The Stakes of the Unwritten Constitutional Norms and Principles Debate in Germany

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The issue of the "writtenness" of the constitution has, up to this point, only been a peripheral issue in German constitutional scholarship. This is unsurprising. The Grundgesetz' (GG) written articles are a reliable starting point and focus for constitutional arguments in academia and practice. The importance of the written text for German political culture is exemplified by the reverence in which the constitutional document is being held, especially on occasion of the Grundgesetz' 75th birthday celebrated these days. At 23.000 words – four times as many as the U.S. constitution – the Grundgesetz also offers more than enough textual material to resolve legal questions. Unlike in the United Kingdom and Canada – examples which will be discussed within this online symposium – constitutional principles such as the principle of Democracy and the principle of Federalism are also part of the written text. And even if there are (hypothetical) gaps in the text – see the current debate on protecting the Federal Constitutional Court (FCC) from authoritarian populism -, the document can be amended relatively easily. Thus, unwritten norms or principles seem to only be of relevance in marginal areas of German constitutional law.

At second glance, however, things are not so obvious. Just like any law, the Grundgesetz is naturally incomplete and patchy. Even the term "*Rechtsstaat*" (which can be roughly captured with the concept of rule of law) – foundational for Germany's constitutional tradition – is only mentioned explicitly with regards to Europe (Art. 23 GG) and the *Länder* (Art. 28 GG) but not for the federal level. The principle of proportionality, the principle of legality (*Vorbehalt des Gesetzes*) or the principle of certainty (*Bestimmtheitsgebot*) are additional constitutional norms that do not have a clear textual basis but are nevertheless central to constitutional thought in the Federal Republic and are also considered to be "particularly German" by comparative constitutionalists. Similarly, one struggles to find a textual basis for canonical "inventions" of the FCC such as the fundamental right to informational self-determination and the fundamental right to climate protection.

The "Writtenness" of Norms in the "German Approach" to Law

Why then do German constitutional lawyers (almost) never discuss unwritten constitutional law – and should that possibly change? Compared to the UK and Canada, there is no practical need for such a discussion. That does not mean, however, that an intense debate over the content of, and relationship between,

the aforementioned principles as well as the role they can legitimately play in a democratic constitutional order does not also exist in Germany. Additionally, while the FCC still enjoys very high approval ratings, the fear of a "Court without Limits", freely creating law is not foreign to the German constitutional debate. However, these debates are *not* framed around the argument that constitutional jurisprudence should focus more on "written" law or, inversely, that it should feature the unwritten constitution more strongly.

Anyone who, for example, argues against the much-criticized jurisprudence of the FCC on the political neutrality obligation of public officials solely on the grounds that there is no mention of this in the text of the Grundgesetz, would expose himself as a legal amateur. Judge Wallrabenstein's dissenting opinion on the Second Senate's ruling of 15 June 2022 therefore justifies her opposition in a completely different way, namely – like the majority – in a non-textual and principle-oriented manner.

It is tempting to explain the relative lack of interest in the question of the "writtenness" of the constitution with a specific method of applying the law and the role of legal doctrine – the famous "German Approach". Ever since *Savigny* and the German historical school German lawyers have treated the positive text as (merely) one factor in a complex process of interpretation oscillating between "historically-intuitive and scientifically-logical reason" (Savigny, p. 204). This model combines a principle-oriented approach, as we might call this today, with a profound respect for the positive text. But whether a specific legal outcome is deduced from the written text or from the "system" is often difficult to discern and hardly ever makes a difference in practical terms.

However, this methodological tradition is not the only explanation. For constitutional law in particular, it might not even be the most relevant one.

The Longing for the Stability and Security of the Written Word

As Linda Colley has shown in her brilliant global history of the constitution, the written constitution as a modern institution does not only emerge from the progressive spirit of the enlightenment era. Rather the success of the (written) constitution as a concept is also due to its efficacy as a tool in mobilising society to resolve the political and social crises that shook the world from 1750 onwards and were often associated with the unleashing of extreme violence. Such a politically motivated deployment of "writtenness" can be found from Norway to – of course – the USA and the revolutionary and post-revolutionary constitutions of France all the way to Meiji era Japan. Great Britain is the exception, but only because a stable settlement had already been found in the aftermath of the civil war of the 1640s and the "glorious" revolution of 1688/89.

Conversely, in a territorially fragmented Germany the idea of a constitutional charter long remained a noble dream and was merged with the yearning for national unity. The Frankfurt Constitution ("*Paulskirchenverfassung*") saw the first attempt at a national constitution fail rather spectacularly in 1849 (for the fascinating fate of

the original document, see here). Success only came with Bismarck's Imperial Constitution of 1871. However, in its structural design this charter was closer to a State Treaty than an actual Basic Law. Or in the words of *Rudolf Smend* (1882-1975), later becoming the doyen of constitutional law in the Federal Republic: "It is an extraordinarily austere and unappealing, badly drafted law that can hardly be fully understood." Due to the "gaps" of the 1871 constitution, the "unwritten constitutional law of the monarchical federal state" – the title of Smend's seminal contribution – was an obvious and important topic for constitutional lawyers during the *Kaiserreich*.

It was only with the Weimar Constitution (1919) that Germany seemed to have reached modernity. The complex history of this "good constitution in a bad time" (Christoph Gusy) cannot be traced here. What followed is well known. Often overlooked however is the fact that the national socialists never repealed the Weimar Constitution. Rather, its fundamental provisions were overwritten through a rapid progression of "governmental laws". These created a wholly new constitutional situation that did not coalesce into a new constitutional charter or a comprehensive concept of Nazi constitutionalism. If, as most Nazi-Jurists did, one nevertheless held on to the idea of a constitution, one had to make virtue out of a necessity, as did *Ernst Rudolf Huber*, the leading constitutional lawyer of this era. According to Huber, national socialism had no "constitution in the formal sense as was characteristic for the 19th century", but an "unwritten basic political order" – that could be pitted against the written constitution at any time (cf. E. R. Huber, Verfassungsrecht des Großdeutschen Reiches, 2nd ed. 1939, pp. 54-55).

This tradition must be borne in mind when considering why unwritten law appeared so precarious as a source of constitutional law after the Second World War. The Grundgesetz's genesis is an additional factor. While the document was certainly not imposed on a helpless Germany, the result of the Parliamentary Council's deliberations had to be approved by the Allies and ratified by state parliaments. Thus it needed to be in writing. To the early Federal Republic, the "writtenness" of its constitution represented enlightenment, westernization, security and stability. The Grundgesetz itself demonstrates its codificatory ambition, particularly in Article 79 which not only removes certain core principles from amendabilty (section 3) but also states in section 1: "This Basic Law may be amended only by a law expressly amending or supplementing its text."

How little the concept of unwritten law could help to come to terms with the new constitutional situation is shown by the discussion on the subject at the the 10th Conference of the Association of German Constitutional Law Professors [*Staatsrechtslehrertagung*] in Göttingen in 1951. This moment likely represents an intellectual low point in the history of the association, which is not rich in stellar moments anyway. Since then, the topic has gone quiet (remarkable exception: Wolff 2000). Why then, to return to the initial question, should it be awoken from its slumber?

Why Should We Care?

There are at least four reasons why the writtenness of constitutional law could and should once again become an issue in Germany.

The *first* is associated with the comparative interest that also motivates this symposium: If other constitutional systems use (un)writtenness as an argument for or against the legal nature and the relative weight of constitutional concepts, such as the principle of democracy, comparative law needs a sophisticated understanding of this concept. Merely stating that the principle of democracy is codified in Germany but not codified in the UK does not explain anything. It is essential in this regard not to view the category of writtenness in a binary way. Instead, it is important who writes what in what form – and how the act of writing relates to the establishment of the constitutional authority of a specific text. The question as to whether a constitutional norm is written or unwritten, is thus transformed into the question of who can write constitutional law, and as such enables a much more nuanced comparative view of the genesis of constitutional law.

Focussing on writtenness can *secondly* sharpen our sensibility of how liberally the German legal system allows the FCC as well as other courts to acknowledge legal norms or principles whose textual basis in the Grundgesetz is far from obvious – which in other jurisdictions might be put into the area of norm-free, principle-oriented argumentation, i.e. whose constitutional quality is being problematized. This should not be taken to mean that the "German Approach" amounts to arbitrariness in its dealing with constitutional law. On the contrary. It does however highlight a tension between the status that the Grundgesetz enjoys as a textual document in our political culture (see e.g., here), and the massive rewriting that this text has undergone over the past 75 years through constitutional jurisprudence and scholarly dogmatisation. Today we need to ask ourselves: Is there a difference between Constitutional patriotism and Constitutional Court patriotism and, if this is the case, which do we have and which do we want? Against this background, it is not surprising that the discussion about "defensive democracy" is currently shifting from the protection of the constitution to the protection of the constitutional court.

The *third* reason is that there is also a smallish body of constitutional norms and principles in Germany whose validity is not derived from the Grundgesetz, but which –despite Article 79 sec. 1 GG – are according to general opinion "unwritten". These norms and principles are to be found in particular in the deeper strata of our constitutional law which have been untouched by the various changes of the political system. They can be traced back to "gaps" in the Imperial Constitution of 1871 for which compromises were later found that remained untouched during the later codification processes in 1918/19 and 1948/49. Specifically, they relate to (1) federalism – every German law student learns about the unwritten legislative and administrative powers of the federal government –, (2) the relationship between the various constitutional organs and (3) the law of parliament. The law of parliament is particularly interesting. Traditionally, the lack of formalization has served the democratic system well, because it left the political parties considerable room for negotiation. With the entry into parliament of parties that fundamentally question the

system of representative democracy, however, this mode of “binding informality” is coming under increasing pressure. Karlsruhe is increasingly being pushed into the role of formalizing parliamentary conventions – currently, for example, in matters relating to committee chairs. The open question is whether the unwrittenness of the relevant norms makes a difference regarding the current process of judicialization and how this is to be assessed with a view to the separation of powers.

Fourthly and lastly, there is in no way a guarantee that the interaction between the written constitution and the Federal Constitutional Court will remain as productive as it used to be. Other countries show that constitutional courts can turn against the constitution. What would happen if Karlsruhe were to refuse to recognize the principle of proportionality in the future due to its lack of a sufficient textual basis in the Grundgesetz? From a policy perspective, such hypotheticals might not seem fruitful, because – luckily – they are still too improbable. From a theoretical point of view, however, they force us to think more clearly about the basis of the validity of our constitutional law. And precisely this is the main purpose of our project Unwritten Constitutional Norms and Principles. A Comparative Study.