

## PARLIAMENTS VERSUS RAISING EXTREMIST MEMBER OF PARLIAMENT – AMENDMENTS TO CONSTITUTIONS NEEDED? / Manfred Dauster

Manfred Dauster  
Presiding Judge at the Bavarian  
Supreme Court/Munich and Presiding  
Judge at the High Court of Appeal of  
Munich, as well as member of the  
Institute for Economic Criminal Law,  
International and European Criminal  
Law at the University of Saarland,  
Saarbrücken; Hilblestraße 12; 80636  
München; Germany;  
manfred.dauster@oblg.bayern.de.  
ORCID: 0000-0001-7582-1127

**Abstract:** *(Right-wing) extremism is on the rise across the continent. Propaganda and other activities affect European societies and parliaments. Extremists do not stop their activities in front of parliaments' buildings. As far as extremist performance within parliaments is concerned, parliaments may react to them using measures of order, as provided for by their Rule Books but cannot apply them to harmful activities outside the parliament in the ordinary (political) arena. Parliamentary means of defence appear inadequate and at the end not efficient to defend our representative democracies. By comparing the present German constitutions in perspective of the German constitutional history, the article seeks to find „sharper armoury“ for parliamentary defence. In conclusion, some consideration is given to constitutional amendment providing parliaments with the authority to expel the unruly Members of Parliament.*

**Key words:** *Manifestations of modern right-wing extremism; the historical right of parliament to get to expel its unruly members (Paulskirchen Constitution 1849); impeachments against Members of Parliament in constitutions of the 20th century do not go far enough and conflict with similar elements of criminal law; return to the Paulskirchen solution by amending current constitutions.*

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### 1. IMPACT OF EXTREMISTS ON OUR DEMOCRACIES

The world currently experiences historical times. Later contemporaries will probably associate 2020/2021 primarily with the Covid-19-pandemic. The pandemic, however, overshadows somewhat worrying trends that have been increasingly virulent for years. On the one hand, there are the populists (Rosanvallon, 2020) - often stocky or mixed up with conspiracy theories. On the other hand, there are the right-wing extremists, who like to use populist catchphrases or make use of conspiracy theories when they coincide with their views. They mirror political currents on the right edge of the political spectrum. Their protagonists use xenophobic, anti-Semitic, neo-fascist and anti-democratic statements, and join forces with tinged conspiracy theorists. In the context of Covid-19, public protest has been forming in Germany for some time against the measures taken by the German governments to contain the corona pandemic. The pandemic-demonstrators are increasingly joined by groups from the spectrum of political

right-wingers (Botsch, 2017; Kopke, 2017), who misuse the demonstrations as a welcome platform for their own purposes, and they do not shy away from violence. The storming of the Reichstag Building in Berlin on August 29<sup>th</sup> 2020, when right-wing participants of a peaceful demonstration against containing measures at the end of the demonstration stormed the stairs of the Reichstag Building while waving the "Reich Flag" and the "Reich War Flag", represent an illustrative example of the aforementioned. Police prevented them from forcefully entering the Parliament Building. The incident even prompted *Federal President* Frank-Walter Steinmeier to speak out publicly about his worries (Michael Sommer, 2020).

Right-wing extremists in Germany seek their advantages in expressions of legitimate civil disobedience. But this is only one piece in the mosaic of the right-wing scene in the Republic and elsewhere in Europe. The right-wing tendencies (*ECRI-Bericht Über Deutschland (Sechste Prüfungsrunde)*, 2020, pp. 20–28; *Rechtsextremismus in Deutschland Unter Besonderer Berücksichtigung Der Neuen Bundesländer (WD 1 - 3000 – 159/14)*, 2016; Fielitz et al., 2018; Fritz & Robertson-von Trotha, 2011; Jesse, 2017; Klärner & Kohlstruck, 2006; Pfahl-Traughber, 1999; Schubarth & Stöss, 2001) and their political protagonists have nothing in common with the legitimate anti-Corona demonstrations. Furthermore, extremist ideology of the right-wing scene is unfortunately in the process of becoming a commonplace perception in Germany (Apostel, 2020; Backes et al., 2019; Bedford-Stroh, 2020; Schellenberg, 2016a, 2016b; Sundermeyer, 2012). Anyone who opposes those right-wingers must expect himself to become a target. This affects Jewish fellow citizens (Ludyga, 2021) as well as Muslim communities, in fact all who the right-wing scene considers to be "different" or "foreign". Politicians of democratic parties on all levels and critical journalists (die medienanstalten - ALM GbR, 2019; Preuß et al., 2017) are regularly verbally attacked; these attacks often include their family members. Representatives of the authorities, even if they "only" fulfil their (legal) duties, are showered with threats (Mittler, 2020). Most of those threats are sent via anonymous email accounts (Zipursky, 2019). Unfortunately, it does not stop at these e-mail threats. The murder of the Regional President of North Hesse *Walter Lübcke* on June 1<sup>st</sup>, 2019,<sup>1</sup> or the assassination attempt on Cologne's mayor *Henriette Reker* on October 17<sup>th</sup>, 2015,<sup>2</sup> show appalling examples of the horrors that constant hate ideology can lead to.

It is questionable whether sufficient public awareness has already been developed when ordinary citizens recognize the risk of being targeted by right-wing extremist violence or hate speech if such right-wingers feel them not sharing their views. It is not possible to foresee under which specific circumstances threats and violence will occur and become reality (*Maßnahmen von Bundesregierung Und Unternehmen Gegen Hassreden („Hate Speech“) Und Weitere Strafbare Meinungsäußerungen Im Internet*, 2016).<sup>3</sup> The protagonists of this kind of violence do not all walk around in combat boots

<sup>1</sup> The Frankfurt Higher Regional Court sentenced the main perpetrator to life imprisonment for murder and in doing so also determined the particularly severe nature of his guilt. The verdict is not final (valid). Germany, Frankfurt Higher Regional Court, 5-2 StE 1/20-5a-3/20 (28 January 2021).

<sup>2</sup> The Düsseldorf Higher Regional Court sentenced the perpetrator on two counts of attempted murder with grievous bodily harm, negligent bodily harm and grievous bodily harm to a total prison sentence of 14 years (Germany, Düsseldorf Higher Regional Court, III-6 StS 1/16 (1 July 2016)). Later, the Federal Supreme Court of Justice dismissed the defendant's appeal as ill-founded (Germany, Federal Supreme Court of Justice, 3 StR 454/16 (21 December 2016)).

<sup>3</sup> In the meantime, the legislator has reacted with the Federal Act on Combat against Right-Wing Extremism and Hate Crimes (2020). The law passed on June 18<sup>th</sup>, 2020 (Bohlen, 2020; Ceffinato, 2020; Eckel & Rottmeier, 2021; Geuther, 2020; Großmann, 2020; Haupt, 2021; Heim, 2020; Jung, 2020; Mantz, 2021; Matsumoto, 2020;

and military clothing. Such hate orators live as bourgeois citizens among us and in unidentified anonymity (Kaspar et al., 2017). No sections of the society are immune to right-wing extremist ideas. Even security-relevant professional groups, such as the military or the Police (Bundesamt für Verfassungsschutz, 2020; Deutsche Presseagentur, 2020b, 2020a; Janisch, 2020c; Müller-Arnold, 2020; Stegemann, 2020; Wernicke, 2020; Wernicke & Steinke, 2020),<sup>4</sup> make negative headlines (on racial discrimination and US policing see Rath, 2020). Among these "bourgeois", there are unfortunately also members of the right-wing groups in the parliaments of Germany. Other countries share similar experiences (cf. Bromell, 2021).

Hate speech and extreme right-wing ideology in all its forms have become an alarming social phenomenon in Europe (Chiarini, 2013; Cinpoes, 2013; Flade & Mascolo, 2020; Georgiadou, 2013; Ghosh, 2013; Häusler & Fehrenschild, 2020; Langenbacher & Schellenberg, 2011; Marchi, 2013; Meiler, 2020; Minkenber, 2013; Nagy et al., 2013; Pankowski & Kornak, 2013; Schellenberg, 2013) demanding our full attention. A "laissez-faire" attitude is anything but appropriate. If we let our attention falter, we should not be surprised that we figuratively hold out the words "Mene mene tekel u-parsim" (מֵנָה, מֵנָה, תְּקֵל, וּפְרִסִין).<sup>5</sup> Babylon's King Belshazzar and the divine warnings to him are perhaps far away in time. Closer to us is the history of the 20<sup>th</sup> century, in which, at the end of the 1920s at the latest, there were signs of coming disaster, which the democratic forces either did not understand or did simply neglect (Liebscher et al., 2020 with regards to the current situation). The social and economic circumstances in those days surrounding the rise of fascism (Kühnl, 1979, p. 85 et seq.; E. Nolte, 1971, p. 49 et seq.) might have been different from nowadays. However, it was the ignorance, negligence, and missing vigilance of democratic forces, which drove Europe into the abyss of the Second World War (Austermann, 2020, p. 98 et seq.).

It should not come as surprise that not only local councils but also parliaments in Germany (Deutsche Presseagentur, 2020c) have encountered such right-wing ideology and their representatives' political vulgarity. Not only in Germany but also in almost every

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Reinbacher, 2020b; Sahin, 2020; Schiemann, 2021; Simon, 2020; Steinke, 2020a, 2020b; Virchow, 2017; Wiecek, 2019) and has been submitted to the Federal President for promulgation according to the German Basic Law (1949), § 82 (1), 1<sup>st</sup> sentence. The Act aims to improve the investigation and securing of traffic data, but also at tightening substantive criminal law. However, prior to the adoption of the law by the legislative bodies, the Federal Constitutional Court had tightened the requirements for access retained data by its decision (Federal Constitutional Court, 1 BvR 1873/13 and 1 BvR 2618/13 (27 May 2020)). Due to the requirements of the Constitutional Court, the Federal President had doubts about the substantive constitutionality of the legislative resolution before him and felt prevented from promulgating the law (Janisch, 2020b; Mascolo & Steinke, 2020). The right of the Federal President to review the constitutionality of federal laws before they are enacted and promulgated is disputed among scholars (Berger, 1971; Hopkins, 2009; Mewing, 1977; Ossenbühl, 2007; Pohl, 2001; Stein, 2009). In the meantime, the Federal President and the Federal Government have agreed on re-drafting the Act and to submit the new draft to both Houses of Parliament for adoption (Janisch, 2020a). On March 30<sup>th</sup>, 2021, after the two Houses had adopted necessary amendments, the Federal President signed and promulgated the Act, which is now to enter into force (Press Release of the Federal President's Office (30 March 2021)).

<sup>4</sup> Police officers of the State Police of North Rhine-Westphalia had founded a private WhatsApp group and used this forum in order to send anti-Semitic, neo-Nazi and other news from the extreme right-wing spectrum to group members. Most of the group members behaved passively and "only" received the criminally relevant news and pictures. However, they remained silent for years and failed to report the incidents to their superiors. All 30 officials were suspended from duty with immediate effect. Criminal and disciplinary proceedings are still ongoing. Their aim is to remove all officials from service. The incident in the police district of Mülheim/Ruhr is unfortunately not an isolated incident but represents the sad culmination of a worrying gain of knowledge in the security sector in recent years.

<sup>5</sup> Counted and weighed but perceived as too light (the prophecy of the fall of the Babylonian Empire and the death of its King Belshazzar).

European country, right wing parties entered the parliaments with high election results. Not all members of parliament from the right-wing groups have their language under control. Unruly aberrations<sup>6</sup> of unparliamentary nature have become numerous in the plenary chambers of parliaments. Presidents of parliament still manage such outages in parliaments using parliamentary means of order when it comes to debates.<sup>7</sup> Imposed parliamentary means of order,<sup>8</sup> however, do not impress these contemporaries particularly. Moreover, in the eyes of their parliamentary and extra-parliamentary supporters, these members of parliament rather become a kind of heroes when they are subjected to measures of order or get removed from plenary chambers in parliaments. As far as Germany is concerned, such findings are very worrying in a country that experienced scenes of turmoil and vulgarity in its parliaments about 80 years ago when the new representative democracy under the Constitution of the Weimar Republic was doomed to seal its faith in the year of 1933 (Bracher, 1984, pp. 26 et seq., 257 et seq.). Are we back on such tracks? „*Principiis obsta. Sero medicina parata, cum mala per longas convaluere moras*“<sup>9</sup> (*Deutsche Einheit. Deutsche Freiheit. Gedenkbuch Der Reichsregierung Zum 10. Verfassungstag 11. August 1929, 1929*, pp. 159, 166, 220–222).

It is even more urgent in respect to the fact that those contemporaries do not limit themselves to parliaments and their committees. They are also and especially active in the extra-parliamentary area, where, on the one hand, they are at best subject to only limited parliamentary controls by presidents of parliament or their presidency councils. On the other hand, they are cautious not to overstep the limits of criminal liability for offences of expression. Nevertheless, their propaganda echoes in the extra-

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<sup>6</sup> Freedom of expression and freedom of the press according to the European Convention for Protection of Human Rights and Fundamental Freedoms, § 5 (1) and § 10 (1) (hereinafter: ECHR) are inextricably linked to the basic democratic constitution of European countries. Democracy without the confrontation of different opinions is inconceivable. This goes back to the classical democracy in Greece, when the marketplace (= ἀγορά [agora]) was the place where public opinion was formed (Cohen, 1995; Eder, 1995; Kenzler, 1999; Pabst, 2010). In contrast to the direct exchange of opinions in real discussion fora, the nowadays' phenomenon of hate speech is being characterized by anonymity of social media on internet fora where everybody can hide (Baldauf et al., 2018; Guhl et al., 2020; Papier, 2019, pp. 127–128). Moreover, we must not lose sight of the fact that words can hurt and even (figuratively) kill. Adequate protection against such words is therefore essential; case law of the Federal Constitutional Court often giving precedence to liberty of speech ("BVerfG, 14.06.2019 - 1 BvR 2433/17: Verletzung Der Meinungsfreiheit Durch Einordnung Einer Äußerung Als Schmähkritik (m. Anm. Gostomzyk)", 2019; Ladeur, 2020; Lange, 2020; Reinbacher, 2020a; Struth, 2019; Teichmann, 2020).

<sup>7</sup> Such means of keeping the order in plenary sessions are adjournment of the sitting (Rules of Procedure of the Bavarian Landtag, § 114 in the version promulgated on August 14th, 2009 - last amended on December 10th, 2014; Rules of Procedure of the Saxonian Landtag, § 97 (1), 3rd sentence) referral of a speaker on the substance of the case and removal of the floor (Rules of Procedure of the Bavarian Landtag, § 115; Rules of Procedure of the Saxonian Landtag (2019), § 95; Act no. 970 on the Landtag of Saarland, § 45 (2) – last amended on November 14th, 2018) giving a reprimand to a member of parliament if he takes the floor without having been admitted to speak and his/her exclusion from the sitting (Rules of Procedure of the Bavarian Landtag, § 116), reprimand and call to order in the event of infringing statements or interjections, exclusion from the sitting (Rules of Procedure of the Bavarian Landtag, § 117; Rules of Procedure of the Saxonian Landtag, §§ 96-97; Act no. 970 on the Landtag of Saarland, §§ 44-50; Rules of Procedure of the Landtag of North Rhine-Westphalia, §§ 36-39; Rules of Procedure of the [German] Bundestag, §§ 36-38 and § 40).

<sup>8</sup> The Constitutional Court of Hamburg in its judgement [HVerfG 3/17 (2 March 2018)] upheld the constitutionality of the exclusion, pronounced by the President of the Parliament (Bürgerschaft) on March 1st, 2017, of a member of the AFD-faction from the session of the Bürgerschaft as a repressive measure against a speech delivered by the member of the AFD which partially violated the dignity of the House.

<sup>9</sup> Publius Ovidius Naso (\* March 20<sup>th</sup>; 43 BC in Sulmo; † probably 17 AC. in Tomis), *Remedia Amoris*. 91: "Resist the beginnings! Too late the medicine is prepared when the evils are strengthened by long hesitation." Carl Severing, the then Reich Minister of the Interior (SPD), made a pugnacious statement on the occasion of the tenth anniversary of the constitution day of the Weimar Republic on August 11<sup>th</sup>, 1929: "The German people's state would be bogged down with a nation of sleepyheads. ... Practice, resist, fight!"

parliamentary scope of politics. Whenever it comes to verbal abuse and hostile verbal attacks, these members of parliament move within a grey area, which is not accessible to the presidents of parliament. Nonetheless, their extra-parliamentary propaganda affects the parliaments in particular through social media, calls the reputation of parliaments before the voters into question, and in this way, saws off the supporting beam of democracy (E. Nolte, 1971). *Constant dripping wears away the stone*.

Against this background, the question as to whether it would be desirable for parliaments to have the means at hand to position themselves in an appropriate manner vis-à-vis the right (or left) protagonists who are harmful to parliaments may be examined. Such means should go beyond the existing parliamentary means of order and the criminal prosecution for offences of expression, such as incitement of the people or defamation.<sup>10</sup> Perhaps this will require some courage and determination, also perseverance, at least when new paths are to be taken. The defence of our democracy in Europe is well worth the effort.

## 2. LESSONS FROM CONSTITUTIONAL HISTORY

Modern constitutional law is not monolithic but should be seen within the tradition, which, in terms of the history of ideas, goes back to, at least, the Enlightenment of the 18th century. This long tradition was also marked by currents of social criticism, which did not spare parliaments after the 19th century had finally brought such people's representations to the countries of Europe. Parliaments, as we find them today, are children of the movement of constitutionalism of the 19th century. It seems worth looking back to those beginnings to get a better understanding of how parliaments today can stand up in the face of the extremism of their members.

### 2.1 *Constitutionalism in the 19th and Early 20th Century*

After the final defeat of Napoleon I, the German states joined together (alongside with other major European powers as for example the United Kingdom, the Russian Empire or the Kingdom of France) at the Congress of Vienna in 1815 that aimed for a new European Peace Order (Lentz, 2014; Siemann, 2016, pp. 487–543; Stern, 1999, pp. 186–188; Straub, 2014); and formed as a part of this endeavour the "German Confederation" through the "German Confederation Act" (Zeumer, 1913, p. 540/544). The "Confederation Act", which was integral part of the Vienna Final Act of June 9<sup>th</sup>, 1815 (Stolleis, 1992, p. 77 et seq.), left its members, above all the Empire of Austria and the Kingdom of Prussia as the largest German states, their full sovereignty under international law (Jansen, 2014). Also as a reaction to the freedom movements (Frotscher & Volkman, 1997, p. 17/18; Krause, 2013; Kröger, 1988, p. 13 et seq.; Nipperdey, 1984, p. 82 et seq.; Schulze, 1985; Stern, 1999, pp. 183, 185) awakened in the German combat against the Napoleonic occupation system, the signatory powers of the "Confederation Act" promised by Article XIII of the Act that "constitutions" should take place in the member states of the German Confederation (Bermbach, 1991, pp. 145–167; Frotscher & Volkman, 1997, p. 17/19; Mager, 1973; Wunder, 1978). This remained an endeavour, which members of the German Confederation did not completely comply with (Beschorner, 1877; Dippel, 2006;

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<sup>10</sup> German Criminal Code, §§ 185 – 189, § 130 in the version of its promulgation of November 13<sup>th</sup>, 1998 – last amended on October 9<sup>th</sup>, 2020 (hereinafter CC).

Lee, 1975).<sup>11</sup> Liberal (Stolleis, 1992, pp. 144 et seq., 156 et seq.)<sup>12</sup> constitutionalism movement of the 19<sup>th</sup> century (Bischof, 1859; Buddeus, 1833; Enzmann, 2012, pp. 23–35; Gundlach, 1904; Hammer, 1909; Heun, 2003, 2006; Köbrich, 1913; Krieghoff, 1894; Lucz, 1893; Passow, 1903a; Pistorius, 1891; Samuely, 1869; Steinbarth, 2011, p. 86 et seq.; Stolleis, 1992, pp. 172–176; Wolfram, 1930)<sup>13</sup> demanded the separation of powers, the guarantee of individual liberties (Böckenförde, 1964, p. 103 et seq.; Böckenförde, 1981, p. 387 et seq.; Frotscher & Volkmann, 1997, p. 17/21 et seq.; Heun, 2001, pp. 14/15, 17 et seq.; Janssen, 1990, p. 8 et seq.; Waldhoff, 2016)<sup>14</sup> and the guarantee of independent courts (Carsten & Rautenberg, 2015, pp. 54–99; Heun, 2001, p. 7; Stolleis, 1992, p. 116 et seq.) - all achievements of the French Revolution and the Napoleonic legal reforms.<sup>15</sup> The movement was either concerned with appropriate representations of the people vis-à-vis the respective national princes (Stolleis, 1992, p. 109 et seq.), who - and not the people! -

<sup>11</sup> (Princely) Degree on the Constitution of the Principedom of Schaumburg-Lippe, Basic Law on the Constitution of the Grand Duchy of Saxony-Weimar Eisenach, Constitution of the Kingdom of Bavaria, Constitution of the Grand Duchy of Baden, Constitution of the Kingdom of Württemberg, Constitution of the Kingdom of Hanover (replaced by the Constitution of 1833, which was abolished by Royal Degree of 1837 and then replaced by the new Constitution of the Kingdom of Hanover of 1840 which was abolished after annexation of Hanover by Prussia by Prussian Act on the unification of the Kingdom of Hanover with the Prussian Monarchy), Constitution of the Duchy of Braunschweig and Lüneburg, Constitution of the Grand Duchy of Hesse, Constitution of the Duchy of Saxony-Coburg-Saalfeld, Constitution of the Electoral Principedom of Hesse, Constitution of the Kingdom of Saxony (Beschoner, 1877), (imposed) Constitution of the Prussian State of 1848 and (revised) Constitution of the Prussian State of 1850.

<sup>12</sup> It should not be overlooked that conservative currents were also a mainstream.

<sup>13</sup> The most prominent representative was the liberal lawyer and political scientist Robert von Mohl with his monograph *Die Verantwortlichkeit der Minister in Einheerschaften mit Volksvertretung* (1837).

<sup>14</sup> Inseparably connected with fundamental rights is the substantive legal concept of 19<sup>th</sup>-century common German constitutional law, according to which any encroachment on freedom and property required a legal basis, or as Title VII, § 2 of the Bavarian Constitution described it: *"Without the advisory council and the consent of the Kingdom's Houses of Parliament, no general new law concerning the freedom of the person or the property of the citizen can be enacted, nor can an existing law be amended, authentically explained or repealed."* Even if constitutional law required the monarch's approval of the legislative resolution of the parliamentary chambers in order for a law to come into being, the (material) reservation of the law was a determinant for the competences of the national representations in the constitutional monarchies of the 19<sup>th</sup> century, which also underwent an expanding interpretation in the course of its development.

<sup>15</sup> German regions on the left bank of the Rhine, which were annexed by France under Napoleon, as well as the Kingdom of Westphalia, which Napoleon had created, and which was ruled by his brother Jérôme experienced the Napoleonic legal reforms (Braun, 2011; Brosig, 2009, p. 4 et seq.). These reforms remained with those regions when they returned to Germany after the Congress of Vienna and represented a step forward towards Rule of Law and independence of judiciary. However, constitutionalism quickly came into conflict with restorative tendencies, especially on the part of the governments in Vienna and Berlin, soon after the German Federal Act had entered into force. Austria's State Chancellor Prince von Metternich (Kraehe & Sauvigny, 1966; Siemann, 2016, p. 638 et seq.) became the face of this restoration in Germany in the sense of a movement backwards. With regards to foreign policy he was supported in particular by Russia closely in pursuing common political goals in the so-called Holy Alliance of Throne and Altar, which originally encompassed Austria and Hungary, Prussia, Great Britain and Russia and, with the accession of monarchical France, developed into the Pentarchy, which in the first half of the 19<sup>th</sup> century essentially determined European politics of balance. In terms of civil liberties, too, constitutionalism was denied full success. Legal guarantees were indeed introduced by acts of parliament as for example the Criminal Code of the Kingdom of Bavaria of 1813, the Criminal Code for the Prussian States of 1851, the Criminal Code of the North German Federation of 1867 and finally the current Criminal Code of 1871 (Joecks, 2017; Weigend, 2007, p. 22 et seq.). Additionally, new Criminal Procedure Codes with rule of law guarantees were introduced (H.-H. Kühne, 2016). Finally, under the German Constitution, the Courts Constitution Act, the Civil Code and the Civil Procedure Code harmonized most of the national law within Germany (Brauneder, 2017; Dölemeyer, 2008; Kisse & Mayer, 2013, p. 3 et seq.; Mertens, 2004).

felt as the land's sovereigns<sup>16</sup> until they were finally overthrown from their thrones in 1918 by the November Revolution (D. Nolte, n.d.).<sup>17</sup> The constitutionalism of the 19<sup>th</sup> and early 20<sup>th</sup> century until 1918 also aimed to controlling monarchical governments so that responsibility of ministers became an issue (Heun, 2001). Most of the state parliaments of the "German Confederation" gained budgetary and fiscal (semi-) sovereignty (Friauf, 1968, p. 28 et seq.; Frotscher & Volkmann, 1997, p. 17/21; Heun, 1989, p. 38 et seq., 2001; Mussgnug, 1976, p. 48 et seq.).<sup>18</sup> Governments could only collect taxes and spend money in accordance with the approved budgets (Dreier, 1998, pp. 59, 69 et seq.; Friauf, 1968, pp. 223–228, 230–238; Heun, 2001; Kaminski, 1938, p. 43 et seq.; Löwenthal, 1914; Schefold, 1981, p. 146 et seq.; Wahl, 1981, p. 171 et seq.),<sup>19</sup> taxes and customs duties could only be levied to the extent that the state parliaments and, after 1871, the Reichstag<sup>20</sup> had passed tax and customs laws.<sup>21</sup> However, German governments remained focused on the monarchical heads of state and their prerogatives (Frotscher & Volkmann, 1997, p. 17/25; Heun, 2001),<sup>22</sup> who appointed and dismissed them, even against the will of parliamentary majorities in respective representations of people. As the constitutions of the 19<sup>th</sup> century did not know governments depending on the political confidence of parliaments (Passow, 1903b), they instead provided for minister impeachments (Gerber, 1865, p. 184 et seq.)<sup>23</sup> as means of parliamentary control over the princely governments.<sup>24</sup> However, those impeachments proved to be not very

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<sup>16</sup> The Vienna Final Act of 1820 supplemented the German Confederation Act and described the monarchical principle in its Article 57: Since the German Confederation, with the exception of the free cities, consists of sovereign princes, according to the basic concept thus given, the entire power of the state must remain united in the head of the state, and the sovereign can be bound by the state constitution to the participation of the national representations only in the exercise of certain rights. Despite the revolutions of 1830 and 1848, this principle remained essentially valid throughout the entire 19<sup>th</sup> century - regardless of whether it was explicitly laid down in the constitutional charters or shaped thinking and state practice as an unwritten constitutional rule (Gerber, 1865, p. 94 et seq.; Heun, 2001). Constitution of the Kingdom of Bavaria, title I, § 1 (1), Constitution of the Grand Duchy of Baden, § 5 (1), Constitution of the Kingdom of Württemberg, § 4 (1) (Gerner, 1989), Constitution of the Grand Duchy of Hesse, § 4 (1), Constitution of the Electoral Principedom of Hesse, § 10 (1) (Ham, 2014), Constitution of the Kingdom of Saxony, § 4 (1), Constitution of the Prussian State of 1848, §§ 43 – 50, Constitution of the Prussian State of 1850, §§ 45 – 52, Constitution of the Kingdom of Hanover of 1833, § 6 and Constitution of the Kingdom of Hanover of 1840, §§ 5 – 6 (Frotscher & Volkmann, 1997, p. 17/25; Stolleis, 1992, p. 102 et seq.).

<sup>17</sup> This discussion has not come to an end. In other parts of the world it is still ongoing.

<sup>18</sup> Reich Constitution, § 69 et seq., Constitution of the Kingdom of Bavaria, title VII, § 1 et seq., Constitution of the Grand Duchy of Baden, § 53, Constitution of the Kingdom of Württemberg, §§ 109 – 118, Constitution of the Grand Duchy of Hesse, §§ 67 and 68.

<sup>19</sup> *In praxi*, fiscal policies were not without conflicts. Best known are the constitutional conflict between government and parliament in the Electorate of Hesse 1850 – 1852 and the conflict between government and parliament on the financing military reforms in the years between 1862 and 1866 which had Otto von Bismarck's appointment to the position of the Prussian Prime Minister on October 8<sup>th</sup>, 1862 as a side effect and though prevented King Wilhelm from abdication.

<sup>20</sup> Reich Constitution, § 4 together with § 5 (1).

<sup>21</sup> Nevertheless, the financing of the militaries remained an issue between governments and parliaments, as the Prussian constitutional conflict on military reforms between 1859 and 1866 proves best.

<sup>22</sup> Other areas were out of parliamentary influence *de lege lata*. The most important of these are military command, the cultivation of international relations and the areas of state emergency and civil protection in case of natural disasters.

<sup>23</sup> As means of parliament to defend the constitutional order.

<sup>24</sup> The impeachment of members of the Princely Governments for violations of the law or the Constitutions remained a constitutional sword throughout the entire 19<sup>th</sup> century until the collapse of the monarchies in 1918, which could not prove its sharpness even after that time, when, particularly as a result of the revolution of 1848, the countersignature of orders of the monarchs (under the conditions of constitutionalism, the

effective (Dauster, 1989, p. 125; Greve, 1977, p. 55 et seq.; Kröger, 1972, p. 160; J.-D. Kühne, 1989, p. 49/64; J. D. Kühne, 1998, pp. 458, 574; Mehring, 2009, p. 304 et seq.; Schmitt, 1929).<sup>25</sup> As a result of developments in the course of the First World War and increasingly difficult internal conditions, members of the Reichstag joined the imperial government for the first time in 1917. Almost inevitably, this development culminated in a constitutional reform in autumn 1918, which made the Reich Chancellor dependent on the confidence of the Reichstag (E. G. Franz, 1997, p. 38/40; Machtan, 2013, pp. 341 – 468).<sup>26</sup> However, this parliamentarisation of the Imperial Government no longer had any influence on the further course of history (Nipperdey, 1984, p. 868; Stern, 1999, pp. 485 – 486).

The German constitutions in the 19<sup>th</sup> century focused on the introduction of representation of the people, on their powers vis-à-vis the monarch and on the protection of the representatives of the people in the exercise of their rights against executive (or judicial) infringements (immunity from prosecution, indemnity for votes and speeches within the plenary of the parliament). The constitutions did not spend any thought on elected representatives who neglected their duties, leaving it to the autonomous regulations within the parliament to sanction negligence or other misconduct of the elected representatives. Consequently, the constitutional law of the 19<sup>th</sup> century did not include impeachments against members of parliament as a correlate to charges against

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constitutional achievement of the countersignature requirement was not per se a step forward, since it could put the countersigning minister in conflict situations between the monarch and parliament as long as the monarch prerogatively decided on the composition of "his" government alone without the participation of parliament (Ehberger, 2013, p. 19 et seq.) became accepted and the governments took responsibility for them (Reich or Paulskirchen Constitution, § 74, which did not enter into force). Nonetheless, the Paulskirchen Constitution reinstated the legal responsibility of ministers and referred corresponding charges brought by the Reichstag to the jurisdiction of the Reich Court (§ 126 lit. i [Reichsminister] and lit. k [Landesminister]) and waived the parliamentary responsibility of Reichsministers (in the modern sense)). The Reichstag was a bicameral parliament with a House of States (Paulskirchen Constitution, § 85 together with § 86) and the People's House (Paulskirchen Constitution, § 85 together with § 93). Each of the houses had the right to bring charges. The following Constitutions of the North German Federation and the Reich Constitution were completely silent on the responsibility of the Reich Government. Both constitutions did not know ministers but only the Reich Chancellor (with view on the German States: Constitution of the Kingdom of Württemberg, § 195 et seq.: impeachment before the State Court; Constitution of the Kingdom of Prussia, § 61: impeachment before all senates of the two supreme courts of the Kingdom; Constitution of the Electoral Principdom of Hesse, § 101) (Frotscher & Volkmann, 1997, p. 17/26; Starck, 2006). Such impeachment was not of practical relevance – neither in 19<sup>th</sup> century nor in 20<sup>th</sup> century, except in the constitutional conflict in Hesse-Cassel between the Prince Electoral and his government under its first minister Ludwig Hassenpflug on the one side and the parliament on the other side in 1850 (Ham, 2007; Kroll, 2010, pp. 43–66). The parliament impeached Hassenpflug four times, but he survived the impeachments in office (Bovensiepen, 1915; Enzmann, 2012; Grothe, 1996; Luther, 2002; Oetker, 1850; Popp, 1996; Scheuner, 1976; Steinbarth, 2011). With regards to the situation in Bavaria see Constitution of the Kingdom of Bavaria, title X, § 5. By the Act on the responsibility of ministers, the constitutional situation changed dramatically. The amendment to the constitution introduced formally an impeachment procedure against members of the government (Weckerle, 1930). Finally, the Act instituting the State Court of Bavaria, which had jurisdiction on impeachments of ministers (Schweiger, 1963).

<sup>25</sup> The reasons for the lack of effectiveness lay, on the one hand, in the non-controversial substantive-law prerequisites of a ministerial indictment (violation of the constitution and the law?, intent?, intention?). The formal requirements to be observed in the prosecution decision were high, the procedure before the competent courts based on the criminal proceedings was not adequate). Beyond that, however, the development went beyond this form of assertion of responsibility, because the political circumstances played into the hands of the parliaments and, in any case, at the end of the 19<sup>th</sup> century the princely governments became increasingly politically dependent on the parliaments. In focussing on the legal responsibility of members of government the institute of impeachment against ministers even proved contra-productive and prevented monarchical governments from becoming politically dependent from the confidence of parliaments.

<sup>26</sup> Amendment to the Reich Constitution (1871) of 1918.



ministers. There is one important exception to this rule which must not be overlooked: Sect. 114 of the Paulskirchen Constitution of 1849 (*Verfassung Des Deutschen Reichs Sammt Dem Reichsgesetz Über Die Wahlen Der Abgeordneten Zum Volkshaus Nach Der Amtlichen Ausgabe Der Reichsverfassung*, 1849) considered this point and gave each House of the Reichstag the right to punish its members for unruly behaviour and to exclude them in the extreme case (paragraph 1). However, sect. 114 para 2 required a two-thirds majority of the House's votes in favour of expulsion. The Paulskirchen Constitution left the details of such rules to the Rules of Procedure of the respective House, which were not enacted, as the Paulskirchen Constitution never entered into force.<sup>27</sup> The other German constitutions that had entered into force before 1918 apparently saw no need to deal with members of parliament who did not fulfil their constitutional duties or who opposed the representative bodies of the people. There were also extremist currents in the 19<sup>th</sup> century from the point of view of time and contemporaries. Obviously, they did not reach the parliaments and did not trigger any need for action there. The Paulskirchen Constitution, which emerged from the revolution of 1848, is an exception to this. Why sect. 114 was inserted into the text is dark and leaves room for speculation.

In summary, the 19<sup>th</sup> century provides explanations for impeachment of members of government. In that era, extremist currents stood in the focus of monarchical governments. What the governments regarded as "endangering the state" did not necessarily have to coincide with the views within the parliaments. Governments, however, had their own means of taking action against those they politically disliked or considered "endangering the state". Reich Chancellor von Bismarck was a master in dealing with the press, and he used it whenever he wanted to eliminate opponents or influence or change parliamentary majorities in order to achieve his goals. The "Kulturkampf" (Borutta, 2010; G. Franz, 1954) directed against the Roman Catholic Church in Germany and the Roman Catholic "Deutsche Zentrumspartei" (Amann, 2013, p. 32 et seq.; Bachem, 1932; Bebel, 1984, p. 29 et seq.; Bismarck, 1984a, p. 27; Evans, 1981; Stern, 1999, pp. 420–425), and the "Sozialistengesetze" ([Anti-] Socialist Laws) directed against the rising SPD (and the trade unions) (Bismarck, 1984b, p. 47; Matthöfer, 2017, p. 326 et seq.; Stern, 1999, pp. 425–428; Treitschke, 1984, p. 41 et seq.)<sup>28</sup> stood for this.

## 2.2 Interim - Period after 1918

After the 1918 revolution, the new republican constitutions (Grawert, 1989, pp. 381–504) at the level of the *Reich* as well as at the level of the *Reichsländer*, the federal states of the new Weimar Republic, made the governments at both levels depending on the confidence of the parliaments.<sup>29</sup> At the *Reich* level, only the *Reichspräsident*, the Head

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<sup>27</sup> 28 governments of smaller German states agreed on the Paulskirchen Constitution, but Bavaria, Württemberg, Saxony and Hanover objected it (Stern, 1999, p. 261). At the latest, when the Prussian King Friedrich Wilhelm IV had rejected the imperial crown offered to him by the National Assembly on April 28<sup>th</sup>, 1849 (Pollmann, 1984, p. 304/305), the revolution of 1848 and the Paulskirche constitution had failed. What followed was restoration (Frotscher & Pieroth, 2017, p. 147 et seq.; Stern, 1999, p. 261/263).

<sup>28</sup> In particular: Reich Act against the Dangerous Aspirations of Social Democracy (1878).

<sup>29</sup> Constitution of Weimar Republic, § 54, Constitution of Anhalt, § 27 (2), 2<sup>nd</sup> sentence, § 35, Constitution of Baden, § 52 (1), 1<sup>st</sup> and 2<sup>nd</sup> sentence, § 53 (1), Constitution of the Free State of Bavaria, §§ 55 (1) (4), 58 (1), 59 (1) (2), Constitution of the Free State of Brunswick, § 33 (1) (2), Constitution of the Free Hanseatic City of Bremen, §§ 36 (1), 53 (1), Constitution of the Free and Hanseatic City of Hamburg, §§ 34 (1), 36 (1),

of State, did not need the *Reichstag's* confidence, as he was directly elected by the voters<sup>30</sup> – as a second power centre beside the *Reichstag*, the Parliament of the Weimar Republic. Although after 1918 members of government depended on the confidence of parliament<sup>31</sup>, most of the *Reichsländer* and the *Reich* nevertheless upheld the impeachment of ministers as a parliamentary control mechanism (Wittreck, 2004, p. 698 et seq.).<sup>32</sup> According to Article 59 1<sup>st</sup> sentence of the Constitution of Weimar Republic, the *Reichstag* had the right to impeach the *Reichspräsident*, the *Reichskanzler* or the *Reichsminister*s before the *State Court* for the *German Reich* of having culpably violated the Constitution of Weimar Republic or any *Reich Law* (Anschütz, 1987; Finger, 1925; Jerusalem, 1930, p. 148 et seq.; Kühn, 1929, p. 16 et seq.).<sup>33</sup> Regarding impeachments against members of governments, the constitutions that came into force after the First World War hereby continued the constitutional tradition that had begun in the 19<sup>th</sup> century. The conditions however had changed. The parliaments were now able to force governments to resign by means of parliamentary votes of no confidence. The nature of the relationship between "political" responsibility of governments before the parliaments and the "legal" government accountability before the state or constitutional courts remained unclear, until the collapse of the democratic institutions after Hitler's seizure of power.

With view of the members of parliaments, the German constitutional history until 1918 had remained silent when it came to members of parliament impeachments as a

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Constitution of the People's State of Hesse, §§ 37 (1) (2), 38 (1) (3), Constitution of the Land Lippe, §§ 26 (1), 35 (1), Constitution of the Free and Hanseatic City of Lübeck, §§ 7 (1), 14 (1); Promulgation of the Lübeckian Constitution, § 14 (1), 1<sup>st</sup> sentence, Constitution of the Free State of Mecklenburg-Schwerin, § 53 (1), 1<sup>st</sup> and 5<sup>th</sup> sentence, § 62 (1), Act on the New Version of the Basic Law of Mecklenburg-Strelitz, § 24 (2), Constitution of the Free State of Oldenburg, § 40 (1) (6), 1<sup>st</sup> sentence, Constitution of the Free State of Prussia, §§ 45, 1<sup>st</sup> sentence, 57 (1), 1<sup>st</sup> and 2<sup>nd</sup> sentence, Constitution of the Free State of Saxony, §§ 26 (1), 27 (1) (2), Constitution of the Free State of Schaumburg-Lippe, § 29 (1), 2<sup>nd</sup> sentence, § 38, Constitution of the Land Thuringia, §§ 35-36, 38, 39 (1), 40, Constitution of Württemberg, § 27 (1) (2), 2<sup>nd</sup> sentence, § 28 (all constitutions are collected and edited by Fabian Wittreck (2004)). As governments became dependent on the support and confidence of parliaments in their creation and in their existence, the German Länder were confronted for the first time with the question of what had to happen when parliamentary conditions did not permit the formation of majority governments. The phenomenon of minority governments, which had to seek majorities in parliament from issue to issue, is rather unpopular in Germany today – in contrast to Scandinavian countries; minority governments were formed extremely rarely after 1945 and were soon transformed into majority governments, often only after the dissolution of parliament that did not find necessary majorities (Klecha, 2010, pp. 12 et seq., 77 et seq.).

<sup>30</sup> Constitution of Weimar Republic, § 41 (1). Upon motion of the Reichstag concluded by two third majority, the Reichspräsident could also be dismissed by a national plebiscite (Constitution of Weimar Republic, § 43 (2) (Anschütz, 1987)

<sup>31</sup> Constitution of Anhalt, § 35, Constitution of Baden, § 53, Constitution of Bavaria, § 59 (1) (2), Constitution of Braunschweig, § 33 (3), Constitution of the Free Hanseatic City of Bremen, § 53 (1), Constitution of the Freie und Hansestadt Hamburg, § 36 (1), Constitution of the People's State of Hesse, § 38 (1), Constitution of the Land Lippe, § 35 (1), Constitution of Lübeck, § 14 (1), Constitution of Lübeck, § 14 (1), Constitution of the Free State of Mecklenburg-Schwerin, § 53 (1), 5<sup>th</sup> sentence, Constitution of Mecklenburg-Strelitz, § 25 (1), Constitution of the Free State of Oldenburg, § 40 (6), Constitution of the Free State of Prussia, § 57 (1), Constitution of the Free State of Saxony, § 27 (1) (2), Constitution of the Free State of Schaumburg-Lippe, § 38, Constitution of the Land Thuringia, §§ 38, 39, Constitution of Württemberg, § 28, Constitution of Weimar Republic, § 54.

<sup>32</sup> Constitution of Anhalt, § 39 (1), Constitution of Baden, §§ 60 et seq., Constitution of the Free State of Bavaria, § 70 (1), Constitution of the Freie und Hansestadt Hamburg, § 49, Constitution of the People's State of Hesse, §§ 47 et seq., Constitution of the Land Lippe, § 37 (1), Constitution of the Free State of Mecklenburg-Schwerin, § 62 (2), Constitution of the Free State of Oldenburg, § 69 (1), Constitution of the Free State of Prussia, § 58 (1), Constitution of the Free State of Schaumburg-Lippe, § 41 (1), Constitution of Thuringia of 1920, Constitution of the Land Thuringia of 1921, § 48 (48); Constitution of Württemberg, §§ 38 (1), 59 (1).

<sup>33</sup> Constitution of Weimar Republic, § 59.

contrast instrument to charges against members of government to constitutional courts. After 1918, the new *Reichsländer* constitutions widely followed this tradition. However, Article 23 para 1 of the Constitution of Anhalt, and sect. 39 para 2 of the Constitution of the Free State of Mecklenburg-Schwerin, allowed impeachments against members of their parliaments if a member of parliament was suspected of bribery or of serious breach of professional secrecy with regard to facts, which have been communicated in secret sittings of parliament.<sup>34</sup> Although at the end of the Weimar Republic not only the *Reichstag*, but also the state parliaments were marked by disturbances, unrest and highly unparliamentary scenes and failures, which emanated mainly from the communist and national socialist factions, the impeachment proceedings in the two *Reichsländer* remained practically irrelevant.<sup>35</sup>

While impeachments of members of government under the new democratic constitutions after 1918 may be seen as a special, traditional form of parliamentary control, such considerations do not apply to impeachments of members of parliament. The constitutional preconditions for such impeachments (bribery and betrayal of secrets) sound like criminal offences, and they may be as such. However, charges against members of parliament brought before the constitutional courts did not prevent ordinary judicial authorities from dealing with such allegations under criminal law and bringing respective members of parliament before criminal courts. Impeachments before constitutional courts and indictments before criminal courts were laid out in a kind of double track (Lammers & Simons, 1932, p. 404 et seq.). The constitutional impeachments of members of parliament have some similarities to disciplinary sanctions in common (on disciplinary power of parliaments Jan, 1925, p. 314/315; Schelhorn, 1924, p. 792/795), as we know them from civil service law. Disciplinary proceedings are also independent of criminal proceedings. Disciplinary sanctions are the state's response to breaches of loyalty by a civil servant. However, bribery and betrayal of secrets are grave felonies. They have repercussions on the body to which the member belongs. The effects of these repercussions on parliaments, *vis-à-vis* the public and *vis-à-vis* the voters bear the constitutional grounds for impeachments of members of parliament. They are less disciplinary tools than more means of institutional self-purification (Jan, 1925, pp. 314, 338; Schelhorn, 1924, p. 792/793).

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<sup>34</sup> The motion for such an impeachment to be filed with the Constitutional Court (Constitution of Anhalt, § 39, Constitution of the Free State of Mecklenburg-Schwerin, § 66 (1) had to be made by one quarter of the statutory number of members of parliament (Constitution of Anhalt, § 23 (2), 1<sup>st</sup> sentence, Constitution of the Free State of Mecklenburg-Schwerin, § 39 (3), 1<sup>st</sup> sentence), and then required a majority of two-thirds of the statutory number of members of parliament to bring the charge (Constitution of Anhalt, § 23 (2), 2<sup>nd</sup> sentence, Constitution of the Free State of Mecklenburg-Schwerin, § 39 (3), 2<sup>nd</sup> sentence). Bavaria also introduced the impeachment of members of parliament by the Act amending the Constitution of the Free State of Bavaria of 1925 (Jan, 1925; Schelhorn, 1924). Simultaneously, discussions on the Reich level on introducing an impeachment against members of the Reichstag (Jan, 1925, p. 314/336) led to nothing.

<sup>35</sup> Constitution of Anhalt, § 23 (1) ruled: Members of Parliament may, at the request of the Diet, be brought before the State Court (§ 39) on charges of bribery and of serious breach of the duty of secrecy with regard to facts which have been communicated in secret session of the Diet. The duty of secrecy shall also extend to such proceedings of the committees for which the committee has decided on confidentiality. The State Court for Anhalt by judgement of June 25<sup>th</sup>, 1931 found two (former) Members of the Landtag für Anhalt guilty of corruption – by the way, the only guilty verdict of a German State or Constitutional Court in constitutional history of Germany (Bönnemann, 2007; Lammers & Simons, 1932).

### 2.3 Modern Era after 1945

After the unconditional surrender of Nazi Germany on May 8<sup>th</sup>, 1945, the Allies very quickly ensured the reconstruction of the German states abolished by the Nazis (*Bavaria, Hesse, Bremen, Hamburg*), or else they established new German states or *Länder* (*Baden, Württemberg-Baden and Württemberg-Hohenzollern [later merged into Baden-Württemberg], Rhineland-Palatinate, Saarland, North Rhine-Westphalia, Lower Saxony, Schleswig-Holstein and Berlin [West]*).<sup>36</sup>

The *Länder* upheld the constitutional tradition from previous periods. As far as they did so, some of them enacted the impeachment of members of government before the constitutional court of each *Land*<sup>37</sup> although the new constitutions made governments depending on the confidence of parliaments.<sup>38</sup> Only few of them maintained the impeachment against members of parliament.<sup>39</sup> *Bremen* and *Hamburg* took a special

<sup>36</sup> In the process of Germany's reunification in 1990, the states of Thuringia, Saxony-Anhalt, Brandenburg, Saxony, and Mecklenburg-Vorpommern were added.

<sup>37</sup> Constitution of the Land of Baden-Württemberg, § 57, last amended in 2011, Constitution of the Free State of Bavaria, § 61, last amended in 2013, Constitution of the Free Hanseatic City of Bremen, § 111, last amended in 2019, Constitution of the Land of Hesse, § 115, last amended in 2011, Constitution of Lower Saxony, § 40, last amended in 2011, Constitution of Rhineland-Palatinate, § 131, last amended in 2010, Constitution of Saarland, § 94 (Rütters, 2017), last amended in 2013, Constitution of the Free State of Saxony, § 118, last amended in 2013. In summary, impeachment of members of government is allowed for any intentional infringement of constitution or of a law by a member of the government. Interestingly, in course of revising its constitution, the state of North Rhine-Westphalia dismissed the impeachments of members of government (including members of parliament) as no longer appropriate. Respective Article 63 of the Constitution of North Rhine-Westphalia (Schneider, 1985) was revoked in 2016 (Bovermann, 2016, p. 63/64; Heusch & Schönenbroicher, 2019, p. 571). Respective provisions (§§ 37 – 42) of the Act on the Constitutional Court of North Rhine-Westphalia, last amended in 2018 were also revoked in 2017 (Dauster, 1984, p. 289 et seq.; Kröger, 1972, p. 159 et seq.; Steinbarth, 2011, p. 267).

<sup>38</sup> Constitution of the Land of Baden-Württemberg, § 54, Constitution of Berlin, § 57, Constitution of Brandenburg, §§ 86-87, Constitution of the Free Hanseatic City of Bremen, § 110 (1), Constitution of the Free and Hanseatic of Hamburg, § 35 (3), Constitution of the Land of Hesse, § 114 (1), Constitution of Mecklenburg-Vorpommern, §§ 50 (2), 51 (1), Constitution of Lower Saxony, § 32 (1) (Busse, 1992, p. 134 et seq.), Constitution of North Rhine-Westphalia, § 61 (1), Constitution of Rhineland-Palatinate, § 99 (2), Constitution of Saarland, § 88 (2), Constitution of the Free State of Saxony, § 69 (1), Constitution of Saxony-Anhalt, § 72 (1), Constitution of Schleswig-Holstein, § 35 in the version promulgated on May 13<sup>th</sup>, 2008, Constitution of Thuringia, §§ 73-74. Bavaria installed a different solution. In terms of stabilizing the government, the Constitution did not formally introduce a vote of non-confidence. Instead, Constitution of the Free State of Bavaria, § 44 (3), 2<sup>nd</sup> sentence rules that the Prime Minister shall resign from office if the political situation does not anymore allow a trustful cooperation between him and the parliament (Lindner et al., 2017; Schweiger, 1999). Finally, if the Prime Minister does not resign, the question has to be submitted to the Bavarian Constitutional Court for decision (cf. Friesenhahn et al., 1958, p. 9 et seq.; J.-D. Kühne, 2003; Lindner et al., 2017; Reitzmann, 1997, pp. 264/265, 267).

<sup>39</sup> Constitution of the Land of Baden-Württemberg, § 43, Constitution of the Free State of Bavaria, § 61, Constitution of Brandenburg, § 61, Constitution of Lower Saxony, § 17, Constitution of Saarland, § 87, Constitution of the Free State of Saxony, § 118. As an example, the Constitution of the Free State of Saxony regulates the prerequisites of such impeachments: "A Member of Parliament who profitably abuses his or her influence or knowledge as a Member of Parliament may be brought before the Constitutional Court under indictment. The same shall apply to a Member of Parliament who deliberately brings to the attention of another person information whose secrecy has been decided upon in a session of the Diet or of one of its committees, in anticipation that such information will become public." In case of conviction of such members of parliament, the constitutional courts of Baden-Württemberg (Constitution of the Land of Baden-Württemberg, § 42 (1)), of Brandenburg (Constitution of Brandenburg, § 61 (3)), of Lower Saxony (Constitution of Lower Saxony, § 17 (3)), Saarland (Constitution of Saarland § 85 (3)) and of Saxony may annul the member's seat in parliament. (Schweiger, 1999; Zeyer & Grethel, 2009). There have been unsuccessful attempts of impeaching members of government. Respective motions did not find necessary majorities (Krieg, 1985); see decision of Landtag of Carinthia to impeach a member of parliament to impeach a member of parliament (25 September 1990). The Constitutional Court of Austria dismissed the impeachment as inadmissible by decision no. 51/90 (13 October 1990).

path in that. Article 85 of the Constitution of the Free Hanseatic City of Bremen allows the Parliament (*Bürgerschaft*) to deprive a member of parliament who persistently and advantageously violates his or her duties as a member of parliament of his or her seat in parliament. Same is ruled by Article 7 para 2 of the Constitution of the Free and Hanseatic of Hamburg.

### 3. CONSTITUTIONAL LAW VERSUS CRIMINAL LAW: "DOUBLING THE EFFORTS?"

As far as impeachments against members of parliament under the rule of the constitutions of *Baden-Württemberg*, *Bavaria*, *Lower Saxony* and *Saarland* are concerned, legal preconditions for such charges focus on corruption and betrayal of secrets. This focus is also shared with the constitutions of *Bremen* and *Hamburg*. This rather limited scope of application raises questions with regards to the German Criminal Code.<sup>40</sup>

Sect. 108e of German CC penalizes "bribery and corruption of elected officials" (Hastedt, 2020; Peters, 2020) in the chapter "Criminal offences against constitutional organs and in elections and votes". Other types of corruption in the civil service are regulated in particular by sect. 331 et seqq. CC. The insertion of sect. 108e CC in the chapter on "the endangerment of constitutional organs and of democracy" suggests that the legislature derives the criminal nature of bribery of members of parliament from this context and gives it a particular significance.<sup>41</sup> Since sect. 108e CC entered into force in

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<sup>40</sup> Hereinafter „CC“.

<sup>41</sup> This significance given to the phenomenon is mirrored by procedural regulations. Offences pursuant to CC, § 108e are not dealt by district or regional courts, which have criminal jurisdiction over common crimes. Offences pursuant to sect. 108e CC are adjudicated by first-instance panels of the Higher Regional Courts (Courts Constitution Act ("CCA"), § 120b). The Higher Regional Courts are designed as appellate courts in the first place. CCA, § 120 also and primarily confers on those Higher Regional Courts at the seat of the Land governments as special jurisdiction the first-instance adjudication of so-called offences of state protection, such as high treason, treason against the Land, espionage or domestic and foreign terrorism and crimes arising from the Rome Statute, i. e. genocide, crimes against humanity, etc. The legislator found affinities of § 108e CC with such serious felonies, and that makes such offences according to § 108e CC even more special and in particular important, as it can be seen from two examples: After the change of government in 1969, the Social Democratic-Liberal Federal Government under Chancellor Willy Brandt opened a new chapter in German foreign policy of coexistence with the Federal Republic of Germany's socialist neighbours to the east, first and foremost the Soviet Union but also the second German state, the German Democratic Republic. This new Ostpolitik was highly controversial and met with the strongest resistance from the conservative CDU/CSU opposition. On April 24<sup>th</sup>, 1972, the opposition in the German Bundestag applied for a so-called constructive vote of no confidence against Chancellor Brandt under Article 67 of the German Constitution and proposed that the parliament elect the opposition leader Rainer Barzel as the new Chancellor instead of him. The opposition was quite sure of their cause. The government majority was in crisis; several members of parliament had left the government factions and had switched to the opposition. In the decisive vote on April 27<sup>th</sup>, 1972, to the opposition's bitter surprise, their motion failed to achieve the required majority. Very quickly, the suspicion became public that the government majority had bought opposition votes. The so-called "Wieland Affair" was born. Karl Wienand was the parliamentary managing director of the SPD at the time and was suspected of having organised and carried out the purchase of votes. Wienand denied the allegations and the affair remained unresolved for quite a long time (Baring, 1982, p. 396 et seq.; Bracher et al., 1986, p. 63; Der Bundesbeauftragte für die Stasi-Unterlagen, 2013, p. 265/267; Merseburger, 2013, pp. 644–645). Today it seems clear that the money for the vote purchase came from the government of the German Democratic Republic. The regime in East Berlin preferred to deal with a social-democratic government in the West instead of being confronted to a conservative government (Wolf, 1997, p. 261). Constitutionally, the affair had no consequences although voices could be heard that secret votes should be abolished in terms of more transparency. Another voting disaster remains unsolved to this day, although there were also allegations that only a vote buy could explain the voting results. After the state elections in Schleswig-Holstein on February

1994,<sup>42</sup> the offence did not however acquire much relevance in criminal practice (Bosch et al., 2017).<sup>43</sup> Sect. 108e CC shares this fate with the institute of the constitutional impeachment of members of parliament, as set forth by the constitutions of *Baden-Württemberg, Bavaria, Brandenburg, Lower Saxony, Saxony and Saarland*.

All constitutional regulations on impeachments of members of parliament had entered into force before sect. 108e CC was adopted (Bosch et al., 2017; Fischer, 2020; Laufhütte et al., 2007, p. 402)<sup>44</sup> on a national level. Before sect. 108e CC had come into force, a practical need for elected representatives to be held accountable for corruption and betrayal of secrets before the state constitutional courts could be argued because of the lack of impunity. However, with the entry into force of sect. 108e CC, especially in its current supplemented, highly extended version, this argument can no longer be heard. However, it cannot be overlooked that both the impeachments of members of parliament and sect. 108e StGB can be based on common values of legal protection, which consist in the protection of the integrity of parliamentary opinion-forming processes against unfair manipulation and in the protection of related public confidence in the independence of the mandate holders (Eser et al., 2019). With regard to the constitutional regulations of the above-mentioned Länder, the reputation of the parliament not only vis-à-vis the other constitutional organs but also vis-à-vis the voters is a further value to be taken into account when it comes to protected legal values. The purpose of impeachment charges against members of parliament is to ensure that individual representatives who violate their duties as members of parliament may not harm the voters' trust in the people's highest representation. Any other view would encourage disenchantment with politics, thus in the long run, leading to a turning away from parliamentary elections.<sup>45</sup>

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20<sup>th</sup>, 2005, the incumbent state premier Heide Simonis, the first woman to head a German state government, had to face her re-election. The majority ratios were conceivably close, but made re-election seem likely. In four rounds of voting held on March 17<sup>th</sup>, 2005, Heide Simonis missed the required majority by one vote (Schleswig-Holsteinischer Landtag, Plenarprotokolle, 16. Wahlperiode, no. 16/1 (17 March 2005)). Traumatized and embittered, Heide Simonis withdrew into her private life ("Statement of Heide Simonis of March 18th, 2005," 2005). Instead of her, the opposition leader Peter Harry Carstensen was elected Prime Minister in the 5<sup>th</sup> voting round on April 27<sup>th</sup>, 2005 (Schleswig-Holsteinischer Landtag, 16. Wahlperiode, no. 16/2 (27 April 2005)). How the missing vote came about is still unclear today (Finkemeier, 2014, pp. 298 et seq., 398–402; Munitus, 2010). Despite their importance, the two incidents, which captured the national interest and the political interest for quite a long time had not any impact on the legal criminalization of improper influencing political proceedings in elected assemblies. The incidents in 1972 in the German Bundestag, the Lower House of Parliament, and 2005 in the Landtag of Schleswig-Holstein, even in their uniqueness, illustrate the crisis-like, even if only temporary, escalation of voting situations in parliaments. It does not seem far-fetched that the criminal prosecution of such crisis situations should be entrusted to a higher regional court. However, sect. 108e of the German CC owes its current version to the fact that Germany has acceded to a number of anti-corruption agreements at European and UN level and had to transpose these obligations into national law (see the explanatory memorandum of the government factions CDU/CSU and SPD on the draft Criminal Law Amendment Act - Extension of the criminal offence of bribery of members of parliament - of February 11<sup>th</sup>, 2014; critical of the incomplete transposition of international obligations into national German law (Eser et al., 2019; Fischer, 2020).

<sup>42</sup> 28<sup>th</sup> Criminal Law Amendment Act (1994).

<sup>43</sup> All reported cases between 2005 and 2014 affected the municipal level but not State Parliaments or international bodies.

<sup>44</sup> Prior to the adoption of sect. 108e CC, it was legally only hardly possible to prosecute corruption within parliaments or on the international level.

<sup>45</sup> Those constitutional rules of the Länder constitutions focus on the proper functionality of Länder parliaments and on proper implementation of democratic proceedings within these representations. Therefore, at first, the principle that federal law (in this case for example sect. 108e of the CC) supersedes law of the states, including their constitutional law (German Basic Law ("BL"), § 31) does not apply, as their scope of application of criminal and constitutional law is different. Article 103 para 3 of the BL (and respective State

Purchase of votes in municipal representations may not have outstanding impacts on the national public, sect. 108e CC, nevertheless, is dealing with them in the same way. Including municipal council votes into sect. 108e CC appears justified because municipal council decisions may have far-reaching significance for the local population and may provoke a regional public echo. Moreover, sect. 108e CC also protects the integrity of in-council decisions (Heintschel-Heinegg, 2015, § 108e, recital 3) and hereby the confidence of the local voters in them. From this point of view, it does not make any difference whether democracy “at the local” or “at the higher level” is concerned.<sup>46</sup>

While impeachments against *Länder* ministers (or other members of the state governments) were not filed since 1945, after reunification of Germany on October 3<sup>rd</sup>, 1990 impeachments against members of parliament experienced a revival – however, in a very special context. The population in the new, eastern German states was and is particularly sensitive to the repression that the communist SED<sup>47</sup> regime exerted on them. This is especially true of the permanent and persistent surveillance carried out by the Ministry for State Security (Stasi) of former German Democratic Republic (GDR) with its network of informers, which was unique in its extent globally. An ordinary citizen of the GDR could never be sure in his life whether his spouse or another member of the family had been recruited by the Stasi as an informal collaborator and enjoyed spying on his own family or on circles of friends in order to pass the information on to Stasi. Article 118 of the Constitution of the *Free State of Saxony*<sup>48</sup> in that context institutes impeachments

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Constitutions), the so-called double jeopardy or principle of *ne bis in idem* does not prevent criminal prosecution paralleled by constitutional impeachments. Such paralleled proceedings are nothing unusual in Germany. In several different regulations, the law (of the Federation and of the States) imposes special professional and personal conduct obligations on members of certain professional groups (judges (Federal Act on Judges §§ 61 et seq., last amended in 2019, Bavarian Act on Judges and Public Prosecutors, § 52 et seq., last amended in 2018), civil servants (Federal Disciplinary Act, last amended in 2020), soldiers (Federal Act on Soldiers, § 43, last amended in 2020), physicians (Bavarian Act on the Practice of the Profession, Professional Associations and the Professional Courts for doctors etc., §§ 66 et seq.), notaries (Federal Act on Public Notaries, §§ 92 et seq., last amended in 2019), lawyers (Federal Act on Lawyers, §§ 112a et seq., last amended in 2017), tax consultants (Federal Act on Tax Consultants, §§ 89 et seq., last amended in 2020), the violation of which may have criminal law consequences. In addition, however, the persons concerned may also be punished under service or professional law. The prohibition of *ne bis in idem* only covers criminal convictions within its scope of application. However, disciplinary or professional measures do not constitute criminal penalties or have a punitive character.

<sup>46</sup> Amtliche Sammlung der Rechtsprechung des Bundesgerichtshofs in Strafsachen (BGHSt) 51, pp. 44 et seq., margin 22 et seq. In view of the free mandate of the municipal deputies in the municipal parliament, the Federal Court of Justice did not consider the activity of the council members there to be the exercise of a public office, which in the case of bribery pursuant to CC, §§ 331 et seq. would lead to prosecution as ordinary crimes. The Federal Court of Justice set aside arguments to the contrary from German municipal constitutional law, which describes the municipal councils as the administrative organ of the municipalities. This is not unproblematic if municipal practice is taken into account. Elected counsellors of municipalities are sent to representative bodies of municipal companies to represent the interests of the city in there. Such municipal enterprises are often organised under private law or are independent institutions under public law. Decisions taken in such companies and their representative and supervisory bodies often have far-reaching financial consequences. The free mandate of city counsellors has not any effect there. Moreover, the sent counsellor is bound by directives as concluded by the city council. In such case taking bribes for the voting, CC, §§ 331 et seq. seem to be more appropriate than CC, § 108e (Bosch et al., 2017; Eser et al., 2019; Fischer, 2020).

<sup>47</sup> Sozialistische Einheitspartei Deutschlands.

<sup>48</sup> Constitution of the Free State of Saxony as amended in 2013, § 118: “(1) If there is a strong suspicion that a member of the Diet or the State Government, before his election or appointment; 1. has infringed the principles of humanity or the rule of law, in particular the human rights guaranteed by the International

against members of the government as well as against members of the Parliament of Saxony.

On several occasions, the *Saxon Landtag* decided to accuse members of parliament before the *Saxon Constitutional Court* in accordance with Article 118 para 1 of the Constitution, because there was evidence that members of parliament concerned had been employed by GDR Stasi before reunification and had provided it with spied information. None of the impeachment proceedings, however, reached the stage of the trial before the *Saxon Constitutional Court*. The impeachment charges failed for reasons of the statute of limitations<sup>49</sup> or other more formal reasons.

#### 4. INTERIM RESUMÉ

The reasons why both the impeachment against members of government as well as against members of parliament had a rather symbolic significance in the constitutional practice of both the Weimar Republic and under the rule of the Basic Law of 1949 are, that it had become possible to assert and enforce the responsibility of the governments through other parliamentary means.<sup>50</sup> Against this background, the judicial impeachment of members of government procedure appears to be cumbersome and lengthy. This cannot be applied to the impeachment of members of parliament, as - apart of such impeachments wherever constitutionally possible - parliaments are only having means of order at hand, which have proved not being effective against unruly members of parliament. In constellations of parliament-damaging misconduct by members of parliament, it is more than unsatisfactory to refer endangered parliaments to outside assistance, for example to investigations by the public prosecutor's offices, of which no one knows what the turn out will be about.

Moreover, an unbiased look at the formal constitutional requirements for impeaching members of parliament is equally sobering. Parliamentary impeachments require at least a qualified affirmative majority within parliaments.<sup>51</sup> Parliamentary

Covenant on Civil and Political Rights of 19 December 1966 or the fundamental rights contained in the Universal Declaration of Human Rights of 10 December 1948; or 2. worked for the former Ministry for State Security/Office of National Security of GDR, and therefore, the continued holding of a mandate or membership in the State Government appears to be intolerable, the Diet may apply to the Constitutional Court for proceedings with the aim of revoking the mandate or office.

(2) The request for the impeachment must be made by at least one third of the members of the Diet. The decision to bring charges shall require a two-thirds majority in the presence of at least two-thirds of the members of Parliament, which must, however, be more than half of the members.

(3) Further details shall be laid down by statute, which may also regulate the loss of pension rights."

<sup>49</sup> Decision of Saarland Constitutional Court, Vf. 16-IX-98 (6 November 1998), Decision of Saarland Constitutional Court, Vf. 17-IX-98 (6 November 1998), Decision of Saarland Constitutional Court, Vf. 18-IX-98 (6 November 1998).

<sup>50</sup> In the Bavarian casino affair at the end of the 1950s, voices were raised calling for the indictment of members of parliament and government, but the Bavarian parliament did not move to do so. The parliament pointed out that the affair had been dealt with by the criminal justice system (Reinicke, 2014, pp. 460-461; Senfft, 1988). The Minister of Justice of Rhineland-Palatinate, Dr Heinz Georg Bamberger, came under criticism for incorrectly filling the position of President of the Higher Regional Court in Koblenz. On 16 November 2011, the CDU opposition's motion to have him brought before the state constitutional court was rejected by the majority of the state parliament (Koch-Baumgarten, 2020, p. 393/418).

<sup>51</sup> In *Baden-Württemberg*, the initiative for an impeachment needs at least one third of the statutory votes of the parliament (Constitution of the Land of Baden-Württemberg, § 42 (2), 1<sup>st</sup> sentence). The decision to bring an indictment requires a two-thirds majority if at least two-thirds of the members of the Landtag are present, but this must be more than half of the members of the Landtag (Constitution of the Land of Baden-Württemberg, § 42 (2), 2<sup>nd</sup> sentence). *Bavaria* requires similar quorum (Constitution of the Free State of Bavaria, § 61 (4), 1<sup>st</sup> sentence). For *Lower Saxony* see Constitution of Lower Saxony, § 17 (2), for *Saarland* see Constitution of Saarland, § 85 (2) and for the *Saxony* see Constitution of the Free State of Saxony, § 118 (2).



minorities or the opposition may initiate an impeachment but must then expect that the parliamentary majority will quickly close ranks behind the government member or the member of parliament concerned. A further weakness of the impeachment procedure results from the fact that state parliaments are not investigating authorities and that they have hardly any legal possibilities in the run-up to an impeachment to investigate the facts leading to such serious decision. There is no "parliamentary police". Current regulations in the Rules of Procedure of the *Bundesländer* concerned neglect this aspect almost totally. The hoped-for expectation that, in extreme, the parliament would install a committee of enquiry "equipped with weapons",<sup>52</sup> before an impeachment could be drafted and concluded, seems deceptive. Committees of enquiry in Germany's parliamentary practice prove to take a long time and to be finally somewhat cumbersome. The facts that these committees bring to light often end up in contradictory assessments that follow the dividing lines between parliamentary majority and parliamentary minority.

Following an impeachment resolution within parliament, the state constitutional courts will deal with the allegations made. No experience has been gained in this respect so far. The laws governing the State Constitutional Courts contain only rudimentary provisions. This may prove to be a handicap in the event of a dispute.<sup>53</sup> Article 42 of the Act on the Bavarian Constitutional Court<sup>54</sup> and sect. 42 of the Act on the Constitutional Court of Rhineland-Palatinate<sup>55</sup> additionally refer to provisions of the Code of Criminal Procedure. In case of dispute, the referral will not help either, because constitutional courts have a different structure and working methods from criminal courts.

## 5. PROSPECTS: CONSTITUTIONAL AMENDMENTS NEEDED

If one considers what means should be given to the parliaments to defend themselves against right-wing (or left-wing) extremist members of parliament, if they disturb the reputation and thus the functioning of the parliaments, the impeachment against members of parliament, which is held in the state constitutions of *Baden-Württemberg*, *Bavaria*, *Lower Saxony*, *Saarland* and *Saxony*, does not seem to be a very effective means under the given legal regime. If there is no substantial rethinking, this finding will also overshadow the constitutional future.

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<sup>52</sup> Constitution of the Land of Baden-Württemberg, § 35 (2) together with Act on the establishment and procedure of committees of enquiry of the Landtag, §§ 13 et seq., last amended in 2016, Constitution of the Free State of Bavaria, § 25 (3), (4) together with Act on the establishment and procedure of committees of enquiry of the Bavarian Landtag, §§ 11 et seq., last amended in 2009, Constitution of Lower Saxony, § 27 (2)-(4), Constitution of Saarland, § 79 (2)-(4) together with Act on the Landtag of Saarland, §§ 20 et seq., last amended in 2018, Constitution of the Free State of Saxony, § 118 (2) together with Act on Committees of Enquiry, §§ 13 et seq., last amended in 2009 (Wiefelspütz, 2003, p. 90 et seq.). In course of the Bavarian deliberations on amending the constitution of 1919 in 1925, participants exposed the expectation that such committees of enquiry would be established by *Landtag* in order to establish the facts and to collect the evidence needed (Jan, 1925, p. 314/330).

<sup>53</sup> If the Federal President is indicted under Basic Law, § 61, which is the only way to assert the constitutional responsibility of the head of state who is not accountable to Parliament (Steinbarth, 2011, p. 223/224), the Federal Constitutional Court may order preliminary investigations by a judge who is not involved in the case (Act on the Federal Constitutional Court, § 54, last amended in 2020. It must order such preliminary investigations if the Federal President or one of the accusing parliamentary houses so requests. It is highly questionable whether these preliminary investigations, which follow the indictment and precede the oral hearing on the charge under Act on the Federal Constitutional Court, § 55, can compensate for the procedural weaknesses that exist in the Bundestag and Bundesrat in a so-called "preliminary investigation".

<sup>54</sup> Last amended in 2018.

<sup>55</sup> Last amended in 2015.

The constitutional situation in Saxony under Article 118 of the Constitution is unique. Article 118 sheds light on one aspect of Germany's coming to terms with its history prior to the German reunification of 1990. The provision of Article 118 of the Saxon Constitution additionally finds its explanation exclusively in injustice committed by the former State party of GDR and the Stasi. The longer this injustice lies in the past and becomes history, the more irrelevant Article 118 of the Saxon Constitution becomes. It is foreseeable that the time will be ripe to delete Article 118 of the Saxon Constitution in its present form from the constitution, as it will have simply become obsolete (Steinbarth, 2011, p. 261).

Charges against members of parliament under the constitutions of suffer in their factual preconditions (corruption and betrayal of secrets) (Lindner et al., 2017; Schweiger, 1963; Zeyer & Grethel, 2009) from a competitive relationship with the correlating elements of (national) criminal law. Bribery and betrayal of secrets committed by members of parliament are better off under criminal law. In the event of criminal convictions, the criminal courts can also rule on deprivation of the ability to hold public office.<sup>56</sup> If one understands the purpose of the parliamentary indictments in their current version as a means of parliamentary self-purification and self-defence, the question arises under the aspect of sustainable constitutional policy whether they still have a real right to exist apart from the possibilities of criminal prosecution. It may be repeated in this context: parliaments are not investigating authorities. They lack the means of criminal proceedings and, moreover, of forensic experience. To this extent, the *Landtage* of *Baden-Württemberg*, *Bavaria*, *Lower Saxony* and *Saarland* can, should an impeachment be concluded, only expect that public prosecutors will provide them with the necessary factual and evidentiary material. This not only reverses the constitutional hierarchy in a certain way, but the proceedings within the state parliaments that lead to an impeachment are additionally largely unregulated. Impeachments are serious encroachments on the status of any member of parliament affected by them, even if they are only imminent. The internal rules of the parliament are however silent about his legal status with respect to the in-house-proceeding within parliaments. One may well ask whether his status rights or his fundamental rights (as a human being) require for example that he must be heard that he must be given access to files, etc.

There is a need for reform. This extends to the proceedings before the constitutional courts dealing with charges brought against members of parliament. It has already been pointed out above that those courts are not sufficiently equipped in terms of procedural law. It should also be borne in mind that corruption cases before the criminal courts often lead to complex proceedings lasting several months, even though the criminal courts are better positioned procedurally to design such complex proceedings and concentrate on substantial allegations. There is something surreal about the idea of a constitutional court entering a hearing, which will last several months. The judges of the *Länder* constitutional courts do not hold a full-time position at these institutions; they also perform their judicial duties there in a subsidiary office. They simply do not have the capacity to sit in court for several months on several days per week in an oral hearing against an allegedly corrupt member of parliament.

In its current version, the impeachment of members of parliament makes little sense in *Baden-Württemberg*, *Bavaria*, *Lower Saxony* and *Saarland*. Nor do the constitutional conditions for bringing charges in these *Länder* enable the parliaments to defend the representative democracies against extreme right-wing machinations in

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<sup>56</sup> CC, § 108e (5) together with CC, § 45 (with view on members of the German Bundestag also see Federal Election Act, § 47 (1(3)), last amended in 2020; CC, §§ 331 et seq. together with CC, §§ 358, 45.

which members of this political group may be involved.<sup>57</sup> This applies all the more to those *Länder* whose constitutions are silent on the possibility of impeachments against members of their parliaments.

Nevertheless, if there is agreement that democracies do not have to stand by and watch even helplessly, as its institutions and values are damaged from within the constitutional institutions themselves or from outside the parliaments by extremists, then a serious question arises as to what the arsenal of a well-fortified democracy must be like in order to avert damage to itself and avert any damage. This is where Article 114 of the Paulskirchen Constitution of 1849 comes again into play and may guide a future discussion. Recourse to the Paulskirchen Constitution has nothing to do with constitutional romanticism or nostalgic constitutional history (Köhler, 2009). Contemporaries consider it to be the most progressive constitution at the time, and its principles and values are still valid today.<sup>58</sup>

By allowing the two houses of the *Reichstag* to deprive members of their mandate, the Paulskirchen Constitution enshrined to the *Reichstag* the responsibility of defending democracy by its own means and protecting parliamentary functioning and parliamentary prestige vis-à-vis voters. If parliaments resort to such measure, they expose themselves and cannot hide behind judicial institutions, as it would have been the *Reichsgericht* in case of the Paulskirchen Constitution. In dealing with the virulent extremism of today and probably of the future, parliaments must stand up and take responsibility for themselves and for the democracy they embody, and they must defend themselves accordingly. The clear assignment of responsibility to the parliaments in defending the representation of the people against any extremists deserves sympathy. Incidentally, the constitutions of *Bremen* and *Hamburg* follow the same path set out in the Paulskirchen Constitution. The first sentence of Article 85 para 1 of the Constitution of the Hanseatic City of Bremen<sup>59</sup> gives the *Bürgerschaft*, the Parliament of *Bremen*, the right to exclude a member of the *Bürgerschaft* if that member misuses his office to gain personal advantages for himself or another person, or persistently refuses to carry out the duties incumbent on him as a member of parliament, or violates the obligation of confidentiality. Similarly, Article 7 para 2 of the Constitution of the Free and Hanseatic City of Hamburg<sup>60</sup> provides for the exclusion of a member of parliament from the *Bürgerschaft*.

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<sup>57</sup> However, the fact that the constitutions of the other *Länder* do not provide for any possibility of bringing proceedings at all against their members of parliament is not a convincing argument against the arrangements in Baden-Württemberg, Bavaria, Lower Saxony and Saarland. The principle of constitutional autonomy applies. The limits of this principle are to be found in BL, § 28 (1), 1<sup>st</sup> and 2<sup>nd</sup> sentence. However, no uniformity in the constitutional law of the *Länder* can be derived from these limits.

<sup>58</sup> With regards to the influence of the Paulskirchen Constitution on the constitution making in Hesse after 1945 see Rainer Polley (1997, p. 47/55).

<sup>59</sup> The motion to initiate exclusion requires the support of one quarter of the statutory number of members of parliament. According to Constitution of the Hanseatic City of Bremen, § 85 (1), 2<sup>nd</sup> sentence, the parliament's committee on rules of procedure shall deal with the substance of the matter. According to its report, the member concerned shall be given a hearing in the plenary session of the *Bürgerschaft* (Constitution of the Hanseatic City of Bremen, § 85 (1), 3<sup>rd</sup> sentence). A decision on exclusion requires a majority of three-quarters of the statutory number of members or, if fewer but at least half of the statutory number of members are present, unanimity. Pursuant to Constitution of the Hanseatic City of Bremen, § 140 (1) together with Bremen Act on the Constitutional Court, § 25 (1), last amended in 2011, the expelled member of parliament may appeal to the Constitutional Court.

<sup>60</sup> Last amended in 2020. Applications for withdrawal of membership in the *Bürgerschaft* can be submitted by at least five members of parliament (Hamburg *Bürgerschaft* Rules of Procedure, § 16 (1) 1<sup>st</sup> sentence, last

If the constitutional legislators decide to make parliaments responsible in the fight against extremists, such decisions will only be successful if they also provide that a member of parliament may be expelled from parliament, if he or she wilfully undertakes to undermine the reputation and functions of the parliament. A provision to be included in constitutions not only in Germany could read:

(1) *A Member of Parliament who abuses his or her position as such for gain for himself/herself or for others, who communicates facts to others, which he or she is obliged to maintain confidentiality by Rules of Procedure of the Parliament or by law, or who wilfully seeks to undermine or to jeopardise the reputation or the function of Parliament may be expelled from Parliament.*

(2) *A motion for expulsion may be submitted to Parliament by one quarter of the statutory members of Parliament. A Member of Parliament is expelled if Parliament so decides by a two-third majority of its statutory members.*

(3) *The procedure is subject to regulation by the Rules of Procedure of the Parliament or by law.*

Constitutional rules (in Germany) do not object to such amendment. In particular, the independence of the mandate of a member of parliament<sup>61</sup> does not prevent such changes. Independence of mandate does neither represent a license for members of parliament to propagate what their extremist ideology might dictate to supporters nor does independence of mandate mean a personal or individual privilege.<sup>62</sup> Independence of mandate is inseparably and irrevocably linked to the parliamentary function and therefore has a serving character. Its intent and its purpose are about ensuring that opinions can freely be exchanged within parliaments uninfluenced by external forces and

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amended in 2020. Neither the Constitution, nor the rules of procedure of the Hamburgische Bürgerschaft, nor Hamburg Act on Members of Parliament, last amended in 2020 regulates the withdrawal procedure. However, under Basic Law, § 103 (1), the member of parliament concerned must be granted a hearing in accordance with the law and must therefore be informed of the reasons for his or her exclusion. He must be given the opportunity to defend himself. The President of the Parliament is responsible for the procedure (Hamburg Bürgerschaft Rules of Procedure, § 3 (1)). Under Hamburg Bürgerschaft Rules of Procedure, § 16 (1(2)), the application for removal from office is dealt with in public in the plenary session of the Bürgerschaft (Hamburg Bürgerschaft Rules of Procedure, § 25 (1)), unless the Bürgerschaft decides, at the request of one tenth of the Members of Parliament, or the request of the Senate, to deliberate and vote in secret (Hamburg Bürgerschaft Rules of Procedure, § 25 (2)). The decision to expel the member from parliament is taken if three-quarters of the statutory members of parliament agree to it (Constitution of the Free and Hanseatic City of Hamburg, § 7 (2), 2<sup>nd</sup> sentence). The excluded member of parliament may appeal against the decision to the Hamburg Constitutional Court (Constitution of the Free and Hanseatic City of Hamburg, § 35 (3(2)) together with § 14 (2); Hamburg Act on the Constitutional Court, §§ 39a et seq., last amended in 2017. On the right to bring an action, see Hamburg Constitutional Court, HVerfG 3/17 (2 March 2018).

<sup>61</sup> Basic Law, § 38 (1), 2<sup>nd</sup> sentence reads: They [Members of Parliament] shall be representatives of the whole people, not bound by orders or instructions and responsible only to their conscience; Constitution of the Land of Baden-Württemberg, § 27 (3), Constitution of the Free State of Bavaria, § 13 (2), Constitution of Berlin, § 38 (3), Constitution of Brandenburg, § 56 (1), Constitution of the Free Hanseatic City of Bremen, § 83 (1), 1<sup>st</sup> and 3<sup>rd</sup> sentence, Constitution of the Free and Hanseatic of Hamburg, § 7 (1), Constitution of the Land of Hesse, §§ 76-77, Constitution of Mecklenburg-Vorpommern, § 22 (1), Constitution of Lower Saxony, § 12, Constitution of North Rhine-Westphalia, § 30, Constitution of Rhineland-Palatinate, § 79 (2), Constitution of Saarland, § 66 (2), Constitution of the Free State of Saxony, § 39 (3), Constitution of Saxony-Anhalt, § 41 (2), Constitution of Schleswig-Holstein, § 11 (1), Constitution of Thuringia, § 53 (1). Nevertheless, The independence of the mandate of a Member of Parliament requires that the Constitution itself makes the necessary arrangements for the termination of the mandate (Badura, 1989; Zeyer & Grethel, 2009).

<sup>62</sup> Constitution of the Free Hanseatic City of Bremen, § 83 (1), 2<sup>nd</sup> sentence makes the point: They [Members of Parliament] are obliged to respect the law and *have a special duty of loyalty to the Free Hanseatic City of Bremen* (see also the appellative establishment of a duty of allegiance which applies to everybody pursuant to Constitution of the Free State of Bavaria, § 117, Constitution of the Free Hanseatic City of Bremen, § 9, 1<sup>st</sup> sentence, Constitution of Rhineland-Palatinate, § 20).

voices and that decisions can be taken without any external coercion or influence. Whether a member of parliament disturbs these principles by his or her behaviour can only be decided by parliament itself. In addition, an excluded member of parliament (in Germany) has the right to appeal an expulsion to the respective constitutional courts.

## 6. CONCLUSIONS

Parliamentary democracy is not a value in itself. It has to be worked for, even earned, every day. After 1945, there have seldom been times in Europe when parliamentary democracies have been attacked from the ranks of the members of parliament in the way that is, unfortunately, the case today. If parliamentary democracy has to be earned every day, it is high time for European parliaments to consider what defences they have against extremist attacks from within their ranks. When it comes to the anti-democratic behaviour of their members outside the parliamentary buildings and outside the parliamentary activity inside the parliaments, this finding will be sobering. Parliaments are powerless when it comes to this "extra-parliamentary" behaviour, although the repercussions on parliamentary functions and the reputation of parliaments are palpable. A "jolt" is needed, as former German Federal President Roman Herzog once put it so aptly in a different context of needed economic and social reforms. This paper aims to contribute to such an initial stocktaking as a first step.

Then, in a second, no less important but also extensive as well as comprehensive step, it should be asked whether the parliaments in Germany and in the other countries are willing to take remedial action against their powerlessness to defend themselves. This second step, which also requires civil courage, is decided by each country and each parliament in its own autonomy, not only in terms of "whether" but also "how". This cannot be done without the involvement of the political and legal sciences. The step requires open discussion, also with the voters. It will therefore take time. If extremist tendencies increase, as there is much to suggest at present, the time factor will be a significant one. This paper, with its look back and its view on the present constitutional situation in Germany, has put forward a proposal for a solution that one would like to think is not well thought out, not sufficiently thought through or simply not feasible. This criticism is legitimate and most welcome. Perhaps banalities need to illustrate it better. Every association under private law will not tolerate members in its ranks who harm the association. Civil law provides the means to remove them. It does not have to go so far that the police and the public prosecutor intervene. Their standards for intervention are anyway different from those of associations, trade unions and political parties when it comes to damaging behaviour by their members. In political life, any member of the government who acts with damaging intent against his or her own government must expect to be dismissed by the head of government or the head of state. This does not yet work in the case of behaviour that is damaging to parliament.

If this paper, however imperfect, contestable or daring it may be, triggers discussions on the two levels mentioned, much has already been gained. A look back at the Paulskirche Constitution of 1849 shows that the unthinkable is conceivable. The first half of the 20th century has shown us all, also with the terrible consequences, how quickly, if there is a lack of inner will on the part of democrats, parliamentary democracies can erode. Let us recall the words of Johann Wolfgang von Goethe in his *Sorcerer's Apprentice*, where it says: "Lord, the trouble is great! The ghosts I called, the ghosts. Now I will not be rid of them". Europe also owes more than 70 peace and prosperity to its own parliamentary democracies as a common political culture. Whatever means of defence parliaments decide to use, these do no harm. Affected parliamentarians enjoy the

protection of the rule of law and judicial review of measures directed against them. This judicial protection may have to be adjusted or extended if parliaments decide to fight back. However, such an expansion would then only be part of the considerations that this paper has addressed for the second level.

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