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The Weimar Constitution

Germany's first Democratic Constitution, its Collapse, and the Lessons for Today

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On 14 August 1919, Germany's first democratic constitution came into force. The Constitution of the German Reich, soon known as Weimar Constitution marked the end of the German Empire and introduced a legal framework that was ambitious for its time - maybe too ambitious: Only 14 years later, the Weimar Republic collapsed into Nazi Germany, an authoritarian state with its dictator as untouchable center of the law. The question of whether or not Hitler's rise to power had been predetermined by the flaws and weaknesses inherent to the Weimar Constitution was heavily discussed throughout the second half of the 20th century. The legacy of the 1919 constitution, however, reaches far beyond its failure: Germany's post-World War II constitution, the Basic Law of 1949 was largely drafted in reflection of the Weimar Republic but also incorporated certain of its constitutional provisions, acknowledging their progressive design. Today, the Weimar experience provides the potential of critical reflection for constitution-building in young democracies as well as for established democratic states, whose foundations are more and more subject to illiberal and populist attacks.

I. The Weimar National Assembly

In November 1918 World War I had come to an end and Germany's monarch Wilhelm II was forced to abdicate as German Emperor and King of Prussia.¹ The abdication was pronounced by Chancellor Max von Baden, who appointed Friedrich Ebert as his successor in office.² On the same day, 9 November 1918, the Social Democrat Philipp Scheidemann famously proclaimed the *German Republic* in a spontaneous speech from a window of the Reichstag.

"The old and rotten, the monarchy has collapsed.
Long live the new.
Long live the German Republic!"³

With his announcement, Scheidemann anticipated the plans of Karl Liebknecht, leader of the Marxist Spartacus League, who declared the *Free Socialist Republic of Germany* later that day.⁴ Led by Friedrich Ebert, the *Council of the People's Deputies*, the young Republic's provisional government, organized federal elections in January 1919, which established a national assembly and marked the first time women were able to vote in Germany, based on a law passed two months prior.⁵ Avoiding the political tensions of the capital, Weimar, a town in the middle of Germany, famous for its cultural heritage,⁶ was chosen as the seat of the constitutional assembly and de-facto parliament, soon to be known as *Weimar National Assembly*.

Friedrich Ebert, who was elected provisional President of Germany on 11 February 1919, asked Philipp Scheidemann to form and head a government. While the Entente Powers were already deliberating the terms of peace in Paris,⁷ the newly formed National Assembly in Weimar started to discuss options of constitutional design. The basis for these discussions was the draft constitution of Hugo Preuß, a law professor from Berlin.⁸

Soon, the lack of a unifying idea became apparent.⁹ The Weimar National Assembly was held while some of the German states had already given themselves new constitutions or were about to deliberate them.¹⁰ The diversity and simultaneousness of the constitutional developments in post-World War I

¹His abdication was pronounced twice: The first time, on 9 November 1918, by Chancellor Max von Baden, who appointed his successor on the same day he pronounced the abdication of the German Emperor; the second time by Wilhelm II himself on 28 November 1918. Oliver F. R. Haardt & Christopher M. Clark, "Die Weimarer Reichsverfassung als Moment in der Geschichte," in Dreier/Waldhoff, eds., *Das Wagnis der Demokratie: Eine Anatomie, der Weimarer Reichsverfassung* (München: C.H. Beck, 2018) 10.

²And thereby violated the constitution of 1871, which required the German Emperor to appoint a Chancellor (Article 15 RV).

³Philipp Scheidemann, "Memoiren eines Sozialdemokraten," vol. 2 (Dresden: 1928) 310.

⁴Haardt/Clark, "Die Weimarer Reichsverfassung als Moment in der Geschichte," 11.

⁵The right of women to vote in elections was established by the "Reichswahlgesetz" of 30.11.1918 for the first time in Germany.

⁶See Friedrich Ebert's reference to the city of Goethe and Schiller: "Now, the spirit of Weimar, the spirit of the great philosophers and poets, must be brought back to life." Speech of 6 February 1919, in Dreier/Waldhoff, eds., *Das Wagnis der Demokratie: Eine Anatomie, der Weimarer Reichsverfassung* (München: C.H. Beck, 2018) 368.

⁷Later resulting in the Treaty of Versailles of 28 June 1919, which marked the official end of World War I. See Haardt/Clark, "Die Weimarer Reichsverfassung als Moment in der Geschichte," 11.

⁸Christoph Gusy, *100 Jahre Weimarer Verfassung: Eine gute Verfassung in schlechter Zeit* (Tübingen: Mohr Siebeck 2018) 41.

⁹Ernst-Wolfgang Böckenförde, "Der Zusammenbruch der Monarchie und die Entstehung der Weimarer Republik," in Jeserich et al., eds., *Deutsche Verwaltungsgeschichte*, vol. 4 (Stuttgart: 1983) 18.

¹⁰Gusy, *100 Jahre Weimarer Verfassung*, 24.

Germany have led to the description of a “variety of constitutional laboratories,”¹¹ the ideas of which interacted with each other. Deliberating the constitution, however, required the ability to compromise.¹² Under the pressure of political instability nourished by ideological divisions, social and economic fatigue, compromise led to the adoption of Germany’s first democratic constitution.

II. The Constitution

The *Weimar Constitution* (WRV)¹³ was born in opposition to two models: The German Empire’s constitutional monarchy and post-revolutionary Russia’s concept of a soviet republic.¹⁴ Although there was strong political support for each of the two concepts, with national-conservatives (e.g., DNVP) on the one and socialists (e.g., USPD) on the other side, a large centrist majority (e.g., SPD, CVP, DDP) chose to abolish the monarchy and incorporate some of its key features at the same time.

Similar to the *Constitution of the German Empire of 1871* (RV), the content of the Weimar Constitution can be structured into three parts: the competences of the state, its internal organization and its relation to the people. One of the key features of the new constitution was the strong position of the *President* (“Reichspräsident”) whose most crucial competencies included the right to appoint and remove the Chancellor (Article 53 WRV), the right to dissolve the *Parliament* (“Reichstag”) (Article 25 WRV) and the power to take emergency measures as well as promulgate emergency decrees (Article 48 WRV).

The resemblance to the dualism of monarch and parliament during the German Empire is striking.¹⁵ Moreover, Article 41 WRV determined the President to be directly elected by the people. In consequence, the constitution established a system of “double representation,”¹⁶ which granted the President and the Parliament the same democratic legitimation. The idea was to represent the unity of the German people through the former and the diversity of the people’s opinions and interests through the latter.¹⁷ Article 22 WRV therefore based the deputies’ election on the principles of proportional representation – a clear departure from the majoritarian system of the German Empire. It was specified by the electoral law of 1920, which applied the principles as directly as possible by not stipulating an electoral threshold, which opened the way for parliamentary fragmentation.

Besides the Parliament, the Weimar Constitution, influenced by the federalist system of the German Empire, reintroduced a second legislative body consisting of members appointed by the German states: the “*Reichsrat*.” While its predecessor, established by the constitution of 1871 was designed to play a strong legislative, administrative and even judicial¹⁸ role, the Reichsrat’s power was limited to a veto that could be overruled by a two-thirds majority of the Parliament (Article 74 WRV).

Other than through elections, people were able to influence the legislative process directly by referendum. The resulting triad of participatory rights was based on the intent to diversify channels of the people’s will in order to enhance its display.¹⁹ Despite the intent, political reality did not meet the

¹¹*Id.*

¹²Haardt/Clark, “Die Weimarer Reichsverfassung als Moment in der Geschichte,” 17.

¹³Short for “Weimarer Reichsverfassung,” official name: “Verfassung des Deutschen Reichs.”

¹⁴Gusy, *100 Jahre Weimarer Verfassung*, 11.

¹⁵Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, vol.3: *Staats- und Verwaltungsrechtswissenschaft in Republik und Diktatur 1914-1945* (München: C.H. Beck 1999) 76-80.

¹⁶Peter Graf Kielmansegg, “Der Reichspräsident – ein republikanischer Monarch,” in Dreier/Waldhoff, eds., *Das Wagnis der Demokratie: Eine Anatomie, der Weimarer Reichsverfassung* (München: C.H. Beck, 2018) 222.

¹⁷*Id.*

¹⁸See Article 76 RV: “Disputes between two federal states, unless they are matters of private law [...], shall be settled by the Federal Council [...].”

¹⁹Gusy, *100 Jahre Weimarer Verfassung*, 133.

potential of this direct democratic element. Article 73 WRV had set the quorums too high to allow a fruitful application. From the few referendums that reached the necessary quorum, not one was successful.²⁰ Possibilities of top-down initiatives by the President were never explored, due to the clear advantages of the emergency powers granted by Article 48 WRV.²¹

Chapter II of the Weimar Constitution offered the most distinct innovation in contrast to the German Empire. 57 Articles defined the “Fundamental Rights and Duties of Germans” by combining democratic guarantees with such of the rule of law and the welfare state.²² It, therefore, constituted the first comprehensive charter of basic rights for federal Germany. Certainly, their protection deviated far from today's established European or German standards.²³ Inspired by the failed *Frankfurt Constitution* of 1848, the inclusion of basic rights caused passionate debates in the *Weimar National Assembly*.²⁴ While some skeptics worried about the interference of an anti-republican judiciary into the decisions of the people's representatives, others saw chapter II as the path to a vibrant democracy, breaking up the strict separation of state and society.²⁵

Against popular belief in the early scholarship on the Weimar Republic, the basic rights of its constitution did not deteriorate into mere directives.²⁶ In fact, the collection of 57 Articles on fundamental rights and duties have to be classified into different groups of normative substance and actual application.²⁷ There were some, such as Article 105 sentence 2 WRV (Right to a lawful judge), Article 115 WRV (Inviolability of the home), Article 118 WRV (Freedom of expression), Article 123 WRV (Freedom of assembly), Article 124 WRV (Freedom of association) or Article 135 WRV et seq. (Freedom of religion), which were generally perceived as directly binding legal provisions and applied by the judiciary.²⁸ Social and economic rights incorporated by the Weimar Constitution, on the other hand, were, unlike classical freedom rights, not designed for a direct application as they presupposed social change by political action.²⁹ Those, such as the provisions on education (Article 142 WRV et seq.) or the right to work (Article 163 sentence 2 WRV) constituted state aims and legislative mandates instead of rights that could be directly invoked.³⁰

This openness of the Weimar Constitution, which was not only expressed by the agenda-setting in Chapter II, but also by the usage of vague terminology, such as the conditions of the presidential emergency powers in Article 48 paragraph 2 WRV (“If public safety and order be seriously disturbed or threatened [...]”), were the root of the Weimar Republic's dynamic constitutional development.³¹ The Weimar Constitution framed the political order and opened it up for legislative appropriation and judicial interpretation, thus entrusted its own development to the source of its legitimacy: the sovereignty of the people (Art. 1 paragraph 1 WRV).³²

²⁰Gertrude Lübke-Wolff, “Das Demokratiekonzept der Weimarer Reichsverfassung,” in Dreier/Waldhoff, eds., *Das Wagnis der Demokratie: Eine Anatomie, der Weimarer Reichsverfassung* (München: C.H. Beck, 2018) 132.

²¹Hanns-Jürgen Wiegand: *Direktdemokratische Elemente in der deutschen Verfassungsgeschichte*, (Berlin: BMV, 2006) 70, 71.

²²Gusy, *100 Jahre Weimarer Verfassung*, 237.

²³Horst Dreier, “Grundrechtsrepublik Weimar,” in Dreier/Waldhoff, eds., *Das Wagnis der Demokratie: Eine Anatomie, der Weimarer Reichsverfassung* (München: C.H. Beck, 2018) 192.

²⁴Gusy, *100 Jahre Weimarer Verfassung*, 238.

²⁵*Id.* at 238. See also: Dreier, “Grundrechtsrepublik Weimar,” 193.

²⁶Dreier, “Grundrechtsrepublik Weimar,” 175.

²⁷*Id.* at 176.

²⁸*Id.* at 178, 179.

²⁹Ralf Poscher, “Die Grundrechte der Weimarer Reichsverfassung,” in Artinger, ed., *Die Grundrechte im Spiegel des Plakats 1919 bis 1999* (Berlin: Deutsches Historisches Museum, 2000) 27.

³⁰Gusy, *100 Jahre Weimarer Verfassung*, 262.

³¹Gusy, *100 Jahre Weimarer Verfassung*, 9.

³²*Id.*

III. Crisis and Collapse

On the day of the constitution's adoption by the National Assembly, Eduard David, Minister of the Interior, called the newborn system the "most democratic democracy of the world."³³ What turned out to be more than a slight misjudgment, yet expressed the hopes that were attached to the new Weimar Republic, an era that was meant to be built on, what Friedrich Ebert called "the change from Imperialism to Idealism, from world power to spiritual greatness."³⁴

In retrospective, however, the Weimar Constitution was often accused of having enabled Hitler's rise to power and the establishment of a totalitarian state in 1933.³⁵ Whether this conclusion is valid depends on a thorough assessment of its historic premises.

Besides the constitution, historians have identified a complex set of social, economic, and political factors, which contributed to the consequential shift in German history. The Treaty of Versailles presented a high financial burden and its apportionment of blame for World War I weighed heavily on the German sentiment. The young republic suffered under economic crisis and social conflict, it was shaped by old elites in the civil service and the anti-democratic resentment of many intellectuals. It was also affected by individual failure, exemplified by Hindenburg's appointment of Hitler as Chancellor on 30 January 1933.³⁶ What was the Weimar Constitution's part in that development?

One central flaw was the accumulation of powers granted to the President of the Weimar Republic, whose function was later referred to as that of a "Substitute Emperor."³⁷ Nevertheless, it would be too easy to identify these extensive powers as the primary cause of the Republic's demise. The intent of the Weimar National Assembly was to design a balanced system, with elaborate sets of competences in mutual interconnectedness.³⁸ The Parliament was able to dismiss the Government by a vote of no confidence (Article 54 WRV) and, with a two-thirds majority, even to initiate the President's removal by popular vote (Article 43 paragraph 2 WRV).

Despite these foundational arrangements, the constitutional reality did not live up to its democratic potential. The political parties of the Weimar Republic were shaped by their experience in the German Empire.³⁹ Neither had they been responsible for appointing a government in the years from 1871 to 1919 nor were they able to do so in the newborn Republic. The Parliament could dismiss the government by a vote of no confidence (Article 54 WRV) but relied on the President to appoint a new one (Article 53 WRV). Additionally, the Parliament was highly fragmented by the electoral principle of proportional representation without an electoral threshold, which allowed for 10 to 15 parties to be elected to the same parliament.⁴⁰ As a result, the system favored the establishment of weak minority or fragile majority governments.⁴¹

³³Eduard David, Speech 31st July 1919, 71. Session of the Weimar National Assembly, https://www.reichstagsprotokolle.de/Blatt2_wv_bsb00000013_00070.html.

³⁴Ebert, Speech of 6 February 1919, in Dreier/Waldhoff, eds., *Das Wagnis der Demokratie: Eine Anatomie, der Weimarer Reichsverfassung* (München: C.H. Beck, 2018) 368.

³⁵Gusy, *100 Jahre Weimarer Verfassung*, 34.

³⁶Dieter Grimm, "Weimars Ende und Untergang," in Dreier/Waldhoff, eds., *Das Wagnis der Demokratie: Eine Anatomie, der Weimarer Reichsverfassung* (München: C.H. Beck, 2018) 276.

³⁷Gusy, *100 Jahre Weimarer Verfassung*, 202.

³⁸Graf Kielmansegg, "Der Reichspräsident – ein republikanischer Monarch," 222.

³⁹*Id.* at 230.

⁴⁰Grimm, "Weimars Ende und Untergang," 280.

⁴¹Graf Kielmansegg, "Der Reichspräsident – ein republikanischer Monarch," 229.

Retrospectively, the new political system would have required a new self-conception of the parties.⁴² Their incapacity to forge coalitions and overcome differences through compromise as well as their willingness to delegate their competences to the Government⁴³ reinforced the role of the President. Furthermore, the right of emergency measures, granted to the President by Article 48 paragraph 2 WRV, was used extensively to govern.⁴⁴

While Friedrich Ebert, the Republic's first President had promulgated 136 emergency decrees during the crisis-ridden period of 1919 – 1925, he was aware of the problematic implications and therefore tried to develop the parliament's ability to meet its democratic responsibilities.⁴⁵ His successor Paul von Hindenburg, however, stood for a strong presidential republic and opposed a strengthening of the Parliament.⁴⁶ From 1930 to 1932, he issued 109 emergency decrees, which widened the scope of Article 48 paragraph 2 WRV almost boundlessly and once and for all affirmed its status as "back-up constitution."⁴⁷ With him, the general rule of Weimar's institutional framework had shifted to the *permanent state of exception*.⁴⁸

This development would not have been possible without the critical acclaim in the scientific and intellectual discourse. An analysis of the dynamic constitutional development and demise of the Weimar Republic, therefore, has to consider the supportive role played by legal scholars and public intellectuals. Due to the openness of the Weimar Constitution, it required not only legislative appropriation but more importantly: *interpretation*, and not unlike any constitution: *public support*.⁴⁹ In contrast to that, the Weimar Republic was accompanied by an evolution of antidemocratic sentiment, which described the Parliament as a weak accumulation of individual interests.⁵⁰ This critic of parliamentarianism developed more and more into a political strategy,⁵¹ the most prominent example of which was Carl Schmitt, who not only justified a strong presidential role but paved the way for the Nazi Dictatorship.⁵²

Did the Weimar Constitution anticipate its own demise? Did it set the course for Hitler's rise to power and the totalitarian state of 1933? Undeniably, the Weimar constitution had its inherent weaknesses. These weaknesses, however, should not be confused with necessities, as Dieter Grimm has rightly pointed out; in fact, "constitutions frame conditions of political action, but do not determine it entirely."⁵³ The decisions that led to 1933 were not without alternatives,⁵⁴ yet most of them were taken in the scope of Weimar's constitutional framework.

⁴²*Id.* at 230.

⁴³The (in total eight) enabling acts from 1919 -1933, broke with the division of powers set up by the Weimar Constitution, but were supported by a majority of parliamentarians and legal scholars. Gusy, *100 Jahre Weimarer Verfassung*, 213.

⁴⁴Gusy, *100 Jahre Weimarer Verfassung*, 279.

⁴⁵*Id.* at 179. See also Graf Kielmansegg, "Der Reichspräsident – ein republikanischer Monarch," 233.

⁴⁶Gusy, *100 Jahre Weimarer Verfassung*, 179.

⁴⁷*Id.* at 207

⁴⁸*Id.* at 208

⁴⁹*Id.* at 9. See also Grimm, "Weimars Ende und Untergang," 278.

⁵⁰See Kurt Sontheimer, "Antidemokratisches Denken in der Weimarer Republik," in *Vierteljahreshefte für Zeitgeschichte*, Vol. 5, No.1 (1957) 52, 54.

⁵¹Gusy, *100 Jahre Weimarer Verfassung*, 168.

⁵²Grimm, "Weimars Ende und Untergang," 285.

⁵³Grimm, "Weimars Ende und Untergang," 280.

⁵⁴*Id.*

Considering the historical legacy of the German Empire, its lost war, the social and economic conditions, the political action or the lack thereof and the spreading anti-democratic sentiment, the Weimar Constitution, its drafting and later application, have to be analyzed within this complexity of interactive determination. In the words of Peter Gay: “The Republic was born in defeat, lived in turmoil, and died in disaster.”⁵⁵ Although the Weimar Constitution contained the opportunity for democratic development, it did not succeed in securing it.

IV. Weimar’s Legacy

One hundred years after the Weimar Constitution came into force and 86 years after the Nazi take-over, the world is facing a revival of illiberal nationalism.⁵⁶ Both, young as well as older, more established democracies are struggling with the rise of parties that promote isolationist agendas, social exclusion, and cultural homogeneity while claiming to be the only or the real voice representing the people.⁵⁷ This populist claim to sole representation is threatening the very core of democratic participation and decision-making in the 21st century. It is also undermining the rule of law, by attacking the separation of powers and especially the independence and legitimacy of judicial institutions.⁵⁸

“Constitutional liberalism has led to democracy, but democracy does not seem to bring constitutional liberalism.”⁵⁹

Fareed Zakaria’s analysis is most drastically illustrated by the Weimar Republic and its collapse into Nazi Germany and has to be taken into consideration in order to describe the legacy of the Weimar Constitution. What was its actual effect on constitution building and constitutional practice in post-World War II Germany and other states? What are the normative conclusions, the lessons learned, that can be drawn from the Weimar experience?

The deliberations of the *Parliamentary Council*, West Germany’s constitutional assembly after the end of World War II, were deeply influenced by the reflections on the Weimar Republic and Nazi Germany.⁶⁰ Although for a long time, the resulting Basic Law (GG)⁶¹ of 1949 was perceived as the antithesis to the Weimar Constitution, it is much more than that.⁶² For the creation of Germany’s Basic Law the Weimar Constitution was, in the words of Horst Dreier “[...] an orientation, in some ways a role model, in some a warning, but always an incentive for improvement.”⁶³

The most important difference is certainly the shift from a semi-presidential system to a parliamentary system, by deconstructing the presidential role and reassigning its competences to the Parliament and the chancellor-led Government.⁶⁴ As the President is no longer legitimized by direct elections, the

⁵⁵Peter Gay, *Weimar Culture: The Outsider as Insider* (New York: W.W. Norton & Company Ltd., 1968) 2.

⁵⁶John B. Judis, *The Nationalist Revival: Trade, Immigration, and the Revolt Against Globalization* (New York: Columbia Global Reports, 2018).

⁵⁷Tom Ginsburg & Aziz Z. Huq, *How to Save a Constitutional Democracy*, (Chicago and London: The University of Chicago Press, 2018) 80.

⁵⁸See generally Gábor Halmai, *Populism, authoritarianism and constitutionalism*, in *German Law Journal*, Vol. 20, Issue 3 (2019).

⁵⁹Fareed Zakaria, *The rise of illiberal democracy*, in *Foreign Affairs*, Vol.76, No. 6 (Nov/Dec 1997) 28.

⁶⁰Dreier, *Die Weimarer Reichsverfassung. Vorbild oder Gegenbild des Grundgesetzes?* in *APuZ* (69. Jahrgang, 16–17/2019, 15. April 2019) 19.

⁶¹Short for “Grundgesetz.”

⁶²Christian Waldhoff, “Folgen – Lehren – Rezeptionen,” in Dreier/Waldhoff, eds., *Das Wagnis der Demokratie: Eine Anatomie, der Weimarer Reichsverfassung* (München: C.H. Beck, 2018) 300.

⁶³Dreier, *Die Weimarer Reichsverfassung. Vorbild oder Gegenbild des Grundgesetzes?* 26.

⁶⁴Waldhoff, “Folgen – Lehren – Rezeptionen,” 300, 301.

Parliament constitutes the central object and source of democratic legitimacy. Along with this structural divergence goes the positive recognition of political parties and the reinforcement of their function “in the formation of the political will of the people,” by Article 21 GG. Another effective contrast to the Weimar Constitution is the introduction of a *constructive vote of no confidence* by Article 67 GG that, for the sake of governmental stability, requires a majority of the Parliament to elect a successor in order to remove the current Chancellor. Furthermore, the composition of the Parliament is no longer a result of proportional representation but a combination of majoritarian and proportional elements. These provisions, however, cannot be found in the Constitution but in the *Federal Electoral Law*.

Another distinctive feature of the Basic Law is the set of articles that introduced the concept of “militant democracy.”⁶⁵ In contrast to the Weimar Constitution, the Basic Law incorporates provisions devoted to the protection against threats to the liberal, democratic constitutional order, such as Article 18 GG (Forfeiture of basic rights), Article 9 (2) GG (Prohibition of Associations) and Article 21 (2) GG (Prohibition of political parties). Based at the top of these provisions is Article 79 (3) GG, the so-called *eternity clause*,⁶⁶ which stipulates:

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

Despite the differences, some provisions of the Basic Law are similar or even congruent to their equivalents in the Weimar Constitution. First and foremost: the democratic foundation remained the same by relying on the notion of popular sovereignty.⁶⁷ The electoral principles of 1919, stipulating a *general, equal, direct* and *secret* election of deputies, which constitutionally embedded the women's right to vote for the first time in German history, were equally adopted by the Basic Law and only modified by the addition of “*free*.” Moreover, a second legislative body, now called the *Bundesrat*, was reintroduced in regard to the historically grown federal culture in Germany. Next to these, almost identical or at least similar provisions, Article 140 GG incorporated a part of the Weimar Constitution itself, namely Articles 136 – 139 and Article 141 WRV into the Basic Law. The adoption of the so-called ‘*Weimar compromise on state-church relations*,’ which stipulates the separation of religion and state but opens up possibilities of cooperation, such as the status of a *corporation under public law* (Article 140 GG in conjunction with 137 (5) WRV), was the result of the incapability of the *Parliamentary Council to agree on a new regulatory model*.⁶⁸

Next to the categorical differences and deliberate commonalities, parts of the Basic Law have to be seen as an evolutionary development of the Weimar Constitution. While the character of the Weimar articles on fundamental rights was nuanced and placed in chapter II, the catalog of fundamental rights of the Basic Law is demonstratively placed at the beginning of the constitutional text and equipped with legally binding force by Article 1 (3) GG.⁶⁹ At the top of both the catalog and the entire constitution, the Parliamentary Council chose to prefix the notion of human dignity:

“Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.” (Article 1 (1) GG)

⁶⁵Waldhoff, “Folgen – Lehren – Rezeptionen,” 304-305.

⁶⁶*Id.*

⁶⁷While popular sovereignty was the source of “the” state authority in the Weimar Republic (Article 1 sentence 2 WRV), it became the source of “all” state authority in the Federal Republic of Germany (Article 20 (2) GG).

⁶⁸Waldhoff, “Folgen – Lehren – Rezeptionen,” 307.

⁶⁹*Id.* at 305.

The creation of this “supreme constitutional value”⁷⁰ affirms the human individual as center and reason of the constitutional order and the direct dissociation from the guiding principle of Nazi education: “You are nothing, your people is everything.”⁷¹ Besides the categorical rejection of Nazi ideology, the Basic Law introduced an independent institution charged with constitutional review: The *Federal Constitutional Court* (“Bundesverfassungsgericht”). The question, which institution would be the most suitable ‘guardian of the constitution’ was intensively discussed during the period of the Weimar Republic.⁷² *While back then, no conclusion could be reached, the Parliamentary Council was “eager not to send an orphan out into the world alone, so they made the Constitutional Court its legal guardian.”*⁷³

Opposite to the *State Court* (“Staatsgerichtshof”) during the Weimar Republic, which was mainly charged with conflict resolution between different state organs, the Federal Constitutional Court is designed as genuine constitutional jurisdiction.⁷⁴ With *ex post control* mechanisms, such as the *Abstract* (Article 93 (1) No. 2 GG) and the *Specific Judicial Review of Statutes* (Article 100 (1) GG) and the individual *Constitutional Complaint*, (Article 93 (1) No. 4a GG), the Federal Constitutional Court soon became a major political actor. Being the guardian of the constitution, the final word in matters of constitutional interpretation was granted to the Federal Constitutional Court, and still: The important role the court constitutes today is not only due to its constitutional design but also its development – its path of self-empowerment.⁷⁵

It is safe to say that the Weimar Constitution influenced its successor, the Basic Law, in various ways. The constitutional design of post-World War II Germany, however, is built on the reflection of both the Weimar Republic’s collapse as well as the horrors of Nazi Germany and its perversion of the law.⁷⁶ Besides the Basic Law, the Weimar Constitution was a reference point for many constitutions worldwide. Notably, the “in 1919 still exotic”⁷⁷ electoral system, with proportional representation and women’s right to vote spread around the world. Today, proportional representation belongs to the most common electoral systems in democratic states.⁷⁸

The list of fundamental rights *and* duties was a pioneering attempt to combine freedom and responsibility, the influence of which can be traced to the Charter of Fundamental Rights of the European Union (2000), the Constitutions of Portugal (1974), South Korea (1987) or Hungary (2011).⁷⁹ Nevertheless, not all inspiration came to the benefit of democratic development. Authoritarian efforts to strengthen executive power, such as in Austria (1929) or Estonia (1933/1937), found a tenable reference point with the Weimar Constitution. Today, semi-presidential systems such as the Weimar Republic’s remain popular, although strong theoretical and empirical arguments have led away from the *president-parliamentary* design of Weimar, where the Government was responsible to and dismissible by both the

⁷⁰BVerfGE 109, 279 (2004).

⁷¹Du und dein Volk (München: Deutscher Volksverlag, 1940): <https://archive.org/details/Schrey-Kurt-Du-und-dein-Volk/page/n27>.

⁷²Most prominently by Carl Schmitt, who argued that the president was the proper guardian of the Republic’s constitution and Hans Kelsen, who attributed the guardian role to the courts. *See generally* Carl Schmitt, *Der Hüter der Verfassung* (Tübingen: Mohr, 1931); Hans Kelsen, *Wer soll der Hüter der Verfassung sein?* (Berlin: W. Rothschild, 1931).

⁷³Kim Lane Scheppele, “Constitutional Interpretation after Regimes of Horror,” in Karstedt, ed., *Legal Institutions and Collective Memories* (Oxford and Portland, Oregon: Hart Publishing 2009) 236.

⁷⁴Dreier, *Staatsrecht in Demokratie und Diktatur* (Tübingen: Mohr Siebek, 2016) 59 et seq.

⁷⁵*See generally* Hans Vorländer, *Regiert Karlsruhe mit? Das Bundesverfassungsgericht zwischen Recht und Politik*, in APuZ (61. Jahrgang, 35-26/2011, 29. August 2011).

⁷⁶Waldhoff, “Folgen – Lehren – Rezeptionen,” 296, 297.

⁷⁷Ewald Wiederin, “Die Weimarer Reichsverfassung im internationalen Kontext,” in Dreier/Waldhoff, eds., *Das Wagnis der Demokratie: Eine Anatomie, der Weimarer Reichsverfassung* (München: C.H. Beck, 2018) 59.

⁷⁸*See generally* International IDEA, Electoral System Design Database: <https://www.idea.int/data-tools/data/electoral-system-design>.

⁷⁹Wiederin, “Die Weimarer Reichsverfassung im internationalen Kontext,” 62, 63.

Parliament and the President, to *premier-presidential* systems, which base the Government exclusively on the trust of the Parliament.⁸⁰

The question remains, what lessons the Weimar experience can offer for contemporary constitutional design. Tom Ginsburg and Aziz Z. Huq have argued to classify the Weimar Republic as a case of *authoritarian collapse*, as opposed to the case of *democratic erosion*.⁸¹ The first one is often initiated by extensive emergency powers or military coups and marks the rapid and complete supersession by authoritarian force, whereas the latter illustrates a slow but substantial democratic decay of the constitutional order.⁸² While no legal order is safe from extralegal action in the form of military coups or revolutionary overthrow, constitutional emergency powers, which can be found in 90% of the constitutions in force today,⁸³ can and should be an object of careful design. The Weimar Constitution granted its emergency powers to the President, who was able to determine the applicable cases and their duration by himself. A basic lesson, therefore, is to limit the duration of emergency powers and to grant the decision over their applicability an authority different from the one exercising them.⁸⁴

The collapse of the Weimar Republic into Nazi Germany, however, cannot be exclusively explained by the extensive emergency powers and an institutional design that favored a strong president over parliamentary rule. It was also the result of deep political divisions, spreading anti-democratic thought, social and economic struggle, all of which resulted in a lack of support for the constitution. Continuing experiences of other states that incorporated key ideas of the Weimar's constitutional framework indicate the possibility of survival and therefore forbid a reduction of causality on constitutional matters.⁸⁵ Moreover, the contempt of partisanship and the rise of nationalist populism posed threats to the Weimar Republic, which are not unknown to the 21st century.⁸⁶ Anti-pluralist rhetoric and the discursive shift from competing to hostile argumentation are phenomena that are not only restricted to less established, young democracies. Right-wing populism in particular tends to capture political discourse in Europe as well as in the USA regularly. Despite the apparent struggles: A strong constitutional framework that secures an effective separation of powers, protects an independent judiciary and enables democratic participation is able to endure attacks as long as the foundational belief in democracy survives.

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⁸⁰See generally Richard Stacey & Sujit Choudhry, *Semi-Presidential Government in the Post-Authoritarian Context*, (Center for Constitutional Transitions at NYU Law, 2017): <http://www.constitutionaltransitions.org/wp-content/uploads/2017/05/Semi-Presidential-Government-in-the-Post-Authoritarian-Context.pdf>.

⁸¹Ginsburg/Huq, *How to Save a Constitutional Democracy*, 40.

⁸²*Id.*

⁸³*Id.* at 58.

⁸⁴*Id.* at 61.

⁸⁵Wiederin, "Die Weimarer Reichsverfassung im internationalen Kontext," 62.

⁸⁶See generally Judis, *The Nationalist Revival: Trade, Immigration, and the Revolt Against Globalization* (New York: Columbia Global Reports, 2018); Jan-Werner Müller, *What is Populism?* (Philadelphia: University of Pennsylvania Press, 2016).

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