

## 9. The Concept of Party Government in the Constitutional System of Germany

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### I. Historic Foundation

The German party history, particularly in the 19th century, shows that, from the beginning, German political parties were social associations representing different political streams. Generally, parties were seen as a part of society but not as a part of government.<sup>1)</sup> Nevertheless, political parties played an active role in the constitutional reality of the German state and, finally, were able to fight their way into the centre of political power. As laid out below, the constitutional history of the German Empire (1871 – 1918) and the Weimar Republic (1919 – 1933) serve as proof for this development.

#### 1. The Constitution of the German Empire

The Constitution of the German Empire enacted in 1871 was the legal foundation for several important constitutional bodies.<sup>2)</sup> Among them were the German Emperor ('Kaiser') representing the Empire in foreign relations and acting as commander-in-chief of the army and the navy<sup>3)</sup>, the Chancellor of the Empire ('Reichskanzler') directing government affairs<sup>4)</sup> and the Imperial Diet ('Reichstag') constituting the parliament of the Empire elected in universal and direct polls.<sup>5)</sup> However, there was no specific provision concerning political parties in the Constitution. One of the main reasons for the absence of such a provision was that the theory of government at that time defined the state as a political entity forming its opinion and executing it, whereas it defined society as separate private sphere with a distance

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1) See Werner Conze, *Die deutschen Parteien in der Staatsverfassung vor 1933* in Matthias and Morsey (eds.), *Das Ende der Parteien 1933* (Düsseldorf 1960) 1, 9; Heinrich Triepel, *Die Staatsverfassung und die politischen Parteien* (Berlin 1928) 29 – 30.

2) See Klaus Stern, *Das Staatsrecht der Bundesrepublik Deutschland* (vol. 5, München 2000) 367 ff; Werner Frotzcher/Bodo Pieroth, *Verfassungsgeschichte* (9th edn., München 2010) § 13 [424 ff]; Michael Kotulla, *Deutsche Verfassungsgeschichte* (Berlin 2008) 543 ff.

3) Art 11, 53.1, 63.1 of the Constitution of the German Empire.

4) Art 15.1 of the Constitution of the German Empire.

5) Art 20 of the Constitution of the German Empire.

to the state.<sup>6)</sup> Therefore, the political party as part of society was considered a private association, but not an institution under constitutional law. From this point of view, political parties, if at all, were tolerated as extra-constitutional phenomenon.

However, the parties of the German Empire were not only private associations, but also participants in constitutional affairs.<sup>7)</sup> They organised themselves in parliamentary groups in the Imperial Diet and succeeded in exerting political influence when the Imperial Diet exercised its power. Some of the relevant competences of the Imperial Diet were the right to legislate, the right to propose bills and the budgetary power.<sup>8)</sup> Particularly the budgetary power proved to be an effective instrument enabling the parliamentary groups to lead the political fight against the Chancellor and the executive power. The political influence of the parties was limited, though. The parties had no say in the appointment of the Chancellor of the Empire since he was appointed and dismissed by the Emperor himself.<sup>9)</sup> Furthermore, the Chancellor was not accountable to the Imperial Diet and could not be toppled by a vote of no confidence. On the other side, there were several conflicts between the executive power and the parties, especially in the era of Otto von Bismarck who was the first German Chancellor from 1871 to 1890.<sup>10)</sup> All in all, the German Empire was far from a genuine concept of party government.

## 2. The Weimar Constitution

After the First World War (1914 – 1918), the monarchy collapsed and the Weimar Republic was founded. According to Art 1 of the Weimar Constitution enacted in 1919, the German Empire was a republic in which the supreme power emanated from the people. The centre of the Constitution consisted of two constitutional bodies: the Imperial Diet ('Reichstag') and the President of the Empire ('Reichspräsident'). The Imperial Diet represented the German people.<sup>11)</sup> The representatives were elected by universal, equal, direct, and secret suffrage pursuant to the principle of proportional representation.<sup>12)</sup> In contrast to the Constitution of the Empire, the Weimar Constitution stipulated that the Government of the Empire, i.e. the Chancellor and the Ministers, is dependent on the confidence of the parliament in order to exercise its mandate.<sup>13)</sup> As a consequence, the Government had to rely on the parliamentary majority. The Chancellor, and, at his request, the Ministers were appointed and dismissed by

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6) Christoph Gusy, *Die Lehre vom Parteienstaat in der Weimarer Republik* (Baden-Baden 1993) 14; Hans Heinrich Rupp, *Die Unterscheidung von Staat und Gesellschaft*, in Isensee and Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (vol. 2, 3rd edn., Heidelberg 2004) § 31 [4 ff].

7) Foroud Shirvani, *Die politischen Parteien im Staatsrecht des Deutschen Kaiserreiches* (2006) 13 *Mitteilungen des Instituts für Deutsches und Europäisches Parteienrecht und Parteienforschung* 77, 81 ff.

8) Art 5, 23, 69 of the Constitution of the German Empire.

9) Art 15.1 of the Constitution of the German Empire.

10) Shirvani (n 7), 83 – 84.

11) Art 20 of Weimar Constitution.

12) Art 22.1 of Weimar Constitution.

13) Art 54 sentence 1 of Weimar Constitution.

the President of the Empire.<sup>14)</sup> The President was the other main constitutional body in the Weimar Republic. He was elected directly by the people<sup>15)</sup> and acted as commander-in-chief of the armed forces.<sup>16)</sup> Moreover, he had the right to dissolve the parliament without stating a reason<sup>17)</sup> and the power of emergency in crises.<sup>18)</sup>

Just like the Constitution of the German Empire, the Weimar Constitution didn't contain explicit tasks for political parties. Only Art 130.1 Weimar Constitution contains the phrase that civil servants serve society in its entirety, while they do not serve any party. Nonetheless, the Weimar Constitution led to a clearly stronger position of the parties:<sup>19)</sup> Art 124.1 Weimar Constitution setting forth the freedom of association for all Germans was the legal basis for the freedom to found parties. More importantly, the Constitution prescribed the principle of proportional representation in elections (Art 22.1). Due to this electoral system, the relative strengths of the parties were reflected in the composition of parliament.<sup>20)</sup> Furthermore, the government required the confidence of parliament. Thus, the parliament and the parties represented therein were in a position to overthrow the government.<sup>21)</sup> In political reality, the Government of the Empire was a party government. However, these party governments of the Weimar era often were unstable. One of the reasons was the destructive no-confidence vote provided for in Art 54 Weimar Constitution authorising the subversion of a government without the need for the simultaneous formation of a new government. In addition, the proportional representation enhanced party fragmentation as there were no electoral thresholds for small parties to enter parliament. Thus, the formation of a government often was not easy.

## II. The Role of Political Parties under German Basic Law

Since the enactment of the German Basic Law ('Grundgesetz') in 1949, there is a constitutional provision explicitly dedicated to parties. According to Art 21.1 Basic Law, political parties participate in forming the political will of the people; they can be founded freely. Art 21 Basic Law confers the status of a constitutional institution to parties and acknowledges them as necessary instruments in the formation of the political will.<sup>22)</sup> In the

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14) Art 53 of Weimar Constitution.

15) Art 41.1 of Weimar Constitution.

16) Art 47 of Weimar Constitution.

17) Art 25.1 of Weimar Constitution.

18) Art 48 of Weimar Constitution.

19) See Christoph Gusy, *Die Weimarer Reichsverfassung* (Tübingen 1997) 121 ff; Seog-Yun Song, *Politische Parteien und Verbände in der Verfassungsrechtslehre der Weimarer Republik* (Berlin 1996) 118 ff.; Hans Hugo Klein in Maunz and Dürig, *Grundgesetz, Kommentar* (München 2001) Art 21 [65 ff].

20) Gerhard Anschütz, *Die Verfassung des Deutschen Reichs* (14th edn., Berlin 1933 [reprint 1968]) 186 – 187.

21) Art 54 sentence 2 of Weimar Constitution.

22) Decisions of the German Federal Constitutional Court: BVerfGE 20, 56 (100); E 73, 40 (85); E 107, 339 (361); E 111, 54 (85); E 121, 30 (54).

constitutional system of the Federal Republic of Germany, parties have the task to mediate between government and society. They are freely established groups rooted in society influencing the governmental sphere. Pursuant to Sec. 2.1 of the Political Parties Act, parties are associations of citizens which, on a continuing basis or for a longer period of time, seek to influence the formation of the political will at the federal or state level ('Bundesland') and to participate in representing the people in the federal German parliament ('Bundestag') or the parliament of a state. Participation in elections is the genuine field of parties' activities. Since electoral law assumes the existence of political parties for organising and holding elections<sup>23)</sup>, parties are often paraphrased as associations preparing elections. According to the jurisprudence of the Federal Constitutional Court ('Bundesverfassungsgericht'), parties are political units that are necessary in a democracy in order to unite voters into politically active groups enabling them to influence the government agenda in an effective way.<sup>24)</sup>

However, the role of parties is not confined to participating in elections. Beyond elections, parties have several other tasks.<sup>25)</sup> They are supposed to instigate a process of communication with citizens and make sure that adequate communication channels between the people and constitutional bodies exist. They also should collect and tie together different social and political opinions, develop political programmes and enhance the participation of citizens in political life.<sup>26)</sup> Furthermore, parties should recruit citizens who are willing to assume public responsibility. Internally, party members ought to discuss different political opinions and establish a platform to compete for concepts with majority appeal. Externally, parties ought to contribute their opinions to the public decision-making process<sup>27)</sup> and put them into practice once they have governmental powers. Performing these tasks, parties live up to their role as mediator and ensure a continuing active relationship between the people and state institutions.<sup>28)</sup>

### III. The Constitutional Concept of Party Government

As mentioned, parties achieve their special position in the representative democratic system by introducing political initiatives and programmes to constitutional bodies and providing a permanent transfer of interests from the people to the government. The logic of their actions and organisation is geared towards steering the political decision-making bodies. Since, in the concept of parliamentary democracy, parties are the main pillars of government filling

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23) BVerfGE 20, 56 (113); E 61, 1 (11); E 91, 262 (268).

24) BVerfGE 11, 266 (273).

25) See Martin Morlok in Dreier (ed.), *Grundgesetz, Kommentar* (vol. 2, 2nd edn., Tübingen 2006) Art 21 [19 ff]; Klein (n 19) Art 21 [162 ff]; Dieter Grimm, *Politische Parteien*, in Benda, Maihofer and Vogel (eds.), *Handbuch des Verfassungsrechts der Bundesrepublik Deutschland* (2nd edn., Berlin 1994) § 14 [12 ff].

26) Hartmut Maurer, *Staatsrecht I* (6th edn., München 2010) § 11 [14].

27) See § 1.2 of the Political Parties Act.

28) See § 1.2 of the Political Parties Act.

the leading positions with their own representatives, they are called ‘creation agencies’ (‘Kreationsorgane’) of the democratic state.<sup>29)</sup> In political science, the concept of political leadership by parties, in which they have a central position in interest mediation and governing, is paraphrased as ‘party government’. Accordingly, parties are responsible for the operational capability of parliamentary business, the selection of members of government and the coordination of government affairs.<sup>30)</sup>

Basic Law, however, just like the Weimar Constitution,<sup>31)</sup> hasn’t explicitly formalised the concept of parliamentary party government. Art 21.1 sentence 1 Basic Law mandates parties to participate in forming the political will of the ‘people’ and not of the ‘constitutional bodies’. Except for Art 53a.1 sentence 2 Basic Law which assumes the existence of parliamentary party groups in the ‘Bundestag’, the Constitution is silent on parties in parliament and government. The German jurisprudence gives diverse answers to the question on the legal basis of the existence of parties in government. Some argue that the influence of parties on government is self-evident in parliamentary democracy. Therefore, the task stipulated in Art 21.1 sentence 1 Basic Law would be geared, beyond its wording, towards government. This opinion deducts from Art 21.1 sentence 1 Basic Law and the principle of democracy (Art 20.2 Basic Law) the mandate of parties to participate in public decision-making.<sup>32)</sup>

Against this point of view speaks that the constitutional mandate in Art 21.1 sentence 1 Basic Law applies to all organisations within the meaning of the term ‘political party’. Hence, this mandate cannot be expanded to the whole public decision-making process. The possibility to participate directly in public decision-making is reserved to those parties that entered parliament by virtue of electoral legitimacy. All other parties are restricted to participating in the formation of political will outside the constitutional bodies.<sup>33)</sup> Therefore, the legitimacy of the presence of parties in parliament or in government cannot be based on Art 21.1 sentence 1 Basic Law. It has to be based on other constitutional provisions and principles.

One of these principles is the principle of representative democracy. It provides that the German people as democratic sovereign shall not reign directly but through parliament as leading and autonomous constitutional body (see Art 38 ff Basic Law). The parties mandated

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29) Gustav Radbruch, Die politischen Parteien im System des deutschen Verfassungsrechts, in: Anschütz and Thoma (eds.), *Handbuch des Deutschen Staatsrechts* (vol. 1, Tübingen 1998 [reprint of the 1st edn. 1930]) 285, 288.

30) Alf Mintzel, Auf der Suche nach der Wirklichkeit der Großparteien in der Bundesrepublik Deutschland, in Klingemann and Luthardt (eds.), *Wohlfahrtsstaat, Sozialstruktur und Verfassungsanalyse* (Opladen 1993) 66, 72; Uwe Jun, Parteien und Parteiensystem, in Helms and Jun (eds.), *Politische Theorie und Regierungslehre* (Frankfurt am Main 2004) 163, 182 – 183.

31) See Triepel (n 1) 26 – 27.

32) Klein (n 19) Art 21 [171, 172, 196]; Karl-Heinz Seifert, *Die politischen Parteien im Recht der Bundesrepublik Deutschland* (Köln 1975) 88.

33) Jörn Ipsen in Sachs (ed.), *Grundgesetz, Kommentar* (5th edn., München 2009) Art 21 [9 ff]; Wiebke Wietschel, *Der Parteibegriff* (Baden-Baden 1996) 160 – 161; Roman Herzog, *Strukturmängel der Verfassung?* (Stuttgart 2000) 24.

by the people in elections rather act as switch-points and mediating institutions of the representative system.<sup>34)</sup> The members of parliament belonging to the respective parties found groups in parliament. Besides, Art 63.1 Basic Law shows an alliance between government and majoritarian parliamentary groups. According to this provision, the Federal Chancellor ('Bundeskanzler') shall be elected by parliament upon the proposal by the Federal President ('Bundespräsident'). Because of this electoral mechanism, the Federal Chancellor needs the confidence of the majoritarian parliamentary groups in order to start his office. Also, the members of government, i.e. the Federal Ministers, are usually recruited from within the parliamentary groups. Hence, each Federal Government ('Bundesregierung') is a party government.<sup>35)</sup> The political parties possessing the majority of seats in parliament and, thus, determining the government are the main entities connecting the people with government.<sup>36)</sup> These considerations illustrate that the concept of party government is not enshrined explicitly in German Basic Law, but can be deduced from a synopsis of different provisions and parliamentary principles.

#### **IV. Current Questions regarding Party Government in the Constitutional System of Germany**

The statements above showed that the concept of party government has a legal basis in German Basic Law. It also should be made clear that not each political party can participate in the formation of government, i.e. not each party can be a government party. One of the reasons is that, usually, only few parties succeed in entering parliament. In German electoral law, there is a legal threshold that only allows those parties to enter parliament that have obtained at least five percent of valid second votes or have won a seat in at least three constituencies (Sec. 6.6 sentence 1 Federal Elections Act). This currently leads to the fact that five parties are represented in the German 'Bundestag'.

If you look at the relationship between parliamentary and non-parliamentary parties, you will find that parliamentary parties have no interest in new competitors gaining ground in parliament. Besides, parliamentary parties, i.e. government parties and opposition parties, have a better position in competing with their non-parliamentary rivals. The electoral threshold, the high attention paid to parliamentary parties in media and the possibility to make election gifts are some factors improving their position.<sup>37)</sup> Because of this, it is very important that

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34) Ernst Gottfried Mahrenholz, *Bundesverfassungsgericht und Parteienstaatlichkeit*, in: Klaus Stern (ed.), *40 Jahre Grundgesetz* (München 1990) 93, 96; Uwe Volkmann, in Friauf and Höfling (eds.), *Berliner Kommentar zum Grundgesetz* (Berlin 2001) Art 21 [17]; Rainer Stentzel, *Integrationsziel Parteidemokratie* (Baden-Baden 2002) 54 ff.

35) Georg Hermes in Dreier (ed.), *Grundgesetz, Kommentar* (vol. 2, 2nd edn., Tübingen 2006) Art 63 [10]; Herzog (n 33) 26 ff.

36) See BVerfGE 52, 63 (83).

37) Klein (n 19) Art 21 [301]; Andreas Schulze, *Kleinparteien in Deutschland* (Wiesbaden 2004) 343 ff;

the principle of free and fair party competition is maintained and legally enforced. Otherwise, a closed-shop party system would emerge and the party system would become incusted. The legal instrument to enforce competition in the German array of parties is the maxim of equal opportunity.<sup>38)</sup> Due to this maxim, the legislator must not falsify the current competitive situation between the parties and distort the process of forming the will of the people.<sup>39)</sup> Furthermore, if the state distributes public funds to parties, it is not allowed to discriminate against non-parliamentary parties. Distinctions between parties are allowed. The significant distinctive criterion, however, has to be the level of the popularity of parties, for example as expressed in election results. The Federal Constitutional Court safeguards the enforcement of this maxim.

Another current question in the German party system is the extension of the array of parties, the impairment of the big parties and the consequence of these phenomena on the formation of party governments. For a long time, governments in Germany could be built by a big catch-all party ('Volkspartei'), i.e. the Social Democratic Party ('SPD') or the Christian Democratic Union ('CDU'), together with a smaller parliamentary party, i.e. the Free Democratic Party ('FDP') or the Green Party ('Die Grünen').<sup>40)</sup> Both big parties, thus, had a potential coalition partner and were able to form a two-party-coalition. This coalition option still exists. The German parties, though, have undergone several structural changes since the 1980ies: The number of members of the big parliamentary parties has decreased in the last decades. Their organisational potential has abated. Besides, the election turnout in Germany has continued to go down. The self-identification of citizens with political parties has declined, while the dissatisfaction of citizens with the performance of parties has increased.<sup>41)</sup> Simultaneously, the attractiveness of the big parties in elections has dropped. Hence, it is difficult for them to achieve a high percentage of votes, like in the 1970ies in West Germany, and form two-party-coalitions. A viable option to solve this dilemma in the last years was the grand coalition formed by the Christian Democratic Union and the Social Democratic Party from 2005 to 2009. Besides, there are discussions regarding the introduction of majoritarian elements in the electoral system.<sup>42)</sup> The proponents of this strategy expect clear majority

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Dirk van den Boom, *Politik diesseits der Macht?* (Opladen 1999) 215 ff.

38) See Morlok (n 25) Art 21 [75 ff]; Seifert (n 32) 131 ff; Klein (n 19) Art 21 [296 ff].

39) BVerfGE 73, 40 (89); E 78, 350 (358); E 111, 54 (105); E 120, 82 (105).

40) See Eckhard Jesse, Die Parteien im westlichen Deutschland von 1945 bis zur deutschen Einheit 1990 in: Gabriel, Niedermayer and Stöss (eds.) *Parteiendemokratie in Deutschland* (2nd edn., Bonn 2001) 59, 70 ff.

41) Elmar Wiesendahl, Wie geht es weiter mit den Großparteien in Deutschland? (1998) B 1-2 *Aus Politik und Zeitgeschichte* 13 ff; Jürgen Dittberner, Die deutschen Parteien: Defizite und Reformideen (2004) B 40 *Aus Politik und Zeitgeschichte* 12 ff; Hubert Kleinert, Abstieg der Parteiendemokratie (2007) 35-36 *Aus Politik und Zeitgeschichte* 3 ff.

42) Rupert Scholz, *Deutschland – In guter Verfassung?* (Heidelberg 2004) 97 – 98; Hans Herbert v. Arnim, Wahl ohne Auswahl. Die Parteien und nicht die Bürger bestimmen die Abgeordneten (2004) *Zeitschrift für Rechtspolitik* 115, 118; Gerd Andreas Strohmeier, Ein Plädoyer für die „gemäßigte Mehrheitswahl“: optimale Lösung für Deutschland, Vorbild für Österreich und andere Demokratien (2007) *Zeitschrift für Parlamentsfragen* 578 ff.

situations in parliament after elections. They argue that, this way, voters could give clear governmental mandates to one big party not being dependent on coalition partners. However, the political proposals concerning this matter have not been successful so far.

## **V. Conclusion**

German parties acted in different constitutional systems and under different political frameworks in the 19th and 20th century. In the German Empire, parties were political organisations on the social and parliamentary level, but were not mentioned in the Constitution and had no influence on the appointment of members of the executive power. In the Weimar Republic, they belonged to the essential powers in the political process and directly participated in the formation of government. However, certain legal constructions of the Weimar Constitution, for example the electoral system, prevented stable party governments from being built frequently. In the Federal Republic of Germany, parties are constitutional institutions responsible for the formation of government. In the just over-sixty years of history of the Federal Republic of Germany, stable party governments were the rule. The big parliamentary parties, though, have been losing acceptance in the electorate in recent decades. Their attractiveness has declined. Concurrently, the array of parties has expanded from a three-party system to a five-party system on the federal level since the 1980ies. These factors could hamper the formation of two-party coalitions consisting of one big and one small parliamentary party in the future.