

INDEX

Altona, civil unrest in, 1
Anschütz, Gerhard, 98, 127, 147
Austria
Constitution, 7, 215
constitutional court, 7, 215
autocracy, democracy and, 14, 19,
43, 198
autonomy
autonomous state entities, 164
constitutional adjudication and, 49 *Länder*, 224, 230
municipal, 51
public service independence, 170
'state-free' society, 125

Bilfinger, Carl, 122, 223 Bluntschli, Johann, 106, 129 Bonn, Moritz Julius, 138 Braun, Otto, 1, 3 Brecht, Arnold, 226 Brüning, Heinrich, 2, 3, 100

'Captain of Köpenick' see Voigt,
Friedrich Wilhelm
civil service see public service
Codex Juris Canonici, 128
communists, 1
compromise, principle of
Constitution of the Weimar
Republic, 115, 120
constitutional adjudication and,
120-4
democracy and, 14, 72, 94
exercise of head of state's powers, 208
majorities/minorities, 94
pluralism and, 201, 206
political parties, 142

Constant, Benjamin, 96, 105, 151, 156, 178, 179, 211 constitution contractualisation by adjudication, guarantees for protection, 35-43 guarantees of constitutionality, 43-4 Kelsen's conception, 27-35 unconstitutional acts, nullification, 35 - 43Constitution of the Weimar Republic compromise, principle of, 115, 120 constitutional theory and drafting of, 119 democratic politics. and, 14 drafting of, 12 emergency powers, 1, 2 limits on amendment, 10 constitutional adjudication as adversarial procedure, 194-6 concept of constitution, 27-35 constitutional guardianship, 79-90 constitutional legislation distinguished, 107-20, 189-94 as contractualisation of constitution, 120 - 4democracy and, 71-2 existence of, 185-9 federal state, 72-5 federalism and, 252 impeachment, 96-8, 101 importance of, 69-78 incidental right of, 6 judicial right of review, 6, 79, 82-8 jurisprudential debate as to, 5, 6 Kelsen's advocacy, 19, 181-3 legal hierarchy, theory of, 7, 13



INDEX 275

legality, 22-7 limits on, 10, 90-107 pluralism and, 196-201 'political' acts, and, 183-5 political crimes, 95-6 procedural guidelines, 75 result of, 61-4 Schmitt's critique, 79-124 scope of, 48-56 standard of, 56-61 'total state' theory and, 196-201 'turn to total state', and, 201-5 constitutional court democracy and, 8, 215 initiation of proceedings, 64-7 judgments, 68-9 oral arguments, 67 parties, 67-8 procedure, 64-9, 75 provision for, 5, 6 public proceedings, 67 rationales for, 44-8 review see constitutional adjudication constitutional guardianship democracy and, 21 dictatorship and, 180 judicial see constitutional adjudication; courts jurisprudential debate as to, 5 monarchical, 175-7 'neutral power' doctrine, 150-60, 177 - 81presidential see President of the Weimar Republic rule of law, and, 175 scope, 174 constitutional legality, Kelsen-Schmitt debate, 16-21 constitutional legislation constitutional adjudication distinguished, 107-20, 189-94 constitutional monarchy constitutional guardianship, 177 constitutional theory democracy and, 178 drafting of Weimar Constitution, 119 head of state, 155

'monarchical principle', 175 relationship of state and economy, 134 rule of law, 93, 105-6, 152 Constitutional Theory (Schmitt), 12 constitutional guardianship, 79 judicial right of review, 6, 79, 82 - 8see also constitutional adjudication; Reichsgericht; Staatsgerichtshof crimes against the state constitutional adjudication, 95-6 Dawes plan, 104 decentralization, federalism and, 230 Defence of Democracy (Kelsen), 20 democracy autocracy and, 14, 19, 43, 198 compromise and, 14, 72, 94 constitutional adjudication, 71-2 constitutional court and, 8, 215 constitutional guardianship, 21 constitutional theory and, 178 dictatorship and, 20 federalism and, 236 head of state, 164 Kelsen's theory, 14 majorities, 20 minority and, 94, 140 party system, 141-4 restriction, 230 democratic politics, Weimar Constitution and, 14 dictatorship constitutional guardianship, 180 democracy and, 20 indefinite continuation, 19 majority/minority, 72 president's powers, 11 suspension, 149 temporary, 18 will of the people, and, 14, 15

Ebert, Friedrich, 158 economy constitutional theory, 134 'turn to total state', 133



> INDEX 276

emergency powers constitutional provision, 1, 11 jurisprudential debate as to, 5 suspension, 2 see also dictatorship

federal state constitutional adjudication, 72-5 federalism constitutional adjudication and, 252 constitutional guardianship, 226 decentralization and, 230 democracy and, 236 Länder autonomy, 224 pluralism and, 196 Preussenschlag and, 4 Preussenschlag judgment and, 16 suspension, 230 finance law

reparations payments under Dawes plan, 104

French senate as court of justice, 95

Gneist, Rudolf von, 81, 92, 106 Goebbels, Josef, 4 Göring, Hermann, 4 government ministers see impeachment Guardian of the Constitution, The (Schmitt), 6, 9, 12, 19, 79–124, 125 - 73Guizot, François, 105

head of state see President of the Weimar Republic Heimann, Eduard, 100 Heller, Hermann, 225 Hindenburg, Paul von, 1, 2, 11, 18, 99, 158, 226 Hitler, Adolf, 3, 4, 18 House of Lords (United Kingdom) Staatsgerichtshof compared, 95

impeachment constitutional adjudication, 96-8, 101 interests balancing, 53, 184, 195 economic, 171

judicial expression, 195 legislative expression, 59 organisation into parties, 132, 198 pluralism, 124, 206 protection, 17, 48, 72, 93 pursuit, 10, 183 state guarantee, 199 transformation into unified will, 142 unified, 208

Jacobi, Erwin, 223 Jellinek, Georg, 153, 224 Joseph, Barthélemy, 153 judicial review see constitutional adjudication Jünger, Ernst, 132

Kaufmann, Erich, 107 Kelsen, Hans Austrian Constitution, 7 Austrian Constitutional Court, 7 concept of constitution, 27-35 constitutional adjudication see constitutional adjudication constitutional guardianship, 5 constitutional legality, 16-21 constitutional legislation, 189-94 debate with Schmitt, 6-16, 19 democracy, theory of, 14, 19 legal hierarchy, theory of, 7, 13 monarchical constitutional guardianship, 175-7 and Nazism, 19 'neutral power' doctrine, 177-81 pluralism and 'total state', 196-201 political' acts, 183-5 President as constitutional guardian, 14, 206-11 President as only guardian, 211 - 16rule of law, 175 scope of constitutional

228 - 53'turn to total state', 201-5 unconstitutional acts, nullification, 35 - 43

Staatsgerichtshof judgment, 5, 17,

guardianship, 174



INDEX 277

Länder autonomy, 224, 230 constitutional protection, 16 federalism, 224 see also Prussia Larnaude, Ferdinand, 107 legal hierarchy, theory of, 7, 13, 28, legislation see constitutional legislation legislative competence of majorities, 99 Ludwig II, King of Bavaria, 218 majorities compromise with minorities, 94 conflict with minorities, 205 democracy and, 20 dictatorship by, 72 formation, 149, 158 instability, 143 lack of, 218 legislative competence, 99 limitations on power, 10 minorities protection, and, 71, 93 president's election by, 14, 209 president's independence from, 171 pursuit of interest, 10 rule of, 8 will of, 140, 208 see also will of the people Mann, Fritz Karl, 134 Mayer, Otto, 112 Merkl, Adolf Julius, 7 Meyer, Georg, 98, 127, 147 Mill, John Stuart, 93 minorities compromise with majorities, 94 democracy and, 94, 140 dictatorship by, 72 protection, 71, 93 Mohl, Robert von, 99, 106 monarchy constitutional guardianship, 175-7 'monarchical principle', 175 municipal autonomy, public authority and, 51

Naumann, Friedrich, 158 Nawiasky, Hans, 222, 225, 226 Nazis, 1, 2, 18
'neutral power' doctrine
constitutional guardianship, 150–60,
177–81
nullification of unconstitutional acts
constitutional protection, 35–43

On the Nature and Development of Constitutional Adjudication (Kelsen), 6, 22–78

Papen, Franz von, 1, 2 Parliament see Reichstag parliament and pluralism, Schmitt's analysis, 125-50 parliamentary sovereignty, Schmitt's analysis, 9 party system, development of, 130-44, 198 Permanent Court of International Justice, 222 pluralism compromise and, 201, 206 constitutional adjudication and, 196-201 federalism and, 196 Schmitt's analysis, 125-50 'political' acts constitutional adjudication, 183-5 political crimes constitutional adjudication, 95-6 political parties, compromise and, 142 Popitz, Johannes, 133 President of the Weimar Republic compromise in exercise of powers, 208 constitutional adjudication, and, 217 - 21constitutional guardianship, 5, 11, 18, 150-60, 206-11 constitutional theory, 155 democratic basis for authority, 168-73 dictatorship see dictatorship election, 14 emergency powers, 1, 2, 11 independence, 164 as 'neutral power', 150-60 as only guardian, 211-16



278 INDEX

President of the Weimar (cont.) emergency powers, 2 presidential government, 2 powers of control, 149 Staatsgerichtshof judgments, and, 5 reparations payments, 104 see also Ebert, Friedrich; rule of law Hindenburg, Paul von constitutional guardianship and, 175 Preuß, Hugo, 91, 119, 137, 149, 157 constitutional theory, 93, 105-6, 152 Preussenschlag, 1-6 constitutional legality, 16 Saemisch, Friedrich, 134 constitutional situation in Prussia, 3 Saxon constitution of 1831, 117, 122 court case see Preussenschlag Schmitt, Carl judgment constitutional adjudication, 9 constitutional adjudication and emergency decree, 1 jurisprudential debates, 5 constitutional legislation Preussenschlag judgment distinguished, 107-20 compromise, 240-3 constitutional adjudication as contractualisation of consequences, 243-5 explanation constitution, 120-4 first version, 234–5 constitutional adjudication as second version, 235-40 guardian of constitution, 79-90 judgment, 16, 231-4 constitutional guardianship, 5 Kelsen's critique, 5, 17, 228–53 constitutional legality, 16-21 object, 228-31 courts as guardians of constitution, 79 opinion, 245-53 Schmitt's closing statement, 222-7 debate with Kelsen, 6-16 Schmitt's critique, 5, 17 democratic basis for presidential authority, 168-73 appeal to Staatsgerichtshof, 4 limits on constitutional constitutional conflict of 1862-6, 98, adjudication, 10, 90-107 and Nazism, 18, 19 Preussenschlag see Preussenschlag; 'neutral power' doctrine, 150-60 Preussenschlag judgment parliament and pluralism, 125-50 public authority, municipal autonomy parliamentary sovereignty, 9 and, 51 presidential guardianship of public service independence, 161-8 Constitution, 11, 18, 125-73 public service independence, 161-8 Rathmann, August, 100 Staatsgerichtshof judgment, 5, 18, Reichsgericht 222 - 7constitutional guardianship, 91 will of the people, 15 political crimes trials, 95 Seydel, Max von, 155 ruling as to judicial right of review, 6, Sieyès, Emmanuel Joseph, Abbé, 105 Simons, Walter, 86, 159 79,82-8Smend, Rudolf, 101 Staatsgerichtshof as special tribunal of, 4 social democrats, 3 Reichsrat, 17, 104, 230, 238, 239, 241, Spranger, Eduard, 137 246 Staatsgerichtshof appeal by Prussian government, 4 Reichstag constitutional guardianship, 213 appointment, 103 dissolution of 18 July 1930, 99 as constitutional court, 6, 122, 165



INDEX 279

constitutional guardianship, 90, 212, 226 general competence, 98 House of Lords compared, 95 impeachment cases, 97, 101 as international court, 222 political crimes trials, 95 'political party', definition, 138 Preussenschlag judgment see Preussenschlag judgment Stahl, Friedrich Julius, 154 state entities, autonomy of, 164 'state-free' society, autonomy and, 125 Stein, Lorenz von, 153 Stoll, H, 91 Sturmabteilung (SA), 1

Talleyrand, Charles Maurice de
Talleyrand-Périgord,
Prince de, 135
tax law, delimitation of
competences, 104
Thoma, Richard, 129
'total state'
theory, 196–201
'turn to', 130–46, 201–5
Triepel, Heinrich, 7, 86, 91, 101, 138, 153

unconstitutional acts, nullification of, 35–43
United Kingdom see House of Lords
United States Supreme Court constitutional guardianship, 79–82, 86
decision-making, 117
independence, 175
right of review, 182

Voigt, Friedrich Wilhelm ('Captain of Köpenick'), 247

Warren, Charles, 117

Weber, Max, 12, 138
Weimar Constitution see Constitution
of the Weimar Republic
Who Ought to be the Guardian of the
Constitution? (Kelsen), 6, 13,
174–221
Wilhelm, Hofacker, 109
will of the people
dictatorship and, 14
existence, 15
interests as origin, 142
majority will as, 208
pluralism and, 11