

## The Bundestag in the 21<sup>st</sup> century: German parliamentarism on a new path

*Gerhard Loewenberg*

Unlike the large body of research examining the failures of parliamentary government in Europe in the first half of the 20<sup>th</sup> century, there has been little systematic attention to the remarkable success of parliamentary government in the last 70 years in many European countries and particularly in Germany. The development of the constitutional position of the German Bundestag into the strongest parliament in Europe, imitated as a model in several post-Soviet democracies, is especially remarkable, given the historic, tragic discontinuity of parliamentarism in Germany. How can we explain this unanticipated development, to which *Suzanne S. Schüttemeyer's* scholarship and editorial career have made such a major contribution? This essay is an attempt to identify the factors that produced this impressive revival of German parliamentarism, showing that institutional development is not necessarily path-dependent.

The path of German parliamentarism exhibited sharp discontinuities even before the Enabling Act of 1933 by which the Weimar Reichstag surrendered to the *Hitler* regime. The tradition of parliamentary government in Germany was always mixed and was certainly problematical at the outset of its post-World War II revival. The theory of path dependence would have predicted that a revived parliamentarism would be fragile at best. In the face of the destruction caused by war, unconditional surrender, and the division of the country, parliamentary government would be exposed to challenges as great as those of the depression and of the radical political movements of the 1920 and 1930s.

The theory of path dependence assumes that past institutional characteristics are self-reinforcing, that departure from past characteristics are costly to the participants, because they entail abandonment of vested interests, of political habits, and of existing legal arrangements.<sup>1</sup> But path dependence does not consider that a “path” can be utterly destroyed. This is what happened in Germany between 1933 and 1945. The interruption of parliamentary government was extremely severe, symbolized by the mysteriously set fire on February 27, 1933 which left in ruins the building that had housed both the Reichstag of the Empire and of the Weimar Republic. What the historian *David Schoenbaum* called “Hitler’s Social Revolution”<sup>2</sup> had destroyed many existing interest groups, sub-national identities, churches, the army, social class-based elites and all the political parties of the Weimar Republic. In this setting, there were few interests committed to the parliamentary institution

- 1 See *Tracy Hoffmann Slagter / Gerhard Loewenberg*, Path Dependence as an Explanation of the Institutional Stability of the German Parliament, in: *German Politics*, vol. 18 (2009), no. 4, pp. 469 – 484, pp. 470 f.
- 2 *David Schoenbaum*, *Hitler’s Social Revolution: Class and Status in Nazi Germany, 1933-1939*, New York 1966.

of the past and few costs of departing from the “path” of the past. As a result, the new beginnings of parliamentarism in Germany after 1945 were shaped by contemporary events, by contingencies whose effect only became clear after they had become influential. Dire predictions about the fragility of German parliamentarism, reflecting historical precedents, proved unexpectedly wrong.

The re-establishment of a democratic parliament in Germany after 1945 and its powerful position in the German system of government is therefore the result of the confluence of a series of contingent factors that reinforced each other. Best known among these was the coincidence between the aims of the military governments occupying the western zones of Germany and the aims of pre-war German political leaders who resurfaced. They both shared an interest in re-establishing stable government in their territories as a bulwark against the Soviet occupation of the eastern zones. Therefore, just three years after Germany’s unconditional surrender to the Allies, German political leaders had received authority from the Military Governors, with few restrictions, to establish a new German political system. This unexpectedly gave German parliamentarism a second chance.

The organization of the military occupation of Germany constituted another contingent factor. The East-West division between the Soviet and the Allied zones of occupation destroyed Prussia as a political entity while the tripartite division of the Western zones reinforced the German tradition of federalism without recreating the imbalance caused by Prussia’s overwhelming size. The sequence in which the Military Governors delegated first administrative and soon thereafter political power to Germans in their zones of occupation established German state governments. While these states did not entirely correspond to the boundaries of the prewar states, they did give the state level of government a priority. That was then reinforced by the Military Governors’ decision to delegate the preparation of a Basic Law for the entire western zones of occupation to a Parliamentary Council selected by these states.

A final contingent factor consisted of the composition of this constitution-making Council. In a rush to proceed, the choice of members of the Council was turned over to the existing state legislatures, which reflected the results of earlier elections dominated by the four political parties that the Military Governors had licensed in their zones of occupation. That limited the problem of party fractionalization in the Council and reinforced its federal composition. It also gave “first mover” advantage to those four political parties which had first operated in postwar Germany. Only one of these, the Social Democratic Party on the left of the political spectrum, had been a party in the Weimar Republic. The three others were new formations, which had emerged from various previous parties. Thus the party organization of the center and right of postwar German politics was new.<sup>3</sup>

Among the 65 members of the Council, eleven had been members of the Reichstag of the Weimar Republic and 22 had been members of state parliaments in that troubled period. Many of the framers were therefore personally aware of the flaws of the Weimar Constitution. The prime ministers of the new German states had picked 22 constitutional experts—two from each state, legal scholars, civil servants, political scientists—and instructed them to prepare a series of proposals that could be laid before the Parliamentary Council as a basis for

3 See *Marcus Kreuzer*, *How Party Systems Form: Path Dependency and the Institutionalization of the Postwar German Party System*, in: *British Journal of Political Science*, vol. 39 (2009), no. 4, pp. 677 – 682.

its work. The result was a 300-page draft representing a consensus on German constitutional thought. That “expert” draft reflected an awareness of two provisions in the Weimar Constitution that had proven fatal to democracy, the division of executive powers between parliament and a popularly elected president and the provision for the exercise of emergency powers by the president at his own discretion. The draft did not include these provisions but in other respects it had the legitimacy of reflecting German constitutional traditions.<sup>4</sup>

Both the party composition of the Parliamentary Council that formulated a new constitution and the “expert” draft which served as a point of departure for its work were therefore the product of contingencies of the early postwar years. “Bonn Is Not Weimar,” a widely admired analysis exclaimed.<sup>5</sup> The views of the occupying powers did not significantly shape the provisions of the Basic Law. At several points in the deliberations of the Parliamentary Council, the Military Governors did make moves to intervene on the Council’s decisions but in almost every instance their influence was weakened by their dominant incentive to accelerate the Council’s work. For foreign policy reasons shared by all the occupying powers, a new political system was put into operation expeditiously without significant military government influence on its constitution.

While the contingent factors that shaped the formative stages of the Federal Republic are well known, less well known are the equally contingent factors that then shaped the institutions that developed within this constitutional framework. The members of the Committee on Rules of Procedure in the first Bundestag largely copied the formal rules of the prewar Reichstag. This was surprising, considering how inadequately those rules had coped with the disruptions caused in the Reichstag by antisystem parties.<sup>6</sup> But the formal rules of a legislature are only a skeleton within which the effective procedure develops informally and gradually, in response to experience. The history of legislatures shows that over time a body of norms of procedure develops which the institution’s professional parliamentarians compile and apply. Beginning almost immediately in its early meetings, the Bundestag’s effective procedure responded to the organization of the political parties and that organization was quite unlike what had existed in the Weimar Reichstag.

The “effective” number of political parties in the Reichstag of the Weimar Republic, in the terms invented by *Rein Taagepera* and *Matthew Soberg Shugart*, had ranged from six to seven. In the Bundestag during its formative years, it ranged from two to three.<sup>7</sup> This significant reduction of the number of “effective” parties was the result of the electoral law to which the framers of the Basic Law—and the Military Governors supervising the work of the framers—gave surprisingly careful attention after the Council had deadlocked on the subject. Agreement between the parties favoring proportional representation and parties favoring a majoritarian system had proven impossible. The issue had been deferred until after the Council had adjourned. This gave the Military Governors the opportunity to intervene as they had not successfully done in the drafting of the Basic Law. After the Coun-

4 See *Michael F. Feldkamp*, *Der Parlamentarische Rat, 1948-1949*, Göttingen 1998, pp. 28 – 43.

5 *Fritz René Allemann*, *Bonn ist nicht Weimar*, Köln 1956.

6 See *Ulrich Sieberer*, *Lehren aus Weimar: Die erste Geschäftsordnung des Deutschen Bundestages von 1951 zwischen Kontinuität und Reform*, in: *ZParl*, vol. 47 (2016), no. 1, pp. 3 – 25.

7 *Rein Taagepera* / *Matthew Soberg Shugart*, *Seats & Votes. The Effects and Determinants of Electoral Systems*, New Haven 1989, pp. 77 – 81. The number of parties in the Bundestag, including those too small to be “effective”, declined from eleven in 1949 to six, four, and three in subsequent elections, as the postwar electoral law took hold.

cil had adjourned, the Military Governors decided to consult existing German political leaders, namely the heads of the state governments, the prime ministers of the Länder, aware that these were the products of a variety of electoral systems. With the assent of the prime ministers, the Military Governors promulgated a law a month later which had both proportional and plurality elements but which, most significantly, restricted the allocation of seats in the Bundestag to parties that had received at least five percent of the votes.<sup>8</sup> This highly consequential provision, on which the members of the Parliamentary Council had not been able to reach agreement, remained in the German electoral system, avoiding the fractionalization of parties that had been an important source of gridlock in the Reichstag of the Weimar Republic. The result was that through the formative years of the Bundestag, procedural consensus required agreement among only three parliamentary groups.

Another important contingent factor contributing to the effective practice of the new parliament was the professionalization of the party organizations in the Bundestag, manifested in the managerial power of their “Geschäftsführer”. Professionalization was the consequence of the large size of each of the party groups. It made possible the achievement of consensus in the Bundestag’s day-to-day procedure through negotiation of just three “managers.” An intimate collegial spirit among them reduced procedural conflicts. At one point, in response to a procedural challenge addressed to the President of the House by a legislator on a procedural point, he ruefully replied that he could not overrule what “die Gewerkschaft der Fraktionsgeschäftsführer” had arranged.<sup>9</sup> In summary, what appeared to be the effect of path dependence in the words of the Rules of Procedure of the Bundestag obscured the impact of the daily contingencies that shaped the Bundestag’s actual practice, practice that reflected both the reduction of the number of parties in the Bundestag and the professional management of procedure.<sup>10</sup>

From the start, that practice was carefully documented by the professional staff of the Bundestag, producing a record which German parliaments had not previously undertaken so extensively. Until the parliamentarians of the first Bundestag began to record practice and codify precedents, the only published work on that subject was an incomplete volume by *Julius Hatschek* “Das Parlamentsrecht des deutschen Reiches,” published in 1915, near the end of the time of the imperial Reichstag.<sup>11</sup> The evolution of procedure in the Bundestag was at first recorded in a multivolume publication prepared by its research staff in 1961. The first book on practice was published by the first head of the office of the parliamentarian in 1963, but it failed to provide a systematic citation of precedents, which are the basis of parliamentary practice in the established parliaments of the world.<sup>12</sup> With the gradual expansion of the research staff of the chamber, documentation of procedure became ever more detailed.

8 See *John Ford Golay*, *The Founding of the Federal Republic of Germany*, Chicago 1958, pp. 138 – 147.

9 *Gerhard Loewenberg*, *Parlamentarismus im politischen System der Bundesrepublik Deutschland*, Tübingen 1969, p. 258.

10 See *Suzanne S. Schüttemeyer*, *Fraktionen im deutschen Bundestag 1949 – 1997. Empirische Befunde und theoretische Folgerungen*, Opladen / Wiesbaden 1998, p. 367.

11 *Julius Hatschek*, *Das Parlamentsrecht des deutschen Reiches*, Berlin / Leipzig 1915. To the incompleteness of the volume see *Jörg-Detlef Kühne*, *Hatscheks teilerschienenes Parlamentsrecht: Zu Abbruch und Rekonstruktion seines legendären Gesamtvorhabens*, in: *ZParl*, vol. 36 (2005), no. 3, pp. 554 – 572.

12 See *Hans Trossmann*, *Der deutsche Bundestag: Organisation und Arbeitsweise*, Darmstadt 1963.

A further revival of parliamentarism came, paradoxically, in reaction to antiparliamentary movements half a generation after the founding of the Federal Republic. That movement was inspired by radical criticism of the established social and economic order coming from various directions in the late 1960s: student organizations, left-wing political movements, groups attacking universities and business organizations, many of them loosely related to their counterparts in other European countries. They all expressed a critique of representative political institutions. This brought a realization that public support for the parliamentary system could not be taken for granted. Scholars and civic leaders reacted by establishing new organizations and publications to support and explore parliamentary institutions, notably the *Deutsche Vereinigung für Parlamentsfragen* (DVParl) and the *Zeitschrift für Parlamentsfragen* (ZParl). These were part of an increasing concern about public understanding of parliament, prompting research and publications by historians, political scientists, constitutional lawyers and politicians on aspects of parliamentary government. Likewise, the steadily expanding staff of the Bundestag's research division produced new documentary sources and scholarly publications "in House".

The first president of the DVParl, a member of the Bundestag, *Hans Apel*, wrote in the first issue of the ZParl that Germany belongs "zu den Ländern mit verhältnismäßig geringer Tradition im parlamentarischen Regierungssystem." "Umso notwendiger," he wrote, "erscheinen Analyse, Kritik und Weiterentwicklung dieser Regierungsform." He regarded this as the purpose of the DVParl and the ZParl. *Winfried Steffani*, one of its founding editors, expressed the hope that the new journal would promote "Kontakt zwischen Wissenschaft, Praxis und Öffentlichkeit" as the Congressional Quarterly does in the United States and the Hansard Society does in Great Britain.

In the outpouring of scholarly work which followed, one of the most notable publications was the handbook "Parlamentsrecht und Parlamentspraxis in der Bundesrepublik Deutschland", edited by *Hans-Peter Schneider* and *Wolfgang Zeh*. In the preface to that volume the then President of the Bundestag, *Rita Süßmuth*, wrote:

„Manche Bücher machen erst mit ihrem Erscheinen klar, dass sie bisher fehlten. Sie zeigen schlaglichtartig die Lücke, die sie alsbald ausfüllen. So ist es bei diesem Werk. 40 Jahre lang hat sich in der Bundesrepublik Deutschland die parlamentarische Demokratie bewährt, bis nun zum ersten Mal eine umfassende Darstellung des gesamten Rechts einschließlich seiner politisch-praktischen Handhabung erscheint, das Parlament und Parlamentarismus konstituiert, ausprägt, und umgibt.“<sup>13</sup>

She noted that the last attempt to provide a comprehensive description of parliamentary procedure had occurred 75 years previously. She cited the work by *Hatschek* and reflected that, like the new handbook, it had appeared fully 40 years after the establishment of the parliament whose procedure it described.<sup>14</sup>

Beginning in the 1980s a new set of contingent events, not determined by past characteristics of the political system, presented a fresh challenge to German parliamentarism. A succession of new political parties entered the Bundestag, parties that had not been present at the founding. First the Greens in 1983, then in 1990 the Party of Democratic Socialism

13 *Rita Süßmuth*, Geleitwort, in: *Hans-Peter Schneider / Wolfgang Zeh* (ed.), *Parlamentsrecht und Parlamentspraxis in der Bundesrepublik Deutschland. Ein Handbuch*, Berlin / New York 1989, pp. V – VI, p. V.

14 *Ibid.*

(later Die Linke), and in 2017 the Alternative for Germany (AfD) changed what had been a procedurally consensual three-party parliament into a six-party parliament. Each of the new parties differed substantially from the founding parties. They were more ideological and more challenging to their leaders. Each appeared to present threats to existing practice. However, the Greens and the The Left, successor to the Party of Democratic Socialism, found acceptance of the procedural norms to their advantage although neither of them had helped to shape the procedural consensuses. They exploited a whole series of existing minority rights that had lain dormant in the years of three-party consensus, and in so doing they reinvented the existing rules without destroying them. The new parties not only found acceptance of existing practice to their advantage but challenges to them costly.<sup>15</sup> The established parties found that entirely acceptable. Although the entry of the Alternative for Germany (AfD) once again tests the existing rules, past experience suggests that existing practice will prove accommodating once again.

Parliaments are puzzling institutions in all countries. Although they are designed to represent the public, they are usually mistrusted and misunderstood. Their decisions generally receive less public attention than do the dramatic actions of presidents and prime ministers. Because of the tragedies in the history of German parliamentarism, the Bundestag has been particularly sensitive to the need of making its work transparent to the public, symbolized by the transparent dome of the remodeled Reichstag. But transparency alone is not a solution. Transparency confronts the public with just those aspects of the work of parliament—controversy, partisanship, compromise, mystifying procedures—which are precisely what the public is likely to distrust about parliament.<sup>16</sup> Awareness of the importance of developing public support for Parliament has been particularly strong in Germany, affecting the curriculum of schools, the outreach activity of the Bundestag, television coverage of its meetings, and the array of publications it has produced for all age groups. Out of its sensitivity to the tragic path of German parliamentarism, the six-party Bundestag that has grown out of its three-party beginnings stands on a new path in the 21st century.

15 See *Tracy Hoffmann Slagter / Gerhard Loewenberg*, loc. cit. (fn. 1), pp. 475 – 480.

16 See *John Hibbing / Elizabeth Theiss-Morse*, *Stealth Democracy: Americans' Beliefs about How Government Should Work*, Cambridge 2002.

## **Funktionsbedingungen des Parlamentarismus. Otto Kirchheimers Überlegungen zum Parlamentarismus während seines Pariser und New Yorker Exils (1933 bis 1943)**

*Hubertus Buchstein*

*Otto Kirchheimer* (1905 bis 1965) gehört zu einer Gruppe junger deutsch-jüdischer Juristen, die aufgrund ihrer politischen Erlebnisse während der Weimarer Republik in der Emigration zu Politikwissenschaftlern wurden und nach 1945 die amerikanische wie auch die westdeutsche Politikwissenschaft prägten. In *Kirchheimers* facettenreichem wissenschaftlichen Werk spiegeln sich in nahezu einzigartiger Weise die politischen und wissenschaftli-