

The *Grundgesetz*

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GRMN 2720: Germany in the World

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“Conscious of its responsibility before God and before man, inspired by the resolve to preserve its national and political unity and to serve world peace as an equal partner in a united Europe, the German people [...] has, by virtue of its constituent power, enacted this Basic Law of the Federal Republic of Germany to give a new order to political life for a transitional period.”¹

The preamble to the Basic Law of West Germany sets clear grounds that the German people wished their new government to be better than the governments that had come before it, both for themselves and the world. They acknowledged the importance of their new government for maintaining peace while boldly stating that it was only temporary, awaiting Germany’s reunification. After World War II, the Grundgesetz was drafted as a provisional constitution for West Germany that was only supposed to last until it reunified with the East, so that the two divided countries might form a new government together. Nonetheless, the Basic Law has lasted through reunification with much support from its citizens, Western and Eastern alike. Because it was written in the complex environment of post-war occupation and separation with a need for reconciliation, it turned out strong enough to prevail through an evolving and growing Germany.

The Allies that occupied West Germany were stretched thin after the war, eventually leading them to push West Germany to govern itself with less oversight from their governments and militaries. The US Army and State Department were the most vocal in pushing for West Germany to be a self-governing state.² Occupying and running West Germany was a costly task that was largely supported by the US government, and it needed to shed some of that responsibility as the occupation was losing support from the American public. The US, England,

¹ *Documents on the Creation of the German Federal Constitution*. (Buffalo: Civil Administration Division Office of Military Government for Germany, (US) 1949), 9, Hein Online.

² Hans G Gnodtke, “Sixty years of the German Basic Law (Constitution of the Federal Republic of Germany 1949) and twenty years of German reunification : a synopsis,” *James Cook University law review* 16, no. 1 (January 2009):6.

France, Belgium, the Netherlands, and Luxembourg were involved in the Six Power Conference in London during the spring of 1948; on 1 June 1948 they agreed to “[propose] the creation of a Federal German government in the Trizonal areas[— the parts of Germany controlled by France, England, and the United States— ...] and [relinquish], by the Military governments concerned, of certain of their powers, in favor of this Federal government, under the terms of an Occupation Statute.”³ The connotation of relinquish suggests that this was a decision not taken lightly even with the Military governments keeping some of their powers. Though the Military Governors— those in charge of each of the Trizonal areas from the nation that occupied the region— gave legislative, executive, and judicial powers to the German government, they still held almost all of the control over their foreign relations and trade.⁴ This agreement allowed the occupying nations to put fewer resources into the survival of West Germany while also keeping control over things that helped avoid another war. The Six Powers had to convince the Germans that forming their own government was what was best for their people.

Drafting a constitution meant formally dividing Germany, so there needed to be a plan in place for future reunification. The Ministers-President— the heads of each of the German state’s governments— originally did not want to draft a constitution because it would cement the division of Germany, but it became clear that Germany was divided for the time being, and there was no way to know how long the Soviets would hold onto control over the Eastern half.⁵ The impossibility for reunification in the near future is what led the Ministers-President to agree to draft a constitution. The Military Governors and Ministers-President agreed in the proposal to draft the constitution that it had to be easy to change for the eventual reunification of Germany.⁶

³ Eric Solsten, *Germany: a country study*. (Washington, DC: Federal Research Division Library of Congress, 1996), 86-87, Hein Online; *Documents*, 42.

⁴ *Documents*, 44.

⁵ Solsten, *Germany*, 87.

⁶ *Documents*, 43-44.

They all agreed that reunification under a democratic government was still the ideal situation; however, it was unlikely, so they made sure that the government formed would be adaptable, though it was still unclear to many whether that meant it would be completely rewritten or simply be edited upon reunification. It was referred to even while in the drafting process as the “Basic Law” or “Provisional Constitution” because of the agreement that it was only supposed to be temporary.⁷ It was decided it would be best if there was a way to void this constitution for a completely new one, so it was important for everyone to know that it was being written only because the Western Trizone needed a functioning government while the East remained under Soviet control. This agreement opened the way for the drafting process to begin.

The next step was to decide who would be writing the Basic Law and who would vote to approve it. The Military Governors originally proposed that the constitution would be voted on in a referendum; however, it was instead voted on by the representatives in the Parliamentary Council.⁸ This may have been because of a distrust in some Germans who might have voted against it without fully understanding the document and its importance. The Parliamentary Council— composed of sixty-five representatives from the West German *Länder* and chaired by Konrad Adenauer— began its meetings in August 1948 at Herrenchiemsee in Bavaria and later met in Bonn that fall to make the final changes.⁹ The people in this Council varied in background from former Nazi soldiers, to members of the German Resistance, to politicians from the Weimar era, and academics.¹⁰ This diverse variety of people was important because it helped form a more representative government where all opinions could be heard. Along with the sixty-five members of the Parliamentary Council there were five from Berlin who did not have a vote but still

⁷ *Documents*, 46.

⁸ Solsten, *Germany*, 87.

⁹ Solsten, *Germany*, 87.

¹⁰ *Documents*, 50-61.

participated in the discussion.¹¹ These representatives debated between various articles and wordings until the final product was approved. During these discussions, the council members were separated into different committees.¹² This allowed them to gain expertise in the areas they were assigned in so that any flaws were found and fixed. On May 8th 1949, the Parliamentary Council settled on their final version and ratified the Basic Law. Bavaria was the only *Land* whose representatives did not ratify the Basic Law, though they knew it was going to get the votes to pass and would go into effect for them. They chose to do so because they believed there was too much power given to the Federal government as opposed to the *Länder*.¹³ Though the Bavarian representatives knew it would go into effect, they felt it was important to voice their opposition to the lack of power specifically laid out for the *Länder*, hoping it could leave the door open for future negotiations.

Before it was ratified, Stalin and the Soviets did not like that West Germany was organizing into a democratic state, so they tried to pressure the West into reunifying under Soviet influence. When that did not work the Soviets blockaded West Berlin, resulting in the airlift.¹⁴ The Soviets continued to try reaching out to the Western powers to get Germany reunited until 1954.¹⁵ They had hoped that the German people wanted reunification enough to be willing to go against the other Allied powers, placing the Soviets in charge, but eventually the Soviets had to give up because the West had formed its own government and still refused to join. The Basic Law got ratified and the new government began as the Federal Republic of Germany.

¹¹ Ulrich Bachmann, Kirsten Nemitz, and Winfried Bader, "Das Grundgesetz. Dokumentation seiner Entstehung. Projektkonfiguration und EDV-Einsatz für die nach Artikeln gegliederte Edition," *Historische Sozialforschung* 18, no. 3 (1993), 107, JSTOR.

¹² *Documents*, 62-63.

¹³ Solsten, *Germany*, 87.

¹⁴ Gnodtke, "Sixty years," 6.

¹⁵ Gnodtke, "Sixty years," 7.

There were many changes made during the writing process, leading up to the version that got passed. There were two versions of the preamble written, eventually the shorter of the two was selected. Though both mentioned the hope for a unified Germany and that East Germans were “denied” participation in writing this constitution, the selected one does not acknowledge the “occupation of Germany by foreign powers [that] subjected the exercise of a right of free national self-determination to severe restrictions.”¹⁶ This was probably excluded to avoid angering the allied powers that occupied West Germany and pressured them to form the government. Another change was to the original draft of article twenty-one paragraph two which did not include the definition of parties that were unconstitutional, but it later added that it was parties that “seek to impair or abolish the libertarian democratic basic order or to jeopardize the existence of the Federal Republic of Germany.”¹⁷ This definition of what parties could be banned was important to include so that parties that were antidemocratic could not gain control like the Nazis did in the 1930s, leading to a take over and dismantling of the democratic government. Many important details were added and changed throughout the drafting process in order to create a more stable government.

The final version of the Grundgesetz has many clauses and articles that are unique and uncommon in other constitutions. One uncommon constitutional clause is article one hundred forty-six, which would suspend the Basic Law after a new constitution is written by a reunified Germany.¹⁸ This was included because the framers wanted to make the process of reunification more democratic by giving Eastern Germans a say in the drafting of their constitution and forming the government. The variation in writing style is also unique. In some places, the Basic Law is reflective of a Civil Code because it is short and ambiguous, but at other times it becomes

¹⁶ *Documents*, 25.

¹⁷ *Documents*, 27.

¹⁸ Gnodtke, “Sixty years,” 7.

more like a piece of legislation because it is precise and closed for interpretation.¹⁹ It is a bit unusual for a constitution to be worded like that; however, it was necessary because some things like civil liberties needed to be broad to include everyone; whereas, financial laws needed to be more specific in order to lay out which branch of the government was in charge of what federal money and who could create taxes on what. This made a strange mix of legal stylings that would satisfy both the Allied governments and the Ministers-President. Because Germans were still under occupation while they wrote the Basic Law, they had to include article twenty-four which gave them the ability to “transfer sovereign powers to international institutions” and “join a system of mutual collective security.”²⁰ That article is what allowed Germany to remain in the European Union after the Maastricht Treaty without having to question who legally had a higher say for security or international affairs.²¹ It is uncommon to see constitutions that allow their government to hand over their powers to other governments outside their country. The Grundgesetz had to include unique stylistics and clauses in order to function in the environment it was drafted in.

The framers had to decide which parts of the government would be given what powers and how West Berlin fit into that government. Any powers that were not given to the Federal government in the Basic Law would fall to the *Länder* governments. The Federal and State governments share responsibility for civil law, refugee matters, public welfare, land management, consumer protection, public health, the collection of statistics (births, deaths, marriage, etc.), higher education, regional economic development, and agricultural reform.²² This lack of specificity for what fell solely to the *Länder* is what made Bavaria not ratify the

¹⁹ Russell A Miller, “Germany’s German Constitution.” *Virginia journal of international law* 57, no. 1 (March 2017): 118-119.

²⁰ *Documents*, 11.

²¹ Rudolf Streinz, “Das Grundgesetz: Europafreundlichkeit und Europafestigkeit Zum Lissabon-Urteil des Bundesverfassungsgerichts.” *Zeitschrift für Politik* 56, no. 4 (2009): 478. JSTOR.

²² Solsten, *Germany*, 350

Grundgesetz when it was first written. Though there are some things that were explicitly shared, it was not specified to what extent each government would be responsible. Bavaria was not the only place controlled by West Germany that faced issues with the Basic Law. There were originally more detailed specifications for how the Bundestag and Bundesrat would work for Berlin. There was debate over whether Greater Berlin or only West Berlin should have been included; however, it was taken out of many articles and simplified into article 144, giving Greater Berlin the right to fair representation despite the East not following the *Grundgesetz*.²³ This simplification took away some of the more set in stone guarantees and acknowledgements of Berlin, seemingly leaving it up to Berliners to decide for themselves whether they were East or West Germans. This could have been part of why the Soviets reacted so harshly to the formation of the Federal Republic of Germany because they laid claim to all of Berlin despite only the Eastern portion being under their control, while the West half was controlled by the Trizonal powers. Perhaps that is part of why the Soviets closed off landways to the West from Berlin because if the West could claim all of it so could they. Powers and representation were split not only between levels of government.

The Judicial system had to be reorganized with less power. The people lacked trust in the courts because of how the Nazis had abused judicial power. Most often the job of clarifying and further defining the rights within the Basic Law has gone not to the courts but rather to the legislature because of the distrust in the court system from the start of the Federal Republic of Germany. This is shown in article five of the *Grundgesetz*, which gives the right for people to give their “opinion through speech, writing and pictures” as well as the freedom of press, radio, and film; and then it goes on to say “these rights are limited by the provisions of the general

²³ *Documents*, 28.

laws.”²⁴ This gives the right to limit these freedoms not to a court but to the legislature through the passing of new laws.²⁵ This not only took the power from the judiciary but gave it to the German citizens because they can vote against parties or Members of the Bundestag who limit those freedoms against the will of the people. The Bundestag could further limit these rights, but there have been times when the Constitutional Court has had to elaborate on or better define them. The Courts extended the basic rights listed in articles one through nineteen of the Basic Law, so they do not only protect people from the government but also from other entities, including: individuals, organizations, business, and more.²⁶ This has helped protect people from retaliation and being sued for exercising their rights. The case of Erich Lüth v. Veit Harlan was the initial decision that supported these basic rights applying between individuals. Lüth called for a boycott of Harlan’s film due to his history creating anti-Semitic propaganda during the Nazis time in power. Harlan sued him, arguing that it cost him money by hurting his business. Initially the District Court in Hamburg sided with Harlan; however, the Federal Constitutional Court agreed that the suit against Lüth went against his right to freedom of expression.²⁷ This landmark case gave people more faith that their rights would be upheld and that the Constitutional Court was able to do its job. Though there was a lack of trust in the judiciary and most of the legal power lies with the Bundestag, the Constitutional Court still had power to expand the scope of rights given in the Basic Law.

The protection that the *Grundgesetz* offered had become well accustomed and understood in the forty years it had been in place leading up to 1990. When reunification finally happened there was debate on what to do with the Basic Law. While it was being drafted, Dr. Carlo Schmid

²⁴ *Documents*, 9.

²⁵ Miller, “Germany’s German Constitution,” 122-123.

²⁶ Rolf Schwartmann, “The Role of the Basic Law in Major Social Conflicts.” in *The German Constitution Turns 60: Basic Law and Commonwealth Constitution: German and Australian perspectives*, ed. Jürgen Bröhmer (Frankfurt am Main: Peter Lang, 2011), 114.

²⁷ Schwartmann, “The Role of the Basic Law,” 114-115.

of the SPD— a member of the Parliamentary Council— believed that a constitution for the reunited Germany should not be made by amending the Basic Law; but rather, a whole new constitution should be drafted.²⁸ This view was held by many others at the time; however, after the people grew used to that government under the Basic Law there was a shift towards a preference for it to remain. Article twenty-three helped reunification and could have been part of the reason the Basic Law has remained because it allowed other parts of Germany to join under this law “on their accession”.²⁹ Through their parliament, the Eastern *Länder* voluntarily applied the Basic Law to themselves, using article twenty-three. Once Germany was reunified, Chancellor Helmut Kohl was against creating a new constitution because its acceptance as law would only require a majority of votes within the constituent assembly as opposed to the two-thirds majority required for any alterations to the Basic Law, and he was afraid that a new constitution could involve more direct democracy— which he believed was part of the reason the Weimar Republic failed— as opposed to representative democracy.³⁰ It was agreed by other German political leaders that Germany did not need a new constitution, so the Basic Law would remain for the unified Germany. There were some minor edits made to it relating to reunification; the main one being that article twenty-three was taken out because there were no parts of Germany left ununited. On July 16 1990, in a meeting with Kohl, Gorbachev acknowledged reunified Germany’s sovereignty from the Soviet Union.³¹ It became official that Germany was reunified under the Basic Law, and no other nation had a claim against its sovereignty.

²⁸ *Documents*, 78.

²⁹ Gnodtke, “Sixty years,” 11; *Documents*, 11.

³⁰ Gnodtke, “Sixty years,” 11-12.

³¹ Solsten, *Germany*, 127.

The *Grundgesetz* has proved itself as a well liked and well written constitution throughout the years, allowing it to remain longer than it was originally intended. The odds were stacked against its success with the Western Allied Powers pushing for its creation and the hesitance from Germans because of their fears that it would only further solidify the divide of their people. The framers had to balance the people's distrust with the need for a strong government to build themselves back up, and after much debate, the Basic Law got passed. It had to include many unique details that have helped it succeed. Though it was meant to be temporary the unified German people decided they did not need a new constitution after all. The *Grundgesetz* remains as the cornerstone of Germany's government.

Bibliography

- Bachmann, Ulrich, Kirsten Nemitz, and Winfried Bader. "Das Grundgesetz. Dokumentation seiner Entstehung. Projektkonfiguration und EDV-Einsatz für die nach Artikeln gegliederte Edition." *Historische Sozialforschung* 18, no. 3 (1993): 106-113. JSTOR
- Documents on the Creation of the German Federal Constitution*. Buffalo: Civil Administration Division Office of Military Government for Germany (US), 1949. Hein Online.
- Gnodtke, Hans G. "Sixty years of the German Basic Law (Constitution of the Federal Republic of Germany 1949) and twenty years of German reunification : a synopsis." *James Cook University law review* 16, no. 1 (January 2009): 5-18.
- Miller, Russell A. "Germany's German Constitution." *Virginia journal of international law* 57, no. 1 (March 2017): 95- 128.
- Schwartzmann, Rolf. "The Role of the Basic Law in Major Social Conflicts." in *The German Constitution Turns 60: Basic Law and Commonwealth Constitution: German and Australian perspectives*, edited by Jürgen Bröhmer, 111-127. Frankfurt am Main: Peter Lang, 2011.
- Solsten, Eric. *Germany: a country study*. Washington, DC: Federal Research Division Library of Congress, 1996. Hein Online.
- Streinz, Rudolf. "Das Grundgesetz: Europafreundlichkeit und Europafestigkeit Zum Lissabon-Urteil des Bundesverfassungsgerichts." *Zeitschrift für Politik* 56, no. 4 (2009): 467-492. JSTOR.