

## CONSTITUTION MAKING AFTER NATIONAL CATASTROPHES: GERMANY IN 1949 AND 1990

INGA MARKOVITS\*

Constitutions, usually, are new beginnings: after some seismic shift in a country's history—a revolution, a lost war, a collapse of government—a nation sets out to reinvent itself. It can do so by looking back into the past or forward into the future. Most constitutions will do a bit of both, but their character will differ depending on which time perspective is foremost in the drafters' minds. A backward-looking constitution will look to past mistakes—perhaps mistakes that brought about the nation's current predicaments in the first place; will try to prevent their repetition, hold on to past successes, and will favor solid and cautious government structures based on reason and experience. A forward-looking constitution will try to create a new and better world. It will distrust the solutions of the past, which, after all, did not prevent the disarray that the new constitution now must help to overcome. Instead, it will aim for new government structures whose design is fueled by hopes and political convictions.

In this Essay, I will compare three twentieth century German constitutions; all three, responses to political disintegration and collapse. The first, the German *Grundgesetz* of 1949, drew its inspiration mainly from the past and became extraordinarily successful. The other two, the first East German Constitution, also of 1949, and the last East German attempt at constitution making, the Roundtable Constitution of 1990, looked mainly to the future and were thorough failures. I will describe how considerations for the past or for the future shaped these constitutions, examine what went right or wrong in their respective lives, and ask whether we can draw any lessons from their fate that may explain what it is

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\* "The Friends of Joe Jamail" Regents Chair in Law, University of Texas at Austin School of Law.

that makes a constitution succeed or fail. Did the drafters' attitudes to time play any role in the effectiveness of their creations?

### I. THE THREE CONSTITUTIONS

A. When the three Western Military Governors, in the "Frankfurt Documents" of July 1, 1948, authorized the West Germans to create a constitution that would establish a new, democratic, law-abiding federal state in their war-torn and divided country, local and regional German self-government already existed in all four Allied occupation zones.<sup>1</sup> It was a more or less independent, *central* German government that the Allies now were looking for. In the West, newly recognized political parties—above all, the Christian Democratic Union (CDU) and the Social Democratic Party (SPD)—ran eleven *Land* (state) governments, each with its own parliamentary body. A similar multiparty structure of local and *Land* governments existed in the Soviet Occupation Zone but was increasingly undermined by the ascendance of the Communist Party. When it became obvious that the Soviet and Western occupation powers could not agree on how to reconstruct a united Germany, the Western Allies decided to create their own consolidated West German state. Hence the Allied request that the West Germans establish a constitutional convention to prepare a constitution that was to be ratified by a West German plebiscite.

The West Germans were keen on self-government but feared that the creation of a West German state would block the path to Germany's future reunification. Instead, they hoped for a provisional governmental structure that would eliminate "the conditions of disorder and anarchy" that plagued their devastated country, "a temporary shelter, not more,"<sup>2</sup> to enable citizens to lead an ordinary daily life until the Soviet Occupation Zone would be allowed to join a free and democratic Germany. In the negotiations over the new constitution, some of the most fervent disagreements between the

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1. I base my description of the inaugural history of the Basic Law on BEWEGT VON DER HOFFNUNG ALLER DEUTSCHEN: ZUR GESCHICHTE DES GRUNDGESETZES, ENTWÜRFE UND DISKUSSIONEN 1941-1949 (Wolfgang Benz ed., 1979).

2. Carlo Schmid, *Rückblick auf die Verhandlungen*, in BEWEGT VON DER HOFFNUNG, *supra* note 1, at 503, 508.

Allied and German representatives concerned semantics. The Germans objected to the lofty title “constitution.” They wanted to produce “a functional structure serving the tasks of a transition period”<sup>3</sup> and accordingly favored giving the document a humdrum, administrative-sounding name such as “*Grundgesetz*” (Basic Law). They also sought to avoid a democratic legitimization of the new charter that might raise it to a higher status than they had in mind; therefore, they rejected a “constitutional convention” in favor of a “Parliamentary Council” elected by the legislative bodies of the *Länder*, and in the end, over strong American objections that almost led to the collapse of the Allied-German negotiations, succeeded in convincing the Occupation Powers that the new Basic Law should not be approved by popular referendum but by the parliaments of the West German *Länder*.

The authors of the *Grundgesetz* were no men of the people. Of the sixty-five delegates to the Parliamentary Council, two-thirds had a university education,<sup>4</sup> over 60 percent were civil servants,<sup>5</sup> and 41 percent were lawyers.<sup>6</sup> There were only four women in the group. The two large parties—Social Democrats and Christian Democrats—each had twenty-seven seats; nine votes were held by smaller bourgeois parties; two delegates were Communists. The drafters’ approach to the work ahead of them was mostly “formed by bourgeois-liberal conceptions of a constitution.”<sup>7</sup> The debates in the Parliamentary Council reflected the elevated class background and education of the members; historical references and literary quotations were bantered back and forth. Almost three-quarters of those present had been “professionally disadvantaged”<sup>8</sup> in the Hitler

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3. *Achte Sitzung des Ausschusses für Grundsatzfragen* (statement of Carlo Schmid), in 5/I DER PARLAMENTARISCHE RAT 1948-1949: AKTEN UND PROTOKOLLE 172, 177 (Eberhard Pikart & Wolfram Werner eds., 1993).

4. Falk Wiesemann, *Die Gründung des Deutschen Weststaats und die Entstehung des Grundgesetzes*, in WESTDEUTSCHLANDS WEG ZUR BUNDESREPUBLIK: 1945-1949: BEITRÄGE VON MITARBEITERN DES INSTITUTS FÜR ZEITGESCHICHTE 118, 131 (1976).

5. Theo Stammen & Gerold Maier, *Der Prozeß der Verfassunggebung*, in VORGESCHICHTE DER BUNDESREPUBLIK DEUTSCHLAND: ZWISCHEN KAPITULATION UND GRUNDGESETZ 381, 396 (Josef Becker et al. eds., 1979).

6. Wiesemann, *supra* note 4, at 131.

7. Wolfram Werner, *Introduction* to 9 DER PARLAMENTARISCHE RAT 1948-1949: AKTEN UND PROTOKOLLE xv (Rupert Schick & Frederick P. Kahlemberg eds., 1996).

8. *Id.* at viii.

years, but prison sentences under the Nazis, except for some of the Socialists and the two Communists, had been relatively rare. The architects of the Basic Law were neither activists nor rebels, but cultivated intellectuals.

Nor did they work on a blank canvas. Even before the Parliamentary Council convened, a group of eleven experts and their staff, the "Herrenchiemsee Constitutional Convent," had discussed the main organizing principles of the new constitution and outlined the *Grundgesetz's* skeleton. Their suggestions exercised a significant influence over the design of the final product. The members of the Herrenchiemsee Convent were appointed by the *Land* prime ministers and were selected on the basis of their expertise. All had at least one doctorate to their names and all were either professors, high court judges, or highly placed administrators in their respective *Land's* justice administration. These men—there was no woman among them—did not see their work as an exercise of political power but of legal know-how. Above all, they wanted to avoid what they saw as "the serious structural mistakes" of the Weimar Constitution,<sup>9</sup> and this professional approach was echoed in the debates of the Parliamentary Council. One of its two Communist delegates would later accuse his bourgeois colleagues of not having come up "with a single new idea."<sup>10</sup> The accusation was a bit unfair, but it reflects the gulf between the two lone activists among the drafters and their more refined and intellectual bourgeois colleagues. Both Communist Council members' lives were dominated by their ideology: they had been incarcerated under Hitler, ran into additional trouble with the authorities of the new West German Federal Republic, and eventually left to live in the GDR. In the debates, nobody listened to the Communists. Their surest way of catching the assembly's attention was by way of catcalls.

The bourgeois majority, meanwhile, set out to design a state that would give temporary shelter to the new democracy but that would not foreclose future political choices made by a hopefully reunited German nation. Despite most members' fear and loathing of the Soviet model of government ("By tomorrow, the Bolsheviks might be

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9. Stammen & Maier, *supra* note 5, at 399.

10. 9 DER PARLAMENTARISCHE RAT, *supra* note 7, at 460.

here,” one of the delegates said on one occasion),<sup>11</sup> the Basic Law does not rule out large-scale nationalizations of land and industrial property as long as individual and social interests are “justly balanced.”<sup>12</sup> But those tricky issues would be for future legislatures to decide. For the time being, the provisional character of their work meant that the drafters of the constitution held on to traditionally accepted values. The Weimar Constitution’s rules on the relations between church and state, for instance, or on the structure of the civil service, which seemed to have worked well enough in previous times, were simply carried over into the *Grundgesetz*. The inclusion of “God” into the final version of the Preamble evoked no real objections. The drafters opted for a “catalogue of classical basic rights”<sup>13</sup> because those rights, considering Germany’s recent past, now seemed more essential to good governance than ever. Suggestions to include some social rights, as the Weimar Constitution of 1919 had done by promising help for families with many children<sup>14</sup> or “the support needed” for people out of work,<sup>15</sup> popped up occasionally in the debate but were quickly rejected as only encouraging “illusions” and “false hopes.”<sup>16</sup> One of the Communists objected to the short-range time horizon of his bourgeois colleagues: “One can’t design a constitution that is confined by its present location in time. We must give purpose and direction to the constitution.”<sup>17</sup> But the majority decided on “modesty in these matters.”<sup>18</sup>

In the end, Article 20 of the Basic Law did declare the Federal Republic to be a “democratic and social state,” and this provision, as we shall see, would take on great significance in the years to come.<sup>19</sup> But its inclusion in the constitution was something of an accident: because the definition was neither thought through nor properly debated, it was accepted by people of very different persuasions and

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11. *Dritte Sitzung des Ausschusses für Grundsatzfragen*, in 5/I DER PARLAMENTARISCHE RAT, *supra* note 3, at 28, 58.

12. GRUNDGESETZ [GG] [Constitution] arts. 14-15 (F.R.G.).

13. *Dritte Sitzung*, *supra* note 11, at 45 (statement of Theodor Heuß, FDP).

14. DIE VERFASSUNG DES DEUTSCHEN REICHS [Weimar Constitution] 1919, Reichsgesetzblatt [RGBl.] 1383, art. 119, ¶ 2 (Weimar Republic).

15. *Id.* at art. 163, ¶ 2.

16. *Dritte Sitzung*, *supra* note 11, at 39 (statement of Josef Schrage, CDU).

17. *Id.* at 47 (statement of Hugo Paul, KPD).

18. *Id.* at 45 (statement of Theodor Heuß, FDP).

19. GRUNDGESETZ [GG] art. 20 (F.R.G.).

passed as a vague and formulaic compromise to a problem that the drafters never properly articulated in the first place.<sup>20</sup>

The fathers and few mothers of the Basic Law did not have the optimism necessary to embark on fundamental social change. The past weighed on their minds and was often mentioned. "Considering what we have experienced in the Nazi-years,"<sup>21</sup> someone might say, or "I'm thinking of the experiences under Nazi-rule."<sup>22</sup> Driven by these experiences, the framers created a powerful system of judicial review that could successfully defend individual human dignity against invasions by the state. An early draft of Article 1 of the Basic Law reversed the fascist adoration of the state: "The state is made for man, not man for the state."<sup>23</sup> The final version of Article 1 expressed the same conviction in a form better suited to a catalogue of rights: "The dignity of man is inviolable."<sup>24</sup> Knowing from experience how easily this dignity could be violated nonetheless, the drafters built defenses right into the constitution. They abolished the death penalty despite the fact that, at the time, it was still favored by most Germans.<sup>25</sup> Under Article 21 of the *Grundgesetz*, political parties that misuse their freedoms to undermine democracy can be outlawed.<sup>26</sup> If individuals attack the constitutional order, certain rights can be forfeited.<sup>27</sup>

But although the makers of the constitution were suspicious of the government, they did not place much trust in the citizens, either. Mindful of the ease with which widespread support had been whipped up for Hitler, they eliminated plebiscites and referenda, restricting popular input to changes of *Land* borders.<sup>28</sup> "We must reckon with the mental laziness of people, the muddy minds, the moral indifference brought about by Nazi rule," said Theodor Heuß,

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20. Ernst Benda, *Der Soziale Rechtsstaat*, in 1 HANDBUCH DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 507, 510 (Ernst Benda et al. eds., 1995).

21. *Dritte Sitzung*, *supra* note 11, at 52.

22. *Id.* at 50.

23. 2 DER PARLAMENTARISCHE RAT 1948-1949: AKTEN UND PROTOKOLLE 217 (Kurt G. Wernicke & Hans Booms eds., 1981).

24. GRUNDGESETZ [GG] art. 1.

25. *See infra* note 168 and accompanying text.

26. GRUNDGESETZ [GG] art. 21, ¶ 2 (F.R.G.).

27. GRUNDGESETZ [GG] art. 18 (F.R.G.).

28. *Id.* at art. 29.

the future President of the Republic.<sup>29</sup> And one of his colleagues from the Christian Democrats warned: “I don’t see a lot of confidence [among us] that the German people will defend its democratic freedoms. If we want to remain level-headed, we should not place exaggerated hopes on the people.”<sup>30</sup> Accordingly, the Basic Law decided on a representative democracy in which members of parliament did not function as an immediate mouthpiece of the people, but rather as go-betweens who could use the power bestowed upon them by the electorate according to the dictates of their own conscience. The drafters also thought that the *Grundgesetz* might have to educate the citizenry: “It is the great task of our generation to wean the Germans of the habits of cheap nationalism.”<sup>31</sup>

Given the Parliamentary Council’s preoccupation with the past, Germany’s responsibility for the horrors of this past had to be on the members’ minds. The issue was debated at great length, and proved difficult to handle. Initially, the “Committee for Basic Principles” had intended to preface the constitution with a short historical narrative that would articulate a rejection of the past. “The national-socialist tyranny has robbed the nation of its freedom. War and violence have plunged humanity into misery and destitution”<sup>32</sup> were to be the first two sentences of this introduction. Actually, the drafters used the old fashioned word “*Zwingherrschaft*” rather than the modern “*Zwangsherrschaft*” or “*Tyrannie*,” suggesting an almost medieval control of an invader over a suppressed population. Ludwig Bergsträsser, a Social Democrat, objected: “*Zwingherrschaft* denotes a power coming from the outside. National Socialism has not come from outside but from within.”<sup>33</sup> But Carlo Schmid, the most prominent Social Democrat on the Committee, rejected Bergsträsser’s interpretation. The term was meant to say that, “[W]e’re talking about domination not based on legitimate authority. We Germans, too, were the victims of National Socialism; even the first.”<sup>34</sup> In the end, the idea of a historical introduction to the

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29. *Dritte Sitzung*, *supra* note 11, at 45.

30. *Achte Sitzung*, *supra* note 3, at 189 (statement of Gerhard Kroll).

31. *Id.* at 184 (statement of Theodor Heuß, FDP).

32. *Neunte Sitzung des Ausschusses für Grundsatzfragen*, in 5/I DER PARLAMENTARISCHE RAT, *supra* note 3, at 226, 230.

33. *Id.* at 238.

34. *Id.*

constitution was dropped. The Basic Law's Preamble begins, "Aware of its responsibility before God and men," but does not specify how that responsibility had been forsaken in the past. Still, without that past, the Parliamentary Council's Constitution would have looked very different.

B. During the making of the first East German Constitution of 1949, the past seemed absent.<sup>35</sup> Considering that the constitution was drafted under the leadership of a party bent on transforming not just its own society but eventually the world, that may come as no surprise. Moreover, East German Communists, having themselves been victims of the Nazis, did not consider their part of Germany to be accountable for Hitler's atrocities. That was the responsibility of the West German side. The two men who exerted most influence on the East German constitution's text, First Communist Party Secretary Walter Ulbricht and his most trusted legal expert Karl Polak, had both emigrated to the Soviet Union during the Nazi years and, steeped in Stalinist ideology, had returned to a Soviet Occupation Zone in ruins with the intention of resolving German problems by the application of Soviet solutions. Already in April 1946, their Communist Party, the KPD, had merged with the Social Democratic Party (SPD)—according to East Germans, to overcome the fatal schism that had debilitated socialist opposition to the Nazis; according to West Germans, under considerable Soviet pressure. Both descriptions had some truth to them. In any event, the new Socialist Unity Party (SED) was clearly controlled by the Communists and steered the constitutional deliberations.

But the East German Communists were not the only group whose input shaped the GDR Constitution of 1949. The Soviet Union held on to hopes for a united Germany longer than the Western Allies did and therefore was more reluctant to authorize the drafting of a constitution for its Occupation Zone than the Western powers had been for what the Germans then called "Trizonesia." Instead, the Russians tried to push for a constitution for a united Germany. To make that constitution palatable to the West, the Soviet Occupation

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35. My account of the East German constitution-drafting process is based on HEIKE AMOS, *DIE ENTSTEHUNG DER VERFASSUNG IN DER SOWJETISCHEN BESATZUNGSZONE/DDR 1946-1949: DARSTELLUNG UND DOKUMENTATION* (2006).



Powers encouraged the creation of a series of popular assemblies called “People’s Congresses for Unity and a Just Peace” that would include delegates from the Western Occupation Zones and that, by way of a “People’s Council” composed of members of the “Congress,” would prepare a draft constitution for a united Germany. The first “People’s Congress,” convened in December 1947, was based on an “opaque”<sup>36</sup> selection protocol. Members were nominated both by political parties and other social groupings (the Western members mainly by the West German branch of the Communist Party); and in the end, East German SED and West German KPD deputies together made up 72 percent of the roughly 2000 delegates. The second “People’s Congress” of 1948 elected a “People’s Council” of 400 members, 100 of them from the West, which in March 1948 (three months before the Western Allies initiated the process that would lead to the creation of the *Grundgesetz*), appointed a “Constitutional Committee” to design an all-German constitution. Again, nine of the thirty members of the “Constitutional Committee” were West Germans. But the West Germans never played a role in any of these various assemblies. As early as 1947, the Western Allies had outlawed West German participation in political endeavors in the Soviet Occupation Zone; the Cold War was on the horizon; on June 24, 1948, the Berlin Blockade began, and by the time the Constitutional Committee completed its final draft of the East German Constitution, the names of its West German members were left unpublished because their participation in the enterprise could be punished under West German criminal law.<sup>37</sup>

Nevertheless, throughout the entire period of their constitution-making efforts, the East Germans maintained their interest in West German collaboration. The Soviets hoped for, and steered the East German authorities towards, a compromise constitution that might prevent the permanent division of Germany, and the East Germans seem to have shared their views. It is a bit mysterious where they found the encouragement to cling to their belief that constitutional cooperation between East and West Germany might actually be possible. The Parliamentary Council was profoundly hostile to what happened in the Soviet Occupation Zone. “Despite the pigsty in the

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36. *Id.* at 133.

37. *Id.* at 139.

East, we must have the same flag,” Theodor Heuß said, for instance, to defend the West German choice of the colors black, red, and gold.<sup>38</sup> But for their part, the East Germans followed attentively the constitutional deliberations in the West. Otto Grotewohl, the Chair of the Constitutional Committee—then chief SED-functionary but prior to the fusion of both socialist parties, head of the East German SPD—was convinced that his committee’s draft could serve as an acceptable compromise to both Germanies.<sup>39</sup> As late as March 21, 1949—a month before the ratification of the Basic Law—the Presidium of the Third East German People’s Council wrote to Konrad Adenauer, the President of the Parliamentary Council and future first Chancellor of the Federal Republic, to suggest an East/West German meeting to discuss a common policy.<sup>40</sup> Only a week *after* the passage of the *Grundgesetz* did the East Germans initiate the ratification process of their own constitution. It was approved unanimously on October 7, 1949, by the “People’s Council,” which at the same time turned itself into the first East German parliament, the “People’s Chamber.”

The 1949 East German Constitution was even less legitimated by popular support than the West German *Grundgesetz*. The West German members of the Parliamentary Council had been delegated by the political parties at *Land* level but at least two-thirds of them had been members of their respective parliaments<sup>41</sup> and thus, at some point, had been elected by the citizens. The various “People’s Congresses” and the bodies emerging from their midst were essentially co-opted by the SED, which at all times made sure that it controlled the majority of the votes. Twelve of the twenty-one East German members of the Constitutional Committee (we can forget about the nine absent members from West Germany) thus were members of the SED.<sup>42</sup> Nevertheless, it would be wrong to see the Committee’s product simply as the result of Communist manipulation and deceit. For one thing, even the Communists intended a compromise with the West Germans. On many of the issues at

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38. Wolfram Werner, *Introduction to 5/1 DER PARLAMENTARISCHE RAT*, *supra* note 3, at xlix.

39. AMOS, *supra* note 35, at 235.

40. *Id.* at 294.

41. Stammen & Maier, *supra* note 5, at 395.

42. AMOS, *supra* note 35, at 145.

stake, the nine bourgeois members of the Constitutional Committee ought to have been able to find support from the former Social Democrats among the SED members on the committee. The Chair himself was a former Social Democrat willing to engage in negotiations and offer concessions. The discussions in the Committee always were settled by a vote, which, though often unanimous, at this stage of East German history still allowed for disagreement and dissent. Objections could be and were raised in crucial matters: the relations between church and state,<sup>43</sup> the legitimacy of private schools,<sup>44</sup> even separation of powers questions.<sup>45</sup> The Communists did not win every battle. This was not a homogenous group: ardent Stalinists, fellow travelers, and future opponents of the system worked together. Only a few years after the founding of the German Democratic Republic, two of the drafters were arrested for political reasons, two were demoted, and one fled to West Germany.<sup>46</sup> Maybe more importantly, most of the Committee members were trained lawyers who had been socialized under a bourgeois legal system. We thus can read the first East German Constitution as a document reflecting more or less authentically the values and beliefs of all of those who drafted it. But, apart from the absurdly optimistic hopes that the West Germans would be willing to cooperate with their colleagues from the East, what were those beliefs?

The 1949 East German Constitution is a strangely mixed bag. It contains a number of provisions that would not have looked out of place in a bourgeois constitution. Article 24 speaks of property in words that seem to have been copied from the Weimar Constitution and the *Grundgesetz*;<sup>47</sup> Article 138 announces administrative courts to protect a citizen against illegal decisions of the administration;<sup>48</sup> the rules on the separation of church and state not only promise “full freedom of belief and conscience” to every citizen, but even

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43. *Id.* at 287.

44. *Id.* at 243.

45. *Id.*

46. See the short biographies of some Committee members in Amos, *id.* at 232-56.

47. DIE VERFASSUNG DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK (1949) [Constitution] art. 24, ¶ 1 (G.D.R.) (“Property obligates. Its use must not run counter to the social weal.”); *cf.* DIE VERFASSUNG DES DEUTSCHEN REICHS (1919) art. 153, ¶ 3 (Weimar Republic); GRUNDGESETZ [GG] art. 14, ¶ 2 (F.R.G.).

48. DIE VERFASSUNG DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK (1949) art. 138, ¶ 1 (G.D.R.).

grant the church the right to speak up on political issues and, in the German tradition, to use the state tax system to collect its members' contributions;<sup>49</sup> and Article 49, like the Basic Law, seems to protect the "essential content" of a basic right even in those cases in which the Constitution allows it to be limited by ordinary law.<sup>50</sup> Provisions like these might have served to assuage the more conservative committee members.

But the bourgeois members of the Constitutional Committee did not seem all that worried in the first place. The political mood in the Committee must have been different from that in the Parliamentary Council. Heike Amos, whose thorough account of the 1949 East German constitution-making process is based on records of the proceedings that became available after 1989, does not report any debates about the past amongst its members. The drafting of the Preamble, for example, which had caused such soul searching in Bonn, proceeded in East Berlin without discernible debate and produced a few uncontested lines largely copied from the preamble of the Weimar Constitution. Whereas the Parliamentary Council's memories of the Nazi years, like Banquo's ghost, were always present at the table, the East German Constitutional Committee seemed unconcerned about such apparitions. The name Hitler was almost never mentioned. The burdens of history were other people's business. As far as Socialism was concerned, they should be jettisoned. The East German drafters behaved like people writing on a clean slate. Some concessions to the past might prove useful to comfort those unnerved by too rapid change. But the past was essentially disposable. Side by side with its bourgeois bits, the constitution contained radical rejections of German government traditions. Had the civil service not served the Nazis with the same conscientiousness as previously the Weimar Republic and the *Kaiser*? Abolish it! Had German judges, appointed for life by a judicial bureaucracy, in any way resisted the perversion of the law? Let the future judiciary be elected by the people! Were private schools not breeding grounds for class division? Replace them by universal public education!

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49. *Id.* at art. 41, ¶ 1 ("Every citizen enjoys the full freedom of belief and conscience."); *id.* at art. 43, ¶ 4 (right to use tax system).

50. *Id.* at art. 49.

The drafters' readiness to deviate from previous solutions makes the East German Constitution's stance appear more forceful and more daring than that of the *Grundgesetz*. For instance, the Parliamentary Council had been hesitant and nervous about granting equal rights to men and women and about assimilating the positions of children born within and outside of marriage. The fathers of the West German constitution (and even three of its four mothers) worried that an equal rights provision would invalidate too many of the family law provisions of the Civil Code. There were repeated reminders that women, after all, have different tasks in life than men and that equality in marriage must be compatible with "the natural functions of the sexes."<sup>51</sup> "One must tell [West German] women that [the more comprehensive notions of equality advocated] in the East exist only on paper,"<sup>52</sup> said a Christian Democrat in the debate. In the end, the *Grundgesetz* included a provision on the equal rights of men and women but delayed its application until March 31, 1953, to give the legislature time to adapt conflicting legislation.<sup>53</sup> When that deadline passed without a new egalitarian family law in sight, the ordinary courts had to decide themselves how to undo the many statutory inequalities between men and women. One court of appeals refused to do so because, absent a legislative guideline, the enforcement of equal rights through unpredictable and haphazard case law would violate the higher-ranking constitutional principle of "legal security."<sup>54</sup> The constitutional deadline had been clear enough, but it took a Constitutional Court decision to declare Article 3, Paragraph 2 of the Basic Law to be directly applicable law even if it should result in possible confusion and disorder.<sup>55</sup> Only four years later did the Federal Parliament finally pass a new family law statute that corrected the previously unequal legislative treatment of men and

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51. *Vierundzwanzigste Sitzung des Ausschusses für Grundsatzfragen*, in 5/II DER PARLAMENTARISCHE RAT 1948-1949: AKTEN UND PROTOKOLLE 621, 643 (Eberhard Pikart & Wolfram Werner eds., 1993).

52. *Siebenundzwanzigste Sitzung des Ausschusses für Grundsatzfragen*, in 5/II DER PARLAMENTARISCHE RAT, *supra* note 51, at 771, 778.

53. GRUNDGESETZ 2 [GG] art. 3, ¶ 2 and art. 117, ¶ 1 (F.R.G.).

54. Bundesverfassungsgericht [BVerfG] [federal constitutional court], Dec. 18, 1953, 3 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 225 (F.R.G.) (citing OLG Frankfurt (court of appeals)).

55. *Id.*

women.<sup>56</sup> The constitution's promise of equal rights for children born within and outside of marriage, which had not included a deadline for the legislature,<sup>57</sup> fared even worse. It was fulfilled only twenty years after the constitution's ratification when the Constitutional Court finally lost patience<sup>58</sup> and put an end to Parliament's dragging its feet.<sup>59</sup>

The example is meant to show how difficult it is to change the world for people who feel indebted to the past, and how easy change looks to people who do not. The East Germans' legislative insouciance produced ironic results. Article 10, Paragraph 3 of the 1949 GDR Constitution, for instance, protected the right to emigrate—a right whose inclusion in the *Grundgesetz* the Parliamentary Council had debated and rejected because it might be too difficult to honor such a right in a devastated land that needed its able-bodied workers to stay home.<sup>60</sup> Eight years later, the GDR passed its first statute penalizing “flight from the Republic.”<sup>61</sup> But at the time of the constitution's birth, its drafters seemed unconcerned with what the country could or could not afford. The constitution's list of social rights—to work, to vacation, to healthcare, to housing (in a world that lay in rubble), even the right to strike—were easily accepted in the Committee.<sup>62</sup> Populist provisions from the Weimar years that allowed the electorate to have an immediate input into legislation, and that the makers of the Basic Law, suspicious of the voters, had rejected, also found a place in the East German Constitution.<sup>63</sup> It was supposed to be an inclusive document. Hence, for example, the

56. Gleichberechtigungsgesetz [Equal Rights Law], June 18, 1957, BGBl. I at 609 (F.R.G.).

57. GRUNDGESETZ [GG] art. 6, ¶ 5 (F.R.G.).

58. Bundesverfassungsgericht [BVerfG] [federal constitutional court], Jan. 29, 1969, 25 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 167 (F.R.G.).

59. The remedial law was finally passed in August 1969. See Gesetz über die rechtliche Stellung der nichtehelichen Kinder [Law on the Legal Standing of Non-marital Children], Aug. 19, 1969, BGBl. I at 1243 (F.R.G.).

60. *Fünfte Sitzung des Ausschusses für Grundsatzfragen*, in 5/I DER PARLAMENTARISCHE RAT, *supra* note 3, at 88, 105.

61. Gesetz zur Änderung des Passgesetzes, Dec. 11, 1957, Gesetzblatt der DDR [hereinafter GBl. DDR] I at 650.

62. DIE VERFASSUNG DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK (1949) art. 15, ¶ 1 (right to work); art. 16, ¶ 1 (right to vacation); art. 16, ¶ 3 (right to preservation of health); art. 26, ¶ 2 (right to housing); art. 14, ¶ 2 (right to strike) (G.D.R.).

63. See *id.* at art. 87 on the *Volksentscheid* (popular decision) and *Volksbegehren* (popular legislative initiative).

rules that not just political parties but also social organizations such as unions or the “Democratic League of Women” could nominate candidates for parliament<sup>64</sup> and that the government would not be run exclusively by the party garnering most votes, but would include, popular-front style, in a united “Block” all parties and organizations with more than forty deputies in the “People’s Chamber.”<sup>65</sup>

The wide-ranging support that such blurry rules found in the Constitutional Committee is surprising. After all, most of its important members were traditionally trained lawyers. But their professional instincts—preciseness, caution, doubt, and skeptical reserve—seemed lost in the excitement of creating a better world. Why was the rule that the constitutionality of legislation should be reviewed not by the courts but by the legislature’s own “Constitutional Commission”<sup>66</sup> not even properly debated by the drafters?<sup>67</sup> Why did the Christian Democrats on the Committee, at whose insistence the constitution introduced a two-chamber system, with the upper house, the *Länderkammer*, representing the then existing five East German states, celebrate the creation of the *Land-chamber* as a major victory and did not notice that it was assigned no political authority to speak of?<sup>68</sup> Why would Karl Schultes, one of the most influential men on the Committee, who in December 1950 fled to West Berlin and would eventually serve as a Justice on the Constitutional Court of West Germany’s *Nordrhein-Westfalen* for twelve years, himself design the constitution’s infamous Article 6, which penalized the “incitement to boycott democratic institutions” as a “felony in the meaning of the Criminal Code,”<sup>69</sup> thus turning the constitution from a shield defending citizens against invasions by the state into a bludgeon of the state to subdue its citizens?

Because—I am suggesting—he did not think of the constitution as a legal document but as a design for a better world. In the early post-war years, the longing for this world, the belief that it might be

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64. *Id.* at art. 13, ¶ 1.

65. *Id.* at art. 92.

66. *Id.* at arts. 66, 89.

67. AMOS, *supra* note 35, at 223.

68. *Id.* at 222.

69. *Id.* at 203.

feasible, and the willingness to apply drastic measures should they be required to create it, were not confined to the Soviet Occupation Zone. While the Parliamentary Council responded to the trauma of the Hitler years with introspection and professional caution, other West Germans were shaken into temporary political activism. Socialism seemed to provide some of the answers they were looking for. In several big cities in the Western Zones, "Antifascist Committees" looking for radical political renewal and composed mainly of Communists and Social Democrats sprang up, and quickly wilted, under the pressure of the Western Military Governments.<sup>70</sup> My own father, as mild-mannered and non-political a man as one can imagine, joined the Social Democratic Party. In March 1946, one month before the merger of the Communist and Social Democratic Parties in the Soviet Occupation Zone, a third of all members of the SPD in the American Zone were willing to support the East German "Unity Party" that was about to be created;<sup>71</sup> 62.1 percent were willing to cooperate with the Communists.<sup>72</sup>

The Western Allies, for whom a sound and democratic West German state represented "a cornerstone in their calculus of anti-communist containment,"<sup>73</sup> had to be worried about such leftist stirrings. When Article 41 of the 1946 Constitution of Hesse, one of the *Länder* in the American Zone, provided for the immediate nationalization of all coal mines, the iron and steel industry, the energy industry, and all rail traffic,<sup>74</sup> General Clay, the military governor, permitted its inclusion only under the condition that it would be submitted to the Hessian people in a separate vote. When 71.9 percent of the electorate approved of their state's socialization plans, General Clay allowed Article 41 to remain in the constitution's text but suspended its execution.<sup>75</sup> He hoped that the political

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70. Günter Plum, *Versuche gesellschaftspolitischer Neuordnung: Ihr Scheitern im Kräftefeld deutscher und alliierter Politik*, in *WESTDEUTSCHLANDS WEG ZUR BUNDESREPUBLIK: 1945-1949*, *supra* note 4, at 90, 92.

71. PUBLIC OPINION IN OCCUPIED GERMANY: THE OMGUS SURVEYS, 1945-1949, at 71 (Anna J. Merritt & Richard L. Merritt eds., 1970).

72. ALBRECHT KADEN, *EINHEIT ODER FREIHEIT: DIE WIEDERGRÜNDUNG DER SPD 1945/46*, at 256 (1964).

73. Wiesemann, *supra* note 4, at 119.

74. For the Hessian socialization plans, see Gerd Winter, *Sozialisierung in Hessen 1946-55*, 7 *KRITISCHE JUSTIZ* 157 (1974).

75. Plum, *supra* note 70, at 112-13.



and economic recovery of their country would cure West Germans of their radical leanings: "Time is on our side."<sup>76</sup> And so it was. Article 41 of the Hesse Constitution was never carried out.<sup>77</sup>

But in the Soviet Occupation Zone, the Military Government's strategic goal of a united Germany open to Soviet influence and the East German Constitutional Committee's blurry and contradictory plans for a socially just and harmonious state fed into each other. Heike Amos, in her account of the 1949 Constitution's genesis, attributes all its inconsistencies and failings to the cunning of the SED, which, under the camouflage of liberal concessions, aimed for a document that would facilitate the transformation of East Germany into a vassal of the Soviet Union.<sup>78</sup> Subsequent events seem to support this view. Nevertheless, it strikes me as one-sided. If they were duped, the bourgeois members of the Constitutional Committee were duped so easily because they, too, believed in the possibility of political renewal. One of them, a politically nonaligned professor of medicine, would later write in his autobiography: "One of my most cherished memories is of my work in the Constitutional Committee led by Otto Grothwohl.... The most judicious and politically knowledgeable heads contributed to this committee."<sup>79</sup> For him, as for all committee members, the first constitution of the GDR was a product of hope.

C. So was the East German Roundtable Constitutional draft of 1990. But because the Berlin Wall collapsed so suddenly and unexpectedly, and because events that followed proceeded at such breakneck speed, the drafting was begun and completed in a mere four months, and the hope that fueled the hectic work looked feverish at first and, at the end, had to be sustained by a stubborn denial of the political developments. Later, a West German critic would accuse East German constitution drafters of fostering "hallucinations of happiness."<sup>80</sup> But in the first weeks after the miraculous events of November 9, 1989, when their work began,

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76. JOHN GIMBEL, *THE AMERICAN OCCUPATION OF GERMANY: POLITICS AND THE MILITARY*, 1945-1949, at 170 (1968) (internal quotation marks omitted).

77. Winter, *supra* note 74, at 164.

78. See generally AMOS, *supra* note 35.

79. *Id.* at 253 n.654 (internal quotation marks omitted).

80. Detlef Merten, *Verfassungspatriotismus und Verfassungsschwärmerei*, 83 VERWALTUNGS ARCHIV 283, 295 (1992).

everything seemed possible. The socialist government of the SED was rapidly disintegrating.<sup>81</sup> Spontaneous roundtable discussions sprang up throughout East Germany: meetings of civic-minded citizens, dissenters, local officials, and ordinary citizens who got together to debate how the political energy exploding all around them could be funneled into the creation of a democratic GDR. The motto of the masses demonstrating in the streets—*Wir sind das Volk!*<sup>82</sup>—claimed its power for the people.

The Central Roundtable of the GDR<sup>83</sup> was established on December 7, 1989, and, like the regional roundtables, was composed of representatives of the “old” and the “new” political forces: fifteen members delegated by the various political opposition groups, which, in most cases quite recently, had been established in the GDR; another fifteen deputies from the political parties in the People’s Chamber. Each side was aided by fifteen advisers who had no right to vote in the proceedings. Especially among the “new” political forces, few were lawyers—a group whose members in the days of socialism had been unlikely to be vocal critics of the government—and few came from occupations in which money played an important role, such as economists or managers. Instead, the representatives of political dissent came from the caring professions or at least from professions unaligned with political authority: theology, medicine, teaching, and the arts. The roundtable discussions were hosted by the church, which provided rooms and moderators and contributed significantly to the “peacefulness” of the proceedings.<sup>84</sup> From the outset, some members of the “old” group crossed over to the “new” side, which therefore early on could count on five additional votes beyond its own sixteen.<sup>85</sup> The Roundtable was also treated with respect by the new East German government which, faced with its own disintegration, needed the

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81. For a description of the events following the collapse of the Berlin Wall, see PETER E. QUINT, *THE IMPERFECT UNION: CONSTITUTIONAL STRUCTURES OF GERMAN UNIFICATION* (1997) and Paul M. Schwartz, *Constitutional Change and Constitutional Legitimation: The Example of German Unification*, 31 HOUS. L. REV. 1027 (1994).

82. “We are the people!” See Schwartz, *supra* note 81, at 1036.

83. On the history of the Central Roundtable of the GDR, see generally UWE THAYSEN, *DER RUNDE TISCH, ODER: WO BLIEB DAS VOLK? DER WEG DER DDR IN DIE DEMOKRATIE* (1990).

84. *Id.* at 36.

85. *Id.* at 42.

dissenters' advice and help to maintain law and order and to transform a universally despised Party state into a state acceptable to its own people. Between the Wall's collapse and the first free elections in the GDR in March 1990, about 2000 East Germans moved daily to the Federal Republic.<sup>86</sup> Those in authority hoped that the Roundtable might help stop the exodus by lending legitimacy to the political process in East Germany. The new Prime Minister Modrow himself paid a visit to the Roundtable deliberations to confer with the reformers. By mid-January 1990, it became obvious that the Roundtable had progressed from its position of "trailblazer of liberation" to being "a central political steering power" in the GDR.<sup>87</sup>

The Roundtable's first decision after convening around its, incidentally, rectangular table, was to charge a subcommittee with drafting a new constitution for the GDR. The Commission was composed of representatives of the dissenters' groups<sup>88</sup> and members of the East German People's Chamber and again, few were lawyers. But it was assisted by a mixed East/West German group of constitutional experts—six East German law professors, four highly respected liberal West German legal academics, a former justice of West Germany's Constitutional Court—and was willing to look for inspiration wherever it could be found. East Germany's best known writer, Christa Wolf, for instance, wrote the constitution's Preamble.<sup>89</sup> No minutes exist of the Drafting Commission's work: there was no bureaucratic framework or experience, no time, and probably no money to hire stenographers. But the discussions of the Central Roundtable itself are published, thanks to the foresight and energy of a West German political scientist who observed all meetings and later reconstructed the proceedings with the help of audio tapes and television recordings of the meetings that, in the heyday of post-Wall enthusiasm, were aired live in the GDR.<sup>90</sup>

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86. Christian Starck, *Deutschland auf dem Wege zur staatlichen Einheit*, 45 JURISTEN ZEITUNG 349, 351 (1990).

87. THAYSEN, *supra* note 83, at 82.

88. Such as the "New Forum," the "Initiative Peace and Human Rights," and "Democracy Now," for example.

89. QUINT, *supra* note 81, at 30.

90. See generally DER ZENTRALE RUNDE TISCH DER DDR: WORTPROTOKOLL UND DOKUMENTE (Uwe Thaysen ed., 2000).

The constitutional subcommittee's work took place in the light of these discussions; the draft reflects the optimism of people who believe that they have just achieved a peaceful revolution. Their constitution was meant to preserve the gains of this revolution or—as the Preamble puts it—of the “revolutionary renewal” of their country. Like the *Grundgesetz*, the Roundtable Draft was not intended to be permanent. In 1949, Article 146 of the Basic Law had limited its validity to the day when the German people would be able “in a free decision” to create a new constitution for a united Germany.<sup>91</sup> Four decades later, Article 136 of the Roundtable Draft expressed similar hopes for a new German constitution created by an “all-German constitutional assembly.”<sup>92</sup> The hopes were not the hopes of realists. Already in the spring of 1990, it seemed quite possible that Germany's reunification would not happen by a coming together of two independent German states under Article 146, but rather by simple accession of the GDR to the Federal Republic under Article 23 of the Basic Law—a method used once before in 1956 when French-occupied *Saarland* joined the FRG.<sup>93</sup> The Draft wanted to make sure that even this second-best reunification would respect the newly won self-determination of the people. Even an accession, Article 132 of the Draft insisted, required a popular vote by all East Germans.<sup>94</sup> The drafters wanted their new East German democracy to find its feet, articulate its own values, and contribute on an even footing to the makeup of a future united Germany. Both the Committee members who were coming from the new civic groupings of dissenters (*Bürgerbewegungen*) and those who were Party-people from the days of socialism were proud of their national identity. Both groups felt that East German citizens were ready to rule themselves. According to Article 43 of the Draft, the flag of their reborn country would show the colors black, red, and gold, in the German national tradition, *and* carry the motto “Swords into Plowshares,” the peace cry of many of the Protestant dissenters

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91. GRUNDGESETZ [GG] art. 146 (F.R.G.).

92. Verfassungsentwurf des Runden Tisches [Roundtable Draft] art. 136, *available at* <http://glasnost.de/verfass/9004verfass.html> (last visited Feb. 23, 2008).

93. Gesetz über die Eingliederung des Saarlandes [Law on the Integration of Saarland], Dec. 23, 1956, BGBl. I at 1011 (F.R.G.).

94. Verfassungsentwurf des Runden Tisches, *supra* note 92, at art. 132.

under socialism.<sup>95</sup> The Roundtable Draft embodies the moral choices of well-intentioned people trying to create a well-intentioned state. At least—so the East German hopes at the time—it would leave its imprint on a future all-German constitutional debate.

The Draft thus had two defining purposes: to distance itself from an undesirable past and to put down markers for a better future. Its attitude to the West German Basic Law is ambivalent. On the one hand, the *Grundgesetz* is the great model of the drafters: its Constitutional Court, its system of government tort liability, its judicial enforcement of basic rights, its notion of an “essential content” of those rights that may not be invaded by the state,<sup>96</sup> and its commitment to the “eternal” validity of some rights that may not even be altered by constitutional amendment,<sup>97</sup> are all borrowed from the Basic Law, sometimes verbatim. But the drafters are also critical of some capitalist freedoms that in their view go too far. The Draft’s protection of free speech does not extend to war propaganda and public discriminatory talk violating human dignity.<sup>98</sup> Private television may not threaten the “multiplicity” of television programs contributing to public information.<sup>99</sup> Research involving certain, unnamed risks may require prior notice to the state.<sup>100</sup> The outlawing of political parties hostile to the constitution (a task of the Constitutional Court both under the *Grundgesetz* and the Roundtable Draft) does not affect the civic rights of the outlawed party’s followers,<sup>101</sup> a rule in direct response to the unfortunate consequences of the West German outlawing of the Communist Party in 1956, which led to a political witch hunt of former party members during the Cold War.

And the Roundtable Draft wants to surpass the *Grundgesetz* by moving towards a more participatory, more culturally diverse, more inclusive, and more tolerant democracy. It eliminates not just the death penalty but also life long prison sentences,<sup>102</sup> expressly

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95. *Id.* at art. 43.

96. *Id.* at art. 40, ¶ 2.

97. *Id.* at art. 100, ¶ 2.

98. *Id.* at art. 15, ¶ 3.

99. *Id.* at art. 15, ¶ 4.

100. *Id.* at art. 19, ¶ 2.

101. *Id.* at art. 37, ¶ 4.

102. *Id.* at art. 12, ¶ 5.

constitutionalizes the right to abortion,<sup>103</sup> protects long-term cohabitation alongside with marriage,<sup>104</sup> introduces voting rights for foreigners,<sup>105</sup> and postulates gradually increasing rights for children.<sup>106</sup> It encourages civic participation in ways that surpass the cautious representative democracy of the Basic Law. The Draft allows for popular legislation by way of a *Volksentscheid*,<sup>107</sup> grants all residents—not just citizens—a right to participate in discussions of public-building undertakings that affect their rights and interests,<sup>108</sup> or to obtain data on potential environmental hazards to one's "life sphere,"<sup>109</sup> and gives the legislature the right to dissolve itself<sup>110</sup> and to remove cabinet members by way of no-confidence votes.<sup>111</sup> The civic groupings of citizens (*Bürgerbewegungen*) that sprang up during the last chaotic years of the GDR and that were the political home of most dissenter-members at the table are honored with their own constitutional provision and given access to official information that concerns their work.<sup>112</sup>

Add to this the apparent socialist carryovers in the constitution and you can see why many West German observers viewed it with suspicion. Provisions like the prohibitions of censorship,<sup>113</sup> of humiliating punishment, or of nonconsensual medical experimentation<sup>114</sup> show that the drafters were afraid of the perversions of government power. Not afraid enough, however, to reject the notion of a benevolent and solicitous state. The Roundtable Draft grants the state an important role in caring for citizens' welfare and promoting social justice, and assumes that invasions of private property will be needed to achieve those goals. Quite in the socialist tradition, the Roundtable members seem to disapprove of private accumulations of large wealth and honor property not primarily as

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103. *Id.* at art. 4, ¶ 3.

104. *Id.* at art. 22, ¶ 2.

105. *Id.* at art. 21, ¶ 2.

106. *Id.* at art. 22, ¶¶ 4, 5.

107. *Id.* at art. 89.

108. *Id.* at art. 21, ¶ 4.

109. *Id.* at art. 33, ¶ 3.

110. *Id.* at art. 55, ¶ 3.

111. *Id.* at art. 77, ¶ 2.

112. *Id.* at art. 35.

113. *Id.* at art. 15, ¶ 5.

114. *Id.* at art. 4, ¶ 2.

an instrument of entrepreneurial energy but as a means of satisfying individual needs. Property that is “personally used” and pension claims based on individual work “enjoy the special protection of the Constitution.”<sup>115</sup> If land greatly increases in value due to a change in public land-use rules, however, the owner must split his gains with the state.<sup>116</sup> Unearned income appears suspicious. Nor should ownership convey too much power over others. The Roundtable Constitution affirms both the far-reaching Soviet expropriations of large private land holdings after the war—which had broken the patronage of the Prussian aristocracy—and all post-1949, mostly economically motivated, nationalizations based on GDR legislation even in those cases in which the transfer was never properly recorded in the public registers. Only owners who lost their property in violation of then-existing socialist law are to receive restitution.<sup>117</sup> Future nationalizations entitle an owner to full compensation only if he personally used the expropriated object.<sup>118</sup> And land ownership of more than one hundred hectares is reserved to public or social institutions and the churches<sup>119</sup>—a rule that at the time the Draft was written required no dispossessions because large private land ownership had ceased to exist in the GDR.

The Roundtable drafters did not much care for “old” property. But they showed great concern for citizens’ “new property”: for benefits derived from work such as wages, pensions, or vacations, or from the government’s solicitous response to people’s needs. Like its socialist predecessor, the GDR Roundtable Draft protects the rights to social security, to work, to housing, to education, and to healthcare.<sup>120</sup> These rights were carefully drafted to exclude direct claims against the state and limit the right to sue the state to certain “cases of special need.”<sup>121</sup> To give the constitutional promises some legal weight, the Draft instead introduces a number of state goals—such as the state’s obligation “as a rule, to pursue an economic policy that grants precedence to the goal of full employ-

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115. *Id.* at art. 29, ¶ 2.

116. *Id.* at art. 32, ¶ 2.

117. *Id.* at art. 31.

118. *Id.* at art. 29, ¶ 3.

119. *Id.* at art. 32, ¶ 1.

120. *Id.* at art. 23, ¶ 2; art. 24, ¶ 1; art. 27, ¶ 1.

121. *See id.* at art. 23, ¶ 2 (establishing the right to social security).

ment”<sup>122</sup>—or “institutional guarantees”—such as a “public law insurance system”<sup>123</sup> providing help in sickness or old age.<sup>124</sup> Again, the “state goals” and “institutional guarantees” are reminiscent of socialist constitutions, which tended to include long lists of promises supposedly ensured by the specific structures of the socialist state. The socialist sovereign, of course, could not be sued. In this respect, the Roundtable’s image of the state profoundly differs from that of its predecessor: the government can be sued by its citizens, a carefully structured judicial system stands ready to adjudicate their claims and to tackle even constitutional issues, and the Draft expressly declares that “the human and civic rights of this constitution bind the legislature, the executive, the courts, and, to the extent that the constitution so provides, other citizens.”<sup>125</sup>

But how should judges interpret the various constitutional guidelines obligating the state to “aim for,”<sup>126</sup> “secure,”<sup>127</sup> “safeguard,”<sup>128</sup> or otherwise ensure respect for a citizen’s basic rights and needs? Do the different wordings in the various provisions imply different degrees of constitutional protection? How can such terms constrain future interpreters? Does a provision stating that “everyone is entitled to respect for his personality and privacy”<sup>129</sup> also bind a person’s fellow citizens? And, if so, what happened to the public/private distinction? West German observers worried about the Roundtable Draft’s unjuridic phraseology, its excess of optimism, its socialist leanings, and its suggestion that even if the—improved—Basic Law should remain the constitution of a united Germany, it should be subjected to an East German plebiscite. Legal bureaucrats in Bonn shook their heads over the Draft’s ambitions. The *Frankfurter Allgemeine Zeitung* called it an “unhatched cuckoo’s egg.”<sup>130</sup> A conservative critic accused it of having

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122. *Id.* at art. 27, ¶ 3.

123. *Id.* at art. 23, ¶ 3.

124. *Id.*

125. *Id.* at art. 40, ¶ 1.

126. *Id.* at art. 3 (referring to the equal rights of men and women).

127. *Id.* at art. 15 (relating to media regulations).

128. *Id.* at art. 33 (relating to environmental protection).

129. *Id.* at art. 8, ¶ 1.

130. Peter Häberle, *Der Entwurf der Arbeitsgruppe “Neue Verfassung der DDR” des Runden Tisches (1990)*, in 39 JAHRBUCH DES ÖFFENTLICHEN RECHTS DER GEGENWART 319, 325 (Peter Häberle ed., 1990).



been nourished by “emancipatory theories of cultural revolution, simple philanthropy, distrust of the nation state, cosmopolitanism, the ideology of multiculturalism, democratization efforts, socialism, pacifism, ecologism, feminism, and the rejection of traditional institutions such as marriage, the civil service, and the traditional relationship of church and state.”<sup>131</sup>

On April 5, 1990, less than three weeks after the first free elections in the GDR, the Roundtable drafting committee handed over its work to the newly constituted People’s Chamber. The Roundtable itself had already been dissolved because a democratically elected legislature now stood ready to represent the people. In a letter to each deputy, the drafters expressed the hope that their efforts would influence the future constitutional debate in the GDR. How long that GDR would still exist was questionable.

## II. WHAT HAPPENED TO THE CONSTITUTIONS?

A. The Roundtable Draft fared worst. It was debated in the People’s Chamber only in passing, in a parliamentary Question Hour, when most speakers expressed the fear that the Draft would prove to be a hurdle to reunification.<sup>132</sup> The delegates decided not even to transfer it to the competent committee. They seemed uninterested in the issues of political ethics that the Draft articulated. Under socialism, the political and cultural identity of the GDR and the particular brand of left-wing, good-willed optimism that the Roundtable Draft had tried to put into constitutional form had been born of the experience of a people forced to look inward, rather than outward, at the world, and had been held together by the Wall.<sup>133</sup> Now that the Wall had fallen and dissent was cheap, it became irrelevant. The March 1990 elections had fundamentally changed the political composition of the legislature.<sup>134</sup> Chancellor Kohl’s Christian Democrats—who advocated the rapid accession of the

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131. Josef Isensee, *Mit blauem Auge davongekommen—das Grundgesetz*, 46 NEUE JURISTISCHE WOCHENSCHRIFT 2583, 2584 (1993).

132. Häberle, *supra* note 130, at 323.

133. See Bernhard Schlink, *Deutsch-deutsche Verfassungsentwicklungen im Jahre 1990*, in DIE VERFASSUNGSDISKUSSION IM JAHR DER DEUTSCHEN EINHEIT 19-20 (Bernd Guggenberger & Tine Stein eds., 1991).

134. QUINT, *supra* note 81, at 20-21.

GDR to the Federal Republic by way of Article 23 *Grundgesetz*<sup>135</sup>—had won 164 of the People's Chamber's 400 seats; the Social Democrats—now also linked to its West German namesake—87 seats; and the communist successor party PDS, despite or because of its political pedigree, had managed to gain 65 seats in the assembly.<sup>136</sup> Depending on how you count, the various civic and dissenter groupings that had dominated the Roundtable discussions together had won only about 30 seats.<sup>137</sup>

In the spring of 1990, East German citizens seem to have felt ambivalent about the future of their country. According to an opinion poll of April 1990, 42 percent hoped for their own new GDR constitution, 38 percent preferred a new constitution to be drafted in East-West German cooperation, and only 9 percent of those questioned wanted the GDR to adopt West Germany's *Grundgesetz*.<sup>138</sup> These preferences reflected the political self-image that the Roundtable Draft embodied: that of a people ready to engage in the "revolutionary renewal" of their country. But citizens' impatience with forty years of deprivations and restrictions won over their newfound civic pride. They *voted* like people wanting, above all, the life that their West German cousins had enjoyed for decades, in which elevators would work, bananas would be available in the stores, and, if you saved enough, you could travel to Italy. That was the life Chancellor Kohl's Christian Democratic Party had promised. It would be achieved by a quick reunification under the roof of the Federal Republic. Under the new CDU Prime Minister de Maziere, the People's Chamber's constitutional work focused primarily on creating the conditions for introducing a market economy in the GDR. The First State Treaty between the two Germanies of May 1990 established in Article 1 "a social market economy" as the "common economic order of both treaty parties."<sup>139</sup>

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135. See *Mr. Kohl's Divisive Appeal for Unity*, N.Y. TIMES, Mar. 20, 1990, at A22.

136. Henry Kamm, *German Losers Reject Victor's Invitation*, N.Y. TIMES, Mar. 20, 1990, at A12.

137. *Id.*

138. Helmut Simon, *Markierungen auf dem Weg zu einer neuen gesamtdeutschen Verfassung*, in DIE VERFASSUNGSDISKUSSION, *supra* note 133, at 139, 149.

139. Vertrag über die Schaffung einer Währungs-, Wirtschafts-, und Sozialunion [Treaty on the Monetary, Economic, and Social Union], May 18, 1990, BGBl. II at 518.

On July 1, 1990, the Deutschmark became common currency in the GDR. The *Grundgesetz* followed on October 3.<sup>140</sup>

The Roundtable Draft did not sink into complete oblivion. Many of its political ambitions—the social rights, the elements of direct democracy, the environmental concerns—are reflected in the state constitutions of the five East German *Länder* where, on a smaller scale and under the protective mantle of federal legislation, constitutional experiments seem less risky.<sup>141</sup> As a concession to East German pride, the Unification Treaty of August 31, 1990, had recommended that a “Common Constitutional Commission” of both German parliaments should study the need for a possible “alteration or amendment” of the Basic Law<sup>142</sup>—a task that was completed in July 1993 and that led only to minor changes.<sup>143</sup> Conservative West German legal academics praised the Commission primarily for its restraint: “The *Grundgesetz* got away with a black eye.”<sup>144</sup> Even most of those West German observers who had watched with sympathy the Roundtable’s attempts at constitutional innovation were glad to see the Basic Law extended to the former GDR. At a meeting of the prestigious West German Association of Public Law Teachers in April 1990 in Berlin (to which no East German public law professor seems to have been invited), most participants had favored the incorporation of the GDR into the Federal Republic under Article 23 of the Basic Law.<sup>145</sup> Few Germans appeared to mind that, once again, a German constitution had been accepted without plebiscite. The legitimacy of a constitution “is not primarily achieved by a one-time formal act of popular acceptance but by its formative imprint on the daily affairs of a state,” wrote Constitutional Court Justice Hans Klein.<sup>146</sup> The peaceful revolution in the GDR turned out not to have been a revolution, after all. It was an

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140. Einigungsvertrag [German Reunification Treaty], Aug. 31, 1990, BGBl. II at 855, art. 5 [hereinafter Reunification Treaty].

141. See Uwe Berlitz, *Verfassungsgebung in den fünf neuen Ländern—ein Zwischenbericht*, 25 KRITISCHE JUSTIZ 437 (1992).

142. Reunification Treaty, *supra* note 140, at art. 5.

143. QUINT, *supra* note 81, at 55.

144. Thus the title of the report by Isensee, *supra* note 131.

145. Gilbert Gornig, *Die Sondertagung der Vereinigung der deutschen Staatsrechtslehrer, Berlin 1990*, 29 DER STAAT 371 (1990).

146. Hans Klein, *Staatsziele im Verfassungsgesetz*, 106 DEUTSCHES VERWALTUNGSBLATT 729, 730 (1991).

“implosion,”<sup>147</sup> a collapse of socialism under its own monstrous weight, that could not generate the reformatory energy that the public acceptance of the Roundtable Draft would have required.

B. The first GDR Constitution of 1949 died not quite as rapidly as the Roundtable Draft. Instead, it atrophied as the SED tightened its hold over the political process. Already the first elections for the People's Chamber in 1950 were not conducted under the system of proportional representation created by Article 51 of the constitution but under the Party's preferred “united list,” which included the delegates of all parties standing for election and which a voter did not even have to mark but simply could drop, unmarked and openly, into the urn.<sup>148</sup> Under the constitution, amendments required a two-thirds majority or at least two-thirds of the total number of deputies.<sup>149</sup> The new election law that changed Article 51 to introduce the collective list vote<sup>150</sup>—as virtually every piece of GDR legislation in the years to come—was passed unanimously.<sup>151</sup> In 1952, the federal structure of the GDR was abolished and replaced by a highly centralized, three-tiered system of executive and legislative bodies.<sup>152</sup> The upper house, the *Länderkammer*, continued to exist as a ghost of its former self until it, too, was dissolved in 1958.<sup>153</sup> In 1968, the People's Chamber passed a new constitution that was slightly more realistic than the 1949 document had been; in 1974, this constitution, too, was thoroughly remodeled.<sup>154</sup>

The 1949 Constitution's chapter on civil rights, under the hopeful heading “Contents and *Limits* of State Power,” did not enable a citizen to challenge the constitutionality of legislation, which the

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147. THAYSEN, *supra* note 83, at 148.

148. AMOS, *supra* note 35, at 329.

149. DIE VERFASSUNG DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK (1949) art. 83, ¶ 2 (1949) (G.D.R.).

150. Gesetz über die Wahlen zur Volkskammer [Election Law], Aug. 9, 1950, GBl. DDR II at 743 (G.D.R.).

151. AMOS, *supra* note 35, at 329.

152. Gesetz über die weitere Demokratisierung des Aufbaus und der Arbeitsweise der staatlichen Organe [Restructuring of the National Government], July 23, 1952, GBl. DDR II at 613 (G.D.R.).

153. Gesetz über die Auflösung der Länderkammer der DDR [Dissolution of the Länderkammer], Dec. 8, 1958, GBl. DDR II at 867 (G.D.R.).

154. See QUINT, *supra* note 81, at 23.

text expressly exempted from judicial review.<sup>155</sup> But under Articles 7 and 33, all legislation violating the equal rights of women or of children born outside of marriage had been abrogated, and ordinary courts were authorized to disregard discriminatory laws and fashion new egalitarian rules.<sup>156</sup> East German judges did a good job of bringing inherited bourgeois family law provisions into line with constitutional requirements, and Articles 7 and 33 were much cited in the early case law. So were some of the constitutional rights protecting citizens against invasions by the government. But the Supreme Court revamped their meaning. For instance, Article 138 had promised the establishment of administrative courts to review the legality of government decisions violating individual rights, and for a short time after its passage, a few administrative courts were actually created at *Land* level and did a creditable job of curtailing breaches of the law by local authorities. But they were soon closed down. When citizens attempted to use the ordinary courts to challenge illegal administrative acts, they were stopped by the new East German Supreme Court, which held in June 1950 that the constitution's announcement of administrative courts implied that ordinary civil courts had no authority to deal with suits against the executive.<sup>157</sup> The new administrative courts were never established.

The Supreme Court turned other constitutional provisions that protected rights *against* the state into rules facilitating the state's *invasions* into private territory. Article 22 of the 1949 Constitution had pledged the protection of property, and Article 24, in a sentence almost identical to one found in the *Grundgesetz* and the Weimar Constitution of 1919, had required that "its use does not run counter to the public weal." The East German Supreme Court ignored Article 22 and used Article 24 to transfer, in Robin Hood fashion, legal advantages from owners to nonowners, usually from landlords to tenants.<sup>158</sup> But the Court's scariest and best known reference to

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155. DIE VERFASSUNG DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK (1949) art. 89, ¶ 1 (G.D.R.) (emphasis added).

156. *Id.* at art. 7, ¶ 2; art. 33, ¶ 2.

157. See Oberstes Gericht in Zivilsachen [OGZ] [Supreme Court in Civil Matters] June 7, 1950, 1 Entscheidungen des Obersten Gerichts in Zivilsachen [OGZ] 12 (DDR); see also OGZ Aug. 22, 1951, 1 OGZ 194; OGZ May 16, 1951, 1 OGZ 151; OGZ Sept. 20, 1950, 1 OGZ 40; OGZ Jan. 10, 1951, 1 OGZ 88; OGZ Feb. 28, 1951, 1 OGZ 106.

158. See OGZ July 5, 1950, 1 OGZ 19; OGZ Sept. 20, 1951, 1 OGZ 221.

the constitution involved criminal law. It relied on Article 6, which began by proclaiming “equal protection under law” and then, in its second paragraph, listed a number of antidemocratic activities such as “incitement to the boycott of democratic institutions” that should be considered “felonies in the meaning of the Criminal Code.” The provision had been drafted by one of the bourgeois members of the Constitutional Committee with the intention of defending the new democracy against attacks by those who, as the Nazis had done, might use the constitution only to undermine it.<sup>159</sup> In a decision of October 4, 1950, the Supreme Court held Article 6 to be “directly applicable criminal law”; chose as the penalties that would apply to this new crime—which the constitutional text, understandably, had not included—the penalties that the Criminal Code provided for other “felonies,” including the death penalty; and declared that the provision protected “the state order of the German Democratic Republic in its entirety.”<sup>160</sup>

For a number of years, the Supreme Court used Article 6 as a catch-all sanction to repress whatever real or imagined opposition might possibly threaten the regime. Jehovah’s Witnesses, spies or presumed spies, “terrorists,” former entrepreneurs, neo-Fascists, and dissenting high school students all could be accused of “incitement to boycott” and could receive very heavy sentences.<sup>161</sup> Lower courts applied the constitutional provision in harmless cases of assaults or insults directed against local dignitaries. In 1957, an amendment to the Criminal Code introduced a number of more precisely defined crimes against the state,<sup>162</sup> and Article 6 was no longer needed to keep dissent and criticism under control. The 1949 GDR Constitution no longer functioned as a legal text. By then, it had already lost whatever civic loyalty it ever had commanded.

C. The West German *Grundgesetz*, on the other hand, did very well. In March 1949, while the Parliamentary Council was still working on the draft, 40 percent of a sample of West Germans had

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159. See *supra* note 69 and accompanying text.

160. See Oberstes Gericht in Strafsachen [OGSt] [Supreme Court in Criminal Matters] Oct. 4, 1950, 1 Entscheidungen des Obersten Gerichts in Strafsachen [OGSt] 33, 40 (G.D.R.).

161. See, e.g., OGSt May 25, 1952, 2 OGSt 37; OGSt May 1, 1952, 2 OGSt 14; OGSt Feb. 12, 1952, 2 OGSt 7.

162. Strafrechtsergänzungsgesetz [Law Supplementing the Criminal Code], Dec. 11, 1957, GBl. DDR I at 643 (G.D.R.).

been “uninterested” and 33 percent “not very interested” in their future constitution. By 1955, six years after its ratification, 30 percent approved of the Basic Law, but 51 percent still admitted to ignorance of its contents.<sup>163</sup> Today, regardless of whether citizens know what it provides, the *Grundgesetz* is the backbone of German democracy. From Jürgen Habermas’s “*Verfassungspatriotismus*”<sup>164</sup> to the popularity of “constitutional complaints,”<sup>165</sup> the constitution is a visible presence in public life. The Constitutional Court is regularly called upon to settle national debates about abortion, access to higher education, same-sex marriage, the proper legal path to Germany’s reunification, the involvement of German troops in the Afghan war—the table of contents of the Court’s decisions cover every important topic in post-war German history. And, for that matter, some unimportant ones as well: when *Land* Cultural Ministers decided to reform the rules of German orthography, the Court was asked to settle spelling issues.<sup>166</sup> It is one of the most respected institutions in the country: in January 2001, 76 percent of a sample of German voters declared that they have “great” or “considerable confidence” in the Constitutional Court, compared to 54 percent who said that they trust the general courts and 52 percent who trust the Federal Government.<sup>167</sup>

For almost fifty years, the *Grundgesetz* has been an effective teacher of the nation. For example, in October 1948, half a year before the Basic Law abolished capital punishment in the Federal Republic, 74 percent of West Germans approved of the death penalty.<sup>168</sup> In 2002, the figure was 23 percent.<sup>169</sup> Of course, rapid

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163. BEWEGT VON DER HOFFNUNG, *supra* note 1, at 9.

164. See JÜRGEN HABERMAS, THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS 74, 76 (2001).

165. In 2006, 5918 constitutional complaints were submitted to the Court, 96.8 percent of its caseload. See Das Bundesverfassungsgericht: Aufgaben, Verfahren, und Organisation — Jahresstatistik 2006 [Federal Constitutional Court: Tasks, Procedures, and Organization — Annual Statistics 2006], available at [http://www.bundesverfassungsgericht.de/organisation/statistik\\_2006.html](http://www.bundesverfassungsgericht.de/organisation/statistik_2006.html).

166. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 14, 1998, 1 Bundesverfassungsgericht [BVerfGE] 1640/97 (F.R.G.).

167. Infratest Dimap, ARD DeutschlandTREND (Jan. 2001), <http://www.infratest-dimap.de/?aid=44&id=39>.

168. JAHRBUCH DER ÖFFENTLICHEN MEINUNG 1947-1955, at 206 (Elisabeth Noelle & Erich Peter Neumann eds., 1956).

169. 11 ALLENSBACHER JAHRBUCH DER DEMOSKOPIE 1998-2002, at 676 (Elisabeth Noelle-

social and moral change lay in the air, and the liberalization of the political climate in the Federal Republic cannot be credited solely to the constitution. In fact, the rejection of the death penalty by the Basic Law had been something of an accident: a right-wing member of the Parliamentary Council, who wanted to put an end to Allied executions of Nazi war criminals, proposed the abolition, and his unexpected support was endorsed by the Social Democratic Party, which had previously despaired of finding the necessary majority for the reform.<sup>170</sup> But a development that began fortuitously was continued with conviction. The Basic Law's profound respect for the dignity of human life<sup>171</sup> found public meaning in numerous Constitutional Court decisions and over the years, encouraged not only the popular rejection of the death penalty, but also a redefinition of prison policies. In June 1977, the Court thus held that human dignity implied the right to hope and that even life sentences required regular review procedures offering realistic chances of release.<sup>172</sup> With respect to some particularly loaded moral issues, the Court itself had to learn to shed its prejudices. The same *Bundesverfassungsgericht* that in 1957 declared male homosexuality to be a legitimate object of criminal penalties<sup>173</sup> in 2002 upheld Germany's same-sex civil union law against attacks that it violated the constitution's express protection of "marriage and the family."<sup>174</sup> But the Court definitely took the lead in the national learning process. It gave citizens who were accustomed to being ashamed of their country's past something to look up to and be proud of.

The Basic Law and the Constitutional Court's imaginative and energetic interpretations were influential far beyond Germany's borders. The *Grundgesetz* served as a model for recent West European constitutions, such as the constitutions of Greece, Portugal, or Spain,<sup>175</sup> as well as for the constitutions of other post-

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Neumann & Renate Köcher eds., 2002).

170. Charles Lane, *The Paradoxes of a Death Penalty Stance*, WASH. POST, June 4, 2005, at A17.

171. Article 1 of the Basic Law states: "The dignity of man is inviolable. To honor and protect it is the obligation of all state power." GRUNDGESETZ [GG], art 1 (F.R.G.).

172. BVerfG June 21, 1977, 45 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 187 (F.R.G.).

173. BVerfG May 10, 1957, 6 BVerfGE 389 (F.R.G.).

174. BVerfG July 17, 2002, 55 Neue Juristische Wochenschrift 2543.

175. See generally GRUNDGESETZ UND DEUTSCHE VERFASSUNGSRECHTSPRECHUNG IM



authoritarian countries, such as South Africa.<sup>176</sup> Many of the new democratic constitutions in Eastern Europe borrowed not only structural devices from the Basic Law—the “constructive vote of no-confidence,”<sup>177</sup> for instance, has been popular—but also its system of constitutional review and its understanding of basic rights. German constitutional thought spread to Hungary by way of fellowships that future Hungarian constitutional justices spent at the Constitutional Court and at German universities.<sup>178</sup> Parts of the Court’s jurisprudence, such as the principle of “proportionality” or the “third party effect of constitutional rights” (*Drittwirkung*) became “constitutional export articles”<sup>179</sup> to courts abroad. It may not be an exaggeration to call the Basic Law the most successful constitution of the twentieth century.

### III. WHAT EXPLAINS THESE CONSTITUTIONS’ FATES?

So are we to conclude that reform-oriented constitutions looking to the future will be unlikely to realize their goals, while constitutions solidly grounded in tradition and with modest hopes will probably succeed? Not so fast. For one thing, both East German constitutions I discussed failed not for structural but for political reasons: the 1949 Constitution, because the powerful Party that had helped to draft it also was intent on pushing it aside; the 1990 Roundtable Constitution, because its drafters had mistakenly believed themselves to be legitimated by a revolutionary surge of popular support. We do not know how these constitutions would have done under more favorable conditions.

More importantly, the *Grundgesetz* did not continue to be as unpresuming and straightforward as it started out. The Constitutional Court’s interpretations of the Basic Law invested it with rapidly increasing political significance. Only a few months after its

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SPIEGEL AUSLÄNDISCHER VERFASSUNGSENTWICKLUNG (Christian Starck ed., 1990).

176. See generally JÖRG FEDTKE, DIE REZEPTION VON VERFASSUNGSRECHT: SÜDAFRIKA 1993-1996 (2000).

177. GRUNDGESETZ [GG] art. 67 (F.R.G.).

178. See generally CATHERINE DUPRÉ, IMPORTING THE LAW IN POST-COMMUNIST TRANSITIONS: THE HUNGARIAN CONSTITUTIONAL COURT AND THE RIGHT TO HUMAN DIGNITY (2003).

179. Dieter Grimm, *Die Karriere eines Boykottaufrufs*, 40 DIE ZEIT 11 (2001).

establishment in September 1951, the Court held that Article 20 of the constitution, which describes Germany as a “democratic and social state,” was an immediately applicable rule that governed the construction of all law and required the state to actively pursue social justice.<sup>180</sup> Although the Court to this day has largely left it to the legislature how this goal should be accomplished, the “social-state clause” has played an important role in “domesticating capitalism”<sup>181</sup> and legitimating the welfare state. “The state is obligated to protect human dignity especially in situations in which citizens are in need of help,” the Court said in 2001, upholding an old-age mandatory state insurance system against attacks that it violated the freedom of individual decision making.<sup>182</sup>

The Constitutional Court’s case law on Article 20 of the *Grundgesetz* reflects a change in the understanding of constitutional rights. These rights used to be seen as individual weapons that a citizen could wield against the state to challenge and defeat it in the courtroom. But what the Germans call *Teilhaberechte*—the rights to share in the country’s social wealth—are realized in more collective ways. The Constitutional Court has used Article 20 primarily to uphold welfare legislation against accusations that it infringed upon traditional defensive rights<sup>183</sup> or to strike down legislation that ignored the special circumstances of particularly needy subgroups of the population—requiring, for instance, that incomes supporting no more than the “existential needs” of an earner remain tax exempt.<sup>184</sup> Only in rare cases—usually in connection with Article 1, the right to human dignity—has the Court enforced *Teilhaberechte* as immediate individual claims against the state.<sup>185</sup> The constitution’s “social-state clause” has benefited far more Germans in their role as citizens than in their role as individual litigants. As an institutional commitment to social justice, the clause’s legal impact, nevertheless, has been substantial.

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180. Bundesverfassungsgerichts [BVerfG] [Federal Constitutional Court] Dec. 19, 1951, 1 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 97, 105 (F.R.G.).

181. PETER BADURA, VERWALTUNGSRECHT IM LIBERALEN UND IM SOZIALEN RECHTSSTAAT 16 (1966).

182. BVerfG Apr. 3, 2001, 103 BVerfGE 197 (221) (F.R.G.).

183. See, e.g., BVerfG Feb. 25, 1960, 10 BVerfGE 354 (F.R.G.).

184. See, e.g., BVerfG June 8, 2004, 110 BVerfGE 412 (F.R.G.).

185. See, e.g., BVerfG June 22, 1977, 45 BVerfGE 376 (385) (F.R.G.).

The Article 20 caselaw demonstrates the constitution's transformation from a container of individual rights into a moral blueprint for society. Early in the Court's existence, its famous *Lüth* decision of 1958 interpreted the constitution's catalogue of basic rights as an "objective value order applicable to all areas of the law."<sup>186</sup> The Court's subsequent case law has confirmed and refined the view of the constitution as the embodiment of a coherent political value system. That means that the Basic Law has important things to say about all legal events and interactions in the country. It colors the private relationships between citizens whose legal claims against each other have to be interpreted in the light of the constitution. It obligates the state to carry out the value judgments of the Basic Law. It requires the legislature to respect the constitution's views on human dignity and citizenship. The *Bundesverfassungsgericht* is careful not to tell parliament how to do its job, but it guides its choices: it has warned, for instance, against the "unconstitutional budgeting"<sup>187</sup> of public education funds, or has insisted that the legislature honor the dignity of life by finding some way to express its moral disapproval of abortion.<sup>188</sup>

Such all-embracing constitutional commitment runs afoul of the careful lawyerly distinctions used in the past to classify the constitution's various imperatives. Under the Court's stewardship, the public/private distinction, the differences between subjective "rights" and objective "state goals," even the separation of powers have become blurrier than before. Take, for instance, the "state goal" of environmental protection, which (at the prodding of the East-West German Reunification Treaty) was added to the Basic Law in 2002.<sup>189</sup> It obligates the legislature "in its responsibility towards future generations to protect the natural foundation of life." The new Article 20a does not entitle individuals to sue the state, nor does it mean, as Christopher Stone suggested in 1972, that trees have been given standing.<sup>190</sup> But, like the "social-state clause," the

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186. BVerfG Jan. 15, 1958, 7 BVerfGE 198 (F.R.G.).

187. BVerfG May 3, 1972, 33 BVerfGE 303 (F.R.G.).

188. BVerfG Feb. 25, 1975, 39 BVerfGE 1 (F.R.G.).

189. GRUNDGESETZ [GG] art. 20a (F.R.G.). Note that this Article was added by Gesetz zur Änderung des Grundgesetzes [Law Amending the Basic Law], July 26, 2002, BGBl. I at 2862 (F.R.G.).

190. See generally Christopher D. Stone, *Should Trees Have Standing?—Toward Legal*

provision can be used to uphold environmental legislation that places burdens, for example, on someone's also constitutionally protected right to property. And if the legislature drags its feet in passing needed environmental legislation, the Constitutional Court would probably find ways to remind it of its duty. As one Constitutional Court Justice put it in 1991: "The relationship between legislature and judiciary that has developed under the *Grundgesetz* is marked by the characteristic feature that constitutional norms and, in particular, basic rights, acquire more impact, the slower the legislature is in enforcing them."<sup>191</sup>

In this view, the first and the third branch of government are no longer separated by a firewall but are engaged in a continuing conversation about how best to realize the goals of the constitution. For instance, German abortion law—whose constitutional status is complicated by the fact that, mindful of the contempt for human life under Nazi rule, the constitution's "right to life" is understood to protect the fetus<sup>192</sup>—has been developed in the back and forth of various proposals and responses between the legislature and the Constitutional Court. The same has been true for Hungarian abortion law. Kim Scheppele has described a similar form of inter-branch cooperation between the Constitutional Court and the executive when the Hungarian Constitutional Court, by limiting the enforcement of the Economic Stabilization Act of 1995, defended the Hungarian government's policy of gradual social change against the pressures of the World Bank, which favored a more ruthless acceleration of market policies.<sup>193</sup> Citizens, too, can be involved in the work of advancing constitutional values. The German "constitutional complaint," for instance, was introduced in 1951 to give *individuals* a final chance to vindicate their personal rights. Today, by way of statutory change and case law, it has taken on *objective* general significance as a means of utilizing individual complaints to stimulate constitutional change.<sup>194</sup> Although under the initial rules

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*Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

191. Klein, *supra* note 146, at 732.

192. BVerfG Feb. 25, 1975, 39 BVerfGE 1 (F.R.G.).

193. Kim Lane Scheppele, *A Realpolitik Defense of Social Rights*, 82 TEX. L. REV. 1921, 1945-47 (2004).

194. See generally Christoph Gusy, *Die Verfassungsbeschwerde*, in 1 FESTSCHRIFT 50 JAHRE BUNDESVERFASSUNGSGERICHT 641 (Peter Badura & Horst Dreier eds., 2001).

of standing a citizen could bring a constitutional complaint to avert “a severe and unavoidable”<sup>195</sup> impairment of his rights, the Court today will accept a constitutional complaint only if “it serves to safeguard constitutional law and to further its interpretation and improvement.”<sup>196</sup> Under the Hungarian constitution, an individual citizen can initiate the abstract constitutional review of legislation that has no bearing whatsoever on his individual rights. Modern constitutionalism has become a collective civic enterprise.

With these developments in mind, it seems that the 1990 East German Roundtable Draft actually came much closer to both the *Grundgesetz* and to East European constitutional deliberations of the time than the Draft’s creators and its critics may have thought. Many of the Roundtable’s innovations, such as the cautiously defined protection of social rights, the third-party impact of constitutional rights, the introduction of “state goals,” and even the disapproval of life-term prison sentences, had already been anticipated by the case law of the Constitutional Court. The same is true for the post-socialist East European constitutions. These constitutions, too, contain many features that once seemed typical of pre-1989 socialist constitutions but that, as we have seen, also characterize the jurisprudence of the *Bundesverfassungsgericht*: the notion that the state owes care and solicitude to its citizens, the articulation of social rights, their protection by way of institutional guarantees, the affirmation of state goals, and the perception of the constitution as a roadmap to a “good” society. You might say that the future, which the drafters of the “provisional” Basic Law were largely blotting from their minds, has returned to European constitution making.

As did the Roundtable Draft, the new East European constitutions have met with a lot of criticism for their “socialist” ways. Western constitutional lawyers worried that their catalogues of “social rights” to work, housing, education, healthcare, and the like were unenforceable and would only confuse and disappoint post-socialist citizens’ understanding of “the rule of law”; that even if it could be given legal meaning, the concept of “state goals” would

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195. Bundesverfassungsgerichtsgesetz [Law on the Federal Constitutional Court], July 21, 1956, BGBl. I at 662 (§ 91a) (F.R.G.).

196. BVerfG July 14, 1998, 98 BVerfGE 218 (243) (F.R.G.).

encourage courts to meddle in matters that were for the legislature to decide; that giving “horizontal effect” to constitutional rights would interfere with the efficiency of market mechanisms; and that the constitutions would encourage East European citizens’ continued dependence on the state.<sup>197</sup> “This is communism pure and simple,”<sup>198</sup> András Sojó wrote in 1996 when the Hungarian Constitutional Court used the constitution’s social rights provisions to halve the intended impact of the government’s austerity legislation.

Under Communist rule, of course, nobody could have sued to challenge the legislation’s constitutionality in the first place. The drafters of the new post-socialist constitutions have learned from experience to mistrust the state and, therefore, have introduced powerful judicial systems to defend individual rights. But Eastern Europeans have also learned from the days of socialism that everyone needs a social safety net in case his own strength fails him. Modern industrial society is simply too fragmented, too complex, too interdependent, and too unpredictable to support the capitalist myth that each individual, all by himself, can be the architect of his own fate. In 1950, when the German Constitutional Court had not yet been established, Harold Berman, in his wonderful book *Justice in Russia*, characterized Soviet law as “parental” law that took the citizen by the hand and guided him in ways that the Party thought would serve him best.<sup>199</sup> In 1963, Berman added in the second edition of his book: “It is the author’s intention to stress these ‘parental’ elements as characteristic not only of Soviet law but also, increasingly in the twentieth century, of other legal systems.”<sup>200</sup> The Constitutional Court’s *Lüth* decision, which paved the way for the Basic Law’s moral authority over all areas of the law, was by then five years old. Today, it seems self-evident that the Basic Law protects those too weak or even just too careless to protect themselves. Assuring for everyone the necessary provisions for old age,

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197. See, e.g., Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857 (2001); Cass Sunstein, *Against Positive Rights*, 2 E. EUR. CONST. REV. 35 (1993); Cass R. Sunstein, *American Advice and New Constitutions*, 1 CHI. J. INT’L L. 173 (2000).

198. András Sajó, *How the Rule of Law Killed Hungarian Welfare Reform*, 5 E. EUR. CONST. REV. 31 (1996).

199. HAROLD J. BERMAN, *JUSTICE IN RUSSIA* 3-4 (1950).

200. HAROLD J. BERMAN, *JUSTICE IN THE USSR* 368 (rev. ed. 1963).

for instance, “is part of the social tasks of the state community,” the Court wrote in 2001.<sup>201</sup> Relying on people’s own insurance is too chancy: “The population lacks the necessary awareness of the risks.”<sup>202</sup> Parents see farther into the future than their children.

I have managed to return to the topic I began with: the perception of time in German constitution making. A constitution “does not just want to regulate that which exists but also wants to be a roadmap for the future,” wrote one of the judges of the Constitutional Court.<sup>203</sup> This view squares well with a parental state concerned for its children’s welfare. But perhaps it was not the Constitutional Court’s future orientation that served the *Grundgesetz* so well; perhaps it was its flexibility and openness for change. Constitutional judges have the difficult task of giving contemporary meaning to “eternal” rights.<sup>204</sup> To do so they must be both loyal to the constitution’s values and imaginative in their responses to the dangers that may threaten them. “Free speech,” for instance, must be defended against different attacks and in different ways in 2008 than in 1949. Judges thus should be alert to the political and social culture of their day. This is particularly true in post-totalitarian democracies that have to learn a new moral vocabulary and in which unforeseen difficulties and the lack of political experience may require imaginative responses.

The German Constitutional Court was greatly helped in its pedagogical role by an appointment process that fosters the selection of moderates. Because half of the justices are chosen by the Federal Parliament and half by the Federal Council,<sup>205</sup> with both houses often dominated by opposing parties, the appointment process usually is preceded by extensive negotiations. Justices quite often are appointed, as it were, in pairs in order to achieve a better

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201. BVerfG Mar. 21, 2001, 103 BVerfGE 195 (221) (F.R.G.).

202. *Id.* at 223.

203. Klein, *supra* note 146, at 735.

204. In *Cohens v. Virginia*, John Marshall said that “[a] constitution is designed to approach immortality as nearly as human institutions can approach it.” See Donald Kommers, *The Basic Law: A Fifty Year Assessment*, 53 SMU L. REV. 477, 481 (2000) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 387 (1821)). The *Grundgesetz* supports this view with its “eternity clause” of Article 79, para. 3, that exempts Article 1 (human dignity) and Article 20 (federalism, separation of powers, the rule of law, and the social welfare state) from any alteration by amendment. See GRUNDGESETZ [GG] art. 79 (F.R.G.).

205. GRUNDGESETZ [GG] art. 94 (F.R.G.).

political balance, and the selection of fundamentalists of any sort is rare. The Basic Law left such details as the number of judges and the length of their tenure to ordinary legislation, and it took some experimentation to arrive at the current rules: the Court now has two Senates, with eight judges each, sitting for a nonrenewable term of twelve years.<sup>206</sup> The term limits ensure a regular turnover at the Court, and so prevent the entrenchment of particular political approaches; the even number of justices forces them to compromise in close cases. The men and women chosen in this way have been remarkable for their moral commitment and their open minds. It helped that the constitution did not settle all appointment choices and thus left room for a flexibility more easily achievable by ordinary law.

So maybe a constitution's success depends on its adaptability to change and on the political sensitivities of its interpreters. Maybe, instead of talking about time orientations, I should have talked about the structural choices facing the drafters of my three German constitutions. But this Essay was concerned with their history. Let someone else deal with the architectural problems of constitution making.

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206. Gesetz über das Bundesverfassungsgericht [Law on the Federal Constitutional Court], Dec. 17, 1970, BGBl. I at 1765 (F.R.G.).