A reply to Sujit Choudhry's 'Resisting democratic backsliding': Weimar legacy and self-enforcing constitutions in post-WWII left-wing constitutional theory

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Abstract: As claimed by Sujit Choudhry, 'historical examples have re-emerged as important elements not only of academic analysis, but also of constitutional practice' worried by the threat of democratic backsliding. Left-wing constitutionalists inspired by the Frankfurt School have left us a theory of constitutional stability drawn on by the Weimar experience. Following Choudhry's call for more historical research on the subject, I will first summarise the critiques of the Weimar constitution developed by these authors and their ensuing proposals for its reformation. Secondly, I will describe the efforts made after 1945 to translate these suggestions into keys for German democratic renaissance. Apart from their impact on the Basic Law, I will focus on the much lesser known attempt to design a 'better Weimar' in the Soviet Zone of Occupation from 1945 to 1947. I will show how Weimar left-wing constitutionalism influenced East Berlin constitutional debate and the reactions of the West German constitutionalists. My final goal is to enrich our understanding of the issue raised by Choudhry of placing the political parties at the very core of the constitution instead of running away from political power.

Keywords: Block-system; militant democracy; post-WWII German constitutionalism; self-enforcing constitution; Weimar

I. Introduction

As Sujit Choudhry rightly asserts in his latest contribution to this journal, 'historical examples have re-emerged as important elements not only of academic analysis, but also of constitutional practice' preoccupied by the threat of democratic backsliding.[1] Weimar represents the paradigmatic

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[1] S Choudhry, 'Resisting Democratic Backsliding: An Essay on Weimar, Self-Enforcing Constitutions, and the Frankfurt School' (2018) 7(1) *Global Constitutionalism* 54.

example in that sense and is still haunting us because even its extremely rich constitutional laboratory appeared helpless facing the rise of autocracy in the 1930s. We want to understand Weimar's merits and limits because, just as then, we wonder if (and to what degree) constitutional forms and institutions can be self-enforcing. According to Choudhry, the theory of constitutional stability developed by exponents of the Frankfurt School such as Kirchheimer, Marcuse and Neumann offers an account drawn on by the Weimar experience. It tells us that a proper constitutional design can create 'a framework for bounded partisan pluralist contestation that is nested within the underlying political economy, within which the major social groups engage in political conflict and compete for power according to the rules and under the institutions of a constitutional order, because it is in their mutual advantage to do so'.[2] Due to such a constitutional design, 'through iterative political interaction, over time, of living under and managing and settling political disagreement through a constitutional regime, a public constitutional culture can emerge from this shared practice, that both explains and justifies the constitutional framework within which it occurs'.[3] Choudhry concludes, 'this is how the "existing legal order" – of which the central component must be its constitution – begins as a system of "factual relations of power" and transforms into a "cosmos of acquired rights"'.[4] If this is true, a self-enforcing constitution could be more than just an academic utopia inasmuch as it can evolve into 'an expressive focal point by providing the raw material for the creation of a public culture'.[5]

Starting from this premise, a counter-narrative of the Basic Law for the Federal Republic of Germany follows. For Choudhry, it is 'the world's archetypical, and arguably the most successful post-authoritarian constitution … of urgent relevance to the current age'.[6] However, it owes its success to factors opposite to today's hegemonic liberal legalistic interpretation of constitutional law prevailing over political power. Rather, it rests on the 'political foundation of power-relations, and provides the infrastructure for a politics of bounded pluralistic partisan contestation. Political parties that track the principal social and economic cleavages are at the centre of this constitutional order and central to ensuring that Weimar does not happen again'.[7] Under such light, the key role shifts from a particular subject – in this case, the German Federal Constitutional

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[2] Ibid 71.
[3] Ibid.
[4] Ibid.
[5] Ibid 72.
[6] Ibid 72–3.
[7] Ibid 73.

Court (*Bundesverfassungsgericht* – BverfG) – to a process relying on public constitutional culture. Basic Law's success rests on its ability to promote the development of sound bonds between political parties and social-economic cleavages. In other words, what we should learn from the Basic Law is that its infrastructures allow a genuine interplay between political and social actors within, rather than over and above, the constitution. The key elements of the infrastructure are political parties, as long as they are bound to rules of militant democracy. In conclusion, the author invites us to consider this reading of the Basic Law as a prompt for more 'historical research into the links between members of the Frankfurt School and the constitutional and political theorists of the left in the 1950s, such as Wolfgang Abendroth'.[8] In his words, 'this is the beginnings of an answer to comparative politics concerning the role of constitutions in resisting democratic backsliding'.[9]

As I agree with the main lines of Sujit Choudhry's interpretation, my article will try to follow his invitation. I will first summarise the critiques of the Weimar constitution developed by the Frankfurt School influenced by left-wing constitutionalists, most prominently by Otto Kirchheimer, Franz Neumann and Ernst Fraenkel. Their main arguments can be summarised as follows: the downfall of political democracy under conditions of social heterogeneity; the resulting dysfunction of the Parliament as agency of social integration; its final de-legitimisation by the administrative and judiciary apparatus.

Then I will describe their ensuing proposals for an *in extremis* reformation of Weimar democracy during the years of its final crisis. As possible remedies, they have advanced a set of suggestions in order to bolster a better interchange between social and political dynamics. First of all, the so-called *Sozial Rechtsstaat* (social rule of law) as a means towards a major social homogeneity, and the state intervention against economic monopolies seen as centres of undemocratic political power. As for the so-called *Parteienstaat* issue (state ruled by the parties), they have suggested a system of economic representation to be associated to the parliament, a constructive vote of no confidence as a means to mutual recognition among the parties and more efficient coalition governments. Finally, they have stressed the overall importance of internal democracy within parties and trade unions.

In the second part of the article, I will describe the efforts made after 1945 to translate these suggestions into practical solutions and turn them into keys of German democratic renaissance. In doing so, I wish to shed some light on aspects much lesser known than the impact of Weimar on

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[8] Ibid 74.
[9] Ibid 72.

the genesis of the Basic Law.[10] I am referring to the attempts to design a 'better Weimar', taking place in what later turned out to be East Berlin from May 1945 to the end of 1947. Although war-torn and divided into zones of occupation, the German capital was the centre of constitutional discussions, even if for a very brief period during which a relatively free debate was possible between the end of World War II and the beginning of the Cold War.[11]

Therefore, I will show how politicians and scholars of constitutional law who happened to live under Soviet occupation have tried to deal with the causes of decay of Weimar democracy. I will try to provide answers to the following issues: can we correlate (and if so, to what degree) the constitutional proposals envisaged by them to prevent the recurring of democratic backsliding to the arguments of Kirchheimer, Neumann and Fraenkel? Could the solutions conceived in the Soviet Zone to promote a political culture based on shared practices between opposite social groups (in particular the so-called Block-system) be an appropriate answer in that sense? Furthermore, in what terms their proposals differed from the better-known answers of their West German colleagues (and what were the reactions of these to their efforts)? My final goal is to assess the merits and the limits of those proposals and to determine their utility for our understanding of the problems raised by Sujit Choudhry. However questionable they may sound, their aim was to develop a constitutional culture of free and equal participation to political contestation. To achieve it, they insisted on placing the political parties at the very core of the constitution instead of running away from political power, since – as Hans Kelsen reminds us – 'democracy is necessarily and unavoidably a party state'.[12]

[10] For the effects of Weimar legacy on the Basic Law, see among many C Gusy, 'Die Weimarer Verfassung und ihre Wirkung auf das Grundgesetz' in S Lasch (ed), *Die Weimarer Verfassung – Wert und Wirkung für die Demokratie* (Friedrich-Ebert-Stiftung, Erfurt, 2009) 27–50; W Pyta, 'Welche Erwartungen weckte die Weimarer Verfassung und welche Erfahrungen vermittelte sie an die Gründerväter der Bundesrepublik Deutschland?' in ibid 51–72; HA Winkler (ed), *Weimar im Widerstreit. Deutungen der ersten deutschen Republik im geteilten Deutschland* (Oldenbourg Verlag, München, 2002); E Eichenhofer (ed), *80 Jahre Weimarer Reichsverfassung – was ist geblieben?* (Mohr Siebeck, Tübingen, 1999).

[11] Among the studies of the first GDR constitution published in West Germany during the Cold War, see: M Draht, *Verfassungsrecht und Verfassungswirklichkeit in der sowjetischen Besatzungzone: Untersuchungen über Legalität, Loyalität und Legitimität. Mit einem Anhang: Verfassung der 'DDR' im Wortlaut* (Bundesministerium für Gesamtdeutsche Fragen, Bonn, 1956); S Mampel, *Die Entwicklung der Verfassungsordnung in der Sowjetzone Deutschlands von 1945 bis 1963* (Mohr, Tübingen, 1964); D Müller-Römer, *Die Grundrechte in Mitteldeutschland* (Verlag Wissenschaft und Politik, Köln, 1965). For the studies written after the reunification and the opening of the GDR archives, see H Amos, *Die Entstehung der Verfassung in der Sowjetischen Besatzungszone/DDR 1946–1949: Darstellung und Dokumentation* (LIT-Verlag, Münster, 2006).

[12] H Kelsen quoted in Choudhry (n 1) 69.

II. The legacy of Weimar: 'Collective democracy', 'dialectical democracy', 'militant democracy'

As a democracy, the Weimar Republic lay on the idea of the political unity of all German citizens. But as a class-divided society, it had to represent citizens divided by opposite interests. The solution offered by the 1919 constitutional compromise was to extend its bill of rights to social aspects – it had to free the citizens not only from the state, but also from the conflicts and forms of domination arising from a modern industrialised society.[13] Its representative bodies (both political – the *Reichstag*, and economic – the *Reichswirtschaftsrat*, the Economic Council of the Reich) had the task of translating these rights into reality, and thus promote the legitimacy of the democratic system.

However, Weimar is warning us just how easily popular frustration caused by the manifest incapacity of the legislative to promote social integration turns into requests for a more 'substantial' (or 'illiberal') democracy instead of the purely 'formal' one. Its Parliament designated to express popular will was criticised both by right- and left-wing observers. They labelled it as a *Schwatzbude* (a talking shop), utterly ineffective in realising the promises of social justice. Today we are witnessing a similar irritation for the 'post-democratic' drift (such as the dispossessing of popular representation by 'technocracy' and 'juristocracy'), or the many tacit de-constitutionalisations of social dynamics. Rethinking Weimar means questioning the legacy of the first attempt to reconcile the political constitution based on the democratic notion of the people as a unity of equals and the legal constitution protecting the autonomy of heterogeneous social forces. Its compromise between the separation of powers delineated in the first part of the constitution and the bill of rights outlined in its second part did not last. Instead, the interaction between the procedural mechanisms (the Parliament, the strong Presidential executive and an independent judiciary able to oppose the legislation) and the substantial programme (in particular socio-economic rights relating both to individuals and to social groups) turned into the subject of an increasingly bitter political feud.

Already in 1927, the Social Democratic constitutional scholar Hermann Heller stated that the complexity of modern mass society made the general will impossible to reach. Nevertheless, he continued, constitutional technique

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[13] According to the author of the constitution, Hugo Preuβ, 'the form of democracy has to be filled with social spirit', see H Preuβ, 'Das Verfassungswerk von Weimar' (1919) in D Lehnert (ed), *Hugo Preuß: Politik und Verfassung in der Weimarer Republik* (Mohr Siebeck, Tübingen, 2008) 89.

has to make up for it. Proper constitutional tools can foster collective self-determination towards its emancipatory programme by addressing the causes of social conflict.[14] Heller was thus starting a line of thought that will have marked the efforts of a group of young social-democratic scholars, most prominently Otto Kirchheimer, Franz Neumann and Ernst Fraenkel.[15] Apart from Heller, they were influenced by the constitutional doctrine of Carl Schmitt, but also the teachings of Hugo Sinzheimer regarding social dimension of the law. They applied those suggestions to the day-to-day praxis of the Weimar Republic in order to find the roots and possible cure to the incipient downfall of Weimar democracy.[16] After the fall of the Republic, they showed a major interest for the social and political theory developed by the Frankfurt School and actively collaborated with it (Kirchheimer worked for its Paris branch from 1933 to 1937, Neumann joined the Institute after it moved to Columbia University. When arriving into USA in 1939 Fraenkel applied for a position in the Institute, but was rejected).

For them, the issue at stake was the de-legitimation of parliamentary democracy caused by social heterogeneity. It is neither easy nor completely justified to try to group and catalogue the flood of proposals, attempts and criticisms generated by these authors. Firstly, in the Weimar years, they had just started their academic careers. Secondly, while Heller died prematurely in 1933, their reflections were further enriched during the years of exile in the UK and the USA with lines of thought alien to the German context. Although this did not constitute a clean break with their youth positions, undoubtedly it made their reflections more multifaceted.

Moreover, even their Weimar years' writings are not free from ambiguity and afterthought. They were due to the succession of twists and turns in

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[14] H Heller, 'Souveränität' (1927) in Heller, *Gesammelte Schriften*, vol. 2 (Mohr, Tübingen, 1992) 92. On this issue see M Llanque (ed), *Souveräne Demokratie und soziale Homogenität. Das politische Denken Hermann Hellers* (Nomos, Baden-Baden, 2010); C Müller and Staff (eds), *Der soziale Rechtsstaat: Gedächtnisschrift für Hermann Heller 1891–1933* (Nomos, Baden-Baden, 1984).

[15] According to Wolfgang Abendroth, Heller was the only important jurist of the Weimar era who interpreted the constitution as a legal means of the self-regulation of the society. See W Abendroth, 'Die Funktion des Politikwissenschaftlers und Staatsrechtslehrers Hermann Heller in der Weimarer Republik und in der Bundesrepublik Deutschland' in Müller and Staff (n 14) 223.

[16] See W Luthardt, *Sozialdemokratische Verfassungstheorie in der Weimarer Republik* (Westdeutscher Verlag, Opladen, 1986); J Blau, *Sozialdemokratische Staatslehre in der Weimarer Republik: Darstellung und Untersuchung der staatstheoretischen Konzeptionen von Hermann Heller, Ernst Fraenkel und Otto Kirchheimer: mit einem Vorwort von Helmut Ridder* (Verlag Arbeiterbewegung und Gesellschaftswissenschaft, Marburg, 1980). The activities of the young Social Democratic jurists in 1920s Berlin are described by O Kirchheimer in 'Einführung' in H Sinzheimer and E Fraenkel, *Die Justiz in der Weimarer Republik: eine Chronik* (Luchterhand, Neuwied, 1968).

the life of the Republic, that challenged their trust in the possibility of a democratic evolution of the system. Although they worked closely together, we can find some differences between their positions. More than actual divergences, these differences often reveal just a time lag between their theoretical elaborations or are due to rhetorical excesses. Thus, they were all critical of the left-wing legalistic constitutional theory most notably represented in the Weimar years by Gustav Radbruch.[17] However, while searching for a less formal and more socially rooted constitutional theory, Fraenkel and Neumann were less critical towards the Weimar compromise, while Kirchheimer's sharp statements were strongly inspired by Lenin's and Schmitt's decisionism.[18] Nevertheless, while attacking the liberal rule of law, they all (Kirchheimer included) criticised the Soviets for reducing the law to a mere instrument of 'class struggle'. Their common goal was to reconcile law and politics: for them, the constitution is neither a system of norms, nor a set of decisions, but a synthesis of the two.

In order to 'save Weimar from itself', they launched a set of proposals – progressively updated with the worsening of the crisis – such as 'collective democracy', 'dialectical democracy' and 'militant democracy'. They interpreted the stalemate in the *Reichstag* as a symptom of 'equilibrium of power' between capital and labour, a notion developed by the Austrian Social Democratic leader Otto Bauer. According to Bauer, historical situations of class equilibrium constitute a 'political-constitutional hiatus'.[19] Such situations are an impediment to the development of a true political democracy, since no social class can express its dominance through parliamentary channels and seeks alternative, extra-constitutional means. However, Bauer identifies a possible remedy in the representation of economic interests as a corrective to parliamentary dynamics. By opening the constitutional framework to the interaction between politics and economy, the parliamentary activity of the parties could be conditioned (or rather rectified) in a legal manner by trade unions and economic associations.

Otto Kirchheimer adopted several aspects of Bauer's analysis with the aim of applying them to the German situation at the end of 1920s, characterised by the stalemate of the 'Great Coalition'.[20] He agrees with

[17] On the controversial relationship between Heller and Radbruch, see H-P Schneider, 'Positivismus, Nation und Souveränität. Über die Beziehung zwischen Heller und Radbruch' in Müller and Staff (n 14) 585–602.

[18] See R Bavaj, 'Otto Kirchheimers Parlamentarismuskritik in der Weimarer Republik. Ein Fall von "Linksschmittianismus"?' (2007) 55(1) *Vierteljahrshefte für Zeitgeschichte* 33–51.

[19] O Bauer, 'Das Gleichgewicht der Klassenkräfte' (1924) in Bauer, *Werkausgabe* (Europaverlag, Wien, 1980) vol. 9, 55–71.

[20] On the 'Second Great Coalition' see HA Winkler, *Der Schein der Normalität: Arbeiter und Arbeiterbewegung in der Weimarer Republik 1924 bis 1930* (Dietz, Bonn, 1988) 521–736.

Bauer on the impossibility of building a political democracy in conditions of class balance, since the persistent institutional impasse erodes the legitimacy of the parliament. The centre of political activity then shifts from the legislative to the executive, whose administrative apparatus progressively expands to compensate for the parliament's lack of effectiveness. As a whole, the state that emerged from the Weimar compromise resembles, to Kirchheimer, a giant with feet of clay condemned to succumb, since its administrative efficiency is not sufficient to promote its legitimacy and the identification of its citizens to it.

In his article 'Legality and Legitimacy' written in 1932, Kirchheimer – who was gradually taking a more critical stand towards Schmitt – focuses his analysis on the effects of the Brüning government acting for two years without parliamentary support. Kirchheimer claims that the government was conducting an unrighteous fight against its political enemies by denying their legitimacy. Concretely, with the support of the judiciary and state administration, the government was determining which of the parties and social organisations should be considered 'good', i.e. in line with the 'national objectives' and which ones should be banned as subversive 'revolutionaries'.[21] By doing so, the government is infringing on the value of social equality enshrined in the rights and duties of the German people, which is a fundamental component of social freedom. As he wrote the following year, 'the coincidence of political and social forms of freedom has often been of supreme importance. Both liberalism and socialism require both forms of freedom and equality. Therefore, today liberty and equality have to be total: they must be achieved both in the political sphere and in the social sphere, or we will not realize them at all.'[22] Only if they are both present, the process of formation of public opinion is free not just from formal impediments, but also from the material ones. This dual freedom is the prerequisite for the realisation of the democratic ideal of the equal possibility for all social partners to participate in the decision-making process. Among these prerequisites, Kirchheimer places particular emphasis on the internal democracy of the political parties, thus distancing himself from Bolshevism.

As for Kirchheimer, for Franz Neumann and Ernst Fraenkel, the issue of social democracy is at the heart of the problem of constitutional stability. According to them, the causes of the decline of Weimar democracy had its

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[21] O Kirchheimer, 'Legality and Legitimacy' (1932) in W Scheuerman (ed), *The Rule of Law under Siege: Selected Essays of Franz L Neumann and Otto Kirchheimer* (University of California Press, Berkeley, CA, 1996) 54–5.

[22] O Kirchheimer, 'Remarks on Carl Schmitt's Legality and Legitimacy' (1933) in Scheuerman (n 21) 79.

roots in the events of 1918–1919, described as an unfinished revolution. As Neumann wrote in 1933, 'the democratic state had tolerated the creation of an anti-state despite the latter was born to destroy democracy'.[23] The goal of the Constituent Assembly was the creation of a social and political democracy. To this end, the constitution recognised four groups of rights: personal liberties, political freedoms and those termed by Neumann as 'capitalist' and 'socialist freedoms'. The former being 'the freedom of ownership, contract and trade' while the latter covers 'all the rights that guarantee the emancipation of the working class'.[24] For their realisation, the Constituent Assembly had translated the democratic ideal into an institutional design that claimed to concentrate all political power in the Parliament. But, 'the problem in every industrialized democracy … is how to root the Parliament in the people'. Concretely, 'how to make Parliament capable of dealing with almost all social and economic affairs'.[25] Despite the enormous importance of the parties, the constitution did not define the way in which they had to operate in Parliament. The member parties of the government coalitions did not dare criticise their ministers, while the 'radical totalitarian parties did not recognize the rules of the parliamentary game'.[26] The parliamentary groups therefore have responsibility for the backsliding of Parliament's legislative activity and for its replacement with the emergency legislation of the President of the Republic, although his role should have been limited to the execution of individual administrative acts. Not only the President and the ministerial bureaucracy, but also the judiciary, thus usurped the political power of Parliament and 'constituted an anti-state within the framework of democracy' with 'the main objective of minimizing social progress and weakening the break with the militaristic, capitalist and reactionary tradition'.[27]

According to Neumann, the judiciary had become 'the hidden ruler'[28] of the Republic. 'The principle of the independence of the judges is a liberal principle, expression of the bourgeois rule of law, based on the division of powers,'[29] remarked Neumann, referring to Schmitt's 'Verfassungslehre'. The Weimar constitution is, however, 'an expression of a parliamentary

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[23] F Neumann, 'The Decay of German Democracy' (1933) in Scheuerman (n 21) 30.

[24] Ibid 33.

[25] Ibid 31.

[26] Ibid 32.

[27] Ibid 35–6.

[28] F Neumann, 'Die soziale Bedeutung der Grundrechte in der Weimarer Verfassung' (1930) in Neumann, *Wirtschaft, Staat, Demokratie: Aufsatze 1930–1954* (Suhrkamp, Frankfurt am Main, 1978) 121.

[29] F Neumann, *Die politische und soziale Bedeutung der arbeitsgerichtlichen Rechtsperchung* (Laubsche, Berlin, 1929) 35.

democracy, that is to say of a constitutional form in which the parliament is (albeit with the appropriate exceptions) sovereign'. It 'represents the will of the people, and creates an identification between rulers and governed'. Therefore, it is 'inconceivable, strictly speaking, both with the concept of division of powers and with the principle of judges' independence'. However, the Weimar constitution 'remains faithful to both these liberal principles' since 'parliamentary democracy is bounded by the same constitution'.[30] Due to an extensive interpretation of the right to verify the formal and material validity of legislative acts, 'the prevailing constitutional doctrine claims that all constitutional-political controversies within the Reich are decided by a judicial body, a court, that is, by state or constitutional justice'.[31] For 'perfectly political' reasons, republican justice 'has assumed a function of censorship with respect to the law', with the aim of 'guaranteeing the maintenance of the current conditions on which our political, social and cultural system is based'.[32]

In the 1937 essay on 'Changes in the Function of the Law in Bourgeois Society', Neumann addressed the problem of natural law, invoked by Weimar's judiciary against Parliament's interventions in the sphere of contractual freedom and private property. 'These theoretical discussions have become political issues of great practical importance,' says Neumann, 'since the German Supreme Court has suddenly accepted the principle of judicial review.'[33] The judiciary opposed the democratic power of the state in the name of natural law, thus defending the private power rooted in class society: 'the recognition of judicial review represents a redistribution of power between state and society. The greater the power of the state, the more ready the judge will be to submit to his authority. The weaker the state, the more the judge will try to realize its private class interest. The recognition of the judicial review has operated in favour of the existing social order.'[34]

Deciding that the legislation adopted by the Parliament violated the security of private property, the judiciary opened the constitutional order to 'natural law, which now plays a counter-revolutionary role', says Neumann.[35] The entire republican period was characterised by the 'prevalence of "general principles" on genuine legal norms. The "general principles" have completely transformed the legal system. Being dependent

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[30] Ibid.

[31] Ibid 34.

[32] Ibid 39.

[33] F Neumann, 'The Change in the Function of Law in Modern Society' (1937) in Scheuerman (n 21) 127.

[34] Ibid.

[35] Ibid.

on a system of extra-legal values, they deny formal rationality, confer an immense amount of discretionary power to the judge, and eliminate the dividing line between the judiciary and the administration so that administrative decisions – for example, political decisions – take the form of decisions of ordinary civil courts.'[36] This rediscovery of the 'general principles' was instrumental in the destruction of 'the system of positive law that has incorporated many important social reforms'.[37] The judiciary thus supported the transforming of the market economy into a monopolistic economy, since the general principles it advocated operate in the interests of the monopolies. In this way, the judiciary – said Neumann – hampered Parliament's attempts to transform the economic order in the sense indicated in Chapter V of the second part of the constitution. The judiciary placed itself above the legislator in the name of the 'idea of justice'. But why, then, asks Neumann, 'must the judiciary, rather than the parliament or the president of the Reich or the *Reichsrat*, be the epitome of the idea of justice of a people, remains an insoluble enigma'.[38]

Ernst Fraenkel was also highly critical of what he termed 'class justice'.[39] We should not mistake class justice for political justice, claimed Fraenkel, since the latter presupposes a judge who decides subjectively because his own political point of view leads him to a unilateral judgment. Rather, class justice describes an objective view of the judiciary, which is the emanation of interests and ideologies of the ruling class that coincide with the socio-cultural identity of the judge. The judgments of the judiciary that absolutised private property turned the constitutional pact upside down. They neglected the social value of property established in Article 156 of the Weimar constitution and distorted the meaning of Article 165, that was essential for the development of economic democracy. According to Fraenkel, the judiciary is therefore an 'objective' obstacle to the realisation of economic democracy. Therefore, it has to be bound to juridical formalism and subjected to the supremacy of the legislative. In order to contrast the natural law invoked by the class justice, modern states need a more developed conception of the rule of law, which can give answers to the conflicts of a complex society.

Searching for the way to reconcile the traditional notion of the rule of law and the needs of mass democracy, in 1932, Fraenkel developed the concept of 'dialectical democracy'.[40] He did it in opposition both

[36] Ibid 128.

[37] Ibid 131.

[38] See (n 23) 40.

[39] E Fraenkel, 'Zur Soziologie der Klassenjustiz' (1927) in Fraenkel, *Gesammelte Schriften, Band 1, Recht und Politik in der Weimarer Republik* (Nomos, Baden-Baden, 1999) 177–211.

[40] E Fraenkel, 'Um die Verfassung' (1932) in ibid 496–509.

to the 'relativistic democracy' promoted by Hans Kelsen and to the 'absolutist democracy' invoked by Carl Schmitt. According to Fraenkel, the former is bearable only as long as the social and economic difference of the two struggling parties is minimal and they agree on the foundations of society construction. The latter declares to act in the name of the general will through plebiscites, claiming that it will produce the political homogeneity of the people. However, in Fraenkel's opinion, since in political reality the uniformity of thought on state and social questions does not exist, the absolutist democracy must repress all the movements that are opposed to the dominant group. According to him, the Weimar constitution offers the conditions for developing a 'dialectical democracy'. Unlike liberal constitutions which merely assert the formal equality of individual citizens, the 1919 constitution explicitly recognises the existence of different social classes (hence the non-existence of the common good) and the consequent threat to political unity. The recognition of the social problem and the commitment to overcome it constitute a fundamental value of the constitutional pact. Thanks to a dialectical democracy, the parties could compete for the majority in Parliament, and at the same time, other institutional forms could deal with the conflict between capital and labour, thus promoting the integration of the workers within the political community.

Moreover, Fraenkel aims at defending the founding values of the constitution against those who do not recognise them, such as opposition parties whose aim is not to participate in democratic government but to prevent its functioning. He claims that the rights of the opposition must therefore be reduced by introducing the constructive vote of no confidence at least until the opposition is not ready or able to take responsibility. Once the role of the parliamentary government has been re-established by preventing obstruction, it is necessary, in the name of the same values, to reduce the competences of the presidential executive and of the administration that had replaced the parliament. With dialectical democracy, therefore, Fraenkel opens the possibility of thinking of a 'militant democracy', legitimised to identifying its enemies and denying them the right to participate in the democratic process. Such limitation of the parliamentary dynamics could appear as an infringement of the right of everyone to participate equally in the decision-making process. Nevertheless, for Fraenkel it does not represent a denial of democracy, since according to him, the egalitarian character of the representative system resides rather in firm constitutional guarantees of the internal democracy of parties and social organisations.

Fraenkel will have reiterated these suggestions in his essay on representative and plebiscitary democracy published in 1958.[41] In it, he associated the issue of internal party democracy to a critical re-reading of the prohibition of the imperative mandate. The latter, according to Fraenkel, was only a 'fiction of fictions' if it was not anchored to an 'objective system of values' which permeated the constitutional culture.[42] A party system freed from values produces a representative system detached from society and public opinion. Rising above it, the party system declares 'the omnipotence of Parliament, which too often can hardly be distinguished from its powerlessness'.[43] Men responsible for drafting the Weimar constitution such as Hugo Preuβ grew up amid the 'legalistic culture of the Bismarck era' and did not know 'anything about the questions of pure political science'. This explains why Preuβ did not face 'the question of how a system of parties should be structured' in order to be capable of supporting the chosen institutional system.[44]

We can summarise the main points of the three authors as follows. Common good or social homogeneity do not exist in modern complex societies. Therefore, constitutional technique has to make up for the loss of political unity of the people. Otherwise, parliamentary government will be unable to manage social issues and unelected but socially dominant forces will get control of the decision-making process, thus provoking a general loss of legitimacy and democratic backsliding. To avoid that, the constitutional design has to provide a set of tools. Firstly, to structure the party system in a way that both fosters effective government and promotes the mutual interest of opposing parties to recognise the rules of the parliamentary game. Secondly, to recognise militant democracy as a constitutional principle aimed at impeding obstructionist practices and guaranteeing internal democracy both in parties and in social organisations. Thirdly, to nest the party system within the underlying social and economic cleavages by combining political and economic representation. Fourthly, to impede the shifts of political power towards the state administration and the judiciary, which hamper the identification of citizens with the democratic process, do not guarantee free and equal access to decision making and impoverish the public culture. The aspect that I wish to highlight is that similar proposals will re-emerge as key features of the post-1945 constitutional debate in the Soviet occupied Germany. Just as

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[41] E Fraenkel, *Die repräsentative und die plebiszitäre Komponente im demokratischen Verfassungsstaat* (Mohr, Tübingen, 1958).
[42] Ibid 73.
[43] Ibid.
[44] Ibid 84.

the authors mentioned above, the main voices of this debate – Karl Polak and Alfons Steiniger – will try to design a 'self-enforcing' constitution that could foster mutual recognition among political opponents. Just as Fraenkel's 'dialectical democracy', they will strive to avoid the limits both of Kelsen-style inclusive but weak and Schmitt-style strong but exclusive idea of a democratic government. They hoped that such framework termed Block-system could promote a democratic public culture in a country burdened with an extremely bitter authoritarian past and a menacing future.

III. Rethinking Weimar in East Berlin (1945–1947)

Despite their prominent role in the studies on the political and constitutional thought of the Weimar era, Kirchheimer's, Neumann's and Fraenkel's proposals appear often alien to today's debate, lost under the rubble of the first German democracy. Deprived of their constitutional context, their suggestions did not have many occasions to evolve beyond the stage of insights – suggestive, but generic and with very few opportunities for practical verification. In general, the constitutional debate after 1945 gave little space to the constitutional proposals that emerged during the Weimar years. 'Bonn is not Weimar': this motto in 1956 summarised the construction path of the Federal Republic of Germany in the midst of the ruins of Nazism.[45] In reality, the legacy of Weimar did not disappear, but it was inserted selectively, to the extent that corresponded to the dictate of the new Atlantic order. The latter determined the way of transposing, from the Weimar constitution to the Basic Law, the concept of democracy, the constitutionally guaranteed value system and the consequent institutional framework. As stated by Heinrich A Winkler, 'the founding fathers of Bonn had rarely quoted Schmitt and yet he was always present, but in reverse'.[46] Concretely, it meant social pluralism instead of unity of popular will, representation instead of plebiscite, normativism instead of decisionism, Constitutional Court instead of President as a 'custodian of the constitution'. Nevertheless, as Sujit Choudhry reminds us, the Basic Law and the German constitutional doctrine in general owe some of its key features to these authors, such as the militant democracy and the constructive vote of no confidence.

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[45] The catchphrase 'Bonn is not Weimar' got popular thanks to the Swiss journalist Fritz René Allemann who described the new West German democracy in his essay *Bonn ist nicht Weimar* (Kiepenheuer & Witsch, Köln, 1956).

[46] HA Winkler, 'Weimar, Bonn, Berlin. Zum historischen Ort des Grundgesetzes' (2009) 57(4) *Vierteljahrshefte für Zeitgeschichte* 489.

The figure of Ernst Fraenkel represents a key link between the Weimar experience and the rebirth of German democracy in the western occupation zones. Fraenkel gradually abandoned the Weimar years' viewpoint on class struggle or social heterogeneity for the sake of social pluralism as a custodian of democracy against totalitarianism. His staunch promotion of neo-pluralism in the Federal Republic is deeply related not only to the influence of Harold Lasky during the years of his exile in the UK, but also to the Weimar lesson. For him, pluralistic democracy is possible only if there is a genuine consensus on an inseparable set of values: popular sovereignty as the undisputed foundation of public power; absolute value of guarantees of freedom and formal equality; control of administrative action and impartiality of justice; finally, recognition of democratic rules by all political subjects. As his commitment to the Freie Universität of West Berlin clearly shows, for him, the realisation of the conditions listed above was compatible with the class structure of Federal Germany.[47]

However, we can find other interesting attempts to design a constitutional framework inspired by similar ideas for post-authoritarian Germany. Although usually neglected and largely unknown, another constitutional debate was taking place in the Soviet Occupation Zone (SBZ – *Sowjetische Besatzungszone*) between 1945 and the end of 1947.

Despite the devastation and division into zones of occupation, in the eyes of contemporaries Berlin was still the political and cultural heart of a country that was expecting a quick reunification as promised by the Potsdam agreements. Therefore, it was there that the political heirs of the Weimar party system were discussing the future institutional set-up not just for the Soviet zone, but for the entire nation. These debates have so far remained usually neglected by most of the historiography that, with an ex post outlook, tends to disregard them as a mere prelude to the Communist dictatorship launched in 1948. However, the authoritarian involution of the political system was not predetermined. After the fall of Hitler's dictatorship, there were very few Germans hoping for the start of a second, Stalin-style dictatorship. Looking back, these hopes in a democratic outcome undoubtedly seem as a fool's paradise because of the Soviet occupation. Yet, for a couple of years, many members of all the political forces, including the Communists, shared them with touching fervour.

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[47] Since his return to Berlin (West) in 1951, Fraenkel developed his neo-pluralistic theory in a series of essays which supported the model of democracy established in Bonn, such as: *Der Pluralismus als Strukturelement der freiheitlich-rechtsstaatlichen Demokratie*, first published in 1950 (Beck, München, 1964); together with K Sontheimer, *Zur Theorie der pluralistischen Demokratie* (Bundeszentrale für Politische Bildung, Bonn, 1964); *Strukturdefekte der Demokratie und deren Überwindung* in E Fraenkel, *Deutschland und die westlichen Demokratien* (Kohlhammer, Stuttgart, Berlin, Köln, Mainz, 1964).

Therefore, we should reassess the historical context, usually described as completely opposed to democratic hopes, with greater attention. As summarised by one of the most renowned scholars of communist Germany, Hermann Weber, in that period there were 'signs of democracy'. 'Democratic tendencies', 'freedom in culture and freedom of the press, pluralism in political parties and in society', were according to Weber 'tolerated by the Soviet occupation forces'.[48] As a result, 'from 1945 to 1947 the Stalinist structures and democratic attempts existed alongside each other'. After the years of Nazi horror, anti-fascists from different political groups united in the sincere intent to 'erect a "better Germany" in the SBZ'. However, these efforts and the spirit of collaboration between parties collapsed with 'the introduction of Stalinism in 1948/49'.[49] As for the Socialist Unity Party – SED, as Hermann Weber points out, it is wrong to trace its birth within a pre-established plan of absorption of the social democratic parties by the Communists in countries under the Soviet control. Firstly, because in 1946 both the Soviet government and the German Communists believed that there were no social conditions for a Communist 'leading role' in Germany. Secondly, because in Hungary, Czechoslovakia and Poland this happened two years later (between June and December 1948), when the Soviets decided to apply the 'teachings' of the German case.[50]

Learning from Weimar meant doing differently from Weimar, both in the western and in the eastern Zone. Here, however, the intention was to correct the Weimar institutional design in a direction contrary to that of the Western Zone, i.e. by enhancing its strong democratic–popular character even further. As usually happens at the moment of conception of a new institutional framework, the political leaders were directing their gaze backwards, that is to say to the institutional crises of the 1920s, where they tried to avoid mistakes. Therefore, their debates were carrying back voices of Carl Schmitt and Hermann Heller who had criticised the attempt to appease Weimar's social conflict by concealing it under the mantle of great parliamentary coalitions. Rather than mitigating the struggle between 'Marxist' and 'bourgeois' forces, the key voices of the debate were blaming these attempts for the impotence of the *Reichstag*, the discredit of parliamentary democracy and the start of Hindenburg's

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[48] H Weber, *Die DDR 1945–1990* (Oldenbourg, München, 2006) 153.

[49] Ibid.

[50] H Weber, 'Einleitung. Zum Transformationsprozeß des Parteiensystems in der SBZ/DDR' in Weber (ed), *Parteiensystem zwischen Demokratie und Volksdemokratie. Dokumente und Materialien zum Funktionswandel der Parteien und Massenorganisationen in der SBZ/DDR 1945–1950* (Verlag Wissenschaft und Politik, Köln, 1982) 49.

presidential dictatorship which paved the way to Nazi takeover. In order to avoid repetition of these dynamics, they focused on attempts to develop a novel constitutional framework capable of pluralist contestation reflecting the underlying political economy.

Concretely, Ernst Fraenkel's idea of 'dialectical democracy' re-emerged, i.e. the belief that the social conditions for democratic development could be implemented only within a constitutional framework that recognises the existence of class conflict and envisages the means for its overcoming. Hence the fundamental difference: after WWII, Fraenkel started considering pluralism a value in itself since it imposes the search for compromise between social groups, while he saw any push towards monistic solutions as a seed of anti-democratic oppression.[51] At the same time, East Berlin constitutionalists were taken back to Fraenkel's Weimar era ideas, and saw in the parliamentary compromise not the value itself, but only a phase of transition towards the final goal consisting in the cancellation of social groups within a homogeneous structure.

In the eyes of the Berlin left-wing constitutionalists and politicians, this appeared as the last chance to devise a democratic constitution for a Germany split between capitalism and communism. The purpose of the envisaged constitution was to allow the reunification of the Western and the Eastern Zones according to the terms of the compromise reached between the Soviet Union and the Western powers at the conference of Potsdam.[52] SED constitutionalist, Karl Polak, developed the first constitutional draft, publicised by his party on 16 November 1946. A constitutional committee comprising the representatives of all four parties operating in the Eastern zone will elaborate it into the final draft without significant alterations. Yet, the ultimate version will include the so-called Block-system, a crucial and unusual rule for the formation of parliamentary governments, devised by the SED constitutionalist Alfons Steiniger in his eponymous essay published in October 1947.[53]

The Block-system had a double purpose. Firstly, it aimed at reconciling the contradictions between parliamentary dynamics and social conflict.

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[51] E Fraenkel, 'Korea – ein Wendepunkt im Völkerrecht?' (1951) in Fraenkel, *Gesammelte Schriften, Band 3: Neuaufbau der Demokratie in Deutschland und Korea* (Nomos Verlag, Baden-Baden, 1999) 497.

[52] For a detailed reconstruction of the positions of the allied powers before and after the November/December 1947 London conference regarding the founding of a unitary German government envisaged by the Potsdam agreements, see C Weisz, H-D Kreikamp and B Steger (eds), *Akten zur Vorgeschichte der Bundesrepublik Deutschland 1945–1949, Band IV, Januar–Dezember 1948* (Oldenbourg, München, 1983) 7–18.

[53] A Steiniger, *Das Blocksystem: Beitrag zu einer demokratischen Verfassungslehre* (Akademie Verlag, Berlin, 1947).

Secondly, Weimar's weighty legacy also recalled the memory of dysfunctional coalitions, associated with obstructionism and cross-vetoes of parties. The inability of Weimar governments to promote an energetic long-term policy finally led to the demise of the Parliament by the state administration. To avoid it, the Block-system establishes – in Steiniger's words – an 'artificial unanimity':[54] the duty for all the parties to participate in the government. Each party would hold a number of ministries proportional to its share of votes at general elections, with the winning party obtaining the presidency of the government. In turn, the parties could not abandon the government and fight it from the opposition benches. The message was clear: despite the fact that the parties represent opposite sides of the critical division in social and economic fields, once they get into Parliament they have to accept the idea of the common good and find a way to reach it together. If they refuse to collaborate, they place themselves outside the constitution. According to Steiniger, such a system was not threatening democracy, as long as there were two preconditions: the internal party democracy, and a bond between the MPs and voters based on what he calls a 'general-imperative mandate'.[55] He refers to a kind of middle ground between virtual and mandatory representation not far from what Fraenkel was referring to as an 'objective system of values'.

However, since the beginning of 1948, with the constitutional debates still in progress, the leading figures such as Otto Grotewohl (vice president of the SED and president of the Constitutional Commission) realised that the spaces for solutions inspired by the compromise of Potsdam were closing up. The relations between the ministers of foreign affairs of the five Powers broke definitively at the London conference on 15 December 1947. Within the SED, the start of the Cold War allowed the minority Stalinist faction led by Walter Ulbricht to control the central secretariat. From that moment, the SED stopped observing the rules of equal collaboration with the other parties of the Zone as envisaged by the Block-system. If the main political rule adopted both in Bonn and East Berlin was 'better all power in half Germany than half in the whole of Germany',[56] the constitutional rules had to turn upside down accordingly. Instead of preventing the reappearance of the Weimar party state and its pernicious dynamics, Ulbricht used the Block-system to turn the SED into a state-party and thus

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[54] Ibid 13.

[55] Ibid 37.

[56] The slogan emerged within the Bonn governmental milieu, nevertheless, it is widely accepted that 'although the phrase is usually attributed to Adenauer, Ulbricht could have also said it'; see J Roesler, *Momente deutsch-deutscher Wirtschafts- und Sozialgeschichte 1945 bis 1990: eine Analyse auf gleicher Augenhöhe* (Leipziger Universitätsverlag, Leipzig, 2006) 36.

monopolise power in an apparently democratic way. He adopted the draft constitution just to legitimise the foundation of the East German State on 7 October 1949. Known as the 'bourgeois constitution', it served as a mere cover to the SED dictatorship up to its replacement with a more appropriate 'socialist constitution' in 1968.

Beyond the very bad overall outcome, the question of the self-enforcing democratic potential of the constitutional design envisaged by Polak and Steiniger is challenging, due to its multiple connections with the theories of left-wing Weimar constitutionalists like Kirchheimer, Neumann and Fraenkel. In particular, it is worth assessing if and to what extent the Block-system was truly able to preserve political pluralism by imposing, onto parties divided by opposing social interests, a forced unanimous collaboration. Could the stifling of the normal competition between the parties in the name of the common interests of the country be a valid answer to the crisis of parliamentary democracy? The original intent of the Block-system should be examined from the point of view of those who in 1945 wanted to adapt parliamentary democracy to the contradictions of the class society. In the name of the common interest, they sought the way to link the decision-making process to the rule of unanimity. The downside was that it denied the parties the right to leave the government and present themselves to the public as opposition. The acceptance of this serious limitation of the freedom of manoeuvre of the parties testified to the difficulty in distinguishing between legitimate opposition and obstructionism guided by partisan interests. The constraint to the 'constructive' collaboration between the block parties revealed the fear of falling into the Weimar party state (*Parteienstaat*), portrayed as a party system destined to self-destructive selfishness by the 'iron law of the oligarchy' formulated by Robert Michels.[57]

IV. Block-system: A way towards a bounded partisan pluralist contestation?

On 14 July 1945, upon the initiative of the KPD, the four parties admitted by the Soviet Military Administration, i.e. the KPD (*Kommunistische*

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[57] R Michels, *Zur Soziologie des Parteiwesens in der modernen Demokratie. Untersuchungen über die oligarchischen Tendenzen des Gruppenlebens* (Klinkhardt, Leipzig, 1911). For the critique of the parties in the Weimar democracy influenced by Michel's 'iron law', see W Durner, *Antiparlamentarismus in Deutschland* (Königshausen und Neumann, Würzburg, 1997) in particular 86–127; C Gusy, *Die Lehre vom Parteienstaat in der Weimarer Republik* (Nomos, Baden-Baden, 1993); K Sontheimer, *Antidemokratisches Denken in der Weimarer Republik: die politischen Ideen des deutschen Nationalismus zwischen 1918 und 1933* (Nymphenburger Verlagshandlung, München, 1962) 188–210.

Partei Deutschlands), the SPD (*Sozial-Demokratische Partei*), the CDUD (*Christlich-Demokratische Union Deutschlands*) and the LDPD (*Liberal-Demokratische Partei Deutschlands*) had formed the 'Unified Front of the anti-Fascist democratic parties', commonly called the *Antifa-Block*. The founding communiqué invoked the common goal of 'saving the nation', which was possible 'only by making a fundamental change in the life and thinking of our people'.[58] As the Social Democrat Otto Meier affirmed during the first session of the block, during Weimar

> ... the key positions in the economy and administration had remained in the hands of the reaction, which had gathered in the so-called populist parties. After having plundered the people during the war and the age of inflation and filled their propaganda funds, they have developed together with the Nazis a front against democracy, the ominous 'Harzburg front'. We, who had witnessed these developments, have a duty to learn from them.[59]

We should bear in mind that before the breakout of the Cold War the Western allies intended to restructure German society along the same lines, motivated by the desire to prevent further rebirth of German militarism. The de-cartelization of the German economy stood out among the objectives suggested to the US military government by Franz Neumann as an analyst of the Office of Strategic Services (OSS).[60] The same intent is also present in the Morgenthau plan, on which until July 1947 the de-cartelization action promoted by the US military government was founded (Office of Military Government, United States – OMGUS).[61]

The intention to develop a form of government capable of overcoming the weaknesses of the Weimar parliament emerges in the block's communiqué of 12 August 1945. While declaring their satisfaction with decisions taken

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[58] *Gründungs-Erklärüng des zentralen Einheitsfront-Ausschusses vom 14. Juli 1945*, published in S Suckut, *Blockpolitik in der SBZ, DDR 1945–1949. Die Sitzungsprotokolle des zentralen Einheitsfront-Ausschusses; Quelleneddition* (Verl. Wiss. u. Politik, von Nottbeck, Köln, 1986) 64–5.

[59] *Verlauf der Gründungssitzung, Gedächtnisprotokoll von Erich W. Gniffke (SPD)*, published in ibid, 62.

[60] See F Neumann, 'German Cartels and Cartel-like Organizations' in F Neumann, H Marcuse and O Kirchheimer, *Secret Reports on Nazi Germany: The Frankfurt School Contribution to the War Effort*, edited by R Laudani (Princeton University Press, Princeton, NJ, 2013) 264–84.

[61] See *Directive to Commander-in-Chief of United States Forces of Occupation Regarding the Military Government of Germany* in *Department of State: Foreign relations of the United States Diplomatic Papers, 1945*, vol. III: *European Advisory Commission; Austria; Germany* (United States Government Printing Office, Washington, DC, 1968) 484–503, in particular 494, 495, 497–8.

by the winning powers at the Potsdam conference to restart democratic life throughout Germany, the parties of the block committed themselves to the setting aside of competition between the parties:

> In this unity lies the guarantee that Nazism will be eradicated along with all its roots, that the unprecedented crimes against our and other peoples will be punished and that Germany will be led towards democratic renewal. The unitary front will avoid the error that took place after the collapse of 1918. At the time, the rifts and divisions between the democratic forces had allowed the reactionaries to reunite their forces and rebuild their apparatus of power. Hitler used this apparatus of power to conduct a criminal war, which dragged the German people into the greatest disaster of its history.[62]

On 26 July 1946, the head of the Soviet administration (SMAD) General Fiodor Bokov summoned the SED leadership headed by Wilhelm Pieck. The theme of the meeting was the possible construction of a unitary government for the whole of Germany and the elaboration of a national constitution (indicated with the term *Reichsverfassung*, following the German tradition maintained also in the Weimar era).[63] Only two weeks later, on 10 August 1946 Walter Ulbricht presented to General Bokov the draft entitled 'Constitution for the democratic republic of Germany' elaborated by the SED constitutionalist Karl Polak.[64] Polak was the right man for the job: he studied law in Weimar Germany and published, in 1933, a PhD thesis entitled 'Studies for an existentialist theory of law' shortly before the new Nazi takeover. His thesis is a clear expression of the main currents of discussion in legal and constitutional theory of these years and shows a clear preference for Carl Schmitt's and Rudolf Smend's existentialist overtones against Kelsen's analytical sobriety. Being a Jew, he had to abandon Germany and opted for the Soviet Union, where he worked for Andrey Wyshinsky, first in his role as Procurator General of the USSR, then as the head of the Institute of State and Law in the Soviet Academy of Sciences.[65]

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[62] *Erklärung der Einheitsfront der antifaschistischen-demokratischen Parteien Deutschlands zu den Beschlüssen der Berliner Konferenz, 12 August 1945*, published in Suckut (n 58) 83.

[63] The term *Reichsverfassung* appears in the Pieck's notes of the meeting; see R Badstübner and W Loth (eds), *Wilhelm Pieck – Aufzeichnungen zur Deutschlandpolitik 1945–1953* (Akademie Verlag, Berlin, 1994) 74–5.

[64] *Synopse des Entwurfs einer 'Verfassung für die demokratische Republik Deutschland' von 10. August 1946*, published in Amos (n 11) 358ff.

[65] On Polak, see N Reichhelm, *Die marxistisch-leninistische Staats- und Rechtstheorie Karl Polaks* (Lang, Frankfurt am Main, 2003); M Howe, *Karl Polak: Parteijurist unter Ulbricht* (Klostermann, Frankfurt am Main 2002).

After minor changes, the SED Presidency unanimously approved the draft on 16 November 1946. The party leadership presented Polak's draft to the national and foreign press and published it in the SED newspaper 'Neues Deutschland'. It contained seven chapters, namely A) Fundamentals of the state system, B) Fundamental rights and duties of citizens, C) Parliament of the Republic, D) Government of the Republic, E) Justice, F) Administration, G) Länder, Districts and Municipalities. The draft was largely a re-elaboration of the Weimar constitution. However, while Article 1 of the Weimar constitution stated dryly that 'state power emanates from the people', Polak gives his definition of democracy a touch of vision by adopting Lincoln's Gettysburg formula. His Article 2 states that 'all state power emanates from the people, is exerted by the people and for the benefit of the people'.[66] Furthermore, 'the people realise their will through elections for popular representative bodies, referendums, participation in the administration, in justice and overall control of the public officials'. Beyond rhetorical formulas, the draft provides a set of tools for active co-participation of citizens through which the traditionally strong political role of public officials (*Berufsbeamtentum*) was to be severely limited.

According to Polak, not only the public officials but also the managers of the industrial cartels and the owners of large estates had a disproportionate political weight in Weimar society. Therefore, the draft's outline for fundamental rights and duties dedicated to the economic order specifies the prohibition of the monopolies and private cartels (Article 18) and the dissolution of the large land estates (Article 23). As to individual rights, while affirming the classic personal and political rights, such as freedom of opinion and association, Polak's draft introduces the notion of militant democracy by prohibiting the propagation of national, religious or racial hatred (Article 7: 'Any expression of national or religious hatred and any racial hatred is forbidden and will be severely punished. Persons spreading militaristic or National-Socialist views will be removed from public service. They cannot hold leading positions in economy and culture. Their right to vote can be withdrawn' and Article 14: 'All citizens have the right to form associations for purposes which do not go against the penal law and do not aim at spreading fascist or militaristic views.').

Article 40 marks most drastically the watershed with the Weimar principles since it repudiates the division of powers in favour of the supremacy of the legislature. It connotes the Parliament as 'the highest body of the republic', which 'has the supreme control over the acts of the government, state affairs, the whole of administration and justice'. Article 41 provides for

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[66] The draft constitution is quoted from the version printed as appendix to O Grotewohl, *Deutsche Verfassungspläne* (Dietz, Berlin, 1947) 87–112.

frequent elections (every three years) and proportional representation, thus further exalting the link between popular sovereignty and a Parliament faithfully reproducing the social moods. The idea of collective democracy, promoted 20 years earlier, also reappears. In order to 'rectify' the dynamics of the party system by imposing a constant confrontation with the demands of socio-economic associations, the parties lose the monopoly on the legislative initiative. Article 43 gives the right to propose new bills also to the 'authorised organisations' such as trade unions. Finally, the right to dissolve Parliament passes from the President of the Republic (as in Weimar) to the Parliament itself or to citizens through referendum.

Faithful to the Jacobin assembleary model, the draft knows no independent executive power, but only a collegial Presidency elected within the Parliament. Article 47 specifies that Parliament in its first sitting elect a Presidency 'in which each party can be represented in proportion to the number of its deputies'. The Presidency was supposed to replace both the President of the Republic and the Constitutional Court. Thus, according to Article 49 'the Presidency decides constitutional conflicts between the republic and the Länder or between the latter'. Furthermore, Article 92 gives the Parliament the power to elect the members of the Supreme Court and the Public Prosecutor General.

The judiciary remains a specialised body not subjected to the will of the people except for the election of the Supreme Court. Nevertheless, Article 88 claims that it must have 'a sense for social justice'. Polak will admit to the SED Constitutional Commission that a 'full democratisation' of the judiciary would have been preferable, 'in the sense that the judges are eligible and substitutable, but under current conditions this would not be feasible, it would be illusory'.[67] By 'current conditions' we can understand the need to reach a compromise with the bourgeois parties, especially in the western areas, which would never have renounced to the independence of the judges. But, we can also assume that Polak considered the German voters unprepared for the task. However, the 'full democratization' of the judiciary remained a long-term objective. This is the meaning of Article 89 – whose function should not be underestimated in the overall design of the constitution – which obliges 'the republic to provide means for juridical formation of the members of all classes of the people'.

The publication of the draft was accompanied by Polak's essay, 'Division of Powers, Human Rights, Rule of Law. Conceptual formalism and democracy'. In it, Polak explains the need to abandon such a crucial point of the

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[67] Polak at the meeting of the SED Constitutional Commission on 11 November 1946, quoted in Howe (n 65) 69.

Weimar system as the division of power in order to protect democracy. The Weimar constitution, while proclaiming popular sovereignty, actually perpetuated the domination of the old imperial state apparatus over the citizen. According to Polak, the protocols of the Weimar Constituent Assembly 'reveal a misunderstanding of the real social forces in Germany which today seems truly appalling. […] In 1919 everything had been done in Weimar according to the old and tested model that the German state doctrine had proclaimed as ''democratic'' since 1848, as a pledge of bourgeois liberties: division of powers, fundamental rights, rule of law, and so on'. However, the bourgeois doctrine of the state 'does not even dare to examine the content of these concepts, their true meaning for society as a whole'.[68]

Polak's argument reveals a strong influence of the constitutional doctrine elaborated by Carl Schmitt in the Weimar years. Whereas Polak repudiated the concept of the rule of law, he went as far as to repeat Schmitt's position word for word (without mentioning the name of an author compromised by Nazism):

> Every people and every age have their own conception of law […] The norm or the order on which each State is based is only *its* law. There is therefore a rule of law of antiquity, a rule of law of feudalism, a rule of law of absolutism [*Polizeirechtsstaat*], a bourgeois rule of law and a socialist rule of law. Even fascist jurists had famously called their state a National Socialist rule of law. The concept of the rule of law is therefore completely devoid of content, since every political and historical formation can use it and have used it in its own name. The concept therefore does not stand up to scientific analysis. This makes the concept even more dangerous in political propaganda. Covered with the label of the rule of law, each party can slander its adversary.[69]

In Polak's view, the 13 years of Weimar democracy reveal how bourgeois legal doctrine instrumentally used constitutional principles. For him, 'the legislative, the only power exercised by the people through representation, was in fact crushed against the wall by the governmental power, the executive', while the Supreme Court (*Staatsgerichtshof*) had usurped the role of a 'Second Chamber' whose decisions 'always favoured the reactionary forces'. To avoid the errors of Weimar, it is essential for German democracy reborn that 'the government of the people must be manifested in its entirety'.

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[68] K Polak, 'Gewaltenteilung, Menschenrechte, Rechtsstaat. Begriffsformalismus und Demokratie' (1946) 7 *Einheit* 385ff; republished in K Polak, *Reden und Aufsätze: zur Entwicklung der Arbeiter- und Bauern-Macht* (Staatsverlag der DDR, Berlin, 1968) 128.

[69] Ibid 141–2 (original emphasis).

This presupposes the total repudiation of the balance between powers since 'the Parliament does not tolerate any counter power beside it, nor any master above it'.[70]

Polak provides also the theoretical justification for the way his reading of militant democracy is affecting the draft's outline of fundamental rights. The constitutional project of the SED, in Polak's words,

> although far from being socialist, is based on the commitment to live up to the concrete situation in which we find ourselves and to block the true oppressors of freedom and enemies of peace and well-being. Monopolistic capital and the large estates must be destroyed, militarism, chauvinism and racial hatred must be forbidden as enemies of the people. Those who try to exploit the democratic rights of the people to destroy the same freedom and democracy, place themselves outside this system.[71]

With the essay 'German Constitutional Plans' published in January 1947, the SED's co-chairman, Otto Grotewohl, tried to explain to German public opinion the most controversial points of the draft, and answer the critiques arising mostly from liberal constitutionalists. The key argument used by the SED leader was that 'the terrible catastrophe' of Nazism required an overall re-examination of the established convictions. The Germans had to take note of the 'intimate connection between the traditional politics of the German state, which led us from catastrophe to catastrophe, and the traditional constitutional principles dominating in Germany'.[72] For Grotewohl, the fundamental flaw of Weimar's democracy 'which had opened the way to dictatorship', was 'that this was not a true democracy at all, a true popular state that would offer the masses of the people even the possibility of effectively opposing the advancing of the dictatorship'. Consequently, 'the essential branches of state power were not in the hands of the people, but were transformed into functions that acted without almost any control by the people'. In his eyes, this was the result of a constitutional doctrine pursuing the 'magic formulas' of separation of powers and rule of law.[73] 'The practice of the Weimar Republic has shown very eloquently what the principle of the division of power for the German reality means: paralysis of democracy, expropriation of the Parliament'.[74] Weimar was not a victim of 'too much democracy', but of too little, concludes Grotewohl:

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[70] Polak's declaration at the session of the SED constitutional committee (11 November 1946) published in Howe (n 65) 67.

[71] Polak (n 68) 138–9.

[72] Grotewohl (n 66) 12.

[73] Ibid 28–9.

[74] Ibid 31.

The proponents of the Weimar constitution and those who still support it today are always ready to blame the people for its failure, for the transformation of democracy into dictatorship. They forget, however, that according to the mechanisms of the Weimar constitution 'the custodian of the constitution' was not the people, but the President of the Reich. The dictatorship of the President of the Reich did not contradict the terms of the constitution; indeed, the latter was granting him unlimited power. Moreover, it was fully constitutional when first Brüning, then Papen repressed the political parties and dissolved the Parliament, thus paving the way for the fascist dictatorship. That is the way the powers were in balance according to the principle of their division in the Weimar republic.[75]

According to Grotewohl, the bourgeois theory of the rule of law suffered the same fiasco. 'With the help of the ordinances issued by the President of the Reich based on the state of exception, the administrative apparatus has given itself its own laws and to hell with the opinion of the people, the political parties and the Parliament'. Likewise, the German courts and 'most of all, the highest court in the Weimar Republic, the *Reichsgericht*' have usurped Parliament's legislative power.[76] The law, says Grotewohl, 'can rule only where the will of the people rules, and the administration and justice implement this will … The principle of the division of powers has destroyed the rule of law in Germany and has paved the way for the dictatorship'.[77]

For Grotewohl, Weimar's democracy had to be grounded on 'the political education of the people', but this could not be developed in the Weimar years. The tradition of statist authoritarianism (*Obrigkeitsstaat*), this 'curse of the Germans', had induced the constituents of 1919 to maintain the authoritarian pattern and assign the state apparatus 'the curatorship of political parties', preventing the people from leaving the state of immaturity.[78] But for Grotewohl the only way for the self-liberation of the citizens is the Kantian *Sapere aude!* or in his words, 'the political life itself': 'all our political problems must be elaborated and decided through a true and fully public spiritual conflict, and with the participation of the whole people in Parliament'. Therefore, 'peaceful democratic development' presupposes 'the hegemony of politics over bureaucracy'[79] (including the judiciary):

[75] Ibid 33.
[76] Ibid 34.
[77] Ibid 35.
[78] Ibid 78–9.
[79] Ibid.

> The German ideology of the state has limited itself to embellishing the spiritual and physical chains that subjugate the citizen to the State and to giving them even a profound meaning. It has never taught what makes the citizen free, that is: the need for an understanding of the totality and the need to participate in its management. Yet, only political parties can transmit this understanding of the totality and give the masses of the people the tools to manage it.[80]

This is 'the task of the politician'. A politician cannot exempt himself from his responsibilities by blaming the 'bad', 'unprepared' and 'stupid' people for 'the catastrophe of the Weimar Republic':[81]

> What could the people do against the secret barters between the ministerial bureaucracy and the magnates of finance, against the terrible class justice, against the refined methods with which a mystifying philosophy delivered by university professors was poisoning the minds of youth and repressing all healthy political sentiment, where the press, cinema and radio were directed exclusively by the so-called 'defenders of the state'. Thanks to the power of their monopolies, the bourgeoisie of the Weimar Republic has acquired the decisive dominion over all the instruments of mass conditioning. The three who have ruined Germany: Stinnes, Hugenberg and Kirdorf were in control of the press, cinema and all the means that form the public opinion [...] Does the people have to be a people of geniuses, if the state itself seeks or tacitly allows to mislead them by the most refined methods of popular propaganda?[82]

Therefore, the politicians, not the people, have failed. They claimed to 'obey the will of the community', while they were just 'going with the flow'. But, 'does a politician really do his job if he merely follows the current of general public opinion approved by the state?' Grotewohl's answer is no: a politician cannot claim to have fulfilled his task, if he has not 'developed an awareness capable of understanding where this current leads', since the political horizon of a people 'is measured primarily by the political horizon of its main politicians'.[83]

'You cannot be the master of your destiny if you just follow the murky currents of public opinion' and fall into the hands of the 'blind forces of destiny and omnipotent governments'. If this happens, it is a sign that 'knowledge and activity' have vanished, that is to say that politics has not fulfilled its task. Only a 'political people' can be free and emancipated

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[80] Ibid.
[81] Ibid 79–81.
[82] Ibid 81–2.
[83] Ibid 82–3.

'from the protection of the old rigid state power, or of the old laws of economy and society'. It is therefore up to the political parties 'to organise politically and educate the people', so that 'a lively political life can replace the obstinate state administration'. Only on this condition 'can political decisions emerge from an open parliamentary debate between the parties, rather than from the President's cabinets or from the sessions of the Supreme Court'. For this reason, the constitutional project of the SED refuses to 'balance the Parliament with any high organ of the State that can act as a dangerous shadow government'.[84]

Polak joined Grotewohl's exhortation for a political mobilisation of the people as an indispensable corollary of the planned constitution. He summarised numerous public interventions in favour of his constitutional project in the article 'Renewal of Justice – a path towards democratic justice', published in 1947. As in his 1946 essay on 'Division of Powers', Polak uses Carl Schmitt's critique of the concept of rule of law. This is

> just a 'bombastic phrase', effective in propaganda only because it pushes us to neglect which policy is pursued thanks to such a law. It pushes us to oppose law and politics, which does not make sense. Each historical and therefore political movement creates its own law: we can assess the value and the disvalue of the law only based on the value and the disvalue of the political movement, of the historical force, which sustains it.[85]

Like the so-called 'left schmittianists' of the 1920s such as Kirchheimer and Neumann, Polak adopts Schmitt's attack against the 'political neutrality' of the liberal 'agnostic, relativist' state, which tends to evade political decision. As for them, the target of Polak's critiques is the Weimar era legal positivism. He defines it a 'juridical theory unable to distinguish the friend from the enemy of democracy'.[86] In the name of militant democracy evoked in 1932 by Fraenkel,[87] Polak states that 'as socialists and advocates of militant democracy, we reject the thesis on the political neutrality of the state and law [...] because the state has never been politically neutral and never will be'. Therefore, 'we aspire to a militant democracy, founded on the will of the people – a democracy that has as its content the implementation of a given program'.[88] Militant democracy does not imply

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[84] Ibid 83–4.

[85] K Polak, 'Justizerneuerung – Wege zu einer demokratischen Justiz' *Weg und Ziel. Organ für Theorie und Praxis unserer Parteiarbeit* October 1947, republished in Polak, *Reden und Aufsätze: zur Entwicklung der Arbeiter- und Bauern-Macht* (Staatsverlag der DDR, Berlin, 1968) 113.

[86] Ibid 92.

[87] E Fraenkel, 'Um die Verfassung' (1932) in Fraenkel (n 39) 496–509.

[88] Polak (n 85) 109.

a repudiation of constitutionalism understood as a link between natural law and positive law. Quite the opposite: it aims at giving new life to the tension between the two, which the bourgeois legal doctrine had erased from its own constitutional order. The bourgeois legal doctrine, says Polak, 'had defended the natural rights of man only as long as the bourgeois order had not imposed itself as dominant'. When the bourgeoisie was able to build its own state and law, 'the contradiction between law and right was declared out of the question as the natural law was realized with the bourgeois legal order. The bourgeois state and bourgeois law were imposed as the natural and rational order'. The profound effectiveness of natural law as a method of investigation, however, consists precisely in the 'critique of existing relationships from the point of view of the "nature" of man and society', that is to say from a historical point of view since it is destined to evolve according to social and cultural changes.[89] 'New forms of social coexistence emerge. A new natural right is affirmed, new human rights. But these do not form in conformity with the dominant institutions, but in contradiction to them.'[90] Having conceived a constitutional project for an epoch of 'transition', Polak underlines in it the coexistence of the old and new fundamental rights:

> The fundamental rights of our constitutional project must become the program of our democracy. [...] These are primarily bourgeois liberties, the best achievements of modern culture: equality before the law, freedom of conscience, word, association, the defence of property etc. To these we have added some new fundamental rights, which go beyond the limits of the old bourgeois constitution. These are the fidelity to the Republic, the defence of citizens' freedom from the economic dominance of industrialists and large landowners; the prohibition of cartels, monopolies and large estates. The Republic also has a duty to repress any instigation of national or racial hatred and to act without compromise against any militaristic incitement of the reaction.[91]

The only way to implement these rights is 'through an all-encompassing activation of the people' not only 'in legislation, but also in administration and justice'. This goal presupposes that 'the popular masses acquire the skills necessary to carry out the highest functions of the state'.[92] Therefore, 'we aim at the hegemony of the political movement, that is to say overcoming the old state order and its laws by the people organised in political parties (which finds in Parliament its highest expression to which nothing can be opposed)'.[93]

[89] Ibid 100.
[90] Ibid 101.
[91] Ibid 109–10.
[92] Ibid 109.
[93] Ibid 117.

Such a key role of the parties within the new constitutional design was calling into question the detrimental aspects of the party state. According to the historical judgment shared by all the participants to the constitutional debate, the ineffectiveness of the Weimar coalitions opened the way to the uncontrolled power of state administration during the years of the presidential governments between 1930 and 1933. This, in turn, had facilitated the emergence of the Nazi dictatorship. The SED constitutionalist Alfons Steiniger will provide in 1947 the theoretical elaboration of the difference between a coalition government and his novel solution for an effective Parliament: the Block-system. The Constitutional Commission added the Block-system to the constitutional draft during its 1947 debates. According to Article 92 of the final version adopted in October 1949 'The strongest group in the People's Chamber names the prime minister; he forms the government. All political groups, if they have at least 40 members, are represented in proportion to their strength by ministers or state secretaries … If a faction excludes itself, the formation of a government takes place without it.' Furthermore, Article 95 of the final version introduces also the constructive vote of no confidence: 'The motion of censure will only be put to the vote if, at the same time, it proposes the new Prime Minister and the policy principles he must follow. … The decision to withdraw the trust is effective only if at least half of the statutory number of Members approves it. … If distrust is expressed to the new government, the People's Chamber is dissolved.'

In his essay, Steiniger defines the Block-system a technical means, which should artificially supplant the lack of social homogeneity that had undermined the efficiency of the Weimar Parliament.[94] Wherever conflicting social interests divide the population, the 'survival of democratic institutions depends on the possibility to include the opposition to the endeavours of the ruling groups'.[95] In his view, the 'lack of opposition in a polarised society shows a lack of democracy; an unsuccessful opposition shows a stalemate in democratic development'; but an opposition that collaborates with the government shows democracy.[96] The Block-system is but an indispensable 'technical staple' to this end. According to Steiniger, his solution corrects the two main defects of the proportional system. On the one hand, it guarantees governability; on the other, the internal party democracy improves the relation between the candidate and its constituency.[97] Its 'ideal meaning' is a 'permanent political mobilisation

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[94] Steiniger (n 53) 8.
[95] Ibid 20.
[96] Ibid 21.
[97] Ibid 33.

of all citizens',[98] both those in favour of the ruling party and those opposed to it. Such outcome should be possible thanks to

> the cardinal rule of solidarity. If the rule in the majoritarian system is: the majority is always right; if one can hardly give a name to the rule in the proportional system (because according to experience the coalition program is in any case so disparate that it dissolves before it can act on the administrative mechanism in an integrated way), in the State determined by the Block, i.e. in the popular republic, the rule is: the whole is always right.[99]

'The whole' of the Block solves not only the technical limits of the coalition government, but above all the fundamental contradiction between the unitary strength of the popular will and the divisive force of socio-economic interests:

> The more the social structure is disunited, the more we need a political organization of the people in which every democratic minority group will collaborate responsibly in the government […] From a practical point of view it can be objected that the coalitions against nature do not last. For a block in which we are constitutionally obliged to participate, leaving us no possibility to threaten the exit from the government, this does not apply […]. We are forced to find a common government that unites the friend and the enemy in the collective work, on which one will have more to say and the other less, but no one can deny his collaboration.[100]

V. Conclusions

The elaboration of the Weimar legacy made by East Berlin constitutionalists appears as an inverted image of those emerging in the western zones. The future constituents of Bonn drew from Weimar the conviction that the primeval element on which to develop the political will of the people, from which everything emerges and to which everything must get back to, is the rule of law. Thus, the Constitutional Court as custodian of the original *fiat* must be able to fold the arm of the popular majority. In the Eastern zone of Berlin, the diagnosis of Weimar's defects brought to the opposite formula: 'promotion of political development or restoration of the state bureaucracy'. In other words, the rule of law does not generate the political system, but it can only be its outcome, since the judicial organs, like any other element of the state, could not be presumed antecedent and superior to the political context.

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[98] Ibid 37.
[99] Ibid 52.
[100] Ibid 32.

It is no wonder that the West German constitutionalists invited between 1946 and 1948 to express their opinion were sceptical of Polak's constitutional draft. The most prestigious among them, Gustav Radbruch, Ulrich Scheuner and Hans Peters, focused the objections on the supremacy of the legislative and the consequent submission of the judiciary that they considered dangerous for democracy. Furthermore, they noted that the obligation of all parties to participate in the government meant that it was impossible to stand as a legally recognised opposition force in front of public opinion.[101] As for Wolfgang Abendroth, in 1950 he considered both the constitutions of West and East Germany as linked to the Weimar principle of the social value of the economy. But, he claimed, while in the FRG the judiciary was a guardian of the political forces, in the GDR, Polak and Grotewohl placed the transformation of the social and economic relations at the forefront of democratic development.[102] According to Abendroth, the West German constitution guarantees individual rights but does not modify the social relations. Consequently, 'apart from an only programmatic equality of the woman, it neglects the conditions of the weaker social groups'.[103] However, as for the GDR constitution, Abendroth is critical not only of the fact that the actual political development does not follow the promised party pluralism due to the de facto SED dictatorship. He also criticises Steiniger's de-legitimisation of parliamentary opposition. Such an arrangement leads, in any case, to a situation in which 'a minister opposing the government, and the party he represents, have no possibility of showing their divergent opinion to the voters. Thus, public opinion has no chance in participating in the critique of governmental politics; therefore, a real popular decision of the fundamental political issues becomes impossible'.[104]

Abendroth's objections are undeniable, yet Steiniger's proposal – as incongruous as it may seem – is questioning the right problem. Fraenkel's 'dialectical democracy' was indicating the need to overcome the dilemma between ineffective coalitions and too oppressive majoritarian governments. It indicated also the need to strengthen the ties between the parties and the socio-economic cleavages. Yet it was not offering any concrete institutional solution. Steiniger's Block-system was boldly proposing to solve both by introducing the constitutional principles of 'forced unanimity' and the

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[101] For the critiques expressed by Hans Peters on 5 December 1946, Gustav Radbruch on 8 May 1947 and Ulrich Scheuner on 26 August 1948, see Amos (n 11) 77–9, 231.

[102] W Abendroth, 'Zwiespältiges Verfassungsrecht in Deutschland. Die Verfassung der "Deutschen Demokratischen Republik" im Vergleich zum Bonner Grundgesetz' (1950–51) 76 Archiv des öffentlichen Rechts, *in Gesammelte Schriften*, vol. II 1949–1955 (Offizin, Hannover, 2008) 91.

[103] Ibid 92.

[104] Ibid 97.

'general-imperative mandate'. It implied the introduction of two distinct elements of coercion within the dynamics of parliamentary democracy in addition to the limits to party activity implicit to Polak's interpretation of militant democracy. Taken together, we can say that Steiniger and Polak were repudiating the classical laissez-faire conception of party democracy for a new one, strictly bounded by constitutional rules. At the same time, their Parliament was meant to be 'sovereign' in the sense indicated by Neumann in 1929, i.e. representative of 'the will of the people' and therefore 'inconceivable, strictly speaking, both with the concept of division of powers and with the principle of judges' independence'. It had to be at the very heart of the political life of the nation, able – as Kirchheimer put it – to promote the legitimacy of the constitution and the identification of its citizens to it.

As their Weimar era intellectual precursors, Polak and Steiniger aimed at properly institutionalising the role of political parties in the constitutional system. Their interpretation of the breakdown of the Weimar Republic convinced them of the need to grant constitutionally a set of rules alien to the liberal tradition. These are: the principle of militant democracy, the role of parties as representatives of social and economic cleavages and their internal democracy, the set of values connecting the voters and MPs, and the legislator's ability to promote an energetic long-term social policy through the Block-system mechanism. In their eyes, it was the key for a constitutional design able to develop a 'self-enforcing' effect and thus prevent democracy from backsliding.