

PARLIAMENTARY DEMOCRACY IN EUROPE



GERMANY'S DUAL CONSTITUTION

PARLIAMENTARY DEMOCRACY
IN THE FEDERAL REPUBLIC

Florian Meinel

GERMANY'S DUAL CONSTITUTION

This book offers a compelling and persuasive framework for understanding the German constitutional system. It argues that it can only be fully understood as a dual structure combining two layers with little in common. The first layer is the basic administrative institutional structure, comprising federal and bureaucratic institutions. The second layer is that of parliamentary democracy. It is the interplay between the two, as mediated by the Chancellery, the major political parties and the Federal Constitutional Court, which lies at the heart of the German constitutional arrangement.

This innovative hybrid perspective allows for a better understanding of the current challenges of parliamentary government in Germany and its potential long-term development. An updated translation of its impactful German edition, this book provides one of the most brilliant introductions to the governmental system of a key state.

Volume 7 in the series *Parliamentary Democracy in Europe*

Parliamentary Democracy in Europe

The European Union is founded on the idea of 'representative democracy'. Its citizens are directly represented in the European Parliament, but Union democracy is equally based on indirect forms of representation especially through the European Council and the Council – two Union institutions whose members will be democratically accountable to their national parliaments. The good functioning of the Union democracy assumes, therefore, the good functioning of the democratic institutions of each Member State.

What is the role and relationship between the European and the national parliaments in the democratic functioning of the Union? Do they exercise distinct or complementary functions? Has the European Parliament adopted a structure similar to national parliaments; and how do national parliaments assume their 'European' functions? These questions have gained particular relevance in recent years. Not only has the Lisbon Treaty conferred new functions upon national parliaments, especially concerning the scrutiny on the compliance with the subsidiarity principle (the so called 'Early Warning System'), the coordination of fiscal and economic policies at the European level has led to significant restrictions of national parliamentary powers.

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NOTE ON THE CITATION OF CASE LAW

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1

Introduction: The Two Crises of Parliamentary Government

The establishment of a far-right opposition party in the German national parliament marks both a watershed and the end of the great transformation the German postwar constitution has undergone since the country's reunification. For more than six decades, as long as the shared memory of defeat and reconstruction was passed on from the founding generation to its children, the Bundestag had known only a loyal opposition. Meanwhile the political polarisation of German society has reached the centre of the political system. A vociferous opposition to the existing order is expressing itself in attempts to destroy the moral and political code of the Federal Republic, while the defenders of the status quo believe that the constitution can be defended by invoking its 'values'. Both sides hold fiercely opposing views on the true constitution. Friends of the constitution pitted against its enemies, democrats against anti-democrats, insiders against outsiders, elites against populists, the institutions against those who scorn them, the upholders of democracy against the rule of elites. And yet, amid this challenge to its constitutional beliefs, the country seems to remain true to its own self in one respect: each and every one is the enemy of the constitution in the eyes of the other.

From the outset, the Federal Republic did not attach its notion of 'constitutional patriotism' (*Verfassungspatriotismus*), this idea of a civic compensation for the lack of a republican identity, to its political institutions and the rules of the political process. Constitutional patriotism is a matter of ideals, high-level constitutional principles and basic rights understood as material truths.¹ As the constitutional lawyer Christoph Möllers has recently put it, high-ranking 'principles' in German constitutional law

substitute for the lack of effective political traditions. Where the American constitutional debates, French republicanism or English parliamentarianism serve less as a consensual basis than as a foil against which disputes take place, the prehistory of the Basic Law cannot offer the same.²

The political inclination to the absolute, however, brings with it two opposing dangers. When every opponent is framed as an enemy of the constitution, there is great difficulty to put a name to the constitution's actual enemy and resolutely to combat him as such. Yet another danger lies in the strategy of all too readily disqualifying unwelcome opponents as 'enemies of the constitution' and thus evading the awkward task of confronting

¹ JW Müller, *Constitutional Patriotism* (Princeton, NJ, Princeton University Press, 2007) 16–20.

² C Möllers, 'Demokratie' in R Poscher et al (eds), *Handbuch des Verfassungsrechts* (Munich, CH Beck, 2021, forthcoming).

2 Introduction: *The Two Crises of Parliamentary Government*

them politically. As a result, the realm of political possibility keeps on shrinking, narrowing down to a simple alternative of loyalty or disloyalty. Any willingness to political and institutional change is lost, and the well-meaning defenders of policies with supposedly 'no alternative' themselves act as protagonists of what the ancient historian Christian Meier has called 'a crisis without an alternative',³ accelerating the crisis much against their will.

Over the last decade the diagnosis of a crisis of liberal democracy has become an unquestioned commonplace of political and constitutional theory, while at the same time the concept of democracy serves as a somewhat vague and unspecific device of polemic. In public debates, not only in Germany, 'democracy' often figures as something that could once be taken for granted and was associated with high turnouts, moderate and broadly based parties, an efficient welfare state, measured statecraft, the West, journalistic objectivity in the mass media, and the absence of Facebook and Twitter. Yet to recall a sense of political stability that has come to seem unfathomable, though it belongs to times only just past, is no substitute for political analysis. As the Greek word 'crisis' signifies the turning point in a disease, it seems fitting to examine the patient's *state*, his *constitution*, rather than to lament too much about the way of life that brought about the depression. The crisis of democracy without a reasonable alternative is a global phenomenon, but its manifestations, driving forces and development logics differ in each particular polity. What are the constitutional peculiarities of democracy in Germany? To what extent does the German model of parliamentary democracy differ from other comparable models? In what direction is it developing? What are its political strengths and weaknesses, and where do its vulnerabilities lie?

Democracy first and foremost is a set of political institutions that guarantee political freedom by submitting the exercise of political power to authorisation and control of the people. Its core therefore comprises the rules that spell out the meaning of representation by defining and intertwining parliaments, parties, government and the administration. Traditionally preoccupied with basic rights and judicial review, German constitutional law and theory has too often taken most of that for granted. To glance today at a standard textbook of German constitutional law is to behold the image of a coherent, self-contained constitutional framework: reasonable gradations of democratic legitimacy embodied by the Bundestag and Bundesregierung, federalism based on the principle of subsidiarity, embeddedness in the supranational federation of the European Union, comprehensive and sophisticated protection of basic rights, the rule of law; the institutional safeguard provided by the Federal Constitutional Court as the 'guardian of the constitution'. No mention is made of the internal contradictions of the constitutional system, of the unpredictably rapid changes to which it might be subject, of returning ghosts of times past, of niggling doubts whether the constitution suits a society so different from the one of the old Federal Republic – no mention, in brief, of the forces slowly eating away at the institutional foundations of parliamentary democracy in Germany. Yet these forces are what this book is about. It asks how Germany is governed today and how it can expect to be governed in the future.

³ C Meier, *Res Publica Amissa: Eine Studie zur Verfassung und Geschichte der späten Römischen Republik* [1966] (Stuttgart, Steiner, 2017) 201.

I. Brexit and the Europeanisation of Westminster Parliamentaryism

Parliamentary politics in the What makes the German case special in the world of parliamentary democracies? Federal Republic is operating under constant critical scrutiny by a constitutional court and shows strong features of bureaucratic autonomy in a complex federal system. This makes its current transformation interesting for anyone interested in the contemporary crisis of representative democracy. But the German case is also interesting because in many respects it represents a radically different type of parliamentary democracy compared to the United Kingdom, where it has been undergoing a profound transformation during the last decades, too. Political science and constitutional thought have long treated continental and Westminster-style parliamentarism as two different institutional models connected only by their name. Perhaps that was wrong. Perhaps critical developments of parliamentary government in Britain and on the continent are more closely connected than they appear at first glance. Perhaps one aspect of the crisis of the British constitution is that it is taking on continental features. This is a remarkable development in every respect.

The English role-model of parliamentary government contributed much to the political ideals of German liberals throughout the nineteenth and twentieth centuries. From the early admirers of Edmund Burke's defence of the Westminster institutions to Max Weber's outline of Germany's interwar constitution and constitutional theorists of the Federal Republic such as Wilhelm Hennis: responsible government, a two-party system and the respective set of constitutional conventions represented the desired opposite of both the German tradition of bureaucratic autonomy and the dangers of revolutionary mass democracy. It was not by chance that the first systematic analysis of British parliamentary procedure was written by an Austro-German liberal lawyer.⁴ But the adoption of this model failed or remained patchwork. German parliamentary democracy has always been and still is different.

Like Montesquieu, who famously misinterpreted eighteenth-century British parliamentary government to model his theory of a mixed constitution, German fascination with British parliamentary democracy has not always been free of prejudices or clichés. The most recent example is the German public's imagination of the Brexit process as a foolish rebellion of irrationality. This view of the British struggle for EU withdrawal was formed by the Leave campaign and the result of the referendum, but even more by the agony of the House of Commons under Theresa May's government after the UK Supreme Court's judgment in *R (Miller) v Secretary of State for Exiting the European Union*⁵ and the events surrounding Boris Johnson's prorogation of Parliament and *R (Miller) v The Prime Minister*.⁶ How could this admired institution of British statecraft fail to present a workable solution? German debates on the British constitutional crisis were touchingly idealistic. Not a word about the fact that withdrawal was an option provided for in the Lisbon Treaty – something that German constitutional theory, too, at the time of the drafting had strongly advocated for reasons of democratic legitimacy. German observers also tended to ignore that the Tories

⁴ J Redlich, *The Procedure of the House of Commons: A Study of its History and Present Form* [German edition 1905], 3 vols (London, Constable, 1908).

⁵ *R (Miller) v Secretary of State for Exiting the EU* [2017] UKSC 5; see M Gordon, *Parliamentary Sovereignty in the UK Constitution. Process, Politics and Democracy* (Oxford, Hart, 2015) viii–x.

⁶ *R (Miller) v The Prime Minister; Cherry v Advocate General for Scotland* [2019] UKSC 41.