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Constitutional History as an Integral Part of General History: The German Case

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Abstract

The German Constitution (»Basic Law«) of 1949 is generally regarded as a successful and effective constitution. Many attribute the altogether lucky development of the Federal Republic of Germany not least to this constitution and its interpretation and implementation by the Federal Constitutional Court. However, neither the Basic Law nor the jurisprudence of the Constitutional Court play a significant role in the books of historians on the Federal Republic. The article argues that the influence of constitutional law on political behavior and social relations is a decisive factor for the situations, developments and events that historians want to describe and explain. A number of examples show where the objects of contemporary historiography cannot be adequately understood and interpreted without regard to the Basic Law and the judgements of the Federal Constitutional Court.

Keywords: Federal Republic of Germany, German constitution (Basic Law), Federal Constitutional Court, historiography

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Constitutional History as an Integral Part of General History: The German Case

I. The Importance of the Constitution for the Historiography of the Federal Republic

1. The Constitution as Historical Factor

The German Constitution, the Basic Law (*Grundgesetz*) of 1949, is generally regarded as a successful and effective constitution. Its acceptance in the population has grown from anniversary to anniversary. Many attribute the altogether lucky development of the Federal Republic not least to the Basic Law, especially if the Federal Republic is compared to the Weimar Republic, whose failure is often ascribed to deficits of its constitution. An influential Constitutional Court insured that the Basic Law became a determinant factor for political behavior and social relations and was able to keep up with changed conditions and new challenges. For other countries, particularly those that had turned towards liberal-democratic constitutions in the second half of the 20th century, the German Constitution became a model and the Court's jurisprudence served as a point of reference for their courts.

It is thus the more surprising to see that the Basic Law and its interpretation and enforcement by the Constitutional Court do not play a decisive role in the historiography of the Federal Republic.[1] This is not to say that they are completely absent from the history books. But reading them, one does not get the impression that the Basic Law and the jurisprudence of the Court had a significant impact on the development of the Federal Republic. Even if one admits that not everything that is relevant for historians of constitutional law is equally relevant for general historians, it seems remarkable how little constitutional history has been found worth mentioning in the books by general historians. Should it have been more? And could it have been more? Or does the discipline lack the capacity to take on the legal aspects of its object?

General history does not mean total history, even if there are schools that claim just this. It is predominantly a political history with the understanding that society, economy and culture have to be taken into account, whereas numerous other areas, like the history of architecture, of education, of philosophy etc., may be included, but are not mandatory and can be left to specialists, most of whom will find their place in the systematic disciplines, not in the history departments. But what about the law and, with regard to political historiography, constitutional law in particular? Is it located at the level of society, economy and culture, which ought to be integrated into the general history, or does it belong to the large number of areas that may be neglected without historians being reproached of having missed an important aspect of their object of study?[2]

One distinctive feature of constitutional law in its relation with politics stands out. Historians of the Federal Republic owe their object of study to the Basic Law. Before the Basic Law was enacted, there was no Federal Republic, and once it had been established, it existed in the form determined by the Basic Law. Like all modern constitutions, the Basic Law regulates the establishment and exercise of political power. It lays down the structure in which politics are to operate, and it determines the principles and goals that political actors have to observe in the pursuit of their functions. The provisions of the constitution are not recommendations but obligations. Political decisions must comply with them in order to be valid. The

1 To demonstrate this is the purpose of my book, Grimm (2022), of which this article gives a brief summary, and which was discussed at a conference at the Max-Planck-Institut für Rechtsgeschichte und Rechtstheorie in Frankfurt on 3 February 2023.

2 For a more detailed account, examining the theoretical approach of Wehler (1987–2008), see Grimm (2000) and in the appendix of Grimm (2022) 329–343.

further development of the country cannot be sufficiently understood without the constitutional arrangement being taken into account.

The regulatory function of constitutions does not allow to reduce them to mere expressions of the power relations at the moment of their enactment and thereby deny them an independent existence. Of course, constitutions do not come out of the blue. Instead, they reflect the experience of the previous system, existing power structures in society, and their drafters' concepts of political and social order. However, the product is never fully determined by the constellation from which it emerges. Rather, the transformation of the concept into a legal document ready for application requires choices and concretizations. Furthermore, constitutions are not just a snapshot of a particular historical moment. They do not merely reflect a certain state of reality, they are aimed at shaping reality. There is a time before and one after the adoption of a constitution, and the difference matters.

Constitutions reach their aim by virtue of being law. The transformation of a concept of political and social order into law decouples it from the moment of enactment and the persons involved in it. As law, the constitution claims binding force regardless of changing governments and conditions. The capacity to achieve this is a consequence of its normativity. In contrast to what was called »constitution« before the American and the French revolutions, modern constitutions are not descriptive but prescriptive, and maintain their binding force until they are repealed or replaced by a different constitution. No subject of a historical subdiscipline is so intimately linked to politics as the constitution. Even a political historiography narrowly conceived cannot excuse itself from including constitutional law in its purview.

2. *Validity and Efficacy of Constitutions*

One proviso must be made, however. Historians have to bear in mind that legal validity is not identical to real efficacy. The constitution contains requirements, but it is not self-executory. It needs to be effectuated.[3] Norm and reality must be brought into congruence through the norm-conforming behavior of its addressees. This is true for all law, but for constitutional law to a heightened degree. The addressees of constitutional law are the power-holders themselves, hence those who dispose of the coercive means of the state to enforce the law. If ordinary people violate the law, they can be compelled by the law enforcement agencies, if necessary through physical force. If the power-holders themselves disregard the law, there is no superior power to enforce it. This difference accounts for the specific weakness that distinguishes constitutional law from ordinary law.

The willingness of power-holders to obey the law cannot be taken for granted. There are constitutions that have been enacted without any intent to make them binding. Their only purpose is to create the impression of a country under the rule of law. There are constitutions that have lost their efficacy over time, for example, when their opponents come to power and ignore or pervert them. These are regarded as failed constitutions, like the Weimar Constitution. Some constitutions are respected only as far as they do not conflict with superior political or religious truths or with hegemonic or economic interests. As soon as constitutionalism was born, it was prone to abuse. One could copy the form without adopting the function. There is abundant evidence in history for this, from as early as the Napoleonic Constitution in France onwards.

But even where politicians are generally willing to comply with the constitution, occasional disregard of its provisions cannot be ruled out. Constitutional requirements meet a political and social reality that follows a different logic than the legal one. Politicians are expected to set aside their own political logic in favor of the law. In concrete situations of political action, however, even a generally law-abiding government will often perceive the law as an obstacle to its goals. It is therefore unlikely that constitutional requirements and political reality will always be in harmony. The fact that constitutional law depends on being followed implies the possibility that it is not complied with, or at least not immediately, not completely, or not in the way imagined by its drafters. The expectation

3 Groundbreaking in this regard was Hesse (1959). For the impact of this seminal publication, see Krüper et al. (eds.) (2019).

that there will ever be a state of full congruence is futile, if only because of social change that permanently poses new challenges to constitutions.

This difference between the constitution's claim to regulate political behavior and its actual implementation means that historians should not content themselves with a description of the constitution at the time of its enactment. There is no guarantee that what is stipulated by the text will also exist in fact. Validity and efficacy are situated on different levels. Validity is a normative, efficacy an empirical notion. Inefficacy leaves the validity of the law unaffected. But its demands remain unfulfilled. The actual state of affairs is then illegal. But it is nevertheless there. This should not be downplayed as the normal difference between constitutional law and constitutional reality. Constitutional reality develops within the scope of action that constitutional law leaves open. If constitutional law lacks efficacy, however, the result should not be called constitutional reality, but rather what it is, namely a violation of the constitution.

Deficits are more likely in the substantive parts than in the organizational parts of the constitution. The latter concern mainly the establishment and organization of political rule. Normally, the institutional arrangements prescribed by the constitution will be installed immediately after its enactment and continue to operate, even if informal entities or procedures precede or complement the formal ones. The substantive parts, by contrast, mainly concern the exercise of public power over time and are more prone to come into conflict with political plans or interests. As a consequence, they are more at risk of being disregarded. Throughout the 19th century and far into the 20th century, fundamental rights were virtually irrelevant in Europe, although their legal validity did not differ from that of the constitutions' organizational provisions.

3. Constitutional Change

However, the possibility of a constitution's failure to take effect, in part or as a whole, is not the only reason why it does not suffice to describe it in its original form. Constitutions are subject to amendment, the more so the older or longer they are. They may have shortcomings that appear in the course of political practice. New challenges may occur that cannot be met under the original provisions. The values that underlie the original constitution may change over time and require an adaptation of constitutional provisions. Some amendments will be of a more technical nature, but others may change the rules of the game, sometimes also the guidelines for politics, and produce different effects. If historians do not take such developments into account, they will miss important changes in the structural conditions of politics or an indication of social change.

Yet, constitutional change can also take place without textual amendments. In this case, the change concerns the meaning of an unchanged text. This change occurs by way of interpretation. Interpretation is inevitable. It is a consequence of the fact that legal norms apply to an indefinite number of future cases and must therefore be formulated in a fairly general and abstract way, whereas the cases to which they apply are always individual and concrete. Consequently, there is a gap between norm and case, which has to be bridged by interpretation. This is true for law in general, but particularly for constitutional law, because large parts of the latter refer to the foundations of the political and social order and resemble principles more than rules. They are not immediately ready for application to cases.

Everybody who has worked with constitutional law has encountered the situation when the constitutional text does not contain the answer to a question raised by a case. This does not necessarily mean that the question remains unsolved and politicians are free to act as they please. Rather, it means that the answer has to be derived from the existing provisions by way of interpretation. This requires generating a more concrete rule from the text, which enables the constitution to be applied at all. While this process finds its starting point in the text, it is not completely determined by it. The task of interpretation cannot be fulfilled without additional input by the interpreter. Interpretation is more than the uncovering of a meaning deposited in the text from the very beginning – to a certain extent, it constitutes the meaning.

How much additional input an interpreter can justifiably introduce is a question of methodology. Methods of interpretation, however, do not share the law's authority. They are the result of the legal practitioners' and scholars' ongoing work with the law. Nor are legal methods established once and for all; rather, they change over time, vary from country to country, and are also quite frequently

contested. Several methodological approaches may coexist, between which a choice has to be made. The choice matters. There are minimalist methods that stick closely to the text or to the supposed original meaning of the words or the presumed intent of the constitution's drafters and that reject a change of meaning. More maximalist methods, by contrast, attempt to give utmost effect to constitutional provisions and favor the adaption of their meaning to new challenges.

The choice is, however, one between legal alternatives. The process of interpretation remains part of the legal system, as arguments have to be acknowledged as of a legal nature by the community of jurists. What counts as legal may be contested, but what is undisputed among jurists is that non-legal – for example, political or religious – arguments are inadmissible. As the application of a constitutional norm to a given set of facts is bound, but not fully determined, by the text of the constitution, acts of interpretation and application enjoy a certain degree of autonomy. Usually more than one interpretation is compatible with the text and even with the spirit of the constitution. In order to determine the impact of constitutional law at a certain point in history, knowledge of its then prevailing interpretation is indispensable. Historians therefore have to engage with interpretation.

4. The Impact of Constitutional Adjudication

Interpretation takes place whenever the conduct of persons or institutions depends on the meaning of the constitution. The less defined the norm, the more contested the question of its correct interpretation. If, in cases of doubt or controversy, the addressees of constitutional provisions – the politicians – interpret the constitution themselves, their political intentions will inevitably influence the interpretation. Together with the specific weakness of constitutional law discussed above, this led constitutional drafters to establish independent and professional judicial institutions to enforce the constitution against the political organs of the state. In general, the decisions of these institutions enjoy supremacy. Their interpretations are the final word in constitutional conflicts. Constitutional law means what the judges think it means.

With the emergence of constitutional adjudication, a new era for constitutionalism began. Up to then, constitutions had claimed binding force, but lacked mechanisms to enforce this claim. Many early constitutions criminalized intentional violations of the constitution by ministers, but these provisions were rarely enforced, and, moreover, did not undo the unconstitutional act. While constitutional adjudication changed this, constitutional courts still can only mitigate the specific weakness of constitutional law, not eliminate it. Just like constitutional provisions, judgments of constitutional courts depend on being followed by their addressees. Like constitutions, constitutional courts may remain ineffective, either if they are organized or composed in a way that the powerholders have nothing to fear from them, or if politicians can disregard their judgments without risking a loss of legitimacy.

Yet, where constitutional courts are in a position to fulfill their function properly, the constitution gains considerable influence on political activities and social conditions. In political systems without constitutional adjudication, the constitution at best comes in as a corrective after the political will has been formed, and is then seen through the lens of political intentions. By contrast, in political systems with constitutional adjudication, the constitution has to be taken into account at an early stage and in a relatively neutral way in the process of political decision-making, to avoid a later defeat in the court. Furthermore, while in political systems without constitutional adjudication, the majority opinion will prevail in cases of conflict, in political systems with constitutional adjudication, minorities have the chance to succeed in court.

Without the Constitutional Court's dominant role in the Federal Republic, which constantly demonstrates the Basic Law's relevance for political behavior and social conditions to the population, the constitution would hardly be as deeply rooted in the collective German consciousness as it is today. This general awareness of the Basic Law's relevance produces effects that go beyond the juridical function of the constitution. If a constitution is not only perceived as legally effective, but also as reflecting a society's aspirations and ideas of a good and just order, it can acquire symbolic value. This, in turn, adds to its efficacy. If a constitution is attributed symbolic value, disregarding it becomes more costly for politicians, and therefore less likely. The symbolic value of a constitution is thus a historical factor of considerable impor-

tance and as such should be of particular interest to historians.

However, the symbolic value of a constitution cannot be taken for granted. Constitutions fulfill their function if they are legally effective; anything beyond this legal function is an added value. In the majority of countries, the constitution lacks this added value, but where it exists it contributes to the integration of society, particularly in increasingly pluralistic societies in which the significance of traditional factors of integration is declining, as is the case in Germany. During the forty years that the country was divided into two states, the usual factors on which integration rests were missing, and for West Germany, it was the Basic Law that filled this gap and even shaped the country's identity. It is not by chance that the unusual compound noun *Verfassungspatriotismus* (»constitutional patriotism«) was forged in the Federal Republic to describe the high regard in which the Basic Law was held.

5. *How to Integrate Constitutional History into General History*

For historians, this means that the impact of the constitution on the development of the country can be understood only when all these factors – the original text of the constitution, the major amendments, the jurisprudence of the constitutional court and the constitution's symbolic value – are taken into account. While this analysis can be performed either by general historians or by legal scholars, they will not approach it in the same way. The legal science is a normative discipline, interested in law for law's sake. Its main concern is the correct understanding and application of the law. These interests remain decisive even when legal scholars undertake historical research. History, on the contrary, is an empirical discipline and treats law as fact. Law is relevant to historians insofar as the object of their research is shaped or influenced by it.

This difference in approach becomes particularly salient when scholars seek to assess the effects of law on social and political reality. Constitutional history as studied by a legal scholar focuses on the question of legal validity of law. This does not mean that the effects of law are not of interest to legal scholars, but their main interest is its effects within the legal system. Jurists are not trained to study the impact of law on society. Historians, in turn, are interested in reality, and in law only insofar as it affects this reality; but they are not familiar with legal practice. As a result, a no man's land stretches between the two disciplines, and the real effects of constitutional law on society are often underestimated. However, as constitutional law and adjudication have often been decisive for the history of the Federal Republic, the question is how they can be adequately integrated into historical research.

If it is true that not everything of relevance for legal historians is also relevant for general historians, the criteria for relevance of the constitution in political and social reality have to be those of general historiography. The constitution and its interpretation and application have to be taken into account by general historians when constitutional law has significantly determined or influenced the conditions, developments and events that they regard as worthy of discussion. The influence of constitutional law can be called significant if a development or event that historians consider worthy of description or explanation was largely conditioned by the constitution and would have taken a different turn without the constitution's influence. The exploration of this will sometimes require counterfactual questions, despite the limited certainty of the resulting answers.

This is admittedly a challenge for historians. Constitutional law follows its own logic. Some aspects require just awareness of the constitution's relevance. To understand other aspects, like the jurisprudence of a constitutional court, historians will need assistance from experts in constitutional history. In this respect, it is remarkable that a constitutional history of the Federal Republic as yet remains to be written and that so far only non-German scholars have produced comprehensive historical studies of the Federal Constitutional Court.[4] The following section will give a brief account of how recent general histories of the Federal Republic have dealt with the impact of the Basic Law and the jurisprudence of the Consti-

4 See Collings (2015); Gaillet (2021).

tutional Court.[5] Given the limited space available, this discussion will necessarily focus on particular examples; a much more detailed account is provided in my book *Die Historiker und die Verfassung*.

II. The Treatment of the Basic Law and Constitutional Jurisprudence in the Historiography of the Federal Republic

1. The Basic Law

The production of the Basic Law was not a German initiative, but demanded by the three Western allies of World War II, who wanted to establish a West German state after all attempts to reach an agreement with the Soviet Union on Germany's future had failed. In the »Frankfurt Documents« of 1947, the three Western occupying powers instructed the »minister presidents« (heads of government) of the newly established West German *Länder* to convene a constituent assembly tasked with drafting a democratic and federal constitution with an adequate central government and a bill of rights. The minister presidents, fearing that such a constitution would cement Germany's division, would have preferred to evade the request. Realizing that resistance would be in vain, however, they convoked the Parliamentary Council, which began its work in 1948 on the basis of guidelines for the new constitution drawn up at an informal preparatory convention at Herrenchiemsee.

While the development that led to the establishment of the Federal Republic is dealt with to a greater or smaller extent in all the works of general history analyzed here, much less space and attention is devoted to the drafting of the Basic Law and its contents, which is discussed only incompletely.[6] All authors put the emphasis on the institutional provisions of the Basic Law, and here especially on the so-called »lessons of Weimar«. Some even call the Basic Law an »anti-Weimar constitution«. While the institutional arrangement on the federal level is usually described in detail, the authors neglect to point out the distinctive form of German federalism. Nor do they appreciate the importance and consequences of the introduction of the Constitutional Court, a real novelty in Germany. The books give the impression that its creation merely added one more institution to the traditional list of president, parliament, government, and thus fail to show that it fundamentally changed the conditions under which all other state powers operated.

This lack of awareness continues regarding the formation of the Constitutional Court.[7] The traditional organs of the state were formed and took up their work immediately after the Basic Law had entered into force, but not the Constitutional Court. The Basic Law's provisions on it were rudimentary and left the details to be worked out by parliament. While the establishment of a constitutional court had faced no opposition in the Parliamentary Council, its further elaboration proved highly controversial in the legislature. The Christian Democratic Party that now formed the government favoured a weak court, the opposition and the *Länder* were interested in a strong one. It therefore took two years until the Court was able to take up its work. However, these debates, although of major interest given the Court's growing importance, are not discussed in the majority of the general histories of the Federal Republic surveyed here.

The substantive parts of the Basic Law, the fundamental principles of the Federal Republic (democracy, the rule of law, federalism, republic, and its definition as a »social state«,) as well as the bill of rights, are neglected to a greater or lesser extent.[8] None of the books name all the fundamental principles. The fundamental rights share this fate. Some books even ignore their existence. Others mention that social and economic rights are missing, but almost none of the works spell out what is in fact protected. The seminal guarantee of human dignity, one of the most copied features of the Basic Law, is mentioned in just one book out of thirteen. Some authors point out that, compared to the Weimar constitution, the binding

5 The following books were analyzed: Birke (1997), Conze (2009), Geppert (2021), Görtemaker (1999), Henrich-Franke (2019), Herbert (2014), Morsey (2007), Recker (2009), Rödder (2004), Wehler (2008), Winkler (2000), Wirsching (2011) and Wolfrum (2006). For the reasoning behind this selection, see Grimm (2022) 9–11. Möller (2022) only appeared after the publication of Grimm (2022).

6 Grimm (2022), ch. II, 45–60.

7 Grimm (2022), ch. III, 61–68.

8 Grimm (2022), ch. II, 51–53, 57–58.

force and the justiciability of fundamental rights had been strengthened. However, they erroneously assume that during the Weimar period, fundamental rights had lacked legal force completely.

Because of the historians' limited interest in the substantive parts of the constitution, their accounts do not only miss important elements of the Basic Law, they also place it into a false opposition to the Weimar Constitution. The similarities between the Basic Law's and the Weimar Constitution's provisions are much more numerous than the differences between the two. The historical works discussed here, therefore, do not paint a reliable picture of the Basic Law. Each offers a fragmentary account, and if the various studies' chapters on the Basic Law were placed side-by-side without saying what they were about, the reader would be hard put to recognize that all treated the same object. All books agree, however, in their high praise of the Basic Law, and ignore the fact that most contemporary experts saw it as flawed and bound to fail. The Basic Law began to be appreciated by both German jurists and German citizens only much later.

2. *Constitutional Amendments*

Between its promulgation and German unification, the Basic Law was amended 36 times. Three of these amendments can be regarded as important.[9] Among these, two concerned subject matters that could not have been regulated in 1949: Germany's rearmament was made possible by an amendment in 1956, and provisions for a state of emergency were introduced in 1968. By contrast, the third important amendment, introduced in 1969, did not consist of additions to the Basic Law, but rather considerably changed existing provisions on the federal system. All three amendments were introduced in response to contemporary developments or took place under conditions whose importance the historians acknowledge in their books. The significance of the resulting constitutional amendments, however, is not reflected by them. Some authors pass them over completely, others mention them but fail to specify the changes and to explain their consequences.

While the rearmament itself is extensively discussed in the general histories analyzed here, little is said about the regulations of the new West German army, the *Bundeswehr*. One might argue that what was of historical importance was the re-establishment of a German army ten years after the end of World War II and Germany's catastrophic defeat, not the constitutional amendment. But without the amendment there would have been no army. Moreover, the necessity of an amendment was not only a formal precondition; it had substantive consequences. The new army's orientation was contested. Traditionalists argued with modernizers. The fact that a constitutional amendment was required (which necessitated a two-thirds majority in both chambers of parliament) gave the opposition a chance to influence both the guiding principles and the structure of the future army. The ideas of the modernizers prevailed. Had a simple majority sufficed, the outcome would most likely have been different.

Like rearmament, the adoption of provisions for the state of emergency required a constitutional amendment. In 1949, the Allies had prevented the adoption of an emergency constitution. By the time West Germany obtained full sovereignty in 1955, emergency rules were regarded as urgent, but it took 12 years until the *Notstandsgesetze* could be introduced into the Basic Law. The subject matter was heavily contested, and only the »Grand Coalition« of the Christian Democratic (CDU) and Social Democratic (SPD) parties formed in 1966, which held a two-thirds majority in parliament, enabled a compromise to be found. Indeed, the urgent need for a number of constitutional amendments was one of the motives for forming the Grand Coalition. Large parts of the population, however, were opposed to the *Notstandsgesetze*, as many feared that their purpose was to provide the instruments for transforming the Federal Republic into an authoritarian system.

Most of the authors of the historical studies discussed here mention that the Grand Coalition with its two-thirds majority paved the way for the emergency rules, but they largely ignore how the necessity of an amendment changed the original concept of the state of emergency. The »lessons of Weimar«, so strongly emphasized in the descriptions of the drafting of the Basic Law, were now forgotten. Among the provisions of the Weimar Constitution that drew the sharpest criticism after

9 Grimm (2022), ch. IV, 81–102.

World War II had been the emergency clause in Art. 48. In the Federal Republic, no political party wanted to return to it. But whereas the Christian Democrats subscribed to the idea that emergencies were »the time of the executive«, the Social Democrats – whose consent was necessary for the amendment – successfully lobbied to limit the powers of the executive, in some contemporaries' view so severely as to nearly render them ineffective.

Despite the strong social mobilization against the *Notstandsgesetze* among the population, some authors mention this amendment not as such, but only in connection with the 1968 movement, which receives substantial attention in all books. The state of emergency debate appears only as one of the causes for the growth of this movement. An explanation for the historians' lack of interest in the *Notstandsgesetze* may be that, up to now, the Federal Republic's government has never invoked a state of emergency. The opposition against the emergency rules died down after they had been adopted in a mitigated form that even included a right to resistance. However, the fact that the emergency powers have never been used diminishes neither the importance of the unrest among the population in 1968 nor the amendment's importance as part of the current constitution. Its provisions are still ready for use.

In contrast to the rearmament and state of emergency amendments, the 1969 reform of federalism did not add to but actually altered the constitution. It was a response to the first economic crisis that hit the Federal Republic in 1966–67, after a long period of continuous economic growth. This crisis had already contributed to the fall of the chancellor, Ludwig Erhard, who was not prepared to adopt a more Keynesian economic policy. The Grand Coalition, formed after Erhard's fall, made this one of its major projects. However, to do so, it needed a constitutional amendment. The independence of the financial and budgetary policy of the *Länder* from that of the federal government was regarded as the main obstacle to effective crisis management. A creeping transformation of the federal system into a more unitary one had already begun before the crisis; now, with the constitutional amendment, the coalition also undertook to formally change West German federalism from dualist to cooperative.

The main instrument for handling the immediate economic crisis was the Law to promote economic stability and growth of 8 June 1967. It could be adopted only after a constitutional amendment, passed earlier on the same day. While nearly all authors of the general histories discussed here mention this law, few point out that it would not have been possible without the prior constitutional amendment. A comprehensive reform of the federal system followed in 1969, which consisted of three amendments that affected a total of 18 provisions of the Basic Law. German federalism was fundamentally different after these amendments. While again most authors mention this reform, only one of them seems aware of the extent and consequences of the structural changes made. As a result, most of the authors miss the fact that the amendments, in solving the economic crisis, led to a political crisis of much greater significance.

As an essential part of the reform, the *Länder* lost their independence in fiscal and economic matters. In compensation, the position of the *Bundesrat*, the body representing the *Länder* at the federal level, was strengthened. To exercise most of its newly acquired legislative powers, the federal government needed the consent of the *Bundesrat*, which did not increase the power of the individual *Länder*, but of their entirety. Furthermore, the strict separation between the responsibilities of the *Länder* and the *Bund* (the federal level) was given up in favour of several joint responsibilities whose exercise usually required unanimity between the two. The same was true for the financial participation of the *Bund* in the performance of *Länder* tasks, which was made possible by the amendments as well.

The reform helped solve the economic crisis, but it turned out to have high democratic and efficiency costs. The increased number of cases in which the *Bund* needed the consent of the *Bundesrat* for federal legislation made it difficult for a federal government to implement its policies if the majorities in *Bundestag* and *Bundesrat* were held by different parties. In this case, the federal majority could realize its plans only if the opposition agreed. If an agreement was not reached, the *Vermittlungsausschuss* (mediating committee) of *Bundestag* and *Bundesrat* was called upon to find a compromise, albeit behind closed doors. As a result, the federal government's projects were frequently delayed, watered-down, or failed completely. Similarly, the unanimity principle for the joint responsibilities of *Bund* and *Länder* often led to agreements based on the smallest common denominator, and if the

compromise turned out to be flawed, it was extremely difficult to change it.

The democracy costs of this reform of federalism consisted in an increased difficulty to hold political actors to account. Both the *Länder* and the federal government could claim responsibility for successes for themselves and blame the other side for failures, without the public being able to know whom to reward and whom to punish at the next elections. All the authors of the historical studies analyzed here point out that the buzzwords of the time were *Politikblockade* (political blockage) and *Politikverdrossenheit* (political disillusionment). However, only a few of them recognize that the situation was a result of the constitutional amendments of 1969. Instead, they blame the political parties for acting only in their own interests and lack of consideration for the common good. It would take more than 30 years until another reform of federalism tried to undo the mistakes of 1969.

Some of the authors conclude their descriptions of this historical period, which for them terminated with the smooth transition from the Grand Coalition to the coalition of SPD and FDP (Free Democratic Party) under Chancellor Willy Brandt in 1969, by saying that by the end of the 1960s, the Basic Law had passed its probationary period and proven itself to be a good constitution. But how does this praise fit with the fact that at the time, the Basic Law was increasingly seen as antiquated and more of a hindrance than a help?[10] This feeling spread rapidly among politicians and within society. The then Minister of the Interior, Paul Lücke, presented a list of no less than 80 articles that he thought were in need of being replaced. Others called for a total revision of the Basic Law. The agitation finally prompted the *Bundestag* in 1970 to install a commission tasked with formulating recommendations for a complete overhaul of the constitution.

However, when the committee presented its report with extensive recommendations for a modernized constitution six years later, interest in a fundamental revision had waned. The general veneration of the Basic Law had begun, and the term *Verfassungspatriotismus* (constitutional patriotism) appeared on the scene. Yet, the fact that the attempts for a total revision of the Basic Law did not bear fruit does not render them unimportant. However, none of the historians mentions either them or their underlying motivations. They are simply unknown. Yet, the discussion regarding the reform of the Basic Law had by no means been restricted to expert circles; rather, it had been conducted in the media and among the general public. For historians of post-war West Germany, it would be worth asking what experiences with the Basic Law, what social changes and ideas of a good and up-to-date constitution had led to the demand for a total revision of the Basic Law.

3. *Rights Revolution through Interpretation*

If one asks whether the amendments or the interpretation have changed the Basic Law more profoundly, the answer depends on which of its sections we look at. Amendments have significantly affected the organizational provisions, whereas the jurisprudence of the Constitutional Court has been decisive for changes to the understanding of fundamental rights. While some textual changes were made to the first 19 articles, their importance ranges far behind the alteration of meaning that the bill of rights underwent in the second half of the 20th century. Both the concept and the impact of fundamental rights have changed in ways that would have been unimaginable in 1949.[11] Because of their vague and open-ended phrasing, fundamental rights depend on interpretation to a greater extent than organizational or procedural norms and even on a general theory of their purpose and function that guides the interpretation. Consequently, they leave more room for different understandings and different interpretation.

During the 19th century and still under the Weimar Constitution, fundamental rights were regarded as binding only for the executive, and only to the extent that intrusions without a basis in statutory law were prohibited. This situation ended with the Basic Law. Article 1 section 3 submitted all public authorities, including the legislature, to fundamental rights. However, the promulgation of the Basic Law did not alter the understanding of

10 Grimm (2022), ch. V, 103–120.

11 The largest part of Grimm (2022) deals with this development, see ch. VII–XII. In addition, there are two chapters on problems resulting from German unification (VI and XIII) and one chapter on European integration (XIV).

fundamental rights as subjective rights of the individual with vertical application vis-à-vis the state and negative effect, meaning that they obliged the state to omit acts that were incompatible with fundamental rights. Any limitation of these rights required a basis in law, but once a law had been found to be constitutional, the influence of the right ended. The interpretation and application of statutory law was considered to lie outside the scope of the constitution and the control of the Constitutional Court.

This traditional understanding of fundamental rights was revolutionized by a seminal judgment rendered by the Constitutional Court in 1958: the *Lüth* decision.[12] The complainant, Erich Lüth, had called for a boycott of a post-war movie directed by the notorious Nazi director Veit Harlan. Lüth wanted owners of movie theaters not to show the film, and if they did, expected »decent German[s]« not to watch it. The movie companies sued Lüth in the civil courts and obtained an injunction that prohibited him from continuing to call for a boycott of Harlan's film. In his complaint to the Constitutional Court, Lüth invoked his right to free speech. According to the traditional understanding of fundamental rights, Lüth would have lost in Karlsruhe, because fundamental rights played no role in private law relationships.

The question faced by the Constitutional Court was thus whether fundamental rights were limited to vertical application or also had horizontal effect. In order to answer this question, the Court reflected on the nature of fundamental rights in general and came to the conclusion that they were not only subjective rights but also objective values or principles, to wit, the highest principles of the legal order. It concluded that they were therefore decisive for the whole legal order, including private law. Regarding the exact relationship, the Court decided that fundamental rights had no direct effect among private parties, but operated indirectly, namely as guiding principles for the interpretation and application of ordinary law. They developed, as the Court called it, a »radiating effect« on the provisions of ordinary law. Disregard of this effect by the ordinary courts constituted a violation of the rights-holder's fundamental rights.

The consequences of this changed understanding of fundamental rights were threefold: In addition to being seen as subjective rights of the individual vis-à-vis the state, they were now also understood as objective principles and thus horizontally applicable. They were to guide the interpretation of ordinary law in cases where its application had a limiting effect on rights. This, in turn, meant that the whole German judiciary came under the control of the Constitutional Court. What the *Lüth* decision left open, however, was the third traditional element of fundamental rights, namely their negative effect. This gap was filled by the Court's first decision on abortion in 1975, in which it derived from the objective character of fundamental rights an obligation of the state not only to refrain from certain actions that would unduly restrict a fundamental right, but also to protect the freedom guaranteed by a fundamental right if the freedom was threatened by private actors.[13]

Lüth revolutionized the West German understanding of fundamental rights and undoubtedly was the most important decision the Court ever rendered. Every German law student is familiar with the case, and thanks to the booming field of comparative constitutional law, it has also become known worldwide. Internationally, *Lüth* stands for the immense gain in importance of fundamental rights in the second half of the 20th century – but none of the historical works discussed here mentions the case. Furthermore, while the Court's 1975 judgment on abortion is mentioned in nearly all of them, this is not because it introduced the »duty to protect« – another revolutionary step in the field of fundamental rights and a logical consequence of *Lüth* – but because the question of abortion had deeply divided society for quite some time and the decision was a bitter defeat for the ruling SPD-FDP coalition.[14]

4. The Underestimation of the Constitutional Court's Jurisprudence

The historians' different reception of *Lüth* and the abortion decision sheds light on their attitude to the judgments of the Constitutional Court.

12 Grimm (2022), ch. VII, 140–157.
13 Grimm (2022), ch. VII, 145–151.
14 Grimm (2022), ch. IX, 185–202.

These are mentioned when they concern important political and social conflicts, but if a case was not spectacular, it goes unnoticed by historians, regardless of its impact. This is, for instance, true of the *Elfes* decision, which extended fundamental rights protection to every restriction of individual conduct and thus opened the doors widely for individual complaints, and for the so-called *Apotheken-Urteil* concerning freedom of occupation, which formulated the proportionality test that today bears the main burden of fundamental rights protection. These judgments did not only affect the relationship between the Court and the ordinary judiciary, but also between the Court and the legislature. The abortion judgment required the legislature to do more than the constitutional text suggested; the proportionality principle limits the legislature's power beyond what the limitation clauses of the various rights require.

When historians mention cases, they are above all interested in their outcomes, in who won and who lost: the government or the opposition. The rejected alternatives, structural consequences, or resulting power-shifts between the organs of the state are largely ignored. A good example is the *Erste Rundfunk-Urteil* (»first television judgment«), which concerned Adenauer's attempt to create a TV station under the control of the federal government.[15] Some *Länder* governed by the SPD challenged the plan before the Constitutional Court, which ruled that the *Bund* had no competence in matters of radio and television. With this statement, the case was solved. However, the Court found it necessary to add that Adenauer's plan also violated the freedom of broadcasting as guaranteed in Art. 5 of the Basic Law. As society's main source of information, so the judges, television must be free of state control.

While this case is mentioned in almost every book, it is seen only as a symptom of Adenauer's declining power. Its enormous significance for the independence of public television, the overall organization of the broadcasting system, the quality of information, and its importance for the public discourse are overlooked. Twenty years later, the third television judgment reacted to the end of the scarcity problem after the possibility of cable and satellite transmission and the ensuing increase in programs. It marked the end of the monopoly of public television and the advent of commercial TV stations. Almost all the historical surveys under discussion here devote chapters to it, but none of the authors consider it worth mentioning that the judgement permitted private TV only under the condition that public broadcasting retained its full function. A displacement of public TV with all its consequences was thereby averted.

The question therefore is what could have caught the attention of the historians. This would be rather easy, where the context out of which a judgment emerged, is an object of the history books. All of the historical surveys analyzed here discuss the change in moral values that occurred towards the end of the 1950s and during the 1960s.[16] Many call it a *Liberalisierungsschub*, a »wave of liberalization« that consisted of a turning away from traditional values towards new ones like self-fulfillment, anti-authoritarianism, pluralism etc. It seems likely that this had something to do with constitutionally guaranteed liberties. If the latter had been narrowly defined by the Constitutional Court, this transformation of social values would probably not have been stopped, but it would certainly have been impeded and slowed down. This hypothesis is supported by the fact that the Court had to reverse many restrictive judgments made by lower courts in matters of freedom of speech, freedom of assembly, artistic freedom etc.

Many of the Court's decisions were not only discussed in the legal community, but found great interest in the media and with the general public. Some occupied the public sphere for weeks and months, indicating that their relevance was not limited to the legal system. The discussion of a case or a particular line of jurisprudence often led to more general debates on the salience of fundamental rights *(Hypertrophie der Grundrechte)* or the role of the Constitutional Court in the political system *(Richterstaat)*. For some observers, democracy was at stake. The debate was not limited to legal experts. Jürgen Habermas, to name a particularly prominent figure, launched a vehement criticism of the Court's value orientation and proportionality jurisprudence.[17] All this could have attracted the attention of historians.

15 Grimm (2022), ch. VIII, 167–183.
16 Grimm (2022), ch. VII, 151–163.
17 Habermas (1992); in English: idem (1998), ch. VI.

5. *The Necessity of a Constitutional Turn in Historiography*

Of course, the inclusion of constitutional law into historical research has its own difficulties. The outcome of decisions can be ascertained more easily than their impact. The former can be found in the formula of the judgment *(Tenor)* that precedes the opinion. The judgement's impact that goes beyond the immediate case, however, largely results from the Court's reasons for the judgment. It seems, however, that these are not perceived as a source by historians. In addition, the long-term effects of the Court's decisions become visible only over time. Whereas the effect of the abortion decision was self-evident, the impact of *Lüth* can be understood only if one is aware of how fundamental rights were interpreted before *Lüth* and how they affected other fields of the law, such as political liberties. However, for the *Lüth* decision, there is actually an edited volume with contributions by legal scholars, political scientists, and historians, which does provide general historians with this kind of contextualization.[18]

The lack of attention paid to constitutional law in the general histories analyzed here is not due to any intentional omission on the part of the authors. Rather, it is the consequence of a lack of awareness of the relationship between law and politics and of the relative autonomy of the law and its application, as well as the historians' unfamiliarity with legal phenomena. However, taking the constitution into account is indispensable if the political history of a country like the Federal Republic of Germany is to be understood. There is abundant evidence that certain historical conditions, developments and events cannot be sufficiently understood without appreciation of their legal implications. A constitutional turn in historiography seems necessary,[19] which, however, will depend as much on the willingness of historians as on the cooperation of legal historians.

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19 Grimm (2022), ch. XV, 305–325.

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