I. Introduction

"All power in the state comes from the people" (Art. 20 II 1 GG) is the fundamental premise of democracy and popular sovereignty. This premise does not exhaust itself in a systemic significance, by defining what requirements are to be placed on the democratic legitimacy of state power under the positive legal validity of the Constitution. The premise rather has systemic significance by itself defining the legitimacy requirements on the Constitution. The Constitution can only lay claim to legitimate legal validity if it emanates from the people as the basic order of state authority itself. In this sense, the constitutional power of the German people is specified in the preamble of the Constitution as the reason for validity of the Constitution.[1] Does the Constitution satisfy this theoretical democratic requirement?

[1] The original preamble states: "Conscious of their responsibility before God and man, inspired by the determination to promote world peace as an equal partner in a united Europe, the German people in the states of Baden, Bavaria, Bremen, Hamburg, Hesse, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Schleswig-Holstein, Württemberg-Baden und Württemberg-Hohenzollern has, in order to impart a new order to the life of the state, for a transitional period, by reason of its constituent power, adopted this Constitution of the Federal Republic of Germany. It has also acted on behalf of those Germans whose participation was prohibited. It remains the responsibility of the entire German people, in free self-determination, to achieve the unity and freedom of Germany."
Since the reunification, the preamble runs as follows: "Conscious of their responsibility before God and man, inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law. Germans in the states of Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hesse, Lower Saxony, Mecklenburg-Western Pomerania, North Rhine-Westphalia, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia have achieved the unity and freedom of Germany in free self-determination. This Basic Law thus applies to the entire German people."

The question appears unrealistic. Since the acceptance of the draft of the Parliamentary Council[2] by the state parliaments[3] and the approval of the Western Allies[4], the Constitution has been de facto the basic order of West Germany[5], and since the accession of the East German states[6], the basic order of the whole of Germany[7] in its post-war borders. If one understands law sociologically or positivistically, the question of legitimacy is superfluous - the Constitution applies in the sense of a normative force of the factual[8] and is applied by the courts, namely the Federal Constitutional Court as the highest in the land, as the highest and unquestionable basic standard.[9]

[2] The Parliamentary Council voted on 08.05.1949 with 53 votes to 12 in favour of the draft of the Constitution. The Parliamentary Council consisted of 70 delegates, who had been elected by the state parliaments of the (western) federal states.

[3] Art. 144 GG provided that the Constitution would come into effect if it was accepted by 2/3 of the (western) federal states. Only Bavaria voted against the Constitution, because the CSU was it favour of greater Federalism. At the same time, the Bavarian state parliament however approved the validity of the Constitution in the event that the Constitution was adopted by the other federal states.
On the foundation of the Federal Republic, the "old" western federal states were still organised differently (Baden-Württemberg was still split into 3 states - Württemberg-Baden, Württemberg-Hohenzollern, Baden), and the Saarland only joined the Federal Republic in 1957.
Art. 144 GG (old version) runs:
(1) This Constitution requires adoption by the popular representations in two-thirds of the German states in which it is initially to apply.
(2) If the application of this Constitution in one of the states listed in Article 23, or in a part of one of these states, is subject to restrictions, the state or the part of the state has the right, in accordance with Article 38, to delegate representatives to the Bundestag, and in accordance with Article 50 to delegate representatives to the Bundesrat.

[4] Approval letter of the Military Governors of 12.05.1949 - although with certain reservations, see the Internet: http://www.verfassungen.de/de/de45-49/grundgesetzgenehmigung49.htm.

[5] Following ratification by all other federal states, the Constitution was issued and announced on 23rd May 1949, at a ceremonial meeting of the Parliamentary Council by the President and the Vice President (Art. 145 Para. 1). The Constitution came into force in accordance with Art. 145 Para. 2 at the end of this day (depending on legal interpretation on 23rd May, 24:00, or 24th May, 0:00).
Art. 145 GG states:
(1) In public sitting and with the delegates of Greater Berlin, the Parliamentary Council adopts, issues and announces this Constitution.
(2) This Constitution comes into force at the end of the day of its announcement.
(3) It is to be published in the "Bundesgesetzblatt" ("Federal Law Gazette").

[6] The basis for the accession of the East German federal states to the FRG was formed by Art 23 GG:
"This Constitution applies initially in the territory of the states of Baden, Bavaria, Bremen, Greater Berlin, Hamburg, Hessen, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Schleswig-Holstein, Württemberg-Baden and Württemberg-Hohenzollern. In other parts of Germany it will be brought into force following their accession."
The accession took place by decision of the People's Chamber of 23.08.1990 with effect as of 03.10.1990., see http://www.bundesarchiv.de/oeffentlichkeitsarbeit/bilder_dokumente/01525/index-16.html.de.

[7] The extension of validity to the "new" states is the logical consequence of accession, but was also expressly specified in the Unification Treaty (Art. 3).

[8] This term was coined by the legal scientist Georg Jellinek (* 16th June 1851 in Leipzig; † 12th January 1911 in Heidelberg), see http://de.wikipedia.org/wiki/Georg_Jellinek.

[9] In this statement, the question of the possibly superior positive law of the European Union and the European Convention on Human Rights remains deliberately excluded. The question of a possibly superior non-positive natural law is also not considered, since it appears irrelevant for the concrete application of law in the present.

But this question only seems unrealistic *initially*. The question of the theoretical democratic legitimacy of the Constitution - if the Constitution stems from the people - is appropriate to question the uncritical application of the Constitution and the political debate for a constitutional reform or new Constitution according to democratic principles is legally founded.

II. Genesis of the Constitution

It is therefore worthwhile to investigate this question more closely. And a glance at the genesis quickly shows that the democratic basis of the Constitution is decidedly "thin":[10]

The starting point of becoming a West German state was the federal states. These states had already been constituted before the establishment of the (West) German State.[11] The state parliaments were freely elected by the respective population of the state.[12] The origin of the Constitution is also based on the federal states. The Constitution was not presented for adoption to an elected (West German) committee, but (only) in the 11[13] state parliaments. The definitive body for the final drafting of the Constitution was the Parliamentary Council, where the Constitution was announced and brought into force. The Parliamentary Council was made up of 65 voting delegates from the western occupation zones, and five non-voting delegates from West Berlin, who had been elected by the respective state parliaments.

It can therefore be established on the "negative" side: 1) The Constitution was *not* put to a vote by the people and 2) The Constitution was *not* drafted and adopted by a full (West) German, freely elected constituent assembly.

This procedure is surprising when one considers the former historical constitutional horizon. The Weimar Constitution was drafted and brought into force by a freely elected constituent National Assembly.[14] The state constitutions of the American and French occupation zones were drafted by

[10] Otmar Jung formulated pointedly in his comprehensive work "Grundgesetz und Volksentscheid": " … and thereby suppress the fact that the foundation of this state [author's addition: the FRG) was a courageous leap into the unknown, which has certainly been worthwhile, but about which it remains true **that it had little to do with democracy**."

[11] In the years 1946/47.

[12] The state parliament elections also took place in 1946/1947.

[13] The number of federal states at that time was 11.

[14] The elections to the constituent National Assembly took place on 19th January 1919. On 31st July 1919 the National Assembly adopted the Constitution in its final form with 262 votes to 75; 84 delegates were absent. On 11th August 1919, Reichspresident Friedrich Ebert signed the Weimar Constitution in Schwarzburg. It came into force on its announcement of 14th August 1919 There was however also *no* plebiscite or referendum on

the respective state parliaments and adopted by the people of the states by popular vote.[15] The constitutional practice could rely on classical democratic theory, which was largely the consensus at the time (including amongst the fathers/mothers of the Constitution): "There are two methods of bringing a Constitution, a replacement Constitution into the world. One is the method of the plebiscite, and the second is that of a directly democratically elected assembly."[16] The preamble to the Constitution refers "resoundingly" to the "constitutional power of the German people"[17] and thereby formulates a claim on itself, which it probably does not satisfy - at least in terms of classical democracy theory. The Constitution remains strangely behind this democratic level - of practice and theory - of the new German Constitution history.

From the lacking direct democratic anchoring of the Constitution (no plebiscite), it follows that the Constitution (until today) provides no direct democratic possibilities of codetermination by the people on material questions.[18] The decision in favour of a "non-popular" constituent procedure therefore seems to be not only of a purely formal nature, but indicates at the same time a material decision against all forms of direct popular participation. This is also surprising given the historical constitutional background: The Weimar Constitution contained elements of direct democracy,[19] just

the Weimar Constitution.

[15] Jung, "Grundgesetz und Volksentscheid", p. 35 ff. The enacting of the Constitution in the British Zone of occupation took place only after the Constitution came into force. This "belated" enacting of the Constitution must therefore be left out of consideration for the constitutional horizon of the Constitution. While it could be expected that the enacting of the Constitution would set the style for the Constitution for the French and American Zones (which proved not to be the case, since quite another procedure was selected for the Constitution), the relationship was reversed with reference to the "English" constitutions - here one can speak of the style being set by the Constitution. Despite the influence of the "non-popular" procedure in the Constitution, the State Constitution of North Rhine-Westphalia (the largest federal state in the British Zone) was presented to the people for a vote on 18th June 1950 (and adopted by a majority). This may be interpreted to mean that the non-popular procedure for the Constitution met with only limited acceptance.

[16] In the words of the then Rhineland-Palatinate Justice Minister Süsterhenn, quoted in Jung, "Grundgesetz und Volksentscheid", p. 211, see also Jung, "Grundgesetz und Volksgesetzgebung", p. 208 with reference to Mußgnug, Origin of the Constitution in Isensee/Kirchhof, Manual of Constitutional Law!, p. 254 f. (in Jung Fn. 25).

[17] See above Fn. 1.

[18] The only exception is the regional plebiscite under Art. 29 II GG: "[1] Measures for the restructuring of the Federal territory are taken by federal law, which requires confirmation by referendum. [2] The states concerned must be heard." Art. 146 GG is also possibly a "back door" for a constitutional referendum. Art. 146 GG states: "This Constitution, which after the achievement of the unity and freedom of Germany, applies to the entire German people, becomes invalid on the day on which a Constitution comes into force, which has been decided by the free decision of the German people." What is to be understood by "free decision", and whether that must necessarily include a referendum, is disputed. In the opinion of Herdegen in Maunz/Dürig, Art. 146 GG Rn. 38, an election to a constituent assembly would also suffice as an alternative to a referendum. As a result, classical democratic theory would then be reflected in Art. 146 GG, see above

[19] Art. 73 WRV:
(1) A law enacted by the Reichstag must be submitted for referendum before its announcement, if the Reichspresident so decides within one month.
(2) A law whose announcement is suspended on the application of at least one-third of the Reichstag must be submitted for referendum, if so required by one-twentieth of those entitled to vote.

as those after the Second World War and prior to the Constitution[20] which came into force in the form of State Constitutions.[21] In this respect also, the Constitution remains strangely behind this democratic level of the new German constitutional history.[22]

How can this "non-popular" procedure regarding the Constitution be explained, departing as it does from constitutional legal theory and practice? The main supporting argument is the "provisional thesis". The Constitution[23] should be only a provisional instrument, until the entire German (not only West German) people gives itself a new Constitution by means of free self-determination.[24] This provisional instrument should not be burdened with "excessive" democratic legitimation - but should be clearly identified in the means of its origin and legitimation as a provisional instrument: A referendum would give the Constitution a weight which should be reserved only for the definitive Constitution.[25]

A referendum must also be held if one-tenth of those entitled to vote so request following presentation of a draft law. The referendum must be based on an elaborated draft law. It must be submitted to the Reichstag by the Government while presenting its opinion. The referendum does not take place if the desired draft law has been adopted unchanged in the Reichstag.
(3) Only the Reichspresident can initiate a referendum on the budget plan, tax laws and pay systems.
(4) The procedure for the referendum is regulated by a Reich law.

[20] The Constitutions of the American and French Zones.

[21] See in detail Jung, "Grundgesetz und Volksgesetzgebung", p. 35 ff. The state constitutions still currently contain elements of direct democracy, particularly at the municipal level. There is no room here for a qualitative assessment. It should only be noted that there is a particular (direct) democratic graduation from the bottom (municipalities) upwards (to the State) - the closer one comes to the Constitution, the more "rarefied" is the "democratic air." An overview of direct democracy in the states can be found at http://de.wikipedia.org/wiki/Volksentscheid.

[22] With regard to the WRV, this can be understood in the sense of a conscious distinction from the ultimately failed Constitution. No favourable experiences were gained from the Weimar Constitution, nor any good experiences with direct democracy in the WRV. One may question as to what extent this argument really holds water (i.e. whether the Weimar experiences with direct democracy were at all bad), (see Jung, "Grundgesetz und Volksgesetzgebung", p. 23 ff. This argumentation however becomes pointless against the background of the state constitutions: If the experiences with direct democracy are supposed to have been so unfavourable, how can it be explained that direct democratic elements were incorporated into the state constitutions (which were created under the impression of the failure of the Weimar Republic)? One is left therefore with the obvious discrepancy between the Constitution and a contemporary historical constitutional horizon which actually had a higher (direct) democratic level.

[23] Therefore also the peculiar word formation "Basic Law" instead of the common term "Constitution".

[24] This idea of a provisional instrument was clearly expressed in the preamble (prior to 1990): "Conscious of their responsibility before God and man, inspired by the determination to promote world peace as an equal partner in a united Europe, the German people in the states of Baden, Bavaria, Bremen, Hamburg, Hesse, Lower Saxony, North Rhine-Westphalia, Rhineland-Palatinate, Schleswig-Holstein, Württemberg-Baden und Württemberg-Hohenzollern has, **in order to impart a new order to the life of the state, for a transitional period**, by reason of its constituent power, adopted this Constitution of the Federal Republic of Germany. It has also acted on behalf of those Germans whose participation was prohibited. It remains the responsibility of the entire German people, in free self-determination, to achieve the unity and freedom of Germany." In consonance with Article 146 GG (old version) this reads as if the Constitution should apply only for a transitional period, which would then be replaced by a new Constitution, adopted by the German people in free self-determination. Art. 146 GG (old version) states: This Constitution becomes invalid on the day on which a Constitution comes into force, which has been decided by the free decision of the German people."

[25] Quoted from Jung, "Grundgesetz und Volksentscheid", p. 211.

This provisional thesis can (possibly) lay claim to validity prior to the contemporary historical horizon of 1949. It may not be capable of rectifying or "healing" the "democratic deficits" of the Constitution, in particular the non-popular procedure by which it came into force, but removes its "severity" (the democratic deficits) with regard to a new Constitution to be created for the entire German people after a transitional period. Against the actual historical horizon however, the provisional thesis clearly cannot endure -due to the over 50-year undisputed validity in the West, and especially through the extension of validity to the new federal states following the reunification in 1990, this provisional status has become the constitutional "final status", which is preserved by the high majority requirements[26] and fundamental content restrictions[27] of a possible constitutional amendment. The idea of a provisional instrument was removed from the preamble[28], and in Art. 146 GG, the validity of the Constitution for the whole of Germany is emphasised.[29] The provisional Constitution became the definitive Constitution - without a referendum, without a constituent assembly and as before without any direct democracy. German reunification was completed by the accession of the new federal states in accordance with Art. 23 GG, and governed by the Unification Treaty. A vote was taken on the Unification Treaty in the People's Chamber and Bundestag - the Constitution itself was not put to a vote.[30] The Bündnis 90 / Die Grünen was the only party represented in the Bundestag to position itself clearly against this procedure: " … the Constitution was created at that time, in order

[26] An Act amending the Constitution requires the consent of two-thirds of the members of the Bundestag and two-thirds of the votes of the Bundesrat (Art. 79 II GG).

[27] Art. 79 III GG: "An amendment of this Constitution which affects the division of the country into federal states, the fundamental cooperation of the states in legislative procedures or the principles laid down in Articles 1 and 20, is impermissible." - so-called "Eternity Clause". Whether Art. 146 GG (except for revolution) opens up a legal way out of the Eternity Clause (e.g. for the abolition of Federalism), is - like the interpretation of Art. 146 GG as a whole - disputed. Jarass/ Pieroth, Art. 146 GG Rn. 3 confers only very limited significance on Art. 146: "The material content of Art. 146 (new version), therefore restricts itself to the empowerment for the legislative bodies to institute the procedure for a fundamental revision of the Constitution, in the course of which a referendum is held, and the necessary constitutional amendments made. Art. 146 therefore allows no underived and unlimited new Constitution, but a constitutional revision which is subject to similar limits as a constitutional amendment."

[28] The preamble now runs: "Conscious of their responsibility before God and man, inspired by the determination to promote world peace as an equal partner in a united Europe, the German people, in the exercise of their constituent power, have adopted this Basic Law. Germans in the states of Baden-Württemberg, Bavaria, Berlin, Brandenburg, Bremen, Hamburg, Hesse, Lower Saxony, Mecklenburg-Western Pomerania, North Rhine-Westphalia, Rhineland-Palatinate, Saarland, Saxony, Saxony-Anhalt, Schleswig-Holstein and Thuringia have achieved the unity and freedom of Germany in free self-determination. This Basic Law thus applies to the entire German people."

[29] "This Constitution, **which after the achievement of the unity and freedom of Germany, applies to the entire German people**, becomes invalid on the day on which a Constitution comes into force, which has been decided by the free decision of the German people."

[30] Although the Bundestag and the People's Chamber by the chosen procedure came out in favour of the unchanged validity of the Constitution (except for marginal changes) in the West and the extension of its validity to the eastern federal states, neither the Bundestag nor the People's Chamber were constitutional assemblies in the classical sense - i.e. a popular representative body which had expressly been elected by the people with the task of the enacting of the Constitution.

to impart a new order to the life of the state, for a transitional period, and because a referendum essential for the adoption of a democratic Constitution was not possible at that time, because a part of the German people were prohibited from participating. Now, following the end of the transitional period, Art. 146 GG unequivocally called for the drafting of a new Constitution and its adoption in the form of a referendum. The faction of DIE GRÜNEN placed special emphasis on the requirement that this new Constitution should be drawn up with the participation of the citizens and a Constitutional Council."[31] and therefore consequently refused its agreement to the Unification Treaty, whilst still fundamentally still being in favour of reunification.[32]

The SPD - like DIE GRÜNEN - also preferred a reunification by means of Art. 146 GG with direct popular participation - but came to an agreement with the CDU on a compromise formula. The CDU advocated the accession solution by means of Art. 23 GG - while abolishing Art. 146 GG (old version). The Constitution was thereby to become the *definitive* Constitution - to the exclusion of a (legal, non-revolutionary) new Constitution according to Art. 146 GG (old version). The SPD finally agreed to the accession solution - while still keeping open the prospect of a new Constitution under Art. 146 (new version).[33] As to what extent Art. 146 GG really opens up the prospect of a new Constitution to be adopted by legal, non-revolutionary means, is more questionable,[34] but will not be examined further here. The controversy over the right way to an all-German Constitution was in any event set aside in favour of a rapid accession solution[35] and removed from the Bundestag to a Joint Constitutional

[31] Bt-Drs. 11/7290 (Recommended decision and report of the Committee for German Unity) p. 14 (to Art. 146 GG).

[32] "The faction THE GREENS, despite its agreement to German unity, does not agree to the Unification Treaty in its present form,

— because it contains no binding agreement on the drafting of a new Constitution, with the participation of the citizens, or to hold a referendum in accordance with Article 146 GG,

—because the states and municipalities in the GDR would be far worse off under the rules in the Treaty despite far greater tasks in the development of administration and infrastructure, as well as in the social and environmental area, than the previous federal states,

— -because the regulations made will have serious social consequences for the population of the former GDR, without adequate aid and security measures having been taken against this eventuality

— and because their subsequent negotiation applications concerning amongst other things the preamble to the Constitution, defence, foreign law, constitution protection, abortion, homosexuality, employment market policy, police law, energy contract, civil service law, radio, education, science and research, agriculture, compensation of victims of National Socialism and post-war regulations have been rejected." see BT-Drs. 11/7920, p. 4.

[33] See with regard to this "historic compromise" Herdegen, in Maunz/Dürig Art. 146 Rn. 19.

[34] Reference has already been made to the very restricted interpretation of Art. 146 in Jarass/ Pieroth, Art. 146 GG Rn. 3 (see Fn. 27). Herdegen also points out (Maunz/Dürig, Art. 146 Rn. 22) that in any event, Art. 146 (new version), in the opinion of the legislator, can only be understood in close connection with Art. 79 III GG (Eternity Clause): "While according to predominant opinion, Art. GG (old version) relieved the decision on a new constitutional order for the entire German people of the commitments of Art. 79 GG, the legislator amending the Constitution was working on the basis of a fundamental change of the regulatory content of the concluding condition, although the wording remained essentially unchanged."

[35] "The accession solution allowed the seizure of the dynamics of the momentum towards unity, and relieved itself of the risk of over-burdening the reunification with a discursive process of overall German constitutional

Commission. And here the decision was made against a Constitution referendum under the finding that the Constitution was democratically legitimised "fully" and "beyond reasonable doubt":

"On the question of a possible lack of legitimacy of the Constitution, it was submitted that a democratic legitimacy deficit of the Constitution does not exist. The Constitution was already fully democratically legitimised by the decisions of the People's Chamber, the Bundestag and the Bundesrat, which were taken by a majority capable of such constitutional amendment. This was clearly expressed by the fact that the Constitution was the all-German Constitution. A referendum could therefore add nothing significant to the legitimacy of the Constitution. The argument that the Constitution was suffering from the "birth defect" that it had never been formally decided by the people, lacks a legal basis. There was no democratic law of nature which stated that the people must each exercise their constitutional power in the form of the referendum. The Constitution of the United States of America of 1787 and the Weimar Constitution had also not been subject to any referendum. The Constitution had been democratically legitimised on its institution by means of its adoption by the parliaments of the participating German states (Art. 144 Para. 1 GG). Even if it were to be assumed that the Constitution had lacked full German legitimacy until 3rd October 1990, this had in any event been conferred by the free vote of the Germans in the former GDR to accede to the area of validity of the Constitution. Thus the Constitution was undoubtedly legitimised as the all-German Constitution."[36]

This view did not remain unchallenged[37], but is relevant for the point of view applicable to the current Constitution reality. The provisional thesis was replaced by the thesis of the "unlimited" and "undoubted" democratic legitimation of the Constitution, originally on the founding of the Federal Republic, by the adoption of the Constitution by the West German state parliaments in 1949 and, subsequent to German reunification, by the adoption of the Unification Treaty by the Bundestag and People's Chamber.

revision, or even to throw away its fleeting opportunity [author's addition: Political instability of the Soviet Union - a political change of course in the Soviet Union may possibly have militarily hindered German reunification]", Herdegen, in Maunz/Dürig, Art. 146 GG Rn. 20.

[36] Report of the Joint Constitutional Commission, BT-Drs. 12/6000, p. 111.

[37] "According to the PDS/LL, the establishment of the Joint Constitutional Commission has negated the political historical and constitutional right of the German people to enact and revise the Constitution in the event of the national unification of Germany. The drafting of a new Constitution for a united Germany remains from this point of view a dictate on politics. With the national unification of Germany, the time has come, according to this view, at which "by free self-determination" in accordance with Article 146 GG, the German people must decide on its definitive Constitution. The provisions of Article 5 of the Unification Treaty have by no means represented a realisation of this Constitution mandate. The purpose of the Constitution, "to impart a new order to the life of the state, for a transitional period" (Preamble) and the stipulations of Article 146 GG limited the validity of the Constitution to the time of the partition of Germany. A different subject than in 1948/1949 - the entire German people - was called on on 3rd October 1990 for the exercise of the "pouvoir constituant.", s. BT-Drs. 12/6000, p. 7.

III. Provisional thesis

Even if the provisional thesis has become outmoded and can have no further direct significance for the question of democratic theoretical legitimation of the Constitution, important conclusions can still be drawn from the examination of the provisional thesis for the present.

In his comprehensive work[38], Otmar Jung "unmasks" the provisional thesis as a bogus argument advanced in order to obscure the actual motivations of the politicians responsible at the time: namely and in particular, the fear of a political confrontation between Communists and the SED and a democratically still "immature" people.[39] The Minister Presidents of the West German states prevented a Constitution referendum on the Constitution, against the wishes and resistance of the Allies (!) and in this way pushed through this procedure alien to the people. "Internally the Allied referendum idea appeared blind to the Minister Presidents, because it would provide the Communists with an almost ideal propaganda opportunity." "Nothing of this should be revealed in public, because people would then say: The Minister Presidents are afraid." Two pretexts were drafted: the supposedly impending loss of time through a referendum and the provisional thesis.[40] The fear of communist propaganda must be understood in the context of the incipient Cold War and the attempts of the SED to orchestrate referenda for propaganda purposes.[41] The fear of the "immature people" may also be understandable against the background of the Weimar era; the people had issued themselves with a political "testament of immaturity" by the election of the NSDAP. But fear of the political opponent and the people are no valid arguments in a democracy. Because democracy lives by political dispute and the competition of different system ideas, and the people is sovereign. Against the background of the Weimar era, the mistrust could have been equally well directed against the party-politicians: After all, they mismanaged the Weimar Republic so much in the eyes of voters that they took refuge in extreme parties; finally, the parties in the Reichstag elected Hitler as Chancellor and voted - with the exception of the SPD and the KPD - for the Enabling Act.[42] German democracy is not "combative" or "argumentative" - as it likes to ascribe to itself - but

[38] Otmar Jung, "Grundgesetz und Volksentscheid" - Reasons and scope of the decisions of the Parliamentary Council against forms of direct democracy, 1994 Westdeutscher Verlag, Opladen.
[39] Ibid, p. 203 ff.
[40] Ibid, p. 214 f.
[41] Ibid, p. 171 ff.
[42] The "best" election result achieved by the NSDAP was in the last Reichstag elections in 1933, at 43.9 %. At no time did an absolute majority of German voters vote for the NSDAP. Not so the parliamentarians: They voted with a 2/3 majority (according to Art. 76 I 2 WRV, laws amending the Constitution require a 2/3 majority) in favour of the Enabling Act (444 votes from 647 seats), which formally established the dictatorship of the NSDAP. Only the members of the SPD and the KPD did not vote in favour of the Enabling Act - the SPD

fearful - it avoids political dispute in its very beginnings in the creation of the Constitution. This "pathological" has continued on into the present day and puts a strictly indirect democratic system in the place of direct democracy, and (in particular party) prohibitions in place of free democratic discussion (at least when faced with extreme positions).[43]

That the decision is not only a matter of "fear" of any direct popular participation, but rather of "tough" questions of power remains "intimated" as far as Jung is concerned: "the fact that the SPD saw itself not as the future opposition, but as the up-and-coming party of government, and therefore also sought to limit the power of the parliament, for example, in order to ensure a strong government. Plebiscites and referenda consequently appeared in this new understanding of democracy - whose primary mandate was the functioning of the state apparatus - to be nothing more than an inconvenience at most."[44] The "fear" is the reflection of the will to power - it is the fear of the loss of power - not only the loss of power of the government to the opposition - but also the loss of power of the "ruling" politicians to the "people". This is the criticism of Loritz in the Bavarian Constitution consultations regarding the alleged rule of the people in a representative democracy as the oligarchy of a few party chiefs and delegates.[45] The important post-war philosopher Jaspers also draws attention in his fundamental criticism of the Federal Republic to the connection between fear and the will to power:

"… The authors of the Constitution seem to have been in fear of the people. Because this law restricts the effectiveness of the people to a minimum. Every four years it elects the Bundestag. The lists or persons put forward to the people by the parties have already been selected in advance by the parties. …The parties are changing their minds. The direction of the change is as follows: They were intended as organs of the people, which through them implement their will, and in return are politically educated by the parties. But they are becoming organs of the state, which again now dominates its subjects as authoritarian state. … The fact that the parties are becoming the only political power is changing their minds. Their position is seductive, not being restricted by the urge to further power. Exclusive possession of power is pernicious, even if the form of the division of powers (Legislative, Executive, Judiciary) dominates."[46]

members voted unanimously against it, while the delegates of the KPD had already been arrested and could no longer take part in the vote.

[43] Party prohibition under Art. 21 II GG, Popular sedition according to § 130 StGB as "Penal law relating to political convictions", restriction and forfeiture of basic rights for the (alleged) protection of the free democratic basic order, internal deployment of the military for the protection of the free democratic basic order (Art. 87a GG).

[44] Jung, "Grundgesetz und Volksgesetzgebung", p. 297 f.

[45] Ibid, p. 39.

[46] Karl Jaspers, "Wohin treibt die Bundesrepublik?" Quoted from the "Spiegel" of 18.04.1966, http://www.spiegel.de/spiegel/print/d-46266482.html.

This criticism is directed not solely and also not primarily at the SPD; but above all at the parties who have prevented until today any direct democratic participation at national level.[47]

The democracy deficit in the enacting of the Constitution is not only a purely academic question in the sense of a "birth defect" - but the original democracy deficit remains until the present day and continues consistently as a democracy deficit of the present constitutional reality.

IV. Democratic legitimation of the Constitution in the view of the Joint Constitutional Commission

Reference has already been made above under II. To the view of the Joint Constitutional Commission formed in 1991 after the reunification. The Constitution was "without restriction" and "beyond doubt" democratically legitimised.

The Commission first makes reference to the adoption of the Constitution in the West German federal states by the freely elected state parliaments. The weakness of this approach is obvious and was also clearly recognised in the negotiations on the Constitution:

"The state governments and their leaders are certainly supported by democratically elected state parliaments. Their mandate however extends only to the management of the relevant part of the German State. The Minister Presidents therefore cannot pre-empt the decisions of a German popular representation; and such popular representation can originate only from genuine, or in other words direct and free elections."[48] "65 women and men were appointed by the state governments, which had been elected on quite different premises and with different tasks, and these state governments are now to decide on this vital question concerning Germany."[49]

The Constitution was not peremptorily "imposed", but genuine democracy looks quite different. The German people is sovereign. It cannot be represented by state parliaments[50] - but only by an all-

[47] In the reunification, the CDU/CSU took the path of Art. 23 GG without a constitutional referendum. The other parties represented in the Bundestag (SPD, FDP, Grüne, Linke) repeatedly put forward reform proposals in past legislative periods in the sense of direct democracy. It remains to be seen to what extent these proposals can be assessed qualitatively. It can be stated however that due to the resistance of the CDU/CSU, they had no chances of realisation, because without the CDU/CSU no majority capable of amending the Constitution can be formed.

[48] Quoted from Jung, "Grundgesetz und Volksgesetzgebung", p. 262.

[49] Quoted from Jung, "Grundgesetz und Volksgesetzgebung", p. 262.

[50] A legitimation of an all-German Constitution by the state parliaments would only be conceivable if it were not the German people which was considered as sovereign, but rather the people of the respective states, and if

German[51] elected national parliament. The authors of the Constitution and jurisprudence were always aware of this. For this reason, the "non-popular" procedure was justified by making reference to the purely provisional character of the Constitution. A further approach to legitimation was to consider the decision of West Germans in the first Bundestag election as the actual referendum, "which was later extended into the doctrine of the Constitution-confirming power of the Bundestag elections, by which the Constitution subsequently experienced further legitimation".[52]

But even this reasoning approach also has obvious weaknesses: the German people was offered only one form of democratic participation (while still denying any direct democratic participation) - elections. The fact that it makes use of this possibility says nothing about whether the people is in agreement with the fact that it is deprived of all further participation possibilities by the Constitution. The Bundestag elections are not regularly held under the auspices of a constitutional discussion. The Constitution is instead considered as a "fait accompli". The citizen does not vote on the Constitution, but on parties and persons. Participation in elections therefore even be assigned an implicit declaration of value in the sense of a constitutional referendum. Such an interpretation goes far beyond the usual methods of legal interpretation required in declarations of intent with far-reaching consequences, which clearly indicate the will of the declarer. This reasoning approach is intentionally (over) constructed:

"All these attempts at substitute legitimation show that the success of their project - acceptance and approbation - is not enough for the leading powers of the Federal Republic. They also want to achieve original democratic legitimation by argument, and thereby suppress the fact that the foundation of this state was a bold leap into the unknown, which has certainly proven worthwhile, but of which it still remains true that it has little to do with democracy."[53]

Can approbation and acceptance justify (subsequent) democratic legitimation? Does not every form of government require a "certain" acceptance? Has a dictatorship without a certain (minimum) level of acceptance any chance of survival - or will it inevitably be toppled by revolution? The collapse of the Communist dictatorship in Central and Eastern Europe can be seen - in addition to exogenous factors (perestroika in the Soviet Union) - probably as a result of a total loss of acceptance amongst the population. This question is difficult to answer and goes beyond the scope of a purely legal treatment. It can however be established that democracy and acceptance are not necessarily

Germany were not a federal Republic, but rather a union of sovereign states.

[51] In the post-war context of the establishment of the Western State, the distinction should be made of the "West German" people as part of the entire German people.

[52] Jung, "Grundgesetz und Volksgesetzgebung", p. 218.

[53] Ibid, p. 328.

consistent - an undemocratic system can find acceptance amongst the people (for example, because it wants a strong leader) and a democracy can lose their acceptance (for example because of "Partisan bickering" and incompetence).

Acceptance and probation are therefore insufficient argumentation points in terms of democratic theory. A question mark must also be placed behind acceptance and approbation. The Federal Republic of Germany can certainly be considered as a model of success in comparison to the Weimar Republic. Political relations are stable, the freely democratic basic order enjoys widespread acceptance, and a well-functioning economy has brought prosperity.[54]. But the acceptance and approbation of the Federal Republic cannot be equated to acceptance and approbation of the Constitution. Because the success of the Federal Republic cannot (at least primarily) be booked down to the account of the Constitution. This must be credited rather to a successful economy and the basic economic policy decision in favour of the social market economy and a changed political culture, which has overcome the deep divisions of the Weimar era between the political parties and the various groups of the population in the form of a basic democratic consensus. These successes could also have been achieved with a different Constitution than the "Basic Law", and even regardless of the "Basic Law".

To return to the reasoning approach of the Joint Constitutional Commission: at the latest, the accession of the new federal states to the Federal Republic of Germany declared by the People's Chamber, legitimised the Constitution as the overall German Constitution. This argument too is almost surprising, because it obviously misses the point: the accession of the *new* states cannot resolve the democratic deficits from the point of view of the *old* states. The People's Chamber election was free. And the outcome was certainly also a vote for a quick reunification, by electing the majority of parties who were in favour of rapid reunification.[55] But from the point of view of the

[54] In this case only a relative success cab established in comparison to the Weimar Republic. This "success" must naturally be accompanied by many question marks. Exorbitant national debt is bringing into question the stability of the Federal Republic, see for example the assessment of the IMF of 12.10.2005, IMF Country Report No. 06/17 (The German budget is not sustainable), assessment of the "Stiftung Marktwirtschaft", Stefan Moog / Bernd Raffelhüschen, "Ehrbare Staaten? Staatsverschuldung in Europa im Vergleich" (In order to close the sustainability gaps, national expenditure would have to be reduced by 1/3). The prosperity is also fragile, because the gap between poor and rich is widening steadily, see: http://de.wikipedia.org /wiki/Soziale_Ungleichheit: "According to a study by the DIW published in 2008, the middle class in Germany has been shrinking for years, and its proportion of the total population declined from 62 % in the year 2000 to 54 % in 2006. The proportions of the population at the margins of income distribution have increased accordingly. The proportion of low-income earners (those with less than 70 % of the annual median income) rose from 19 % in 1996 to 25 % in 2006, the proportion of high-income earners (those with more than 150 % of the annual median income) increased from 19 % in 1996 to 21 % in 2006."

[55] The "Alliance for Germany" advocated the rapid accession of the GDR to the FRG on the basis of the Constitution. The "Alliance for Germany" was a party alliance between the CDU, DSU (German Social Union) and DA (Democratic Reform). The "Alliance for Germany" made up the largest political block in the People's

people of the new states, no approval of the Constitution in its concrete form can be derived from this accession intent. The East German population wanted to join the success model of the Federal Republic, the Constitution in its concrete form was not put to the vote. Nor can it be derived from the People's Chamber election that East German citizens agree with the basic decisions of the Constitution, e.g. against direct democracy, or that they deliberately wanted to uphold this basic decision by their vote.

It can therefore be stated: **The Constitution is** (now as before) **not sufficiently legitimised democratically.** The Constitution is therefore open to criticism not only from an external perspective, but rather does not even satisfy is self-declared claim of being derived from the constituent power of the German people.

The weak justification of the Joint Constitutional Commission reveals that people utterly unwilling to seriously challenge the democratic legitimation of the Constitution, and therefore also saw no need to develop sustainable arguments (beyond shallow platitudes) for the democratic legitimation of the Constitution. The question of democratic legitimation has long been settled from the pragmatic political perspective in the sense of the "normative force of the factual". This question is however by no means settled from a constitutionally critical point of view, since the non-popular procedure applied in the enacting of the Constitution continues to sustain itself logically by the rejection of any direct democracy, and until today still characterises the reality of the Constitution.

V. Exacerbation of the democratic legitimacy deficit: exclusion of any direct popular participation

The direct democratic deficit of the Constitution of the present is therefore a reflection of the democratic legitimacy deficit of the Constitution of the past, and at the same time the exacerbation and keystone of a Constitution inimical to direct democracy: the people has never decided whether it should charge the Bundestag in the framework of the Constitution with its representation. The lack of direct democratic participation also deprives the people of the possibility of revising this (inadequately legitimised) factually existing representation or modifying it by amendment of the framework. The following basic democratic rule is however undisputed: "Once established, the power of the state may not become autonomous, but must always remain reliant on the will of the governed, must remain bound to them and must be responsible to them."[56] For this reason, there are

Chamber with 192 out of 400 seats.

[56] Müller-Franken, "Unmittelbare Democratie und Direktiven der Constitution", in DÖV 2005, 489 ff., 492.

regularly scheduled elections - an election “per eternam” would be undemocratic. The same applies of every constitutional framework: A Constitution “per eternam”[57] is undemocratic - the Constitution requires this feedback to the people as the sovereign body - i.e. the possibility of direct democratic revision.

The people were excluded (from the creation of the Constitution) and remain so (in the current constitutional reality). In the theory of the Constitution, the people are the sovereign body, while in the reality of the Constitution, it is the Parliament.[58] **From a critical perspective of direct democracy, the representatives of the people have promoted themselves to the post of actual sovereign for the purpose of self-empowerment**. This fundamental criticism of a purely representative democracy is not new, corresponding votes were cast in the process of enacting of the Constitution - that the alleged rule of the people of the representative democracy was an oligarchy of a few party leaders and delegates[59] - and went hand-in-hand critically with the history of the Federal Republic[60] and is now as before right up-to-date.

The Constitution bars itself off “hermetically”. In addition to the exclusion of direct democratic participation, further “bars” include the increased parliamentary majority requirements on amendment of the Constitution[61] and the so-called Eternity Clause.[62] Experts in constitutional law continue to wrangle over the extent and the correct understanding of Art. 79 III GG. Is this a case of restriction of the sovereignty of the people?[63] This is theoretically hardly conceivable: The grounds of validity of the Constitution is the constituent power of the German people. The Constitution is derived from the sovereignty of the people and not vice versa - the Constitution cannot therefore by any means restrict the sovereignty of the people (rather, the reverse applies: the people as the

[57] The so-called Eternity Clause of Art. 79 III GG must also be viewed critically against this background.

[58] Parliament sovereignty was expressly postulated in the theoretical respect by the English expert in constitutional law Albert Venn “A. V.” Dicey (04.02.1835 - 07.04.1922) in his principal work “An Introduction to the Study of the Law of the Constitution” (1885).

[59] Jung, “Grundgesetz und Volksentscheid”, p. 39. Jung echoes the fundamental criticism of Loritz. Loritz was the founder of the WAV (Wirtschaftliche Aufbau-Vereinigung). In Wikipedia it says: “This existed from 1945 to 1953 and won seats both in the Bavarian state parliament as well as in the Bundestag. The populistic party of the middle class, which was elected to the Bundestag thanks to the support of refugee associations, foundered in personal disputes. At times it made efforts towards cooperation with rightist extremists.”, http://de.wikipedia.org/wiki/Wirtschaftliche_Aufbau-Vereinigung_(Partei).

[60] Attention has already been drawn to the radical criticism of Karl Jaspers: Karl Jaspers, “Wohin treibt die Bundesrepublik?” Quoted from the “Spiegel?” of 18.04.1966, http://www.spiegel.de/spiegel/print/d-46266482.html.

[61] Art. 79 II GG: “Such a law [author’s addition] requires the agreement of 2/3 of the members of the Bundestag and 2/3 of the votes of the Bundesrat.”

[62] Art. 79 III GG: “An amendment of this Constitution which affects the division of the country into federal states, the fundamental cooperation of the states in legislative procedures or the principles laid down in Articles 1 and 20, is impermissible.”

[63] Jarass/Pieroth Art. 79 Rn. 5.

"pouvoir constituent" could restrict and abolish the Constitution). Art. 79 III GG must therefore be logically understood only as a restriction of the legislative bodies as the "pouvoir constitué" - the constitutional power of the people remains unaffected by the Eternity Clause.[64] The question as to how Art. 79 III GG should be interpreted continues with the difficult interpretation of the unclear standard of Art. 146 GG[65]. Should Art. 146 GG enable an underived and unconditional revision of the Constitution by the German people? Or must such a revision only take place within the framework of Art. 79 III GG? This also poses the question of demarcation between legal revision of the Constitution and (from the point of view of the order of the Constitution) illegal revolution.[66] Regardless of the theoretical significance of Art. 79 III GG, it can be said that the people, as the sovereign body within the existing order cannot in fact implement any amendment of the Constitution, because the procedural prerequisites for conducting a referendum are not provided by applicable law. In order to conduct a referendum, the people would first have to build up at least partial parallel state structures. An amendment of the Constitution with the participation of the people can in practical terms only come from "above", and therefore follows the democratically questionable tradition of "revolution from above".[67] Exactly this process from above must have conformed to the democratically deficient idea of the legislator of the Constitution: a joint Committee formed from the Bundestag and Bundesrat works out the principles of a constitutional reform, which *can* then (by the "grace of the rulers") be out to a vote by the people. Such an initiative from "below" - so essential for direct democracy - from the people is in this case neither envisaged nor desired.

The reference to the possibility of joint determination by the people through the right to vote is also of no further help here. Firstly, because the vote has no direct relation to material (constitutional) issues. And secondly: in the context of the question of parliamentary power in particular ("parliamentary sovereignty"), the right to vote proves itself to be democratically completely inadequate. The people may of course elect other parties to the Bundestag - but it cannot vote out the Bundestag as such. Whoever is elected as a representative of the people represents not only the people, but rationally speaking also pursues their own power interests: the preservation of the power of parliament with regard to the people. Although there may be parliamentary initiatives for direct democracy on the part of the SPD, FDP, the Greens and the Left, these move only within narrow limits. The crucial democratic question - namely budgetary authority as the germ cell of

[64] Herdegen in Maunz/Dürig Art. 79 Rn. 72.
[65] Art. 146 GG: "This basic laws, which on the achievement of the unity and freedom of Germany for the entire German people, becomes invalid on the day on which a Constitution comes into force which has been adopted in free self-determination by the entire German people."
[66] See above Fn. 27 and 34.
[67] http://de.wikipedia.org/wiki/Revolution_von_oben.

democracy[68] - should according to the proposals of the parties be exempted from direct democratic participation and remain the "monopolistic" domain of the (self-empowered) parliament.[69]

It can therefore be established: **The democratic legitimacy deficit of the Constitution is further exacerbated particularly by the exclusion of direct participation possibilities.**

VI. The way out of the democratic crisis

The way out of the "democratic crisis" (democratic legitimacy deficit of the Constitution) can only lead by way of a new Constitution, which is laid down by the German people in free self-determination (Art. 146 GG). The classical democratic theory assumed that a new Constitution, taking into account the sovereignty of the people, could be effectively brought about in two ways: 1) indirectly by the election of a constituent assembly or 2) directly by popular referendum on the Constitution. Which way is the right one - with regard to the constitutional power?

"Seen in itself, the principle of the sovereignty of the people is always realised by direct democracy, at least according to the theory, because the power of the state emanates directly from the people, if the people decides directly on an outstanding issue, i.e. by popular referendum."[70] Applied to the interesting question of the democratic legitimation of a Constitution posed here, this means: a Constitution which is adopted by referendum is democratically legitimised.

According to prevailing constitutional doctrine, indirect democracy - i.e. elections to a popular representative body - should fundamentally behave equivalently to direct democracy with regard to its democratic legitimation.[71] This question is currently being discussed in particular with regard to the precedence of popular legislation and parliamentary legislation at state level - Can a parliamentary law amend and suspend a popular law? The question of the relationship between parliamentary and popular legislation was also posed during the Weimar era and partly answered with reference to the greater democratic quality of popular legislation in terms of precedence.[72] The

[68] Viewed historically, parliaments wrested democratic control over the (monarchic) government via budgetary authority.

[69] The budgetary reservation is also provided for in the initiative of the Left, which goes furthest in terms of direct democracy: "Popular initiatives which affect the division of the country into federal states, the fundamental cooperation of the states in legislative procedures or the principles laid down in Articles 1 and 20**, and the Budget Act**, are impermissible.", Government Publication 17/1199 of 24.03.2010.

[70] Grzeszick in Maunz/Dürig, Art. 20 GG Rn. 62.

[71] Grzeszick in Maunz/Dürig, Art. 20 GG Rn. 62.

[72] Jacobsen, "Zur Verbindlichkeit der Volksgesetzgebung", DÖV 2007, p. 949 ff., 950.

question of any precedence is however just one aspect to which the constitutional discussion must not be restricted.

The fact that democracy does not amount only to the power of the state being able to be derived from the people by a legitimation sequence of whatever length is recognised in the jurisdiction of the Federal Constitutional Court. Democracy also includes a sufficient "proximity" of the state power exercised to the sovereign body. The Federal Constitutional Court therefore rightly requires that major decisions may not be delegated by the parliament by way of statutory authority to the ministerial bureaucracies. The decisions must remain within the purview of the parliament, where they are publicly and transparently discussed (so-called parliamentary reservation or materiality reservation).[73] A comprehensive Enabling Act - on the model of the end of the Weimar era - is perhaps formally but certainly not materially compatible with a democratic Constitution. The length of the legitimation chain - direct or indirect legitimation or indirect legitimation via several intermediate stages - must therefore be attributed decisive importance for the qualitative assessment of the democracy. And it can therefore be established that indirect democracy can only derive its legitimation indirectly from the people, while a referendum represents an act of underived state power.[74] It is therefore impossible to speak of an equivalence of direct and indirect democracy. **It is instead appropriate to continue the idea of materiality reservation conferred by the sovereignty of the people directly democratically, such that the most important of all important decisions - namely the enacting of the Constitution - must be reserved directly for the people (popular reservation).**

If we transport out thoughts to the "zero hour" - the time of the new framing of the Constitution - the deficits of a constituent assembly to the exclusion of a Constitutional referendum become obvious:

By elections, an organ (the Bundestag) is charged with the exercise of state power on behalf of the people. The relationship of the people and the Bundestag is that of the represented and the representative. It is unclear however how far the authority conferred by elections should extend. Does the people delegate its sovereignty to the parliament in terms of parliamentary sovereignty so that the parliament may decide as and how it will? Tis would also mean that the parliament could abolish democracy, e.g. by proroguing the elections or abolishing the freedom of opinion. Or does this representative power have limits? Who defines the limits? In an existing constitutional order,

[73] See Jarass/Pieroth, Art. 20 GG Rn. 6 and 42 f.
[74] Grzeszick in Maunz/Dürig, Art. 20 GG Rn. 62.

this question can be answered pragmatically: the limits are determined by the Constitution. The Constitution defines the framework within which the German Bundestag may act, and the Federal Constitutional Court reviews whether the laws passed by the Bundestag fall within this framework. [75] The question becomes more difficult when such a constitutional order does not yet exist, and first has to be created. It may be conceivable to define the limits from the idea of popular sovereignty: the representative authority of the parliament comes up against its limits if the parliament attempts to subvert the popular sovereignty. The definition of the limits is theoretically conceivable, but difficult to implement in practice. Where exactly does the limit run? It is therefore appropriate for the people to decide on the limits of representative authority in advance by the direct act of enacting of the Constitution, and thereby specify to the parliament the framework in which it may act on behalf of the people.

It is however exactly this problem of undefined representative authority which inevitably faces a constituent assembly (as a means of constitutional revision allowed for by classical democracy theory). Should the constituent assembly also be allowed to adopt an extremely undemocratic Constitution? Is it empowered to do so by the people? Where do the limits of this empowerment run? Everything therefore speaks for the fact that the "zero hour" or the "big bang" of democracy - the enacting of the Constitution - can only take place by an act of direct democracy - in other words a popular referendum.[76]

[75] As to what extent these control mechanisms actually work will not be examined here. In this connection it would be more appropriate to focus on the party-political manning of the Federal Constitutional Court. It is a matter here only of the theoretical model - and this is provided for by the Constitution as a binding constitutional framework, with the Federal Constitutional Court as the guardian of the Constitution.

[76] This understanding of popular sovereignty corresponds to the interpretation of Art. 146 GG, according to which a popular referendum is essential for the framing of a new Constitution, see on this point Herdegen in Maunz/Dürig Art. 146 GG Rn. 37 ff.