



# Hugo-Preuß-Gesellschaft e.V.

## Perspectives and Problems of a Rediscovery of Hugo Preuss

*By Detlef Lehnert and Christoph Mueller:*

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*Detlef Lehnert and Christoph Mueller:*

## **Perspectives and Problems of a Rediscovery of Hugo Preuss\***

“What tortures one are lost possibilities.  
To be sure of an impossibility is a true  
relief” (Karl Kraus).

### **“Bonn is not Weimar”**

The years following 1949 saw the growth of a myth in regard to the establishment of the Federal Republic of Germany and its so-called Basic Law, or Constitution – a myth which stresses to excess the distance lying between the first and the second German republic. The societal, economic and political basic and prevailing conditions of these two attempts at founding a democracy are fundamentally different. Yet it is an inadmissible simplification, to look at the problem in such a way as to explain the destruction of the Weimar Republic as having been already inherent in the Constitution of 1919. Doing so merely distracts from the true causes and accountabilities.

At his time, Hugo Preuss aroused great animosity und was obliged to defend himself against the accusation that the Constitution he had played a substantial part in drafting was “un-German” and “a Jew republic”. This Constitution of Weimar was regarded as too democratic by many a part of the population, whose political consciousness was still determined by structures and ideas of the monarchy. After 1949, the draft of the Constitution as drawn up by Hugo Preuss saw itself confronted with the very opposite accusation, namely that errors of construction in this work of his were allegedly a major reason why it did not possess sufficient strength of resistance to put up against the anti-democratic forces – suddenly it was considered not democratic enough.

It is a question of intellectual honesty as well as historic justice to the work and person of Hugo Preuss: we must not follow the convenient and comfortable legend any longer – that Weimar failed due to his constitution. After more than half a century of stable democratic development, our republic is no more in need of such pedagogical constructs of history. What is necessary here is a sense of the entire sum of our present republic’s preconditions and starting points, in order to convey to the later generation both: the memory of the catastrophes and crimes of the twentieth century, from which the second German republic has taken its lessons, and at the same time the recollection of democratic impulses within the Weimar Republic, these inspired to a great degree by Preuss, as well as its older historic models, specific objects of connection for him in this regard.

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\* Introduction into: Detlef Lehnert and Christoph Mueller (Eds.), *Vom Untertanenverband zur Bürgergenossenschaft* (From a Political Body of Subjects to a Free Association of Citizens), Symposium on the occasion of the 75<sup>th</sup> anniversary of the death of Hugo Preuss on 9<sup>th</sup> October 2000, Baden-Baden, published by Nomos Verlagsgesellschaft, 2003, p. 11-48. With friendly permission of the publisher.

It is now time to recognize Hugo Preuss as one of the most significant democratic scholars, theorists, publicists and politicians of our country, and to perceive – as well as discuss with all serious intention – his extensive body of work. He was a master of the spoken and written word, characterized by keen thought as well as what can be termed a veritable Anglo-Saxon common sense. In his arguments, he utilized a sweeping knowledge of history together with the most exact knowledge of constitutional and administrative detail. Moreover, his was a most constructive mind, showing surprising insight into the conditions of function of modern political organization and its democratic forms of institution. With the bridges of thought which he built from the Weimar Republic to the Democrats of 1848 and to older impulses coming from Germany's constitutional development, he made lines of tradition visible – and us thus conscious of them – upon which our Basic Law, or Constitution, rests. He embodied, as did hardly another, what is called “constitutional patriotism” today.

Upon his death in October 1925, half a year after the death of Friedrich Ebert, one did not hear much more about him. His descendants were driven out of Germany in 1933. His personal estate did not survive the emigration of his family. Hugo Preuss now lives on only in his literary works. These exist in published form, some available only in hard-to-reach places and sometimes difficult to locate. Remembrance of him has been reduced to some rather simplified catch phrases and key words that have not enjoyed a great deal of checking or study. It is a *nobile officium* and thus an act of compensation now to make available his works in their entirety. In so doing, we are helping his work, by means of such recollection and such serious discussion, in fact to help us in our attempts to resolve the problems of today which lie before us. In our own interest and for our own benefit, we can no longer do without Hugo Preuss.

Even though it by no means represents the general level of research in the authoritative historic discussion, Hans Mommsen (cf. his contribution in: Lehnert/Mueller, *Unterthanenverband*, see footnote \*, page 47-57) has focused upon a central point, namely in elaborating on the fact that the Weimar Republic did not fail as a result of “faulty constructions”, i.e. errors, of the Constitution, but rather was due to the lack of a sufficiently broad basis for a culture of democracy between 1918 and 1945.

At that time, democratic groups were already in existence. They were concentrated in certain segments of society, namely the “Freisinn” (authentic Liberals), the Social Democrats, and the democratic wing of the “Zentrum” (catholic Center). Before 1918, these were the political parties which Bismarck most energetically wished to preclude from any political influence on the political formation of the country. But the house of cards of his constitutional construction collapsed. After 1918, these forces, declared to be “enemies of the Empire” by Bismarck, had to form the “Weimar Coalition” in order to find a way out of the serious crisis in which the leadership and the military of the Empire had taken the country. And they took over the responsibility for the failure of the authoritarian state. But a culture of democracy had not yet reached deeply enough into the middle classes still holding convictions favoring the monarchy. The infamous *Dolchstoß-Legende* (the claim of being stabbed in the back – widely believed in Germany at the end of World War I) turned things around and clouded the true causes of the German empire's breakdown, which in actual fact had lain in inadequacies of the

Bismarck constitution, the personal regime of the Kaiser, and failures of the high army command. In addition, there were unfavorable external conditions, internal contradictions, and social blockades, all of which in and of themselves already hindered the firm establishment of a common basis for democratic forces in society at this very moment.

For Preuss, the Constitution of Weimar was not the final stage of the democratization of Germany but a first beginning, as it were. For centuries gone by, the chances to set the stage for developments leading to a democratic constitution had been blocked. A process of learning out of experience was necessary, as was further and further deepening of this process, in order to gradually overcome the old destructive energies and then develop a model of integration of all democratic forces. And it was indeed for this purpose, with this end in mind, that lines of tradition were so important: those with which Preuss attempted to establish constructive starting points rooted in the past, yet effective for the solution of problems of the present.

The “anti-democratic” thinking in the Weimar Republic has been researched in quite a thorough manner. However, we don’t know very much about its counterpart, namely the “democratic thinking” of that time. The “asymmetrical level of research”<sup>1</sup> is surprising. And it often goes unrecognized just how great the contributions of the Weimar Republic actually were - and how many preconditions it created upon which our Basic Law, i.e. constitution, of 1949 could later have been built.

### **The political function of anti-Semitic agitation**

Whereas the work of one of the greatest German constitutional patriots and theorists of democracy in the scholarly and political domain has been neglected in a most unseemly manner up to today, it appears that the anti-democratic forces of that time, having attacked and calumnied him during his entire lifetime, have achieved what they wanted. The newspaper *Neue Preussische Zeitung*, since 1848 megaphone of the conservatives “fighting for king and country, with God on our side”, commented on the occasion of his death on 9<sup>th</sup> October 1925, just a few hours after it had become known:

“Dr. Hugo Preuss was a highly undesirable element, an extremely unpleasant figure in the political life of the German and the Prussian people.”

The newspaper *Kreuz-Zeitung* went even further, openly stating the true reason behind its antipathy. It termed him “one of the Jewish democrats sympathizing with Social Democracy”, which amounted to damnation in the eyes of ruling circles. By background, Preuss was a middle-class liberal and supported, despite massive criticism of certain elements of the Social Democrats of that time, a coalition with the party that Bismarck had declared *hors la loi* with his “Anti-Socialist Act.” Up until the outbreak of the First World War, they had been stigmatized by Kaiser Wilhelm II as *vaterlandslose Gesellen*, as folks without a fatherland and with no feeling of patriotic allegiance to their country. His Jewish family background as well made him suspicious to bourgeois circles, since the majority of Jews who had become emancipated from the centuries of

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1 Gusy, Christoph (Ed.), *Demokratisches Denken in der Weimarer Republic*, Baden-Baden, 2000, Introduction (Gusy), p. 11f.

ghetto existence did not as a rule vote for the parties that had oppressed them, but rather the parties supporting the hated democracy.

Historian Heinrich von Treitschke had made a form of “unspoken” or “below-the-surface” lower-middle-class anti-Semitism acceptable even in academic circles, something which was to become the subject of bitter complaint on the part of the liberal historian Theodore at later awarded the Nobel Prize. Adolf Stoecker, in his official function as “Hofprediger” (preacher of the imperial court in the protestante cathedral opposite the Imperial castle), made use of such resentments in order to gather together a political movement against the Social Democrats. They explained the social and economic tensions of the times and particularly the crisis of the “medieval” middle classes on the grounds of internal contradictions of a “bourgeois society”. Stoecker however attempted to divert criticism of capitalist society in the direction of the Jews, in the hope of finding a broad basis in the middle classes which found themselves in the same time endangered by modern capitalism as well as by the worker’s movement. Aided by anti-Semitic prejudices, behind which stood a basic feeling of Christian “anti-Judaism” that had been in existence for nearly 2000 years, he agitated by means of giving a new costume to the old anti-democratic resentments.

Records of the Ministry give witness to the fact that the major reason for Hugo Preuss not being offered a post as professor at the University of Berlin was his Jewish family background,<sup>2</sup> similar to the case of the great Georg Jellinek at the University of Vienna. Count Ernst von Mirbach, Court Marshall to the Kaiser’s wife, intervened with the Ministry and successfully prevented his appointment. Von Mirbach called him a “mocking Jew” who stood against the authority of the state and was “indeed so suspiciously far to the left of the political mainstream of the time that he was in danger of mixing with the *vaterlandslosen* Social Democrats”.

As late as today, more than 75 years after his death, it seems as though the aim of the *Kreuz-Zeitungs-Partei*, as they had been calling themselves since 1918, has in fact been achieved, at least in the end result, namely to strike “this Jewish democrat” from national memory. No academic or political institution has utilized his name, neither then nor now. The only object to bear his name in Berlin, his city of birth, a bridge, was completely destroyed, as was the Tiergarten quarter in which he lived, in the course of Hitler’s war. The divided and now reunited city of Berlin has still not decided to devote any visual memorial to the name of one of its most significant sons.<sup>3</sup>

The Weimar Republic and its organs were vilified in the public eye and ear, without receiving any protection whatsoever from the courts. A term used – and meant to be particularly disparaging – was that of a “Jewish republic”. Hugo Preuss dealt with this accusation, subjecting it to thorough examination and analysis at a major public rally shortly before his death. He looked at the background of this prejudice:

“The Constitution of Weimar has made a modern democratic German state the basis of political organization of the German people, after the breakdown following World War. With this, it has

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2 Gillessen, Guenther, *Hugo Preuss. Studien zur Ideen- und Verfassungsgeschichte der Weimarer Republic*, dissertation (1955), Berlin, 2000, p. 64.

3 In the city of Kassel, located in the federal state of Hesse, where Philipp Scheidemann held the office of mayor at one time, there is a street named after Hugo Preuss; in the city of Erfurt, in the federal state of Thuringia, Germany’s Federal Labour Court resides on Hugo Preuss Square.

taken up the efforts, wishes and thoughts of the best Germans of past generations. And yet there is shouting in the smallest of streets that it is an un-German work, a Jewish Constitution, simply for the very secondary fact that I, a Jew, had the privilege of working, together with others, on the drafting of this new constitution.”

In order to explain what lies behind this accusation, he gives an overview of Germany’s historical development. While England and France had consolidated themselves into territorial national states at an early stage, “statehood” stood in contrast to “cultural unity of the nation” in Germany for centuries. The formation of a state in Germany did not take place on the level of a *Reich*, or unified empire, but rather – after the downfall of the medieval Emperor’s authority – on the level of a sort of “rag rug” made up of mass of absolutist “territories of princes”, with their officials as “servants of princes” and their mercenary armies. Although the economic development of the urban middle class actually needed an extensive market, “statehood” in Germany had, down through the centuries, always begun with only “patrimonial authorities”, who attempted to force political unity “from the top down”, instead of consolidating the political community “from the bottom up”, which would have corresponded to a “national development”.

“It was an authoritarian regimen from top to bottom, of patrimonial manner, with exclusions of all sorts. There was a lack of fluidity as would belong to a national common ground of the entire public life. Thus barriers to all sides, formation of classes everywhere. And how should one then not shut out the Jews above all, when each was trying to shut out the other, in patrimonial narrowness? Yes, it was even more than that: the discrimination *of* the Jews was almost an instinctive, an involuntary expression of holding on to the outmoded traditional forms of authority, of aristocracy, of patrimoniality, of feudality.”

The first example of an identification of modern political organization with the term “Jew republic”, meant as an insult, comes from a time in which the Jews in Germany were not able to play any political role whatsoever, because their legal “emancipation”, their recognition as citizens with equal rights, was not much more than a program for the future.

“A most characteristic symptom: when, together with the union of these German authoritarian, territorial conditions as well as France, which had seen a regeneration through its great Revolution, the state of Frederick the Great, too, broke down, and the reforms as propagated by Stein and Hardenberg wished to lay the first basis for a development, and were able to do so only in part, the aims of which were of necessity the modern development of a national state, that was when the “Junker” von der Marwitz, a great lover of argument, exclaimed his now famous words: namely, that the reformers wanted to make a *newfangled Jew state* out of the old royal Prussia! And this in about the year 1810! Just imagine that! At that time, there could have been no talk of Jewish influences in politics – the ink being hardly dry on the paper in regard to the beginnings of emancipation (...). What can the gentleman von der Marwitz, hardly stupid, in fact highly intelligent and highly energetic, been thinking of when he used the term *newfangled Jew state*? What he was thinking of with *newfangled state* I can well imagine. That was to be seen over there in France. And the *epiteton ornans* “Jew” had already been added at that time, devoid of sense and reason, simply to make something contemptible, despicable. For what had been seen, up to that time in Prussia, of Jews in the public life? I know of only one thing to mention, that a Jew had had the audacity to be a better writer than Frederick the Great. It was Moses Mendelssohn. Otherwise, I know of nothing in which Jews had made themselves burdensome or of annoyance in politics. But that itself is characteristic, most typical. Every attempt, every move to lead the German people into the flow of modern democratic national and state development calls up, as a natural matter of course, the enraged resistance of all the old powers and forces (...). You, noble German, have an Aryan distaste for freedom, for democracy, for na-

tional independence. These are foreign inventions, this is a foreign poison, which is to be forced down your throat by those foreigners living among you, the Jews.”<sup>4</sup>

At the turn of the 19<sup>th</sup> to the 20<sup>th</sup> century, there existed an incomparable chance. The possibilities for an emancipation of the Jews corresponded to the possibilities of a political liberation and “self-rule” for the Germans. For more than a millenium, Jews had lived in Germany. A large majority of the Jews in the world spoke a dialect which takes its origin from Middle High German. Theodore Mommsen had considered it absolutely imperative, following the establishment of the German *Reich*, for a liberal, urban and worldly middle class to overcome the old limiting regionalism. Out of Bavarians, Wuerttembergers, Hessians, Saxons, Brandenburgers and other “tribes”, a nation of Germans would have to be created.<sup>5</sup> At the beginning of the new century, Germany experienced what was nearly a “second age of genius”, with a dynamic upswing and numerous great achievements. “From where came this creativity, this upswing in almost all fields?” The Jewish contribution in the form of urbanity and enlightened education was in any case helpful. The many starting points of a German-Jewish cultural synthesis have enriched our country and contributed substantially to the world reputation of German science and culture. Hugo Preuss was a prime example of this. Among his political and academic contemporaries, he was considered a rock of Berlin’s intellectual scene, full of wit with words and acuity of mind, a passionate local patriot, an Anglophile, and a citizen of the world. But these great perspectives failed, due to the backwardness of conditions of the times. Chauvinism and “anti-national nationalism” destroyed the life’s basis of the country they purported to strengthen. The failure of Weimar and the rise of National Socialism were characterized by Fritz Stern as “greatness, gambled away”.<sup>6</sup>

### **Is the democratic people’s state un-German?**

In 1871, Bismarck had founded the national German state only “from the top”. The point now was to finally fill it with life “from the bottom”. The “wars of liberation” had in fact thrown off the Napoleonic yoke, but they had not made Germany free. The “contradiction between the hopes of the patriotic fights for freedom and the real results of the wars of liberation” was painful.<sup>7</sup> With great passion and as long as he had breath in his body, Hugo Preuss never ceased to campaign tirelessly for the aim of having a Democratic Republic, in which the very early beginnings of freedom of the city and sovereignty of the people, going back as far as the 13<sup>th</sup> century, were to find their final unfolding as well as inner consistency.

Preuss took as his starting point the monumental work of history by Otto von Gierke, who had seen a “unifying nature of things” to be functioning in the early forms of union

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4 Preuss, Hugo, *Die heutige politische Lage und das deutsche Judentum*, in: *Juedisch-liberale Zeitung*, 5th year of publication, No. 26 (26th June 1925), 1st supplement.

5 Mommsen, Theodor, *Auch ein Wort ueber unser Judentum* (Berlin, 4th edition, 1880), as quoted by Walther Boehlich (Ed.) in: *Der Berliner Antisemitismusstreit*, Frankfurt-on-Main, 1988, p. 219.

6 Stern, Fritz, *Verspielte Groesse, Essays zur deutschen Geschichte*, Munich, 1996.

7 Preuss, Hugo, *Entwicklung des deutschen Staetewesens* (1906), reprint, Darmstadt, 1965, p. 302.

in the Middle Ages;<sup>8</sup> in sharp contrast to a rule or reign put in place “from above”, it was also possible to organize “unity in multiplicity” as a common matter and a unity of people “from below”. Such “cooperative” kinds of organization found expression in a variety of forms: in village and regional community, in cooperatives of citizens, in brotherhoods, guilds and trade unions, in associations of a “civil society”, and finally in the fusing of “citizenry and city” into a unified idea and expression of city. Gierke’s central concept, with the help of which he interpreted these specific forms of historical development, was his idea of “association”.<sup>9</sup> The first volume of his work entitled *Genossenschaftsrecht (Law of Cooperative Societies)* begins with the sentence:

“What the human being is, he owes to the union of human being and human being. The possibility to create associations, which not only increase the strength of those living at the same time, but above all connect past generations with those to come, by means of their continuity, a continued existence which lives on and remains beyond the personality of the individual, is what gave us the possibility of development, of history.”<sup>10</sup>

Preuss attempted to draw these lines even further. For him, a democratic republic was not a newfangled invention. External occurrences and events only deflected tendencies to this end, seeming to lead to this goal since the oldest of times, so that the very promising early starting points apparently withered away time and again.

Gierke as well recognized in medieval forms certain tendencies which were structured toward “republican” forms of organization – unified formation “from the bottom to the top”. He as well already saw elements of a “republican” constitution in urban development. Yet this did not cause him to come out in favor of republic and democracy on the state level as well. As a historian, he showed that there had been no “linear” and logical development, because there were as well opposing forces. Since the oldest of times, a formation of unity from “above to below” had likewise made a way for itself. Those who held economic and political power – aristocracy, rulers, kings and emperors – forced “unity in multiplicity” by means of military “power” and “reign”. The cooperative political forms of organization, which seemed to announce themselves above all as republican urban freedom, met with a resistance that had its social roots in the agrarian feudal rule over “land and people” and found its consolidation as the dominant form of society on the continent of Europe in the absolutism of early modern times. Gierke remained in a “dualism” which set both principles of organization – “reign” or “ruling power” versus “cooperative” – next to one another as alternative possibilities. He also coined the term *Obrigkeitsstaat*, or authoritarian state.

“The nature of this thought – though by the way, so great may be the difference between the authority which demanded obedience of Luther, or the *l’état c’est moi* of Louis the 14<sup>th</sup>, and the ‘first servant of the state’ in the understanding of Frederick the Great – this thought has

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8 von Gierke, Otto, *Das deutsche Genossenschaftsrecht*, 4 volumes (1868-1913), reprint, Darmstadt, 1965.

9 Peter Blickle points to parallels in the work of von Gierke and Marx, in: his *Gemeinde und Staat im Alten Europa*, Munich, 1998 (*Historische Zeitschrift*, supplement 25, edited by P. Blickle), introduction, p.20; Blickle, *Otto von Gierke als Referenz. Rechtswissenschaft und Geschichtswissenschaft auf der Suche nach dem Alten Europa*, in: *Zeitschrift fuer Neuere Rechtsgeschichte*, No. 17 (1995), p. 247.

10 von Gierke, *Genossenschaftsrecht*, Volume 1 (footnote 8), p. 1; see Blickle, *Gierke als Referenz?* (footnote 9), p. 247.

remained identical irregardless of all its progressive clarification and spiritualization – indeed, it still occurs in all the multitude of state constructs of the philosophers of the 17<sup>th</sup> and 18<sup>th</sup> centuries and the idea of state of the French Revolution in the same way(.) ... If we observe the particular form that the thought of authority took on in Germany, then we recognize that it is just as much a potentialization of the idea of reign as did before the concept of community come from a potentialization of the old cooperative organizations(.) ... Whereas therefore the constitution of a commonwealth (*Gemeinheitsverfassung*) determines the organization by means of which the entirety of community may rule itself, the authoritarian constitution contains the organization through which the entirety of community is ruled. In the concept of *citizen* are to be found political right and political duty, rule and obedience, active and passive participation in the community; in the concept of *subject* (*as an underling*) the subject has legal authority only in private law, in public law he is merely object, he stands in the state as the layman in the church. Thus the community demands the participation of the citizen in administration, jurisprudence and legislation, and tends to the principle of election, collegiality and majority; authority urges the exclusion of subjects from public life and promotes the centralizing administration through appointed uniform organs. When thus the authoritarian principle strives for realization of the *absolute* state, so does it seem at the same time a *police* state(.) ... More and more decisively, the authoritarian state (...) acts *outside* and *above* the law and becomes the opposite of the *rule of law* as formed by the community, *i.e.* a state which stands within the law and understands law as the limitation of its acts, – whose organism is itself law –, and strives for unity of state and law as its ultimate aim.”<sup>11</sup>

Seen in historical perspective, this was a great step: it broke through the oneness with which historians, later Max Weber as well, looked at the development of state and society primarily in categories of a sociology of “rule”.<sup>12</sup>

For Hugo Preuss, each of these sentences was one that he could affirm. Strangely enough, however, Gierke and Preuss take completely different political directions. In the case of Gierke, his “dualism” made it possible for him not necessarily to adhere to the principles of urban freedoms, of *res publica*, republic – the tendencies which he himself had worked out – when it came to his own personal preferences. He himself in fact opts, in the concrete political constellation of his times, for the opposite principle – for “reign” as he had described in such sharply drawn contours. Under the spell of influence cast by the external success story of Bismarck’s empire, Gierke, who had been awarded an aristocratic title, idealized the constitutionalism of the Prussian-German monarchy, still wearing the cloak of authoritarianism, as an already achieved “state of the people”.

In contrast to his teacher, Preuss did not regard the two principles of organization as “dualistic”, existing side by side, as though one could opt either for the principle of “reign” or that of “cooperative”. Preuss takes the part of the cooperative form of organization. He gives reasons for this. From a perspective encompassing world history, he recognizes a “resultant”, which, coming out of the forces and counterforces active in society, shows itself in the long term and in all places, and must of necessity lead to an organization of political community “from bottom to top”. His term *Volksstaat*, or state of the people, means: “All power of state lies with the people”.<sup>13</sup> This corresponds to the

11 von Gierke, *Genossenschaftsrecht*, Volume 1 (footnote 8), p. 642-3.

12 Blickle, *Gierke als Referenz?* (footnote 9), p. 245 and 248.

13 Hintze, Hedwig, *Hugo Preuss. Eine historisch-politische Charakteristik*, in: *Die Justiz*, II (1927), p. 226.

assumption, widely accepted today, that democracy represents a universal means to regulate social conflicts, to which there is no longer any real alternative.

But democratic conditions do not come automatically. Particularly in Germany, there were counterforces for centuries, leading to a blockade of political development. A decisive turning point that prevented “urban liberty” from becoming a “dominant” structure is connected with the person of Frederick II of the House of Hohenstaufen in the middle ages. He recognized citizens and peasants in the valleys of Switzerland as “freemen” who “owed obedience only to the Empire”,<sup>14</sup> yet retreated in the face of the power of territorial princes in his other regions. The German emperor did not ally himself with the urban middle class against the high aristocracy. Quite the contrary: in the *constitutiones ad favorem principum*, he stood against the cities, whose interest would have been to support the emperor against such princes. Moreover, the emperor – like the territorial princes later as well – became more and more dependent upon the urban middle class, which was gaining steadily in power and influence, both economically and culturally. In light of the ever higher expenses connected with maintenance of court as well as of the military, neither the emperor nor the absolutist princes could manage on the agrarian revenues. But the emperor was no longer in a position to ally himself with the urban middle class against the territorial lords,

“because, by reason of more deeply lying causes, fragmentation had already advanced to such a stage that the prerequisites for a unified national state culture on an urban basis are no longer given.”<sup>15</sup>

In England, however, by means of the Model Parliament of 1294, the Crown had succeeded in bringing together the entire country in a House of Lords and a House of Commons, the latter comprising representatives from all communities of England. France as well took an early path to the form of a territorial state, even if it was not until the Great Revolution that a many feudalistic bits and pieces were completely done away with.<sup>16</sup> In Switzerland, the free peasants of the rural communities, together with the free citizens of city communities, were able to make their territories “impenetrable” for absolutist rulers.<sup>17</sup> In the German territories, however, “urban freedom” was limited to small islands, and these were unable to build a bridge to the rural communities, which remained oppressed and forced into obedience by feudal powers up to the time of the French Revolution.<sup>18</sup>

“A strong and firm solidarity of the Empire with the cities against the feudal aristocracy could perhaps have led here to the building of a German national state of urban culture. But the Empire itself was already fragmented by feudalistic structure, the Kaiser not the head of the people, but the ally in class of the high aristocracy. Thus, at a critical hour, German development took the opposite path. The *Empire* dissolved into a conglomerate of territories, rulership

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14 Blickele, Peter, *Kommunalismus. Skizzen einer gesellschaftlichen Organisationsform*, Volume 2 (Europe), Munich, 2000, p. 87.

15 Preuss, *Staetewesen* (footnote 7), p. 37ff.

16 Brette, Armand, *Les limites et les divisions territoriales de la France en 1789*, Paris 1907.

17 Preuss, *Staetewesen* (footnote 7), p. 101.

18 Preuss, *Staetewesen* (footnote 7), p. 101ff.

passing to the high feudal aristocracy and the landed princes. Empire and cities had not fought side by side, yet together they were the losers.”<sup>19</sup>

In long struggles full of contradictions that were finally at an end in the 16<sup>th</sup> century, the absolutism of the landed princes subjugated the cities and made them part of its territorial organization. It destroyed the medieval “freedom of the cities”, yet was dependent on the modern money economy that had developed in the cities, based on trade and commerce. In this, the cities had gone beyond more primitive forms of older agrarian economies, in fact coming back to the more highly developed forms of economy of antique times. These lords of the land took over the modern principles of a “city economy”, promoted the urban bourgeois, upon whose wealth they were dependent. They were obliged to leave these people in the cities at least some cultural freedoms, in addition to the economic ones; yet they abolished the inner political liberty of the city community for centuries to come.

Preuss felt himself to be in agreement with Otto von Gierke in his description of the development of urban community. Another point in which they were also in full agreement was their celebration of *Reichsfreiherr* Karl von Stein’s *Staedteordnung*, or city constitution, in 1808 as the great new beginning. The Prussian king had reluctantly called upon him to introduce at least a few urgent reforms, following the collapse of the antiquated system of Frederick the Great after the blows dealt by Napoleon. The other side, that is to say, the underside of this absolutist authoritarian state had been the completely apathetic population deprived of all political rights. Von Stein was to have the task of overcoming this apathy. To this end, he restored the “urban liberty” that had been destroyed by the territorial princes.

In this endeavor, however, the renewal of freedom in the cities was to be only a first step. If a free society of citizens was meant to emerge, liberation of the peasants and formation of a national representative body had to follow. But von Stein was dismissed before he was able to complete his work. A century after von Stein’s city constitution, Hugo Preuss felt the time to be more than ripe for realization of the second step, which the Prussian crown had prevented the great political reformer from taking. Preuss could not understand what should be so “un-German” about this.

Recent research in the field of urban history confirms the theory of Preuss that “republican” tendencies had been visible also in Germany since the late Middle Ages, which actually went in the direction of a truly democratic constitutional state. The blindness even of major and important scholars towards these tendencies of their own history – as well as the belated and hesitant involvement of “heartfelt monarchists” who had at least become “republicans by reason”<sup>20</sup> – had not set strong enough barriers of a democratic culture against this agitation, which was later to bring Europe to ruin.

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19 Preuss, *Staedtewesen* (footnote 7), p. 5.

20 Schefold, Dian, *Hellers Ringen um den Verfassungsbegriff* in: Christoph Mueller/Ilse Staff (eds.), *Der soziale Rechtsstaat. Gedaechtnisschrift fuer Hermann Heller. 1891-1933*, Baden-Baden, 1984, p. 556.

### “Republican tendencies” in the nature of cooperative organization

The greatest scholarly opponent of von Gierke was at that time Georg von Below. He battled, with all his energies, what he believed to be the seemingly dangerous “republican mood” and the “liberal and democratic features” which he saw in the Gierkes’ theory of cooperatives. He wanted to “nip it in the bud”.<sup>21</sup> But von Gierke had restricted himself to the mere observation and description of the social processes. In fact, he never draw conclusions from the democratic and republican tendencies, for which he had seen starting points in his historical research and which von Below so feared. This remained to be done by Hugo Preuss. However, in the eyes of von Below, it was not enough to save the honor of von Gierke, that Preuss openly pursued his dissent with von Gierke and von Gierke in turn rejected the conclusions of Preuss.

In his Habilitation (a postdoctoral thesis, relating to qualify as a university teacher), which was in fact dedicated to von Gierke, Preuss had already made clear, albeit respectfully and in all friendship, that he was against his teacher’s adherence to the traditional concept of sovereignty (cf. Karsten Malowitz in his article on Preuss and Gierke, see above, footnote \*, p. 123-150). Preuss regarded this concept as antiquated, due to its close connection to absolutism, and because it had served above all to allow the princes to escape any binding accountability by law. And he was of the opinion that von Gierke would have to agree with this. But his teacher did not; he continued to adhere to the absolutistic concept of sovereignty – meaning a stance against Preuss – and refused to accept the consequences of his own republican and democratic discoveries. Thus Preuss developed an interpretation of von Gierke of which von Gierke himself disapproved.

But Preuss was not alone in holding von Gierke to his own epoch-making insights. Too little recognition has been given to the fact that Preuss found substantial impulses for his concept of the democratic state of the people in English traditions of a balanced relationship of the different levels of decision in local and national government – and this also “disappeared” to a great extent against the backdrop of the day-to-day political polemics of the Weimar discussions concerning state and constitution. Today, a great deal of the meaning and significance that the work of Preuss currently has for us stems from his success in utilizing the new traditions of law - which von Gierke had raised to general public consciousness – for a new foundation of democratic thinking.<sup>22</sup> In the same way, the earlier English theorists of pluralism made use of the possibilities of thought to be found in von Gierke’s cooperative theory without worrying much about his own personal political options – just like Hugo Preuss.

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21 Blickle, *Gierke als Referenz?* (footnote 9), p. 249; Otto G. Oexle, *Rechtsgeschichte und Geschichtswissenschaft* in: Dieter Simon (ed.), *Akten des 26. Deutschen Rechtshistorikertages*, Frankfurt-on-Main, 1986, 1987, p. 87, 90; Otto von Oexle, *Die mittelalterliche Zunft als Forschungsproblem. Ein Beitrag zur Wissenschaftsgeschichte der Moderne* in: *Blaetter fuer deutsche Landesgeschichte*, 118 (1982), p. 25, 31; Boeckenfoerde, *Zeitgebundenes Denken in der deutschen verfassungsgeschichtlichen Forschung des 19. Jahrhunderts* (1961), 2nd edition, Berlin, 1995, p. 157 and 162.

22 Kuemin, Beat, *„How good Gierke is“! F.W. Maitland in seinem europaeischen Kontext. Ausschnitte aus einer akademischen Korrespondenz der Jahrhundertwende* in: *Zeitschrift fuer Neuere Rechtsgeschichte*, 17 (1995), p. 268.

Historical and political comparative studies have not yet ventured much beyond insinuations of connecting lines of thought between the cooperative theory and English pluralism.<sup>23</sup> In the lines of tradition of the theory of pluralism in Germany, von Gierke's school of thought is acknowledged, namely for its ground-breaking studies of collective labor law,<sup>24</sup> – without absolutely no mention, however, of the impact of Preuss in this respect.<sup>25</sup>

Von Gierke and Preuss went separate ways on the great issue of what conclusions may or should be drawn from this new research. Even if von Gierke fought the “Romanists” in the battle of schools of thought in regard to law taking place at the time, becoming himself the head of the “Germanists”, this did not yet amount to his being narrowly “enamored of all things Germanic” at the start. His rejection of Roman thinking on law in the absolutist traditions on the continent of Europe envisaged in historical perspective all the free, cooperative formations of law of the entire Anglo-Saxon cultural world including the United States. He saw them originally as allies. But when it came to the period of transition from the Bismarck constitution to Wilhelmism and then to the Weimar Republic, von Gierke was not prepared to tolerate the republican conclusions made by his student Preuss. Malowitz (see above once again) shows how their estrangement increases and finally comes to a head after 1918. As the failure of Bismarck's half-constitutionalism becomes evident, von Gierke opts decisively for the monarchy.<sup>26</sup> Even his concept of “social consideration”, which was the central aim of his fight for the German *Buergerliches Gesetzbuch*, or *Civil Code*, of 1900, was in the end completely absorbed by Bismarckian “state socialism”, whereas Preuss, who also considered Bismarck's social policy to be sorely lacking, sought a balance between the reform oriented part of the bourgeoisie with their sense of freedom and those supporting the Social Democrats. This, however, in von Gierke's eyes, was going too far and therefore no longer acceptable.

### The paradigm of English local government

Hugo Preuss, looking to the future at the beginning of the new 20<sup>th</sup> century, wished to bring to fruition the old democratic and republican tendencies which von Gierke had shown in his theory of the cooperative. But this desire for their full development stood in contradiction to the commonly taught views of most German public and constitutional jurists as well as historians, even Otto Hintze, who was most innovative in his me-

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23 Fraenkel, Ernst, *Deutschland und die westlichen Demokratien* (1964), enlarged edition 1991, p. 202ff.; Adolf M. Birke, *Pluralismus und Gewerkschaftsautonomie in England. Entstehungsgeschichte einer politischen Theorie*, Stuttgart 1978.

24 Sinzheimer, Hugo, *Juedische Klassiker der deutschen Rechtswissenschaft*, Amsterdam 1938; Fraenkel, *Deutschland* (footnote 23); see as well Blickle, *Gierke als Referenz?* (footnote 9), p. 260.

25 Kremendahl, Hans, *Pluralismus in Deutschland. Entstehung, Kritik, Perspektiven*, Leverkusen 1977.

26 „... while continuing to uphold freedom of association in principle, he in practice identified group personality and fellowship above all with the fortunes of the German nation-state. ‘Prusso-German to the bone’ (U. Stuetz, *Zur Erinnerung von Otto von Gierke. Gedaechtnisrede in: Zeitschrift der Savigny Stiftung fuer Rechtsgeschichte*, Germ. Abt. 43 (1922), p. 43 ), he was borne along on the nationalist tide, then shattered by the defeat of 1918”, Antony Black, *Guilds and Civil Society in European Political Thought from the Twelfth Century to the Present*, 1984, p. 216.

thods of work. We owe to him fascinating insights into the historical conditions of the representative institutions; it almost seemed at times that he was in fact predestined to build the bridge to the Western European constitutional state. However, he too, justified “the tenacious perseverance of the monarchist principle” and the Prusso-German military state, using for his argument the “Seely theorem”, according to which “the extent of political freedom in a state” must, in terms of reason, be “in opposite proportion to the military and political pressure that weigh upon its borders.”<sup>27</sup> This “pressure on the borders” could be diminished, however: Prussian Germany would only have needed – following the hesitant efforts during the period of reform of Freiherr von Stein – to make its definite peace with the Western European constitutional state. At least at the beginning of the 20<sup>th</sup> century, it should have been possible to see, i.e. to realize the inner instability and lack of principle embodied in a “state by God’s grace” and a “personal regime” of rule and power.

Instead, the constitutional work of Weimar, which showed a constructive way out of the contradictions and blockades from centuries of German fallible development and was also suitable for a breakthrough, namely out of the tragic self-isolation of Germany, met with a decisive rebuff on the part of most. Preuss was accused of having “overburdened” the citizens of his country with his “radicalism”, even though his concept of the Weimar National Assembly meanwhile served a completely new aim, namely to ban the danger of a Bolshevik experiment. If the concept of a democratic republic appeared reactionary to the revolutionary forces, then any attempt to restore the “constitutional monarchy” in this situation would have been equivalent to pouring oil on the fire. Likewise, Preuss cannot well be blamed for the difficult and unpleasant circumstances which hindered his constitutional work and about which he complained bitterly. He had long since warned of the dangers that now appeared. Rather than listening to the messenger, all directed their hate at the messenger.

In addition to Otto Hintze, it was above all Rudolf von Gneist to whom we owe basic studies of the English representative constitution. He had shown how in England the

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27 Hintze, Otto, *Das monarchische Prinzip und die konstitutionelle Verfassung* (1911) in: Hintze, *Staat und Verfassung*, Collected Papers, Volume 1, 3rd edition, Goettingen 1970, p. 366; see also Hintze, *Staatsverfassung und Heeresverfassung* (1906), see: quoted above, p. 81-83; John R. Seely, *Introduction to Political Science*, London 1896, p. 134. See here Hugo Preuss, *Deutsche Demokratisierung* (1917) in: *Staat, Recht und Freiheit. Aus 40 Jahren deutscher Politik und Geschichte*, edited by Else Preuss, Tuebingen 1926, reprint Hildesheim 1964, p. 339ff: „The point of view that a strict and well-organized authoritarian system is a necessary prerequisite for Germany in order to exercise and maintain its power, due to its central political and geographical location and the pressure upon its borders, has always been promulgated and disseminated here among us with as much fervour as success. The bitter experience of the world war has gradually begun to shake the foundations of this notion in that it shows all too clearly that Germany, in terms of foreign policy, is by no means strengthened by the great contrasting difference of its internal political structure as compared to all the other modern states; rather, it is sorely weakened, and the international pressure put upon it heightened to an unbearable degree. This experience shows that the governments rooted in the common will of the people are stronger and more able to act than an authoritarian government relying only on its own authority.” - Later, Otto Hintze arrived at a strong relativization of the Seely theorem and admitted that “the powers of resistance in the democratic nations had proved to be superior to those of empires taking their legitimation from monarchism”, Otto Hintze, *Liberalismus, Demokratie und auswaertige Politik* (1926) in: Hintze, *Soziologie und Geschichte*, Collected Papers, Volume 2, 3<sup>rd</sup> edition, Goettingen 1982, p. 200.

same dignitaries who represented local government at the community level of local government were in a position to organize a central government in Westminster comprising government and opposition. Preuss admired the research studies of von Gneist, who had gone beyond the abstract categories of von Gierke's cooperative theory, making the permanent parliamentary institutions of England on the local and national levels his direct object of research.

But just like Otto Hintze, who considered the Prussian military state unavoidable, and Otto von Gierke, who had made his peace with the half-hearted constitutionalism of the Bismarck version of constitution, Rudolf von Gneist also retreated in fear from the consequences of his own studies, although definitely still having his roots in the movement of 1848. Von Gneist began to doubt his own model as he saw how suffrage reforms led to shifts in internal powers. He was displeased by the coming to an end of "parliaments of honorable people of rank" on the local and the central level.

The English representative constitution was rooted in conditions that predated democracy. It was able, however, to maintain itself as a structure of organization of great integrative strength when new political classes appeared in the period of Industrialization. In England, it was helpful that democratic and social impulses were for the most part reform-oriented, free of the "socialist fundamentalism" of orthodox Marxism. But the election successes of the Social Democrats in Germany clouded the historical view of things. Deeply convinced of the "terrible danger" of Social Democratic platform and agitation, the majority of those political forces who in fact should have had an interest in liberal developments of society, economy and politics instead grouped themselves around the "governmentalism" of the existing powers.

And yet Rudolf von Gneist did integrate into this new governmentalism elements which had been important in the liberal movement and remained important: even if liberalism in Germany had failed politically, it had demanded the development of constitutional structures in government and administration. Von Gneist himself was deeply convinced of the dangerous nature of Social Democracy and had no doubts about "coordinating" police oppression of the Social Democrats by means of an administrative law in the German Reich. But

"a judicial [criminal] law against Social Democracy which places instigators, participants and abetors under penalty for their acts seems to me to be impossible. Were it possible, it would certainly have already come to pass, through the efforts of all sides. It appears impossible, because the characteristics of an extremely dangerous Social Democratic agitation cannot be circumscribed by law as the facts of a case constituting a criminal offence." – "A movement directed against state, church, society cannot be prohibited in general without rescinding the freedom of expression of thought. For all of public life is based on a chain of justified efforts towards improvements, therefore changes in state, church and society. All of legislation consists of progressive reforms, therefore changes in state and society. An ongoing penal law against Social Democracy would thus be in contradiction to the nature of freedom of the press, freedom of association, in particular, however, to the right of coalition of the working classes, this right being now irrevocably recognized by German legislation, in agreement with the civilized nations of Europe, as a basis of the society of today."<sup>28</sup>

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28 von Gneist, Rudolf, *Das Reichsgesetz gegen die gemeingefährlichen Bestrebungen der Sozialdemokratie, staatsrechtlich erörtert*, Berlin 1878, p. 3ff.

Von Gneist was by no mean thinking of building a bridge to Social Democracy. But nevertheless it was still of great value that von Gneist wished to place administration under the control of law and that he introduced judicial review of administrative acts in Prussia (cf. Dian Schefold: *Selbstverwaltungstheorien: Rudolf Gneist und Hugo Preuss*, see footnote \*, p. 97-121). Even if the “lawfulness” of administration was not yet to be measured according to the standard of “subjective rights” of citizens, but only thought of in the sense of a control of formal legality in the “objective” sense, it was still a “germinal seed” in that independent courts forced their way into the very center of all that was sacred in state administration. No one would wish to do without this today. But control by law in the interest of an inner rationality of public administration is no sufficient substitute for the political rights and liberties, for which no room had been allowed in the governmentalism of the Bismarck constitution.

As much as Preuss may have felt himself allied with von Gneist in earlier times, he now made a clear turn away from the latter’s patterns of interpretation of a rule of dignitaries, which indeed were far removed from democracy. From the turn of the century on, Preuss went more and more deeply into his reception of the British model – following the work of Josef Redlich,<sup>29</sup> who, in substantial material, had shown the internal democratization and the new socio-political aims of the English system of communal administration, while in Germany the depolitization of the middle class continued on.

### **The claim of neutrality of state and administration as a form of “depolitization”**

Since the times of “political romanticism”, major German intellectuals have attempted to idealize the unquestionable cultural riches of their own society, with its inner lack of political freedom at the same time, as “inwardness protected by power”, and to pretend that such a German “culture” is superior to western “civilization”. An opposition of “civilization” and “culture”, the very idea of an “apolitical culture” – these notions were completely foreign to the thinking of Preuss. The paradox of an uncivilized state of culture would have been as incomprehensible to him as it would have been to

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29 Redlich, Josef, *Englische Lokalverwaltung. Darstellung der inneren Verwaltung Englands in ihrer geschichtlichen Entwicklung und in ihrer gegenwaertigen Gestalt*, Leipzig 1901. Contrary to von Gierke, Redlich affirmed and approved of the democratization of local and central government in England, a country he visited for some weeks every year. He rejected the legalistic “state scholastics” of Laband and Jellinek and was likewise no supporter of Kelsen; rather, he cultivated close contact with F.W. Maitland and A.V. Dicey, whose works instilled in him a “final immunization against the Prusso-German doctrines of state law”. He was also a close friend of Sidney and Beatrice Webb, followed the developments of the London School of Economics, established in the spirit of the Fabian Society, and enjoyed great esteem in England. Other than a few episodes of return to Austria, he turned away for the most part from the objectionable traditions of continental Europe, wrote an influential report on the American methods of teaching law, and accepted a professorship at Harvard in 1926. Whereas Preuss was fighting for a German understanding of the development of parliamentary democracy in England, Redlich would seem to have regarded this as a lost cause. See in this connection as well F. Fellner (ed.), *Dichter und Gelehrter. Hermann Bahr und Josef Redlich in ihren Briefen. 1896-1934*, Salzburg, 1980, p. 530ff; Detlef Lehnert, *Kommunale Institutionen zwischen Honoratiorenverwaltung und Massendemokratie, Partizipationschance, Autonomieprobleme und Stadtinterventionismus in Berlin, London, Paris und Wien. 1888-1914*, Baden-Baden, 1993/94, p. 40, 69, and 88.

Western European intellectuals. For him, culture and politics belonged together. The life of Hugo Preuss

“belonged to science – the pursuit of knowledge – and to politics, not as two fields of life which he entered alternatively, but rather as two forms of expression of the same work, of which the one was complement and confirmation of the other”.<sup>30</sup>

The “piety towards the state” of that time, meaning the exaggerated devoutness exhibited by certain groups, justified its contempt towards politics by claiming that state and administration stood above the parties, in selfless service of only the general good of the public. In the discussions of the Weimar Republic, Gustav Radbruch had called this attribution of a “non-party” character to the state administration “the greatest lie of the authoritarian state”.<sup>31</sup> Preuss had already formulated with preciseness that the feigning of a “neutral” nature of the state was only for the purpose of oppression of the oppositional parties. Behind the government stood, however, the parties of the right, at whose mercy lay the entire body of state and administration, one may say. They spoke of “the welfare of the public” and tried to hide their political manoeuvres behind the curtain of “neutrality”, in order to be beyond criticism. They often even operated behind the back of the Crown and made use of this terminology just for their intrigues.

His basic studies of constitution and administration brought Preuss to the conclusion that a parliamentary democracy must of necessity have political parties, being “partisan” in nature in this sense. As there are no objective or scientific final answers to the question of what is the “general good” here, the argument on the subject can only be decided “politically”, in the forms of democratic vote and election.

Seen from this perspective, it was a disastrous, even fatal, blockade for the development of democracy in Germany that Bismarck made every possible effort to reduce the parties to the level of pure representation of interests and to keep them away from any direct political responsibility. The parties were thus supposed to remain unable to take the government into their own hands. The authoritarian state is based

“by no means on the suppression of the political will of the people by a ruling caste(;) ... authoritarian government is, however, insurmountable, because it is indispensable as long as there is no other potent power able and willing to govern, coming from the general political will”.<sup>32</sup>

Only under the pressure of responsibility for government do parties become able to serve in governmental functions. And it was this that Bismarck’s governmentalism wished to prevent. He therefore stopped parties from becoming a real opposition. As long as a party does not develop “a strong will for political power”, it can content itself with the negative politics of an opposition “dedicated to the purity of convictions”, whereas a real “parliamentary” opposition aims at taking over the responsibility for the entire country one day and being in a position to decide norms in its legislative activities,

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30 Feder, Ernst, *Hugo Preuss. Lebensbild*, Berlin 1926, p. 5.

31 Radbruch, Gustav, *Die politischen Parteien im System des deutschen Verfassungsrechts* in: *Handbuch des deutschen Staatsrechts*, Volume 1, Tuebingen 1930, p. 289.

32 Preuss, *Deutsche Demokratisierung* (footnote 26), p. 337.

norms which indeed correspond to its general view of things yet at the same time must be suitable to become generally binding, and therefore make compromise unavoidable.<sup>33</sup>

Moreover, up to the year 1918, a one-sided policy of personnel had also kept democratic forces from gaining experience in administration and judiciary. When the “Weimar Coalition” was obliged to accept responsibility for the failure of the Bismarck constitution, it had no experienced ministerial civil servants and no academics of the state universities at its disposal. There were no Social Democratic constitutional jurists to whom Ebert could have entrusted the drafting of the new constitution. In the person of Hugo Preuss, he called upon an experienced “liberal” constitutional jurist, expert in local government, and a professor of the Handelshochschule (a private Commercial University).

The task facing Preuss was almost impossible: on the one hand, a bourgeois society that was in a state of stagnation had to be propelled in the direction of a completely developed parliamentary democracy, while on the other, at the same time, revolutionary forces – under the motto *Republik, das ist nicht viel – Sozialismus ist das Ziel* (Just a republic, that’s too tame – Socialism is our aim) – who wished to turn away from the liberal republic had to be prevailed upon to calm their “revolutionary impatience”, in order to first bring to a good end the revolution of the bourgeoisie. It was a piece of luck that in this Wilhelminian society there was at least one outsider who brought to this impossible task professional qualifications, political sensitivity, powers of good judgement, as well as drive and energy, showing

“how fruitful the blend of legal and historical thinking in *one* head can become, in particular when a passion as well as a gift for statemanship and politics are also present.”<sup>34</sup>

### Controversies in regard to “legal positivism”

Among academics of a particular genre or field, political controversies are not dealt with openly in most cases. The “interests” that are at stake often become independent of themselves on the level of political consciousness, taking on the form of figures of thought which almost begin a life of their own. Those not in the know, i.e. outsiders to the controversy, find these arguments to be more or less the splitting of hairs. But as soon as one includes the real facts and the background, the political relevancy of these abstractions becomes visible. This is also true of the endless discussions about “legal positivism” as it was developed by Paul Laband.

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33 Cit., p. 343. Great Britain gave an exemplary demonstration of such a responsible opposition. In 1914, Ramsey Macdonald opposed England’s entry into the war. As a result, he lost not only the chairmanship of the Labour Party but his own seat in Parliament as well. He was then reelected in 1922 and went on to become in 1924 the first socialist prime minister in Great Britain. Even if he did fail with his peace policy in the end, he in fact developed an alternative concept able to be expanded, one which could make good use of a democratic Germany, whereas a reactionary nationalism would certainly have anti-national consequences as the result. In this connection, public opinion mocked the supposedly soon-to-come “socialist lords” – see *8 Uhr-Abendblatt – Nationalzeitung*, 77<sup>th</sup> year of publication (1924), No. 6 (8<sup>th</sup> January 1924) – and let the chances pass.

34 Hintze, Hedwig, *Hugo Preuss* (footnote 13), p. 223.

Here as well, it is a variation of the topic of “apolitical” neutrality of state and law. Laband by no means stood for an traditional conservative legitimism; he did not merely continue the old traditions of “public law”, instead he took over categories of civil law with the purpose of developing quite a modern neo-conservative and national-liberal synthesis. The status quo of the bureaucratic and military authoritarian state underwent a completely new division of work with the meanwhile highly industrialized society.

Von Gierke was correct in his great and subtle critique of Laband when he began by admitting that there were in fact good reasons for a strict method of jurisprudence. A legal system must be thoroughly worked through in its terminology if it is to be consistent. This requires the abstraction of legal terms from social reality to a certain extent. But von Gierke accused Laband of overshooting the mark of reasonable legal abstraction. Laband’s “positivism” attempted to create the impression that his “creative dogmatics” – free of all “interests” – served the intransmutable neutrality of law alone. Von Gierke, however, showed that Laband, in his constructions of legal terminology, often only seems to abstract them from the interests behind, concealing only the political motive which was decisive for his dogmatic constructions. This does not exactly make his interpretations “neutral”, but rather gives them – committed to the status quo as they are – an “absolutist character”, as von Gierke also felt.<sup>35</sup>

Hugo Preuss takes up this criticism of Laband as expressed by von Gierke. He, too, criticizes Laband’s legal positivism. He interprets Laband, as do the early writings of Anschuetz – which were still in line with Laband – as an attempted legal reformulation, albeit elegantly, of real political factors of power, in order to justify with these legal constructions – seemingly without interests of their own – the social and political status quo in a hidden way. The character of an objective, neutral and nonpartisan position is therefore a sham.

Yet Preuss was no antipositivist, at least not in the sense of the later “humanities” schools of thought. He never left any doubt about the fact that a positivist-legal core must be and must remain the necessary scaffolding of form, in which contents coming from the themes of society and economics, private law, and politics and constitutional law must all find their place. He did not postulate any theorems of natural law which laid claim to a higher authority than the positively valid law. Courts and administration were to be bound to the laws passed by the legislative instances, according to the principle of “lawfulness”, of “legality”.

Taking support from von Gierke, but going beyond him at the same time and deepening the cooperative theory in the sense of parliamentary democracy, Preuss criticized the politically motivated narrow position in Laband’s legal positivism as an example of “scholastic denial of real phenomena”.<sup>36</sup> He attacked the whole of the conservative, national-liberal understanding of state and offered in place of it an alternative, authentic liberal line of tradition that went beyond the more moderate Albert Haenel<sup>37</sup> and pointed

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35 von Gierke, Otto, *Labands Staatsrecht und die deutsche Rechtswissenschaft* in: (Schmollers) *Jahrbuch fuer Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reich*, 19th year of publication (1883), p. 1097-1195, separate new print run, Darmstadt, 1961, p. 14 and 35.

36 Preuss, Hugo, *Das staedtsche Amtsrecht in Preussen*, Berlin 1902, p. 66.

37 Friedrich, Manfred, *Zwischen Positivismus und materiellem Verfassungsdenken. Albert Haenel und seine Bedeutung fuer die deutsche Staatsrechtswissenschaft*, Berlin 1971.

back to the impulses of 1848, which had been buried during the era of the founding of the German Reich by Bismarck, now, however, part of the new conditions of a meanwhile highly industrialized and urbanized society.

Preuss followed von Gierke in that he spoke out against the strict isolation of jurisprudence from its neighboring disciplines, in contrast to a more desirable multidisciplinary approach, favoring instead a contemporary, modernistic form of work in “Staatswissenschaft”, an older, pre-positivist form of political science in Europe. In his view, the economic, social, philosophical and political foundations of law must not be left out. However, in comparison to von Gierke, who, besides his interest in historic illumination of the legal facts, searched for direct access – via the “idea of law” – to the “nature” of associations and to the “tasks” and “barriers” of the highest earthly power, Preuss tended to proceed more empirically.

### **The struggle to make the Bismarck constitution a parliamentary one**

In contrast to the speculative tendencies of von Gierke, Preuss was more committed to the categories of a comparative theory of constitution. For him, the great course of development in regard to constitution was to be found in the ever greater evolution of parliamentary responsibility, as he could see from his observations of Western European conditions. He found his view of things confirmed by the fact that German semi-constitutionalism had failed in reality, doing in fact worse than the institutions of Western Europe. Above all, he took leave of the unfounded prejudicial notion, meanwhile disproved, that democracies were internally and externally weaker than an authoritarian state.

Thus Preuss is among the founding fathers of a political science which, in the analysis of conditions of society, looks for empirical criteria that can be objectified.

Preuss wanted to improve the construction of the Bismarck constitution by means of step-by-step reform. This was more than problematic. Central organ of government was to be the *Reichsrat*, or Imperial Council, which consisted of more than two dozen dynasties. As Prussian prime minister and leader of the block of votes of the Prussian members, with their overwhelming majority, Bismarck was able to steer this council in the directions he desired. He was accountable only to the emperor, not to the Reichstag. But this went well only as long as the Kaiser did what he wanted. Later, when Wilhelm II, the grandson, wished to make another attempt at “personal rule”, he was able to dismiss “his” chancellor with the stroke of a pen. A constitution, however, is meant to stand for the political structure of a country in the long term, and must not be constructed *ad personam*. There can hardly be a stronger argument than the event of his dismissal to show that a responsibility of the federal chancellor to the emperor was less rational than the Western European principle of responsibility of the prime minister to the parliament.

Dramatic reconstruction was necessary if the constitution of the German Reich was to come up to modern standards. For Preuss, the Prusso-German conditions of constitution could only be understood correctly if administrative structures were also viewed.

For him, they were “coagulated politics”, “politics in solidified form”, and did not have merely a politically neutral, simply technical character.

Since the Prussian constitutional conflict of the early 1860’s, which put its stamp on the entire configuration of constitution and law, a liberal party platform had been seen primarily in the question of refusal to approve the budget for a military reorganization which the Crown wanted. In Western European constitutionalism, also in the Belgian constitution of 1832, which had yielded the model for the constitution of Prussia, the right of parliament to control public finances with the help of the Budget Act was not doubted. In Prussia, on the other hand, a conservative and – since 1866/67 – national-liberal “governmentalism” wanted to limit the relevance of the parliamentary budgetary process for the military sector of public administration.<sup>38</sup>

Hugo Preuss immediately went to the central issue of this major question. In Prussia, budget debates and discussions had always been a ritual empty of any meaning, and arguments concerning legal terminology were for Preuss but mock battles as long as the opposition against reform of the army did not begin to strife for a real parliamentary form of ministerial responsibility and thus a rupture with the authoritarian state. The right of budget belonged to the central political area of representative government according to the Western European model. According to Preuss, the military sector could

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38 Bismarck drew upon the so-called *Luecken-Theorie* or “gap theory”: Article 99 of the Prussian constitution stipulated that the budget of the state administration was to be established by law on an annual basis, yet did not regulate what was to be done if such a law according to Article 62 did not come to pass. Financing of the military without budget approval would thus – according to Bismarck – not be in violation of any positive constitutional regulation, because such a regulation did not exist in fact. A similar aim is to be seen in Laband’s scholastic distinction between a “material” and a “merely formal” conception of law, demonstrating how politically “neutral” and unbiased his “creative dogmatics” were: The budget law of parliament, stipulated by the constitution, allegedly had no “legal tenets” in the “material” sense; it was only a case of “formal” legal tenets, which, as he claimed, were no greater than a “merchant’s invoice”. Thus an infringement of the right to approve a budget would be no real “legal” violation; see in this connection Hermann Heller, *Der Begriff des Gesetzes in der Reichsverfassung* (1927) in: Heller, *Gesammelte Schriften*, Volume 2, 2<sup>nd</sup> edition, Tuebingen, 1992, p. 214, 219 and 235ff. Bismarck, however, found these arguments ticklish. After the Crown had pushed through its desired reorganization of the army, in violation of the constitution, and public opinion had changed in favor of Bismarck following his victorious battle by Koenigraetz, he asked for a budget approved by parliament after the fact, by means of an “Indemnity Act” dated 14<sup>th</sup> September 1866, a law “in such a form and formulation that – in view of the responsibility of the state government – it is to be as if administration had been carried out during the period of time mentioned on the basis of a state budget of legal stipulation and timely publication”; see Ernst Rudolf Huber (ed.), *Dokumente zur deutschen Verfassungsgeschichte*, Volume 2 (1961), 3<sup>rd</sup> edition, Stuttgart, 1986, p. 102. “Here as well the political root of the Laband school of thought must not be forgotten. Just as the constitutional concept of law as a whole is a result of the bourgeois revolution, Laband’s budget law and concept of law is the product of the budget conflict which was successfully fought to its conclusion by Bismarck in favor of the Prussian crown”; see Heller, as above, p. 208. One could “feel the intention”, yet not all were “disturbed by it”. Quite the contrary: the prevailing teachings on law of state had extracted many a new finesse from Laband’s dogmatic differentiations between formal and material law. The great exceptions were Albert Haenel, *Studien zum deutschen Staatsrecht*, Volume 2: *Das Gesetz im formellen und materiellem Sinne*, Leipzig, 1888, p. 231; see Manfred Friedrich, *Zwischen Positivismus und materiellem Verfassungsdenken* (footnote 37), p. 60; and Richard Thoma, *Der Vorbehalt des Gesetzes im preussischen Verfassungsrecht*, in: *Festgabe fuer Otto Mayer*, Tuebingen, 1916, p. 176. According to Thoma, the idea of only the „material law” as tenet of law is “theoretically and logically” indefensible; later, however, Thoma resigned in the face of the prevailing opinion.

no longer be considered the reserved right of late absolutism, taken out of parliamentary control.

Preuss demanded of parliamentary deputies, beginning with his 1890 series of articles entitled *Organisation der Reichsregierung* (*Organization of Government of the German Reich*), that they develop self-confidence in the political arena and that they push through full ministerial responsibility also in the cases of formerly reserved rights that the Crown had kept for itself in military and foreign policy. He spoke out energetically against the traditional dogma of sovereignty, because he saw in it the decisive bastion of resistance against the development of a state of law, the parliamentary system and democracy.

In the dogma of State sovereignty lay also for Georg Jellinek a line that he could not cross; it prevented an understanding of democracy in the sense of a civil society. He did admit that “the (local) community is older than the state”, but even if and when the communities had “a territory, members and an independent power, similar to the state”, this “power” was, however, never original, but always only imaginable as an “imperium granted by the state”.<sup>39</sup> The thought of building state and constitution “from below” was foreign to him. The autonomous regional bodies from bottom to top naturally needed a form of legal coordination and a hierarchy of competence; only under these conditions they could build an organic unit in their entirety. Jellinek can imagine such an order of competence comprising all territorial bodies only as a “delegation of the imperium” from above to below, because – according to his (as well as Laband’s) view – “own” rights of power or rule can “by virtue of the term itself only be held by a state”.<sup>40</sup> This idea only appears to follow logically from the traditional idea of what “sovereignty” is. But in fact it was just a political postulate.

In the beginning, Paul Laband tried to convince Jellinek of his “purely constitutional”, “legal” view of questions in regard to state and law. Jellinek then turned away from Laband, however, and developed a theory of state – in the direction of Max Weber’s sociology – which, in addition to a “general theory of constitutional law” – already presented the concept of a “general social theory of state”. But in order to have arrived at a modern theory of democracy, he would have had to gain a “pluralistic” understanding of political decision-making processes and to stop thinking exclusively in the categories of “reign” and “rule”.

The decisive step on the part of Preuss which went beyond not only von Gierke but Jellinek as well was his conscious attempt to make the connection to democratic thought of Western Europe. Neither Georg Jellinek nor Max Weber was able to do this; from their premises of thought, they could find no path of access to a “civil-cooperative” constitutional statehood.<sup>41</sup>

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39 Jellinek, Georg, *Allgemeine Staatslehre* (1900), 3<sup>rd</sup> edition (1921), reprint Darmstadt 1959, p. 644.

40 Jellinek, Georg, *Staatslehre* (footnote 39), p. 645, see also Preuss, *Amtsrecht* (footnote 35), p. 131 and 137.

41 Vollrath, Ernst, *Max Weber: Sozialwissenschaft zwischen Staatsrechtslehre und Kulturkritik*, in: *Politische Vierteljahresschrift*, 31 (1990), p. 102-108.

The concept of Hans Kelsen made “unity of rule of law” the bearer of sovereignty.<sup>42</sup> His idea was more compatible with democratic constitutional law as envisaged by Preuss, because Kelsen gave up the old idea of “sovereignty” as an “unlimited” power. Preuss did not come to grips with Kelsen’s *Reine Rechtslehre*, or *Pure Theory of Law*, because it appeared in its entirety only after Preuss had already developed his theoretical concept. However, he did look at the concept of Hugo Krabbe, which shows some similarities with that of Kelsen. Common to all three authors was their belief that the traditional dogma of sovereignty was just that: too traditional, meaning too laden with the traditions of absolutism. And Kelsen’s “critical rationalism”, which is to be found later in some elements of Gustav Radbruch, is not dissimilar to the critical habitus of Preuss (cf. Detlef Lehnert, in his contribution on Hugo Preuss, Hans Kelsen, and Max Weber, see above, footnote \*, p. 151-178).

After 1949, a short-lived “renaissance of natural law” bloomed at Germany’s *Bundesverfassungsgericht*, or constitutional court of the federation; it has since faded. At that time, the general accusation was made that legal positivism, normativism, formalism and relativism – due to their principle of “abstinence from values” – had served to give any political power whatsoever a service of apology, and then – blind to all consequences – later to have fostered National Socialist totalitarianism. This attacks were directed above all at Kelsen’s “relativism”.<sup>43</sup> But Preuss as well had spoken out vehemently against the pretensions of “absolute theories” and insisted that in the process of forming political opinions and building a political will, only “relative” positions were possible. Otherwise, social conflicts in a democracy could not be resolved politically, because “absolute” values are politically insurmountable and block a change of government and opposition.<sup>44</sup> Such misinterpretation of “democratic relativism” no longer agrees with current research and insight. The positivist legal system as seen in the Weimar Republic was “turned around” by the Nazi jurists – with widespread approval on the part of legal thought as well as the courts – primarily by slipping over its head – by virtue of a quasi natural law – a new *Weltanschauung*, or view of the world. They boasted of having finally put forward inner “values” again – *Blut, Boden, Rasse* – blood, soil, and race – against the relativism of democracy.<sup>45</sup> In the meantime, it is better understood how inseparable Kelsen’s pure theory of law is from a modern theory of democracy.

Also in the work of Richard Thoma, the legitimate heir of Georg Jellinek and successor to his university chair as professor, there are still traces to be found of the hardly modified concept of state of Laband with its absolutist background. Thoma, a national liberal from southwestern Germany, was interpreted as a progressive democrat in for-

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42 Kelsen, Hans, *Das Problem der Souveränität und die Theorie des Völkerrechts. Beitrag zu einer reinen Rechtslehre*, Tübingen 1920.

43 Kelsen, Hans, *Vom Wesen und Wert der Demokratie* (1920-21), 2nd edition (1929), new print run, Aalen 1981, p.98ff.

44 Preuss, Hugo, *Bodenbesitzreform als soziales Heilmittel*, in: *Volkswirtschaftliche Zeitfragen*, 14 (1892), p. 1ff.

45 Dreier, Horst, *Rechtslehre, Staatssoziologie und Demokratietheorie bei Hans Kelsen* (1986), 2nd edition, Baden-Baden 1990, p. 249ff.

mer times;<sup>46</sup> this was rather too well-meaning. Indeed, Richard Thoma was open to the problems of mass democracy of the 20<sup>th</sup> century and knew that the state needed “recognition” from its subjects. But his understanding of the Weimar democracy, however, is to be seen, for the most part, “on the horizon of bourgeois-liberal reformism” and the “Wilhelminian apparatus of state” (cf. Christoph Schoenberger, on Preuss and Thoma, in: see above footnote \*, p. 179-187).

### German *Reich* and its states

As the approaching breakdown of the German empire could be discerned, Preuss – who had striven for a step-by-step pragmatic improvement of things, turned his attention more and more to the great questions relating to reorganization of the Reich’s constitution. One of the most central problems was the extreme predominance of Prussia within the German Empire. In regard to such focal issues, it is now time to bring into the discussion once again the position of Preuss, who analyses the critical signs of his times with a great deal of common sense and looks for ways out of the various dilemmas with a perceptive eye.

During the transition to the Weimar Republic, Preuss remained, by principle, an opponent to any kind of “bogus” or “sham” constitutionality of a new order and to a “statehood of federal territories” which had its main center of power in a *Bundesrat*, or federal council, dominated by territorial princes – able to block any initiative on the part of the *Reichstag*, or federal parliament, by means of a veto. In his memorandum at the beginning of the year 1919, he gave a clear formulation of his concept, making the Prussian question a subject of public controversy.<sup>47</sup>

He had no leaning toward the classic centralism of a national state as exemplified by the French model, even after the transition of the German Reich into a republic. His thinking was too deeply rooted in the model of English self-government. The political

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46 Rath, Hans-Dieter, *Positivismus und Demokratie. Richard Thoma 1874-1957*, Berlin, 1981. Worth mentioning, however, is that Thoma at least defended the functions of parliament, which were also important for Max Weber: the appointment and peaceful defeat by vote of “caesarist party leaders”, – against the opponent of parliamentarism Carl Schmitt. Thoma criticized what Carl Schmitt propagated as the “ideal type” of real parliamentarism, although it did not correspond to the methodic criteria of Georg Jellinek’s and Max Weber’s definition. For them, an ideal type is an empirical “model”, from which a few historical contingencies are temporarily eliminated, in order to work out specific characteristics. In contrast, Carl Schmitt raised empirically unfounded suppositions from the times of early liberalism to the status of “ideal type”, then having to hear the reproval from Thoma that political institutions are not dependent on political ideologies “that have been brought forward in literature for the purpose of their justification”, Richard Thoma, *Zur Ideologie des Parlamentarismus*, in: *Archiv fuer Sozialwissenschaft und Sozialpolitik*, 53 (1925), p. 214. Carl Schmitt mocked Max Weber by calling parliamentarism “untrue” and “senseless”, without being impressed by his positive practical functions, so important to Weber. But Carl Schmitt was interested in some sort of a “metaphysical” view of things, forbidding allegedly any “heterogeneity of principles”, – which is quite the opposite of the formation of a concept of an ideal type. See also Ernst Fraenkel, *Deutschland und die westlichen Demokratien* (footnote 23), p.55: Schmitt „made demands of democratic parliamentarism under the fulfillment of which it would automatically have to break down”.

47 Preuss, Hugo, *Denkschrift zum Entwurf des Allgemeinen Teils der Reichsverfassung* vom 3. Januar 1919, in: *Reichsanzeiger* of 20th January 1919, also in Preuss, *Staat, Recht und Freiheit* (footnote 26), p. 368.

front against the bureaucratic authoritarian state and his own roots in territorial princedom led him to a very specific concept of “national democracy”, in which the central level of politics and the decentral level of community self-government complemented one another; they were for him the two necessary and complementary aspects of a democratic political system – the central level serving to set the necessary constitutional framework and the conditions of action for the pluralistic development of self-governing levels. Here “patriotism for the republic” was needed, which, in his view, gave political and cultural integration, while a “local” and “regional” patriotism was grounded in the everyday world of life of citizens. Between these two, there was no room for a further level of identification, if the centrifugal forces within the German Reich were not to gain the upper hand. Preuss fought against the pretention of any territorial “own statehood” that would go beyond his definition of functionality of the individual territorial states – for him, they were but political bodies of “the highest potential of self-administration”.

Hugo Preuss wanted to dissolve the State of Prussia back into its old parts, taking them out of their hegemonic bonds, in a way that would be acceptable and congenial to the Reich. He was afraid of the overdimensionality of Prussia. Such an enormous central governing power would lead to a resistance, especially on the part of the southern German states, and could instigate separatist movements.

Although his suggestions accommodated the anti-Prussian feelings of the southern German states, Preuss experienced no support from their side. Even Bavaria held on to its “own independent statehood”, without consideration of region or area, determined, of course, by its earlier dynastic character. In addition, he was not able to overcome the common mistrust of the democratic consequences following from his unitarian republicanism.

Up today, Preuss is still accused of having had unrealistic goals in this issue, although his ideas were basically suitable for overcoming the anti-Prussian particularism on the part of the southern German states laying the groundwork of an authentic democratic federalism. But his suggestions collided too greatly with new constellations and interests as well. After the revolution, the Social Democrats suddenly saw a totally new advantage in the predominance of Prussia, namely that of a “bulwark” of democracy, of which they did not want to lose hold.<sup>48</sup> His proposals caused great indignation at the time, especially on the part of “his” Prussians as well, these exhibiting the greatest variety of political opinion and motive.

In the meantime, the structure of today’s federal states are not basically different from the political map that Preuss ordered made, thinking at that time of representation in a second chamber. Today’s Federal Republic of Germany corresponds to the de-

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48 The avowal and affirmation of a unified German nation-state, as well as the fight against „Prussian peculiarism“ as such, were firm principles among the traditions of the Social Democrats, yet the time which was ripe for a solution of the problem of Reich and federal states passed quickly. “Each residence had brought forth its own revolution, its own workers’ and soldiers’ council, and thus its own provisional government. Moreover, the enthusiasm for a unified state was definitely not shared by the Social Democrats in South Germany”, see Hagen Schulze, *Otto Braun oder Preussens demokratische Sendung*, Frankfurt-on-Main, 1977, p. 225f. Otto Braun argued that the suggestion of Hugo Preuss for dissolving Prussia was – in view of the past – understandable. But “the new, the democratic Prussia should not be shattered”, Hagen Schulze, see above, p. 252-254.

mands of Preuss in terms of the format of the federal states – in any case for the most part. The new order of federal states represents a clear improvement in the functioning of this republic as compared to the Weimar Republic. Later integration of North Rhine-Westphalia and Baden-Wuerttemberg also built bridges across the old rifts represented by historic landscapes and regions. Now, in the 21<sup>st</sup> century, there is still the task of a restructuring of the German federal states. This, too, lends weight to the thoughts of Preuss.

Even if Preuss was unable to push through his demands for a new structure, or even to make this demand understandable, one still cannot deny his farsightedness. Prussia was dissolved after World War II by the control commission of the Allies. In 1919, the republic was not able to solve this central problem under its own power. But the fact that the catastrophe of a world war and the intervention of the allied occupying powers were necessary in order to overcome this serious structural flaw throws a strange light on the political abilities of the nation to do the necessary.

The structural problem of the “Prussian question”, as presented by history, for the new constitutional organization, i.e. the unresolved relationship of Reich to states, is not worthy of attention only in connection with the beginning years of the Weimar Republic. Under the broad heading of federalism, the entire shaping and development of regional authorities in pluralism, i.e. the territorial dimension of this issue, is a topic that has been under intensive discussion in both theory and practice, going beyond the historic forms in which it is to be seen, taking in as well the fields of public and constitutional law and political science.<sup>49</sup> The Preuss’ concept of overcoming the Prussian hegemonic state by means of a reorganization of the relationship between Reich and Laender deserves, against the background of theory of society and democracy, a less superficial interpretation than has been the case historically as well as in contemporary times. Even in monumental works on the “Prussian question” and the “problematics of Reich and Laender”,<sup>50</sup> the work of Preuss has been neglected, not to say ignored, for the most part. One of the reasons for this lies in the fact that his statements and articles are not easy to locate or to obtain. The many speeches Preuss gave in the *Landtag*, or Prussian state parliament, his last venue of political work, after his own party had denied him a seat in the German national parliament, are a veritable treasure trove of items yet to be brought to light, representing analyses of problems that are truly innovative. Until his death in October 1925, the major leftist-liberal newspapers as well, in particular *Berliner Tagesblatt*, *Frankfurter Zeitung* and *Vossische Zeitung*, allowed Hugo Preuss to speak out frequently within their pages. Yet there have been few and only partial reprints.

Although the work on the constitution of Weimar focused, naturally enough, on the reconstruction of the “Reich”, meaning the central and national level of politics, Preuss did not take leave of his open mind towards supranational horizons. Article 4 of the Weimar Constitution, which he formulated, makes clear that it recognizes the validity of basic principles of international law. In the establishment of regional authorities from

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49 Benz, Arthur and Lehbruch, Gerhard (eds.), *Foederalismus. Analysen in entwicklungsgeschichtlicher und vergleichender Perspektive*, Wiesbaden 2002.

50 Schulz, Gerhard, *Zwischen Demokratie und Diktatur. Die Periode der Konsolidierung und der Revision des Bismarckischen Reichsaufbaus 1919-1930*, Berlin 1987.

bottom to top, there was also the cosmopolitan dimension, that of crossing the borders of the national state in the interest of common and global necessities of life.

This was true then just as it is now of the demands of European integration. The institutions of the European Community, i.e. Union, do not fit into the traditional schemata of either an association of states or the federal state. A look back at Preuss could open the door to a better understanding of newer forms of political organization. With strong arguments, he had fought against the pretension of the federal states to insist on regarding themselves – as far as possible – as sovereign “states”, thus endangering the stability of the republic. These old discussions on the position and status of federal states in a national state could bear fruit in regard to a solution of the problems on a now higher level.

### **The position of *Reichspräsident*, or president of the German Reich**

After the German kaiser had given up the throne and fled into foreign exile, the development pointed to a republican solution of the constitution issue. This demanded, among other things, a positivist-legal fine tuning of the competences of the Reich’s parliamentary government and the position of a president. Because Weimar’s constitution had greatly strengthened the office of president, provided for presidential election by the people, and granted this presidential office extensive powers in the case of any paralysis of federal parliament and government, Hugo Preuss has come under heavy attacks of criticism in our day. Ernst Fraenkel, to mention one name, to whom via Hugo Sinzheimer a tradition-building link to the school of thought of von Gierke can be made, formulated two negative judgements on the constitutional work of Hugo Preuss – both of which enjoy considerable influence up to the present day – that are worth examination.

Fraenkel claims that Preuss weakened the parliamentary system by giving the Reich’s president a plebiscitary position. The election of the president by the population and his right to call for a plebiscite against the parliament were, in Fraenkel’s view, still a product of the very “authoritarian-state thinking” that Preuss in principle was battling and an understanding of democracy as understood by Rousseau based on “identity” and not on “representation”.<sup>51</sup> In a look at this, a real problem becomes apparent; Hitler came to power via a presidential cabinet. But the accusations require more exact study.

The dualism of president and parliamentary government which was so disastrous in the end phase of the Weimar Republic will have to be attributed mainly to Max Weber and his conception of a “plebiscitary democracy with a *Fuehrer*”, or leader.<sup>52</sup> In the protocols of the constitutional committee, which were not available to Fraenkel but are now to be found in the edition of the complete works of Max Weber, there can be no mistake: a great difference between Preuss and Weber is to be recognized here. Weber did in fact want to enthrone the president as a “counterweight” to the German federal parliament, whereas Preuss wished to see the chancellor as governing prime minister, following the English model, and to limit the president to those powers to which a

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51 Fraenkel, *Deutschland und die westlichen Demokratien* (footnote 23), p. 144ff.

52 Mommsen, Wolfgang J., *Max Weber und die deutsche Politik*, 2nd edition, Tuebingen 1974, p. 387ff.

“monarch limited by parliament” would be suitably entitled in the models of Western Europe.<sup>53</sup> If indeed it is a point of criticism of the constitutional draft as done by Preuss, who underestimated the danger of misuse of presidential power and trusted too greatly in Ebert’s careful fulfillment of duties contingent on the office, who in turn was to put his stamp on the powers of the office of president, the reasons for the compromises in the text of the Reich’s constitution must still be taken into greater consideration.

Among the open questions not yet sufficiently clarified was that of just how far Preuss followed the problematic Redslob’s thesis of “authentic parliamentarism”,<sup>54</sup> according to which a head of state had to be equipped with his own competence in order to prevent a “parliamentary absolutism”. It is to be doubted that Preuss, other than a situative reference to Redslob, was truly convinced of this theory. In his fragment of a commentary on the Weimar constitution,<sup>55</sup> he no longer makes any use of Redslob, either explicit or implicit. In contrast, his acknowledgement of the primary status of parliamentary is quite clear in a number of publications. Besides this, it is to be seen that Redslob did not develop any theory of parliamentary democracy, as Manfred Friedrich demonstrates (cf. his contribution on Redslob and Preuss, see footnote \*, p. 189-201). Rather, Redslob had in his mind’s eye, as a model of “authentic” parliamentarism, the case of a constitutionalism in which the executive was dependent on the trust and confidence of the monarch. To strengthen his – monarchist – government, the head of state must hold and maintain the right to dissolve parliament. But this model no longer corresponded to the constitutional structures of Great Britain, in which government was dependent on the trust of parliament. But in a system of parliamentary government however – in contrast to the premises of Redslob – this right to dissolve parliament in the hands of the president would weaken government.

Completely inaccurate is the interpretation of Fraenkel, who saw in the original democratic concept of Preuss a strong influence of Rousseau. Here can be seen a fixation in retrospect upon the thinking of Carl Schmitt,<sup>56</sup> who had attempted to base his anti-parliament ideas on Rousseau. This, however, is a false judgement.

At the beginning of the 1890’s, when they were still supporting fundamentally different positions, Preuss accuses the Social Democrats of having mixed feelings toward parliamentarism and a dependency upon Rousseau, both of which, in the feelings of Preuss, corresponded to a “primitivistic” concept of democracy, to use the later words of Hans Kelsen, who paraphrases the criticism coming from Preuss well. Rousseau’s orientation model was one of a pre-industrial democracy of rural society; thus his construction of a harmonious social utopia could only fall completely short of the modern industrial society with its division of work. Preuss criticized this model of a social homogeneity as unreal and set down his own pluralistic ideas in place of it. In the

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53 Weber, Max, *Gesamtausgabe*, Volume 16, edited by Wolfgang J. Mommsen, Tuebingen 1988, p. 35f.

54 Redslob, Robert, *Die parlamentarische Regierung in ihrer wahren und in ihrer unechten Form. Eine vergleichende Studie ueber die Verfassungen von England, Belgien, Ungarn, Schweden und Frankreich*, Tuebingen 1918.

55 Preuss, Hugo, *Reich und Laender. Bruchstuecke eines Kommentars zur Verfassung des Deutschen Reiches*, edited by Gerhard Anschuetz, Berlin 1928.

56 Schmitt, Carl, *Geistesgeschichtliche Lage* (footnote 46).

fragment included in his constitutional commentary in which he expressly declares this idea to be “Rousseau’s error”, Preuss formulates his criticism even more clearly: he saw political formulation of will as moving from individual to community without the organizational “stages between”, seen in pluralist thinking as constituent, i.e. “formative”.

Carl Schmitt later had it out with Hugo Preuss, as it were, in a strange manner. Schmitt took over his chair at the *Handelshochschule*, before the Nazi regime was able to give him a place at Berlin’s *Friedrich-Wilhelm-Universitaet* by relegating Rudolf Smend to Goettingen. He tried to present his anti-parliamentary concept in such a way as though he was merely drawing the sharper logical conclusions from the premises of Preuss. As an unorganized multiplicity in the technical and judicial sense is not capable of making decisions and therefore of ruling, Carl Schmitt’s borrowings from Rousseau are but a foil, a transparency, against the background of which his option of a sovereign dictator whose support comes from an unorganized form of acclamation can be made to seem inevitable. Carl Schmitt exacerbates the problem of parliamentary ability to govern by introducing an absolutist concept of state as the means with which he justifies the presidential cabinet, whereas Preuss was looking for strengthening the functionality of the Reich’s parliamentary government (cf. Marcus Llanque, in his contribution on Hugo Preuss, Carl Schmitt, and Hermann Heller, see above, footnote \*, p. 203-231). On this level, the discussion, now opened anew, needs to analyze more deeply the term “sovereignty”.

### **Socio-liberal coalition in city and state**

The failure of the Weimar Republic is often explained by the declaration that it was a democracy without democrats, because the center was too weak and the “extremities” too strong. Yet large segments of the “extremists of the left” would have been part of the democratic spectrum, had the inner weakness of both orthodox Marxism as well as Leninist revisionism already been recognized in a more general way. Many of them resisted the Weimar republic out of the fear of the “half-measures” of a merely “bourgeois” democracy. However, the extremism of the right also showed peculiarities: it was in fact the middle classes – which in Western Europe had been the bearers of parliamentary democracy – that denied their support to the Weimar Republic. Seymour Lipset has therefore suggested to use the term “extremism of the center”,<sup>57</sup> which does not fit in well with the simplified picture of extremist wing parties to both the right and the left of the political spectrum having put pressure on the democratic parties of the center.

It was not only the “backwardness” of a “belated nation” that had weakened German liberalism from the inside. Middle-class society in Germany at the turn of the century was very highly developed in the fields of research, technology, scientific organization and cultural differentiation. Here as well, the inner logic of development went in the direction of a system of parliamentary government. It would also be too shortsighted an explanation merely to say that Bismarck had been able to split German liberalism by ta-

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57 Lipset, Seymour Martin, *Political Man. The Social Basis of Politics*, Garden City, New Jersey 1956, p. 57 and 131ff.

king over for himself some of the liberals' own urgent demands, in order to break the will of the liberal movement for continuous and continuing political collaboration.

This weakness has still another explanation: German liberalism started to doubt its own principles as it saw that the workers' movement also utilized these basics. Out of fear that democratic consequences of their own thinking would benefit the Social Democrats, the German variation of a "Bonapartist" solution was produced: better to do without certain freedoms than to endanger primary material interests.

The life's work of Hugo Preuss stood – and stands – at the center of these political problems, because he, as a member of the bourgeoisie who rejected Marxist fundamentalism, tried to arrive at a realistic new assessment of Social Democracy, it having "changed its feathers", and to build a "socio-liberal" bridge. For him, in contrast to von Gierke and von Gneist, England itself being absolute the proof that it was entirely justified to draw conclusions from the cooperative starting point of von Gierke's thinking, the consequences of which von Gierke himself did not accept. The reception of von Gierke's ideas in England showed – quite against his intention – that the idea of the cooperative carried within a new and more profound starting point for democratic thought, if liberalism tried to build a bridge to the workers' movement.

In 1895, Hugo Preuss became a candidate in the elections for Berlin's *Stadtverordnetenversammlung*, or City Assembly of Councillors. This was surely a decision that had to do as well with the hopelessness of receiving a professorship at Berlin's university. But it was more than a stopgap solution; it corresponded to his deeply felt conviction that a modern political organization had to built up from "underneath", from the level of communal self-government. His model in this connection was Rudolf von Gneist, who had also been a member of Berlin's city assembly for many years. His involvement in communal political life as a councillor – as a *Stadtrat* without pay after 1910 – meant for Preuss, as it did for von Gneist as well, that he actively stood for what he believed: his theory of law, state, politics and administration was as well practice for him.

The involvement of Preuss in communal politics around the turn of the century was under an entirely new omen. Von Gneist had left the assembly in 1875, and since that time industrialization had seen a storm of development in Germany, following the Franco-German War. Just as in Western Europe, a dramatic process of urbanization brought forth the industrial metropolis, changing the traditional city structures quite literally from the ground up. In order to assure the primary necessities of life for city dwellers, new forms of intervention in economic processes on the part of the political system were needed. Communal problems did not stop at the borders of large cities; they were to be felt in the entire political system and also had their effect on the central, national level.

Industrialization and urbanization have created the modern intervention state. Here, in the communal structures of politics, weapons are forged – with the help of which the Scandinavian and the English "welfare state" and the American New Deal could be developed.

As a liberal, Preuss was originally sceptical of Social Democracy. On the communal level, however, it could be seen that constructive cooperation with Social Democrats was not only imperative but also realistic and possible. Such efforts, however, were

subject to a certain general judgement by society. Bismarck had wanted to fight the “great danger to the public” as posed by the social democratic movement by means of a legislative prohibition norm. But in the face of the perplexing multitude of new social problems that had to be dealt with, forms of cooperation between reform-orientated bourgeoisie and reformist social democracy evolved in a number of cities, more or less by themselves and without any master plan whatsoever. On the communal level, even radical Socialists did not refuse to look for practical solutions for the daily necessities of life of the inhabitants of big cities. This new kind of communal socio-political coalition policy could be expanded even into the concept of a “municipal socialism” (cf. Christoph Mueller, in his contribution on Communal Democracy and Communal Economics, see above, footnote \*, p. 233-274).

Preuss was elected to office in the first class of the three-class eligibility for election. He immediately disappointed his liberal constituents by explaining to them that there was a need to work closely with the councillors of the Social Democratic party. On the communal level, the bridge could often be built, one which he later demanded as well for the German *Reichstag* and the representative organs of the federal states. This background of practical experience lends weight to his theoretical postulates on constitutional law. It was an intolerable contrast: the industrial metropolis of Berlin with its millions of inhabitants on the one hand, its very low degree of communal autonomy on the other. This prevented the city from taking the responsibility for the search for solutions to its own problems. A provincial so-called “High President”, who resided in Potsdam and hardly understood the modern problems of the day, was to oversee this. Thus conflicts with the instances of communal supervisory authority were already to be geared. They lie at the very center of state and law, of constitution and administration. Preuss criticized, in addition to insufficient participation on the part of citizens, the “excess of governance” of the Prussian administrative apparatus, which followed from a vast and confusing expansion of state administrative jurisdictions, growing by leaps and bounds and seemingly outside any regulation or control. As they stood, the formal authority and powers of the state ministerial administration were not contested. However, in practice, it was often unable to intervene against the domineering “lord of the manor” attitudes of district magistrates and rural district councils east of the Elbe and to change the old habits of governance *à la seigneur*.

Even if the “Weimar Coalition” later fell apart during the Weimar Republic and no productive cooperation was achieved between the workers’ movement and the bourgeois parties, it is still important to see that such productive cooperation was indeed possible on the level of community parliaments. Here experience could be gained, which could have been well utilized to solve the problems on the central level, had there been more time and less stormy seas to navigate.

In the years of formation of the modern industrial metropolis, the position and function of Hugo Preuss in communal politics was by no means a sideline to be exercised with his right hand tied behind his back.

### Hugo Preuss and Theodore Barth

Hugo Preuss fought a lifelong battle in support of his concept of a cooperative democracy of citizen and society on the community – i.e. local – as well as the national level, with the aim of international coordination as well. He is a key figure in the anchoring of western democratic thought in Germany. He was an individual fighter, yet he did not stand alone. There was, however, only a small group of practical political men and theorists who exhibited the same lack of prejudice and quality of farsightedness as did Preuss. There has to be thrown more light on the context of these personal and biographical connections, which are of great importance for historical research, and shown as well how Preuss found backing and support plus encouragement in the circle around Theodore Barth and among the readers of the journal *Die Nation*. As regards his reception in the historical context, Preuss can only be fully understood in terms of his origin in this Barth circle rooted in Germany's *Kaiserreich*. (cf. Lothar Albertin, *Liberal Revisionism: Theodor Barth and Hugo Preuss*, see above, footnote \*, p. 59-96).

Hugo Preuss grasped the factors upon which democratic development in Germany depended. After Bismarck had bonded the conservatives as well as increasing numbers of National Liberals to his half-parliamentary authoritarian state system, and the Zentrum had set other priorities, due to its exceptional position owing to religious denomination, there were few left to hear the message, namely the aim of making the constitution more parliamentary in nature. It was above all the remaining *Freisinn*, or radical left-wing liberals, who were prepared to work together with the Social Democrats. Within the circle around the *Nation*, Theodore Barth and Hugo Preuss had been supporting such a coalition of radical liberals and social democrats since the turn of the century. A thorough examination and evaluation of this almost forgotten *Intelligenzblatt* – as a journal with an almost incomparable intellectual form and content at the time – promises to yield substantial and important elucidation and insight in regard to the sphere of thought in which Preuss used to live.

For Preuss, participation in this intellectual circle around Theodore Barth represented at the same time part of his need for intellectual revival, which, as he later expressed it, followed from the conflict between “apolitical culture” and “political non-culture”. As early as his first long paper, written at a time when he was still in fact almost a youth, Preuss had rejected the idea that Bismarck, the Chancellor of the Reich, in spite of his dominant status in the external sphere of major activity and state proceedings, could be considered a suitable representative of the intellectual life of his times, since “the internal spirit of our times does not find expression in him”.<sup>58</sup> But he was not able to make himself and his views understandable at that time.

However, his book *Das deutsche Volk und die Politik (The German People and Politics)*, written in 1915, received a great deal of attention. He defended his country against unjust attacks. But, in contrast to the war books that were written by almost all leading intellectuals and as such painted a peculiar picture of the internal situation of the country, he made a passionate case for breaking up the self-imposed and disastrous

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58 Preuss, Hugo, *Deutschland und sein Reichskanzler gegenüber dem Geist unserer Zeit*, Berlin 1885, p. 9.

isolation of Prussian Germany and taking over at least the spirit of institutions of the western constitutional states, because these were most evidently superior to those of the Prusso-German authoritarian state.<sup>59</sup> Here he also found – and took – the starting point from which he, in his well-known revolutionary article that appeared in the *Berliner Tageblatt* on 14 November 1918, later warned of the leftist illusions of a *Raete-Republik*, or soviet republic and the Bolshevik experiment by calling these things “an authoritarian state turned in the other direction”.

In the time of Germany’s *Kaiserreich*, his academic opponents had still shown him esteem and respect. This is to be seen in the very positive review of his book with the title *Das staedtische Amtsrecht in Preussen* or *Official City Law in Prussia*, by the great and well-known Paul Laband in the leading specialist journal *Archiv fuer oeffentliches Recht*. Despite all his distance to the basic convictions of Preuss – to whom he, the conservative councillor in the Reich’s state of Alsace-Lorraine, known among colleagues as the arch opponent of von Gierke, was as far removed as hardly anyone else one could name – began his critique with the verdict that this work was worthy of an excellent place in the academic discussion and closed with the summary that “the science and literature of state law in our academic circles would be well served if we were to have many such monographs”.<sup>60</sup> In the political conflicts of the Weimar Republic, however, this objective recognition of Preuss as a scholar was lost more and more. Needle-sharp remarks had been heard already since the 1890’s; as the liberal state councillors were disappearing, open hostility to Preuss broke out after 1918.

But there were exceptions and counter-movements. Gerhard Anschuetz was considered by those of his field to be the legitimate heir of Laband’s legal positivism, and was a National Liberal in his politics. In Germany’s *Kaiserreich*, he was hardly closer to Preuss – who had been branded a “radical” democrat – than Laband. Anschuetz himself said that he was “filled with a passionate sentiment and conviction as regards the state”. With this attitude as his yardstick, he criticized leftist liberalism as being “a veritable stance of denial toward the state”, which he felt to be “apolitical”.<sup>61</sup> Hugo Preuss, on the other hand, “a very pronounced political head”, lost part of his sympathy due to the fact that

“nearly all of his – very numerous – works on state law, not to mention his newspaper articles and published speeches, serve the purpose of presenting the correctness of certain particular political opinions and institutions, and the incorrectness of others.”<sup>62</sup>

One could think here that he was describing a selfrighteous character. But when he comes to the passionate political involvement of Preuss in terms of content, the picture shifts:

“The aims to which he aspires can be described with the shibboleths unitarianism, democracy, parliamentary government. His ideal was the unified German state, carried and supported by the

59 Llanque, Marcus, *Demokratisches Denken im Krieg. Die deutsche Debatte im Ersten Weltkrieg*, Berlin 2000, p. 68ff., 169ff., and 295ff.

60 Laband, Paul, review of Hugo Preuss, *Staedtisches Amtsrecht in Preussen* (1902), in: *Archiv fuer oeffentliches Recht*, 18 (1903), p. 73-84.

61 Anschuetz, Gerhard, *Aus meinem Leben*, Frankfurt-on-Main, edited and with an introduction by Walter Pauly, p. 122

62 See above, p. 121.

will of the nation, led by a government based on the trust and confidence of the people's representatives and of the *Reichstag*.”<sup>63</sup>

In other words, what we have here is, in truth, “deep involvement in the pursuit of knowledge” and, as Anschuetz admits, “constitutional and political ideas” in which he “was quite of one mind with him at the time” and with which he later felt even more agreement.<sup>64</sup> Yet, at the same time, he still found the “radical sharpness” of Preuss and his wit disagreeable: one often did not know “whether his intention was to mock himself or others”, not to mention his *Berliner Schnodderigkeit* (a tendency of typical Berliners to be extremely cheeky, not to say insolent, in their everyday communication).<sup>65</sup> But, in the words of Anschuetz, this was the “shell” and not the “core” of Preuss.

“The decency of his way of thinking, his views and opinions, the uprightness and integrity of his character have never given me cause for doubt(.) ... A man of this given political direction, and in addition one who loved to speak his views in more radical terms at times than indeed they in fact were, had negative perspectives in Germany, namely in the Prussia of prewar times if he desired to be employed in the service of the state, or at an university, and to get on in this service. In this point, one was extremely intolerant – exceptions, which were made, for example, in favor of great scholars of first rank, only serve to prove the rule. Thus it was that Preuss never attained a professorship, which he had undoubtedly deserved and of which chair he would have been a much better occupant than many others who were preferred.”<sup>66</sup>

After the death of Preuss, Anschuetz did show great respect of Preuss by editing and publishing the fragment of his commentary of the Weimar constitution that Preuss had left.<sup>67</sup> And Hedwig Hintze, wife of Otto Hintze,<sup>68</sup> honored Preuss in an essay of deeply felt understanding. She had distinguished herself with a study on the blocked possibilities of a communal constitution in revolutionary France,<sup>69</sup> which showed that her stance was very close to the political ideas of Preuss. She also edited and published an other fragmentary work left by Preuss, writing an introduction which went deeply into the

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63 See above, p. 121.

64 See above, p. 121.

65 See above, p. 122. The rather fussy Anschuetz had no understanding whatsoever for the passionate involvement of Preuss, who – very like Max Weber – looked beyond the academic ivory tower and fought public battles in the cause of forming political opinion, even in newspaper articles. Anschuetz likewise did not have any real access to the humor and sarcasm on the part of Preuss. Hugo Preuss could – even in regard to the subject of responsibility of ministers, which was at the core of his lifelong battle for modernization of the German Reich's constitution – beat an ironic retreat from his deep emotional commitment and write, in a casual critique, the following: “In the case of the Prussian constitution, we see, in addition to the many laws which are there, as well as some ‘which are not there.’ To these belongs a law of responsibility for ministers namely.” This had been promised by the constitution nearly 40 years ago, “but the change has not been honored, despite its having been presented a number of times. Most of these laws are at least promised from time to time; but the one in connection with the responsibility of ministers does not even enjoy this surrogate of fulfillment,” in: *Die Nation*, 5th year of publication, (1887/88), No. 18 ( 28th January 1888), p. 255-56.

66 See above, p. 122

67 Preuss, Hugo, *Reich und Laender*, posthumous works, edited by Gerhard Anschuetz, Berlin 1928

68 Compare footnote 26 above. This conservative historian was later to be the only member of the Prussian Academy of Science to protest openly against the forced exclusion of Albert Einstein from the Academy, see Fritz Stern, *Verspielte Groesse* (footnote 6), p. 270

69 Hintze, Hedwig, *Staatseinheit und Foederalismus im alten Frankreich und in der Revolution*, Stuttgart 1928

problems.<sup>70</sup> A collection of essays entitled *Staat, Recht und Freiheit* ( *State, Law and Freedom* ) also attempted to keep the work of Preuss part of the ongoing discussion. But, in and after the agony of the Weimar Republic, this no longer enjoyed any great success.

This man, in the depths of his character conciliatory, friendly, open-minded as well as cosmopolitan, who was far from any and all forms of dogmatism, found himself in the position of a hopeless outsider all his life, because he unsuccessfully advocated already in his time, what to-day in fact is in everyone's mouth.

Thus it is all the less understandable and all the more demanding of explanation why up to today in the Federal Republic of Germany he has been denied his true and correct place and the rightful esteem and appreciation which his work and ideas merit.

## Epilog

With all the means and methods at his disposal, with sober and down-to-earth scholarly analysis, in a passionate and imploring battle in the formation of public opinion, at times with irony and sarcasm, Hugo Preuss fought a lifelong battle against wrong turns and errors in the course of Germany's development. As bitter as it was for him to experience the rejection of his life's work, he did not allow this to influence his theoretical views. The wrong orientations of his country had come about under specific social conditions, yet these were subject to change and modification. Thus it was conceivable in principle, that developments could lead to a new orientation, even if this would take time.

If one looks at his entire work, one discovers an important political author. Already in the times of early recent history, German theorists had made substantial contributions to an understanding of developments leading to democracy. This is true of Johannes Althusius, whom Otto von Gierke and Carl Joachim Friedrich had brought back into public consciousness; it is true of Samuel Pufendorf, the first theorist who, following the breakdown of the old fundamentalist stock phrase *one God – one king – one people*, had searched for a new basis for the political system which was now divided in terms of religion and moving toward political pluralism, thus contributing to the emancipation of politics from religion. Even though the dream of the classical school of "German philosophy" had been already at least "the dream of the French Revolution",<sup>71</sup> the theorists and politicians of the so-called *Vormaerz* (the time between 1815 and the March revolution of 1848), found their way to affiliation with the great developments of Western Europe, also in reality, namely Karl von Rotteck and Karl Theodor Welker, as

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70 Hintze, Hedwig, *Hugo Preuss* (footnote 13); Hugo Preuss, *Verfassungspolitische Entwicklungen in Deutschland und Westeuropa. Historische Grundlagen zu einem Staatsrecht der Deutschen Republik*, posthumous works, edited by Hedwig Hintze, Berlin 1927. After the death of her husband (1940), who still tried –himself persona ingrata – to protect her, she was dismissed from her position on the editorial board of the journal *Historische Zeitschrift*; she escaped the persecution of the Jews by fleeing to Western Europe and later – robbed of all means to go on – through suicide. In Bremen, the non-profit association *Hedwig-Hintze-Gesellschaft fuer Historische Forschung und Bildung e.V.* devotes itself to her scholarly works and personal legacy ([www.hhi.uni-bremen.de](http://www.hhi.uni-bremen.de)).

71 Heine, Heinrich, *Einleitung zu Kahldorf: Ueber den Adel* (in: Briefen an den Grafen M. von Moltke) (1831), in: *Saemtliche Werke*, Leipzig: Der Tempel-Verlag, Volume 9, p. 308

well as – in somewhat weaker form – representatives of the “Prussian liberalism” such as Wilhelm von Humboldt. But the persecution of demagogues under Metternich and the anti-socialist laws of Bismarck saw to an ever greater withering of the intellectual and political exchange of ideas with Western Europe. In these lean times, Hugo Preuss was in fact the leading figure of the liberal bourgeoisie who thought beyond the day’s political battles, who took up the old starting points of thought and discussion, developing them further and into a real theory of parliamentary democracy – under the changed and changing conditions of an accelerated industrialization and without the widespread tendency towards intellectual self-censure. Just as Preuss brought back the name of Franz Lieber into the annals of our science of politics – who had been driven out of his country into emigration, going to the great democracy of American –, Hugo Preuss himself deserves the same: he must not be forgotten. And indeed, for our own sake, we can no longer do without him.

What he wanted and what he anticipated has already been achieved in many points. However, unusual learning steps were necessary for this: a truly inconceivable number of human victims, unbelievable destruction, demolition of contexts of culture which seemed secure. Past history cannot be erased after the fact. Yet it remains interesting to analyse – “contra the facts”, as it were – the options which a country refused, and it is both reasonable and sensible to reconstruct the “lost possibilities” as well. In any case, this farsighted constitutional patriot must – and will – receive the recognition and appreciation which is his just due. When the Dutch were living in their Golden Age, they did not know at the time that it was their Golden Age. Our feeling today is a similar one in respect to the Weimar Republic. In addition to all its gleam, it was, however, a time of catastrophes and deep cuts. The world economic crisis had brought many countries to the brink of ruin. But at the same time, something new arose in this period, something that pointed to the future as it helped to work through in a productive manner the events of crisis. In Scandinavia, a bridge was built between bourgeoisie and workers’ movement; in England, the Fabian Society reduced the resistance against social reform; in France, new leftist-liberal alliances were formed; and in the USA, where capitalism is more popular than in any other country in the world, Franklin D. Roosevelt succeeded in realizing the great concept of the New Deal.

This had already been the way of Hugo Preuss, going in the directions prepared in the western constitutional states. The “social market economy” and a “social capitalism” were the successful and influential model for western democracy up to – and well into – the 70’s. Germany tried out a destructive and self-ruining alternative option before. When, after the Second World War, it finally took its place among the western constitutional and welfare states with their great developments, this followed with such naturalness and lack of noise, so to speak, that the anti-democratic hysteria, which seemed so insurmountable up to the year 1933, could hardly be comprehended.

Today, it seems to us that Weimar was something of a great laboratory in which many promising socio-political measures underwent their preparation, but it serves as well as a paradigm by means of which it is possible to study what happens when blockades

make it in fact impossible to do what is theoretically realized as necessary.<sup>72</sup> Unable to act energetically, the Weimar Republic left many of its concepts that had already been worked out to the Nazi system. In place of a peace economy à la Keynes came the pseudo Keynesian system of a war economy.

Since then, the problems have again changed drastically. But as we seek solutions for the great tasks that lie before us, those which emerge out of today's new and great challenges inherent in the expansion of "globalization", it is imperative to remember the discussions of the Weimar period. The sentence, "Bonn is not Weimar" sounds different to our ears today than it did in the year 1949. At that time, it expressed relief at finally having overcome the blockades that brought down the Weimar Republic. Today, however, we can feel the possibilities of that period, now forever lost, for which stood the figure of Hugo Preuss, more steadfastly than any other.

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72 „... but already so often in our history has the necessary again and again proved itself to be at the same time the impossible,” Hugo Preuss, *Regierungsfähige Opposition*, in: *Berliner Tageblatt*, 52nd year of publication (1923), No. 355 ( 31st July 1923 ), again printed in Preuss, *Um die Reichsverfassung von Weimar*, Berlin, 1924, p. 55.