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How a constitution can safeguard democracy: The German Experience

The Federal Republic of Germany adopted a constitution in 1949, called the Basic Law, which is based upon democracy, freedom and the rule of Law. Our Basic Law reflects the painful experience of the Nazi Regime and the lesson taught by the decline of the Weimar Republic. Germany overcame the most terrible dictatorship when it started to formulate a new democratic constitution. The Basic Law opens with a catalogue of human rights, crowned by the principle of human dignity. The acknowledgement of human rights as the fundamental element of our constitutional system is a response to the disdain of human dignity during the period of 1933 - 1945. For this reason all imaginable guarantees and remedies were inserted into the Basic Law to prevent the repetition of the rupture of civilization as it occurred during the period of national socialism.

It was the firm consensus of all political forces active in the constitutional assembly to prevent another failure of representative democracy in Germany and to establish effective safeguards against dictatorship and the disregard for human rights. The constitution should therefore be the **paramount law** of the land and claim priority over any government act. In order to reach this goal, the Basic Law contains the following important guarantees.

1. 1. The basic principles of the constitution - such as democracy, the **rule of law**, the principle of the **social state**, **federalism**, respect of **human dignity** - may not be altered at all; not even by a constitutional amendment. The aim was to prevent the **enemies of democracy** from overturning it using its own instruments - like the majority rule.
2. 2. According to art. 1 (1) **human dignity** is the **unalterable foundation** of the constitutional order. The confession to the inviolability of human dignity and personality was and is a response to the perversion of law in the Third Reich and the mass murder in the shadow of this injustice. Therefore the state is not only obliged to respect, but also to protect human dignity.
3. 3. Crowned by the principle of human dignity, the fundamental rights have legally binding force. It is stated in the first article of the Basic Law, that the following basic rights **shall bind** the **legislature**, the **executive** and the **judiciary** as **directly enforceable law**. This means that all public officials and institutions have to respect and secure human rights.
4. 4. Moreover, the binding effect of all human rights is expressly extended to the legislature by art. 1 (3). Here we observe the Basic Law rejecting the assumption of the constitutionalists of the Empire

and to a large extent also of the Weimar Republic, that the legislature was free to restrict fundamental rights as it pleased. According to art. 19 (2) there is an **ultimate limit to legislative measures**: In no case may they touch the essential content of a human right.

5. 5. The Parliamentary council which worked out the Basic Law established the classic catalogue of liberal rights and added some new ones in the light of the experience made under the Nazi dictatorship, such as freedom of broadcasting, freedom of art and the right to life and physical integrity. But it decided not to follow the Weimarian experiment with social rights. Instead, a general principal was included into the constitution according to which Germany is recognized as being a social state.
6. 6. Finally, the Parliamentary Council **established a special institution** designed to enforce the constitution against any other government authority. This institution is the Federal Constitutional Court, which should be a safeguard against dictatorship and the disregard for human rights. And you can observe in recent history that the experience of proceeding totalitarian regimes inspire the framers of constitutions not only to formulate a Bill of Rights but also to establish a kind of constitutional court and **judicial review**. You will find many examples in Eastern Europe as well as in Africa. The Basic Law established this special court in order to grant protection against all infringements of constitutionally guaranteed rights.

The **Federal Constitutional Court** (FCC) is endowed with ample powers, among them the power of ***judicial review***. As I mentioned above: In the German system all constitutional organs have to respect and enforce human rights. But only the FCC decides on the interpretation and application of the federal constitution ***with final binding force***. Should another court consider a law unconstitutional and therefore wish not to apply it, it must first obtain the decision of the Federal Constitutional Court. The FCC is not a court of appeal which examines the decisions of the ordinary courts for any error of fact or law. Its **exclusive responsibility** is to decide questions of constitutional law and to interpret the Basic Law. The FCC enjoys the ***last word*** **on the meaning of the Basic Law**, and its word is Law.

The supremacy of the constitution

With the introduction of this kind of constitutional jurisdiction the principle of the supremacy of the constitution attains its practical point. This concept confers the highest authority in a legal system on the constitution. Stating this principle does not imply simply giving a rank-order of legal norms. The point is not solely a conflict of norms of differing dignity. The principle of the supremacy of the constitution also concerns the institutional structure of the organs of the State. The scope of the principle becomes clear if we reformulate it: the supremacy of the constitution means the lower ranking of statute; and this in turn implies the lower ranking of the legislator (1) .

The principle's practical consequence may most easily be seen from a concrete example:

In 1957 the Bundestag enacted a law reordering family law in accordance with the constitutional requirement of sex equality. This Equal Rights Act removed the husband's right of decision in matrimonial matters. The Act also followed the case law that parental care and custody go to both father and mother. But for the case where the parents were unable to agree, the father was to have the last word. Only this parental casting vote was held suitable to safeguard family peace and marriage in its Christian, Occidental form.

The Act had barely entered into force when four married mothers filed a constitutional complaint with the Federal Constitutional Court. They asked for repeal of the law giving fathers the last word on childrearing, because it infringed Art. 3 (3) Basic Law. This article of the German constitution reads: "Men and women shall have equal rights". The Federal Constitutional Court declared the paternal right of final decision null and void, a year after the Act came into force. The Court was unable to see how far objective biological or functional differences or the special nature of woman could justify the paternal prerogative (2) .

The Federal Constitutional Court thus repealed a provision enacted by a majority of the legislators elected by the people. The judges disregarded majority rule. Yet the judges are neither elected by the people, nor owe them any responsibility. For they cannot be removed through new elections, and thus cannot be called to account (3) . *Is this form of judicial review not deeply undemocratic?*

The experience of totalitarian regimes in the last century led to a fundamental rethinking of the problem of the limits to State power. This culminated in the image of a State order that is both democratic and guarantees the individual's fundamental rights (4) . This is the principled answer to the accusation that judicial review is incompatible with the democratic principle. Majority rule does not by itself constitute the essence of modern democracy. Democracy means not just that State power derives from the people and that politics is determined by their elected representatives. Also part of democracy are particular fundamental values, to which all organs of State are committed. It is not only the two dictatorships on German soil that have taught us that democracy cannot be upheld without the validity of human rights. "Democracy is thus a delicate balance between majority rule and particular fundamental values, such as human rights" (5) .

Defenses against the enemies of democracy
The failure of the Weimar Republic provided the historical knowledge-base for orientation in the search for additional means of defense against the enemies of democracy and destructive political minorities. The founders of our constitution found one such means in the constructive vote of no confidence. Thereby the Bundestag, the Federal Parliament, can only express its vote of no confidence against the Bundeskanzler, the (Federal) Chancellor, if the majority of its members have elected a successor. (Art. 67 GG)

Furthermore, the Federal Constitutional Court can declare a political party unconstitutional and dissolve it (Art. 21 Abs. 2 GG), impeach the Federal President (Art. 61 GG), and dismiss judges (Art. 98 Abs. 2 GG) if they are found to have intentionally violated the Basic Law. Up to this date no impeachment procedures have ever been implemented against the Federal President or a judge. However the Federal Constitutional Court in its early years declared two parties unconstitutional: in 1952 the Sozialistische Reichspartei or Socialist Reich-party, a neo-nazi group, as well as the Communist Party of Germany (KPD) in 1956.

Only the Federal Constitutional Court can dissolve a political party deemed unconstitutional. This requires that the political party in question, either by its goals or by the behavior of its followers, is aimed at disturbing or removing the fundamental liberal democratic order of the Federal Republic of Germany or threatens the existence of the Federal Republic itself.

The resistance-ready democracy

For the Federal Constitutional Court, turning away from political indifference and totalitarian rule as intended by the Basic Law, has been and still is one of the guiding principles of its administration of justice. Prominent examples of this are provided by the aforementioned decisions from the court's early years, in which it declared unconstitutional the Socialist Reich-party and the Communist Party of Germany. The Court coined the term **"streitbare Demokratie" or self-assertive democracy**, to emphasize the constitutional elements drawn upon in these rulings. The idea of the self-assertive democracy is considered to be the reply to the failure of the Weimar Republic and the perversion of the law in national socialism. It is widely cited, not only by political scientists, as being part of the political culture of the Federal Republic today.

In the KPD-ruling there is talk of a **liberal democracy** which has an obligation to defend and secure **human dignity**. Some of the advantages of the Basic Law which the Court considers to be characterizing are: the commitment to absolute values, the **strong emphasis on the "third" power, the judiciary**, and "the striving to subjugate in an unusually broad manner the proceedings in the political domain and actions of political organs to the control of independent courts and to thereby realize the **postulates of the constitutional state** procedurally". At the same time the Federal Constitutional Court underscores as a fundamental requirement of the liberal democracy that only the constant intellectual discourse between contending social interests and political ideas as well as the political parties representing them can be the correct path to the formation of public will; that only the constant mutual control and critique provides the best guarantee for "a (relatively) appropriate political line as a result and the equalization between the operative political forces within the state."

The bar of the guarantee of freedom within the party-ban justifies the Basic Law's attempt to find a **synthesis** of the **principle of tolerance** towards all political views and the commitment to **certain inalienable fundamental values** of the public order. The material understanding of the Basic Law starting to take shape here, subsequently finds its impact on the interpretation of the fundamental freedoms, be it the freedoms of opinion, the arts, or the press. The catalogue of fundamental rights is not only seen as a system of entitlements, but also as an **objective value system** which emanates onto all domains of the law and obligates all public powers. Democracy, in this sense of the word, does not exacerbate itself in the rule of the people. It is -as mentioned before- a delicate balance between the rule of the majority and certain fundamental values such as human rights.

What caused the failure of the Weimar Republic?
For the founders of our constitution the question stood in the foreground, if and to what extent structural flaws of the Weimar constitution obstructed and even prevented democratic interaction. Yet up to this date, the scholars do not agree in their reply to the question of what caused the demise of the Weimar Republic. Was it a case of self-sacrifice of a democracy or was success denied because it was ahead of it's time? Did the political parties fail because they were incapable of forming majorities and finding compromises?

But we know this much: that the failure of the Weimar Republic cannot solely be traced back to its constitution. The liberal democracy was also incapable of survival because it **lacked the consensus of the citizens to carry it**. It failed because of the lack of acceptance in the population, the prevalent servant-mentality, and the fact that the democratic constitution was widely without loyal enforcers. Complacency and passivity of the majority of the German public including its elites in the face of overt acts of terror against minorities and those who thought differently, paved the way for the unbound

arbitrary system of national socialism. Anti-democratic reservations fed by **authoritarian traditions** ruled the state bureaucracy. **The indifference, yes even hostile attitude of the state officials and judges** towards the parliamentary form of government was then also a point of critique in the consultations of the Parliamentary Council in 1948/49.

In the Federal Republic of Germany a **transformation from a servant-mentality to a culture of citizenship** has taken place. It is a truism that the constitutional document by itself cannot establish loyalty towards the democratic system. It much rather symbolizes the multi-layered forces of integration. The characteristic advantages of the Basic Law had to reveal and prove themselves in daily political life in order to spur acceptance. Certainly one cannot deny that the **"Wirtschaftswunder", or economic miracle of the 1950s**, carried much of the Germans' exhilaration surrounding the liberal democracy. Nevertheless, without the success of the anchoring of the interaction of political and judicial institutions within the Basic Law, this stable legal frame, which allows for free and at the same time socially responsible trade and industry, would not have been created.

Despite the bad premonitions of the early years the citizens of the Federal Republic gradually developed a **satisfaction with democracy** in the ensuing years. Along with the economic and political success-story of the Federal Republic grew the acceptance of the democratic system and its principles. Towards the end of the seventies, the pride in the own political order reached a level comparable to that of other democracies. In contrast to the Weimar constitution the Basic Law has not only found citizens concerned about their fundamental rights, but also loyal political actors and judges.

The failure of the Weimar Republic was "devastating proof" for the thesis, that a state-system is dependent on the constantly renewed voluntary consensus of its citizens (Rudolf Smend). Today, political scientists agree that a political system is stable to the extent that it is anchored in the hearts and minds of its citizens. This is also and especially true for the state form of democracy.

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(1) As pertinently put by Rainer Wahl, Der Vorrang der Verfassung, in: Der Staat 4/81, 485.
(2) BVerfGE 10, 59 <74 f.>.
(3) Ronald Dworkin, Gleichheit, Demokratie und die Verfassung: Wir, das Volk und die Richter, in: U.K. Preuß, Zum Begriff der Verfassung, Frankfurt am Main 1994, p. 171.
(4) Wahl, fn. 1, p. 490.
(5) Aharon Barak, Judicial Discretion, New Haven 1989, p. 125.