

The Grundgesetz: 60 years of Germany's post-war constitution

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Sixty years ago, May 23, 1949, saw the enactment of the Grundgesetz (literally, basic law, or constitution). Four years after the end of the war, this date marked the founding of the Federal Republic of Germany (FRG) in the western part of the country. A little more than 40 years later, the former German Democratic Republic (GDR, East Germany) acceded to the FRG, thus coming under the jurisdiction of the Grundgesetz.

Today, the political establishment from left to right are united in singing the praises of the Grundgesetz. It has established “peace, freedom, the rule of law, the welfare state and parliamentary democracy” (Oskar Lafontaine, Left Party); it is an “outstanding constitution” (Gregor Gysi, Left Party); a “success story” (Hans-Christian Ströbele; Green Party); or is even a “propitious document” (Peter Ramsauer, Christian Social Union).

But this is all just whistling in the wind. The year of the founding of the FRG saw the beginning of a period of relative economic, social and political stability of capitalism, a period that is long past. The more rifts and faults it exhibits, and the greater the danger of collapse, the more loudly the democratic and social façade of German capitalism is being praised for its alleged splendour.

The Grundgesetz cannot be understood without understanding how it came into being.

Following defeat in the Second World War, Germany's ruling elite had been thoroughly discredited by its participation in the greatest crimes in human history. This applied not only to the few Nazi and business top leaders who faced the courts and were condemned in the Nuremberg Trials. It pertained as well to the bankers and entrepreneurs who had profited from the war, Arianisation and slave labour; the officers responsible for conducting the war of extermination in the East; the civil servants, judges and police officers who ensured “public order,” and the professors who had elaborated the ideology of the Nazis.

Tens of thousands were involved in the crimes and atrocities of the Nazi regime and with just a few exceptions went undisturbed and unpunished. With the beginning of the Cold War, they were once again needed. The Grundgesetz provided a democratic façade, enabling them to regain their positions and status. The establishment of the FRG meant they could again rise to prominent social and political posts.

However, this could not be done without granting some democratic and social concessions to the working class, among whom anti-capitalist and revolutionary tendencies were prominent. These tendencies were so powerful that even the Christian Democratic Union (CDU) saw itself forced in 1947 to call for nationalisations and economic planning in its “Ahlen programme,” which opens with the words: “The capitalist economic system has not served the vital interests of the German people in the public and social domain. After the country's dreadful political, economic and social collapse, a new order can only be built from the bottom up. The content and aim of this new social and economic order can no longer be the capitalistic pursuit of profit and power, but must be the

welfare of our people.”

The legal system of the FRG contained many things that had been fought for by the workers' movement for a hundred years, and which to some degree were achieved under Kaiser Wilhelm and the Weimar Republic: Constitutionally anchored and legally enforceable human and civil rights, universal suffrage, secret and direct elections and the principle of the state's responsibility for social welfare. Against the bitter resistance of the Church and conservative layers, equal rights for women were also anchored in the Grundgesetz.

However, these democratic concessions came with qualifications, preventing the masses from engaging directly in politics. They “found expression in the obligations of the legislators and restrictions on voters, the like of which probably do not exist in any other democratic constitution,” as historian Heinrich August Winkler writes.*

This begins with the fact that the Grundgesetz has never been submitted to the people for ratification, and unlike other state constitutions, and except in cases of a reorganization of the federal territory, is not intended to be put to a popular vote. The organisation and determination of politics is reserved exclusively to the parties represented in the Bundestag (federal parliament). Small parties receiving less than 5 percent of the vote are excluded from parliament, and article 21 of the Grundgesetz expressly contains the possibility of prohibiting “unconstitutional” parties.

In a 1956 judgment, under which the German Communist Party (KPD) was banned and which declared “Marxism-Leninism” incompatible with “free democratic constitutional structures,” the Supreme Court clearly expressed the notion which had been prominent in the elaboration of the Grundgesetz: “The installation of effective legal securities against such political tendencies ever again winning influence on the state dominated the thinking of those who framed the constitution.”

Thus the Supreme Court judges in Karlsruhe aimed their fire equally at Nazis and communists. In practice, however, it was primarily Marxists and tendencies advocating the class struggle that were the target. In the struggle against such leftists the FRG called upon the services of the remaining elements of the state and legal apparatus of the Third Reich. There never was a “year zero” in the FRG.

The old Nazis were the most reliable forces to be entrusted with the persecution and suppression of the political opposition from the left and the working class, which had begun immediately following the establishment of the FRG. The state doctrine was not freedom, democracy and the principle of the state's responsibility for social welfare, but rather unadulterated anticommunism.

With the “Adenauer decree” of 1950, membership in a “communist” organization was sufficient to bring dismissal from the public service. On the other hand, Nazis—with the exception of Gestapo agents or those deemed to have been “main culprits”—were granted a legal right to their old jobs.

The KPD's youth organisation Freie Deutsche Jugend (FDJ, Free German Youth) had already been banned in 1951. In the same year, the

bulk of political criminal law was reinstated and anyone who actually or allegedly maintained political contact with the GDR or the KPD, or who rejected rearmament, was criminalised. At the same time, the federal government called for the prohibition of the KPD, which the Supreme Court then pronounced in 1956, five years later.

However, the criminalisation of the KPD had begun before this date. In 1950, members of the then still legal KPD had their passport applications refused. Communist students were not accepted for university places. Parents had their childcare accreditation revoked because of their political views. Survivors of the war had their legal pension payments cancelled; compensation for those who had suffered injustice under the Nazis was refused, disallowed or had to be paid back.

Approximately 125,000 preliminary investigations were instigated on grounds of membership of an “anti-constitutional organisation” (later termed an “offence against party prohibition”), “anti-constitutional subversion,” etc., representing far more members than the KPD had at the time of its prohibition. Approximately 7,000 of these proceedings led to a criminal conviction, with some facing several years’ imprisonment. Some courts regarded it as an aggravated offence leading to an increased penalty if the accused had been already imprisoned under the Third Reich for their KPD membership. Even where there was no conviction, the proceedings usually led to the loss of a person’s job. Journalists, editors and publishers faced *Berufsverbot* (banned from following their profession), newspapers were prohibited and confiscated.

In its ruling, and after quoting pages and pages from the Marxist classics, the Supreme Court ruled that “Marxism-Leninism,” and in particular the overthrow of the rule of capital, was incompatible with “free democratic fundamental order in the sense of the Grundgesetz.” The ban affected not only the KPD, but also every “substitute organization.” Among these was understood to be any organisation which “followed or wanted to follow their [KPD] immediate, partial or long-term goals, for a shorter or longer time, locally or further afield, openly or hidden.” As a result, hundreds of other organisations were banned.

With the KPD ban, the development of the FRG proceeded on the foundation of anticommunism. The KPD ban served as a precedent for the ruthless persecution of all tendencies that espoused revolutionary Marxism and opposed capitalism. All the splendid fundamental rights whose praises are being celebrated today so lyrically—the freedom of the individual, the freedom to follow one’s profession, freedom of opinion, the press and association—can very quickly turn to dust if the ruling elite believes the most important and fundamental right for them is in any danger: The freedom to own the means of production, guaranteed under article 14 of the Grundgesetz and embellished with the addition that this should “at the same time” serve the public interest.

The KPD ban was facilitated by the policies of the KPD itself, which after the war declared its support for free trade and private property, and which defended the crimes of the Stalinists in the GDR, including the suppression of the workers’ uprising on June 17, 1953.

In 1968, the grand coalition government of the SPD and CDU/CSU reacted to the economic crisis by passing the Emergency Laws Decree. This made possible the introduction of a dictatorship—constitutionally! However, the constitutionality of these laws has never been tested. A few years later there followed the “Radical Decrees” (*Radikalerlasse*) of the Willy Brandt (SPD) government, which like the Adenauer decree banned members of left-wing organizations from working in the public service. According to the Supreme Court, these decrees do not breach fundamental rights.

Since then, fundamental democratic rights have been systematically eroded.

In the 1970s, in reaction to the terrorist acts of the Red Army Faction (RAF) the principles of due process during proceedings involving state security were drastically curtailed; with the same applying to freedom of

opinion. A critical word could result in criminal proceedings for “exhibiting sympathy” for the RAF.

In the 1990s, the right to political asylum and the inviolability of the home were largely abolished, with support of the SPD and the Supreme Court. Human dignity is allegedly inviolable, according to article 1 of the Grundgesetz. However, the reality looks very different for those on low wages, refugees in custody awaiting deportation, migrants visiting the Aliens Office and other authorities, and the unemployed in job centres.

If in its judgement banning the KPD the Supreme Court had told the Marxists the state was “an instrument for harmonising social organisation”—which “liberal democracy” regards “as its task that of preventing real exploitation, i.e., the utilization of labour power under unworthy conditions and for insufficient wages”—today the state ensures the opposite under the welfare and labour reforms of Agenda 2010 and Hartz IV.

Since the attacks of September 11 2001, the prohibition of torture is also increasingly being questioned. When Wolfgang Daschner, vice-president of the Frankfurt police, permitted a child kidnapper to be threatened with torture, and then publicly defended this, he received support from prominent politicians, including Left Party leader Oskar Lafontaine. Some constitutionalists are even demanding more or less expressly that consent be given to so-called “protective torture” in the context of “counterterrorism.”

And while the Grundgesetz supposedly should prevent war ever again being waged from German soil, today Germany’s interests are being “defended” by the Bundeswehr (armed forces) in the Hindu Kush. After decades during which it was held that such international operations by the Bundeswehr were incompatible with the Grundgesetz, the Supreme Court suddenly arrived at the opposite conclusion—without the need for a single word of the constitution to be changed.

In Germany, democratic and social rights and principles were only defended and fought for by the working class. This also found its reflection in the Grundgesetz. However, the time of class compromise is now over. While the Grundgesetz is being mythically overhauled, everything progressive it contains is coming under fire.

* Heinrich August Winkler, *Der lange Weg nach Westen. Zweiter Band. Deutsche Geschichte vom Dritten Reich’ bis zur Wiedervereinigung* (“The Long Road to the West, vol. 2, German History from the Third Reich to Reunification”), Munich: 2000, p. 133.



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