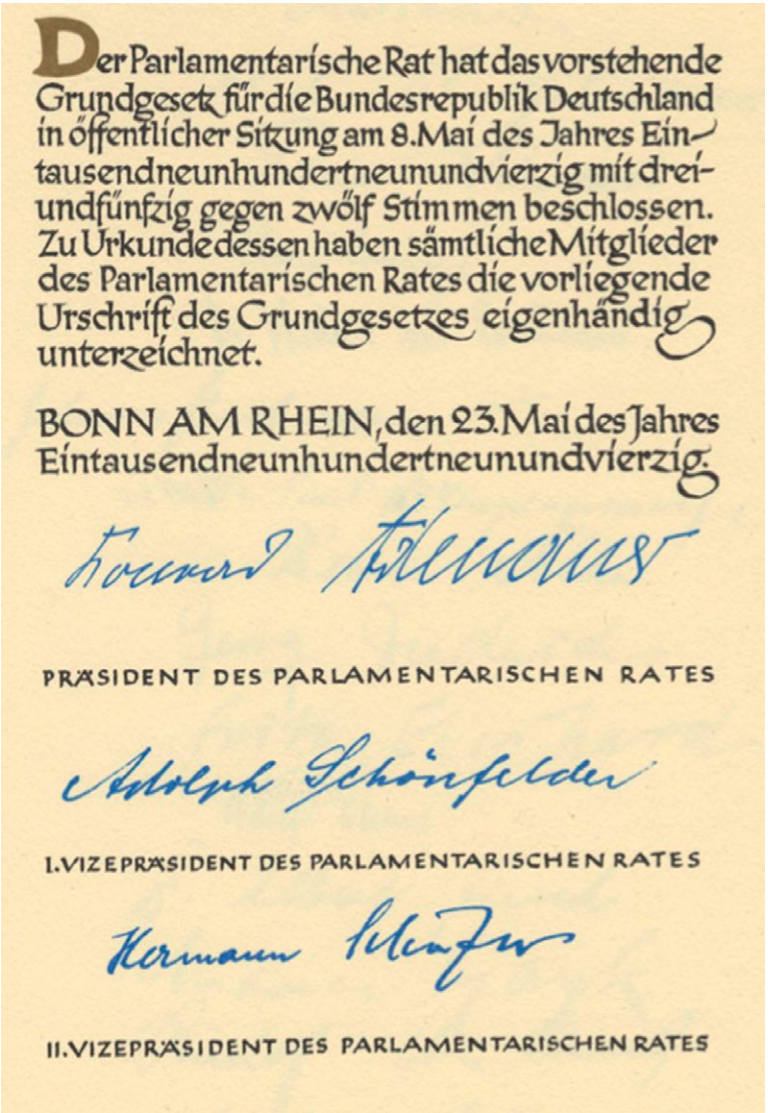


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Der Parlamentarische Rat hat das vorstehende Grundgesetz für die Bundesrepublik Deutschland in öffentlicher Sitzung am 8. Mai des Jahres Eintausendneunhundertneunundvierzig mit dreiundfünfzig gegen zwölf Stimmen beschlossen. Zu Urkunde dessen haben sämtliche Mitglieder des Parlamentarischen Rates die vorliegende Urschrift des Grundgesetzes eigenhändig unterzeichnet.

BONN AM RHEIN, den 23. Mai des Jahres Eintausendneunhundertneunundvierzig.

PRÄSIDENT DES PARLAMENTARISCHEN RATES

I. VIZEPRÄSIDENT DES PARLAMENTARISCHEN RATES

II. VIZEPRÄSIDENT DES PARLAMENTARISCHEN RATES

Figure 4.1 Facsimile of the official signatures on the *Grundgesetz*

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All state power derives from the people.
Article 20, *Grundgesetz für die Bundesrepublik Deutschland*

Ah, Grundgesetz, *yes*, Grundgesetz, *you keep invoking the* Grundgesetz. *Tell me, are you a communist?*
Franz-Josef Degenhart, German folksinger and activist lawyer (from the song 'Interrogation of a Conscientious Objector')

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WHO CONSTITUTES POWER?

Checks and Balances

1

'What's your favourite article?'

I am chatty; Frau Schmidt is not. It's just the two of us in her small office. On her desk is a figurine of a bulldog nodding its head. Frau Schmidt doesn't nod. She looks at me seriously, questioningly. Maybe the final test is one of solemnity.

The first test, a few weeks ago, was the easiest – multiple choice about German culture, law and history. All questions available online for preparation.

After that came the real test. Excruciating. I've been posting a steady stream of papers to Frau Schmidt's desk for more than eighteen months. I have written a whole autobiography in stamped and certified forms, with long German words galore. I have arranged and rearranged my life in a yellow A4 folder, *in der richtigen Reihenfolge*: not in chronological order, but in the 'correct' order. By the end of the process, I could almost feel the pleasure of it.

This, now, is supposed to be the fun part.

'Frau Schmidt, do you have a favourite *Grundgesetz* article?'

I grin at her, playfully, placing my hand on the book in front of me. I brought my own copy. Preloved, with worn edges, and colourful index stickers poking out of it.

She looks at my hand, then at the book, then at the purple-yellow pin on my jacket. Our eyes meet. She smiles for a split

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second, then recalls herself to seriousness. She points at the black eagle on the cover of my book. I raise my hand.

Suddenly, it's not just the two of us in the room. I feel a powerful new presence: the State.

'I solemnly declare that I will respect the *Grundgesetz*, and the laws of the Federal Republic of Germany, and that I will refrain from doing anything that could harm it.'

When I finish this sentence, I am a German.

2

I am still Polish, too. My grandfather was raised by neighbours, because when he was 9 years old, the Nazi Gestapo arrested his mother. I grew up listening to Grandpa's occupation stories at bedtime: he had a great talent for deflecting trauma with humour. But when Grandpa visited me in Berlin, aged 85, he woke up in the middle of the night in terror. Outside, on the street, someone was yelling, '*Deutschland, Deutschland!*' It was during the 2014 FIFA World Cup.

My first German words were *halt!* (stop!) and *raus!* (get out!), which I had picked up from war movies. My school curriculum abounded in war books and war poems. When I moved to Germany, I realised that we hadn't been taught much about what had happened in Germany immediately after the Nazi defeat. What does a country do when it has murdered millions and wrecked the world, and wakes up, guilty, on a regular working Monday?

The country has to constitute itself anew. Or rather: its people must constitute themselves anew, as people – *the people* – and found a new state, by writing a new constitution. In post-war Germany, this was a daunting task. Most constitutions are written in moments of victory, from which their authors draw power and authority. In 1948, Germany still lay in ruins, humiliated by its excesses of power. The writers of the *Grundgesetz* had to derive their authority from this defeat.

Elisabeth Selbert, one of only four women among the sixty-five authors of the *Grundgesetz*, compared the launch of the

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Figure 4.2 Opening meeting of the Parliamentary Council in Bonn, 1 September 1948
(*Source*: Federal Press Office [BPA])

Parliamentary Council tasked with writing it to a 'crematorium ceremony'. The launch party was hosted by the Koenig Zoological Research Museum in Bonn, with dead, stuffed animals staring eerily at the jurists. 'It wasn't a fanfare for a new beginning but the end of the end,' Selbert recalled[1] (Figure 4.2).

The writers of the *Grundgesetz* (which means 'basic law' or, literally, 'ground law') refrained from calling it a constitution, mostly for fear that this would give fixed, legal status to the partition of Germany into East and West. The *Grundgesetz* is a constitution, nonetheless: a foundational utopia of the state. Yet, as poetically pointed out by the jurist Heribert Prantl, it was written as a mixture of genres. In some ways, the *Grundgesetz* was like a school assignment that Germany, overseen by the Allies, was required to complete, each of its 146 articles another way of writing on the blackboard of history 'I will never do it again'. It was also a 'letter of heartbreak', written by a nation that didn't know whether it could still love itself, after all it had done.[2]

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Writing a constitution is an exercise of power – the constituent power, *verfassungsgebende Gewalt*. The German word *Gewalt* has a double meaning: power as faculty, the socially recognised authority, and power as violence, destructive force. In 1948, Germany's constituent power was acutely aware of its own violence. So when the authors of the *Grundgesetz* assumed the power to write the new future, they were neither triumphant nor naïvely optimistic. They were determined to learn from the experience of Nazi rule – and to implant in the *Grundgesetz* sufficient legal tools to prevent history from repeating itself

The rule of law offers two types of mechanism to prevent the abuse of power. Like most liberal constitutions, the *Grundgesetz* sets up systemic checks and balances. It divides state power into several branches – the legislative, the executive and the judiciary – that monitor and limit one another. The *Grundgesetz* also declares fundamental rights that guarantee a minimum standard for humanity. These rights are intended to protect people in their vulnerabilities, and help them to realise their freedom.

The *Grundgesetz* was written 'in German dirt, debris, and misery' – it was written with the humility that comes from humiliation.[3] This humility put the human at the centre of the nineteen fundamental rights (*Grundrechte*), even though the post-war years were politically and economically challenging.

> *[A]lmost one and a half million refugees were encamped in little Schleswig-Holstein alone, but a basic right to asylum … was taken for granted … The murder rate had risen to unprecedented heights in the insecure post-war years, but the abolition of the death penalty was written into the* Grundgesetz *nonetheless. The new threat of war, the danger of espionage and attacks was palpable, but there was no argument whatsoever about the ban on torture.*[4]

Of all the fundamental rights included in the *Grundgesetz*, by far the most controversial was the clause 'Men and women shall

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have equal rights', inscribed in Article 3. When Elisabeth Selbert first proposed it, not even the other three women supported her. Friederike Nadig, Selbert's colleague from the SPD, worried that equal rights would destabilise the whole system: 'You cannot try to override or change the whole of family law; that would mean legal chaos.'[5]

Most of the men, on the other hand, didn't even take Selbert's proposition seriously. According to the minutes, they reacted 'with hilarity'.[6] Back then, a married woman in Germany was not allowed to open a bank account; men had a legal right to terminate their wives' job contracts to make them attend to their duties in the home. The Parliamentary Council voted down the equality clause three times.

Elisabeth Selbert was furious. Abandoning all convention, she became, in her own words, a 'travelling preacher' of women's rights. For several weeks, she travelled all over Germany giving public lectures (Figure 4.3). She spoke to journalists and to the wives of conservative politicians. Her message was precise. Her anger carried energy. Soon, the Parliamentary Council was flooded with letters of protest.

All the female MPs from all the West German federal states (with the exception of Bavaria) sent letters – as did 40,000 female metalworkers and the entire female population of Dörnigheim (a town in Hesse), among others. Women's organisations, and the media, further amplified these voices. By 18 January 1949, the Parliamentary Council had apparently transformed into an army of feminists. 'Men and women shall have equal rights' was voted into the *Grundgesetz* – unanimously.[7]

Today, the idea that men and women should have equal rights does not seem very controversial – unlike the right to socialisation, as inscribed in Article 15. In 1948, the opposite was true. Support for socialisation was fairly mainstream, and few would have dared to deny that economic power could – like any kind of power – be misused against democracy.

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Figure 4.3 The statue of Elisabeth Selbert in Kassel (*Source:* Wikimedia Commons)

3

'[P]rivate enterprise cannot be maintained in the age of democracy.' On 20 February 1933, the newly appointed chancellor Adolf Hitler laid out his vision to the twenty-five heads of German industry. The principle of entrepreneurial leadership (*Unternehmertum*) was close to that of *Führertum*, he said; the bosses' power should not be restrained by the need to negotiate salaries with trade unions. Without hedging, Hitler presented his plan to end parliamentary democracy and destroy the labour movement. Then he asked the business leaders for their financial contribution.

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'The [financial] sacrifice[s] would be so much easier … to bear,' Hermann Göring, the President of the Reichstag continued, 'if it [industry] realised that the election of 5 March will surely be the last for the next ten years, probably even for the next hundred years.' The money poured in. A fund of 3 million Reichsmark was set up with large donations from Deutsche Bank, IG Farben (a conglomerate of six chemical and pharmaceutical firms including BASF, Bayer and Agfa) and AEG, among others.[8] Hitler kept his promises to his business donors: he banned free trade unions and ended democracy.

When the Parliamentary Council discussed inscribing Article 15 into the *Grundgesetz*, the memory of the enthusiastic support some industrial monopolists gave to Hitler was still fresh. And so, while the legal possibility of socialisation already existed in the Weimar Constitution, the threat of the 'misuse of economic power' was no longer an abstract possibility. And it wasn't only about their direct funding of Hitler: the fact that property, especially in heavy industry, was concentrated in the hands of a few monopolists was generally seen as having weakened the Weimar democracy – and enabling Hitler's war economy.[9]

As far as general debates about political economy were concerned, liberalism was still largely considered discredited by the crash of 1929/1930. The consequences of this crash, as well as the unequal distribution of wealth, were seen as key reasons for the Nazi Party's popularity with the masses.

In their party manifesto of 1947, the Christian Democrats (CDU) postulated *Gemeinwirtschaft* as 'an economic and social constitution that responds to people's rights and dignity, serves their spiritual and material growth, and secures an internal and external peace'[10] (Figure 4.4). For the Social Democrats (SPD), socialisation was one of the key points of their economic programme – a first step in the transition towards a socialist economy. Thanks to the support of these two major parties, clauses enabling socialisation had already been included in the newly passed state constitutions of Hesse, Bavaria and Rhineland-Palatinate.

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Figure 4.4 'CDU fights for the Gemeinwirtschaft'; this 1947 poster shows that the Christian Democrats stood for a socialisation and solidarity economy
(*Source:* Wikimedia Commons)

There was also the broader political context: the power and organisational capacity of the labour movement. In November 1948, more than 9 million people – almost 80 per cent of the entire workforce – participated in a twenty-four-hour general strike in Bizonia (the British and American occupation zones combined). The strike was in response to the steep rise in food prices, which had been deregulated after the currency reform. This strike – the biggest in German history – effectively forced the CDU chancellor, Ludwig Erhardt, to change course, away from free market liberalism and towards a so-called 'social economy'.

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For all these reasons, the intense disputes over socialisation within the Parliamentary Council were, for the most part, not a question of if, but of how. The differences between the parties concerned issues of compensation – the CDU didn't want socialisation without compensation, while the SPD wanted to make sure compensation of a merely nominal value was possible – and the mode of implementation, namely, whether it should be done via legislation or via an administrative act.

In the final wording, a compromise between the proponents of a *Gemeinwirtschaft* and its liberal opponents, Article 15 states:

> *Land, natural resources and means of production may, for the purpose of socialisation (*Vergesellschaftung*), be transferred to public ownership (*Gemeineigentum*) or other forms of solidarity economy (*Gemeinwirtschaft*) by a law that determines the nature and extent of compensation. With respect to such compensation the third and fourth sentences of paragraph (3) of Article 14 shall apply* mutatis mutandis.[11]

What does this mean in practice? First, socialization is a standalone fundamental right – that's why it has its own Article in the *Grundgesetz*. It is *not* a form of limitation on individual property rights, all of which are specified in Article 14. But socialisation stands apart from all the other fundamental rights in that it does not apply to individuals. It is a 'fundamental social right' (*soziales Grundrecht*): a collective right, or a legally enabled collective possibility. The purpose of socialisation is 'not to limit the formal freedom of the few (owners), but to extend the substantial freedom of the many (non-owners)'.[12] This freedom of the many justifies expropriating a significant share of relevant resources from private enterprises.

Secondly, socialisation is a purpose in its own right. While it may indeed curb misuses of economic power and the monopolisation of property, the real meaning of socialisation is affirmative, and lies in developing forms of solidarity economy: *Gemeinwirtschaft*. *Gemeinwirtschaft* strives for both fair distribution

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and democratic management of resources, which, for this dual purpose, can be withdrawn from the profit-oriented logic of the market. However, as a tool for democratising the economy, it cannot be implemented via an administrative act, only through legislation.

Thirdly, socialisation demands compensation – yet because its aim is to withdraw resources from the logic of the market, the compensation would likely be below market value. Ultimately, Article 15 is an expression of the constitutional principle of economic neutrality. The task of the *Grundgesetz* is not to uphold or prescribe a particular economic system (such as capitalism), but to ensure that fundamental rights are protected within whatever economic system the society might choose.

In 1948, the dread of relapsing into authoritarianism was strong. The members of the Parliamentary Council wanted to err on the side of caution. And so, in addition to the 'standard' constitutional tools, such as fundamental rights and systemic checks and balances, they introduced new formal tricks that would protect democracy from excesses of power. For example, they gave fundamental rights a 'pre-political' and 'supra-legal' status. This means that all fundamental rights – including the right to socialisation – are put 'rhetorically and legally before the actual existence of the Federal Republic as a political entity'.[13]

Another legal innovation to protect democracy is a special 'eternity clause' (*Ewigkeitsklausel*). It ensures that the precise wording of two articles – Article 1 and Article 20 – can never be changed. Article 1 declares human dignity inviolable. Article 20 asserts that '[a]ll state power derives from the people', and that the Federal Republic of Germany is 'a democratic and social federal state'.

4

What does 'a democratic and social federal state' really mean? When the different political factions within the Parliamentary Council finally agreed, after many long and heated debates, on the exact wording of all the Articles, their words were subjected

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to more long, heated debates among the jurists, who interpreted them in different, and sometimes even contradictory, ways.

The word 'social' in the phrase 'a democratic and social federal state' was the subject of one such debate, which became one of the most important for the interpretation of the *Grundgesetz*. Commonly referred to as 'the Forsthoff–Abendroth controversy', this debate played out in the mid-1950s between two prominent commentators of the *Grundgesetz*: Ernst Forsthoff and Wolfgang Abendroth.[14]

In German public law, the Forsthoff–Abendroth controversy is the equivalent of the legendary 1971 boxing match between Muhammad Ali and Joe Frazier – the fight of the century. Both jurists were heavyweight champions. Each of the contestants' new tricks made history in their respective disciplines. And the public was as excited by the game as by the politics behind it. Ernst Forsthoff, like Joe Frazier, was a representative of the pro-war establishment. Wolfgang Abendroth, like Muhammad Ali, was an activist – a socialist of the Frankfurt School who was open about the fact that he brought his political convictions with him into the ring. The two jurists were almost peers, but their careers had taken very different paths.

Ernst Forsthoff had had an impressive career. He became professor of public law at the University of Frankfurt in 1933, at the age of just 31. His predecessor in the role was Herman Heller, who, as a social democrat and a Jew, had been forced to flee Nazi Germany. However, Forsthoff was not an opportunist. His views remained strikingly consistent: he disliked pluralism and constitutional democracy before, during and after Hitler. In the early 1930s, he criticised the Weimar Constitution, saying it weakened the state by endorsing party competition and democratic control.

Wolfgang Abendroth, on the other hand, praised democratic control – and waited a lot longer for his career to blossom. In 1933, the Nazis deprived him of his licence to practise law. He worked instead as a legal advisor to opposition figures, until he was arrested in 1937 by the Gestapo and charged with high treason. After four years of imprisonment, Abendroth was forcibly

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conscripted into the 999th division, a penal military unit serving in occupied Greece. There, he helped to set up an anti-fascist cell before deserting to the Greek People's Liberation Army.

Forsthoff eulogised war. For him, war was a vehicle for fusing the authoritarian state with the Aryan folk. Just as the Nazis were taking power, Forsthoff published *Der totale Staat* ('The Total State'). The book praised 'legitimate authoritarianism' for finally superseding the constitutional state, with its self-critical distinction between the law and the people.[15] Hitler's 'great purge … served to eliminate all those who could no longer be tolerated as foreigners and enemies'.[16] The 'qualitative total state' would be based on Führer, state and the Aryan folk.

In 1944, Abendroth was captured and imprisoned by the British, and spent two years in British internment camps. These included the Wilton Park re-education centre, set up in one such camp by a German Jewish émigré, Heinz Wilton, and run like an academic campus. Resistance fighters, political leaders and academics came to talk to former Nazi soldiers 'as partners' about the future of German democracy.[17] It was breathtakingly democratic.

Forsthoff was not a soldier; he was an academic. After 1945, he rejected calls for self-criticism over his support for the Nazi regime. He responded to them with an aphorism by Ernst Jünger: 'He who interprets himself sinks below his [own] level.'[18] In any case, Forsthoff was not a political activist; he was only a jurist. His defenders argued that he joined the Nazi Party 'relatively late', in 1937.[19] He endorsed the Nazi regime, but made critical points where he felt it was necessary. And so, while the 'denazification' committee initially classified him as 'incriminated', his case was soon dropped.

Back in Germany, Abendroth was finally able to relaunch his career. In 1947, he was appointed a judge in Potsdam and, in 1948, Professor of Public Law at the Friedrich Schiller University of Jena. However, his career soon stalled again – again, on account of his convictions. Potsdam and Jena were now in East Germany. Abendroth was a member of the Social Democrats (SPD). But in 1946, the East German government dissolved the SPD, and tried

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to force its members to join the Socialist Unity Party of Germany (*Sozialistische Einheitspartei Deutschlands*, SED). Abendroth resisted this, and in 1948 he fled to the West. In his resignation letter to the university, he spoke out against the dissolution of political pluralism in the German Democratic Republic.

Forsthoff, once he had officially been cleared of the political accusations against him, continued his impressive career. He became a professor of public law at the University of Heidelberg. In his works, he criticised the Nazi regime – but not for its moral atrocities. As far as Forsthoff was concerned, the downfall of Nazi Germany was the consequence of procedural failures. Hitler had failed to protect the authority of the state from the influence of the people. The 'total state' had been totally derailed because it had listened to the people. For Forsthoff, even the Third Reich was too democratic.[20]

Meanwhile, Abendroth kept getting into trouble. Just as he had opposed the banning of the SPD in East Germany, in 1956 he opposed the banning of the Communist Party (KPD) in the Federal Republic, which he again saw as the dismantling of Germany's pluralism. After his death, his most eminent student, Jürgen Habermas, described him as 'a partisan professor in the land of followers' (Figure 4.5).



Figure 4.5 Wolfgang Abendroth by Zersetzer.com (*Source:* Creative Commons)

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Forsthoff and Abendroth fought out their differences over the *Grundgesetz* in public. Forsthoff was one of its most vigorous critics. He worried that, like the Weimar Constitution, the *Grundgesetz* weakened the state by giving too much control both to political parties and to the people. Abendroth, however, considered the *Grundgesetz* to be quite a success. He had his favourite articles: Article 15, which allows for socialisation, and Article 20. And so, to defend the term 'social state' in Article 20, he confronted Forsthoff in the ring.

Ding ding! The bell rings. The gloves are off – the fight begins. Forsthoff leans in, putting his full weight behind his first blow. The jab is aimed at Article 20. He wants to rid 'a democratic and social federal state' of the word 'social'. But his punch lands on a high guard – an eternity clause protects Article 20 from any changes.

Abendroth responds with an uppercut: Article 28 speaks of a 'democratic and social rule of law'. But Forsthoff's right hook is relentless. He claims the word 'social' has no legal meaning. He keeps on punching: the 'social rule of law' is a contradiction in terms; the rule of law depends on full separation from society! The public gasps – Abendroth is on the ropes. But soon they realise this is just a trick, a rope-a-dope to wear out his opponent.

Abendroth comes roaring back with a hard left hook. But Forsthoff is prepared. Everyone knows Abendroth is a southpaw. Forsthoff throws a cross to the body, packed with the weight of his credentials. It was he who introduced the idea of an 'existential minimum' (*Daseinvorsorge*) to German legal thought, back in 1938. He endorses public services, but he won't allow the people to mess with the state and make their own decisions. It looks as if Abendroth is cornered.

But look at this nimble footwork! Abendroth pivots and dashes to deliver a full-frontal blow: the 'social rule of law' in Article 20 is a constitutional call to extend democracy into society. The word 'social' doesn't only mean welfare rights. The word 'social' also implies the democratic right to participation (*Teilhabe*) in shaping the society. Bam – Forsthoff hits the ground.

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Is it a knockout? The referee starts counting. The Constitutional Court confirms: Article 20 is a 'guiding principle' of the *Grundgesetz*. The 'democratic and social state' is a valid legal concept that empowers the democratic constituency to shape society.[21] The audience roars with delight. Eight – nine – ten.

Abendroth won in the ring of public law. The Constitutional Court's understanding of the word 'social' in Article 20 aligned with his. Abendroth used legal arguments to dodge the fist of a centralised state with the nimble footwork of democracy, the push and pull of people's competing interests. He saw democracy as a regulated conflict through which a diverse society approximates decisions that aim at least to be *fair enough* for everyone.

To him, Article 15 gave society a constitutional ticket for making democratic decisions about the economy – and for shaping society *together*, beyond individual rights. 'If Article 15 were to be removed,' he once responded to the lawyers who speculated that Article 15 had become 'obsolete' – 'Article 20's definition of the Federal Republic of Germany as a social state would become a thinly veiled lie.'[22]

Within German constitutional law, the legal status of the 'social state' is well affirmed and fixed. But Abendroth's victory with Forsthoff didn't end history; no victory ever does. As Abendroth was exiting the ring in triumph, the wind of history blew the outer ropes away.

Suddenly, the whole world is the ring. Forsthoff, with his state-strong fist, and Abendroth, with his democratic footwork, stare at each other in disbelief. Then they look up. High above them, they see a new creature hovering out of reach: the Jabberwock. The referee announces the arrival of globalisation.

5

'To our misfortune, we won!' Lech Wałęsa, an electrician and Nobel Peace Prize laureate, had a talent for casual prophecy. Like any prophet, he didn't always know the exact meaning of his words. But he was right.

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Wałęsa lacked formal education, but he was a political artisan. He had intuition. He sensed that Solidarność's landslide victory in Poland's first free elections, in June 1989, was not simply checkmate. Rather, it shifted the game to a new and wholly unfamiliar terrain: the globalised West. Here, there were forces completely beyond Solidarność's control – and they turned out to be much less predictable, at least to Solidarność, than even those of the Soviet Union.

Solidarność lost twice. Each time, it lost even though it had won: and, each time, it was the democratisation of the economy at stake. First, Solidarność lost against the authoritarian Polish state, backed by the Soviet Union. And the second time, Solidarność lost against Poland's international creditors, backed by the International Monetary Fund (IMF) and the World Bank.

The first defeat was violent and spectacular. This was when the extra-constitutional military junta declared the movement illegal, on 13 December 1981. The announcement of martial law was timed to coincide with the national congress of Solidarność delegates in Gdańsk. Conveniently, the movement's leaders could all be arrested simultaneously, at their hotels.

Martial law was introduced for two reasons: Poland's deepening economic crisis, and mass support for Solidarność's plan for overcoming this crisis. In October 1981, with membership at a peak of 10 million, Solidarność ratified its official political programme known as 'The Self-Governing Republic' (*Samorządna Rzeczpospolita*). One of its key concepts was socialisation (*uspołecznienie*).

To Solidarność, the word 'socialisation' had a double meaning. On the one hand, it meant broad popular participation in political decisions, including decisions about the economy:

> *Society must be able to organise itself in such a way as to ensure a just distribution of the nation's material and spiritual wealth and a blossoming of all creative forces. We seek a true socialisation of our government and state administration. For this reason, our objective is a self-governing Poland … This is why we demand social control over the government's anti-crisis measures.*[23]

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On the other hand, socialisation entailed participatory management of publicly owned enterprises and their assets. This was a key element in Solidarność's plan for managing the crisis democratically:

> *A new economic structure must be built. In the organisation of the economy, the basic unit will be a collectively managed social enterprise, represented by a workers' council and led by a director who shall be appointed with the council's help and subject to recall by the council.*

Before it was declared illegal, Solidarność managed to translate some of its postulates for 'socialising' public enterprises into new legislation.

The law on the self-government of workers in a state enterprise, passed by the Polish parliament on 25 September 1981, was remarkable not only because of its content (introducing elements of participatory management), but also because of the democratic process of negotiating the law, which was unprecedented in the authoritarian Polish People's Republic.

The most dramatic point in the legislation process was 'the rebellion in the parliament' on 24 September 1981. For the first time in history, MPs of the Polish United Worker's Party (*Polska Zjednoczona Partia Robotnicza*, PZPR) refused to follow their party leadership, instead backing the version of the law negotiated with Solidarność.[24]

But while Solidarność was still debating the compromises made in the legislative process, the military was already preparing 'Operation Fir', the coordinated arrest of the Solidarność leadership after the declaration of martial law. Solidarność was outlawed until April 1989. Its activists were violently persecuted, and the rank-and-file membership shrank by 75 per cent.

The second defeat of Solidarność was more discreet. Its violence, which I experienced as screams outside my window in Łódź, leaked into crime and poverty statistics, but was drowned out in public by the clamorous cheers of victory. To be fair, Solidarność's victory was not a trivial thing. The 1989 elections

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Figure 4.6 Electoral poster of Solidarność on a Warsaw tram (*Source:* Wojciech Druszcz)

were the first free elections in the whole of the Eastern Bloc. Wonderfully, Solidarność's new government restored to Poland the civil liberties of Western democracy (Figure 4.6).

Then Solidarność implemented shock therapy: an economic programme that was the exact opposite of the self-governing republic, and violated most of the social protections promised in the Round Table agreements. When people reacted with strikes and mass protests, the new government ignored them, effectively betraying its own social base. The spirit of solidarity was defeated.

'We believe that people's power is a principle that we do not have the right to abandon', states Solidarność's famous programme.[25] So why did the leaders of Solidarność abandon this principle once they were in power?

There are many explanations. Politically, the eight years in which Solidarność was outlawed effectively undid its mass character, cutting the leadership off from the base. Ideologically, Chicago-school neoliberalism became the new global zeitgeist,

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with envoys of Thatcherism and Reaganomics screaming promises of freedom. Materially, the new government was presented with two options: the carrots of neoliberal freedom, or the stick of foreign debt if Solidarność refused to eat them.

When Solidarność came to power, Poland was 46.1 billion US dollars in debt. Until 1989, Poland's creditors in the Paris Club used the debt to exert control over the authoritarian regime, justifying it with their concern for democracy. The infamous empty shelves in Polish shops were partly the consequence of export clauses attached to loans, which required repayment in products and raw materials. Rising food prices – the main reason for the protests that led to the formation of Solidarność – were partly the result of creditors 'hammering hard at the Polish pricing system', which was designed to keep food prices below market levels.[26]

Solidarność was a democratic movement that peacefully and democratically overthrew the authoritarian regime that had put the country in debt. Shouldn't this have been a good enough reason for creditors to give Poland's new government some debt relief? But the IMF took a hard line. In the United States, George H. W. Bush, after congratulating Solidarność on its victory, made clear that the new government was still responsible for repaying the old debt. Poland was caught in a debt trap.[27]

Earlier, at the Round Table Talks, several options for the Polish economy had been discussed. Beyond the 'self-governing republic' and Thatcher-style neoliberalism, there was also significant support for the 'Swedish model': a welfare state working closely with the unions.[28] Now, with inflation at 600 per cent, something had to be done, fast. Chain-smoking in stuffy meeting rooms, the activists-turned-politicians slowly began to grasp the extent of their misfortune: their democratically won freedom was haunted by economic dependency.

A bullwhip cracks. A mustang whinnies. Jeffrey Sachs, the 'Indiana Jones of economics', has arrived in Warsaw. Sachs is by no means an activist: 'I'm not a naïve do-gooder,' he explained to *The New York Times*. He is an independent expert. With his 'outspoken views and a penchant for Third World countries', he is a travelling salesman of economic 'shock therapy'. He has already

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recommended it to Bolivia and, parallel to his engagement in Poland, he is also advising Venezuela and Mexico.[29]

Sachs is a 34-year-old Harvard professor who has never held any position in government. He is, however, extremely well-connected in Washington, DC and in the IMF. His magic touch softens the creditors, who promise debt relief – but only if the government adopts a hard line against its people. Sachs emboldens the new government to go against the Solidarność programme; they can pull it off, he says, precisely because people trust them. In any case, they don't have much choice.

Sachs drafts his economic programme for Poland in a single night. On my fourth birthday, the parliament passes the legislation that will force Poland to go cold turkey with deregulation, austerity and privatisation. Politically, the implementation of shock therapy relies on a flight from democracy, and pushing ahead as fast as possible, against the protests of the people.[30] As a result, Solidarność splits internally and engages in a destructive inner conflict. It loses the 1993 elections to members of the former communist party.

But wasn't it all worth it in the end? The shock therapy worked, didn't it? That depends on your perspective. If you consider only abstract economic benchmarks, it was indeed a success. Since 1992, Poland's GDP has grown steadily. But GDP only measures the overall market value of goods and services bought and sold within an economy. Once you break these numbers down into stories, the picture becomes more complicated.

Throughout the whole of the 1990s, more than a third of the population of Poland lived below the poverty line. The group that benefited most from the rapid privatisation of industry was the elites of the communist regime. A study conducted in June 1993 showed that 67 per cent of the presidents of management boards of privatised enterprises were already directors before privatisation.[31] The social anger at Solidarność's betrayal was captured by right-wing authoritarianism.[32] Salaries in Poland are still among the lowest in Europe.[33] The average tenant in Warsaw spends more than half of their income on rent.[34] Since 2004, 2.5 million Poles have left Poland. Me too.

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6

All state power derives from the people. When I swear on the *Grundgesetz*, I become part of 'the people'. From now on, constitutionally speaking, Germany's state power also derives from me. Saying it to myself out loud, holding a certificate of naturalisation that smells of fresh ink, it feels somewhat grandiose. But then I catch myself. Do I have citizen impostor syndrome? Or maybe we all have an impostor syndrome: we-the-people, unsure whether the state power we constitute really is ours to use?

Contemporary Western democracy has been hollowed out; it is a 'democracy without *demos*'.[35] This was the diagnosis of Peter Mair, an Irish political scientist who devoted his life to a comparative analysis of political systems in Europe. The word 'democracy' literally means 'rule of the people'; it assumes that people can exercise agency on the system that governs them. In theory, this idea is still widely endorsed by the political elites. In practice, however, political parties have long since abandoned the premise on which they were founded: representing the interest of their electorates.

Mair's analysis shows that the programmatic gap between mainstream political parties – even ones that are formally in opposition to each other, like the SPD and CDU – is now much smaller than the gap between any of these parties and their own voters. From the 1980s onwards, parties have abandoned the task of political representation, and have gradually withdrawn from the realm of the civil society. Instead of being *responsive* to their voters, the politicians claim to be *responsible* with regard to the economic system.[36]

Almost all mainstream parties still declare their commitment to democracy. Yet when it comes to economic policy, representing the interests of voters is dismissed as populism. This anti-democratic rhetoric is being justified by the fiscal crisis and the growing indebtedness of the contemporary state. Economic policy has widely been handed over to central banks and international financial institutions, which prioritise

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the wellbeing of the financial markets while being described as 'independent'.

As pointed out by the economic sociologist Wolfgang Streeck, the 'independence' of these financial institutions does not mean they are free of political agendas – only that they are free of democratic accountability.[37] Sheltered from democratic procedures that would evaluate them based on the effects of their policies on a political community, they can neutralise democracy by overruling voters' preferences. This is what happened in Poland in 1989 – or in Greece in 2015, when, during the country's government-debt crisis, the international creditors effectively blackmailed the Tsipras government into ignoring the results of the referendum, in which people had rejected the shock-therapy-like bailout conditions driven by harsh austerity.

In theory, economic globalisation and egalitarian democracy have a common value denominator: freedom. However, while democracy and the rule of law both pursue the normative ideal of the 'free and equal subject', the globalised economic system lays claim to freedom while perpetuating inequality. Moreover, the supposedly 'neutral' financial experts limit the notion of freedom to individuals. When a single person, driven by their self-interest, makes an economic decision, this is perceived as the cornerstone of the free market. Yet as soon as people make an interest-driven decision together – act on their *shared* economic interest, using democratic procedures – their freedom is narrated as a threat to the economy.

This limiting of collective freedom appears rather *unfree*. More importantly, though, the claim that limiting democratic control of the economy is done in the name of individual freedom is factually incorrect. As pointed out by the Nobel Prize-winning economist Elinor Ostrom, even most 'regular' companies are in fact collective endeavours.[38] Financial markets, on the other hand, are run exclusively by extremely powerful collective entities: banks, investment funds and corporations.

As creatures of the financial market, corporations are de facto large, socially uprooted shareholders' collectives. Their

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enormous power does not derive from anyone's individual freedom. It derives from a coordinated and pooled interest, a form of oligopoly. This oligopoly has gradually developed into what Louis Brandeis, a future US Supreme Court Justice, was already calling, in 1913, 'financial oligarchy'.

More than a century later, the existence of the financial oligarchy is impossible to deny. Between 2020 and 2023, the richest 1 per cent grabbed almost two-thirds of all the world's new wealth – almost twice the amount shared by the other 99 per cent of humankind. If the world's richest ten men 'were to lose 99.999 percent of their wealth tomorrow, they would still be richer than 99 percent of all the people on this planet'.[39] It would be naïve to assume that such a massive accumulation of wealth could occur without political coordination. And it would be facile to imagine that this coordination happens at various secret gatherings, as conspiracy theories would have it. How do the super-rich communicate in order to coordinate their interests politically?

The super-rich communicate through money. Jürgen Habermas calls money a 'steering medium' of the contemporary economy: a communicative tool that coordinates the interest-based action of economic agents without the need for language-based conversation. Money 'has the properties of a code by means of which information can be transmitted from sender to receiver'. Because such communication is 'de-linguistified' and uprooted from the social context, it is also sheltered from political questioning of deliberative democracy.[40]

Now, it would be all-too-easy to dismiss Habermas's theory as a de facto conspiracy theory wrapped in the sort of intellectualised metaphor typical of German philosophy – were it not for the fact that the US Supreme Court, for example, has actively endorsed the vision of reality that Habermas critiques.

In January 2010, in *Citizens United v. Federal Election Commission*, the US Supreme Court ruled against government bans on the corporate funding of electoral committees. In this way, the Supreme Court effectively permitted corporate money to overwhelm the electoral process. Most importantly, though, in

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justifying this decision, the Court equated the ban on corporate spending with a limitation on free speech.

Free speech is a civil liberty protected by the First Amendment to the United States Constitution. In the justification of the majority opinion, Justice Kennedy argued that funding a political campaign with money amassed on the market is a form of political speech. He also stated that the civil right to free speech should not be limited to 'natural persons' (humans), or even apportioned differently between humans and corporations.[41] Effectively, the US Supreme Court empowered a legal fiction that assumes both economic and political equality between a human person and a corporation. For isn't a human person – a teacher from Michigan, for example – free to spend as much money on campaign funding as, for example, Google or Amazon?

Concealed behind the fiction of a 'legal person', a corporation – a super-powerful, socially detached collective of shareholders – can pursue its group interest while narrating this as individual freedom. At the same time, when a democratic constituency – a collective of citizens territorially rooted in a community – openly and transparently pools people's interests based on the basic needs of the individuals (everyone's individual need for housing, for example), the supposedly 'independent' financial agencies narrate this as a threat to individual freedom.

While money needs neither language nor parliamentary democracy to serve as a means of communication, it does need something else: the law. Neither money nor financial markets could exist if they weren't anchored in the law. Money, too, is a legal fiction: a hundred-dollar banknote is a worthless piece of paper unless the law declares it valuable, and most financial wealth doesn't have even this much materiality. The connection between money and power is forged by private law.

But neither private nor international law can exist without the nation states that back them. And the Western liberal ideal of the rule of law *still* commits the nation states to the rules of parliamentary democracy. Thus, the rule of law – and especially the public law that *still* upholds some principles of egalitarian democracy – becomes the only meaningful interface where

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democratic people's power has any chance to counter the financial oligarchy.

In the US context, the *Citizens United* decision is so poignant (and scary) because it legally dismantles we-the-people as a political community of real humans. And it doesn't do it to protect other living creatures, or even our planet as a living ecosystem. No. We-the-people must give up our privileged political status to feed the fictional Jabberwock with even more power.

However, if the corporate Jabberwock were to attempt to assume the political status of a human being under the terms of the German *Grundgesetz*, you would very soon hear the clip-clopping of hooves as Immanuel Kant comes galloping in on his great Holsteiner horse. His categorical imperative, legally inscribed in the *Grundgesetz*, explicitly protects *human* dignity and rights.

As Kant enters the Federal Constitutional Court to make his stand, he sees, sitting on the benches, the sixty-five mothers and fathers of the *Grundgesetz*. Through their special eternity clause, they remain ever-present, ensuring that their wording of Article 1 and Article 20 can never be changed.

Human dignity shall be inviolable. The Federal Republic of Germany is a *democratic* and *social* federal state. All state power derives from *the people*.

7

The Berliner Walter Benjamin argued that time, in politics, is not always linear. Sometimes, suddenly, the 'now-time' (*Jetztzeit*) ripens with the energy of past struggles. Short-circuited by the power of the present, the past may blast open the continuum of history and take a 'tiger leap' into the future.[42] This might be happening now to Article 15.

Over the course of history, many people have devoted their energy to making socialisation and *Gemeinwirtschaft* possible. Article 15 carries in itself the triumphant people's power of the German Revolution, the persistent will for self-determination of the workers' movement, and also the humble strength of the

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mothers and fathers of the *Grundgesetz*, who took on the responsibility of learning from one of history's darkest periods.

After this, for almost seventy years, the notion of socialisation was forgotten. History is written by the victors, and they tend to edit out elements of the past that do not fit their victorious narrative. Some victors even have the boldness to claim both past and future, announcing – like Francis Fukuyama after the collapse of the Eastern Bloc – that all history has ended.

But history does not cease just because someone wants it to. The past, albeit dormant, remains a resource for the future. According to Benjamin, the emancipatory energy of the past is stored in the materiality of our cities. By virtue of their diversity, cities never succumb to any one, single story. But the past also dwells within the law, which – *because* it is conservative by nature – has protected the legal possibility of socialisation from the changing winds of politics.

For Benjamin, the past ripens to its full meaning not when it is simply retrieved or memorialised, but when it transforms itself by short-circuiting on the here-and-now. This, too, is the story of Article 15. When the Parliamentary Council was writing the *Grundgesetz*, the threat of the 'misuse of economic power against democracy' was thought of only within state boundaries. But even then, the mothers and fathers of the *Grundgesetz* considered it a danger. They intuited that economic power – like any form of institutionalised power – had to be checked and held in balance by other powers.

With economic globalisation, we are increasingly confronted with the need to impose checks and balances on economic power operating globally. If it is true that the state is a Goliath that, if not democratically restricted, may crush individual freedom, the same is true for the corporate Jabberwock.

In most democratic states, however, the people lack legal tools to enable them to counterbalance economic power. With Article 15, the mothers and fathers of the *Grundgesetz* achieved a double constitutional innovation. First, they extended the idea of democratic checks and balances to include the economy. They gave the state a legal tool for limiting economic power if it starts to

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run wild. And they opened the way for the people to control the economy by democratic means. Secondly, they extended the notion of fundamental rights from the individual to society, thus allowing free and equal subjects to be *free together*.

Even with Article 15, it would not be easy to counter the power of the corporate Jabberwock. One could certainly expect the 'independent' financial institutions to mobilise in order to disable the idea of economic democracy. In January 2019, when the first polls showed Berliners overwhelmingly supporting socialisation, the international credit rating agency Moody's threatened to downgrade Berlin's international rating if the city went ahead with socialisation.[43] The threat is wrapped up in a one-page 'report' that contains no meaningful legal or economic analysis. But it fulfilled its role: it produced headlines that projected socialisation as an 'irresponsible' desire of the people.

But what if assuming democratic control to fix the system's perversion is the most *responsible* thing we-the-people can do? By now, it is mainstream knowledge that the global financial system misuses its power: we know this from *Financial Times* articles and *Netflix* movies as much as from academic publications and activist statements. To know that something is harmful and not to act on this knowledge, or to keep replaying the same set of strategies when we know full well that they didn't work before: is this a *responsible* thing to do?

With Article 15, the *Grundgesetz* offers a powerful tool for curbing the misuses of corporate power responsibly, within the bounds of the democratic system. And while the global financial system would inevitably rebel against this solution, Germany is the world's fourth largest economy and arguably the most powerful country in Europe. It has enough power to back a democratic decision taken by its own people.

Many times in the past, Germany has leveraged its economic power to prevent other democratic constituencies – in Greece and Poland, for example – from exploring alternatives to austerity and privatisation. The socialisation of housing in Berlin could therefore send a paradigm-shifting signal to the entire global

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economy that an alternative is indeed possible, and worth exploring.

All state power derives from the people. As I swear on the *Grundgesetz*, I suddenly have a flashback to my grandfather's moment of terror. When I get home, my daughter looks at my certificate and asks me what a citizen *does*. The present short-circuits: suddenly, I feel on me the eyes of both history and the future.

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