T]he state power in imperial affairs is exercised by the organs of the Reich on the basis of the Reich Constitution» (*Die Staatsgewalt wird in Reichsangelegenheiten durch die Organe des Reichs auf Grund der Reichsverfassung* […] *ausgeübt*)[78]. Powers and responsibilities followed, each in its respective sections: the Reichstag (section II), the *Reichspräsident* and the Reich government (section III) and, somewhat behind, the administration of justice (*Rechtspflege*) in section VII. What was missing, though, was a clear constitutional declaration of the principle itself. This is all the more understandable as both the parliamentary regime and the strong commitment to popular sovereignty as the source of all legitimacy were fundamentally opposing principles. Moreover, the dictatorial power of the *Reichspräsident* according to art. 48 para. 2 Weimar constitution allowed the concentration of all executive and legislative competences within the Reich government, and particularly in the hands of the *Reichspräsident* himself, and resulted between 1930 and 1932 in a Reichstag deprived of its powers and in the elimination of the separation of powers in any form[79].

The Basic Law of 1949 turned the tables. This was to a large degree the result of the experiences of the Nazi era, which forged a general awareness that a lack of separation of powers fosters dictatorship[80]. Therefore, the text starts with the enumeration of the three powers in art. 1 para. 3 (though the final wording only appeared in 1956), and this enumeration in the context of the fundamental rights obligation of any state power is confirmed and as "core element of the principle of the rule of law" repeated

in art. 20 para. 3: «Legislation is bound by the constitutional order, executive power and jurisdiction are bound by statute and law» (*Die Gesetzgebung ist an die verfassungsmäßige Ordnung, die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden*)[81]. As consequence, the federal parliament (*Bundestag*) and federal council (*Bundesrat*) follow in sections III and IV, the Federal Government in section VI, and the judicature in section IX. Here, for the first time, the term «judicial power» (*rechtsprechende Gewalt*) appears (art. 92)[82], qualifying the judiciary as third power, equalling the two others in status.

The practical confirmation of an existing separation of powers notwithstanding, the lack of its specific justification in the text has led to criticism, most notably from political scientists[83]. This criticism tends to be absent among lawyers and legal historians. Indeed, outside the sphere of political science, scholars of the Basic Law generally share the opinion that there is nothing to be added to the confirmation of the separation of powers in the eternity clause of art. 79, para. 3; in other words, the existence of the eternity clause is presumed to safeguard the separation of powers, which again documents that this clause symbolizes the centre of gravity of the Basic Law itself.

Accountability

In contrast to the separation of powers the principle of accountability or the responsibility of office holders, here coming as number eight of our principles of modern constitutionalism, has rarely met with expressive opposition – as far as theory is concerned. As soon as we look onto its practical realization, however, shortcomings, delays, and all sorts of internal resistance abound, making the calls for reform as perennial as the principle itself. Germany in the first half of the twentieth century is no exception to the rule, leaving aside those twelve years of absolute irresponsibility (1933-1945) which for systematic reasons do not fit into an investigation of modern constitutionalism.

In the Constitution of the German Empire of 1871, the word «accountability» (*Verantwortlichkeit*) appeared twice. Hardly any other constitutional article expresses the spirit of this constitution more accurately than the second sentence of art. 22: «Truthful reports on public sessions of the Reichstag shall subject those making them to no responsibility» (*Wahrheitsgetreue Berichte über Verhandlungen in den öffentlichen Sitzungen des Reichstages bleiben von jeder Verantwortlichkeit frei*)[84]. This single sentence covers ground concerning criminal law, parliamentarians, and the press. But which institution determines what «truthful» (*wahrheitsgetreu*) is? Such wording echoes the authoritarian state and has nothing to do with the freedom of the parliamentary mandate which is the basic prerequisite of any political responsibility, and whose *locus classicus* is the English Bill of Rights of 1689[85].

Art. 17 of Bismarck's imperial constitution – the other article mentioning accountability – specified the emperor's orders to issue and promulgate the laws to «require the countersignature of the Reich Chancellor in order to be valid, whereby the latter takes the responsibility» (*zu ihrer Gültigkeit der Gegenzeichnung des Reichskanzlers [bedürfen], welcher dadurch die Ver-*

antwortlichkeit übernimmt)[86]. It was exactly this not binding provision which characterizes the German constitutions of the nineteenth century. This responsibility had no political meaning as there was no one – no person, office, council, or otherwise – who could demand or impose sanctions, especially since the 1871 text was deliberately designed to be anti-parliamentary[87]. So, the only possible reading of the article, and of the concept of «responsibility», is a legal one. But who should or could accuse the Reich chancellor of violating his responsibility, and before which court? The spectre of responsibility appears to be an empty promise rather than a true standard of accountability, with an attractive sound yet lacking any consequences.

Looking at the Weimar constitution, it may be surprising to find its art. 30 almost verbatim repeating art. 22 of the Bismarck Constitution, although the Weimar constitution was supplemented by the freedom of the parliamentary mandate in art. 37 and the guarantee of freedom of the press in art. 118, though not binding them to the «truthful reports» of the 1871 example. To whom, therefore, art. 30 of the Weimar Constitution was addressed remains mysterious[88]. Moreover, the provisions in art. 131, concerning the state liability for public authorities (*Amtshaftungsanspruch*) only cover *legal*, rather than *political* responsibility. As a precise term, the word «responsibility» (*Verantwortlichkeit*) or «responsible» (*verantwortlich*) fails to appear anymore in the Weimar Constitution.

However, this absence does not mean that the government was not subject to parliamentary control, which was based in particular on arts. 33 and 34. While the latter determined the control of normal political business, the Weimar Constitution also knew extensive – perhaps even excessive – forms of political responsibility, true to Hugo Preuß's statement that «shyness from responsibility is one of the most serious threats to democracy» (*die Scheu vor der Verantwortlichkeit* [ist] *eine der schwersten Gefährdungen der Demokratie*)[89]. Thus, at the request of the Reichstag, the *Reichspräsident* could be dismissed by a referendum (art. 43 para. 2). Notorious was art. 54, which on the one hand enshrined parliamentary control of the government, but on the other hand determined that the Reich chancellor and each Reich minister had to resign «if the Reichstag withdraws its confidence in him by express resolution» (*wenn ihm der Reichstag durch ausdrücklichen Beschluß sein Vertrauen entzieht*)[90]. Though only rarely leading to the direct overthrow of a government, the mere existence of the provision was sufficient to make political instability the hallmark of the Weimar Republic[91]. Finally, the Reichstag was able to charge the *Reichspräsident*, the Reich chancellor and every Reich minister before the State Court if they had «culpably violated the Reich Constitution or a Reich Law» (*schuldhafterweise die Reichsverfassung oder ein Reichsgesetz verletzt*) (art. 59)[92].

The latter provision was most likely not justiciable, to which nineteenth-century constitutions with comparable provisions eloquently bore witness. The same applied to those passages where the Constitution spoke of *Verantwortung* (responsibility), and thus ultimately meant a moral rather than a legal or political category[93]. As a result, the imperial chancellor, in contrast to the constitution of 1871, assumed *Verantwortung* (art. 50) with his obligation to countersign. Likewise, he had to assume

Verantwortung in front of the Reichstag for his guidelines in general matters of politics as also his ministers for running their ministry (art. 56). Each of them would then be held politically accountable to the Reichstag. Initially, however, responsibility acted more like a moral appeal.

As a conclusion one may summarise that the democratic constitution of Weimar vehemently insisted on political accountability of those in office due to its own claim. How to translate responsibility into workable constitutional terms proved, however, to be less obvious thus letting its overall results appearing ambiguous.

In many aspects, the founding fathers of the Basic Law found themselves facing the same dilemma. Therefore, almost all the aforementioned passages of the Weimar Constitution, in which the words *Verantwortung* or *Verantwortlichkeit* appear, have successors in the Basic Law. These include some peculiarities; art. 42 para. 3 Basic Law, for example, stipulates that «[t]ruthful reports of public sittings of the Bundestag and of its committees shall not give rise to any liability» (*Wahrheitsgetreue Berichte über die öffentlichen Sitzungen des Bundestages und seiner Ausschüsse bleiben von jeder Verantwortlichkeit frei*), which hearkens back to the «truthful reports» provision of the 1871 Constitution, a provision since long considered anachronistic[94]. Furthermore, by 1949 the terminology of «responsibility» turned towards *Verantwortung* rather than *Verantwortlichkeit*, whereby the term assumed a clear moral meaning – as in the opening sentence of the preamble, which frames the text «[i]n the awareness of the responsibility before God and men»[95]. This moral core is supplemented from time to time with a legal undertone, such as in art. 46. Political responsibility is not expressly stated anywhere in the Basic Law, and its arts. 67 and 68 concerning the vote of no confidence and the question of trust take great pains to establish a strict legal regulation in order to avoid any discussion of political responsibility, thus nipping the instability inherent in the Weimar system in the bud.

Summing up these findings the impression prevails that modern constitutionalism, the principles of which began at the national level to find their way into German constitutional reality in 1919, and which were accepted by a broad majority in 1949, appeared less resounding in the question of the political responsibility of rulers, despite the warnings of Preuß. This was to have a lasting effect on the German political culture in the subsequent decades: The primary concern was political stability. Every form of political instability was to be avoided at all costs, and so the resignation of ministers for political reasons remained a rarity. To speak up openly for political mistakes and to draw the political consequences from them is still rare within German democracy.

Judicial Independence

A completely different political, legal, and cultural context is evident when concerning the principle of the independence of the judiciary. That this is not a subsidiary consequence of the principle of separation of powers, as is sometimes claimed[96], is evident with regard to its historical origins. Again, England can be regarded as the *locus classicus*, this time with reference to the Act

of Settlement of 1701, which withdrew the power from the king to dismiss judges at his discretion and instead determined their employment for life (*quamdiu se bene gesserint*), with a fixed and secure salary. It also bound their possible removal from office to the initiative and approval of both houses of Parliament[97]. This happened long before Montesquieu and underlines that exempting the law courts from their traditional dependency on the executive and the independence of the judiciary, unlike the separation of powers, are not exclusively a principle of state organisation. Additional criteria of the personal, professional, and functional independence of the judges are at least as relevant and regulated by provisions on appointment, term of office, removal from office, remuneration, jurisdiction, and so on. Each of these aspects has a decisive impact on judicial independence, and the violation of any of them would impair it, regardless of the organisational autonomy of the judiciary within the framework of the separation of powers.

Any search for this broadly-defined principle of judicial independence, even in a limited form, in the Imperial Constitution of 1871 will be in vain, as the Bismarckian text saw no reason to establish a judiciary power and limited its content concerning the courts to two brief articles. The Courts Constitution Act (*Gerichtsverfassungsgesetz*; GVG) of 1877[98], which came into being after years of negotiations, offered at least some compensation. Its first paragraph read: «The judicial power is exercised by independent courts subject only to the law» (*Die richterliche Gewalt wird durch unabhängige, nur dem Gesetze unterworfene Gerichte ausgeübt*)[99]. This initial provision was followed in §§ 2-11 by further provisions on judicial independence which became national constitutional law with the Weimar Constitution of 1919. Here, its section VII began with the statement: «The judges are independent and subject only to the law» (*Die Richter sind unabhängig und nur dem Gesetz unterworfen*) (art. 102)[100]. Art. 104 then added to this principle of state organisation the guarantee of judicial independence with regard to the terms of office (appointment for life, with the possibility of forced retirement at a defined age) and the prohibition of removal from office or displacement against his will, though art. 104 (3), might restrict, even annul this prohibition in case of the reorganisation of judicial districts. Thus, the Weimar constitution theoretically had left open a back door to get rid of unpopular judges[101], which, however, hardly ever happened, although a considerable number of judges had reservations about the Weimar Constitution with some openly opposing it[102]. No provisions concerning appointment and salary existed, although these had been regulated in §§ 3-5 and 7 of the 1877 law. Nevertheless, one can generally speak of a far-reaching judicial independence in the Weimar Constitution, as compared to the less enshrined legal provisions of previous decades.

In 1949, the Basic Law with its art. 97[103] followed the pattern set by the Weimar provisions of art. 104. Complementarily, art. 94 para. 1 Basic Law stipulates that half of the judges of the Federal Constitutional Court shall be elected by the Federal Parliament (Bundestag) and half by the Federal Council (Bundesrat), and that they «may not be members of the Bundestag, of the Bundesrat, of the Federal Government, or of any of the corresponding bodies of a *Land*» (*weder dem Bundestage, dem Bun-*

desrate, der Bundesregierung noch entsprechenden Organen eines Landes angehören)[104]. The appointment of judges to the other supreme federal courts is decided by a committee for the selection of judges consisting of the competent Land ministers and an equal number of members elected by the Bundestag jointly together with the competent Federal Minister (art. 95 para. 2). Terms of office and salary are regulated by corresponding laws. In practice, the independence of the judiciary is thus anchored more substantially in the Basic Law than in the Weimar Constitution.

The Amending Power of the People

As the last of the ten principles of modern constitutionalism, the three German constitutions of the first half of the twentieth century have still to be examined as to the constitutional amending power of the people. The answer may be relatively short. The Constitution of 1871 settled the matter in its art. 78: «Amendments to the Constitution are made by way of legislation. They are considered to be rejected if they face fourteen votes against them in the Federal Council» (*Veränderungen der Verfassung erfolgen im Wege der Gesetzgebung. Sie gelten als abgelehnt, wenn sie im Bundesrathe 14 Stimmen gegen sich haben*)[105]. Since Prussia held seventeen votes in the Federal Council, any constitutional amendment against Prussian interests was just as impossible as against the four southern German states (Bavaria, Württemberg, Baden, and Hesse-Darmstadt), which together had sixteen votes. The people were not mentioned in this context[106]. Any amendment decision was ultimately taken by the Federal Council, which was composed of the ruling princes.

Obviously, the Weimar Constitution 1919 changed this procedure. Now the presence of two-thirds of all members of the Reichstag, as well as the approval of at least two-thirds of those present was required. The same supermajority was required for an amending resolution instigated by the Imperial Council (*Reichsrat*). Art. 76 still knew of a third variant: «If a constitutional amendment is to be adopted by referendum on a petition for a referendum, it shall require the consent of a majority of those entitled to vote» (*Soll auf Volksbegehren durch Volksentscheid eine Verfassungsänderung beschlossen werden, so ist die Zustimmung der Mehrheit der Stimmberechtigten erforderlich*)[107]. In other words, the constitution provided for the direct participation of the people in constitutional amendments, even if the *Reichsrat* had objected to this constitutional amendment and demanded a referendum on the disputed issue.

In 1949, the Basic Law adopted the two-thirds provisions of Weimar art. 76 as its art. 79 para. 2 with regard to constitutional amendments. In addition, it attached two conditions to the constitutional amendment procedure. On the one hand, by inserting the word «only» into what had been the first sentence of art. 76 of the Weimar Constitution, art. 79 para. 1 stipulated that constitutional amendments could only be made by a corresponding federal law expressly amending or supplementing the Basic Law text. This provision was to rule out the Weimar practice of constitutional breach. On the other hand, the eternity clause already mentioned was added to art. 79 para. 3[108]. In other words, the Basic Law may be amended by law exclusively

by the votes of two-thirds of the members of the Bundestag and Bundesrat, with the exception of those articles which may not be amended at all by any majority. Direct participation of the people is not provided, even if art. 146 allows for a future total revision – which after reunification appears to be rather theoretical – «by the German people in free decision» (*von dem deutschen Volke in freier Entscheidung*)[109]; hardly surprising, the article says nothing about how this participation should take place.

In 1949, despite original intentions to the contrary no referendum on the Basic Law took place. In part, this was due to the memories of Weimar, but also to quench further attempts by the churches, and particularly the Catholic Church, to extend their influence[110]. Instead, the Basic Law was due to enter into force on 23 May 1949, if it had been adopted in the previous week by more than two-thirds of the parliaments of the West German *Länder*[111]. Henceforth, the Basic Law was to apply to the Federal Republic of Germany as a whole, *i.e.* even in those states which might have rejected it or, as Bavaria, which had abstained.

Conclusion

We have analysed the German constitutions since 1871 with regard to the implementation of the ten principles of modern constitutionalism. Despite its barbarities – or, perhaps more accurately, because of them – this half-century period proved to be the decisive epoch in German constitutional development over the last two hundred years. Though the ideas of modern constitutionalism had started "migrating" to Germany from the beginning of the nineteenth century on and gained remarkable ground in the constitution of Hesse-Kassel of 1831[112] and again in the *Paulskirche* constitution of 1849. Yet all of these accomplishments were nullified by the Imperial Constitution of 1871, to the exception of none[113]. Instead of being a climax of German constitutional development, as still occasionally claimed, Bismarck's document represented a dramatic trough, not only by hindering the further implementation of modern constitutionalism in Germany for almost eighty years, but also by reversing what had already been achieved. In the official ideology of 1871, the Constitution of the German Empire was the German answer to the «ideas of 1789»[114].

Consequently, with the Imperial Constitution of 1871 in force until the November Revolution of 1918, none of the ten principles of modern constitutionalism was valid constitutional law in Germany, a situation unprecedented in Western Europe at the time. The result of the Bismarckian text was an autocratic-militaristic constitution. This reading is much more consistent with the results of modern historical research that describes the power structure of the Empire of 1871 as bonapartist[115] or caesarean[116], as opposed to the assessment of some constitutional lawyers who, following the example set by Laband and disregarding this impressive body of historiography, go so far as to recognise echoes of democracy in the 1871 regime, or classify it as a successful «expression of late German constitutionalism» (*Ausprägung des deutschen Spätkonstitutionalismus*) and «adequate to the situation» (*[der] Situation angemessen*)[117]. Even if one may accept that the constitution of 1871 was, *rebus sic stantibus*, the

only political solution possible at the time, we are not allowed to shut our eyes to its deficits and consequences.

With the Weimar Constitution of 1919, this 1871 attempt to turn the constitutional clock back in Germany was stopped[118]. The achievements of the decades before 1871 should no longer be lost, and special regard was paid to the *Paulskirche* constitution of 1849. Of all the principles of modern constitutionalism, the Weimar commitment to the independence of the judiciary appeared to be the most self-evident and least problematic. For a variety of reasons, the first German republican constitution could only commit itself with restrictions to universal principles, the representative system of government and the responsibility of those in power, while even more reservations about the separation of powers and, most notably, about human rights were applied. In the case of limited powers and the precedence of constitution, the Weimar Constitution remained committed to the German tradition of the nineteenth century and was not yet ready to accept them. On the other hand, Weimar not only readily adopted, but in fact far exceeded the remaining two principles of modern constitutionalism, *viz*. the sovereignty of the people and the amending power of the people. Whereas modern constitutionalism restrains itself in both cases exclusively to its legitimizing function, the Weimar Constitution additionally introduced with its operative dimension its version of radical democracy through allowing the direct and active intervention of the people, both for legislation and constitutional amendment.

Whereas until 1918 a general rejection of modern constitutionalism had shaped the Bismarckian constitution, from 1919 onwards the relationship between the two became more complex, more differentiated, but also more contradictory. By overemphasising principles, which in turn prevented other constitutional provisions from fully exercising their functions and significance or their adequate meaning, and which even amounted to the rejecting of others, the Weimar constitution was a major step forward towards modern constitutionalism. Its overall result, however, was not as balanced and consistent to convince sceptics or those hesitant and to keep the extremists on the right and left at bay.

Nevertheless, modern constitutionalism had regained its foothold in Germany in 1919. But it took another thirty years (and the apocalyptic experience of Nazi rule) before the complete breakthrough of modern constitutionalism was finally achieved, with the advent of the Basic Law in 1949[119]. This was realised not because or even though «one was hardly dependent on regular imports of constitutions from abroad […] for the creation of the Basic Law» (*[a]uf regelrechte Verfassungsimporte aus dem Ausland […] bei der Schaffung des Grundgesetzes kaum angewiesen*)[120], but thanks to the «migration of constitutional ideas», which had meanwhile become common property. Without this process, the enormous progress made in 1949, regardless of the role of the Allies, cannot sufficiently be explained. The Parliamentary Council, neither physically nor metaphorically, met in a vacuum, and the list of its members with knowledge of non-German constitutional law was long.

The direct democratic elements were now consequently removed from national German constitutional law; popular sovereignty and popular participation in the constitutional amending process were reduced

to its purely legitimizing function, thus elevating the principles of representative government, limited powers, and separation of powers to an unrivalled place in the centre of the constitution. The independence of the judiciary, again, was undisputed. Certain verbal reservations remained about the commitment to the responsibility of the rulers. In contrast to Weimar, human rights and universal principles were elevated to the core of the Basic Law, and traditionally minded constitutional lawyers failed to prevent the supremacy of the constitution from being recognized, though not formally declared.

In assessing these results we may conclude that in spite of (or perhaps due to) repeated constitutional breaches Germany achieved in the first half of the twentieth century, thanks to the migration of constitutional ideas, a tremendous boost to modernize its constitutional basis. It did not only manage to find its place within the framework of modern constitutionalism. In enlarging this basis in subsequent decades, Germany also succeeded in laying the ground for actively contributing to its further evolution[121].

[1] My thanks go to Javier Espinoza de los Monteros, Mexico City, who first brought me to write about this topic. Horst Dreier, Thomas Duve, Dieter Grimm, Jörg-Detlef Kühne and Michael Stolleis commented on subsequent drafts of it which helped me to improve my argument for which I am grateful to them all. Ulrike Müßig prepared and advised the English translation, and undertook the editing for the Giornale. The English version as it stands now is my sole responsibility. All remaining errors are my own.

[2] Cf. D. Willoweit, *Deutsche Verfassungsgeschichte. Vom Frankenreich bis zur Wiedervereinigung Deutschlands*, Munich, Beck, 1997[3], pp. 267-268; H.-U. Wehler, *Das Deutsche Kaiserreich 1871-1918*, Göttingen, Vandenhoeck & Ruprecht, 1980[4], pp. 150-151.

[3] Thus F. Giese, *Verfassung des Deutschen Reiches vom 11. August 1919, Taschenausgabe für Studium und Praxis*, Berlin, Carl Heymanns, 1926[7], p. 31. See also the balanced assessment of M. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol. III, Munich, C. H. Beck, 2002, pp. 83-86, 95.

[4] According to H. Holste, *Der deutsche Bundesstaat im Wandel (1867-1933)*, Berlin, Duncker & Humblot, 2002, esp. pp. 533-535, as well as G. Anschütz, *Die Verfassung des Deutschen Reiches vom 11. August 1919*. Ein Kommentar für Wissenschaft und Praxis, Berlin, Stilke, 1926[3/4], p. 29, the Weimar federal states (*Länder*) were no longer very different from the autonomous structures of a decentralised unitary state (*von den autonomen Gliederungen eines dezentralisierten Einheitsstaates nicht mehr sehr verschieden*).

[5] A. von Bogdandy, *Comparative Constitutional Law: A Contested Domain. A Continental Perspective*, in M. Rosenfeld, A. Sajó (edited by), *The Oxford Handbook of Comparative Constitutional Law*, Oxford, Oxford University Press, 2012, pp. 25-37.

[6] C. Thornhill, *A Sociology of Constitutions. Constitutions and State Legitimacy in Historical-Sociological Perspective*, Cambridge, Cambridge University Press, 2013.

[7] U. Kischel, *Rechtsvergleichung*, Munich, C. H. Beck, 2015.

[8] P. Häberle, *Universaler Konstitutionalismus aus nationalen und völkerrechtlichen Teilverfassungen – sieben Thesen*, in P. Häberle, *Vergleichende Verfassungstheorie und Verfassungspraxis. Letzte Schriften und Gespräche*, Berlin, Duncker & Humblot, 2016, pp. 34-36. These theses appeared first in 2014.

[9] R. Hirschl, *Comparative Matters. The Renaissance of Comparative Constitutional Law*, Oxford, Oxford University Press, 2014.

[10] S. Choudry (edited by), *The Migration of Constitutional Ideas*, Cambridge, Cambridge University Press, 2006.

[11] See G. Heydemann, *Konstitution gegen Revolution. Die britische Deutschland- und Italienpolitik 1815-1848*. Göttingen and Zurich, Vandenhoeck & Ruprecht, 1995; H. Dippel, *A Nineteenth-Century "Truman Doctrine" avant la lettre? Constitutional Liberty Abroad and the Parliamentary Debate about*

British Foreign Policy from Castlereagh to Palmerston, in K. L. Grotke, M- J. Prutsch (edited by), *Constitutionalism, Legitimacy, and Power. Nineteenth-Century Experiences*, Oxford, Oxford University Press, 2014, pp. 23-48.

[12] See H. Dippel, *Aux origines du radicalisme bourgeois. De la constitution de Pennsylvanie de 1776 à la constitution jacobine de 1793*, «Francia», 16, n. 2, 1989, pp. 61-73.

[13] C. von Rotteck; *Constitution; Constitutionen; constitutionelles Princip und System; constitutionell; anticonstitutionell*, in C. von Rotteck and C. T. Welcker (edited by), *Das Staats-Lexikon. Encyklopädie der sämmtlichen Staatswissenschaften für alle Stände*, vol. III, Altona: Johann Friedrich Hammerich, 1847², pp. 519-543, particularly pp. 522-524.

[14] See H. Dippel, *Visionen eines zukünftigen Deutschlands: Alternativen zur Paulskirchenverfassung 1848/49*, 3 vols., Berlin, Duncker & Humblot, 2017.

[15] Cf. D. Grimm, *Die Zukunft der Verfassung*, Frankfurt a.M., Suhrkamp, 1994², esp. p. 31-66, though with different emphasis.

[16] Cf. the critical remarks by C. Schönberger, *Der „German Approach". Die deutsche Staatsrechtslehre im Wissenschaftsvergleich*, with articles by A. Takada and A. Jakab, Tübingen, Mohr Siebeck, 2015.

[17] S. Caporal, J. Luther and O. Vernier (edited by), *Documents constitutionnels de la France, de la Corse et de Monaco / Constitutional Documents of France, Corsica and Monaco 1789-1848*, Berlin and New York, de Gruyter, 2010, p. 30.

[18] *Essex Result, 1778*, in O. Handlin and M. Handlin (edited by), *The Popular Sources of Political Authority. Documents on the Massachusets Constitution of 1780*, Cambridge (MA), Belknap Press, 1966, p. 332.

[19] Quoted after S. Rials (edited by), *La Déclaration des droits de l'homme et du citoyen*, Paris, Hachette, 1988, p. 116.

[20] The preceding constitutions of New Hampshire of 5 January 1776 and of South Carolina of 26 March 1776 as well as the *Rules and Regulations of the Colony of Georgia* of 15 April 1776 still have the character of traditional organisarional statutes. See H. Dippel (edited by), *Constitutional Documents of the United States of America, 1776-1860*, 8 vols., Berlin and Boston, de Gruyter, 2006-2011, particularly vol. II, pp. 9-12, vol. IV, pp. 313-315, and vol. VI, pp. 15-22.

[21] See in detail H. Dippel, *Modern Constitutionalismus: An Introduction To A History In Need Of Writing*, «Tijdschrift voor Rechtsgeschiedenis / Revue d'Histoire du Droit / The Legal History Review», n. 73, 2005, pp. 153-169. D. Grimm, *Die Zukunft der Verfassung II: Auswirkungen von Europäisierung und Globalisierung*, Berlin, Suhrkamp, 2012, esp. pp. 39-30, 324-325. With his functional understanding of constitution Grimm lists of the ten principles popular sovereignty and the supremacy of the constitution.

[22] Thus the principle of the independence of the judiciary, especially in many individual states of the United States, as supposedly undemocratic has repeatedly met with resistance since the very beginning. Cf. *Outraged by Kansas Justices' Rulings, Republicans Seek to Reshape Court*, «New York Times», 2 April 2016.

[23] E. R. Huber (edited by), *Dokumente zur deutschen Verfassungsgeschichte*, vol. II, Stuttgart, Kohlhammer, 1964, p. 290.

[24] E. R. Huber, *Deutsche Verfassungsgeschichte seit 1789*, vol. III, Stuttgart, Kohlhammer, 1966, pp. 756-758. This is not changed by the fact that the Reichstag played a more active role in the creation of the constitution of the North German Confederation in 1867.

[25] Huber, *Dokumente zur deutschen Verfassungsgeschichte*, cit., vol. III, p. 129. Cf. C. Gusy, *Die Weimarer Reichsverfassung*, Tübingen, Mohr Siebeck, 1997, pp. 84-86; Anschütz, *Die Verfassung des Deutschen Reiches vom 11. August 1919*, cit., p. 37.

[26] The fact that in this case the people do not appear as sovereign in the legal sense but as authorized persons appears secondary, since the people act politically as the last decision-maker directly and thus intervene in the political process beyond the existing constitutional institutions.

[27] The Law on the Referendum of 27 June 1921 <http://www.documentarchiv.de/wr/1921/volksentscheid_ges.html>, accessed 29 January 2016. Generally on the subject, cf. P. C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law. The Theory & Practice of Weimar Constitutionalism*, Durham (NC) and London, Duke University Press, 1997.

[28] H. Dreier and F. Wittreck (edited by), *Grundgesetz. Textausgabe mit sämtlichen Änderungen und andere Texte zum Verfassungsrecht*, Tübingen, Mohr Siebeck, 2006, pp. 14, 27.

[29] On the latter, see O. Jung, *Grundgesetz und Volksentscheid. Gründe und Reichweite der Entscheidungen des Parlamentarischen Rats gegen Formen direkter Demokratie*, Opladen, Westdeutscher Verlag, 1984. W. G. Leisner's Basic Law commentary, and particularly his work on the preamble and art. 20.2 (referring to the sovereignty of the people as a constitutional principle), in H. Sodan (edited by), *Grundgesetz*, Munich: Beck, 2015³, pp. 2, 239-240, bearly touches these issues. See, on the other hand, in great detail H. Dreier, in H. Dreier (edited by), *Grundgesetz. Kommentar*, vol. I: *Artikel 1-19*, Tübingen, Mohr Siebeck, 1996, pp. 26-29 (preamble). The meaning of the word «votes» has been much discussed since then. It seems indisputable, however, that it does not contain a general authority for popular lesgislation. Cf. H. Dreier, in H. Dreier (edited by), *Grundgesetz. Kommentar*, vol.

II: *Artikel 20-82*, Tübingen, Mohr Siebeck, 2006², pp. 90-93.

30 See Stolleis, *Geschichte des öffentlichen Rechts in Deutschland* cit., vol. II, pp. 371-376.

31 M. Kotulla, *Deutsche Verfassungsgeschichte. Vom Alten Reich bis Weimar (1495-1934)*, Berlin and Heidelberg, Springer, 2008, pp. 532-533; H. Dreier, *Idee und Gestalt des freiheitlichen Verfassungsstaates*, Tübingen, Mohr Siebeck, 2014, pp. 54-55. The reference to the catalogues of rights in the constitutions of the individual states is not convincing to the extent that these, by their very nature, could not offer any protection against infringements of rights on the federal level.

32 Cf. M. Dreyer, *Die Entstehung der Weimarer Reichsverfassung*, in H. Mittelsdorf (edited by), *80 Jahre Weimarer Reichsverfassung (1919-1999)*, Weimar, Wartburg Publishers, 1998, pp. 55-57.

33 See also M. Stolleis, *Weimarer Kultur und Bürgerrechte*, in A. Rödder (edited by), *Weimar und die deutsche Verfassung. Zur Geschichte und Aktualität von 1919*, Stuttgart, Klett-Cotta, 1999, esp. pp. 91-99. Dreier finds a more general meaning to this, cf. Dreier, *Idee und Gestalt des freiheitlichen Verfassungsstaates* cit., pp. 55-56. On the other hand, Othmar Bühler is sceptical about fundamental rights in general. O. Bühler, *Die Reichsverfassung vom 11. August 1919*, Leipzig and Berlin, Teubner, 1927², pp. 103-104.

34 On the different interpretations, cf. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland* cit., vol. III, pp. 109-114.

35 Huber (edited by), *Dokumente* cit., vol. III, pp. 145-154; Anschütz, *Die Verfassung des Deutschen Reiches vom 11. August 1919* cit., pp. 300-301; H. Dreier, *Die Zwischenkriegszeit*, in D. Merten and H. J. Papier (edited by), *Handbuch der Grundrechte in Deutschland und Europa*, vol. I, Heidelberg, C. F. Müller, 2004, p. 159. See also R. Thoma, *Rechtsstaat – Demokratie – Grundrechte. Ausgewählte Abhandlungen aus fünf Jahrzehnten*, Tübingen, Mohr Siebeck, 2008.

36 H. Preuß, *Politik und Verfassung in der Weimarer Republik*, in H. Preuß, *Gesammelte Schriften*, Bd. IV, D. Lehnert (edited by), Tübingen, Mohr Siebeck, 2008, p. 112. Preuß was convinced that the «programmatic guidelines» served the development of democracy, parliamentarism and the rule of law, as the three basic ideas on which the constitution of the Weimar Republic was based (*die drei Grundgedanken, auf denen die Reichsverfassung der deutschen Republik aufgebaut ist*).

37 Cf. generally, F. Küster, *Entstehungsgeschichte der Grundrechtsbestimmungen des zweiten Hauptteils der Weimarer Reichsverfassung in den Vorarbeiten der Reichsregierung und den Beratungen der Nationalversammlung*, Göttingen, Cuvillier, 2003. For a more nuanced view Gusy, *Die Weimarer Reichsverfassung* cit., esp. pp. 280-286. Cf. also G. Gillessen, *Hugo Preuß. Studien zur Ideen- und Verfassungsgeschichte der Weimarer Republik*, Berlin, Duncker & Humblot, 2000, pp. 135-137.

38 Huber (edited by), *Dokumente* cit., vol. III, p. 145.

39 H. Dippel, *Vom Völkerrecht zum Verfassungsrecht: Die Stellung der Minderheiten in den Verfassungen des Neuen Europa nach dem Ersten Weltkrieg*, «Moderní Dějiny / Modern History», n. 24, 2016, pp. 27-46.

40 W. Werner (edited by), *Der Parlamentarische Rat 1948-1949. Akten und Protokolle*, vol. IX: *Plenum*, Munich, Boldt, 1999, p. 37. In addition, C. Bommarius, *Das Grundgesetz. Eine Biographie*, Berlin, Rowohlt, 2009, p. 174.

41 A. Somek, *The Cosmopolitan Constitution*, Oxford, Oxford University Press, 2014, p. 9, sees the central position of human dignity in the Basic Law as reaching a new level of constitutionalism.

42 Cf. H. Sodan, in Sodan (edited by), *Grundgesetz* cit., p. 37. More balanced: H. Dreier, in Dreier, *Grundgesetz. Kommentar* cit., vol. I, pp. 131-139. Also Dreier, *Idee und Gestalt des freiheitlichen Verfassungsstaates* cit., pp. 57-61.

43 Dreier and Wittreck (edited by), *Grundgesetz* cit., p. 15, and in general on art. 1-19 of the fundamental rights pp. 15-27. Willoweit, *Deutsche Verfassungsgeschichte* cit., p. 351. When claiming that the fundamental rights of Weimar were largely transferred to the *Grundgesetz*, Willoweit fails to recognise the serious differences between the two.

44 Huber (edited by), *Dokumente* cit., vol. III, p. 129.

45 Dreier and Wittreck (edited by), *Grundgesetz* cit., pp. 14-15, 31.

46 Cf. J. Fortescue, *The Governance of England: Otherwise Called The Difference between an Absolute and a Limited Monarchy. A Revised Text*, London, Oxford University Press, 1885.

47 W. Frotscher and B. Pieroth, *Verfassungsgeschichte*, Munich, Beck, 2005⁵, p. 218, in modification of the well-known dictum of Laband, which is also discussed here.

48 Huber (edited by), *Dokumente* cit., vol. II, p. 303.

49 Stolleis, *Geschichte des öffentlichen Rechts in Deutschland* cit., vol. III, pp. 117-118. Cf. H. Dreier, *Verfassungsgerichtsbarkeit in der Weimarer Republik*, in T. Simon, J. Kalwoda (edited by), *Schutz der Verfassung: Normen, Institutionen, Höchst- und Verfassungsgerichte. Tagung der Vereinigung für Verfassungsgeschichte in Hofgeismar vom 12. bis 14. März 2012*, Berlin, Duncker & Humblot, 2014, pp. 317-372.

50 Huber (edited by), *Dokumente* cit., vol. III, p. 147.

51 H. Schneider, *Die Reichsverfassung vom 11. August 1919*, in J. Isensee and P. Kirchhof (edited by), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, vol. I, Heidelberg: Müller, 2003³, p.

197. Similarly, M. Haedrich, *Die Grundpflichten in der Weimarer Reichsverfassung. Möglichkeiten ihrer Fortschreibung heute*, in E. Eichenhofer (edited by), *80 Jahre Weimarer Reichsverfassung – Was ist geblieben?*, Tübingen, Mohr Siebeck, 1999, esp. pp. 185-193; cf. also Anschütz, *Die Verfassung des Deutschen Reiches vom 11. August 1919* cit., pp. 348-349.

52 Dreier and Wittreck (edited by), *Grundgesetz* cit., p. 15. For this, see also Dreier, in Dreier (edited by), *Grundgesetz. Kommentar* cit., vol. I, pp. 141-163.

53 Dreier and Wittreck (edited by), *Grundgesetz* cit., p. 69.

54 Dippel (edited by), *Constitutional Documents of the United States of America* cit., vol. I, p. 62.

55 [*Ü*]*berhaupt die Verfassungsurkunden nur in dem Zwecke abgefasst worden, um durch ihre Satzungen eine festere, unantastbarere und über die Veränderlichkeit und Laune der gewöhnlichen gesetzgebenden Gewalt erhobene Grundlage für das Staatsleben zu erhalten*. R. von Mohl, *Über die rechtliche Bedeutung verfassungswidriger Gesetze*, in R. von Mohl, *Staatsrecht, Völkerrecht und Politik. Monographien*, vol. I, Tübingen, Laupp, 1860, p. 82.

56 *Die in der Verfassung enthaltenen Rechtssätze können zwar nur unter erschwerten Bedingungen abgeändert werden, aber eine höhere Autorität als anderen Gesetzen kömmt ihnen nicht zu*. P. Laband, *Das Staatsrecht des Deutschen Reiches*, vol. II, Tübingen, Laupp, 1878, p. 38. On Laband, cf. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland* cit., vol. II, pp. 341-348.

57 Cf. Holste, *Der deutsche Bundesstaat im Wandel* cit., esp. pp. 261-264, 544.

58 Huber (edited by), *Dokumente* cit., vol. II, p. 303. Cf. the statement by Bühler, *Die Reichsverfassung vom 11. August 1919* cit., p. 24: «Nothing related to the command of the army and fleet, including the appointment of all officers, was subject to the countersignature of a minister, unlike other government acts. Rather, this was exempt from it and thus from parliamentary responsibility – a politically very serious restriction of the constitutional system.» Essentially similar: Wehler, *Das Deutsche Kaiserreich 1871-1918* cit., pp. 149-165; T. Nipperdey, *Deutsche Geschichte 1866-1918*, vol. II: *Machtstaat vor der Demokratie*, Munich, Beck, 1993², esp. pp. 202-226. Ernst Rudolf Huber's attempt to refute the accusation that the Empire was a military state is not convincing, especially since Huber limits his argumentation to a few formal legal aspects alone, without sufficiently addressing the power of command and its implications. E.R. Huber, *Das Kaiserreich als Epoche verfassungsstaatlicher Entwicklung*, in J. Isensee and P. Kirchhof (edited by), *Handbuch des Staatsrechts*, vol. I, Heidelberg, Müller, 1987, pp. 154-157.

59 Huber (edited by), *Dokumente* cit., vol. III, p. 155.

60 For this: Gusy, *Die Weimarer Reichsverfassung* cit., pp. 146-147; Bühler, *Die Reichsverfassung vom 11. August 1919* cit., pp. 88-89.

61 So too H. Ridder, *Wie und warum (schon) Weimar die Demokratie verfehlte*, in R. Herzog (edited by), *Zentrum und Peripherie: Zusammenhänge – Fragmentierungen – Neuansätze. Festschrift für Richard Bäumlin zum 65. Geburtstag*, Chur and Zurich, Rüegger, 1992, esp. pp. 87-97. Ridder sees Weimar's fault in the failure to democratically legitimise popular sovereignty instead of taking it as a continuation of the absolutist concept of sovereignty, which in German constitutional law has since tended to derive the supremacy of the state over the constitution.

62 T. Kingreen, *Vorrang und Vorbehalt der Verfassung*, in Isensee and Kirchhof (edited by), *Handbuch des Staatsrechts der Bundesrepublik Deutschland* cit., vol. XII, p. 310. The realisation that the primacy of the constitution, if it is meant seriously, logically leads to a constitutional jurisdiction that can pass or ward off unconstitutional laws was already drawn in the United States in 1788 in the *Federalist* and in 1803 in the case of *Marbury v. Madison*.

63 Dreier and Wittreck (edited by), *Grundgesetz* cit., p. 137.

64 The attempt of Dreier to derive the primacy of the constitution from the sovereignty of the people and the constitutional power of the people is neither historically nor in substance justified, especially since the Weimar Reich Constitution already emphasises that the two principles do not follow one another. Cf. Dreier, in Dreier (edited by), *Grundgesetz. Kommentar* cit., vol. I, pp. 26-27. On the contrary, it is precisely on the basis of the principle of popular sovereignty that a denial of the primacy of the constitution can be justified, as has been the case in France for around 200 years and for which the constitutional referendum of 1962 is regarded as classic proof.

65 K. Stern, *Das Staatsrecht der Bundesrepublik Deutschland*, vol. I, Munich: Beck, 1984², pp. 7-11.

66 Cf. in particular A. Jakab, *Staatslehre – Eine deutsche Kuriosität*, in Schönberger (edited by), *Der «German Approach»* cit., pp. 75-121.

67 Kotulla, *Deutsche Verfassungsgeschichte* cit., p. 544.

68 Huber, *Deutsche Verfassungsgeschichte seit 1789* cit., vol. III, p. 774. Cf. Bühler, who clearly considered the empire to be a monarchy, especially in the Wilhelminian epoch. Bühler, *Die Reichsverfassung vom 11. August 1919* cit., p. 19.

69 Laband, *Das Staatsrecht des Deutschen Reiches* cit., vol. I, pp. 87-88.

70 For this Gusy, *Die Weimarer Reichsverfassung* cit., pp. 107-113. In view of the classification of the Constitution of the Fifth Republic as a «semi-

presidential» constitution, which is widespread in political science today, the thesis of C. Skach, *Borrowing Constitutional Designs. Constitutional Law in Weimar Germany and the French Fifth Republic,* Princeton and Oxford, Princeton University Press, 2005, p. 9 appears unconvincing in its argument with regard to art. 48 WRV, suggesting that the Weimar Constitution was a precursor to the Constitution of the Fifth Republic in the sense of being a «semi-presidential» constitution and thus is comparable to the Constitution of the Fifth Republic. This disregards that the Constitution of the Fifth Republic was constructed differently in decisive points. Nevertheless, the Weimar Constitution did include, among other things, some similarities, as discussed among others by H.-P. Schwarz, *Der demokratische Verfassungsstaat im Deutschland des 20. Jahrhunderts – Gründung und Niedergang, Bewährung und Herausforderung*, in K. Dicke (edited by), *Der demokratische Verfassungsstaat in Deutschland. 80 Jahre Weimarer Reichsverfassung, 50 Jahre Grundgesetz, 10 Jahre Fall der Mauer*, Baden-Baden, Nomos, 2001, p. 15. Critical of art. 48, one of the «focal points of our new Reich Constitution» and the «dictatorship of the Reichspräsident», is Bühler, *Die Reichsverfassung vom 11. August 1919* cit., pp. 68-70. See also W. Pauly, *Die Stellung der Weimarer Reichsverfassung in der deutschen Verfassungsgeschichte*, in Eichenhofer (edited by), *80 Jahre Weimarer Reichsverfassung* cit., esp. pp. 12-14. Cf. Anschütz, *Die Verfassung des Deutschen Reiches vom 11. August 1919* cit., pp. 166-179, without taking sides.

71 Huber (edited by), *Dokumente* cit., vol. III, p. 136.

72 See also L. Seifert Greene, *Direkte Demokratie unter Berücksichtigung der Kommunen der Weimarer Republik*, Baden-Baden, Nomos, 2012.

73 Gusy, *Die Weimarer Reichsverfassung* cit., p. 92, Weimar was thus regarded as a «representative democracy with plebiscitary elements», which, however, ignored the role of the Reichspräsident. A similar view is held by H. Möller, *Die Weimarer Republik. Eine unvollendete Demokratie*, Munich, dtv, 2004[7], p. 192; H.A. Winkler, *Der lange Weg nach Westen*. vol. I: *Deutsche Geschichte vom Ende des Alten Reiches bis zum Untergang der Weimarer Republik*, Munich, Beck, 2001[3], pp. 404-405. On the anti-parliamentary efforts in the Weimar Republic, see Stolleis, *Geschichte des öffentlichen Rechts in Deutschland* cit., vol. III, pp. 103-105.

74 Dreier and Wittreck (edited by), *Grundgesetz*, p. 27.

75 Nevertheless, it seems significant that Dreier only lists «republic, democracy, social, federal and constitutional state» among the «characteristics guaranteed» by art. 20 and does not mention the representative system of government at all. Dreier (edited by), *Grundgesetz. Kommentar* cit., vol. II, p. 2. Also missing in R. Weber-Fas, *Wörterbuch zum Grundgesetz*, Stuttgart, Klett-Cotta, 1993, is the concept of the «representative system of government». On the other hand, Karl-Peter Sommermann notes that art. 20 connects «sovereignty of the people with the principle of representation». K.-P. Sommermann, in H. von Mangoldt, F. Klein, and C. Starck (edited by), *Kommentar zum Grundgesetz*, vol. II: *Artikel 20-82*, Munich, Franz Vahlen, 2010[6], p. 65. But there is nothing more to the latter. Historically, it was these two principles that, although not identical to democracy, provided the gateway for democracy to the constitutions of modern constitutionalism. Accordingly, the English mixed constitution of the seventeenth century was already interpreted in such a way that the House of Commons represented the people and thus embodied the democratic element of the constitution.

76 This formal classification does not take into account Blackstone's addition to Montesquieu's separation of powers that the powers must not only be separated from each other, but must also be enabled to inhibit and control each other, which the Constitution of the Second Republic in France of 1848 also ignored. Cf. H. Dippel, *Blackstone's Commentaries and the Origins of Modern Constitutionalism*, in W. Prest (edited by), *Re-Interpreting Blackstone's* Commentaries. *A Seminal Text in National and International Contexts*, Oxford and Portland, OR, Hart, 2014, pp. 199-214.

77 Detailed information on the powers of the Federal Council is to be found in Holste, *Der deutsche Bundesstaat im Wandel* cit., pp. 201-213.

78 Huber (edited by), *Dokumente* cit., vol. III, p. 130.

79 In addition: Möller, *Die Weimarer Republik* cit., esp. pp. 204-206.

80 An example of this is the keynote address of 8 September 1948, in which Carlo Schmid emphatically demanded that the «division of powers must be realised». Werner (edited by), *Parlamentarischer Rat 1948-1949. Akten und Protokolle* cit., vol. IX, p. 37.

81 Dreier and Wittreck (edited by), *Grundgesetz*, p. 28; K.-P. Sommermann, in Mangoldt, Klein, and Starck (edited by), *Kommentar zum Grundgesetz* cit., vol. II, p. 97, also pp. 109-125; cf. H. Schulze-Fielitz, in Dreier (edited by), *Grundgesetz. Kommentar* cit., vol. II, esp. pp. 217-227.

82 Dreier and Wittreck (edited by), *Grundgesetz* cit., p. 83. Compare Schulze-Fielitz, in Dreier (edited by), *Grundgesetz. Kommentar*, vol. III: *Artikel 83-146*, Tübingen: Mohr Siebeck, 2008[2], esp. pp. 1433-1436.

83 W. Horn, *Probleme der Gewaltenteilung – heute*, in Dicke (edited by), *Der demokratische Verfassungsstaat*

in Deutschland cit., pp. 119-123.

[84] Huber (edited by), *Dokumente* cit., vol. II, p. 295.

[85] *Bill of Rights*, Art. 9: «That the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament». E.N. Williams, *The Eighteenth-Century Constitution 1688-1815. Documents and Commentary*, Cambridge, Cambridge University Press, 1960, p. 28.

[86] Huber (edited by), *Dokumente*, vol. II, p. 294.

[87] For this, see Nipperdey, *Deutsche Geschichte 1866-1918* cit., vol. II, pp. 92-94.

[88] Anschütz does not address this, and treats the article purely formally and legally. Anschütz, *Die Verfassung des Deutschen Reiches vom 11. August 1919* cit., p. 130.

[89] *Interventionen von Hugo Preuß in den Plenarberatungen. Verfassungsgebende Deutsche Nationalversammlung. Zweite Lesung, 46. Sitzung, 4.7.1919*, in H. Preuß, *Das Verfassungswerk von Weimar*, in H. Preuß, *Gesammelte Schriften*, vol. III, D. Lehnert, C. Müller, and D. Schefold (edited by), Tübingen, Mohr Siebeck, 2015, p. 246.

[90] Huber (edited by), *Dokumente*, vol. III, p. 137.

[91] Cf. the overview of the resignation of the imperial governments between 1920 and 1933, in *ivi.*, pp. 159-160. For parliamentary control: Gusy, *Die Weimarer Reichsverfassung* cit., pp. 137-139.

[92] Huber (edited by), *Dokumente* cit., vol. III, p. 138.

[93] In addition, S. Steinbarth, *Das Institut der Präsidenten- und Ministeranklage in rechtshistorischer und rechtsvergleichender Perspektive. Ursprünge, Erscheinungsformen und bleibende Sinnhaftigkeit von Gerichts- und Impeachmentverfahren zur Durchsetzung gubernativer Verantwortlichkeit*, Baden-Baden, Nomos, 2011, esp. pp. 213-217.

[94] Leisner, in Sodan (edited by), *Grundgesetz* cit., p. 400. Less pointed is M. Morlok, in Dreier (edited by), *Grundgesetz. Kommentar* cit., vol. II, pp. 1086-1087. Still dogmatic N. Achterberg and M. Schulte, in Mangoldt, Klein, and Starck (edited by), *Kommentar zum Grundgesetz* cit., vol. II, pp. 1153-1155. None of the authors mentioned seems to have become aware of the fact that Art. 42 para. 3 established a provision of 1871, which consequently belonged to a completely different context of meaning and law.

[95] *Im Bewußtsein seiner Verantwortung vor Gott und den Menschen* […] Dreier und Wittreck (edited by), *Grundgesetz*, p. 14.

[96] Cf. E. Holthöfer, *Ein deutscher Weg zu moderner und rechtsstaatlicher Gerichtsverfassung. Das Beispiel Württemberg*, Stuttgart, Kohlhammer, 1997, p. 15.

[97] Compare the legal footprint in Williams, *The Eighteenth-Century Constitution 1688-1815* cit., p. 59.

[98] Huber, *Deutsche Verfassungsgeschichte seit 1789* cit., vol. III, pp. 977-979; Gusy, *Die Weimarer Reichsverfassung* cit., pp. 184-195.

[99] <https://de.wikisource.org/wiki/Gerichtsverfassungsgesetz> (accessed 27 January 2016).

[100] Huber (edited by), *Dokumente* cit., vol. III, p. 144. See also Anschütz, *Die Verfassung des Deutschen Reiches vom 11. August 1919* cit., pp. 278-281.

[101] Anschütz does not mention this either, but points to further questions about securing judicial independence. Anschütz, *Die Verfassung des Deutschen Reiches vom 11. August 1919* cit., pp. 282-284.

[102] In addition, see Möller, *Die Weimarer Republik* cit., esp. pp. 184-191.

[103] In addition, see A. Haratsch, in Sodan (edited by), *Grundgesetz* cit., pp. 633-636.

[104] Dreier and Wittreck (edited by), *Grundgesetz*, p. 85. Here, *Land* is used in its German context to refer to a federal state within the Republic.

[105] Huber (edited by), *Dokumente*, vol. II, p. 305.

[106] In contrast, Frotscher and Pieroth concluded that the Reichstag, due to its competence to pass a constitutional amending law, possessed the competence-competence. This did not take into account the fact that, ultimately, the Bundesrat decided whether the proposed constitutional amendment actually came about, with which it practically decided on the competence of the Reichstag. Frotscher and Pieroth, *Verfassungsgeschichte* cit., p. 207.

[107] Huber (edited by *Dokumente* cit., vol. III, p. 140.

[108] See also Haratsch, in Sodan (edited by), *Grundgesetz* cit., pp. 518, 520-526.

[109] Dreier, Wittreck (edited by), *Grundgesetz* cit., p. 137.

[110] Bommarius, *Das Grundgesetz* cit., pp. 192-194.

[111] Dreier and Wittreck (edited by), *Grundgesetz*, p. 14.

[112] H. Dippel, *Die kurhessische Verfassung von 1831 im internationalen Vergleich*, «Historische Zeitschrift», n. 282, 2006, pp. 619-644.

[113] On the legal side, this anti-liberal reaction to 1848 was preceded by the change in public law methods initiated by Carl Friedrich von Gerber in 1852. Cf. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland* cit., vol. II, pp. 331-337.

[114] H. Dippel, *1871 versus 1789: German Historians and the Ideological Foundations of the Deutsche Reich*, «History of European Ideas», n. 15, 1992, pp. 829-837. This initially political decision was underpinned by the prevailing doctrine of constitutional law, so that dissenters and members of the opposition could only be heard after 1918. Cf. Stolleis, *Geschichte des öffentlichen Rechts in Deutschland* cit., vol. II, pp. 322-380.

[115] Wehler, *Das Deutsche Kaiserreich 1871-1918* cit., pp. 63-69.

[116] Nipperdey, *Deutsche Geschichte 1866-1918* cit., vol. II, pp. 106-109.

[117] Kotulla, *Deutsche Verfassungsge-*

schichte cit., pp. 530-531.

[118] See also Grimm, *Die Zukunft der Verfassung II* cit., p. 183.

[119] Willoweit's statement (Willoweit, *Deutsche Verfassungsgeschichte* cit., p. 351) that the Basic Law is a «creation oriented towards the past», even from the perspective of 1949, must be read in the context that the Basic Law endeavoured to come to terms with the past, while at the same time deliberately setting new and forward-looking accents for German constitutional law.

[120] H. Dreier, *Grundlagen und Grundzüge staatlichen Verfassungsrechts: Deutschland*, in A. von Bogdandy, P. Cruz Villalón, and P. M. Huber (edited by), *Handbuch Ius Publicum Europaeum*, vol. I, Heidelberg, C.F. Müller, 2007, p. 25.

[121] Cf. U. Kischel (edited by), *Der Einfluß des deutschen Verfassungsrechtsdenkens in der Welt: Bedeutung, Grenzen, Zukunftsperspektiven. Ergebnisse der 34. Tagung der Gesellschaft für Rechtsvergleichung vom 12. bis 14. September 2013 in Marburg*, Tübingen, Mohr Siebeck, 2014.