

**WHAT TO CELEBRATE?
THE PLACE OF THE WEIMAR CONSTITUTION
WITHIN THE HISTORY OF MODERN
CONSTITUTIONALISM**

**¿QUÉ HAY QUE CELEBRAR?
EL LUGAR DE LA CONSTITUCIÓN DE WEIMAR DENTRO
DE LA HISTORIA DEL CONSTITUCIONALISMO MODERNO**

HORST DIPPEL
Universidad de Kassel, Alemania
dippel@uni-kassel.de

ABSTRACT:

The Weimar Constitution had its merits. It more than doubled the electorate, extending the right to vote to all Germans, male and female, above twenty years of age. It insisted on gender equality, and it introduced a remarkable number of social rights. But despite its progressive elements, often connected with the political program of the Social Democrats (SPD), legal and constitutional thinking had to fight hard to shake off the authoritarian traditions of the past.

Keywords:

Weimar Constitution, History of Modern Constitutionalism.

RESUMEN:

La Constitución de Weimar tenía sus méritos. Más que el electorado, extendiendo el derecho al voto a todos los alemanes, hombres y mujeres, mayores de veinte años de edad. Insistió en la igualdad de género e introdujo un número notable de derechos sociales. Pero a pesar de sus elementos progresistas, a menudo relacionados con el programa político de los socialdemócratas (SPD), el pensamiento jurídico y constitucional tuvo que luchar duro para sacudirse las tradiciones autoritarias del pasado.

Palabras clave:

Constitución de Weimar, Historia del Constitucionalismo moderno.

A hundred years after taking effect—for less than fourteen years, to be sure—the incessant popularity of the Weimar Constitution of 1919 may appear surprising.

Constitutions once abolished tend to disappear from memory, the French constitution of 1793 and the Cádiz constitution of 1812 are among the most noteworthy exceptions. Even the fact that the Weimar constitution is not completely historical as its articles 136, 137, 138, 139, and 141 covering religion and the relationship between church and state are still existing constitutional law in Germany as they are incorporated into the *Grundgesetz* of 1949 according to its article 140 may not contradict the prevailing impression. Also, beyond Germany the Weimar constitution still appears to retain its reputation especially in Southern Europe,¹ in Mexico, and in other parts of Latin America. In most cases this reputation rests on constitutional issues or provisions in national constitutions which are traced back to the Weimar Constitution from which they originated. A couple of years ago, Cindy Skach, to cite two further examples, discovered parallels between the Constitutions of Weimar and of the French Fifth Republic,² while more recently Paula Borges Santos demonstrated how the Weimar Constitution influenced Portuguese authoritarian constitutionalism in the 1930's.³

I shall restrain from trying to unearth further examples of constitutional lineage of specific constitutional provisions from Weimar to other constitutions. Instead, I shall attempt a broader view of the migration of constitutional ideas in order to establish the place of the Weimar Constitution within this migration process.⁴

Since the late eighteenth century, when written constitutions in its modern understanding came into being, different types or models of constitutionalism have evolved. Constitutional monarchy prevailed in nineteenth-century Europe and was also the model for the Brazilian Empire from 1824 to 1889. It deviated from the much older form of the English or British Constitution, though unwritten, of what some prefer to call a Parliamentary Monarchy with parliamentary sovereignty as its main feature. Evolving in the nineteenth century and constitutionalized on a national level in 1874 is the Swiss model of a constitution largely based on extended elements of direct democracy.⁵ During the twentieth century further constitutional models surfaced, such as the communist constitutions in Eastern Europe, Asia, and Cuba, authoritarian constitutions in parts of North Africa, the Middle

¹ Cf. WIEDERIN, Ewald, "Die Weimarer Reichsverfassung im internationalen Vergleich", in: *Das Wagnis der Demokratie. Eine Anatomie der Weimarer Reichsverfassung*, ed. by Horst Dreier and Christian Waldhoff, Bonn: Bundeszentrale für politische Bildung, 2019, esp. 57-73 (the book was originally published by C.H. Beck in Munich in 2018); with the focus on Germany: Christian Waldhoff, "Folgen — Lehren — Rezeptionen. Zum Nachleben des Verfassungswerks von Weimar", in: *ibid.*, 289-315, and, obviously, the complete volume; also "Dossier: La Constitución de Weimar en su centenario (1919-2019)", in: *Historia Constitucional*, 20 (2019), 201-498.

² SKACH, Cindy, *Borrowing Constitutional Designs. Constitutional Law in Weimar Germany and the French Fifth Republic*, Princeton and Oxford, Princeton University Press, 2005.

³ Paula Borges Santos, "A Constituição de Weimar e o Constitucionalismo do Autoritarismo Português", in: *Historia Constitucional*, 20 (2019), 469-498.

⁴ Cf. CHOUDRY, Sujit (ed.), *The Migration of Constitutional Ideas*, Cambridge, Cambridge University Press, 2006.

⁵ Cf. GRABER, Rolf, *Wege zur direkten Demokratie in der Schweiz. Eine kommentierte Quellenauswahl von der Frühen Neuzeit bis 1874*, Vienna/Cologne/Weimar: Böhlau, 2013.

East, and elsewhere, theocratic constitutions (Iran), or for that matter the present Constitution of Venezuela. Most popular and most widespread, however, became what are today called the constitutions of Modern constitutionalism.

Modern constitutionalism emerged in the American Revolution, and its first resounding example was the Virginia Declaration of Rights of 12 June 1776. It contained several individual rights, some of which were directly copied from the English Bill of Rights of 1689, as well as specific principles on which to establish the subsequent constitution in order to provide for securing the rights and liberties of the citizens and entrenching power in order to permanently prevent it from invading these rights. It thus established what came to be the ten core principles of Modern constitutionalism: sovereignty of the people, human rights, universal principles, limited government, the constitution as supreme law, representative government, separation of powers, accountability, independence of the judiciary, and the ability to amend the constitution with the participation of the people.⁶ In spite of objections some brought forward to this interpretation of Modern constitutionalism,⁷ it still better explains the process of globally establishing these ten principles. It was a tiresome process accompanied by enduring massive opposition and myriads of setbacks, with some of its principles on a theoretical level, even today, more embattled than others, while others on a practical side were sometimes diluted, evaded or omitted. The United States is no exception as a recent article demonstrated: “Outraged by Kansas Justices’ Rulings, Republicans Seek to Reshape Court”.⁸ Though judicial independence keeps being embattled in several states, Modern constitutionalism basically defines American constitutionalism until today. Its model character exerted a lasting impact on Latin American constitutions ever since,⁹ while as early as 1789, its principles crossed the Atlantic and through the constitutions of revolutionary France and the revolutions of 1848 and further events became the core pattern of an increasing number of European constitutions in the twentieth century.¹⁰

However, for more than two centuries a major difference between American and French constitutionalism characterized Modern constitutionalism. The dividing line was marked by the relationship between popular sovereignty and the higher legal ranking of the constitution, the two essential principles of Modern constitutionalism according to Dieter Grimm.¹¹ American and French constitutionalism provided two opposing answers to the understanding and ranking of

⁶ See in detail DIPPEL, Horst, “Modern Constitutionalism: An Introduction To A History In Need Of Writing”, in: *Tijdschrift voor Rechtsgeschiedenis / Revue d’Histoire du Droit / The Legal History Review*, 73 (2005), 153-169.

⁷ HEUN, Werner, “Die Struktur des deutschen Konstitutionalismus des 19. Jh. im verfassungsrechtlichen Vergleich”, in: *Der Staat*, 45 (2006), 365-382.

⁸ *The New York Times*, 1 April 2016.

⁹ Cf. DIPPEL, Horst, “El surgimiento del constitucionalismo moderno y las constituciones latinoamericanas tempranas”, in: *Revista Pensamiento Jurídico*, 23 (Sept.-Dec. 2008), 13-32.

¹⁰ Cf. DIPPEL, Horst, “Constitutional History as the History of Modern Constitutionalism: Germany since 1871”, in: *Giornale di Storia Costituzionale*, 37 (2019), 27-52.

¹¹ GRIMM, Dieter, *Die Zukunft der Verfassung II: Auswirkungen von Europäisierung und Globalisierung*, Berlin, Suhrkamp, 2012, esp. 29-30, 324-325.

these two crucial principles. The American Revolution had first to define their relationship as neither popular sovereignty, nor a higher law were British constitutional features. The revolutionary elite in the American colonies had cautiously embraced the idea of the sovereignty of the people in 1774 which had been propagated by other parts of the population for almost a decade. In 1776, the elite insisted that the sole object of the sovereignty of the people was constitution making and conferring legitimacy on the new constitutions which were in the course of being drafted since early 1776. It should never become an operative principle of the constitutions beyond regular elections for offices including the legislature, as any further extension of this principle would endanger other constitutional principles and especially the supremacy of the constitution as a higher law considered indispensable to safeguard the rights and liberties of the people.

This entrenchment of popular sovereignty did not pass unopposed. When in September 1776 Pennsylvania adopted its constitution, the conflict burst into the open. The legislature was installed as the dominant power with an executive council largely dependent on it. The people were directly involved in the process of law making enabling them to give instructions to their representatives for the final reading. Popular sovereignty was no longer considered “fiction” as it has come to be styled,¹² but a functional element in the political process. The American political elite was furious at the Pennsylvania document and worked incessantly until it achieved in 1790 that a new constitution was drafted and adopted in Pennsylvania, this time falling in line with what had become, by now, the standard of American constitutionalism with its entrenched popular sovereignty and the constitution as a supreme higher law. Hardly surprising the elite did not oppose or intervene when Louisiana sought admission to the Union in 1812. The Enabling Act of 1811 had expressly directed Louisiana to declare in its constitution “fundamental principles of civil and religious liberty”.¹³ Though neither the mandated religious liberty nor popular sovereignty were included in the Constitution of Louisiana of 1812, Henry Clay summarized in the House of Representatives on March 19, 1812: “The Convention of Orleans had framed a constitution for the State in conformity to the law of Congress imposing certain conditions as preliminary”.¹⁴

France opposed these American preferences. In the long run, though the Napoleonic constitutions as well as the constitutions of 1814 and 1830 rejected Modern constitutionalism, France had no problems with the principles of Modern constitutionalism with the sole exception of constitutional supremacy. The sovereignty of the people was the paramount principle discarding any entrenchment of it along American lines as totally unacceptable. Consequently, disregard of the

¹² MORGAN, Edmund S., *Inventing the people: The Rise of Popular Sovereignty in England and America*, New York: Norton, 1988, esp. 235-287.

¹³ *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America*, ed. by Francis Newton Thorpe, 7 vols., Washington: Government Printing Office, 1909, III, 1377.

¹⁴ *The Debates and Proceedings in the Congress of the United States [Annals of the Congress of the United States]*, Twelfth Congress, First Session, Washington: Gales and Seaton, 1853, 1225.

sovereign people brought the Constitution of 1791 to a rapid end. Its successor, the Jacobin Constitution of 1793, basically an adaptation of the Pennsylvania Constitution of 1776,¹⁵ integrated popular sovereignty into the political process. Though never put into effect it lived on as a myth, especially through the second half of the nineteenth and the first half of the twentieth centuries.

Three constitutional moments stand out to symbolize the French appreciation of popular sovereignty as sacrosanct. The first is the ill-reputed Constitution of the Second Republic of 1848 with some remarkable parallels to the Weimar Constitution seventy years later. It installed a legislature and a president, adopted from the American model, both directly elected by the people. The obvious consequence was that there might arise a conflict between both institutions, each directly legitimized by the sovereign people. The constitution makers were aware of the problem. Nonetheless, they failed to provide a constitutional solution to this pending danger.¹⁶ The reason is obvious. Any constitutional solution to this conflict would have resulted in compromising the principle of popular sovereignty through setting the constitution above the sovereign people. A constitutional solution was impossible, and, therefore, once the conflict arose, it would be the end of the constitution – as happened in 1851.

The second example, again hinting at the Weimar Constitution of later days, refers to the origins of the Third Republic. In 1871, the President of the Republic was by law installed. That the future constitutional order was to be a republic was still highly embattled in the early 1870s when the National Assembly had a two-thirds majority of monarchists. When the Duke de Mac-Mahon became President in 1873, the restoration of the monarchy seemed to be at hand, even more so when in 1875 the Duke de Broglie was installed as Prime Minister and the Constitutional Laws of 1875 took effect. But as the constitutional crisis of Mai 1877 led to a renewed republican majority in the National Assembly, five months later, Léon Gambetta who had proclaimed the Republic in 1870, famously required Mac-Mahon, “de se soumettre ou de se démettre”, to submit or to step down. Mac-Mahon finally had to give in and two years later he resigned.¹⁷ The sovereign people had spoken, crushing opposing constitutional preferences.

The third example is of a more recent vintage. Charles de Gaulle, President of the Fifth Republic of 1958, decided in 1962, in opposition to the Constitution, to run for re-election on a direct vote of the people. Art. 89 of the Constitution provided for revising the Constitution —according to which the President was indirectly elected by an electoral college— by the votes of two National Assemblies and a subsequent referendum, or a vote by a three-fifths majority of a Congress, constituted of both chambers of Parliament, without subsequent referendum. De Gaulle

¹⁵ DIPPEL, Horst, “Aux origines du radicalisme bourgeois. De la constitution de Pennsylvanie de 1776 à la constitution jacobine de 1793”, in: *Francia*, 16/2 (1989), 61-73.

¹⁶ Cf. RAUSCH, Fabian, *Konstitution und Revolution. Eine Kulturgeschichte der Verfassung in Frankreich, 1814-1851 (Pariser Historische Studien, vol. 111)*, Berlin/Boston: De Gruyter Oldenbourg, 2019, esp. 385 (though, obviously, missing the point).

¹⁷ Cf. RUDELLE, Odile, *La République absolue. Aux origines de l'instabilité constitutionnelle de la France républicaine 1870-1889*, Paris: Publications de la Sorbonne, 1982, esp. 41-64.

decided otherwise and without involving the legislature in one or the other way immediately called for a referendum. With some 82% of the vote supporting the popular election of the president, the sovereign people had spoken and overruled constitutional provisions. The matter was settled. According to French constitutional doctrine, at least until 2008, the sovereign people was supreme, not the constitution.¹⁸

The Weimar Constitution of 1919 brought Modern constitutionalism back to Germany where it had been introduced in the first half of the nineteenth century by bits and pieces, only to experience its fundamental rejection in 1867/1871 with the Bismarckian Constitution. But the choice the Weimar Constitution made was decisive. It did not opt for the American version of the supremacy of the constitution with its entrenched popular sovereignty. Instead, it adopted the French version of the supremacy of popular sovereignty encroaching on the constitution if necessary or convenient. The consequences were far-reaching.

In order to demonstrate the choice made by those who drafted the Weimar Constitution we need to understand the philosophy behind the principle of constitutional supremacy. The constitutional *locus classicus* for the supremacy of the constitution is art. VI of the US Constitution providing “This Constitution [...] shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”.¹⁹ The limits this principle imposed on law-making resulted in a clause concluding the article containing the Bill of Rights which appeared for the first time in the Constitution of Pennsylvania of 1790: “WE DECLARE that every thing in this article is excepted out of the general powers of government, and shall forever remain inviolate.”²⁰ Of particular interest is the clause the Constitution of Kentucky of 1792 added to this section, otherwise copied *verbatim* from the Pennsylvania document: “and that all laws contrary thereto or contrary to this constitution shall be void.”²¹ The Kentucky provision “that all laws [...] contrary to this constitution shall be void”, the first of its kind in any constitution, may have resounded in the ears of Chief Justice John Marshall when, in 1803, the US Supreme Court delivered its opinion on the laws of the Union to be open to judicial review. Marshall taking up Alexander Hamilton’s argument in the *Federalist* persuasively extolled the meaning of a higher-ranking constitution: “The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law; if the latter part

¹⁸ For a more detailed examination of the relationship between popular sovereignty and supremacy of the constitution, cf. Horst Dippel, “Angleterre, États-Unis, France: Constitutionnalisme et souveraineté populaire”, in: *L’An I et l’apprentissage de la démocratie. Actes du colloque organisée à Saint-Ouen les 21, 22, 23, 24 juin 1993*, ed. by BOURDERON, Roger, Saint-Denis: Éditions PSD, 1995, 537-559.

¹⁹ *Constitutional Documents of the United States of America, 1776-1860*, ed. by Horst Dippel, 8 vols., Berlin/Boston: De Gruyter, 2006-2011, I, 62.

²⁰ *Ibid.*, V, 369 (art. IX, sec. 26).

²¹ *Ibid.*, III, 21-22 (art. XII, sec. 28).

be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.”²² After the American Civil War numerous US laws were declared null and void by the Court because they contradicted the Constitution.

This constitutional philosophy remained alien to the Weimar constitution makers. Quite telling, the only article materially dealing with the Constitution appeared as penultimate article in the title dealing with national legislation. Art. 76 exclusively provided for amending the Constitution which required a supermajority of the *Reichstag*. Its proposed amendment might be passed over the objections of the *Reichsrat*. However, “If by popular petition a constitutional amendment is to be submitted to a referendum, it must be approved by a majority of the qualified voters” (art. 76, 1). While no article was devoted to defining the Constitution and its legal status, popular sovereignty intruded even the sole article on the Constitution. Marshall’s warning sounded prophetic and found its justification in the political practice of making laws which though not passed as amendments to the Constitution were to all intents and purposes meant to alter the Constitution, the so called *verfassungsdurchbrechende Gesetze* (constitution-breaking statutes).²³ The Constitution was neither superior higher law nor was it particularly entrenched. Even the individual rights it granted were not firmly secured as they might be suspended by the *Reichspräsident* according to art. 48, 2. Limited power in order to prevent the *Reichspräsident*, the government, or even the legislature from invading individual rights was no option. The state had to be powerful. Individual rights had not even been included in the original draft of the Constitution.²⁴ Wondering about the philosophy behind this construction, the tribute or, more adequately, the blame must be given to the *Staatsrecht* (state law), originating from the absolutist notion of sovereignty and lacking any democratic legitimation, which still held its sway on Germany.²⁵ According to its constitutional law was nothing more than an inferior partial law always strictly subservient to the positivistically construed state law (*Staatsrecht*). Paul Laband, who dominated the German state law since the late nineteenth century provided the argument which put its stamp on Germany well into the first half of the twentieth century: “The legal principles contained in the Constitution can only be amended under restricted conditions, but they do not have a higher authority than other laws”.²⁶

²² *Marbury v. Madison*, 1 *Cranch* 137, 177 (1803). Cf. *The Federalist*, ed. with Introduction and Notes by Jacob E. Cooke, Middletown CT: Wesleyan University Press, 1961, 524-529 (*The Federalist*, no. 78).

²³ Cf. GUSY, Christoph, *Die Weimarer Reichsverfassung*, Tübingen: Mohr Siebeck, 1997, 146-147; Ottmar Bühler, *Die Reichsverfassung vom 11. August 1919*, 2nd ed., Leipzig/Berlin: Teubner, 1927, 88-89.

²⁴ Cf. KÜHNE, Jörg-Detlef, *Die Entstehung der Weimarer Reichsverfassung. Grundlagen und anfängliche Geltung* (*Schriften des Bundesarchivs*, 78), Düsseldorf: Droste, 2018, 343.

²⁵ Cf. also GRAF, Friedrich Wilhelm, “Die Weimarer Reichsverfassung im deutschen Intellektuellendiskurs”, in: *Das Wagnis der Demokratie. Eine Anatomie der Weimarer Reichsverfassung*, ed. by Horst Dreier and Christian Waldhoff, Bonn: Bundeszentrale für politische Bildung, 2019, esp. 68-70; and more generally, Christoph Schönberger, *Der „German Approach“*. *Die deutsche Staatsrechtslehre im Wissenschaftsvergleich mit Beiträgen von Atsushi Takada und András Jakab*, Tübingen: Mohr Siebeck, 2015.

²⁶ LABAND, Paul, *Das Staatsrecht des Deutschen Reiches*, 4 vols., Tübingen: Laupp, 1876-1882, II, 38. On Laband, cf. Michael Stolleis, *Geschichte des öffentlichen Rechts in Deutschland*, 4 vols., Munich: Beck, 1988-2012, II, 341-348.

The Weimar Constitution transferred the supremacy it had denied to the Constitution to the people or at least purported to do so, even though it was not the first German constitution to install popular sovereignty as has been claimed.²⁷ The Constitution of Anhalt-Köthen of 1848 deserves this praise as it had declared: “All powers emanate from the people” (pt. I, § 5).²⁸ While the *Paulskirche* Constitution of 1849 had abstained from a similar provision, most of the German *Länder* constitutions set up in 1919 before 11 August 1919, the day the Weimar Constitution was signed, adopted the principle of popular sovereignty, such as the Preliminary Constitution of Hesse of 20 February 1919 (art. 3), of Bavaria of 17 March 1919 (§§ 2 and 3), and of Saxony-Altenburg of 27 March 1919 (art. 3), the Constitution of Baden of 21 March 1919 (preamble and § 2), of Saxony-Weimar-Eisenach of 19 May 1919 (§ 3), of Württemberg of 20 May 1919 (§ 3), of Oldenburg of 17 June 1919 (§ 3), and of Anhalt of 18 July 1919 (§ 2).²⁹ Regarding this plethora of proclamations of popular sovereignty, the preamble of the Weimar Constitution fell into line with the widespread climate of opinion after the revolution: “The German people [...] has given itself this constitution”, repeated in its final art. 181: “The German people has, through its Constituent Assembly, determined upon and decreed this constitution.” The legitimation for this act delivered art. 1: “The political power emanates from the people.” It was a bold statement without further theoretical or philosophical underpinnings, like the *Länder* constitutions and the Austrian Constitution of 1920 but less expressive than the French constitutions of 1791 and, even more so, of 1793, or for that matter than the German *Grundgesetz* of 1949 or the French Constitution of 1958. Helmut Ridder criticized this failure to democratically legitimize popular sovereignty and interpreted this lack as the continuation of the absolutist concept of sovereignty.³⁰ Despite these shortcomings and the failure to strengthen representative government as core principle of the Constitution even as it might be supported by elements of direct democracy, popular sovereignty was made operative in articles 73-76 of the Constitution. Art. 73 provided three scenarios. A first clause granted the *Reichspräsident* the power to appeal to the people in order to prevent a bill passed by the *Reichstag* from becoming law: “A bill passed by the Reichstag shall, before its publication, be subject to a referendum if the President of the Reich, within a month, so decides”. The second clause offered the possibility for the people to express itself on a bill passed by the *Reichstag* before the *Reichspräsident* signed it into law: “A law, the publication of which has been deferred on the request of one-third of the members of the Reichstag shall be subject to a referendum upon

²⁷ Cf. Waldhoff, “Folgen — Lehren — Rezeptionen”, 306-307.

²⁸ *Deutsche Verfassungsdokumente 1806-1849*, ed. by Werner Heun, 6 vols., Munich: Saur, 2006-2008, I, 175. The provision was abolished in 1850 (*ibid.*, 188).

²⁹ For the individual texts, cf. *Weimarer Landesverfassungen. Die Verfassungsurkunden der deutschen Freistaaten 1918-1933. Textausgabe mit Sachverzeichnis und einer Einführung*, ed. by Fabian Wittreck, Tübingen: Mohr Siebeck, 2004.

³⁰ RIDDER, Helmut, “Wie und warum (schon) Weimar die Demokratie verfehlte”, in: *Zentrum und Peripherie: Zusammenhänge — Fragmentierungen — Neuansätze. Festschrift für Richard Bäuml zum 65. Geburtstag*, ed. by Roman Herzog, Chur and Zurich, Ruediger, 1992, esp. 87-93.

the request of one-twentieth of the qualified voters” (art. 73, 2). Finally, the people should be able to demand the passage of a law: “A referendum shall also take place, if one-tenth of the qualified voters petition for the submission of a bill. Such petition must be based on a fully elaborated bill. The bill shall be submitted to the Reichstag by the Ministry accompanied by an expression of its views. The referendum shall not take place if the bill petitioned for is accepted by the Reichstag without amendment” (art. 73, 3). The rules for a referendum were to be detailed in a subsequent statute.³¹

If the *Reichsrat* rejected a bill passed by the *Reichstag* the *Reichspräsident* might call for a referendum. Otherwise the bill was dead. In case, however, the *Reichstag* overruled the opposition of the *Reichsrat* by a two-thirds majority and the *Reichspräsident* was not ready to sign the bill into law he must call for a referendum (art. 74, 2).

Art. 75 is the shortest of the four articles and, according to Gerhard Anschütz,³² refers to art. 73, 3: “A referendum can annul a resolution of the Reichstag only when a majority of the qualified voters participate.” Art. 76, as mentioned above, deals with amending the Constitution though in this case, and only in this case, the people may take the initiative. But the majority of the qualified voters must approve any such amendment.

None of these central articles made the direct involvement of the people in the legislative process automatic and mandatory, as the Constitution of Pennsylvania of 1776 and the French Constitution of 1793 had provided. The question is whether it is justified to call this involvement of the people optional (*fakultativ*), as Anschütz has done.³³ The generally recognized point of reference for optional referenda was the Swiss Constitution of 1874: “Federal laws and generally binding federal decrees which are not of an urgent nature shall additionally be submitted to the people for approval or rejection if 30,000 Swiss citizens entitled to vote in eight Cantons so demand” (art. 89, 2).³⁴ The Weimar deviation from this model is telling and may be understood as a consequence of the fact that the constitution makers never thoroughly discussed direct democracy, as Jörg-Detlef Kühne has underlined.³⁵ While in Switzerland the sovereign people act on its own and may scrutinize any federal law or decree without any intervening institution—with only a small number of qualified citizens, far less than 5 percent of the adult population, sufficient to set the process in motion—the possibility of the German people to take action according to the Weimar Constitution depended on the *Reichspräsident* and/or the *Reichstag*. Either of them had to call on the people or

³¹ On art. 73, cf. ANSCHÜTZ, Gerhard, *Die Verfassung des Deutschen Reichs vom 11. August 1919. Ein Kommentar für Wissenschaft und Praxis* (Stilke's Rechtsbibliothek Nr. 1), 3rd and 4th ed., Berlin: Stilke, 1926,222-226.

³² *Ibid.*, 228.

³³ *Ibid.*, 223.

³⁴ Own translation of the text as published by Graber, *Wege zur direkten Demokratie in der Schweiz*, 461. In the present Swiss Constitution of 1999, the quorum is 50,000 Swiss citizens entitled to vote or eight Cantons (art. 141,1).

³⁵ KÜHNE, *Die Entstehung der Weimarer Reichsverfassung*, 209.

make room for their involvement through their deliberate inaction. The general right of the Swiss people guaranteed by the constitution degenerated to a mere possibility in the Weimar Constitution close to a mock provision, as other constitutional organs had to step in to open up this option, but even then, for starting a petition or for a successful referendum, the requested quorum was prohibitively high. No wonder referenda on a national level almost never happened or succeeded.³⁶ Art. 76, 1 dealing exclusively with amending the constitution was the only exception though, again, the stakes were high with a required approval rate of the majority of the qualified voters.

Nevertheless, it was exactly these articles 73-76 together with art. 43 (on removing the *Reichspräsident* from office), strictly conditioned as they were and almost never applied in fourteen years, which contributed to the general impression of the Weimar Constitution as excessively emphasizing popular sovereignty.³⁷ This impression was enhanced by the well-known claim of the fathers of the Constitution to have created the most democratic constitution existing.³⁸ Gertrude Lübbecke-Wolff, however, is certainly right to point out that the Weimar Constitution was, instead, “shaped by reservations about the real *demos* and parliament as its representation”.³⁹ Weimar’s purported excessive popular sovereignty comes close to window dressing.

No doubt, the Weimar Constitution had its merits. It more than doubled the electorate, extending the right to vote to all Germans, male and female, above twenty years of age. It insisted on gender equality,⁴⁰ and it introduced a remarkable number of social rights.⁴¹ But despite its progressive elements, often connected with the political program of the Social Democrats (SPD), legal and constitutional thinking had to fight hard to shake off the authoritarian traditions of the past. The traditional *Staatsrecht*, firmly embedded in the conservative, anti-parliamentary and anti-democratic part of academia,⁴² was a paralyzing burden.

³⁶ GUSY, Christoph, “100 Jahre Weimarer Verfassung”, in: *Historia Constitucional*, 20 (2019), 218-221.

³⁷ On the ambivalences of Weimar “Rousseauism”, cf. Kühne, *Die Entstehung der Weimarer Reichsverfassung*, esp. 194-212.

³⁸ Cf. KÜHNE, *Die Entstehung der Weimarer Reichsverfassung*, 57, 143, 196, 208; Peter Graf Kielmansegg, “Der Reichspräsident – ein republikanischer Monarch?“, in: *Das Wagnis der Demokratie. Eine Anatomie der Weimarer Reichsverfassung*, ed. by Horst Dreier and Christian Waldhoff, Bonn: Bundeszentrale für politische Bildung, 2019, 223; Gusy, “100 Jahre Weimarer Verfassung”, 221.

³⁹ LÜBBE-WOLFF, Gertrude, “Das Demokratiekonzept der Weimarer Reichsverfassung”, in: *Das Wagnis der Demokratie. Eine Anatomie der Weimarer Reichsverfassung*, ed. by Horst Dreier and Christian Waldhoff, Bonn: Bundeszentrale für politische Bildung, 2019, 148. A shortened version of the article was published in Spanish translation in: *Historia constitucional*, 20 (2019), 253-274.

⁴⁰ Cf. CANKIK, Pascale, “Der Kampf um Gleichberechtigung als Voraussetzung der demokratischen Republik”, in: *Das Wagnis der Demokratie. Eine Anatomie der Weimarer Reichsverfassung*, ed. by Horst Dreier and Christian Waldhoff, Bonn: Bundeszentrale für politische Bildung, 2019, 151-174.

⁴¹ Cf. STOLLEIS, Michael, “Die soziale Programmatik der Weimarer Reichsverfassung”, in: *Das Wagnis der Demokratie. Eine Anatomie der Weimarer Reichsverfassung*, ed. by Horst Dreier and Christian Waldhoff, Bonn: Bundeszentrale für politische Bildung, 2019, 195-218. The article appeared in Spanish translation in: *Historia constitucional*, 20 (2019), 233-251.

⁴² Cf. HOPPE, Bernd, *Von der parlamentarischen Demokratie zum Präsidialstaat. Verfassungsentwicklung am Beispiel der Kabinettsbildung in der Weimarer Republik*, Berlin: Duncker & Humblot, 1998, esp. 204-262.

The intention to establish Modern constitutionalism in Germany, real as it was, was, however, blurred by the tendency to follow the French version of it with the constitution constantly subservient to the sovereign people. But instead of eliminating the flaws of this model —as the French Constitution of 1958 and its unfolding practice over the subsequent decades have done— the Weimar Constitution enlarged on them decisively, surpassing in its basic philosophy and constitutional design even the Constitution of the Second Republic of 1848 with its fatal error. In contrast to the French predecessor, it additionally weakened the principle of representative government only to counterbalance it through its —largely unfounded— claim of strengthening popular sovereignty, two principles, according to Oliver Lepsius, at odds with each other.⁴³ Finally, it installed a widely unchecked though powerful *Reichspräsident*, a construction again surpassing the French example, while the Constitution itself was not entrenched. No constitutional court was established to protect the Constitution and to enforce limits on governmental power and let the law prevail. The consequences were an unbalanced constitution which did not automatically lead to disaster. Under normal conditions and with more experience at hand it might have worked well and over time corrected its major errors. But a “good” constitution as the Weimar Constitution has been classified recently,⁴⁴ should provide the means to fend off even severe crises through providing constitutional solutions. The Weimar Constitution due to its construction lacking the necessary instruments, offered nothing to prevent the disaster from happening.⁴⁵ This was its greatest fault.

⁴³ Cf. LEPSIUS, Oliver, “Volkssouveränität und Demokratiebegriﬀ in der Weimarer Republik”, in: *Historia Constitucional*, 20 (2019), 275-296.

⁴⁴ GUSY, “100 Jahre Weimarer Verfassung”, esp. 206, 231.

⁴⁵ Cf., though arguing differently, Dieter Grimm, “Weimars Ende und Untergang”, in: *Das Wagnis der Demokratie. Eine Anatomie der Weimarer Reichsverfassung*, ed. by DREIER, Horst and WALDHOFF, Christian, Bonn: Bundeszentrale für politische Bildung, 2019, esp. 275-288.