Constitutional tradition and constitutional reform in Germany

Klaus Messerschmidt, Humboldt
University of Berlin

1. Introduction[92]

In the 20th century the German People lived under five different constitutions:

- The Constitution of the German Empire ("Reichsverfassung") until 1919
- The Constitution of the so-called Republic of Weimar ("Weimarer Reichsverfassung") (1919-1933)
- The Basic Law (1949 until now)
- The first Constitution of the German Democratic Republic (1949-1968)
- The second Constitution of the German Democratic Republic (1968-1990)

So a 90 year old person, born in 1916 and living all his life-time in Western Germany lived under three constitutions whereas his East-German fellow countryman even lived under 5 different constitutions, ending with the Basic Law which was extended to the Eastern part of Germany due to reunification.

Four of these constitutions corresponded to different political and social systems:

- The Constitution of 1871 was the instrument of government of the constitutional monarchy which ended due to Germany's military defeat in World War I.
- The Constitution of 1919 expressed the ideas of the first German Republic which was destroyed by the German Fascists and their allies.
- The Basic Law of 1949 is the legal foundation of modern Germany. Although it originally was viewed as a provisional instrument of government it lasts longer than its predecessors. Whereas the first German Constitution lasted less than 50 years and the Weimar Constitution only survived for 13 years, the post-war Basic Law is going strong since 57 years and probably for

[92] This is an original contribution to the King Prajadhipok's Institute (KPI) congress on "Constitutional Reform: Comparative Perspectives", to be held 3-5 November 2006 in Bangkok. Due to very restricted time of preparation the shortcomings of a text that was written in a foreign language could not be eliminated by a language editor. I deliberately took the risk to express my ideas in my own – inappropriate – words.

many years to come. This success story culminated in the extension of the Basic Law to Eastern Germany in 1990.

Looking at the chronology of German constitutionalism the period from 1933 to 1945 must be excluded because the Fascist Third Reich not even pretended to live under a constitution. The Weimar constitution and the rule of law were suspended giving way to the commands of the Fascist leadership.

It should be noted that Germany never established a new constitution for constitutional art's sake. Constitutions were always – with the sole exception of the GDR Constitution of 1968 – created after very deep political changes: The Constitution of 1871 was preceded by the unification of Germany, the Weimar Constitution was preceded by Germany's defeat in World War I and the revolution of 1918/1919, which, however, unlike Russia, did not lead to a socialist state but to a political compromise symbolized by this constitution. The Basic Law, finally, contributes to the rebuilding of German statehood after the Barbarian rule of Fascism which lead to World War II, genocide, the devastation of large parts of Europe and Germany itself. So the story of German constitutionalism has a very difficult background. The work of the framers never resulted from the idea "it would be nice to have a new constitution" but started from a unique turning-point in history.

As an exception to the rule that major political changes and the framing of a new constitution are linked, the most important political event of post-war history in Germany, reunification of Western and Eastern Germany in 1990, neither required nor initiated a new constitution.

It might be interesting to compare the conditions leading to new constitutions in different countries. I presume that in most cases there has been an urgent need, although less dramatic than in Germany. Sometimes, however, symbolic reasons, may suffice. To my mind symbolic reasons are not good enough, especially when a constitution in action is affected and working institutions must be adapted to the new constitutional rules.

My report will concentrate on the Basic Law but will take into account its constitutional tradition. Therefore the first part of my report will concentrate on the path leading to the Basic Law whereas the second part will analyse constitutional reform within the framework of the Basic Law. One might also say the first parts deals with constitutional reform writ large (transcendent constitutional reform), including revolutionary changes, whereas the second part deals with constitutional reform

writ small covering the business of piecemeal amendments of the constitution (immanen constitutional reform).

2. Changing Constitutions

2.1 The path to modern German Constitutionalism

As a matter of fact German constitutionalism did not start only in 1871, but in 1849 and ever earlier. In 1849 a revolutionary Constitution was proclaimed by the first German Parliament, known as Paulskirchenverfassung because the MPs assembled in a church named Paulskirche in the heart o Germany, the then autonomous town of Frankfurt where the Mediaeval German Emperors were elected and crowned. I do not deal with this highly interesting document because it never entered into force. Suffice to know that it was liberal in character, less radical than the French Constitutions from 1791 to 1795, but opposed to reactionary government and the dominance of the Prussian state which abolished the constitution a few months later. Other 19th century German constitutions are also omitted although the constitutions of Prussia and other German constitutions such as the constitution of the Northern Union of 1866 ("Norddeutscher Bund") certainly deserve attention.[93] The same is true of the doctrinal background of the Basic Law which is part of the great tradition of constitutional ideas put forward by *Locke, Montesquieu, Abb Siey s, the Federalists, Kant, Wilhelm von Humboldt* and many others.

While none of the great constitutional shifts may be addressed as constitutional reform in the usual narrow meaning of this notion, they do not only express revolutionary changes of the constitution and the political system. They also prove continuity of political institutions and constitutional doctrine, to some degree. However, the quest for continuity is only interesting from the historical and from the doctrinal point of view, whereas in terms of legal theory the notion of continuity must be discarded.[94] Referring to different constitutions means that they are valid, applicable and legitimate independently. None derives validity from another one. Otherwise this constitution should not be addressed as a new constitution but only as a new version of the basic constitution.[95] The distinction between changing constitutions (transcendent constitutional change) and amendments to

[93] Cf. G tz, p. 149.

[94] See especially Merkl, p. 1279 et seq. who, however, takes a different view.

[95] Cf. Kelsen II, p. 1389 et seq.

the constitution (immanent constitutional change)[96] consequently forms the basis of this essay and is tantamount to the opposition of 'pouvoir constituant' and 'pouvoir constituant'.[97] From the strictly legal point of view it does not matter whether a constitution invokes some constitutional tradition. There is only one ultimate test of the autonomy of a constitution: A derivative or revised constitution is enacted according to the provisions of the preceding constitution, whereas a new constitution arises from legal *tabula rasa* coming into existence at zero hour relying only on the "Grundnorm"[98] that a constitution once successfully established should be obeyed.

2.2 Comparison of Basic Structure and Contents

In rough outline the common and the divergent features of the three succeeding constitutions may be presented in the following way:

	Constitution of 1871	Constitution of 1919	Basic Law of 1949
Form of government	Constitutional monarchy	Republic	Republic "constitutional democracy"
Head of state	King resp. Emperor	President	President
Dominant factor	King & Chancellor	Chancellor & President	Chancellor
Democracy	*	***	**
Rule of law	*	**	***
Separation of powers	**	*	*
Social state		*	*
Environmental state			*
Federalist state	*	*	*
Sovereign state	**	*	*
Declaration of rights		*	**
Independent	*	**	**

[96] Merkl, p. 1284.

[97] Schuppert, p. 45.

[98] Cf. Kelsen III, p. 1397 et seq. & Kelsen I, p. 200 et seq.

courts			
Constitutional Court		(*)	**
Rigid Constitution	*	*	**
Number of amendments			52
Legislation by parliament	*	*	**
Regulations by administration	**	**	*
Role of political parties	*	**	***
Independent media	*	**	*
Repression of political enemies	**		*
Emergency powers	King	President	shared
Public support and acceptance	**	*	**
Supporters	Nobility and bourgeoisie	Workers, bourgeois and catholics (partially)	mixed
Adversaries	Socialists and Catholics	Traditionalists and right-wing extremists, anti-Semites, Communists	Right-wing and left-wing extremists, Muslim fundamentalists

To present the evolution of German Constitutionalism in such a simplistic way is bound to meet criticism. However, the above scheme gives an idea of the characteristics of the different constitutions when additional information is supplied. Some of the items are evident and need no further explanation such as the "Kaiserreich" being a constitutional monarchy. Other items and the distribution of points in particular need explanation (sub 2.2.3).

2.2.1 Form of Government

Qualifying the Federal Republic of Germany as "constitutional democracy" may sound somewhat strange. Everybody knows the word "constitutional monarchy". "Constitutional democracy" is less familiar. This word is meant to highlight the basic idea of the German Fundamental Law: The power of the people should be limited in the same way as the traditional power of the monarch by a constitution. The constitution restricts the competence even of the people and their legitimate representatives and prevents democracy to turn to totalitarian democracy. Consequently the constitution not only prevails against legislation and administration but claims supremacy, even when it comes to amendments of the Basic Law.

Constitutions which can be changed by the ordinary legislative authority in the same way in which ordinary laws are enacted, and those which, because they cannot so be changed, stand above ordinary laws.

Bryce

According Art. 79 para 1 any amendment to the Constitution can only be effected by a change of the wording of the Constitution. This looks like a truism. Only the historical background reveals its meaning: Weimar Constitution allowed amendment through legislation passed by a two-thirds majority of Parliament. It did not ,however, specify the concept of alterations of the Constitution. Thus, laws adopted in Parliament by at least a two-thirds majority were regarded as legal "departures" from the Constitution and were given precedence over it.[99] So Art. 79 para 1 serves both transparency and constitutional supremacy.

Art. 79 para 2 sets a procedural standard for any amendment of the Constitution. Any law amending the constitution must be carried by at least two thirds of the Members of each Chamber of German Parliament ("Bundestag" and "Bundesrat"). Compared to ordinary legislation, the amendment of the constitution has been made more difficult. Thus a simple political majority cannot change constitutional decisions, commonly arrived at an earlier time. This procedural difficulty influences decisions whether modifications or which modifications should be undertaken[100] since

[99] G tz, p. 151.

[100] Klein, p. 32.

constitutional reform depends on a broad consensus. In this way reticent attitude vis- -vis constitutional amendments is guaranteed.[101]

Though the Weimar Constitution contained a similar provision, due to Art. 79 para 1, which is unprecedented, Art. 79 para 2 has a different impact.

Art. 79 para 3 precludes the principles of Arts. 1 and 20 from any alteration whatsoever.

Article 79 para 3
Amendments to this Basic Law affecting the division of the Federation into L nder (states), their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

Article 1 reads as follows:

Article 1 [Human dignity]

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
(2) The German people therefore acknowledge inviolable and inalienable Human rights as the basis of every community, of peace and justice in the world.
(3) The following basic rights shall bind the legislature, the executive, the judiciary as directly applicable law.

Thus the principles of Art 1 also refer to the basic rights binding all powers of State.

Article 20 reads:

Article 20 [Basic institutional principles; defence of the constitutional order]

(1) The Federal Republic of Germany is a democratic and social federal state.
(2) All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies.

[101] Klein, p. 33.

(3) The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice.

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

Amendments, even when passed by the required majority, must not change the identity of the Basic Law. The hard, unalterable core of the Basic Law includes the free and democratic constitutional system, respect for human rights, the sovereignty of the people, the separation of powers, governmental accountability, executive legitimacy, the independence of the judiciary, the multi-party system, and equal political chances as well as federalism.[102]

The claim of Article 79 para 3 that a core of major and fundamental principles of the Basic Law are outside the scope of potential amendment, which is paraphrased as 'eternity clause'[103] resp. 'perpetuity clause'[104] ("Ewigkeitsgarantie"), meets little understanding outside Germany. British lawyers, in particular, have strong objections. As a matter of fact, this kind of constitutionalism is the very opposite of parliamentary supremacy or sovereignty as expounded by *Dicey*[105] and his adherents.[106] In order to understand this provision, the historical background of the German Basic Law must be taken into account. The Basic Law was framed as a reaction to the dark years of the Fascist regime and the breakdown of the Weimar Republic. Obviously the collapse of the Weimar Republic was not produced by a coup d' tat but resulted from elections which saw the Nazi party as the great winner. Even Hitler pretended to act within the limits of the Weimar Constitution when he suspended by the notorious "Empowering Law", which entitled the government to legislate without parliament.[107] So the framers of the Basic Law, though dedicated democrats, concluded that democracy should be restricted in a way that the events of 1933 could never happen again. Therefore they established several instruments, first of all the ban on unconstitutional amendments even if they are launched by a vast democratic majority.[108]

---

[102] Schuppert, p. 48.

[103] Stern, p. 20.

[104] Schuppert, p. 47.

[105] Dicey, p. 37 et seq.

[106] Cf. Wade (introduction to Dicey), p. xlviii. & Messerschmidt, p. 553.

[107] Cf. Karpen, p. 82.

[108] Cf. Schuppert, p. 48.

2.2.2 Head of state

After the end of monarchy the President as the head of state of the first Republic became a sort of substitute emperor. In response to the destructive role of the last *Reichspr sident* who contributed to the decline of the Weimar Republic and paved the way for Nazi dictatorship the position of the president has been reduced considerably by the Basic Law. Whereas the Weimar Constitution provided the *Reichspr sident* with wide executive powers, the *Bundespr sident* is limited in favour of the government and the parliament. He can neither take the initiative to dissolve the parliament nor appoint a new chancellor without prior majority vote by the parliament.[109] He has no independent role in shaping policy and no emergency powers.[110] He is mainly and simply the first representative of the State.[111] In contrast to the President of the Weimar Republic, he is not elected directly by the people, but by an assembly drawn from MPs and representatives of the Federal States. Thus the Basic Law takes care that the President never again may overcome parliamentary government. The dominant role now lies with the Chancellor, the German equivalent of the Prime Minister. German history always saw strong chancellors like *Bismarck*, the Weimar Constitution, however, made it extremely difficult for Chancellors to stay in office for several years. The Chancellor enjoys increased powers under the Basic Law and is viewed as the democratic leader of the nation. Being elected by the Parliament the Chancellor, in some way, is also chosen by the general electorate. All in all, the Federal Republic of Germany may be characterised as a 'chancellor democracy'.[112]

2.2.3 Explanatory remark

The comparison of the different German constitutions concentrates on the fundamental structural principles and the institutional setting on the one hand and the role of fundamental rights on the other hand. Although it is not possible to cover all notions mentioned above, some of them need to be commented in more detail.

It may be unusual to present the comparison in the form of a table. Therefore the applied method requires a short explanation. In order to give you some idea of the characteristics of the subsequent German Constitutions and in order to compare the contents of the Basic Law to its predecessors, I

[109] Magiera, p. 89.

[110] Cf. Karpen, p. 83 et seq.

[111] Ress, p. 116 et seq.

[112] Hailbronner, p. 70.

chose the most important features and attributed points according to their role and strength in each constitution. Some people might object that this method is only appropriate in a hotel guide and does not live up to the serious tasks of constitutional analysis. Nevertheless it may be helpful. Some people may also wonder why the scale is restricted. It only goes from zero to three points. So aren't there any five star institutions in German constitution? However, these "stars" are not meant to detect excellence. "Zero" indicates the full or almost full lack of a specific institution such as a Constitutional Court in Monarchist and Weimar Constitution. "One point" says that a specific institution or set of rules exists. Additional points – up to 3 – indicate that the constitution attributes above-average importance and strength to a particular institution or principle. We must distinguish because one constitution may implement a constitutional principle in a basic way, whereas another constitution may put more stress on it.

The scheme of constitutional evolution in Germany suffers from another shortcoming as well. The method of discerning "points" does not allow to go into details. So the statement that federalism is strong in Monarchy, Weimar Republic and modern-day Germany does not reveal the important changes of German federalism. The same is true of other notions, which, however, cannot be commented here because we have to concentrate on the more general aspects of constitutional reform, which means that some specific contents of constitutions must be neglected. So the written report concentrates on the most important observations. The explanation of other findings, contained in the above table, must be left to discussion.

2.2.4 Democracy

Contrary to popular prejudice, democracy in Germany did not start with the Republic of Weimar. The German Empire is characterised both by the so-called principle of monarchy and democracy. The Members of Parliament ("Reichstag") are appointed by general elections and Parliament has a say in legislation and budget. However, it cannot be denied that democracy at that time was underdeveloped. Germany is not one of those states which made major contributions to the development of democracy.[113]

Comparing the level of democracy in Weimar Constitution and Basic Law Weimar comes first. Both constitutions establish representative – parliamentary – democracy. Art. 20 para 2 BL reads:

[113] Robbers, p. 60.

All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive, and judicial bodies.

The Basic Law embraces the idea of representative democracy and confines direct democracy by referendum and plebiscite to a very limited role.[114] Weimar Constitution, on the contrary, was more open to direct democracy allowing the immediate resolution of substantial issues by plebiscites (Arts. 73 and 76). Moreover the President was elected by popular vote (Art. 41). The framers of the Basic Law held that unrestricted Weimar democracy contributed to the suicide of the first German republic and were still shocked about Hitler's rise to power and Nazi referenda.[115] Therefore their general attitude towards democracy may be characterised as cautious optimism. Paramount importance is attached to fundamental rights as safeguards of the rights of the minority resp. the individual. The idea of inadmissible amendments as expounded in Article 79 para 3 reflects this sceptic attitude. Thus the democratic majority principle is restricted by constitutional handicaps.[116] Another expression of scepticism are provisions relating to the so-called self-assertive or combative democracy ("wehrhafte Demokratie")[117] which allow authorities to fight enemies of democracy and to put a ban on extremist political parties and associations. This, again, is a lesson from Weimar, but also an expression of Cold War anxiety. Another characteristics of the Basic Law is the acknowledgement of 'party democracy' (Art. 21). Party politics are necessary but their influence on administration and public media must be restricted.[118]

2.2.5 Rule of law

The comprehensive German public law notion of "Rechtsstaat" escapes translation by just another word. Although rule of law is at the base of this concept, the now universal idea of "rule of law, not of men" does not cover all aspects of 'legal state'. German law and legal theory associate the rule of law with the guarantee of fundamental (human) rights as well as with principles of state organisation such as separation of powers (Art. 20 para 3) and independence of judges (art. 87), and with more general principles of due process such as the prohibition (Art. 103) or restriction of retroactive laws ("R ckwirkungsverbot"), the protection of legitimate expectations ("Vertrauensschutz"), the principles of legal certainty ("Bestimmtheitsgrundsatz") and

[114] Robbers, p. 61.

[115] Ress, p. 125.

[116] Starck I, p. 11.

[117] Klein, p. 18.

[118] Cf. Karpen, p. 72 et seq.

proportionality ("Verh ltnism igkeitsgrundsatz").[119] The tradition behind these maxims dates back to the 19th century.[120] However, the Basic Law and constitutional evolution reinforced those principles and applied them also to legislation. That is why a continuous increase of the rule of law can be stated.

2.2.6 Separation of powers

This notion ("Gewaltenteilungsgrundsatz") is linked to the rule of law in the way that separation of powers is a prerequisite of rule of law. Rule of law is hardly imaginable when laws are made and executed by the same people. Without independent judiciary rule of law will never prevail. Besides, checks and balances depend on the existence of different powers. Nevertheless the meaning of separation of powers has changed since the times of constitutional monarchy. Whereas constitutional monarchy faced a real dualism of crown and Parliament,[121] democracy put an end to that kind of separation of powers because now all power results from the will of the people. Consequently, the classical antagonism of legislative and executive powers is bridged by the maxim of parliamentary government.[122] Therefore it should be noted that separation of powers is less fundamental than in the constitutional monarchy but still an important instrument of good governance. Owing to the growing role of judicial review checks and balances will persist.

2.2.7. Social state

This is another word that sounds good in German ("Sozialstaat") and clumsy in English. The familiar English word 'welfare state' is too narrow to cover the multiple aspects of the German notion. "Sozialstaat" goes back to the 19th century when welfare and social security (i. e. national insurance) started under *Bismarck's* rule. At that time, however, almost nobody related social policy to a principle of constitutional law. Constitutional law still was restricted to the conflict 'man vs. state'. The Weimar Constitution introduced several social rights responding to the demands of Social Democrats and trade unions. However, they were not legally binding. It took 30 more years to adopt the notion of 'social state' in German constitutional law. As a matter of fact, the Basic Law attributed the word "social" two times to already well-established constitutional notions (Arts. 20 para 1 and 28 para 1), one time to 'federal state' ("sozialer Bundesstaat"), another time to 'legal

[119] G tz, p. 152 et seq. & Robbers, p. 62 et seq.

[120] G tz, p. 144.

[121] Ipsen, p. 108.

[122] Messerschmidt, p. 523 et seq.

state' ("sozialer Rechtsstaat"). The rise of 'social state' is an outstanding example of constitutional evolution which shall be explained later. The notion was construed as an objective principle, which imposed duties on the state, but did not grant corresponding rights. This restriction is reasonable because the capacity of welfare state depends on available resources.[123] Together with the order to respect and protect human dignity, this principle obliges all state organs to provide for social conditions which are compatible with human dignity. Above all, the state must take care of the weak, by providing the material minimum for an acceptable standard of living.[124] However, this does not mean that everybody is entitled to housing or a job, as proponents of social rights would like to have it. Proposals to insert such rights into the Basic Law were futile efforts. Most politicians and lawyers were afraid that laying down unattainable goals and empty rights would destroy the authority of the constitution,.[125] although such "second generation rights" are not unfamiliar in European constitutions.[126] In addition, the principle of social state is also understood as imposing an obligation on the state to work towards the common good.[127] Another aspect of the social state principle is the redistribution of wealth which may be either a side effect of welfare or a goal in itself leading towards material equality and social justice.[128] To my mind, the most important aspect of the social state principle consists in this: First, it makes clear that the state under the Basic law must not be conceived as a minimal state but as an active state disposing of the right of intervention. Secondly, the principles confers additional powers to the state. Thirdly, restrictions of fundamental rights, such as property (Art. 14), may be justified by reference to the social state principle. However, the social state largely depends on legislation which is left with a broad margin of discretion. Therefore it should be made clear that this principle is less binding than rule of law and democracy. Notably some fundamental rights are very close to the social state principle. This is in particular true of the freedom of association (art. 9 para 3) which also applies to trade unions and is even binding private persons ('direct horizontal effect', "Direkte Drittwirkung").[129] Art. 9 is the constitutional guarantee of the freedom and parity of trade unions and employers associations and of the right to collective bargaining ("Tarifautonomie") and strike.[130] Moreover the concept of social state tends to replenish the traditional defensive concept of liberty with an affirmative – positive and

[123] Klein, p. 27 & Karpen II, p. 108.

[124] Robbers, p. 64.

[125] Starck I, p. 12.

[126] Starck II, p. 19 & Karpen II, p. 101 et seq..

[127] Robbers, ibid.

[128] Cf. Hailbronner, p. 65 et seq.

[129] Robbers, p. 51 et seq. & Karpen, p. 67.

[130] Karpen II, p. 91.

equal opportunity – understanding of freedoms.[131] At the end of the day this reading of the social state idea means to organize state and society along the same lines ('constitutionalization' of society)[132] and to deny self-determination of the citizen ("Privatautonomie").

2.2.8 Environmental state

Article 20a [Protection of the natural bases of life]

Mindful also of its responsibility toward future generations, the state shall protect the natural bases of life by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.

The task or 'state goal' ("Staatsziel") to protect the environment may be viewed as a corollary of social state. It was introduced only in 1994. Admittedly the legislator when amending the constitution was afraid of a dynamic constitutional evolution by the courts, that could lead to a preponderance of ecological requests. This attitude also explains the awkward wording of the new article. In this special case it would be unfair to put the blame on the translator.

2.2.9 Declaration of rights

The Basic Law puts the Fundamental Rights at the start, whereas both the Frankfurt Constitution of 1849 and the Weimar Constitution deal with them later and the imperial Constitution contains no bill of rights at all. In view of the extreme violations of human rights by fascist dictatorship the Basic Law thus emphasizes the paramount importance of the rights of the individual. Basic rights have achieved an undisputed leading position in German constitutional law.[133] Neither the specific rights nor the constitutional evolution of rights can be expounded here.[134] However, the growth of fundamental rights is evident.

---

[131] Karpen, p. 57 et seq.

[132] Klein, p. 20.

[133] Stern, p. 29.

[134] Cf. Robbers, p. 48 et seq.

2.2.10 Constitutional Court

The establishment and working of the Constitutional Court is an outstanding feature of the Basic Law[135] and a cornerstone of constitutionalism. The need and legitimacy of judicial resp. constitutional control of legislation has been discussed in Germany over a period of a century.[136] In the mid 1920s the Supreme Court ("Reichsgericht") claimed the right of judicial review vis- -vis legislative acts.[137] An outline of constitutional review in Germany[138] would go beyond the scope of this report. Suffice to say that the constitutional jurisprudence assumes a key function in the process of constitutional interpretation and the improvement of constitutional law.[139] The judicial supervision of state acts, in particular statutes, against the constitutional yardstick is the backbone of the supremacy of the constitution.[140]

2.2.11 Rigid constitution

The constitutional notion, underlying the Basic Law, is best characterized by the principle of "constitutional law as binding law"[141], binding in particular even upon the legislature (cf. Art. 20 para 3). The first prerequisite of the supremacy of the constitution is the distinction between the power to issue and amend the constitution and the power of statutory law-making as expounded above. The predecessors of the Basic Law lacked this quality either because they did not draw a clear line (Imperial Constitution) or because they reduced the constitution to a political programme in the hands and at the discretion of the parliamentary majority (Weimar Constitution).[142] Because of the procedural and substantive safeguards against undue constitutional amendments the Basic Law clearly belong to the type of rigid constitutions.[143]

---

[135] Klein, p. 32.

[136] Ipsen, p. 108.

[137] Ipsen, p. 110 et seq.

[138] Cf. $

[139] Stern, p. 21.

[140] Starck I, p. 9.

[141] Ibid.

[142] Ibid.

[143] Klein, p. 34.

2.2.12 Conclusion

It is never easy, in studying the history of an institution, to determine how much of its success or failure is due to its own character, how much to the conditions, external and domestic, in the midst of which it has to work.

Bryce

Although the Framers of the Basic Law intended to learn from the mistakes of the previous constitution, it is hard to determine the influence of the institutional settings on the collapse of the Weimar Republic and it is even harder to relate the stability of modern Germany to its Constitution. Some analysts reject the formal-legal approach and attach much more importance to social conditions and civic culture. Most probably the Weimar Republic did not die because of its constitution, which was well conceived but because of too little popular support[144] and obstruction by elites such as judges and civil servants, thus turning out as a "Republic without Republicans".

3. The German Basic Law

The German Basic Law being "the supreme law of the Land" fully conforms to the general definition of a constitution.

A Constitution is a Frame of Government designed to describe the form which the administration of a State takes, to define its powers over the citizen, and the rights of the citizen against it.

Bryce

It is both a bill of rights and an instrument of government. Both pillars are linked by the general idea of protecting liberty by fragmenting power and making it accountable.[145] Like all modern constitutions it is a written constitution.[146] The specific problems of constitutional reform, discussed in this report, result from this feature.

Judging from its contents, which has already been discussed above, the Basic Law meets all criteria of a constitution. Its genesis, however, is atypical.[147] The creation of the Basic Law in 1948 and 1949 required only a few months while the procedure deviated from all accepted standards of

[144] Cf. Limbach, p. 3.

[145] Karpen, p. 56.

[146] Nevertheless most scholars assume that, in addition, unwritten constitutional norms and principles exixt, cf. Kube, p. 199 et seq.

[147] Klein, p. 23 et seq. & Schuppert, p. 44 et seq.

constitution-making. The German people neither elected the framers of the Constitution, the Parliamentary Council, nor did they approve of the Basic Law by popular vote. Instead the members of the Parliamentary Council were appointed by the governments of the Members States of the Federation *in statu nascendi* and their final draft was approved by the military governors of the Western Powers.[148] Nevertheless the Basic Law was not rejected as an *octroi* because the overall majority of the German people understood that the total collapse of fascist Germany and the regime of occupation did not allow an ordinary constitution-making process.

Because of these deficits in the constitution-making process, but even more due to the fact that the new constitution did not come into existence in the Eastern part of Germany the constitution was regarded as a transitional and temporary framework only. In order to stress its provisional character the document was not called Constitution, but the more neutral title of Basic Law was chosen.[149] However, the Basic Laws meets all substantial standards of a constitution and soon was accepted as the constitution of Western Germany and finally united Germany.

Although the German Reunification offered a perfect opportunity to make good for the poor democratic origins of the Basic Law, the idea to hold a referendum on the Basic Law[150] or even to create a new constitution was rejected. The last Parliament of the vanishing post-revolutionary German Democratic Republic preferred to join the Federal Republic of Germany by way of accession, thereby accepting the Basic Law as the constitution of reunified Germany. Although the Basic Law originally expected reunification to go along with the adoption of a new constitution (Art. 146) it did not exclude the speedway to national unity (cf. Art. 23).

It should be noted, however, that this kind of pragmatism does not fit to the notion of "constitutional patriotism", elaborated by German political scientists.[151] Though it is true that the overall majority of the German electorate continuously gave support to loyalist parties, the horror populi is a serious shortcoming of German constitutionalism. I do not pledge that each amendment should be put to popular vote. However, I prefer an explicit approval of the constitution by the people. In Germany we have missed this chance.

---

[148] Cf. Spevack, op. cit.

[149] Dolzer, p. 370.

[150] Cf. in more detail M. B ckenf rde, p. 107 et seq.

[151] Cf. Schr der, p. 29 et seq.

4. Amendments of the Basic Law

4.1 Constitutional Background

The mode of amending Constitutions (...) has become one of special importance in modern times, and that for two reasons. The older Constitutions (...) are (...) capable of being varied by the ordinary legislative authority without any special formalities. But nearly all recent Constitutions (...) are embodied in an instrument which can be altered not by the legislature in the course of its regular action, but only in a specially prescribed way, usually by a vote of the people. This provision is intended to place obstacles in the way of any but well-considered changes which the nation as a whole desire. (...) Hence the need for making amendment a slow and comparatively difficult process.

Bryce

As mentioned in the very beginning of this essay, constitutional amendments must confirm to Art. 79 which reads as follows:

Article 79 [Amendment of the Basic Law]

(1) The Basic Law may be amended only by a law expressly amending or supplementing its text. (...)

(2) Any such law shall be carried by two thirds of the Members of the Bundestag [House of Commons] and two thirds of the votes of the Bundesrat [Senate, representing the German States].

(3) Amendments to this Basic Law affecting the division of the Federation into L nder (states), their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be inadmissible.

Due to this provision the Basic Law corresponds to the rigid type of constitution. However, this statement does not exclude constitutional change.

That even a Rigid Constitution (...) cannot stand unchanged from generation to generation is a truth which has become clearer now than it was a century ago.

Bryce

Actually the comparison of rigid and flexible constitutions is somewhat misleading because the notion of flexibility only applies to the relationship between constitution and statute, but does not rule out the right to change the constitution within a given framework.

4.2 Some Facts

Because of the procedural and substantive safeguards the Basic Law may be called a rigid constitution although it had been changed 52 times so far. This means that the Basic Law has been changed on average almost in every year of its existence, whereas the American Constitution saw only 27 amendments in two centuries and only 6 amendments during the years corresponding to the period of validity of the German Basic Law.[152] As a matter of fact constitutional reform alternated between years of activism and years of resting position. So no amendments were passed from 1976 to 1983 and from 1984 to 2000, whereas 16 amendments have been carried out between 1968 and 1972. Since 1990 generally one amendment per annum is passed. Just from looking at these numbers we arrive at a quite important conclusion: Constitutional amendments reached their peak when legislative activity was intense as well. This finding backs the thesis that constitutional reform in Germany is mostly undertaken in order to facilitate legislation by means of putting constitutional handicaps aside. Major and minor amendments alternate.

The recent reform of federalism may be addressed as the biggest and perhaps most important reform ever. It affects 20 Articles (out of ca. 170) ad inserts 4 new Articles. Since it intends to facilitate decision-making, which suffers so far from federalism, changes are vital for legislation in Germany. The constitutional reform of 1994 only comes second. The reform of 1994 was meagre when compared to its original goals and reflected a very cautious handling of constitutional reform. Owing to the Unification Treaty, which called for a constitutional reform within two years, the above-mentioned "Common Constitutional Commission" was established. It suggested some modifications, but no fundamental revision of the Basic Law, which consequently were adopted through the normal procedure of amendments without any referendum being held.

Furthermore the amendment of 1956 relating to the reinstallation of military power ("Wehrverfassung") deserves mention.

---

[152] Cf. http://www.ashbrook.org/constitution/amendments.html; http://www.yale.edu/lawweb/avalon/amend1.htm; more interesting details in http://www.lexisnexis.com/constitution/amendments_factoids.asp

Another important amendment is the introduction of emergency powers provisions ("Notstandsverfassung") in 1968, which were extremely controversial at that time, causing considerable unrest.[153] The risks of this reform were, as we know now, largely overstated.

4.3 Evaluation

The fact that the Basic Law has been amended 52 times does not turn it into an unstable constitution.[154] Neither a single amendment nor amendments in total changed the character of the constitution. "The substance of the Constitution ... remained untouched."[155] Most of the amendments[156] concerned federalism trying to make it more efficient without changing its basic idea. The general relations between the citizens and the state were not subject to major changes, although single fundamental rights, such as the right to equal protection, as enshrined in Art. 3 (in 1994), the right of political asylum under Art. 16 (in 1993 and 2000) and the right of the inviolability of the home in Art. 13 (in 1998). Restriction on asylum and the introduction of the environmental protection clause (Art. 20a) mark extremely important governance problems. No substantial modifications can be noted with respect to the institutional framework and the parliamentary system.[157] Many amendments demonstrate by their technical wording[158] a rather specific meaning and little impact on structures and principles of the constitution.

The frequency of amendments indicates in no way general discontent about the Basic Law. Amendments were made because of specific problems that had to be solved, but not or only occasionally for principle or symbolic reasons. On the contrary, the overall attitude towards the Basic Law is either down-to-earth or enthusiastic but almost never overtly critical. Self-praise and fishing for compliments are predominant. The Basic Law has been celebrated as a stroke of luck for German history.[159] According to another scholar the Basic Law has on the whole turned out to be an extraordinary stable foundation for the national, economic and societal development of the Federal Republic of Germany.[160] "The extraordinary esteem which the Basic Law has gained, even in

[153] Karpen, p. 83 et seq. & Ress, p. 131.

[154] Cf. Stern, p. 20.

[155] Klein, p. 34.

[156] Cf. Hailbronner, p. 55 et seq.

[157] Schr der, p. 37.

[158] On sheer technical modification Schr der, p. 27.

[159] Stern, p. 21.

[160] Dolzer, p. 366.

international comparison, in its development in recent years reflects the stable and just order of the community which has arisen on the foundations of the Basic Law."[161] Almost nobody contradicts its assessment as a successful and durable constitution.[162] An American scholar was polite enough to agree: "The Basic Law has stood the test of time, and it is likely to survive in perpetuity."[163] He concludes: "In terms of its prestige and influence around the world, the Basic Law stands today on an equal footing with the United States Constitution."[164] Not surprisingly, both the Constitutional Reform Inquiry Commission, established in 1971 to reassess the Basic Law,[165] and the "Common Constitutional Commission" set up in 1992 made no suggestions for a thorough revision of the Basic Law.[166] Though the latter Commission discussed numerous proposals, it made only few suggestions which have been modified and finally adopted by the legislator in the procedure according to Art. 79. The recent far-reaching reform of federalism proves that the previous reforms were insufficient. Moreover it confirms critics who bemoaned the lack of courage and vision of constitutional reform.[167] The moderate step-by-step way of constitutional reform[168] may be too timid. So the conservative attitude towards the Basic Law is open to different interpretations: It may express a sense of harmony and loyalty to the constitution or, on the contrary, a state of self-congratulation, paralysis and petrification. Presumably there is some truth in both views.

4.4 Constitutional reform by informal evolution

Quite similar to the American experience, the Delphic character of the most important provisions of the Basic Law made it possible to reform the constitution primarily through case law rather than by formal amendments and explicit constitutional revision.[169] In addition, the notion of an objective (value) order provided the judges with a convenient tool to reinterpret the fundamental rights in a more flexible way.[170] So "evolutionary change of the constitution" ("informeller

---

[161] Dolzer, p. 386.

[162] Stern, p. 31 et seq. Also compare Starck II, p. 15: "It has been repeatedly affirmed that the Basic Law has proven to be an extraordinarily sound foundation for the state order and an excellent political framework."

[163] Kommers, p. 65.

[164] Kommers, p. 67.

[165] Stern, p. 27.

[166] Kloepfer, op. cit.

[167] Kloepfer, p. 148 et seq.

[168] Klein, p. 35.

[169] Durham, p. 38.

[170] Kommers, p. 67. Sceptical Karpen II, p. 99 et seq.

Verfassungswandel")[171] resp. qualified reinterpretation of the constitution by the judiciary may have similar effects to formal constitutional reform by parliamentary bodies. Because of the evident fact that informal, tacit evolution is not subjected to any formal, in particular procedural restrictions it is both appealing and frightening. Contrary to constitutional reform, neither a broad consent nor textual transparency are required. Formal and informal reform also differ seen from the point of separation of powers. Whereas formal constitutional reform remains with the Parliament, informal evolutionary reform is in the hands of the Constitutional Court commanding of the most important vehicle of constitutional change.[172] From the point of view that constitutional reform must be made more difficult than other acts and decisions, precautionary measures are requested in order to curb circumventions of the procedural rules governing constitutional reform. Therefore informal evolution is only acceptable, when specific criteria are met which must be defined meticulously. So a single adjudication is not enough to state evolutionary reform. Only precedents, i. e. constant judicial decisions containing the new rule or principle, may be acknowledged as evolutionary reform of the constitution. Furthermore, formal constitutional reform and evolutionary informal reform, as a rule, apply to different areas of law. Precise provisions, which prevail in the instrument-of-government part of the Constitution and which are expected to demarcate powers (competences) in the clearest possible way, are above all subject to formal constitutional amendments, whereas vague substantive principles of the rights catalogue allow a more flexible approach to constitutional reform, as provided by informal evolution by the judiciary.

The risks of uncontrolled constitutional evolution showed up in the recent decision of the German Constitutional Court on the constitutionality of the last national elections. Contrary to other countries, the German constitution restricts the dissolution of Parliament to exceptional situations. None of these could be ascertained when the former Chancellor *Schr der* asked for premature elections for reasons of political strategy. The Constitutional Court shut its eyes to the political farce and accepted a dissolution-oriented vote of confidence, making use of arguments that are either bizarre or not in line with the representative type of democracy established by the Basic Law.[173] In this case it would be inadmissible to read this highly debatable judgment as a contribution to constitutional evolution towards a more plebiscitarian type of democracy. The constitution is just different from what the Court said it is.

[171] Schuppert, p. 49 et seq.

[172] Schuppert, p. 52.

[173] Cf. Apel/K hler/Wihl, op. cit.

Finally evolutionary reform itself may be subject to evolution. Unlike the United States the German constitutional adjudication, however, has no distinct turning points such as Lochner and the 'revolution' of 1937,[174] although attitudes, preconceptions and methods may vary. Once adjudication of the Constitutional Court gave rise to the idea that substantial judicial review might give way to reinforced scrutiny of due process and procedural rationality.[175] Varied judgments, however, do not allow such a conclusion.

4.5 Constitutional reform by trans-national higher law-making authority

Last but not least, a sort of constitutional reform results from the impact of European lawmaking on the legal system of Member States, which even affects the national constitution.[176] It is impossible to deal with this difficult problem at length without going beyond the scope of this report. Therefore I confine my remarks to two theses. First, the adjudication of the German Constitutional Court basically accepts or, at least, should accept the idea that the meaning and the impact of the Basic Law are modified by European law. Secondly, the traditional notion of German constitutional theory of "Verfassungsdurchbrechung"[177], which means, roughly speaking, 'departure without violation', (neither derogation nor override), might help to understand this process beyond judicial mainstream comprehension.

5. Lessons from German constitutional reform

Are there any lessons legal scholars, politicians and citizens in Germany and abroad may take from the ways and the contents of constitutional evolution in Germany? In my conclusion I will make some general suggestions.

5.1. Preliminary remarks

Explaining the German constitution abroad does not mean to entice other people do follow the German way. It is just an invitation to legal comparison. This should be clear from the outset because international dialogue sometimes suffers from an arrogant attitude bordering on legal and humanitarian imperialism. Democracy, rule of law, solidarity, and respect of human rights are

[174] Cf. Messerschmidt, p. 611 et seq.

[175] Cf. Messerschmidt, p. 817 et seq.

[176] Cf. Hailbronner, p. 81 et seq. & Geiger, op. cit

[177] Cf. Ansch tz, p. 401 et seq.

common values of mankind, but they do not require the German or American type of democracy or rule of law. Even comparing the legal cultures of Western cultures shows there are different ways to attain good governance. It is certainly helpful to stress the assets of the German constitution, but we should not deny its shortcomings.

5.2. Some suggestions

- No uniform direction of constitutional evolution exists. It is mere ideology to assume that constitutions get ever closer to a pre-existent ideal constitution. Progress and set-backs happen and sometimes it is difficult to say which is which. So by comparison of Weimar constitution and Basic Law we cannot say in general which is the better one. Obviously the Basic Law is much more successful than short-living Weimar Constitution which, however, does not only go back to its inherent qualities, but owes a lot to benevolent political and international conditions. Looking at the principles held in both constitutions it must be stated that Weimar Constitution was more advanced in matters of democracy whereas the Basic Law taking constitutionalism almost to extremes.

- The main principles of constitutionalism are closely linked. However, trade-offs between rivalling principles such as democracy vs. supremacy of the constitution, legal minimal state vs. social activist state, unity vs. pluralism, and international, esp. European integration vs. national sovereignty, pacifism vs. interventionism – just to name the most important matters – are indispensable. Although politicians and Constitutional Court managed so far to keep all elements of German constitutionalism in balance, its further evolution is open. The need to reform Germany's welfare system, immigration, internationalisation of law as part of the globalisation of economy, and growing alienation of the populace from mainstream political parties are items which put the "Berlin Republic" to a serious test. The future will show whether Germany's rigid constitution allows sweeping reforms or whether it will hamper and slow-down adaptation to political and social imperatives in an ever quicker changing world.

- A constitution should be rigid but flexible enough to allow both "constitutional evolution" by the judiciary and amendments by parliament or popular vote.

- The success of German constitutionalism owes a lot to the Constitutional Court who mostly took wise decisions and did not give rise to a major constitutional crisis. However, there is no legal

remedy to prevent the "guardian of the Constitution" to abrogate from the path of constitutional and political moderation ("Quis custodiet custodes ipsos?").[178] On several occasions the Constitutional Court could have created a severe crisis. Imagine the consequence if the Court takes sides against European integration. On several occasions the Court found it difficult to approve of the supremacy of European law but gave in with a *caveat*. Post-war Germany only once came near to a constitutional crisis when the Constitutional Court in the 1970s abolished several progressive Laws by the then social-liberal majority which proposed to modernise Germany. When everybody expected that the Court would also interfere with German foreign policy of reconciliation with our neighbours to the East, it took a turn back to judicial restraint. The German example shows that it is possible, though difficult and not for granted to have a constitutional court with wide powers of judicial review which is independent and "irresponsible", but does not act in an irresponsible and unreasonable way.

- Once a Constitutional Court is established it can reduce the need for constitutional reform. Constitutional evolution through interpretation by the Court may substitute to some degree and on many occasions formal constitutional reform. However, the Constitutional Court should only be allowed to do the fine-tuning. A "government of the judiciary" is a serious threat to democracy.

- Democracy can only rely on constitutional control if the jurisdiction and the people share common values. The Republic of Weimar is the sad example of a state which could not even rely on its officials and judges. Hard to tell, whether a Constitutional Court, composed of true Republicans, could have prevented the decline of the Weimar Republic. It is evident, however, that a Constitutional Court must be composed of men and women who are both independent and loyal. The German Basic Law managed to reconcile these requests. Although judges are quite close to political parties, professional training, constitutional tradition and peer group review on the one hand and mutual control by political partisans in the Court on the other hand contribute to decent work. Once there is a predominance of one party or influence by pressure groups gets stronger, the Constitutional Court could degenerate and miss his task as guardian as the constitution and promoter of constitutional reform. The Constitutional Court should take advice from the American public law scholar *John Hart Ely* who suggested that one of the main tasks of judicial review is "clearing the channels of political change".[179] The "representation-

[178] Cf. Karpen I, p. 86. On the problem of guarding the guardians" Tribe, p. 12 et seq.

[179] Ely, p. 77 et seq.

reinforcing approach" to judicial review seems to be more promising than the attempt of the Constitutional Court to improve on legislation according to own unaccountable ideas.

- One more lesson has been suggested by a German public law teacher who analysed the creation of the Basic Law and foreign constraints on Constitution-making in particular: "Legitimation deficits within the constitution-making process may hamper the legitimacy of a constitution at the outset, but if the constitution is accepted by the people as the legally binding framework of their society and political system, these deficits will be overcome, and at the end of the day, the constitution will enjoy full and undoubted legitimacy. By contrast, if the substance of a constitution lacks crucial elements like a sufficient guarantee of human rights and democratic decision-making procedures, these failures cannot be cured."[180] I cannot fully subscribe to this. Only the unique situation of the coming into existence of the Basic Law justifies the grave deviations from generally accepted standards of the *pouvoir constituant*.[181] It is self-contradictory to ask for democratic decision-making procedures, but not to apply this yardstick to the constitution-making which precedes the establishment of democracy.

- As to amendments, German politician and experts hold the following views, to name only a few:
- New constitutional provisions are superfluous if their contents will not essentially differ from the present state of law.
- Constitutional provisions must not comprise promises the State cannot keep.
- One observation might be added: Left-wing parties are more inclined to amend the constitution than moderate and right-wing parties. Whether this is a coincidence or a rule remains to be seen.

[180] Lorz, p. 165.

[181] Cf. Schuppert, p. 37.e

References

I confined references, whenever possible, to books and essays available in English. Readers should be aware that most sources are summaries of the German literature. Decisions of the Federal Constitutional are not indicated in this text but in the cited reference books.

Ansch tz, G.: Die Verfassung des Deutschen Reichs vom 11. August 1919, 14th ed, 1933, Reprint Aalen 1987 (Scientia)

Apel, S./K rber, C./ Wihl, T.: The Decision of the German Federal Constitutional Court of 25th August 2005 – Dissolution of the National Parliament, in: German Law Journal 2005 No. 9 (available via internet)

B ckenf rde, M.: Constitutional referendum in Germany – Country report, in: Riedel, op. cit., p. 107 – 125

Bryce, J.: Constitutions (1905), Reprint Aalen 1980 (Scientia)

Dicey, A. V.: An Introduction to the Study of the Law of the Constitution, 10th ed. 1959, Reprint 1987 London (Macmillan Education)

Dolzer, R.: The Path to German Unity: The Constitutional, Legal and International Framework, in: Kirchhof/Kommers, op. cit., p. 365 - 387

Durham, W. C.: General Assessment of the Basic Law – An American View, in: Kirchhof/Kommers, op. cit., p. 36 – 64

Ely, J. H.: Democracy and Distrust, Cambridge/Mass. 1980 (Harvard U. P.)

Geiger, R.: EU Constitutionality and the German Basic Law, Jean Monnet/Robert Schuman Paper Series Vol. 5 No. 1A January 2005 (available via internet)

G tz, V.: Legislative and Executive Power under the Constitutional Requirements entailed in the Principle of the Rule of Law, in: Starck II, op. cit., p. 141 - 166

Hailbronner, K./Kau, M.: Constitutional Law, in: Reiman/Zekoll, op. cit., 53 - 85

Ipsen, J.: Constitutional Review of Laws, in: Starck I, op. cit., p. 107 - 137

Karpen, U.: Application of the Basic Law, in: Starck I, op. cit., p. 55 - 88 [Karpen I]

Karpen, U.: The Constitution in the Face of Economic and Social Progress, in: Starck II, op. cit., p. 87 - 110 [Karpen II]

Kelsen, H.: Reine Rechtslehre, 2nd ed. 1960, Reprint Vienna 1983 (Deuticke) [Kelsen I]

Kelsen, H.: Was ist ein Rechtsakt? (1951/52), Reprinted in: Klecatsky et al. (ed.), Die Wiener rechtstheoretische Schule, vol. 2, Vienna 1968 (Europa Verlag), p.1395 - 1416 [Kelsen II]

Kelsen, H.: Der Begriff der Rechtsordnung, (1958), Reprinted in: Klecatsky et al. (ed.), Die Wiener rechtstheoretische Schule, vol. 2, Vienna 1968 (Europa Verlag), p.1381 - 1393 [Kelsen III]

Kirchhof, P./Kommers, D. (ed.): Germany and its Basic Law, Baden-Baden 1993 (Nomos)

Klein, E.: The Concept of the Basic Law, in: Starck I, op. cit., p. 15 - 35

Kloepfer, M.: Verfassungs nderung statt Verfassungsrevision, Berlin 1995 (Berlin Verlag A. Spitz)

Kommers, D.: Comments on Part I, in: Kirchhof/Kommers, op. cit., p. 65 - 67

Kube, H.: Unwritten Constitutional Norms and Principles in Germany, in: Riedel, op. cit., p. 199 - 215

Limbach, J.: How a constitution can safeguard democracy: The German Experience (internet resource)

Lorz, R. A.: International Constraints on Constitution-Making, in: Riedel, op. cit., p. 143 - 165

Magiera, S.: The Interpretation of the Basic Law, in: Starck I , op. cit., p. 89 - 105

Merkl, A.: Das Problem der Rechtskontinuit t und die Forderung des einheitlichen rechtlichen Weltbildes (1926), Reprinted in: Klecatsky et al. (ed.), Die Wiener rechtstheoretische Schule, vol. 2, Vienna 1968 (Europa Verlag), p. 1267 - 1300

Messerschmidt, K.: Gesetzgebungsermessen, Berlin 2000 (Berlin Verlag A. Spitz)

Reimann, M./Zekoll, J. (ed.): Introduction to German Law, M nchen 2005 (C. H. Beck)

Ress, G.: The Constitution and the Requirements of Democracy, in: Starck II, op. cit., p. 111 - 140

Riedel, E. (ed.): Constitutionalism - Old Concepts, New Worlds, Berlin 2005 (BWV)

Robbers, G.: An Introduction to German Law, 3rd ed., Baden-Baden 2003 (Nomos)

Schr der, M.: Strengthening of Constitutional Law: Efforts and Problems, in: Starck II, op. cit., p. 25 - 41

Schuppert, G. F.: The Constituent Power, in: Starck I, op. cit., p. 37 - 54

Spevack, E.: Allied Control and German Freedom, M nster 2001 (LIT-Verlag)

Starck, C. (ed.): Main Principles of the German Basic Law, Baden-Baden 1983 (Nomos) [Starck I]

Starck, C. (ed.): New Challenges to the German Basic Law, Baden-Baden 1991 (Nomos) [Starck II]

Stern, K.: General Assessment of the Basic Law - A German View, in: Kirchhof/Kommers, op. cit., p. 17 - 36

Tribe, L. H.: American Constitutional Law, 2nd ed., Mineola N. Y. 1988 (Foundation Press)

All Constitutions referred to in this report and all amendments to the Basic Law from 1951 to 2000 may be looked up in German language in http://www.documentarchiv.de/da/fs-verfassungen.html. For Weimar Constitution in English translation see http://www.zum.de/psm/weimar/weimar_vve.php; for Basic Law in English see http://www.bundesregierung.de/Content/EN/StatischeSeiten/breg/basic-law-for-the-federal-republic-of-germany,layoutVariant=Druckansicht.html. Unfortunately no up-to-date translation seems to be available. The above mentioned text corresponds to the state of 2002. Recent decisions and some leading cases of the Federal Constitutional Court of Germany are available in English language as well, see http://www.bverfg.de/en/index.html.