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## **Juristocracy: The beginnings**

Today, in many countries of the world, alongside the political system and political struggles of democracy, it is judicial forums, mainly constitutional courts, that decide on the issues that shape the life of society. A kind of dual state and dual political system has emerged, with a democratic state at the bottom, with a multi-party system and a parliamentary majority government, but at the top, a juristocratic state of chief justices, in symbiosis with global NGO networks, can override the decisions of parliamentary elections and majority democracy within a wide range.<sup>2</sup> This did not exist until the early 1900s, with only sporadic beginnings in this direction in some state legislatures in the US open to left-wing demands, which were constantly overturned by the staunchly conservative, right-wing federal Supreme Court on the grounds of fundamental constitutional rights and principles. Let us see how these sporadic beginnings have evolved from a judicial supremacy, a juristocracy, into the state-building and political system that widely dominates today's states.

### *I. The American beginnings*

Social transformation efforts based on fundamental constitutional rights in the form of lawsuits began as early as the 1850s in the USA, demanding an economic system based on free wage labour instead of slavery, financed mainly by the capitalist groups of the northern states. But the demands of the liberal-democratic political forces of the North were consistently rejected by the conservative-majority Supreme Court, which would have seen the constitutional right of private property as infringed by the adoption of the motions of liberal political forces that invoked the right to equality. The successes of left-wing socialist aspirations in some national legislatures after the civil war over this issue, embraced mainly by liberal intellectual political groups, activated the intervention of conservative-majority high courts on the basis of fundamental constitutional rights (see, for example, the *Lochner case of 1905*), and showed that political shifts of power in the arenas of political democracy could be neutralised from the centres of judicial power over the democratic political machine.

In this initial phase, the judicial juristocratic forums above democracy supported the conservative right-wing political groups, and thus by left-wing liberal political and intellectual groups, it was classified as an 'oligarchy of old judges'. At the same time, however, liberal and socialist political groups began to build up legal organisations of constitutional rights-based litigation to help the blacks and other social groups they supported. Thus, in 1902, *Theodore Schroeder*, a socialist-liberal intellectual, formed *The Free Speech League*, in which he gathered left-wing intellectuals, and in 1909 a backing financier provided him with a secret fund to finance his litigation activities.<sup>3</sup> But it was really the American Civil Liberties Union (ACLU), founded by *Roger Baldwin* in 1920, that became the base for left-wing socialist political groups to correct decisions of conservative right-wing-majority Congress and state

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<sup>2</sup> See Béla, Pokol: Double State and the Doubling of the Legal System. Ludovika University Publishing, Budapest, 2021.

<sup>3</sup> "In 1909 a benefactor gave Schroeder a 'secret fund' for the purpose of supporting the organization and defending people prosecuted for the free speech." (Charles Epp: The Rights Revolution. 1998, 48. p.)

legislatures through judicial litigation based on fundamental constitutional rights.

Baldwin's activities were also aided by the banking groups, albeit in a somewhat more indirect way than Schroeder had been. In 1921, *Charles Garland*, the heir of a wealthy New York banker, refused to keep the millions he had left him because of his firm communist beliefs, which even drove him for a time to the newly formed Soviet Union, and, on Baldwin's advice among others, he invested them in a fund of which Baldwin became a director. The in many ways exalted Garland then set up a commune for farming, but mostly for free love, and finally got out of managing his fund, but Baldwin, relying on and recapitalizing the ACLU, began to build a constitutionally based litigation with a purpose. He organized a series of left-wing liberal lawyers around the ACLU with Garland's money, and built branch ACLU chapters in the states in a short time.<sup>4</sup> True, since this money was in the stock of the *First National Bank of New York*, owned by Garland's hereditary ancestor, the 1929 worldwide banking crisis put a long stop to the flow of this money, but Baldwin had already made connections with the heads of the Rockefeller and Carnegie foundations at the beginning of his management of this money, and with their support he was able to continue his political activities based on constitutional litigation without any problems. And when with President Roosevelt, the Democrats took over the central administration in 1933 and fought hard to break the conservative majority on the federal Supreme Court, Baldwin and the ACLU and the left liberal legal organizations built around it reaped the rewards. Now, not only did they dominate the courtroom environment with their coordinated lawsuits and briefs, but the hitherto hostile conservative judicial majorities were replaced in a growing number of federal courts by judges who supported their constitutional litigation goals. This, however, did not become a comprehensive system throughout the US until the early 1960s, and meanwhile the lawyers who arrived with the occupying US troops in Europe after the victory in World War II here in defeated Germany had achieved an extensive system of juristocracy over democracy sooner than had been achieved in the US by the 1960s. It is true that in many ways the two models of juristocracy subsequently merged and set the pattern for a number of countries around the world during the takeover.

## *II. The German version of juristocracy*

*General Lucius Clay*, at the head of the occupying US military authority (OMGUS), with the help of German constitutional lawyers who had moved to the US to escape Hitler, including former professor *Karl Löwenstein* (later also in literature: Carl Loewenstein), sought to draft a constitution that would ensure that the democratic elections restored to millions of Germans would not be used to elect another Hitler. To help construct this, Clay invited Roger Baldwin to Germany, who had been organising the correction of democracy with help of the constitutional adjudication for years, although at home in the US it had only been a partial success because of opposition from conservative judges.<sup>5</sup> Baldwin's involvement in the constitution-making process in occupied countries after the Second World War did not begin with the Germans, but had previously been involved in Japan and South Korea at the request of the State Department, although only in the latter did a strong

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<sup>4</sup> "Baldwin used the term 'cooperating attorney' as early as 1920, since that time cooperating attorneys have proved to be one of the significant strength of the organization. Additionally, state ACLU affiliate organizations grew out of the main organization over the years, significantly increasing the organization's reach throughout the country. The ACLU's support for constitutional litigation significantly affected the Supreme Court agenda". (Epp 50. p.)

<sup>5</sup> See "Roger Nash Baldwin visited Germany at the invitation of Lucius Clay." Lora Wildenthal: Human Rights Activism in Occupied and Early West Germany. *The Journal of Modern History*. Vol. 80. No. 3. (2008 September) 525 p.

constitutional adjudication for the control and correction of democracy emerge later.<sup>6</sup> In any case, the active participation of the Americans in the drafting of the constitutions of the occupied countries was for a long time a closely guarded secret, and the document recommended for adoption was presented to the public as a draft constitution prepared by professors of their own nation. This was even defensible in the case of the Germans, because after all, Karl Löwenstein and the other German lawyers who had emigrated to the USA, even if they were no longer living in Germany, were originally German constitutional lawyers and political scientists, but in the case of Japan, they could not be involved in the drafting of their constitution by American lawyers in such a way, and this was discovered after a good decade.<sup>7</sup> *Noah Feldman* described how the external, imposed nature of the Japanese constitution became public knowledge in Japan ten years after its enactment, and a commission was then set up to review and possibly revise the provisions of the constitution, but ultimately retained everything in it that would be unthinkable today, he adds, because of the need for internal legitimacy of constitutions: “Less than a decade after the adoption of the Japanese Constitution, the document’s imposed foreign origins became public knowledge in Japan. A commission was formed to consider redrafting – and despite the recommendations for changes, the existing constitution was preserved in its entirety. A half century later, one cannot imagine this sort of acquiescence being reproduced in most places in the world. Today a new constitution must be understood as locally produced to acquire legitimacy.”<sup>8</sup>

Several German jurists who had emigrated to the USA were involved by the leaders of the occupying American authorities in the drafting of the new German public law and constitution they were planning, but in retrospect, e.g. according to the German historian *Barbara Fait*, General Clay considered Carl Loewenstein the most authoritative of the Germans.<sup>9</sup> But he was the most pessimistic as to whether the control of state power through democracy could be returned to the millions of the German masses without danger. He saw the only way to pacify the Germans from the US point of view was by bringing them into a larger European unity: “In his briefing of Roger Nash Baldwin (president of the American Civil Liberties Union) in September, 1950, Loewenstein presented a “very discouraging picture” of German democratization. In Loewenstein’s view, the best way of preventing Germany from reverting to its “autocratic patterns” was in “bringing [it] into a larger unity in an organized Europe.” Nash briefing notes, September 15, 1950, Roger Nash Baldwin Papers, Princeton University, box 17.”<sup>10</sup>

The main dilemma for the US occupation authorities was that they did not want to let the constitution-making process out of their hands, but on the other hand they wanted to present it to the public as the Germans’ own creation: “It was an expressed desire that these constitutions are being developed by the Germans in an atmosphere of freedom from Military Government direction and inference. [...] On the other hand, neither Clay, nor his staff were inclined to accept constitutional content contrary to the objectives of the occupation or vital

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<sup>6</sup> “Baldwin became involved with international affairs in 1947, when the War Department invited him to go Japan and South Korea to assist in developing civil liberties agencies in the infant democracies. He founded the Japan Civil Liberties Union, and the Japanese Government awarded him the Order of the Rising Sun in recognition of his service to Japanese democracy.” Mudd 3. p.

<sup>7</sup> For a detailed description of Loewenstein’s constitution-making activities under the supervision of the occupying US authorities, see R. W. Krostal: *The Alchemy of Occupation: Karl Loewenstein and the Legal Reconstruction of Nazi Germany, 1945-1946*. Cambridge University Press, 2011.

<sup>8</sup> Noah Feldman: *Imposed Constitutionalism*. Connecticut Law Review (Vol 37.) 2005, 859.p.

<sup>9</sup> Clay set up a working committee alongside himself in early 1946 to consider all the proposals received on constitutional issues, and Loewenstein became a German member of this committee, see Fait p. 425.

<sup>10</sup> See R. W. Krostal: *The Alchemy of Occupation: Karl Loewenstein and the Legal Reconstruction of Nazi Germany, 1945-1946*. Law and History Review (Vol. 29.) 2011. No 1., footnote 245.

American interests.”<sup>11</sup> To demonstrate the secrecy of direct American control over the drafting of the constitution, an internal US document states that the evaluation material of drafts produced by the German constitution drafting committees by the occupying authority was also to be kept secret: “Furthermore, it must be understood that [...] [it] will never be distributed to German officials nor will it be widely distributed either in this Headquarters”.<sup>12</sup> Although this was written for the preparation of the 1946 provincial constitutions, it illustrates the duality of the American intention to define the content of the constitutions and the secrecy of this intention. The Canadian constitutional historian *Erich Hahn* writes the same of the preliminary scrutiny and approval of the content of the draft German constitution by representatives of the occupying powers at a meeting in London: “As mentioned above, the London agreement included a confidential ‘Letter of Advice [...] Regarding German Constitution’ to help the military governors assess the Basic Law. The Parliamentary Council was not given this letter so as to avoid the appearance of dictation”.<sup>13</sup> Hence the dilemma that divides German constitutional historians in hindsight, to what extent their 1949 Basic Law can be considered a German constitution, or to what extent it was a joint creation with the lawyers of the occupying military authorities, or whether it can simply be considered an American constitution imposed on them.

In his book on the subject, *Edmund Spevack* analyses the positions in detail<sup>14</sup> and, in a conference paper, argues as his own position that it was essentially the position of the occupying powers, especially the Americans, that gave the German constitution its main content and that in the subsequent negotiations the Germans could only accept it: “While German historiography has traditionally argued that the Basic Law is primarily an indigenous German product, the argument here will be that it is in fact a constitution which was initiated by the Allies and then arose in a dialectical process of negotiation between Allies and Germans.”<sup>15</sup> Based on Barbara Fait’s study of 1998, Spevack notes that the drafting of the Länder constitutions was also controlled in all its important details not only by the occupying authorities in Germany, but also had to be sent home to the Washington leadership for approval: “The process was initiated by the American, specifically General Clay; the Americans intervened, if discreetly, in the process of constitution-making when things were not going the way they thought they should go; and the final product had to be approved not only by the American military on the ground in Germany, but by higher authorities in Washington as well. It was in the making of the Länder constitutions that the Americans tested and refined their methods of controlling and intervening in the process of constitutional making. These methods were soon to be used again in the making of the Basic Law. Barbara Fait has documented the American methods of subtle influence (“subtle Einflussnahme”) for the Bavaria case in great detail.”<sup>16</sup>

It is important to see, in the context of the establishment of the German constitutional court with its almost unlimited powers, which subsequently transformed political democracy into a juristocracy throughout the Western world and later also in the countries of the other

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<sup>11</sup> Fait, 433. p.

<sup>12</sup> Fait, 437. p.

<sup>13</sup> See Erich J. C. Hahn: *The Occupying Powers and the Constitutional Reconstruction of West Germany, 1945-1949*. In: *Cornerstone of Democracy. The West Germany Grundgesetz, 1949-1989*. German Historical Institute. Washington D. C. Occasional Paper No. 13. 24. p.

<sup>14</sup> See Edmund Spevack: *Allied Control and German Freedom: American Political and Ideological Influence on the Framing of the West German Basic Law*. Münster LIT Verlag.

<sup>15</sup> See Edmund Spevack: *German Drafts for a Postwar Federal Constitution versus Allied Decisions of the London Six-Power Conference*. In *Conference Papers on the Web*, GHI. *The American Impact on Western Europe: Americanization and Westernization in Transatlantic Perspective*. Conference at the Historical Institute, Washington D. C., March 25-27, 1999. 2. p.

<sup>16</sup> Spevack 1999, 9. p.

continents, that the occupying powers initially refused to allow even the reunification of the historically independent German states – and the French in particular insisted on ruling this out all the time – and that in the end they could only accept the unification of the federal state into a single federal state instead of a mere confederation, while weakening the federal level. Added to this was the introduction of strong judicial control over the legislature at a level that did not even exist in the US Supreme Court. Erich Hahn quotes the confidential Occupying Power London ‘Letter’ to the military governors of the occupying powers: “Two institutional checks on central power were also required: a bicameral legislature with an upper house that had ‘sufficient power to safeguard the interests of the states’ and a system of independent judicial review to uphold the constitution and protect civil rights”<sup>17</sup> The Parliamentary Council – as the constitutional assembly of delegates from the later member states parliaments was called – was unaware of the ‘London Letter’ binding the military governors, but in debating the incorporation of the governors’ claims into the constitution it was only fighting against the weakening of the federal level’s taxing powers, and the power of unprecedented constitutional court control was not even a major issue for discussion. This only became a problem in the early 1950s, when this court partly filled with American and British trustees began to function.

But the constitutional control of the legislature by the constitutional court, which seemed familiar from the USA and neighbouring Austria, became much broader in the German Basic Law, if only because the constitutional rights on which the control was based were not simply the political freedoms that had long been known and more or less defined, but, alongside them, empty formulae from the moral philosophy literature with essentially no normative content. Thus the ‘right to the development of the personality in all its aspects’ or the ‘inviolability of human dignity’, which sound very noble, but in the case of case-by-case control of the law, this leaves the constitutional judges with an arbitrary discretion, and they can only really decide on the basis of their political preferences. And this broad power is only partly exercised by constitutional judges with a disciplined record as senior judges in the case of the constitutional court organised outside the ordinary courts, which was taken over from the Austrians by the Germans, or more precisely by the lawyers of the US occupying military government that controlled the constitution-making here. This body of constitutional judges, which broadly controlled the parliamentary legislature and the majority government, was in turn filled by selection subject to the control and approval of the lawyers of the occupying military governors, and a perusal of the 1951 membership list shows that five of the constitutional judges are American or English, in one case from Dutch emigration to Germany with the occupying military authorities, five were lawyer-politicians of the Social Democrats who remained in opposition for a long time, two were of the liberal Free Democrats, and five could be classified as lawyer-politicians of the long-ruling CDU.<sup>18</sup> *Gerhard Leibholz*, who later played a key role in increasing the power of Germany’s already wide-ranging constitutional judiciary, not only returned to Germany as an emigrant, but a letter he wrote on

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<sup>17</sup> Hahn 25. p.

<sup>18</sup> Thus, according to the list of members on Wikipedia, *Georg Fröhlich* returned from emigration after 1945 (he was harboured by the Dutch Resistance), *Rudolf Katz* returned from the USA, *Gerhard Leibholz* from England, *Hans-Georg Rupp* was also in the USA in 1935-37 and attended Felix Frankfurter’s seminar at Harvard, and *Bernard Wolff* headed the legal department of the British and American occupying military governors from 1946 until his election as constitutional judge in 1951. *Martin Draht*, *Wilhelm Ellinghaus*, *Rudolf Katz*, *Hans-Georg Rupp* and *Fanz Wessel* were socialist lawyer-politician by background; free democratic lawyer were *Gerhard Heiland* and *Herman-Höpke Aschoff*, and finally a CDU lawyer, *Julius Federer*, *Ernst Friesenhahn*, *Anton Henneke*, *Herbert Scholtissek* and *Erwin Stein*, but if we also include the information that has since come to light, that the constitutional judge *Willi Geiger*, who served as constitutional judge from 1951-77, kept the Adenauer administration informed from the outset about the state of internal decision-making in the body, he too must be classed among the CDU lawyers.

his appointment indicates that he was still a British citizen and had no intention of giving up his permanent residence in Oxford.<sup>19</sup>

Thus, given the broad powers and the majority of constitutional judges, who were largely opposed to the government majority and politically connected to the opposition, it was important for the parliamentary majority and its government, elected by an electorate of many millions, that the constitutional judges should exercise their power to strike down laws only in moderation. This was made possible by the Constitutional Court Act of 1951, which, in the wake of the Basic Law, curbed the broad powers of the constitutional judges by placing their budget under the Ministry of Justice and by placing the judges' decision-making staff and the determination of their operating conditions in the hands of the Minister of Justice. This legal arrangement brought about a spectacular struggle with the constitutional judges in the early 1950s, which challenged the classification of their administrative conditions and terms and conditions within the government's judicial sector. Its survival would have enabled the Adenauer government to better contain the constitutional judges' increasingly unrestrained encroachments on the legislature. The positions of the opposing sides can be seen in a document prepared for a meeting of the Adenauer government: "On 27 June 1952, the Federal Constitutional Court had adopted a memorandum, which had been presented to the Federal President, the Presidents of the Bundestag and the Bundesrat and the Federal Chancellor – as representatives of the supreme federal authorities – calling for the Court to be granted independence from the Federal Minister of Justice [BMJ] and for its status as a constitutional body with the highest authority – which was to be on an equal footing with the Bundestag, the Bundesrat and the Federal Government – to be recognised.<sup>20</sup> – On Dehler's rejection of the idea<sup>21</sup>, in which the BMJ stated, inter alia: "Certain forces in the Federal Constitutional Court are concerned with turning this court into a supergovernment with legislative power. The opening sentence of the above-mentioned decision reveals the existing hubris [...]. The Federal Constitutional Court is a court and nothing more than a court. The talk of a supreme constitutional body finds no support either in the Basic Law or in the Federal Constitutional Court Act. Some gentlemen of the Federal Constitutional Court are trying to use these nebulous terms to give the Federal Constitutional Court a power that goes beyond the administration of justice."<sup>22</sup>

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<sup>19</sup> "I am glad to say that arrangements have been made with the German authorities and with the Home Office that my status as a British subject will be not affected. My permanent residence will remain in Oxford." It is also clear from this letter that Leibholz saw clearly at the time that the German Constitutional Court, to which he was elected, would have more power than the US Supreme Court "This part had unanimously been offered me by Parliament in Bonn about two months ago and I feel it difficult to refuse the offer – in face of the very important powers the Court is called upon to wield in Germany in future and which are more far-reaching than those of the Supreme Court in the United States and the Dominions." (Leibholz to Bell, 11 November 1951, Bell Papers 40, fol. 479 (handwritten).) And looking back 70 years later, *Justin Colling* sees this English citizen and Oxford resident Leibholz as the moral and intellectual leader of the first German constitutional majority: "Gerhard Leibholz, the moral and intellectual leader of the early Court, was a leading Weimar-era jurist." (Collings, 6. p.)

<sup>20</sup> Memorandum in Schiffers, pp. 473-478, with further documents in B 136/4436 and B 141/83.

<sup>21</sup> See in particular the note of 11 December 1952 in B 141/84.

<sup>22</sup> See the original German version: "Das Bundesverfassungsgericht hatte am 27. Juni 1952 eine Denkschrift verabschiedet, die dem Bundespräsidenten, den Präsidenten des Bundestages und des Bundesrates und dem Bundeskanzler – als Repräsentanten der obersten Bundesorgane – überreicht worden war. Diese Denkschrift hatte die Forderung erhoben, dem Gericht die Unabhängigkeit vom Bundesminister der Justiz zu geben und seinen Rang eines mit höchster Autorität ausgestatteten Verfassungsorgans – das ebenbürtig neben Bundestag, Bundesrat und Bundesregierung zu stehen habe – anzuerkennen. (Denkschrift bei Schiffers S. 473-478, mit weiteren Unterlagen in B 136/4436 und B 141/83.) – Zur ablehnenden Haltung Dehlers siehe insbesondere Vermerk vom 11. Dez. 1952 in B 141/84, in dem der BMJ u. a. festhielt: "Es geht bestimmten Kräften im Bundesverfassungsgericht darum, dieses Gericht zu einer Überregierung mit gesetzgebender Gewalt auszugestalten. Der Eingangssatz des erwähnten Beschlusses offenbart die vorhandene Hybris [...]. Dieser Geisteshaltung kann nicht schroff genug entgegengetreten werden. Das Bundesverfassungsgericht ist ein Gericht

The government thus intended the constitutional judges to have the status of a simple, sectorally supreme court alongside the supreme judicial forum of the other sectors, but did not see the status of a supreme constitutional law body above and beyond this as permissible for them. The constitutional judges did not want to accept this, even though the Basic Law itself left the question open and the Constitutional Court Act did not support their position. But the process of drafting the constitution also supported the government's position, because the preliminary draft constitution, which was prepared mainly by lawyers and ministerial officials in Herrenchiemsee, had provided for a separate chapter in the constitution for the constitutional judiciary, but the Parliamentary Assembly, which was legitimised to draft it and was composed of delegates from the member states parliaments, and which eventually adopted the Basic Law, rejected it. Instead, the Constitutional Court was regulated in broad terms in the chapter on the judiciary, along with the other supreme courts, and a separate law was enacted to regulate the details.<sup>23</sup> In the structure of the Basic Law, the Constitutional Court, despite its otherwise broad powers, was thus not made a constitutional body on an equal footing with the other public bodies and organs, the parliament, the federal president and the government, and the Constitutional Court rebelled against this.

As *Verena Frick* writes in her new study: "From the very beginning, the court understood itself as an institution *sui generis* and enthroned itself in the 1950s as the supreme guardian of the constitution. The framers of the constitution had left the question of the new institution's status open. Thus, it was the court that empowered itself in the so-called status memo as a strong independent constitutional body."<sup>24</sup> However, the very raising of the question in this way, and the break with the idea of the constitutional court as a purely supreme court, was by no means the result of a debate within the whole body, but was the position of a single judge, Gerhard Leibholz: "The memorandum is closely linked to the person of Gerhard Leibholz, professor of constitutional law and judge at the FCC from the very beginning, who wrote these influential passages and who was eventually able to convince his colleagues in the court to follow his interpretation of the concept of guardianship."<sup>25</sup> To make Leibholz's position the majority position of the Constitutional Court – with the support of twenty judges and only two judges voting against it<sup>26</sup> – it is important to see that the distribution of judges close to the governing CDU and the opposition socialist SPD had already been such in the 1951 elections for the Constitutional Court that the five judges close to the socialists were elected to the 1<sup>st</sup> Senate of the Court, while those close to the governing CDU were elected to the 2<sup>nd</sup> Senate. This distribution created a situation where Senate 1 was more inclined to veto the CDU government's priorities, and in this case, CDU-close *Willi Geiger* had already alerted the federal justice minister about Leibholz's plan when

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und nichts als ein Gericht. Das Gerede von einem höchsten Verfassungsorgan findet weder im Grundgesetz noch im Bundesverfassungsgerichtsgesetz eine Stütze. Einige Herren des Bundesverfassungsgerichts versuchen, durch diese nebulösen Begriffe dem Bundesverfassungsgericht eine über die Rechtsprechung hinausgehende Gewalt zu verschaffen."

<sup>23</sup> See "Die Herrenchiemseer Konvent [...] wollte der Bundesverfassungsgericht als gleichberechtigtes Verfassungsorgan neben den andern Bundesorganen anerkennen und die Stellung mit einem eigenem Abschnitt in der Verfassung hervorheben. [...] Die Anregung des Herrenchiemseer Konvents, das Bundesverfassungsgericht in einem eigenen Abschnitt zu regeln, wurde nicht aufgegriffen. Stattdessen wurde die Ausgestaltung im Übrigen gem. Art. 94 Abs. 2 S. 1 Hs. 1 GG dem Gesetzgeber überlassen." *Konstantin Chatziathanasiou*: Die Status-Denkschrift des Bundesverfassungsgerichtshofs als informaler Beitrag zur Entstehung der Verfassungsordnung. *Rechtswissenschaft, Jahrgang 11 (2020) Heft 2*. 153. p.

<sup>24</sup> See *Verena Frick* 2019 21. p.

<sup>25</sup> *Frick*, 21. p. Formally, a committee was set up by the federal constitutional judges to examine the status question, chaired by Leibholz, but according to Leibholz's subsequent information, it did not meet, and he alone drafted the Status-Denkschrift that was finally adopted. See "Nach Auskunft von Professor Leibholz bestand der Ausschuss nur auf dem Papier. Er trat niemals zusammen." *Chatziathanasiou*, 155 p. footnote 51

<sup>26</sup> See *Chatziathanasiou*, 156. p.

it was first mooted.<sup>27</sup>

The split thus placed the constitutional court entirely above the forums of political democracy, and gradually transformed the entire political system. This could not have happened in Germany, which in 1952 was still firmly under the control of the military governors of the occupying Western powers, and first of all without the consent of the dominant US military governor. Immediately after the adoption of the Basic Law by the Parliamentary Assembly in May 1949, which was not followed by a referendum as originally planned because the members of the Assembly feared the Bavarian masses would vote against it, the law professor *Werner Weber* had already indicated that the immense powers of the constitutional court made it a judicial state, a view fully confirmed by experience in later years: “Worse still, political parties would themselves be mediated and constrained by courts. Weber railed at the ‘unheard-of’ – of proliferation of elements of the judicial state (“justizstaatlicher Elemente”).”<sup>28</sup>

### *III. Outlook*

The German Constitutional Court, which quickly became the most politically powerful court in the world through the processes described above, together with the US Federal Supreme Court, which also became the main arbiter of politics from the 1960s onwards, provided a model for a number of countries from the 1980s onwards on how to operate a public law system, structured according to political democracy, over and occasionally against the will of millions of masses, so that the will of elites with social resources could actually prevail without any coup d'état or constitutional coup. *Ran Hirschl* has described how this has happened in Canada, Israel, New Zealand and South Africa, where the political forces still in majority in parliament, seeing the inevitable rise of opposing forces, have handed over their parliamentary supremacy to chief justices with the same political values as they, in the face of the inevitable fall, celebrated this in public by realising the importance of human rights and individual constitutional rights. And in the case of the new South African political system of the early 1990s, relying on a chief justices with white elite values to counter the electoral results of the huge black majority against a constituency of millions, the constitution-makers created a powerful constitutional court to counter the electoral results, which then borrowed everything from the activist constitutional court formulas that had been established by then, both by the US Supreme Court and the German constitutional judges.<sup>29</sup>

But the German Constitutional Court's divergence from the written constitution and its style of ruling, which most broadly overruled the parliamentary majority government, and its formulas, were already taken over by the Spanish Constitutional Court, which was modelled on it from the early 1980s. But it went even further than that in its departure from the written constitution, later going so far as to declare as constitutional the ambition to allow same-sex marriage, in defiance of a literal provision of the Spanish constitution.<sup>30</sup> This broad

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<sup>27</sup> See Georg Vanberg: Establishing Judicial Independence in West Germany. *Comparative Politics*, 2000 April 342. p.

<sup>28</sup> Justin Collings: *Democracy's Guardians. A History of the German Federal Constitutional Court 1951-2001*. Oxford University Press. 2015. XXV. p.

<sup>29</sup> See Ran Hirschl: *Towards Juristocracy. The Origins and Consequences of New Constitutionalism*. Harvard University Press. 2004, 17-30. p.

<sup>30</sup> The most obvious example of such a decision-making style of the Spanish constitutional judges was their decision in 2012, in which they decided over the Civil Code provision permitting same-sex marriage. The Spanish Constitution literally states that marriage is a legal tie between a man and a woman, but this provision was recognized as consistent with the constitution by the Spanish constitutional judges. The relevant provision of the Spanish Constitution in English translation reads: “Art 32.1. A man and a woman will be entitled to marry in



constitutional court model was also implemented in the Eastern European countries from the early 1990s, after the break-up of the Soviet empire, with the powerful help and encouragement of the leading circles in Germany and the USA. In particular, Hungarian constitutional judges went so far as to overrule the parliamentary majority government, annulling almost a third of its laws in the early 1990s, that it was awarded the title of the world's most powerful constitutional court by analysts.<sup>31</sup>

In East Asia, India's opposition political circles saw the potential of activist constitutionalism, just beginning in the US, to determine state power despite electoral outcomes as early as the late 1950s, and this has made India a model state of juristocracy today.<sup>32</sup> But since the late 1980s, constitutional judges in Taiwan, then South Korea and Thailand, have also adopted the decision-making style and decision-making formulae of German constitutional adjudication, which depart from the written constitution, and in Thailand in particular have used them to intervene more forcefully in the functioning of state power. For example, the prime minister has been removed from office twice in recent years at the behest of opposition circles, who have deemed some of his decisions unconstitutional.<sup>33</sup>

In some Latin American countries, the activist constitutional adjudication formulas developed by the US chief justices in the 1980s have been influential, but in recent decades they have been reinforced by those of South Africa and India, and have also found their way from Europe through the Germans and their constitutional adjudication formulas here. Colombia and Brazil are even among the top countries in Latin America for the strength of their enhanced juristocracies.<sup>34</sup>

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terms of full legal equality." This is interpreted by the constitutional judges as follows: "Otherwise, if strictly and literally interpreted, Article 32 CE only identifies the holders of the right to marry, not the other spouse, although, we must insist, systematically speaking it is clear this does not mean that there was a wish in 1978 to extend the exercise of this right to homosexual unions" STC No. 198/2012, 5.p. However, despite the declared admission of the opposition of their decision to the constitution, they declared the same-sex civil marriage as consistent to the constitution.

<sup>31</sup> "If Hungary's Constitutional Court was frequently viewed as the most activist in the world in the 1990s, that mantle passed to the South African court during the 2000s." Stephen Gardbaum: Are Strong Constitutional Court Always a Good Thing for New Democracy? *Columbia Journal of Transnational Law*. (Vol. 53.) 2015, 289. p.

<sup>32</sup> See Shyamkrishna Balganesh: The Constitutionalization of Indian Private Law. (*Faculty Scholarship at Penn Law*.) Perhaps the culmination of constitutional activism can be seen in a recent Indian Supreme Court ruling that the constitutional requirement that cinemas play the national anthem before film screenings, which it is customary for everyone to listen to in a state of tense vigilance, is a constitutional requirement. For a history of this, see How the Supreme Court Almost Revoked Its Order on Playing the National Anthem in Theatres. *The Wire* 24/oct/2017.

<sup>33</sup> See Eugénie Méricau: Thailand's Deep State, Royal Power and the Constitutional Court (1997-2015). *Journal of Contemporary Asia*. 46. No.3. 445-466.p.

<sup>34</sup> See for the comprehensive analysis of the constitutional adjudication in the countries of Latin America Roberto Gargarella: Too "Old" in the "New" Latin American Constitutionalism. *Yale University Research Papers*, 2015, 44. p., and Jorge L. Esquirol: The Geopolitics of Constitutionalism in Latin America. In: Colin Crawford/Daniela Bonilla Maldonado (eds.): *Constitutionalism in the Americas*. Edward Elgar Publishing. New York. 2018. 79-108. p.