

# Judicial Review, Administrative Review, and Constitutional Review in the Weimar Republic

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*Abstract.* Judicial review (*richterliches Prüfungsrecht*), administrative review (*Verwaltungsgerichtbarkeit*), and constitutional review (*Verfassungsgerichtsbarkeit*) are three different ways in which the judiciary has sought to control the executive and legislative powers of the state. Historically and functionally they are closely linked. I intend to discuss them in their German context, focussing, in particular, on the Weimar Republic, that is to say, on the period between 1919 and 1932. Although I shall not be addressing the highly interesting parallels with the U.S. Supreme Court, or with the comparable courts in Italy, France, and, especially, Austria, I should like to invite attention to them, for there is really no *Sonderweg* in Germany as far as these developments are concerned.

## I

The thirteen years of the Weimar Republic were a time of dramatic foreign policy changes and domestic crises verging on civil war, but they were also a period of remarkable cultural and intellectual fertility, especially in state theory. Older ideas came to maturity more quickly than at any other time in the past, and, in the atmosphere of crisis, a sharper light than usual was cast on a great many things. This is true, for example, of judicial review—the notion that a judge could have power to determine the formal and material validity of a law. This right requires that the function of a judge be clearly separate from that of the executive.<sup>1</sup> The judge must be so independent, both as a person and in light of the facts, that he can overrule the normative products of the legislative authority, i.e., laws, or the executive authority, i.e., ordinances, in individual cases or in general. This became possible, however, only at a certain point in time—once the functions of state authority had

<sup>1</sup> See, for example, § 112 of the constitution of Kurhessen, 5 January 1831: “In the future the judiciary ought forever to be separated from the administration.”

been separated completely, following a move away from the system of constitutional monarchy in which judges were still regarded as servants of the monarch (Herrmann 2001).

The notion of administrative review is also linked to a specific era. After lengthy debate, it took hold in Germany and Austria in the last third of the nineteenth century. Its key question was: How can the actions of the executive powers be bound to the law in such a way that politically formative action by the state is still possible? The solution was found—at any rate, in Prussia—by linking the new courts so closely to the executive powers that there was no longer any fear of the state being paralysed at its core (Kohl 1991).

Finally, we come to constitutional review (Haberle 1976). This requires a written constitution, which explains why it did not develop until the nineteenth and twentieth centuries. At the same time, being “review,” it had to be capable of rescinding or amending any legal regulations in the constitution that might be a hindrance to laws or ordinances. In one sense, then, constitutional review is an extension of the powers of judicial review, since both involve judges “examining” the law in a legitimate way in the context of a higher legal regulation and having the power to declare it invalid. In another sense, however, constitutional review is an *aliud*, since it answers only questions of interpretation of the constitution, whereas judicial review applies in individual cases and can exist, as it does in Germany today, alongside constitutional review.

Let us begin with judicial review, that is to say, the right (or rather, the duty) of civil and penal judges in the lower courts to examine the formal—and sometimes material—validity of laws and ordinances within the scope of a trial. If the result of the examination is negative, the law in question is not to be applied to the specific case in hand.

The decisive issue here is whether the judge, figuring as a part of the “powers of review” in the sense of the division of state authority into legislative, executive, and adjudicative powers, may regard a law passed by parliament as “not valid” in his specific decision. There is a clash here between two principles. The first principle is this: The judge is bound to the law. Thus, since he is “bound,” he cannot act arbitrarily. The law is an expression of the sovereignty of the people, who, by democratic election, create a parliament, where decisions are taken that are meant to be binding on all, including, in particular, the judge. The second principle is this: The judge is independent and he can overrule the law in the name of what is “right.” He is understood as a “guardian of the law.” In this capacity, he may apply all forms of law that prevail over parliamentary law. This applies primarily to the constitution, but also (though this is a matter for debate) to unwritten norms of a higher kind, such as “natural law” or “morality,” and even religious commandments. According to this second principle, the judge is granted a position of significant power. This position tends to become the

highest power in the state, controlling the legislative and executive powers, for both of them act within the legal structure and both, then, must expect to be informed by a judge in the event that they create an injustice in applying the prevailing law. Whether judges are to be granted “rights of judicial examination” is a fundamental question of state law, or, quite simply, a constitutional issue.

It is therefore no coincidence that this question was first raised in Germany in the early nineteenth century. After the Vienna Congress of 1814–15 had established a new order in which Austria and Prussia ignored their peoples’ wishes for a constitution, smaller states were quick to introduce constitutions. These constitutions contained guarantees of judicial independence for the first time.<sup>2</sup> But the judges remained public servants and were not “controllers” or justices of the peace elected by civil society, as in England. Justice was an ancient sovereign right of the monarch<sup>3</sup> and remained such, for the position of the sovereign in these constitutions remained virtually unchanged. Justice was not, as it is today, a “third power.” Rather, it was a special form of the executive. This also fitted in with the tradition of absolutism in which judges were servants of the sovereign and subject to the rule of law. If these judges had any doubts about the significance of validity of a rule, they had to inform the government and wait for an authentic interpretation.

This concept is alien to us today. Having learned our lesson from the dictatorships of the twentieth century, we tend to see absolutism in a negative light. Yet to do so is to overlook the enormous achievement of absolutism in shaping the modern state in the first place, and in establishing a monopoly of legitimate power. The unity of state authority preceded the modern division of authority. It was only through the unity of state authority that it was possible to render a country homogeneous and modern by creating cohesive administrative, legislative, financial, and judicial systems and by overcoming the structures of guilds and estates, which were no longer effective.

This has to be pointed out quite clearly, for the idea of emancipating the judiciary from the legislative and executive powers could only emerge after the absolute rulers of the eighteenth century had become the constitutional monarchs of the nineteenth century. The new constitutions provided a yardstick by which to determine whether the law was at least formally in order, having made its way through the procedures prescribed by the constitution. In material terms, an examination appeared impossible: The law was now

<sup>2</sup> Art. viii, § 3 of the Bavarian Constitution of 1818: “The courts are independent within the limits of their competence [ . . . ]”; art. ii, § 14 of the Constitution of Baden of 1818: “The courts are independent within the limits of their competence [ . . . ]”; Constitution of Wurttemberg 1819, Part A, § 46: “No public servant, acting as judge, can be dismissed or moved to a lower position, whatever the reason may be.”

<sup>3</sup> Bavarian Constitution 1818, Art. viii, § 1: “The judiciary puts down to the king [ . . . ].”

the expression of the “people’s will”; that will could not be countered by individual judges whose attitudes were similar to those of the parliamentary representatives. What is more, basic rights were aimed against the monarchical executive and not against the legislature formed by the people. Parliaments saw themselves as “guardians of basic rights.” It would have seemed absurd for the judiciary to try to apply these basic rights against the laws made by parliament.

The constant controversy surrounding judicial review raged throughout the nineteenth century and remained unsolved. The overwhelming opinion was that the judge should be able to examine whether a law had been issued correctly, and this approach prevailed in Germany throughout the entire nineteenth century. The Constitution of the German Reich of 1871 contained neither a means of the control of laws by judges nor a constitutional court. Even the remaining German states had no judicial review.<sup>4</sup> Although scholars debated the issue, it never got beyond the point at which the judge was empowered simply to examine the formal validity of a law. Judges had to accept the content of the law as reflecting the will of the state.

The Supreme Court of the German Reich—as the highest and, *de facto*, leading instance of the judiciary—followed the same line.<sup>5</sup> The Supreme Court examined the creation of a rule in formal terms, but respected its content as unassailable.<sup>6</sup> This position, which was more or less taken for granted, corresponded to the prevailing legal positivism of the day. Judges consulted the constitution to the extent that it had anything to say about the lawmaking process. It could not be consulted further, for it contained no basic rights by means of which a material legal argument might be constructed. Until the First World War, there seemed to be no reason to change this system. The constitutional monarchy and its lawmakers were to keep to their own rules of procedure, which could be examined by a judge without intervening in the legislature. The content of the law, however, was off limits, even if for no other reason than that it was regarded as the act of a sacrosanct state. In short, an authority had spoken that was higher than the power of the judge.

There is one special issue that ought to be mentioned here, since it serves to relativise the theory that there was no material judicial review before 1919. That is the judicial examination of ordinances issued by the executive of the Reich and by the individual states. Since ordinances ranked below the law, these could actually be examined. In this case, the judge had a clear

<sup>4</sup> Prussian Constitution from 1850, art. 106: “The judicial examination of correctly pronounced ordinances is the duty of the parliament, not the administrative authorities.”

<sup>5</sup> The decisions of the German Supreme Court (*Reichsgericht*) begin with RGZ (= *Entscheidungen des Reichsgerichts in Zivilsachen*) 9, 232, 236; then vol. 24, 3; 25, 274; 45, 270; 48, 84, 205; 77, 231. These precedents are used in 1921 (RGZ 102, 161–6) where the Court says that the courts themselves are “qualified fully to examine laws and ordinances, except in cases in which such examination is precluded by law.”

<sup>6</sup> In clear language, the decision of the *Reichsgericht*, in *Goldhammer’s Archiv* 1908, 55: 325ff.

yardstick. It did not bring him into conflict with the legislature or the monarch, but only with the executive, who is subject to the law. Judges did exercise a review power in this particular area before the First World War, and they occasionally repealed ordinances on grounds that these overstepped the limits established by the legal framework. Regional legislation, too, which ranked below Reich legislation, was examined in this way. In other words, wherever it was possible without endangering the equilibrium of the state authorities, wherever the judges had a clear yardstick, and wherever it was a question of the hierarchy between law and ordinance, Reich legislation and regional legislation, they did not hesitate to exercise the power of judicial review.

Apart from "regular" justice as constituted by the civil and penal law of the Supreme Court of the German Reich, there had been judicial review of administrative action in Baden since 1863 and in Prussia since 1875.<sup>7</sup> It had been created after decades of debate in order to examine the legality of the executive's intervention in matters of freedom and property.

In order to examine such intervention, a yardstick was required, and that could only be the law or an ordinance derived from the law. If there was any doubt as to the validity of these rules, the administrative judge must also determine whether he had the authority to exercise "judicial review." Here, too, there was, before 1918, a compromise that granted the judge formal but not material review. Yet there was one special aspect of administrative review: It came into play wherever it was a question of the ancient basic rights of "freedom and property." Prussian judicial review of administrative action could even apply a material yardstick here. That is to say, the guarantees of basic rights set forth in the Prussian Constitution of 31 January 1850, guaranteeing equality, personal freedom, and the inviolability of property.<sup>8</sup>

This meant that even at this early stage, there was a functional equivalent to the later constitutional review; for the court, unlike civil and penal procedures, had the possibility of reviewing an administrative act (such as expropriation, prohibition of an assembly, or prohibition of business enterprise) in legal and constitutional terms. Even if the administrative act was covered by the law, the law itself could, theoretically, still be "unconstitutional." An ordinance could fail by the standards of higher law or of the constitution. In this respect, judicial review of administrative action offered rich potential for judicial review and served at the same time as a functional substitute for a lack of constitutional review. To be sure, it did not count as real constitutional review, but the argument based on the constitution was beginning to be understood as a superior argument and was being applied, at least as a back-up measure. An analysis of the adjudication of the Prussian

<sup>7</sup> Baden 1863, Prussia 1875, Bavaria 1875, Austria 1875, Braunschweig 1896. Cf. Keller 1998.

<sup>8</sup> Constitution of the Prussian State from the 31 January 1850, art. 4 (equality), art. 5 (freedom), art. 9 (property).

Supreme Administrative Court, the most important court of its kind in Germany, in the period 1875 to 1918, shows that in many cases rights of freedom were protected by means of arguments based on the constitution.<sup>9</sup> Review of the position of foreigners, and freedom of association and of assembly are of interest here. In the case of Poles, Catholics, and Socialists, who were treated repressively by the Prussian administration, the focus was on the protection of elementary basic rights.

## II

The revolution of 1918 and the new Constitution of the German Reich of 1919 radically changed the legal system. The constitutional monarchy was replaced by a republic and the monarchic principle by democratic sovereignty. The weight was shifted towards parliament. The legislature was the highest of the three state authorities. The executive and adjudicative authorities were bound by their respective laws. In this respect there should have been, in theory, no judicial review whatsoever, and no constitutional review either. Basic rights, too, seemed superfluous. The people had become ruler, electing representatives by means of egalitarian suffrage which included women for the first time. Seen in terms of Rousseau's philosophy, the will of the people manifest in parliament was the *volonté générale* against which there could be no basic rights, no judicial review, and no constitutional review of the protection of individual rights.

This point of view, however, was not tenable in practice. It did not correspond to the political situation, and it did not take into account the psychological reservations against parliamentarianism either. Hugo Preuss, "father of the German constitution," posited in 1919 that a democratic system did not require any basic rights "against" parliament. Against his intention, however, a major constellation of basic rights was created, partly out of bourgeois fears of "parliamentary absolutism." Even the formidable powers of the Reich President, whose legitimation was based on democratic election, were motivated by a general distrust of parliament. Max Weber vigorously supported this solution.

Right from the start, there were strong forces—particularly among the liberal bourgeoisie and the conservatives—lobbying for judicial control of laws passed by parliament. The shock of revolution had fuelled the fears of "left-wing" rule, creating a climate conducive to the concept of judicial review. The judges who had to make the decisions were the product of an imperial age. Several studies in the field of social history have shown that they were predominantly conservative and that they regarded themselves as a bastion against socialism (Ormond 1994).

<sup>9</sup> There is still no monograph on this topic. On one small aspect, see Wichardt 1976.

The civil servants of the imperial age, including the judges, had been asked by all parties concerned to stay in place and serve the new state loyally. This they did, though their loyalty was not unqualified. The president of the Supreme Court of the German Reich<sup>10</sup> called all his judges to a plenary assembly and declared the new state authority legally valid in spite of the fact that it had been created by means of a revolution (Fischer 1929). This resulted in a duty to obey the laws whose enactment had been formally correct. This was set forth in the new Constitution of the German Reich (art. 102 WRV). It also allowed, however, that the former elite remain on guard to ensure that the new state would continue in the same manner as the former system, without, then, affecting bourgeois values. There were three paths that could be pursued in this judicial scrutiny of the new legal order. First of all, the concept of judicial review could be extended. Secondly, administrative review could be exercised against the executive of the new state, and, thirdly, constitutional review could be introduced. I shall discuss them in this order.

### III

The Supreme Courts of the German Reich responded quickly to the question of judicial review. As soon as the Constitution had been enacted, the Supreme Court of Fiscal Jurisdiction (*Reichsfinanzhof*) determined that courts were fundamentally entitled and obligated to “examine whether the laws they are to apply have been duly and properly created and whether they are constitutional.”<sup>11</sup> The Supreme Court of the German Reich quickly followed suit, declaring in 1921—in a manner verging on falsification—that “the *Reichsgericht* (Supreme Court of the German Reich) has, by means of continuous review, entitled the courts of law to examine the formal and material legality of laws and ordinances insofar as such review is not prohibited by law.” (RGZ 1921, 102: 161–6). An examination of the evidence indicates that there was no such thing as a review of “material legality” prior to 1914. In other words, the *Reichsgericht* sought to establish the facts by simply asserting them, henceforth establishing a material right of review (Fangmann 1979, 260). This was done by claiming the basic rights to be “sacred to the German people.” (RGZ 102, 151 [165]). During the period of inflation, the *Reichsgericht* was even more emphatic in calling for a review of the constitutionality of laws (RGZ 1925, 111, 320). Even though this power of review was in fact exercised only moderately, and with little impact (Nörr 1988, 10ff.), the changing face of judicial review from 1919 onwards is extremely interesting: When the government of the German Reich planned

<sup>10</sup> Rudolf Freiherr von Seckendorff (1844–1932) became president in 1905 and remained till 1920. See Müller 1997, 122f.

<sup>11</sup> *Entscheidungen des Reichsfinanzhofs* 5, 333 (335); 7, 97 (100). About this see Gusy 1985, 80.

to prevent the revaluation of pecuniary claims and mortgage debts, the Association of Judges (*Richterverein*) declared in the *Reichsgericht* that such an intervention would probably be regarded by the court as a violation of *boni mores* and equity and as an infringement of the basic rights of property and equality (Huber 1992, 4: 36). That was an open declaration of war by the judiciary against the politicians, and the politicians retreated. With that, judicial review had become an official right; individual protests were ineffective (Goldschmidt 1924; Jellinek 1925, 454; Bettermann 1982). Now laws could be measured against the yardstick of the Constitution both formally and materially. The standards were, above all, the recently discovered basic rights. They were more tangible and specific than the notion of *boni mores* or "loyalty and good faith."

In the Weimar Republic, the scholars of constitutional law also discovered basic rights, a field for which, before 1914, they had hardly been prepared. The constitution of 1848/1849 had not been entirely forgotten, and there were still commentaries on the regional constitutions with their basic rights, and some treatises (Stolleis 1999, 109). But the second main section of the Weimar Constitution (Basic Rights and Basic Duties) was a new concept.

The academic assimilation of this material went through a number of phases. The first, which ran from 1919 to 1924, is marked by a blend of criticism and dismissal. At this time, basic rights were still not regarded as "standard legislation," but were seen more as political declarations, as petitions to the lawmakers, without legal substance. It was only when inflation and the political crisis of 1923 threatened the republic and the property of the bourgeoisie that the value of basic rights in defending the status quo was recognised. Basic rights provided a means of countering socialist or excessively reformist lawmakers. Private property, equality, the institutions of civil service, marriage, and inheritance could all be invoked. Thus, the basic rights became a system of "legalised values"—at any rate according to Heinrich Triepel. This system tended towards anti-positivism and anti-parliamentarianism. It was no accident that the conservative and anti-positivist jurists in particular—Heinrich Triepel, Rudolf Smend, Gerhard Leibholz, Hans-Carl Nipperdey, Carl Schmitt, Erich Kaufmann—were so committed to basic rights. The anti-liberal Carl Schmitt, in particular, declared basic rights—a typical product of liberalism—to be inviolable.

The tendency of judges to adopt the concept of judicial review from 1920 onwards can thus be seen in the context of a constitution and a new parliamentary system that were not fully accepted by the judges. The crises of the republic and the economic threat posed by inflation prompted the judiciary to resist the legislature. At the same time, conservative and anti-positivist theory of constitutional law turned basic rights into a "system" that had to be respected by the legislature. It was thought that not only the judges and the executive were bound to the law and basic rights, but the sovereign, too—that is to say, parliament.

## IV

At the same time, judicial review of administrative action continued to expand. It served, as already pointed out, to protect individual rights against detrimental intervention by the state. Judicial review of administrative action was a matter for the individual states. There was no Supreme Administrative Court at the time. Although such a court had indeed been planned since 1875 and was provided for in the Weimar Constitution (art. 31, section 2, art. 107, 166 WRV), political difficulties prevented its inception before 1933 (Huber 1981, 6: 568ff.; Kohl 1991). However, at the regional level judicial review of administrative action spread both in depth and in breadth. In dialogue with the citizens, as it were, it established that the administration in a state based on the rule of law should be bound by stringent regulations in any intervention in the rights of the citizens. These regulations were developed particularly in the field of police law (Götz 1985, 397ff., 416ff.).<sup>12</sup>

Given the continuity of institutions and staff in the transition from the Kaiserreich to the Weimar Republic, it is hardly surprising that judicial review of administrative action continued to expand in the Weimar Republic. It embodied the liberalism of the late nineteenth century and was, in social terms, the domain of the middle classes and the educated nobility in the tradition of Prussian administration. In the context of the Weimar Republic, judicial review of administrative action also played a role in the movement depicted by the example of judicial review. Here, too, there was an increasing tendency not to accept legislation unquestioningly, but to measure its "justice" by the higher standard of the Constitution. This was also a sign that the administrative judges defended the status quo and sought to limit the influence of the state vis-à-vis basic rights, reaching to the gradually established stance that the administration would have to live with controls wherever the legislature had granted discretionary powers.<sup>13</sup>

## V

The Weimar debate over constitutional review was of inestimable importance for the post-War years and, in particular, for the founding of the Federal Constitutional Court. The concept of "constitutional review" (*Verfassungsgerichtsbarkeit*) was coined by Heinrich Triepel in 1928 in contrast to the older "*Staatsgerichtsbarkeit*" (Triepel 1929, 5: 2ff.; Friesenhahn 1932, 2: page 98, note 3). Both the Austrian and the German theory of public law, in spite of fundamental differences in method, agreed on the political neces-

<sup>12</sup> Concerning the history of the Prussian police law from 1931 see the forthcoming book of Naas 2003.

<sup>13</sup> The supporters of greater control over the administration (Gerhard Anschütz, Willibalt Apelt, Ottmar Bühler, Erich Kaufmann, Kurt Perels, Richard Thoma) often heard the argument that this position would paralyse the state. To meet this argument, they proposed excluding discretionary decisions from control. See Perels 1925, 113.

sity of constitutional review. After 1945, at a time when the shock of the Nazi regime was still keenly felt, constitutional review was the only new “guardian of the constitution” that could be considered. In Austria, the reintroduction of the 1920 constitution and the continued practice of constitutional review were a matter of course, and Germany was given little choice. All the arguments put forward in Vienna at the 1928 meeting of the Society of Public Law Teachers had become highly topical once more: the political character of public law cases, the difficulty in drawing a line between law and politics on the one hand, and confidence that legal issues could indeed be isolated on the other.

The continuation of this debate beyond 1945 is just one aspect, however, and in studies of post-war German and Austrian constitutional review it sheds light only on the role of a certain “background situation.” The other aspect is a genuinely historical one: Why was it that, since the nineteenth century, the need for constitutional review as a means of protecting the rights of the individual had been voiced increasingly, and why was the call for constitutional review especially vociferous in the context of the democratic republics after 1919? This is the question we have to ask. I shall go back in history quite a long way in order to answer it.

In tracing the historical beginnings of constitutional review in Germany, much depends on whether one regards the forms that held sway in the *Ancien Régime* before 1806 as the functional equivalent of modern constitutional review. The two high courts of the empire established in the early sixteenth century—the *Reichskammergericht* and the *Reichshofrat*—were, of course, not comparable to modern constitutional courts. Still, they dealt with disputes involving “public law” matters, such as litigation by villages, guilds or estates against a ruler, or violation of the public peace, issues of regal and monarchic rights, feudal rights, and so on. These courts have sometimes been described—perhaps a bit too enthusiastically—as the forerunners of today’s Federal Constitutional Court, but the heart of the matter lies elsewhere and is obvious: Germany has a tradition, going all the way back to the Late Middle Ages, of allowing subjects and corporations of all kinds to seek justice against the ruling classes before an imperial (or imperially legitimised) court. Constitutional questions such as the interpretation of the Peace of Augsburg of 1555 were also examined by the imperial courts.

Much of this, to be sure, was “pre-modern.” There was no definitive constitutional text, no list of basic rights, no control of the legislative powers, and important territories had privileges that freed them from imperial justice. Yet in the period before 1800, there was a general awareness that questions of a constitutional and political nature that did not fall within the bounds of penal law or civil law could be decided by a supreme court.

This awareness was strongly consolidated in the period following the Napoleonic wars, at which time constitutions and lists of basic rights were being drawn up throughout Europe, and much thought was given to the

“protection of the constitution.” Also the German Federation since 1820 had had an arbitration tribunal to decide constitutional questions (arts. 21, 23 *Wiener Schlußakte* [1820]). The constitutions of Bavaria, Baden, and Württemberg provided for court rulings on disputes between the government and parliament, and on the violation of citizens’ rights guaranteed by the constitutions.<sup>14</sup> So did Kurhessen, Saxony, and Hanover in the 1830s, albeit to a lesser degree.<sup>15</sup> There is something almost revolutionary in the approach taken by the Frankfurt National Assembly of 1848–49: an “imperial court” (*Reichsgericht*) invested with powers in constitutional matters that were classical in scope. This court was to rule not only on disputes concerning the interpretation of the imperial and state constitutions, but also on complaints filed by individuals against a government on grounds of violation of the constitution or the violation of “rights guaranteed by the imperial constitution.” (German Imperial Constitution 1849, §§ 125, 1209).

The Constitution of the German Reich of 1871 did not provide as much. It had no catalogue of basic rights for citizens. And the more or less technical notion of the constitution as an “organisational statute” was aimed more at solving disputes through negotiation and constitutional amendment than through constitutional review. Only the Federal Council (*Bundesrat*) had limited authority to act as arbitrator between the federal states.<sup>16</sup>

Given this historical development, the Constitution of 1919 was indeed innovative. In accordance with the Constitution (art. 108 WRV), a “Constitutional Court for the German Reich” (*Staatsgerichtshof für das deutsche Reich*) was established in 1921 (*Reichsgesetzblatt* 1921, 905). Its jurisdictional competence extended to issues of constitutional disagreement between the Reich and the individual states insofar as these had no constitutional courts of their own,<sup>17</sup> to disputes between the states, and to some further special cases (Friesenhahn 1932, 2: 529). Other disputes, for instance between organs of the Reich (Reich President, Reich Chancellor, Reich Minister) fell within the jurisdiction of the *Reichsgericht*. The Reich Administrative Court was also to be given certain judicial powers, but by the end of the Weimar Republic it had not yet been established (see Kohl 1991). As long as it did not exist, judicial review of administrative action, especially that of the Supreme Administrative Court of Prussia, served as the “ordinary citizens’ constitutional

<sup>14</sup> Cf. The Bavarian Constitution 1818, X, §§ 5, 6; The Constitution of Baden 1818, §§ 6a–67g (since 1868); § 67; The Constitution of Württemberg 1819, §§ 30, 54ff., and especially §§ 195–205 (*Staatsgerichtshof* with the purpose of protecting the constitution).

<sup>15</sup> The Constitution of Kurhessen 1831, § 154 (Compromise Court between the government and the parliament); The Constitution of Saxony 1831, § 49 (protection of individual rights), §§ 142, 153: Constitutional Court.

<sup>16</sup> It was not a quasi-Constitutional Imperial Court, as Huber 1992, vol. vi, 543 puts it, but more or less an instrument of domination by the most important state, Prussia.

<sup>17</sup> The situation in several German *Länder* was different. Constitutional cases at issue, charges against ministers and deputies, control of elections were partly assigned to courts of the *Länder*, in part to the ordinary courts, in part to the State Court (*Staatsgerichtshof*). See Friesenhahn 1932, vol. II, 531ff.

review" by offering legal protection against the state and, so to speak, by putting some distance between the rights of the citizens and the intervention of the state.

Many of these legal provisions and courts were never really implemented, what with the death throes of the Weimar Republic from 1929 onwards. For that reason alone, the scope and depth of Weimar's "constitutional review" should not be overestimated. There was no canon of review. Experience has shown that this would take decades of work in legal dogmatics to develop. Nor did judges form an obviously distinct political group. Indeed, with the sole exception of the suppression of the Prussian government by the Chancellor of the Reich in 1932, there were no major cases to speak of (Lammers and Simons 1929, 1930). Disputes between the various organs of the Reich were regarded as too political; there was a reluctance to include them. Above all, however, at the Reich level the popular component was missing, for the power of individuals to assert their basic rights by means of a constitutional complaint was lacking. That was to be found only in Bavaria (art. 93, Bavarian Constitution, 15 September 1919). In retrospect, this is most regrettable, for a constitutional complaint would undoubtedly have turned basic rights into legal norms far more quickly, strengthening and consolidating the awareness of the range of individual rights. Yet neither public opinion nor public law was really ready for that. Legally protected rights of individuals were not seen as desirable. It seemed more important to maintain the unity of the state, countering putsches and crises, and ruling party politics with a strong hand. Generally speaking, there was an "anti-individualistic" mood, which was particularly strong in both the left- and right-wing factions.

By way of conclusion, it may be said that, although the Weimar Constitution sought to carry forward the tradition of 1848–49 with respect to constitutional review, it did so only half-heartedly and hesitantly. Traditional notions still held sway: a neutral state with the aura of a higher authority, not unlike a personified monopoly of power to be obeyed—by the judiciary just as by others. The law was seen as the will of that higher authority. At the head of the state stood the monarch or the president, that is to say, the executive. Thus, it was difficult to imagine, after 1919, that the judiciary could be strengthened to such an extent that, without being subject to any control, it could override the laws of the state where they conflicted with the constitution.

Such reservations soon waned. It quickly became clear that the conservative bourgeois judiciary and its three instruments of judicial review, administrative review, and constitutional review could serve well as a check on the much-feared phenomenon of parliamentary absolutism. This presupposed, however, that basic rights would be seen as legal norms. From around 1925, following the inflation of 1923–24, basic rights, particularly the rights of property and equality, were strengthened as a bastion against

parliament. Laws that violated these basic rights were to be treated as invalid. Attempts were also made to bind the lawmakers to the basic rights, especially to the concept of equality (Leibholz 1925; Kaufmann 1927). Thus, there was a distinct increase in the interpretation of basic rights, and the idea of constitutional review took on an unwanted vitality. I believe there are two underlying reasons for this.

The first was the conservative bourgeois front against a legislature that was regarded with political distrust. It would, however, be one-sided to see this front, created by economic interests and political resentment, as the primary motive. Instead, there is a second important ground, namely the experience of an industrial mass society controlled by law. After the First World War, it was clear that the days of steady and reliable legislation were gone. The legislature was driven by a need to overcome social and economic crises. Laws became products that were created quickly, frequently fallible, and often rapidly repealed. Experience showed that legislation was no longer to be trusted. Legislation was something that could be factually incorrect and even unjust. This fuelled anti-positivism politically, intellectually, and methodically. It regenerated interest in natural law and, above all, it activated the new basic rights of the Constitution, which came to be seen as a system of values set above the law. In order to activate this system of values, "constitutional review" was required. It was therefore only logical that there would be agreement, in Vienna, at the 1928 meeting of the Society of Public Law Teachers: Kelsen favoured constitutional review on grounds of his own experience and concept of justice. Triepel, an anti-positivist, vigorously emphasised the political elements of constitutional review, but also endorsed the practice in the end. The Vienna debate on constitutional review was to be the last major round in the "debate on method" in constitutional law (Stolleis 1999, 193–5).

All these considerations took on a certain urgency in the years between 1925 and 1929. In retrospect, these were the only years of the Weimar Republic in which both internal and external pressures proved to be less severe. These were the years of Gustav Stresemann's foreign policy, in which he restructured Germany's payment of reparations, achieved rapprochement with France, and brought about Germany's acceptance into the League of Nations. Inflation was under control and capital was coming into the country. Even the phase of civil war militia and putsch attempts seemed to be over. Unemployment insurance was introduced. Reform laws were being drawn up, including the introduction of a Reich Administrative Court (*Reichsverwaltungsgericht*), and a structural "Reich Reform" was underway.

It might have become a happy republic under a "happy constitution" (Clavero 1997). It might have, that is, had these positive developments not suddenly turned to catastrophe. The world economic slump hit Germany with a vengeance, and unemployment exceeded anything known earlier. In October 1929, Germany's best politician, Gustav Stresemann, died. In 1930

the last democratically legitimised government fell. From then on, politicians and the masses turned increasingly towards authoritarian solutions, yearning for a “leader” who would promise them a “salvation” from all evils.

The legislature no longer had any authority. There was no longer any interest in controlling it. Help was expected only from the executive, and there was no longer any thought of controlling it through the courts. Carl Schmitt’s work on the “Guardian of the Constitution,” written in several phases, declared in no uncertain terms that the judiciary, incapable of action or policy, could not be the “Guardian of the Constitution.” Instead, according to Schmitt, under the current circumstances only the President of the Reich could have that function (Schmitt 1929). He undoubtedly saw things clearly. A state in crisis cannot be saved by the judiciary, at any rate not by the judiciary in the traditional sense.

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## Abbreviations

RGZ: Entscheidungen des Reichsgerichts in Zivilsachen.  
WRV: Weimarer Verfassung.

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