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**The American Impact on Western Europe:
Americanization and Westernization in Transatlantic Perspective**

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Edmund Spevack
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versus
Allied Decisions of the London Six-Power Conference

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American opinion polls conducted in Germany at the time support the conclusion that in 1945-1949 most ordinary Germans were preoccupied with issues of basic material and physical survival and showed a great deal of indifference to the constitutional fate of Germany.¹ However, many Germans were not as apathetic as that. Soon after his arrival in Germany, Clay's advisor James K. Pollock began to believe that "every leading German has a constitution in his pocket."² And indeed, the number of constitutional drafts formulated in the resistance movement, in exile, in the individual German Länder, in the recently reestablished political parties, as well by private citizens, was impressive. It goes almost without saying that the influence of leading Nazi constitutional theorists was eradicated in the wake of the Allied occupation of Germany. In contrast, many constitutional proposals drawn up by Germans in the resistance or in exile during the war years were in direct opposition to Hitler's Germany. Indeed, many of them were democratic and some of them were based on the Weimar system or on western models. However, a large number had almost nothing in common with the ideological sources of the Basic Law, calling for forms of government such as theocracy, monarchy, feudalism, or communism.

In an early but still influential book on the origins of the Basic Law, published in 1961, the journalist Friedrich Karl Fromme stated that the key experiences for the German framers of the Basic Law were the failure of the Weimar constitution and the experience of National Socialist dictatorship.³ One should expand this list to include the historical precedent of 1848 and the fear of Soviet Communism which was becoming ever more pervasive in German society after 1945. However, even with these experiences in mind, many of the drafts for a German constitution that existed after 1940, and even after 1945, did not share the ideological sources of the later Basic Law and had little affinity to the constitutional principles that were to

become permanent parts of the future West German constitutional order in 1949. Which external factors brought about such a surprising ideological shift?

The main argument below will be that the post-1945 constitutional order of West Germany was based largely, even primarily, upon the constitutional preferences of the Western Allies, and not on the ideas circulating in Germany at the time. The main framework of reference for the constitutional future of a West German state was created at the London Six-Power Conference which met in two sessions in the spring of 1948 (February 23 to March 6, and April 20 to June 1), as well by the interdivisional working group which met in Berlin from March 20 to April 12, 1948.⁴ While American (as well as British and French) elements were largely absent from the constitutional drafts written during World War II by resistance circles and exile groups, the constitutional proposals of the newly established parties after 1945, such as the SPD and the CDU, all had to contend with the presence of strong American political and ideological influences on constitutional matters. It will be made clear here that only those proposals which either anticipated Allied demands or were direct reactions to them played an important role in the 1948-1949 constitution-framing process. All other proposals, whether democratic or non-democratic, pro-Western or anti-Western, were collected and evaluated by the Americans; however, in the making of the Basic Law in 1948-49, their content was largely ignored. While German historiography has traditionally argued that the Basic Law is primarily an indigenous German product, the argument here will be that it is in fact a constitution which was initiated by the Allies and then arose in a dialectical process of negotiation between Allies and Germans.⁵

a. From Weimar to National Socialist Germany:

In many ways, the Basic Law was based on the Weimar constitution of 1919, and many contemporaries saw the Basic Law as a patched-up version of Weimar.⁶ It can certainly be said that the Basic Law built on the memory of Weimar liberal democracy, and its framers tried consciously to avoid some of the errors of construction which they recognized in the Weimar constitution. The constitutional thought and principles

of Hugo Preuss and his associates of 1919 thus were reawakened after 1945, but this done without great enthusiasm. Had the western Allies not intervened in the fate of post-1945 Germany, it can be argued that most Germans would have much preferred to forget about the Weimar constitution than to reawaken many of its main principles in the Basic Law. One key problem among the German constitutional drafts in the era 1940-1948 was that the ideas about why precisely the Weimar Republic and its constitutional order failed were so widely divergent. For example, the SPD and its constitutional expert Walter Menzel thought that too much federalism had brought down the Weimar system. On the other hand, Bavarian decision-makers such as Hans Ehard thought that there had been too little federalism in Weimar. The members of the Kreisau Circle thought that the Weimar system had allowed for too much popular participation in the political process, and they argued against conducting national elections in the future, insisting instead that popular general elections should only be held on the local level.

For the work of the Parliamentary Council, as well as for German constitutional drafts in the period 1940 to 1948 in general, however, there was another historical experience which was just as important as the failed experiment of Weimar: the era of National Socialism was clear in the memory of the Germans, and the majority of those involved in drawing up constitutions had experienced the Nazi dictatorship first-hand. In recent works on the subject of Nazi constitutional reform proposals, Uwe Bachnick and Diemut Majer have described the many constitutional drafts circulating during the Third Reich.⁷ It is very clear from Bachnick's and Majer's works that there was a very active constitutional thought in Germany during the Third Reich. This thought, however, shared none of the major tenets of the Weimar or of the Bonn constitution. Instead, the ideas of highly influential German theorists such as Carl Schmitt or Ernst Rudolf Huber focused on very different central themes: on the Führer principle as the way in which all power was distributed; on political centralization of the Reich; on the idea of the Volksgemeinschaft as the basic way of organizing the German nation; and the principle of Sonderrecht, which stated that human beings were basically unequal, and that their rights depended on their status within the Nazi racial hierarchy.

b. Proposals of the German resistance:

Ever since 1941, constitutional drafts were drawn up by the German resistance to Hitler. The constitution drafted by Carl Goerdeler and Ludwig Beck early in 1941 formed part of their memorandum entitled "Das Ziel."⁸ The draft was composed at the very zenith of Hitler's military successes, and made remarkable assumptions about the expansion of the German Reich's national territory on the basis of the status prevalent in 1938. It was characterized by a rejection of the "dictatorial and tyrannical Führer state" as well as by the dislike of an "unbridled super-democratic parliamentary system." Goerdeler and Beck called for the abandoning of a proportional electoral system which was "unorganic" because it no longer provided for any meaningful identification of the voter with the representative whom he was electing. The Reich was to be constructed from bottom to top, from local to national level, not the other way around as was just being effected by the Nazi regime. Elections should only be conducted on the local level. The Weimar system had failed because of a misguided belief that national elections based on abstract and intangible party programs could lead the electorate to make meaningful choices. Only on the local level would the voters be able to ensure "dass man weder einen Lumpen noch einen Phantasten wählt." The draft by Goerdeler and Beck was based on federalist assumptions, but also provided for strong Reich control over the local areas. Instead of the customary Regierungspräsident, an Oberpräsident was to preside over the individual Land, guaranteeing the Reich control over the Land. The Reich chancellor was to have strong powers to implement policy. At the same time, a mainly representational head of state (Reichsführer) was to be instituted. The draft stated: "In Betracht kommen: Erbkaiser, Wahlkaiser, auf Zeit gewählter Führer." Goerdeler and Beck expressed their own preference as being for hereditary monarchy (Erbmonarchie).

The "Grundsätze für die Neuordnung" were compiled by the Kreisau Circle in 1943.⁹ Led by Helmuth James Graf Moltke and Peter Graf Yorck von Wartenburg, the Circle also included social democrats, Protestant and Catholic clergymen, diplomats and politicians. Adam von Trott zu Solz was one of the most

prominent figures. The members met on von Moltke's Silesian estate in May and October 1942, and in June 1943, and drafted their principles for the order of Germany after the anticipated collapse of the Nazi regime. The main pillars on which the new Germany was to rest were the workers and the churches. Christianity was the basis on which the Germans could be brought back to a belief in law, and how they could supersede the "hatred and lies" which characterized the Nazi era. The Kreisau draft called for an end to the violations of human rights within Germany, and an end to racism and totalitarian control over the minds of the people. Instead of using their national power to oppress other European peoples, the Germans should peacefully integrate themselves into a united Europe.

One of the most interesting aspects of the Kreisau draft is also its emphasis on the nationalization of industry. The state was to have a strong role supervising economic competition, and key industries such as mining and steel, chemical industry and energy companies were to become the property of the state. The concepts of the Kreisau draft were thus significantly different from the ideas of Goerdeler and Beck. While the latter advocated a return to privatization after the war, the Kreisau group maintained significant socialist elements in their program. While some German economic historians have pointed out the roots of postwar German capitalism in the early 1940s, it is interesting to see how persistently socialist conceptions reappeared in postwar German constitutional drafts and even in the state constitutions of Hesse and Bavaria. The Americans went on to block these provisions whenever they could.¹⁰

The constitutional concepts put forth by the Goerdeler-Beck Group and the Kreisau Circle are remarkable for their critique of Weimar liberalism and their skepticism about national universal suffrage. The Goerdeler-Beck draft represented the tendency to turn back the clock not to the Weimar Republic but to pre-1918 times. The Kreisau Circle draft, in contrast, was somewhat more forward-looking. However, only very few of the ideas prevalent in it found their way into the Basic Law five years later. In fact, these proposals were largely ignored during the making of the Basic Law in 1948-49. Since most had been

executed during the final year of Nazi rule, not a single prominent member of these resistance circles was a participant in the Parliamentary Council.

c. Proposals of exile groups:

As early as January 1945, the American foreign service had begun to investigate what Social Democrats in exile might be thinking about a democratic reconstruction of postwar Germany. The American legation in Bern, Switzerland reported on January 12, 1945, that it had received a new report "on the present thought of German Social Democrats" from "one of its confidential informants."¹¹ The report shows that the Social Democrats were increasingly anxious about their ability to influence events inside Germany, and that they feared that a stable peace might not be achievable in the foreseeable future. They also wished at all costs to avoid the view among the German people that they were agents of Allied policies aimed at the destruction of Germany. After the end of hostilities, the Social Democrats favored placing Germany within a peaceful international order, disarming it, democratizing it, and reeducating its people. They also believed that the Germans should be given a chance to design their own democratic postwar political and constitutional order. The Social Democrats were anxious about the possible influence of Communists directed by Moscow in postwar Germany.

American legation officials were also watching the Social Democratic exile scene in Scandinavia. On June 12, 1945, the American legation in Stockholm reported on the views about the future of Germany published by the German emigré Kurt Stechert in a Stockholm daily newspaper.¹² The legation reported that Stechert had outlined a thesis of the German Sonderweg, namely the late abolition of the feudal order and the belated arrival of the "bourgeois social order." He wished to show how the German people had not been ready for the revolution of 1918, and how "large sections of the German bourgeoisie" went over to the National Socialists after the economic crisis of 1929. Stechert wrote that "at that time the German Social Democratic Party which, by the way, also "was combatted by the Communist dictatorship party", was the "only large

party in Germany which endeavored to keep watch over the imperishable spiritual inheritance of (German) liberalism and humanism", and voted in the Reichstag on March 23, 1933 against the bill which placed Hitler into power.

Indeed, many leading Social Democrats in exile devised plans to "patch up" the Weimar constitution. They remained proud of this constitution, which had been devised by an SPD majority and which had enabled the SPD to become the leading party ("staatstragende Partei") during the majority of the Weimar years. One such program was put forth in the United States by Albert Grzesinski, the former Berlin police chief and Prussian minister of the Interior. On July 3 and 4, 1943, a conference of German-speaking Social Democrats and labor union representatives took place in New York, and Grzesinski outlined his program to the participants.¹³ He began his remarks with the comment that although it met with resistance and ridicule, "the Weimar Constitution was indeed...the most democratic in the world." He believed that the future of Germany would be democratic if some important principles were followed. Among those were the ideas that Germans should not be subjected to "lengthy occupation by foreign troops, or reeducation by foreign teachers." The German people was able to reeducate itself without foreign help. Grzesinski also harshly rejected the dismemberment of Germany into smaller states, because that would fuel German nationalism and instability in Europe for decades to come. These provisions bear little resemblance to what actually happened in postwar Germany after May 1945; neither does the hope expressed by the Social Democrats in a resolution of July 3 and 4, 1943, that a revolution would break out in Germany and the German people would rise up itself to throw off the Nazi regime. Some of Grzesinski's plans, however, were more in tune with the actual future development of Germany. Former Nazis should not be allowed to vote or to stand for election. Institutions of militant democracy should actively guard the constitution against persons or groups who wanted to abolish the democratic order. He even referred to the new constitution as "ein neues Staatsgrundgesetz," employing a term similar to the one which would later be introduced by the minister presidents and used by the Parliamentary Council.

The thoughts put forth by German emigrés in Swiss exile in May 1945 were quite close to the actual development in western Germany in the following months and years. The group calling itself "Das Demokratische Deutschland" included many highly prominent Germans living in Swiss exile, including the former SPD Reichstag member and future Bavarian minister president Wilhelm Hoegner, the former Reich chancellor Josef Wirth of the Center Party, and the former Prussian minister president Otto Braun of the SPD. Their constitutional plan was influenced by the experience of the Weimar Republic, disgust at the Nazi regime, and their exile in Switzerland.¹⁴ They expressed their belief that "a real peace" in Central Europe could only be achieved if it were to be "a just peace." A territorial dismemberment of Germany at the hands of the Allies would be a great mistake. If a peace "worse than Versailles" were placed upon the Germans, then this would once again lead to decades of unrest and instability. Another leading theme in the draft put forth by "Das Demokratische Deutschland" was the opposition to theses about the collective guilt of all Germans. In the realm of economics, the draft placed considerable blame for the Nazi seizure of power on "a politically misled big business community which hoped to rescue its property and threw itself into much worse danger." The members of "Das Demokratische Deutschland" showed strong support for the nationalization of large estates and key industries. The main goal in the political realm was the creation of a "German Federal Republic" ("Deutsche Bundesrepublik (DBR)"). This republic was to be organized on a decidedly federalist basis, and the building of a new political structure was to take place "from the bottom up."

d. Länder Constitutions:

The Länder constitutions in the American zone of Germany were made before those in any of the other zones. Not even one year after the end of World War II, the Americans hastened to provide a new basis for government and popular elections in the German states. As these postwar constitutions are now more than 50 years old, this phenomenon has been much studied in recent years. In her work Demokratische Erneuerung unter dem Sternenbanner, published in 1998, Barbara Fait has discussed the American influences

on the making of the Bavarian constitution of 1946.¹⁵ She has shown that, during the making of the state constitutions, the American occupiers were omnipresent. The process was initiated by the Americans, specifically General Clay; the Americans intervened, if discreetly, in the process of constitution-making when things were not going the way they thought they should go; and the final product had to be approved not only by the American military on the ground in Germany, but by higher authorities in Washington as well. It was in the making of the Länder constitutions that the Americans tested and refined their methods of controlling and intervening in the process of constitution-making. These methods were soon to be used again in the making of the Basic Law. Barbara Fait has documented the American methods of subtle influence ("subtile Einflussnahme") for the Bavarian case in great detail.

In her section entitled "Autonomie oder Fremdbestimmung," Fait has made a successful attempt to analyze where power lay during the making of the Bavarian constitution. She shows the American concern about avoiding the public impression of a dictated constitution. She also reports in detail on the the American discussion on how to best achieve results when influencing the German constitution-framers. Henry Parkman, then the chief of the OMGUS Civil Administration Division, put four possible models of influence before General Clay in 1946, ranging from no intervention to procedure only according to strict orders. In July 1946, OMGUS also made sure to draw up a list of ten "vital points" which must be included in a democratic postwar German state constitution; departures from this list were not tolerated throughout the process of constitution-making.¹⁶

There were certain very specific areas in which the Americans heavily intervened during the making of the Bavarian constitution. One was the area of the economic order. Although all German parties, including the newly formed CSU, called for nationalization of industries and a planned economy, the Americans disallowed this element in the Bavarian constitution. They also battled the Bavarians on the questions of the civil service reform, basic rights, a Bavarian citizenship, and the relationship of Bavaria towards a future German federal government. An interesting proof that the Bavarians were able to prevail against American veto power

was in the making of the provisions defining the Bavarian relationship towards a future central German government. Although the Bavarians had shown at several points that they could effectively get their way against the American military establishment, the atmosphere when the constitution was finally ratified on October 26, 1946 was dominated by a mood of "sobriety" ("Nüchternheit").¹⁷

e. German Postwar Drafts for a Federal Constitution:

Between 1945 and 1948, an extremely large number of constitutional proposals were drawn up by private citizens. These proposals were sent by members of the German public to General Clay, and handed over by his office to the OMGUS Governmental Structures Branch, and are today collected at the National Archives in College Park. The drafts include those by a Carl Gabriel of Hamburg, a Werner Willenberg of Dormagen, a Hubert W. Stahmer of Munich, and a Hein Martin also of Munich.¹⁸ The writer Alexander Reuss from Schwetzingen in Baden sent his "Entwurf einer Verfassung des Deutschen Reiches" to the Allied Control Council and the United States Government in July 1945. While he introduced western democratic elements, his draft proceeded from the idea that German national division could be avoided after 1945.¹⁹ While the negative experiences made under National Socialism were important, the authors of these drafts did not necessarily have the Westernization of German constitutional life in mind; in fact, other issues were much more important to them. They could also not foresee the political developments brought about by the increasing East-West tensions, and the London decisions of the Western powers.

An interesting proof of the varied and often anti-western character of German constitutional thought in 1945 to 1948 can be found in the pages of the news magazine Der Spiegel. During the year 1948, it allowed prominent Germans of various persuasions to voice their opinions on a federal German constitution on one page. On February 21, 1948, Erwein Freiherr von Aretin wrote that the only rational solution to solidifying German constitutional democracy after 1945 was to reintroduce a monarchy. He also wrote that "Amerika ist nicht Deutschland" and believed that it would be counterproductive to attempt to introduce American

elements into German constitutional life.²⁰ In his Spiegel article entitled "Blick auf 1848," Theodor Heuss encouraged Germans to look primarily to their own constitutional tradition when making a new federal constitution. He thought that in 1948 the Germans should not disregard the central question of "intrinsic German as well as foreign power." Anything else would lead to falsehood and confusion. He thus hinted at the power position he perceived the Germans to be in in 1948.²¹ The problems of Bavarian particularism were sounded in articles by Joseph Baumgartner of the Bavarian Party and Josef Müller of the CSU. Although Baumgartner showed his interest in American-style federalism by entitling his essay "Vereinigte Staaten von Deutschland," both politicians showed in their contributions above all how difficult it would be to implant Bavaria in a future German federal state.²²

Rumors about a possible Allied plan to create a West German constitution began to circulate in the German press in 1947. Indeed, several German institutions had already been asked by the Allies to study the question of a federal constitution. The constitutional committee of the "Deutsches Büro für Friedensfragen" met six times from May to December 1947 in order to debate a future German federal constitution.²³ Although representatives from Bremen did participate, most of the delegates at these discussions were from southern Germany. The leading members were from Württemberg-Baden and Bavaria. Friedrich Glum's draft of a "Verfassung der Vereinigten Staaten von Deutschland" served as the departure point for the discussions. In a final meeting of July 16, 1948, a reduced circle of former participants attempted to reformulate the "Vorschläge für eine Bundesverfassung" of December 17, 1947, into a draft which was in line with the changing political atmosphere.

These meetings aimed at drawing up specifically southern German proposals for the constitutional future of Germany. It can be said generally that the prevailing opinions were more federalist in outlook than those voiced by the northern German Zonenbeirat, which had been charged with thinking about a future German federal constitution in the British zone. The southern German meetings created a sizeable amount of paperwork involving various issues related to the foreseeable constitutional future of Germany. This

paperwork included a report on the world political situation after the Moscow CFM conference, and the consequences for a German federal state, written by Hesse state secretary Hermann Brill on April 23, 1947. Among the other working papers drawn up were an "Entwurf über die Zuständigkeitsabgrenzung in einer künftigen deutschen Verfassung," the "Vorschläge für eine Bundesverfassung," a memorandum on "Erweiterung der Bundesgewalt zum Nachteil der Bundesländer in den Vereinigten Staaten von Amerika seit 1913," An "Entwurf eines Vertrages über die Bildung einer Deutschen Staatengemeinschaft," an "Entwurf eines Vertrages über die Bildung eines Verbandes Deutscher Länder," "Vorschläge für eine Regelung der Zuständigkeitsverteilung zwischen Bund und Staaten," "Vorschläge für eine Verfassungspolitik des Länderrats" of April 15, 1948, and "Richtlinien für eine künftige deutsche Verfassung" of April 21, 1948.²⁴

At the same time, the northern German states had also been asked by the British military government in 1946 to begin thinking about the possibility of a German federal constitution. The Zonenbeirat conducted several meetings in 1947 and published a pamphlet entitled Der Zonenbeirat zur Verfassungspolitik in August 1948.²⁵ In the introduction, the members of the Zonenbeirat stated that they saw themselves as occupying a moderate middle position between the federalist South and the centralist-unitarian East of Germany. They stressed their willingness to cooperate with the Stuttgart Länderrat and with the constitutional thought coming from southern Germany, and they expressed regret that they were not able to cooperate in a close way with eastern German representatives. They also wrote explicitly that their sovereignty was severely limited by the British occupation of their territory. While the Zonenbeirat did have strong views on the future economic organization of Germany, they recognized in the summer of 1948 that their constitutional proposals could only serve as temporary and provisional ideas aimed at easing the most important current organizational problems in Germany.

Some of the most influential constitutional proposals circulating in Germany in 1947-48 were drawn up by bureaucrats employed by the state governments. Walter Strauss, state secretary in the Hesse ministry of the interior, drew up "Grundlinien für eine zukünftige Reichsverfassung" in October 1946. He had been

requested to do so by William W. Dawson, chief of the Regional Government Coordinating Office which was responsible for American liaison work with the Länderrat. At the request of the Director of the Internal Affairs and Communications Division at OMGUS, George B. McKibbin, Strauss later composed his "Gedanken über eine Deutsche Bundesverfassung" in 1948.²⁶ A proposal entitled "Verfassung der Vereinigten Staaten von Deutschland" was drafted by Friedrich Glum, Ministerialdirigent in the Bavarian state chancellery, in the summer of 1946.²⁷

But the major driving force in defining specifically German desiderata for the constitutional future after 1946 were the individual political parties. The OMGUS Civil Administration Division was watching the political parties and their constitutional thought from early on. For instance, an "Intelligence Note" of May 14, 1947 evaluated "CDU Proposals for a German Constitution."²⁸ This note evaluated the proposals of the CDU working committee on constitutional questions founded at Königstein, and paid special attention to the problem of federalism. A CDU/CSU group known as the "Ellwanger Kreis" met several times to discuss a German federal constitution in 1947 and 1948, and finished its final proposal entitled "Grundsätze für eine Deutsche Bundesverfassung" at a meeting in Bad Brückenau on April 13, 1948.²⁹ Still reminiscent of the Weimar Republic's centralism and discrimination against the federalist values of southern and southwestern German states, the CDU and CSU representatives wished to strengthen an indigenous German variety of federalism.³⁰ Meeting for the first time in Ellwangen on March 1-2, 1947, the CDU and CSU politicians involved wished to counter a "centralist danger coming from the north of Germany." The participants also voiced discomfort with the society of the United States, uttered harsh criticism at the American military occupation, and stressed the idea that Germany should avoid foreign models in its search for an appropriate constitutional future. While anti-Americanism seems to have played some role among the German participants, it can be assumed that American authorities were informed in great detail about the Ellwangen Circle's work well before the final constitutional draft had been produced on April 13, 1948. For instance, the minutes of the CDU/CSU circle's fourth meeting in Ellwangen on November 22-23, 1947 found their

way into American possession, and into the OMGUS records at the National Archives in Washington.

Either an American representative was present, or one of the German participants handed the information over to the American authorities.³¹

The SPD, meanwhile, developed its own constitutional principles. Based on the traditions established in the Weimar constitution, and shaped by the rigid leadership of a single individual, Kurt Schumacher, the SPD began its work on the "Richtlinien für den Aufbau der deutschen Republik" in September 1946. In March 1947, the "Richtlinien" were accepted by the party leadership, and they were ratified by the general party congress in Nuremberg in July 1947.³² The SPD adopted the view that too much federalism, not too little federalism, had enabled the National Socialist regime to take over power. The party also thought that while the political future of Germany, and the question of national unity, were unclear, an occupation statute handed down by the Allies was more important than a German draft for a constitution. A German constitution could only be drawn up when national unity and full sovereignty had once again been secured.

The two official drafts of the SPD, devised after July 1948, were written very much with these considerations about the example of Weimar, centralization, and lack of national sovereignty in mind. Both were drafted by the constitutional expert Walter Menzel. The first was commissioned by the SPD leadership in early July 1948, and published as "Westdeutsche Satzung" in August 1948.³³ It shows considerable resistance to American plans in Germany, and constitutes an attempt to merely create an administrative document which would temporarily serve German interests until national unification occurred. However, it had already been surpassed by political events, and a second draft, entitled "Entwurf für ein Grundgesetz," was published by Menzel on September 2, 1948.³⁴ The fact that Menzel had to produce a revised draft in a great hurry in September 1948 shows that he was not setting the agenda for what was going to happen during the drafting of the Basic Law, but that he had to adapt his own thought to the changing reality as dictated by Allied wishes.³⁵

f. The Allied London Decisions of spring 1948:

The crucial decisions about the constitutional future of West Germany were, however, initially not made by German private citizens, institutions, or political parties. Instead, they were made by the Six-Power Conference which met in London in two sessions in the spring of 1948, as well as by its subsidiary, the Berlin interdivisional working group which met in the period during which the London conference was not in session. The goal was to design a unified political, economic, and military framework for all of western Europe, in which western Germany should become an integral part. The main issues were the details of the integration of a western German state into western Europe; the economic reconstruction of western Europe; the Ruhr question (which was vital to the survival of Germany); and the question of a future European security system (this issue was watched especially closely by France).³⁶ It was important for the Americans and the British to win French support and overcome the great amount of French skepticism about the making of a new German federal state. The larger world-wide context of Western European integration was the increasing threat of Soviet expansionism throughout eastern Europe.

The London Six-Power Conference met in two sessions, from February 23 to March 6, 1948, and from April 20 to June 2, 1948. From the beginning, the American secretary of state George Marshall did not view the division of Germany as a permanent solution to the German problem. However, he also could not afford to procrastinate in the matter of economically reviving and politically consolidating western Europe. The main issue for the Americans was the rapid and smooth integration of a stable western German state into a revived Western European economy.³⁷ The key American idea for the structuring of such a state was the concept of federalism. The political reconstruction of West Germany was to proceed from the Länder, and the central government was only to have the powers necessary for the coherence of the states and for ensuring the economic and social rehabilitation of West Germany.³⁸ Like the Americans, the British tried to leave the door open for a future unification of Germany once the international political landscape had changed. The

British had no federalist tradition in their own constitutional experience, but instead were usually advocates of a centralist system of government. However, they did not fundamentally oppose the introduction of a federalist system in West Germany.³⁹

For the French, the introduction of federalism in West Germany was of the highest priority. France wished to avoid the founding of a West German state until the very end of the London Conference; however, if the founding of a new German state could not be prevented, this state should at least have strong individual Länder and as weak a federal government as possible. In the realm of economics, the French wished to hold down the rate of industrial production in postwar West Germany, and wanted to profit from the Ruhr's industries. In the realm of politics, they wished to achieve the indefinite weakening of Germany by encouraging an extreme federalist position. They also wished to incorporate the Saar into their own national territory, and retain occupation troops in Germany for as long as possible.⁴⁰ The French even rejected the idea of a federal West German parliament if such a body encouraged the Germans to strengthen federal political authority.⁴¹ The French socialists also continued to see themselves as mediators between east and west. They wished to maintain their contacts with the Soviet Union and wished to avoid offending the Soviets by their participation in the founding of a West German state. Soviet participation in the formation of a general settlement of the German question might also contribute to the political and economic weakening of Germany.⁴²

At the beginning of the London Conference, the British government produced a draft document making proposals for the future political order of Germany, entitled "Supplementary Principles to Govern the Treatment of Germany."⁴³ This draft included the division of powers, thoughts about a second chamber, and individual rights. Federalism was allowed but not overly emphasized. The Germans were only to be given a consulting role in the making of their new constitution, and a future German government was to be closely observed by the Allied Control Council which had the power to veto government decisions it thought of as undemocratic. In contrast, the American ambassador to the U.K., Lewis W. Douglas, thought that the

future German constitution should be determined largely by the Germans themselves. There should be a second chamber to ensure federalism, and the constituent assembly should be elected in the way which would provide for the greatest amount of federalism in the future constitution. The French were alarmed by the American plan to hand over so much autonomy to the Germans, and the Benelux countries favored even more federalism in Germany than the French did.⁴⁴

At the end of the first session of the London conference, on March 6, 1948 the participants established a "Berlin Working Group" which consisted of seven subgroups known as "working parties." Working party number 5 dealt with the future West German constitution, and met for the first time on March 19, 1948. The success of this group's meetings were, however, severely limited. The main reason for this lack of progress was that the American representative Edward Litchfield presented the French participants with a detailed plan for the making of the West German constitution, including a precise time schedule. The French delegates were shocked and temporarily left the meeting. Litchfield's draft, which had been cleared with General Clay, thus caused a major disturbance and showed the great clash in interests between the United States and Britain on one side, and France on the other.⁴⁵ Clay soon made another attempt to win French support by compromising some aspects of the American position. On April 8, 1948, he sent a revised proposal to the French and British Allies. And indeed, the position of the French diplomat Couve de Murville, who came to visit Clay in Berlin, appeared to be softening.⁴⁶ However, another area soon began to lead to tensions with the French. This was the ensuing discussion about a future occupation statute. On April 7, 1948, the Americans had submitted a first draft for an occupation statute, and only massive American and British pressure eventually caused the French to change their practice of military occupation from colonialism to the fostering of democracy and political autonomy in Germany.⁴⁷ The "Final Report of Working Party Number 5 of the Military Governors' Conference" was finished on April 9, 1948. It included suggestions on "Future Political organization of Western Germany," but was seen overall as having "showed little progress."⁴⁸

The second session of the London Conference began on April 20, 1948 with the discussion of General Clay's paper on the constitutional future of Germany. Both the French and the British made counterproposals. The main controversies centered around the questions of when and how to convene the constitutional assembly. Americans and French deeply disagreed on how the Parliamentary Council should be elected. The name of the new West German state, as well as the redrawing the the state boundaries (termed "affected areas") were also highly controversial. The three proposals continued to be discussed on April 28-30, 1948.⁴⁹ The final results of the London Six-Power Conference were summarized in a "Report," dated June 1, 1948 and submitted to the individual governments of the participating countries.⁵⁰ The "Report" included appendices A through L, which dealt with specific issues that had been under discussion. Several key issues remained highly controversial, and were not covered in the "Report" in any detail. These included the Ruhr statute, the occupation statute, and the military security office. Other unsolved issues were covered over by vague compromising language, such as the method of electing the Parliamentary Council, and the way the new constitution would be ratified.⁵¹ The appendix dealing with the constitutional structure of West Germany (Appendix H) was worded in a rather vague way. It was known as the "Letter of Advice to Military Governors regarding German Constitution," was referred to as "TRI\15 (Final)," and was dated May 12, 1948.⁵² The provisions listed were limited to a decentralized federal organization; a two-chamber system with sufficient powers for the chamber representing the states; limited emergency powers for the federal government; no centralist powers in the areas of education, culture, churches, local administration, and public health; only limited powers of the central government in the areas of public welfare and police; the right of the federal government to collect taxes only for areas in which it is responsible and entitled to wield power; the guarantee of an independent judiciary which could practice judicial review, adjudicate Federal-Land conflicts, and protect the rights of individual citizens; and limits on the number of federal agencies to be established.⁵³

The provisions of this first "Letter of Advice" were initially not made known to the Germans; however, the "Letter" was later used as the basis of the Allied memorandum of November 22, 1948, which was handed over to the Parliamentary Council and aimed at making the Germans conform more closely with the Allied plans for the constitution.⁵⁴ The second "Letter of Advice," entitled "Letter of Advice to the Military Governors Regarding Powers of Civil and Military Governments" was dated May 19, 1948 and designated TRI/17.⁵⁵ The provisions contained therein were the fundamentals of the later Occupation Statute: the military governors would conduct West German foreign affairs and control West German trade; they would retain control over the Ruhr; they could take measures to ensure the prestige and security of their troops; they would ensure the observance of the new constitutions; and they reserved the right to assume total control of West Germany in a military emergency. These stipulations were likewise kept secret from the Germans.

The "Report" summarizing the agreements reached at London was never released to the German minister presidents in the summer of 1948, but rather remained known only to the Allied governments. The Germans thus were probably aware that the Allies had set up guidelines for the making of the Basic Law, but they were not allowed to know specifically what these guidelines were. The only document which was made public, and which did describe some of the agreements reached at London, was the "Communiqué of the London Conference on Germany," released to the press on June 7, 1948.⁵⁶ The "Communiqué" contained summaries of provisions on several issues, including "Association of Benelux Countries in Policy Regarding Germany"; "Role of the German Economy in the European Economy and Control of the Ruhr"; "Evolution of Political and Economic Organization of Germany"; "Provisional Territorial Arrangements"; and "Security." In the final section attention was paid to "Measures during the period in which the occupying powers retain supreme authority in Germany," as well as "Measures after the period in which the occupying powers retain supreme authority in Germany." The latter subsection emphasized that the creation of a West German state was "designed to solve the urgent political and economic problems arising out of the present

situation in Germany," but that a permanent solution to the German problem would be sought at a later time in the form of a four-power agreement.

This "Communiqué" was released less with respect to German feelings than for the use of the French National Assembly. Both the United States and Great Britain hoped that the French would abandon their opposition to the founding of a West German federal state, and instead agree on support for the necessary profound changes in French policy towards Germany. Communists and Gaullists were still bitterly opposing any shift in policy towards Germany, with all the side effects this would have on policy towards the Soviet Union. The provisions which favored France were listed in detail, and the full text of the agreements on international control of the Ruhr were included in an appendix.⁵⁷ On June 9, 1948, the United States and Great Britain approved the London provisions for the future of West Germany, and the Benelux countries followed with their approval on June 14, 1948. A French decision, however, was still not reached by the middle of June. On June 14, the United States threatened to implement the London decisions even without French consent, and the approval of the National Assembly in Paris was finally reached after long debates on June 16-17, 1948. Only after that could the Allied military governors begin to phrase the three documents which were to be handed over to the German minister presidents at Frankfurt on July 1, 1948.⁵⁸

At the same time, the psychological effect on the Germans was not forgotten by American policy makers. General Clay sent a cable to Washington indicating that "I do not want to bring to the attention of the responsible authorities in Washington once again that we still have a German problem." Clay advocated releasing the "Communiqué" because he wished the German minister presidents to be able to meet with the Allied Military Governors and then inform the German public about the London provisions. Clay wished to avoid publicizing the agreements on German federalism too much, because he did not want the Germans to think that the French position of ultra-federalism was the dominant one. He believed that the Germans would be more supportive of American positions on many issues. He also wished to avoid the impression in the German public that the Allies were attempting to impose a constitutional order on West Germany. Clay

ordered the translation of the document into German and transmitted a message to the minister presidents that the London resolutions were much more positive than they were assuming on first sight. Specifically, he declared that the provisions regarding the Ruhr did not call for separation of the Ruhr from Germany, and were much milder than could have been expected.⁵⁹

These diplomatic tactics did not, however, manage to assure German consent to the London provisions. In fact, the initial German reaction was one of shock and outrage. Konrad Adenauer stated that while he favored the political consolidation of western Germany, the provisions for economic control reached at London seemed to him "a catastrophe" and "worse than Versailles." He wondered in the summer of 1948 whether the Germans should adopt the tactic of non-cooperation versus the Allies in order to force more favorable concessions from them.⁶⁰ Kurt Schumacher and the SPD had similar reservations about the published results of the London Conference. Schumacher began to voice grave concerns about the implications which cooperation on the London decisions would have for the national unity of Germany. In the months that followed, Schumacher remained a staunch critic of the Allied policies in western Germany, and became known to the Americans as a man whose "fanatic zeal left him little room to compromise."⁶¹ It was now up to the Allied military governors to convince the Germans that the London provisions were milder and more constructive than they appeared to be.

g. Toward the Basic Law:

The program for the creation of the postwar constitutional order, known as the "Frankfurt Documents," was handed over to the Germans by the three Allied military governors on July 1, 1948. The German minister presidents responded with their Koblenz resolutions, a result of their meetings of July 8-10. The Germans were not ready to make a proper constitution and to found a state until they had regained full national sovereignty. They only wanted a provisional statute which would make the administration of a provisional national territory possible, but not a full constitution. They also did not want a popular

referendum to ratify any constitutional document. Most importantly, they wanted the Allies to release an occupation statute which would tell the Germans unambiguously what their rights were.⁶²

These resolutions, however, were so negative that they in turn angered the Americans. General Clay argued on July 14, 1948 that the Germans were giving away their only chance for autonomy and constructive work. Clay went on to state to the Germans on July 20, 1948 that the London decisions were an indivisible unity and had to be accepted as such. The Germans revised some of their opinions in their Niederwald meeting of July 21-22, 1948, softening to the Allied rules outlined in the Frankfurt Documents.⁶³ Konrad Adenauer, for one, had now come to the conclusion that any West German provisional constitution would "not be equal to the Ten Commandments," and that cooperation on this matter would in fact constitute an important step towards national sovereignty. On July 26, 1948, the West German minister presidents met with the Allied military governors in Frankfurt and after a heated and dramatic discussion, they settled the details for the making of a West German constitution.⁶⁴ The final Report of the Herrenchiemsee meeting of constitutional experts, released on August 31, 1948, was another step in this direction.⁶⁵ The experts meeting at Herrenchiemsee knew what the Allied desiderata were, and they could also very well gage their own degree of political autonomy. They therefore concentrated on making those constitutional suggestions which could be relevant under the difficult circumstances which existed in Germany. The recommendations of the Report were evaluated for the American military government by Carl Friedrich, who found them adequate and in tune with Allied policy.⁶⁶

When the Bonn Parliamentary Council began its work on a "Basic Law" on September 1, 1948, the American control machinery was also in place, ready to observe, evaluate, and control every move the German delegates made. The most important German constitutional drafts were collected, classified, and published in an edition by the American occupiers.⁶⁷ From the very outset of the process of constitution-making, the Americans thus knew which proposals the Germans had on the table as departure points. The American official Kurt Glaser prepared an outline entitled "Vergleich der Verfassungsentwürfe" which was

handed over to the German constitution framers. It compared the Herrenchiemsee Report, the Proposals of the East German "Deutscher Volksrat," the "Ellwangen Proposal," and the "Westdeutsche Satzung" prepared by Walter Menzel.⁶⁸ The constitutional outlines on which the Germans could base their future work had thus been narrowed down to a convenient few drafts, available to both Germans and Allies alike. The western German constitutional discussion could not be the same anymore after July 1, 1948 as it had been before. Instead, the making of the Basic Law after September 1, 1948 took place in a process of continuous negotiation between Germans and Allies. When German-Allied differences had become very great in the spring of 1949, the Allies negotiated directly with selected members of the Parliamentary Council, organized first in a committee of five and then in a committee of seven members. As the controversies with the Allies became more heated and difficult, German autonomy and power grew, particularly in April of 1949. While many elements of western ideology were readily accepted into the Basic Law, such as individual rights, federalism, and a the establishment of a supreme court, other elements were rejected by the Germans, such as the creation of a senate, or the adoption of the principle of presidentialism. The Canadian historian Erich Hahn has been correct in pointing out that when the Basic Law was finished, the Germans had emerged as "partners" of the Allies, "not full, not equal, but vital partners." However, one also has to agree with the German constitutional scholar Erhard Lange, who has written: "The Allies designed the crib in which the Germans were allowed to move."⁶⁹

NOTES

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