

Revolutionary Constitutional Lawmaking in Germany— Rediscovering the German 1989 Revolution

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Abstract

Today, the 1989 Revolution in East Germany is recognized and celebrated as the event that abolished the German Democratic Republic (GDR) and brought about German unification. What is mostly overlooked, however, is that these are not the Revolution's only and, from the perspective of constitutional law, not even its most important achievements. More important with respect to understanding constitutional lawmaking in Germany is that the 1989 Revolution did not lead to an unconditional adoption of West German constitutional law in the new East German states. Instead, the Revolution had its own constitutional agenda, which went beyond the West German Basic Law and was transferred to unified Germany where it then needed to be integrated into the existing West German constitutional order. The Article reinterprets the 1989 Revolution and shows how a revolutionary popular movement in the GDR developed its own constitutional agenda, which first found legal manifestation in GDR legislation, and then was transferred to unified Germany through the Unification Treaty and the new state constitutions.

* Associate Professor of Law, Peking University School of Transnational Law. I wish to thank Bruce Ackerman, Donald Kommers, Peter Quint, Lori Reynolds, and my colleagues at STL for their valuable comments. The topic of this article is part of a broader analysis of the 1989 Revolution's impact on unified Germany's constitutional law in STEPHAN JAGGI, THE 1989 REVOLUTION IN EAST GERMANY AND ITS IMPACT ON UNIFIED GERMANY'S CONSTITUTIONAL LAW: THE FORGOTTEN REVOLUTION? (Hart & Nomos 2016).

A. Introduction

The recent celebration of the 25th anniversary of the unification of Germany¹ presents an opportunity to look back and gain a fresh understanding of the event and its history. While unified Germany officially celebrates German unification, East Germans focus on a different event—the peaceful Revolution of the fall of 1989. On October 9th in Leipzig, for example, people gather in front of the St. Nicholas Church and walk towards the Opera and then onto the Ring, because that is what they did on that fateful day in October 1989 when, in what came to be known as the 1989 Revolution in the German Democratic Republic (GDR), the people of East Germany came together to pronounce their sovereignty and reclaim the government from the Communist regime. The excitement over German unification is understandable, but it bears with it the danger of overlooking, and eventually forgetting altogether, the 1989 Revolution, which not only made unification possible but, in terms of shaping unified Germany's constitutional law, is a much more important event than unification itself. In order to understand unified Germany's constitutional law, we need to understand the constitutional goals and achievements of the 1989 Revolution. With that in mind, Leipzig is a good place to start. It was in Leipzig that East Germans first came together to engage in political discourse and form citizens' movements, which later developed into a popular movement that finally swept away the Communist regime and brought about German unification. Unification, though, was neither the only goal nor the only achievement of the 1989 Revolution—a fact most authors overlook. My thesis is that although East Germans certainly wanted unification, and wanted it through an adoption of the West German Constitution—the Basic Law (Grundgesetz; hereinafter GG)—they did not want an *unconditional* adoption of the GG. Instead, they held on to important elements of their own constitutional agenda that significantly differed from the GG, and they succeeded in transferring these elements to unified Germany. These constitutional achievements of the 1989 Revolution and their meaning for unified Germany's constitutional law will be forgotten if we only focus on unification.

This Article will first show that the conventional view—that the 1989 Revolution only brought about German unification through an unconditional adoption of the West German Basic Law—is a profound misunderstanding. My reinterpretation of the Revolution reveals that the revolutionaries developed their own constitutional agenda, which differed significantly from the West German GG, and that they succeeded in preserving and transferring to unified Germany important parts of that constitutional agenda.²

¹ German unification officially dates back to October 03, 1990.

² For an analysis of how these transferred constitutional achievements changed unified Germany's constitutional law by being integrated into the existing West German constitutional order, see STEPHAN JAGGI, *THE 1989 REVOLUTION IN EAST GERMANY AND ITS IMPACT ON UNIFIED GERMANY'S CONSTITUTIONAL LAW* 151 *et seq.* (Hart & Nomos, 2016).

B. A Profound Misunderstanding

The conventional view of the 1989 Revolution in East Germany is that, at least at some point, it was only about German unification and the unconditional adoption of the West German GG by the East German states. It is argued that even if the revolutionaries originally wanted to reform and preserve the GDR, at some point in late 1989 or early 1990, they gave up on that goal and decided to join the Federal Republic of Germany (FRG) and take over its constitutional order.³ Amendments to the West German Basic Law, some argue, were not pursued but only accepted as far as perceived necessary to bring about unification as fast as possible.⁴ Some authors even deny that the 1989 Revolution had any constitutional dimension and argue that it was an event with primarily, if not exclusively, economic significance. They describe the event as a “revolutionization of the methods of production” (“Revolutionierung der Produktionsweise”), which was only “accompanied and made possible by [the GDR’s] accession to the Federal Republic’s constitutional system.”⁵ Claus Offe, for example, considers the overthrow of the SED regime and German unification as “a process of economic integration characterized by its . . . meaninglessness in terms of constitutional categories.”⁶ Other authors do not deny the revolutionaries’ constitutional ambitions but argue, rather, that they were limited to acceding to West Germany’s legal and economic order.⁷ Jürgen Habermas, for example, calls the 1989 Revolution a “catch-up” (“nachholende”) revolution by which the people wanted to make up for “the politically luckier and economically more successful development” of the FRG.⁸ According to Habermas, the 1989 Revolution was characterized by an “almost complete lack of innovative, forward-looking ideas” and aimed at returning to democracy and the rule of law in addition to getting access to the capitalistic West.⁹

My thesis is that this understanding is incorrect. It overlooks that the GDR revolutionaries did not only have a detailed constitutional agenda but also did not give up on that agenda when they decided to unify with West Germany. Instead, as I will show, they succeeded in

³ See Wolfgang Schäuble, *Der Einigungsvertrag: Vollendung der Einheit Deutschlands in Freiheit*, in Bernd Guggenberger & Tine Stein (eds.), *DIE VERFASSUNGSDISKUSSION IM JAHR DER DEUTSCHEN EINHEIT* 283, 293 (1991).

⁴ See *id.*

⁵ Claus Offe, *Wohlstand, Nation, Republik*, in Hans Joas & Martin Kohli (eds.), *DER ZUSAMMENBRUCH DER DDR* 282, 283 (1993).

⁶ *Id.* at 284.

⁷ See, e.g., Martin Heckel, *Die Legitimation des Grundgesetzes durch das deutsche Volk*, in Josef Isensee & Paul Kirchhof, *HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND*, VIII, § 197 para. 9 (1995), for authors in addition to those cited in the following.

⁸ See generally JÜRGEN HABERMAS, *DIE NACHHOLENDE REVOLUTION* 181 (1990).

⁹ See *id.*

using the unification process to transfer important elements of their constitutional agenda to unified Germany. The misunderstanding is based on a misinterpretation of the 1989 Revolution in general and of the outcome of the first free parliamentary elections in the GDR on March 18, 1990 in particular. It is also based on the failure to look closely at the Unification Treaty and other legal documents that the revolutionaries used to transfer their constitutional achievements to unified Germany. In what follows, I will first show how the East Germans developed their own constitutional agenda and how this agenda changed over time. I will then demonstrate how they succeeded in transferring important parts of their constitutional agenda to unified Germany.

C. The People's Constitutional Agenda

The people's constitutional agenda reveals itself in a popular movement, institutional reactions, and manifestations through law. The popular movement was initiated by citizens' movements and carried by the people demonstrating in the streets, aware of their sovereignty, and expressing their constitutional will by way of acclamation. First, the people's will was initially directed at liberation, specifically at liberating themselves from the tyranny of the SED.¹⁰ In this respect, the people demanded that the SED regime actually upholds and practices individual rights that, formally, already existed, such as the freedom to travel, freedom of speech, and freedom of assembly, as well as the right to vote in free elections under participation of a multitude of parties and without falsification of election results. Second, the people pursued the constitutional goal of what I will call individual empowerment. Individual empowerment stands for a set of constitutional social rights and principles that seek to implement individual rights—to make them a social reality rather than merely a formal legal position. Third, the people demanded environmental protection. Contrary to popular belief, when the people decided in favor of German unification they were not content with civil liberties as granted by the GG but instead insisted on individual empowerment and environmental protection.

The popular movement brought about a variety of institutional reactions. Such reactions were partly negative in that the governing SED regime was abolished. Primarily, and most impressively, they were positive in that the first free federal elections on March 18, 1990 and communal elections on May 6, 1990 brought clear victories devoted to the revolutionary constitutional agenda, which consisted of unification, individual empowerment, and environmental protection. The new government considered it its popular mandate to bring about German unification and to transfer the principles of individual empowerment and environmental protection to unified Germany. The legal manifestation of these elements came in laws proposed and adopted in the GDR prior to unification as well as in state constitutions that were adopted in the new East German states upon unification.

¹⁰ SED stands for *Sozialistische Einheitspartei Deutschlands*; it was the ruling Communist party.

The Revolution is generally divided into two phases: (1) a first phase during which the people pursued a new form of government for a sovereign GDR, and (2) a second phase during which they changed their minds and wanted fast unification with the FRG instead of a new GDR. I will follow this structure in order to outline the people's constitutional agenda and to show how this agenda changed over time.

I. First Phase of the Revolution

The Revolution's first phase is characterized by a process of revolutionary constitutional lawmaking through a popular movement, institutional reactions, and the manifestation of constitutional achievements through law.

1. Popular Movement

The first phase of the Revolution lasted roughly from September 1989 until the end of 1989.¹¹ The popular movement during this first phase consisted of two elements: (1) the citizens' movements as initiators of the Revolution and providers of substantive revolutionary ideas, and (2) the people in the streets acting out their newly established political self-awareness. Together they developed a constitutional agenda for a new GDR, which consisted of the principles of liberation, individual empowerment, and environmental protection.

1.1 Citizens' Movements

Citizens' movements had initiated the first political opposition in the GDR in the 1980s and, from there, developed into driving forces of the 1989 Revolution.¹² Herbert Winkler emphasizes the "inspiring effect" these groups had on the people in the GDR and calls them "carriers of the opposition."¹³

¹¹ See HEINRICH AUGUST WINKLER, *DER LANGE WEG NACH WESTEN*, II, 520–21 (2000); Rolf Reißig, *Das Scheitern der DDR und des realsozialistischen Systems: Einige Ursachen und Folgen*, in Hans Joas & Martin Kohli (eds.), *DER ZUSAMMENBRUCH DER DDR* 49, 60–61 (1993). See generally TIMOTHY GARTON ASH, *THE MAGIC LANTERN: THE REVOLUTION OF '89 WITNESSED IN WARSAW, BUDAPEST, BERLIN AND PRAGUE* 69 (1993); Bernhard Schlink, *Deutsch-deutsche Verfassungsentwicklungen im Jahre 1990*, in Bernd Guggenberger & Tine Stein (eds.), *DIE VERFASSUNGSDISKUSSION IM JAHR DER DEUTSCHEN EINHEIT 19* (1991); EHRHART NEUBERT, *UNSERE REVOLUTION: DIE GESCHICHTE DER JAHRE 1989/90* 324 (2008).

¹² See generally NEUBERT, *supra* note 11, at 40–44; ILKO-SASCHA KOWALCZUK, *ENDSPIEL: DIE REVOLUTION VON 1989 IN DER DDR* 232 (2009). See generally Jan Wielgohs & Marianne Schulz, *Von der "friedlichen Revolution" in die politische Normalität*, in Hans Joas & Martin Kohli (eds.), *DER ZUSAMMENBRUCH DER DDR* 222 (1993), for an overview of the development of the citizens' movements in the GDR since the 1980s with further references.

¹³ WINKLER, *supra* note 11, at 491.

The Ministry for State Security (Ministerium für Staatssicherheit, MfS, or Stasi) estimated the number of people active in citizens' movements on June 1, 1989 to be 2,500. These 2,500 were involved in 160 organizations, 150 of which were Christian groups.¹⁴ One of the oldest groups, the "Initiative Peace and Human Rights" (Initiative Frieden und Menschenrechte, IFM), was founded on January 24, 1986.¹⁵ The largest group, the "New Forum" (Neues Forum), was founded on September 9, 1989. Although it started with 30 people who signed the foundation proclamation, it had 200,000 registered supporters by early November 1989.¹⁶ Other groups, such as "Democracy Now" (Demokratie Jetzt, DJ) and "Democratic Awakening" (Demokratischer Aufbruch, DA), were founded on September 12, 1989 and October 2, 1989, respectively.

Initially, none of the citizens' movement groups were political parties.¹⁷ They explicitly emphasized their status as citizens' movements and distinguished themselves from the party system, which, at the time, was represented by the SED and its so-called "bloc parties" (Blockparteien).¹⁸ The citizens' movements rejected the concept of membership and allowed everyone to participate. They had no elaborate political programs ready for implementation but understood themselves as a forum for political discourse and the forming of political opinions. A perfect example of this self-understanding is the New Forum's founding proclamation, which stated that "[w]e establish a political platform for the entire GDR that enables people from all professions, spheres of life, parties, and groups to participate in the discussion and treatment of existential problems of the society in this country."¹⁹ The only opposition groups that were founded as political parties were the "Social Democratic Party of the GDR" (SDP, later renamed SPD) on October 7th, 1989 and the "Green Party" (Grüne Partei, GP) in early November of 1989.²⁰

By the fall of 1989, the citizens' movements had developed into a political factor serious enough for the Stasi to conclude that they could no longer simply be dissolved and that

¹⁴ See *id.*

¹⁵ See NEUBERT, *supra* note 11, at 70, 193, for an overview of the most important opposition groups. See also *id.* at 74, for statements specifically on the IFM.

¹⁶ See Wielgoths & Schulz, *supra* note 12, at 233. See generally IRENA KUKUTZ, CHRONIK DER BÜRGERBEWEGUNG: NEUES FORUM 1989 - 1990 29 (2009).

¹⁷ That changed when it became clear that elections for a parliament would be held on Mar. 18, 1990. Preparing for these elections, many citizens' movements became either parties or so-called "electable associations" ("wählbare Vereinigungen"). See Wielgoths & Schulz, *supra* note 12, at 237.

¹⁸ See WINKLER, *supra* note 11, at 492–93.

¹⁹ See Irena Kukutz, *Gründungsaufruf des Neuen Forums*, in CHRONIK DER BÜRGERBEWEGUNG: NEUES FORUM 1989–1990 57 (2009) (author translation).

²⁰ See WINKLER, *supra* note 11, at 491; Wielgoths & Schulz, *supra* note 12, at 231.

“operative measures by the MfS [Stasi] with repressive character are not possible because of the development of the situation.”²¹ On October 4, 1989, seven citizens’ movement groups (Democracy Now, Democratic Awakening, Initiative Peace and Human Rights, New Forum, United Left, SDP, and the Green Party) established a common “contact group” in East Berlin in order to coordinate their activities.²² Only two months later, this contact group called for and contributed to the establishment of the Central Round Table (CRT), an institutionalization of the popular movement that developed into the central steering organ of the GDR government.²³ This shows how important the citizens’ movements were for the Revolution.

Some of the citizens’ movements’ constitutional goals for the first phase of the Revolution were indicated in a “Call for an independent GDR” on November 26, 1989.²⁴ This call stated that the Revolution’s goal was “to develop in our country a solidarity-based society in which peace and social justice, freedom of the individual, free movement for all, and the protection of the environment are guaranteed.”²⁵

Liberation from tyranny was one element of the citizens’ movements’ constitutional agenda. When the citizens’ movements began their work in the 1980s, tyranny was embodied in the governing SED regime, which “had monopolized for [it]self the right of action [and] had banished the citizens from the public realm into the privacy of their households.”²⁶ To combat such tyranny, the citizens’ movements pursued the cause of individual liberty as an important first step towards freedom. The citizens’ movements’ fight for liberation is already reflected in a “basic consensus” that the citizens’ movements’ contact group reached in a meeting on November 3, 1989. This consensus called for the abolition of the SED’s power monopoly, free and secret elections, freedom of assembly and of association, and freedom of the press.²⁷

The next pillar of the citizens’ movements’ constitutional agenda was what I want to call *individual empowerment*. Individual empowerment is a concept according to which the state

²¹ WINKLER, *supra* note 11, at 494.

²² See *id.* at 529; NEUBERT, *supra* note 11, at 199; Wielgohs & Schulz, *supra* note 12, at 232.

²³ See NEUBERT, *supra* note 11, at 199; Wielgohs & Schulz, *supra* note 12, at 232.

²⁴ See Charles Schüddekopf, *Aufruf für eine eigenständige DDR*, reprinted in WIR SIND DAS VOLK!: FLUGSCHRIFTEN, AUFRUFE UND TEXTE EINER DEUTSCHEN REVOLUTION 240–41. See generally NEUBERT, *supra* note 11, at 74, 193, for an account on the citizens’ movements and their programs.

²⁵ See Schüddekopf, *supra* note 24, at 240 (author translation).

²⁶ HANNAH ARENDT, ON REVOLUTION 130 (1963).

²⁷ See NEUBERT, *supra* note 11, at 199.

is constitutionally responsible for shaping a social environment in which individual constitutional rights can become a social reality for everyone. In its strongest form, individual empowerment establishes a judicially enforceable individual constitutional claim against the state to make constitutional rights a social reality. In a weaker form, it only establishes an objective, judicially not enforceable, state obligation to make constitutional rights a social reality.

Individual empowerment was a core element of the citizens' movements' revolutionary constitutional agenda. According to Wolfgang Ullmann, a leading member of the citizens' movement group, "Democracy Now," the challenge of the future was to reconcile capitalism with democracy and social justice.²⁸ Ullmann rejected Carl Schmitt's thesis of an innate contradiction between freedom and equality and argued that the 1989 Revolution's victory over the SED dictatorship disproved Schmitt's thesis.²⁹ A successful revolution, in Ullmann's view, justifies, and even requires, replacing a defensive-restrictive (specifically, a negative) liberalism with a universal liberalism, which Ullmann defined as "equality of freedom" in the midst of historical inequality and, in particular, as "full social and political parity for men and women."³⁰ According to Ullmann, the realization of equality in a social reality of inequality is the specific characteristic of humanity.³¹ Individual empowerment was the constitutional principle through which the citizens' movements wanted to achieve this goal.

The citizens' movements' specific constitutional means for implementing the principle of individual empowerment were the constitutionalization of (1) real social equality instead of just formal legal equality, particularly for women, and (2) social rights as embedded in the Social Charter and the Round Table Draft Constitution (RTD).³²

In this context, real equality for women was a particular concern of the citizens' movements. Ullmann points to the eminent importance of women for the success of the peaceful Revolution: "It is because of the women's participation that the Revolution was peaceful and democratic."³³ He points to the role of women, such as Bärbel Bohley, Ulrike Poppe, Vera Wollenberger, Tatjana Böhm, and Ingrid Köppe, as the Revolution's driving forces and contributors of political content.³⁴ The importance of women finds its legal manifestation in

²⁸ See WOLFGANG ULLMANN, VERFASSUNG UND PARLAMENT 55 (1992).

²⁹ See *id.* at 201.

³⁰ *Id.* at 217 (emphasis added).

³¹ See *id.*

³² See *infra* 595 *et seq.* (Social Charter) and 596 *et seq.* (RTD).

³³ ULLMANN, *supra* note 28, at 75.

³⁴ See *id.* at 75–76.

the RTD's call for a constitutional state obligation to work for real social equality for women in Art. 3 II RTD.³⁵

Finally, the citizens' movements pursued the goal of environmental protection. For example, the New Forum stated that it stood for "justice, democracy, peace, and the protection and preservation of nature."³⁶ The group, Democratic Awakening, emphasized its environmental commitment in its title by naming itself "Democratic Awakening—social-ecological (DA)."³⁷ As early as 1988, a specific environmental protection group, the "Green Network Ark" (Grünes Netzwerk Arche), was founded as part of the citizens' movements. Its goal was to "improve the exchange of information and the coordination of common activities for the protection of the environment."³⁸ With respect to environmental protection, too, the state was to play an active role in the goal's realization.

The citizens' movements, at least during the Revolution's first phase, wanted to develop a sovereign alternative to the FRG because they were afraid that the GDR's accession to the FRG would endanger their constitutional goals.³⁹ To the citizens' movements, the FRG represented the values of capitalism and a disregard for the moral values and substantive principles of the citizens' movements' constitutional agenda.⁴⁰ This perception did not so much reflect "thinking in old dichotomies and structures of the Marxist-Leninist ideology,"⁴¹ but instead serious concerns about whether the citizens' movements' constitutional goals of individual empowerment and environmental protection could be met after acceding the FRG.

To understand the citizens' movements' political importance to the 1989 Revolution, it is necessary to see that in the early fall of 1989 the citizens' movements were the only political opposition in the GDR at a time when political parties, such as the East CDU, still cooperated with the SED as so-called "bloc parties." Even more importantly, the citizens' movements were not only opposed by the SED but also by the party system in the FRG. Since the 1970s,

³⁵ See *id.* 76–78.

³⁶ See NEUBERT, *supra* note 11, at 79.

³⁷ *Id.* at 87.

³⁸ *Id.* at 84.

³⁹ Representative in this respect is the program of "Democracy Now." It wanted to establish a "reformed socialist society" as an alternative to the "western consumer society." See *id.* at 85–86.

⁴⁰ See Gert-Joachim Glaesner, *Am Ende des Sozialismus: Zu den Ursachen des Umbruchs in der DDR*, in Hans Joas & Martin Kohli (eds.), *DER ZUSAMMENBRUCH DER DDR* 86 (1993).

⁴¹ See *id.*

all FRG governments, as well as all parties in the FRG, had refused to support citizens' movements in the GDR, based on the idea that preserving peace required refraining from destabilizing the SED regime.⁴² The FRG government's attitude towards the citizens' movements during the 1989 Revolution is reflected in a September 1989 report to Chancellor Kohl by a State Secretary (Staatssekretär), which stated that "the work of old and new groups in the GDR is a far cry from effective opposition work," "the New Forum will . . . hardly contribute to mobilization," and "among the intellectuals participating in the New Forum are no political talents."⁴³ A secret service report of April 25, 1990 to Kohl is even more outspoken. It states that the citizens' movements are aiming at "a leveling of society" and are "standing in the way of a new start," so that "the central question [was] going to be: can the work of the citizens' committees be suppressed?"⁴⁴

During the Revolution's first phase, the citizens' movements and their constitutional agenda were closely connected with the revolutionary people in the streets. The citizens' movements' contact group in East Berlin actively called upon the people "to support their demands with their own contributions and actions."⁴⁵ In many places, it was the citizens' movements that encouraged the people to attend peace prayers and participate in the ensuing demonstrations.⁴⁶ Moreover, the citizens' movements provided the people with constitutional ideas. The New Forum, for example, inspired peace prayers and demonstrations with constitutional demands published on flyers. The quest for constitutional principles that would reconcile a market economy with real democracy, individual liberties, social justice, and environmental protection was the thread that connected the citizens' movements with the people in the streets.

1.2 *The People in the Streets*

It was the people in the streets who turned the citizens' movements' political opposition and their constitutional agenda into a revolution aimed first at liberation from the SED tyranny and then at the establishment of a new form of government.

What the people carried into the streets was a real event during which the people as an unorganized factor became aware of their sovereignty and acted on that awareness by expressing their will by acclamation. The 1989 Revolution was characterized by an ever increasing number of people spontaneously participating in demonstrations without ever

⁴² See NEUBERT, *supra* note 11, at 43, 59–60. See also *id.* at 60, for the few exceptions.

⁴³ *Id.* at 82.

⁴⁴ See KUKUTZ, *supra* note 16, at 16 (citation omitted).

⁴⁵ See NEUBERT, *supra* note 11, at 199.

⁴⁶ See *id.* at 193.

formally joining political organizations or adopting ideologies.⁴⁷ Instead, the people were driven by the urge to take action in order to liberate themselves from tyranny and reclaim their government.⁴⁸ Contrary to the revolutions in Poland or the Czech Republic, the 1989 Revolution in the GDR was not built on a prominent political organization, such as *Solidarnosc* in Poland, or around an outstanding political leader, such as Vaclav Havel in the Czech Republic. Still, more and more people joined the demonstrations spontaneously, carrying the revolutionary movement into ever wider social realms.⁴⁹ The 1989 Revolution truly “outlived all ideological justifications,”⁵⁰ in that the revolutionary people did not adhere to one of the classical 19th century ideologies such as nationalism, internationalism, imperialism, capitalism, socialism, or communism. Their goal instead was to overcome such ideologies, particularly the classical east/west, communism/capitalism dichotomies, and instead implement a form of government that would actually improve people’s lives.

Through their action, the people became aware of themselves as the constituent power. Authors who describe the 1989 Revolution as a pure exit instead of a voice revolution focus on only one historical fact and ignore the rest. Indeed, dissatisfaction with the political and economic situation in the GDR did drive many people into leaving the country.⁵¹ What many authors overlook, however, is that the more people left the GDR, the more people took to the streets to raise a different voice, one that said: “We stay here” and “We are the people.”⁵² These people did not want to leave; they wanted to change their country and its form of government. It was the voice and particularly the action of the people who stayed that turned dissatisfaction into political action for a new beginning. The GDR security forces did not shoot into the masses because they were impressed by the number of people in the streets in Leipzig, Dresden, and East Berlin, not by the number of people in the FRG’s embassies in Hungary and the Czech Republic.⁵³

The Revolution started in Leipzig on September 4, 1989 when, after a peace prayer in the St. Nicolas Church, approximately 1,000 people came together for the first “Monday demonstration,” where, for the first time, the people did not chant “We want out” but

⁴⁷ See Karl-Dieter Opp, *Zu den Ursachen einer spontanen Revolution*, in Hans Joas & Martin Kohli (eds.), *DER ZUSAMMENBRUCH DER DDR* 194, 197 (1993).

⁴⁸ See REINER TETZNER, *LEIPZIGER RING: AUFZEICHNUNGEN EINES MONTAGSDEMONSTRATEN 1989/90* 51 (2004).

⁴⁹ See NEUBERT, *supra* note 11, at 170.

⁵⁰ ARENDT, *supra* note 26, at 11.

⁵¹ In 1989, 343,854 GDR citizens had left the country for the FRG. See TETZNER, *supra* note 48, at 133.

⁵² NEUBERT, *supra* note 11, at 102; WINKLER, *supra* note 11, at 491.

⁵³ See TETZNER, *supra* note 48, at 179.

instead “We stay here.”⁵⁴ From then on, an ever-increasing number of people participated in demonstrations every Monday following the peace prayers.⁵⁵ On September 22, 1989, the regime reacted and the government in East Berlin issued an order stating that the “hostile actions” had to be “destroyed at their roots” to prevent a mass movement.⁵⁶ In order to prevent demonstrations on September 25, 1989, 1,500 security forces were dispatched to Leipzig. Still, some 6,000 people demonstrated that day, and the security forces could not stop them.⁵⁷ Such small victories increasingly encouraged the people. On October 2, 1989, there were more than 10,000 people demonstrating in Leipzig.⁵⁸ This was the day on which, in response to the security forces’ violent interference with the demonstration, the people created what was to become the Revolution’s battle cry: “We are the people.” Neubert writes that, on this day, the people gave up their role as subordinates and instead became the sovereign, the constituent power.⁵⁹ After this display of the people’s self-consciousness, the demonstrations gained an important tactical victory when, on October 9, 1989, the number of demonstrators in Leipzig exploded to 70,000. This was despite the fact that, on October 7 and 8, the police had brutally dissolved demonstrations in East Berlin in an attempt to deter the people from demonstrating in Leipzig.⁶⁰ Security forces did not interfere even though they had explicit orders from East Berlin to “prevent” the demonstrations by all “appropriate means.”⁶¹ After October 9, 1989, more Monday demonstrations followed, not only in Leipzig but in cities all over the GDR.⁶² The demonstrations again increased exponentially in participation from 300,000 people in Leipzig on October 30, 1989 to more than 500,000 people in East Berlin on November 4, 1989.⁶³ Also, the demonstrations were not limited to the big cities; they occurred all over the country.⁶⁴

⁵⁴ *Id.* at 102.

⁵⁵ *See generally id.* at 104 *et seq.*

⁵⁶ *See id.* at 105.

⁵⁷ *See id.* at 106.

⁵⁸ *See* NEUBERT, *supra* note 11, at 113.

⁵⁹ *See id.* at 114.

⁶⁰ *See id.* 136; GARTON ASH, *supra* note 11, at 67–68.

⁶¹ WINKLER, *supra* note 11, at 503.

⁶² *See id.* at 504.

⁶³ *See* GARTON ASH, *supra* note 11, at 68.

⁶⁴ *See* NEUBERT, *supra* note 11, at 165.

This was no longer an exit revolution. The people in the streets had given it a voice, and this voice had grown loud and clear. What did it say? The revolutionary East Germans expressed their will by way of acclamation. Acclamation, according to Carl Schmitt, is very much focused on a leader or a political elite presenting some kind of political statement, which the people then either agree with or reject. Schmitt writes, "They can acclaim in that they express their consent or disapproval by a simple calling out, calling higher or lower, celebrating a leader or a suggestion, honoring the king or some other person, or denying the acclamation by silence or complaining."⁶⁵ Hannah Arendt has a fundamentally different understanding of the people's capacity to express themselves as the *pouvoir constituant*. Arendt distinguishes between "the mob" and "the people." She writes that "the mob always will shout for the 'strong man,' the 'great leader' . . . [w]hile the people in all great revolutions fight for true representation."⁶⁶ The 1989 revolutionaries confirm Arendt's view because their acclamations were much more than just saying "yes" or "no" to a political elite's pre-established program. The 1989 Revolution was a result of the people acting, not the mob. The revolutionaries showed the world that Germans, acting as *pouvoir constituant*, were capable of saying more than "yes," "no," or "heil." These people developed a culture of singing and chanting that drew a sophisticated picture of their political will.⁶⁷

First, they sought liberation by demanding civil rights, such as the freedom to travel, freedom of speech, and the freedom of assembly.⁶⁸

Moreover, by singing "We shall overcome," the revolutionary people connected themselves with the American Civil Rights Movement of the 1960s.⁶⁹ The American Civil Rights Movement was characterized by religiously inspired peaceful demonstrations—a key feature of the 1989 Revolution as well.⁷⁰ Most importantly, in terms of political content, the Civil Rights Movement did not stand for simple liberation in the negative sense of protection against government intrusions. It went much further than that and turned the legal formalism of the 19th century into a constitutional concept that developed the New Deal

⁶⁵ CARL SCHMITT, *CONSTITUTIONAL THEORY* 272 (J. Seitzer ed. & trans., Duke Univ. Press 2008) (1928).

⁶⁶ HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 107 (1951).

⁶⁷ See SCHMITT, *supra* note 65, at 131, for the interpretive problem that Schmitt points out.

⁶⁸ See WINKLER, *supra* note 11, at 507; NEUBERT, *supra* note 11, at 161.

⁶⁹ See TETZNER, *supra* note 48, at 155–56. See NEUBERT, *supra* note 11, at 107, for Neubert's statement that the 1989 revolutionaries, through their songs and chants, placed themselves within the tradition of the 1789 French Revolution, the Russian Revolution of 1917, and the American Civil Rights Movement.

⁷⁰ Neubert points out that in Dresden on Oct. 7, 1989, the Catholic Church distributed leaflets among the demonstrators informing them about the "Strategy of non-violence according to M.L. King." See NEUBERT, *supra* note 11, at 152. See generally BRUCE ACKERMAN, *3 WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* (2014), for a new analysis of the American Civil Rights Movement.

principle of activist government into a principle of making individual rights and liberties a social reality for everyone, including African Americans.⁷¹ In other words, the Civil Rights Movement stood for the principle of individual empowerment. Therefore, the dominant opinion in Germany that interprets the people's singing of "We shall overcome" as a call for civil rights as granted by the GG is incorrect. In truth, the demonstrators were relating to the citizens' movements' constitutional concept of individual empowerment.

The demonstrators repeated this same basic call for individual empowerment by chanting the three principles of the French 1789 Revolution: "Freedom, equality, brotherhood."⁷² Arendt has made it very clear that the French Revolution was not only about liberation in terms of civil rights, but also about the fight for economic and social justice.⁷³

My interpretation of the people's acclamations is finally supported by the people's singing of the "International," or, more specifically, the International's refrain: "Peoples, hear the signals/let's go for the last fight/the International fights for the human right."⁷⁴ The singing of this song during the 1989 Revolution is particularly remarkable because it was this song that the SED regime had made the East Germans sing during every official occasion. The very same people who now sought to overthrow the SED regime were singing the same old song. Why? The people wanted to send a clear message: The SED regime was only seemingly a government aimed at supporting the individual to realize his or her full potential. As a fact of social reality, it was a one-party dictatorship that deprived the individual of his or her human dignity. The people sang the International, together with the other songs, to express their will to establish a new form of government that would make human dignity, social justice, and the possibility for individual self-realization a social reality for everyone.

Finally, the people expressed their constitutional will on banners they carried during the demonstrations.⁷⁵ Some authors argue that the people displayed their political "action program" on those banners.⁷⁶ The banners demanded, among other things, "revolutionary

⁷¹ See ACKERMAN, *supra* note 70, at 185–86.

⁷² See NEUBERT, *supra* note 11, at 107.

⁷³ See ARENDT, *supra* note 26, at 59 *et seq.*; LORENZ V. STEIN, THE HISTORY OF THE SOCIAL MOVEMENT IN FRANCE, 1789–1850 111 (Kaethe Mengelberg ed. & trans., Bedminster Press 1964).

⁷⁴ WINKLER, *supra* note 11, at 499 (author translation).

⁷⁵ See NEUBERT, *supra* note 11, at 145, 166 *et seq.*

⁷⁶ See TETZNER, *supra* note 48, at 69 (referring to Bernd-Lutz Lange).

transformation,"⁷⁷ freedom to travel, unlimited democracy, unlimited socialism, and environmental protection.⁷⁸

From all this it must be concluded that, during the first phase of the Revolution, a popular movement formulated a constitutional agenda that aimed at liberation from tyranny, individual empowerment, and environmental protection. As I will show next, this agenda was confirmed by institutional reactions and manifested through law.

2. Institutional Reactions

The institutional reaction reflecting the revolutionary people's push for liberation during the Revolution's first phase was the abolition of the SED regime. Trying to preserve as much power as possible, being faced with the people in the streets and the Soviets' refusal to intervene, the SED regime's first reaction to the Revolution was to oust Erich Honecker in mid-October 1989.⁷⁹ Honecker was replaced with Egon Krenz, who tried to buy time by promising reforms.⁸⁰ And, again, it was Chancellor Helmut Kohl and the West German party system who initially supported Krenz. Kohl offered Krenz cooperation and publicly stated that by replacing Honecker with Krenz the SED had accommodated the peoples' quest for change and that it was now important that Krenz implemented necessary reforms.⁸¹

Nevertheless, it turned out to be too late for the party establishment to turn the tide. Suspicious of Krenz, whom the people considered a typical representative of the SED dictatorship,⁸² the people engaged in demonstrations that spread across the entire country and exploded in numbers of participants, as described above.⁸³ In response to these developments, a significant part of the SED decided to join the Revolution in order to at least preserve the party and its participation in power.⁸⁴ In response to the people's demands,

⁷⁷ NEUBERT, *supra* note 11, at 147.

⁷⁸ See TETZNER, *supra* note 48, at 51.

⁷⁹ See NEUBERT, *supra* note 11, at 145 *et seq.*; WINKLER, *supra* note 11, at 503–05.

⁸⁰ See WINKLER, *supra* note 11, at 505. See generally NEUBERT, *supra* note 11, at 145 *et seq.*

⁸¹ See WINKLER, *supra* note 11, at 506.

⁸² See *id.*; NEUBERT, *supra* note 11, at 146.

⁸³ See *supra*, at 588.

⁸⁴ See WINKLER, *supra* note 11, at 507–08.

Krenz stepped down as “Chairman of the Council of State” (Staatsratsvorsitzender) on December 6, 1989 and was replaced with Manfred Gerlach.⁸⁵

Hans Modrow, upon the SED’s Central Committee’s (Zentralkomitee) proposal, had been elected “Chairman of the Council of Ministers” (Vorsitzender des Ministerrats)⁸⁶ by the GDR’s Parliament, the Volkskammer (VK), on November 13, 1989.⁸⁷ Modrow had been SED District Party Leader (Bezirksparteichef) in Dresden and was considered the party’s reform candidate.⁸⁸ Some even saw in him the GDR’s Gorbachev.⁸⁹ Modrow’s goal was to keep the SED in power but also to establish the legal basis for a transition to real democracy.⁹⁰ The Modrow government’s power was seriously undermined by the foundation of the Central Round Table (CRT) on December 3, 1989. Its power was all but abolished on January 15, 1990, when the pressure from the streets forced Modrow to ask the CRT to participate in what came to be known as the GDR’s “government of national responsibility.”⁹¹ In an act of *liberation*, the popular movement had abolished the SED party dictatorship.

Finally, the revolutionaries’ constitutional agenda during the Revolution’s first phase was manifested through law.

3. *Manifestation Through Law*

The revolutionaries’ efforts at legal manifestation comprised all elements of their constitutional agenda—liberation, individual empowerment, and environmental protection.

Liberation, such as the abolition of the SED party dictatorship and the guarantee of civil rights, was legally manifested on December 1, 1989, when the VK, at the request of all parties represented in the VK, deleted Article 1 of the GDR Constitution, which had established the leading role of the working class and its Marxist-Leninist party (that is, the

⁸⁵ See *id.* at 529; NEUBERT, *supra* note 11, at 262–63. The Chairman of the Council of State (*Staatsratsvorsitzender*) was like a President of the GDR. He was the state’s highest representative.

⁸⁶ Comparable with a Minister President.

⁸⁷ See Walter Süß, *Bilanz einer Gratwanderung: Die kurze Amtszeit des Hans Modrow*, DEUTSCHLAND ARCHIV 596 (1991); WINKLER, *supra* note 11, at 521.

⁸⁸ See WINKLER, *supra* note 11, at 596.

⁸⁹ See *id.* at 597 n.3 (referring to a Soviet diplomat).

⁹⁰ See Süß, *supra* note 87, at 600.

⁹¹ *Id.* at 604; NEUBERT, *supra* note 11, at 330.

SED).⁹² On January 12, 1990, Article 12(I)(2) of the GDR Constitution, which had prohibited private property in power plants, banks, and industrial enterprises, was deleted and replaced with a provision that allowed the legislature to reintroduce private property in these fields.⁹³ On February 5, 1990, after intense discussions with the CRT, the VK adopted a resolution that guaranteed freedom of opinion, information, and the media,⁹⁴ liberties that were further specified by legislation granting, for example, freedom of association and freedom of assembly. These rights were very similar to guarantees included in the FRG's GG.⁹⁵ Beyond that, the principles of individual empowerment and environmental protection were legally manifested in the Social Charter (3.1) and the Round Table Draft Constitution (RTD) (3.2).

3.1 The Social Charter

The CRT adopted the Social Charter on March 5, 1990.⁹⁶ Instead of only alleviating the negative social effects of a market-economy, the Social Charter intended to use government policy to shape a social environment in which constitutional individual rights could become a social reality for everyone.⁹⁷

To effectively implement this goal, the Social Charter conceived social rights not as mere state goals but as judicially enforceable individual rights against the state.⁹⁸ It thus went beyond the Social State Clause of the FRG's GG (Article 20(1), 28(1) GG) and instead resembled the European Social Charter, which formulates social guarantees as international human rights.⁹⁹ According to the Social Charter, the economic order should be based on and obliged to the standards of equality.¹⁰⁰ Rights in the Social Charter included, for example, a

⁹² See WINKLER, *supra* note 11, at 528; Thomas Würtenberger, *Die Verfassung der DDR zwischen Revolution und Beitritt*, in Josef Isensee & Paul Kirchhof (eds.), *HANDBUCH DES STAATSRICHTS DER BUNDESREPUBLIK DEUTSCHLAND*, VIII, § 187 para. 15 (1995).

⁹³ See Würtenberger, *supra* note 92, at para. 17.

⁹⁴ See *id.* at paras. 26–27.

⁹⁵ See *id.* at para. 27.

⁹⁶ See WINKLER, *supra* note 11, at 557; NEUBERT, *supra* note 11, at 337; KLAUS MICHAEL ROGNER, *DER VERFASSUNGSENTWURF DES ZENTRALEN RUNDEN TISCHES DER DDR* 39 para. 89 (1993).

⁹⁷ ROGNER, *supra* note 96, at 40.

⁹⁸ *Id.*

⁹⁹ *Id.*; Peter Quint, *The Constitutional Guarantees of Social Welfare in the Process of German Unification*, 47 *Am. J. Comp. L.* 303, 311 (1999). See generally DAVID HARRIS & JOHN DARCY, *THE EUROPEAN SOCIAL CHARTER* (2d ed. 2001) (discussing the European Social Charter).

¹⁰⁰ For this and the following content of the Social Charter, see ROGNER, *supra* note 96, at 40 *et seq.*; WINKLER, *supra* note 11, at 557; Markus Bremers, *Soziale Staatsziele und soziale Grundrechte: Arbeit, Wohnen, soziale Sicherung*,

right to labor, equal treatment of the sexes, a right to education, a right to housing, and a right to a system of social security.

The VK, in its last session before the first free elections on March 18, 1990, adopted the Social Charter on March 7, 1990. The VK then sent the Charter to the FRG's parliament as a basis for negotiations over the planned Currency, Economic, and Social Union between the FRG and the GDR.¹⁰¹ Some of the Social Charter's rights and principles later reappeared in the RTD, the Unification Treaty (UT), and even the GG.

3.2 *The Round Table Draft Constitution (RTD)*

The RTD was another attempt to legally manifest the popular movement's constitutional agenda of the Revolution's first phase.¹⁰² The RTD was prepared by "New Constitution of the GDR," a working group the CRT had established for the purpose of drafting a new constitution for a new sovereign GDR.¹⁰³ How important this project was for the CRT is evident in the fact that it was initiated at the CRT's very first meeting on December 7, 1989.¹⁰⁴ Erich Fischer, speaker of the East SPD for constitutional questions at the CRT, calls it "the CRT's first and most meaningful decision."¹⁰⁵ The RTD's purpose was to provide the Revolution's achievements with stability and durability. This makes the RTD an example for the revolutionary phenomenon that, while still in the process of beginning something new, revolutionaries are already concerned with its conservation.¹⁰⁶

The RTD's content reveals it as a legal manifestation of the popular movement's constitutional agenda consisting of liberation, individual empowerment, and environmental protection:

in VERFASSUNGSDISKUSSION UND VERFASSUNGSGEBUNG 1990 BIS 1994 IN DEUTSCHLAND, BAND I 125, 139 *et seq.* (Erich Fischer & Werner Künzel hrsg. eds., 2005).

¹⁰¹ WINKLER, *supra* note 11, at 557; GERHARD RITTER, DER PREIS DER DEUTSCHEN EINHEIT: DIE WIEDERVEREINIGUNG UND DIE KRISE DES SOZIALSTAATS 190 (2d ed. 2007).

¹⁰² A copy of the RTD of Apr. 4, 1990 is reprinted in VERFASSUNGSDISKUSSION UND VERFASSUNGSGEBUNG 1990 BIS 1994 IN DEUTSCHLAND, BAND II 20 *et seq.* (Erich Fischer & Werner Künzel hrsg. eds., 2005) [hereinafter *RTD*].

¹⁰³ *Id.* at 1.

¹⁰⁴ Erich Fischer, *Vom Runden Tisch zum Grundgesetz*, *in* VERFASSUNGSDISKUSSION UND VERFASSUNGSGEBUNG 1990 BIS 1994 IN DEUTSCHLAND, BAND 1 11 (Erich Fischer & Werner Künzel hrsg. eds., 2005).

¹⁰⁵ *Id.*

¹⁰⁶ See ARENDT, *supra* note 26, at 223.

(1) *Liberation*: The people's call for liberation was manifested in the RTD's catalogue of individual rights, which is almost identical to the GG's list of basic rights.¹⁰⁷ The provisions include, among others, the protection of human dignity (Article 1(1) RTD),¹⁰⁸ equal rights for men and women (Article 3(1)), the freedom to travel (Article 6(1)), and the inviolability of the home (Article 9(1)).

(2) *Individual empowerment*: The RTD, moreover, manifested the people's demands for individual empowerment in social rights, such as the right to decent housing (Article 25(1)), the right to labor (Article 27(1)), free access to public education (Article 24(1)), and the right to social security aiming at enabling the individual to live a life of equal opportunity and independence (Article 23(2),(5)). The people's call for real-social equality for women was manifested in provisions, such as Article 3(2), establishing a government obligation to promote equal treatment of women in the job market and in public life, in education, in the family, and in the field of social security, and Article 4(3), which gave women the right to a "self-determined pregnancy" and obliged the state to protect the unborn life by offering social support.

(3) *Environmental protection*: Finally, Article 33 RTD legally manifested the people's demand for environmental protection. It described the natural environment as a "foundation of life for present and future generations" and made its protection an obligation of the state and all citizens. The government's environmental policy must prevent damage to the environment and make sure that natural resources are used moderately. Article 33 RTD granted everybody who claims her health to be endangered by environmental destruction a right of access to environmental data of her living environment.

Against this background, the RTD clearly is a legal manifestation of the popular movement's constitutional agenda of the Revolution's first phase.

In summary, the 1989 Revolution's constitutional agenda, during the Revolution's first phase, consisted of liberation from tyranny, individual empowerment, and environmental protection. This agenda is reflected in institutional reactions, such as the abolition of the SED regime, and has found legal manifestation in fundamental amendments of the GDR Constitution, the Social Charter, and the RTD.

Next, I will consider how the 1989 Revolution's constitutional agenda changed during the Revolution's second phase.

¹⁰⁷ See RTD, Art. 1.

¹⁰⁸ All of the following listed provisions are from the RTD unless otherwise indicated.

II. Second Phase of the Revolution

Opinions differ as to when exactly the Revolution entered into its second phase. Some say it was with the fall of the Berlin Wall on November 9, 1989.¹⁰⁹ Others think it started in January 1990, when the demonstrations became dominated by the black-red-golden flags and the chant “We are *one* people” instead of “We are *the* people.”¹¹⁰ The truth probably lies somewhere in the middle.¹¹¹

More important than the timing is the substantive change that characterizes the Revolution’s second phase. In that respect one thing is undisputed: Whereas the revolutionaries during the Revolution’s first phase wanted to renew a sovereign GDR, the Revolution’s second phase was defined by the people’s will to unite with the FRG and to do so quickly. Confronted with the options of establishing a new sovereign GDR, which would then enter into negotiations with the FRG about a future cooperation or unification on the one hand, and fast unification with the FRG on the other, the people clearly voted for the latter in the first free VK elections on March 18, 1990.¹¹²

The interesting constitutional question is: How did this change affect the rest of the people’s constitutional agenda? Most scholars assert that, by phase two, the people wanted an unconditional adoption of the GG.¹¹³ Winkler, for example, interprets the results of the March 18, 1990 elections as a vote for German unity and the adoption of the West German economic, social, and constitutional system.¹¹⁴ Reißig argues that those who prevailed in the Revolution’s second phase were the promoters of an “unconditional adoption of the West German model.”¹¹⁵ According to Habermas, the FRG government dominated all basic decisions of the GDR development,¹¹⁶ and it was economic pressure that made East Germans

¹⁰⁹ See, e.g., WINKLER, *supra* note 11, at 520; GARTON ASH, *supra* note 11, at 69 *et seq.*; Schlink, *supra* note 11, at 19.

¹¹⁰ NEUBERT, *supra* note 11, at 324; WINKLER, *supra* note 11, at 520–21 (emphasis added).

¹¹¹ For a differentiated analysis of the process, see Reißig, *supra* note 11, at 60 *et seq.*

¹¹² See WINKLER, *supra* note 11, at 559.

¹¹³ See Schlink, *supra* note 11, at 19; Donald Hancock & Helga Welsh, *Models of Unification: Integration Theory and Democratization*, in *GERMAN UNIFICATION, PROCESS AND OUTCOMES* 1, 8 (Donald Hancock & Helga Welsh eds., 1994); Steffen Heitmann, *Die mißbrauchte Einheit, Bemerkungen zur Verfassungsdiskussion im wiedervereinten Deutschland*, in *FESTSCHRIFT FÜR HERBERT HELMRICH ZUM 60. GEBURTSTAG* 217, 220 (1994).

¹¹⁴ WINKLER, *supra* note 11, at 559–60.

¹¹⁵ Reißig, *supra* note 11, at 60.

¹¹⁶ Jürgen Habermas, *Die andere Zerstörung der Vernunft*, *DIE ZEIT*, May 10, 1991, at 63.

vote for the FRG's economic and social model.¹¹⁷ A speaker for the (East) CDU, during a VK debate on April 19, 1990, said that it was the GG that had driven the people into the streets and that the people had voted for in the elections on March 18, 1990.¹¹⁸

The most powerful argument for this point of view is the result of the first free VK elections of March 18, 1990. By voting for parties that stood for a fast accession to the FRG, the people provided the new VK and the new government with a popular mandate to fast accession based on Article 23, 2 GG as it existed prior to German unification (henceforth: Article 23, 2 GG (a.F.)). Article 23, 2 GG (a.F.) stood for an unconditional adoption of the GG¹¹⁹ and stated that “[i]n the other parts of Germany it [the GG] must be entered into force upon their accession.”¹²⁰

Only few authors dispute this point of view. One of them is Hans-Jochen Vogel, who writes that the East Germans' decision to accede to the FRG based on Article 23, 2 GG (a.F.) was misinterpreted as a vote for an unchanged adoption of the GG.¹²¹ The most outspoken critic of the dominant opinion is Hans Joachim Meyer, who writes,

I admire the courage of those who . . . know exactly what the people wanted on March 18, 1990. Apparently, they wanted our constitution from Article 1 to Article 146 [GG], they wanted a constitution that contains nothing about environmental protection, they wanted a constitution that is interpreted like our constitution, so that we transfer fundamental rights to the EC without enforcing the EC's parliamentarization, etc., etc. Do you really believe you can say that this is what they wanted? I think that is an admirable fiction.¹²²

¹¹⁷ Reißig, *supra* note 11, at 62.

¹¹⁸ Peter Häberle, *Der Entwurf der Arbeitsgruppe "Neue Verfassung der DDR" des Runden Tisches (1990)*, JÖR 319–49, 325 (1990); Rupert Scholz, *Aufgaben und Grenzen einer Reform des Grundgesetzes*, in *FESTSCHRIFT FÜR PETER LERCHE ZUM 65. GEBURTSTAG* 65, 66 (1993); Heitmann, *supra* note 113, at 220.

¹¹⁹ See, e.g., UWE THAYSEN, *DER RUNDE TISCH ODER: WO BLIEB DAS VOLK?* 199 (1990); Würtenberger, *supra* note 92, at para. 33; Peter Lerche, *Der Beitritt der DDR — Voraussetzungen, Realisierung, Wirkungen*, in *HANDBUCH DES STAATSRICHTS DER BUNDESREPUBLIK DEUTSCHLAND* § 194, VIII para. 18 (Josef Isensee & Paul Kirchhof hrsg. eds., 1995); Heckel, *supra* note 7, at paras. 27, 28, 32, 37; Hans-Jochen Vogel, *Aus dem Westen nichts Neues*, *NEUE JUSTIZ* 145, 146 (1994); *Id.* at n.5; Heitmann, *supra* note 113, at 220.

¹²⁰ Author translation. Article 23 GG was amended upon unification.

¹²¹ Vogel, *supra* note 119, at 146.

¹²² Hans Joachim Meyer, *Deutschlands Aktuelle Verfassungslage, Berichte und Diskussionen auf der Sondertagung der Vereinigung der Deutschen Staatsrechtslehrer in Berlin am 27. April 1990*, in

Meyer goes further and explicitly denounces the dominant opinion as a doctrinal cover-up for a western power elite's hidden agenda; according to Meyer, "[t]his is driven by the will to preserve the status quo of social power distribution based on the Grundgesetz. You want to preserve the status quo by granting a veto position to a minority that is able to prevent constitutional amendments."¹²³

The following analysis shows that the dominant opinion's conclusion, according to which the people decided for an unconditional adoption of the GG, cannot be reconciled with the historical facts. These facts show that, even though the people did want fast unification, the adoption of the GG, and participation in West German economic wealth, they did not want, and did not vote for, an unconditional adoption of the GG. Instead, they wanted to preserve and transfer to unified Germany important elements of their revolutionary constitutional agenda. The revolutionary people, again, articulated their constitutional will by way of (1) popular movement, (2) institutional reaction, and (3) legal manifestation.

1. Popular Movement

The VK elections on March 18, 1990 were the central event expressing the people's will during the Revolution's second phase. These elections, acknowledged as having constitutional meaning, were the first free elections in the GDR, marking the end of the Revolution.¹²⁴ Martin Heckel writes that the elections had the character of elections meant for a "constituent national assembly" ("*konstituierende Nationalversammlung*").¹²⁵

93.4% of East Germans, well-informed about the parties and their positions, participated in the elections.¹²⁶ The elections' outcome was less the result of traditional or socially determined party affiliation than it was so-called "issue voting," meaning determined by the specific political issues at stake.¹²⁷ Interpreting the election results is thus key to determining the people's constitutional will during the Revolution's second phase.

VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTLERER, HEFT 49, 161–63 (1990) (author translation).

¹²³ *Id.* at 164 (author translation).

¹²⁴ See WINKLER, *supra* note 11, at 560; Heckel, *supra* note 7, at paras. 26–27.

¹²⁵ Heckel, *supra* note 7, at para. 26.

¹²⁶ See WINKLER, *supra* note 11, at 559; NEUBERT, *supra* note 11, at 367 (93.22%); Kowalczyk, *supra* note 12, at 529.

¹²⁷ See Dieter Roth, *Die Wahlen zur Volkskammer in der DDR, Der Versuch einer Erklärung*, POLITISCHE VIERTELJAHRRESSCHRIFT, VOL. 31, NO. 3, 369, 371, 382 *et seq.* (Sept. 1990); Karl Schmitt, *Politische Landschaften im Umbruch: Das Gebiet der ehemaligen DDR 1928-1990*, in Oskar Gabriel & Klaus Troitzsch (eds.), WAHLEN IN ZEITEN DES UMBRUCHS, 404, 433 *et seq.* (1993).

My thesis is that it is incorrect to interpret the results of the March 18, 1990 elections as a popular vote for an unconditional adoption of the GG. The dominant opinion's fundamental mistake is to assume that the parties who won the elections stood for an unconditional adoption. This flaw is most poignantly expressed in Habermas' implication that the people's vote for the Alliance for Germany (Allianz für Deutschland) was a vote for Helmut Kohl.¹²⁸ The following analysis will show that the people's vote for the East CDU and Lothar de Maiziere cannot be interpreted as a vote for the West CDU and Helmut Kohl because the parties, as well as the candidates, were fundamentally different and the people were well aware of that.¹²⁹ Ignoring these differences leads to an incorrect picture of the popular mandate that the people gave the new VK in March 1990.

The elections brought a clear victory for the Alliance for Germany—with 48% of the vote¹³⁰—who consisted of the East CDU, the DSU (Deutsche Soziale Union), and the DA (Demokratischer Aufbruch). That victory was correctly interpreted as a popular mandate for the Alliance's political agenda,¹³¹ so the decisive question is: What was the Alliance's political agenda? It is here that the dominant opinion's analysis becomes blurry. Undeniably, the Alliance wanted fast unification through the GDR's accession to the FRG based on Article 23, 2 GG (a.F.). Hence, it stood for an adoption of the GG. From this, however, the dominant opinion concludes, without further analysis, that voting for the Alliance meant voting for an unconditional adoption of the GG, amended only insofar as that was technically necessary for unification.¹³²

A closer look at the Alliance's agenda, and particularly at the statements made by their political leader, Lothar de Maiziere, however, reveals that the Alliance did not stand for an unconditional adoption of the GG. Instead, it stood for an adoption of the GG under two conditions—preservation and transfer to unified Germany of important constitutional achievements of the 1989 Revolution.

¹²⁸ Jürgen Habermas, *DIE ZEIT*, Mar. 30, 1990, *quoted in* WINKLER, *supra* note 11, 562; for similar interpretations, see KOWALCZUK, *supra* note 12, at 530–31.

¹²⁹ A poll taken by the Forschungsgruppe Wahlen in May 1990 shows that the voters in the GDR did not consider the East CDU to be equal to the West CDU; see Matthias Jung, *Parteiensystem und Wahlen in der DDR*, in *AUS POLITIK UND ZEITGESCHICHTE* B 27/90 3, 15 (1990). Neubert writes that de Maiziere “never became Kohl's puppet.” See NEUBERT, *supra* note 11, at 373. It is, moreover, undisputed that the East Germans, prior to the Mar. 18, 1990 elections, were highly interested in politics. See Roth, *supra* note 127, 388 *et seq.* They were also well informed about the parties' agendas and their differences. See *id.* at 369, 390.

¹³⁰ WINKLER, *supra* note 11, at 559.

¹³¹ *Id.* at 559–60.

¹³² See, e.g., THAYSEN, *supra* note 119, at 199; Württenberger, *supra* note 92, at para. 33; Reißig, *supra* note 11, at 60; Heckel, *supra* note 7, at paras. 27–28, 32, 37.

Prior to the SED regime's break-down, the Alliance's East CDU had been one of the so-called bloc parties cooperating with the SED in what was known as the "national front." The Alliance's DSU was a Christian-conservative party, who was supported by the West German CSU and demanded "freedom instead of socialism."¹³³ The Alliance's DA was a partly Christian-ecological, partly Christian-conservative party, which in August 1990 merged with the CDU. The East CDU, who had won 40.8% of the vote (as opposed to 6.3% for the DSU and 0.9% for the DA),¹³⁴ clearly dominated the Alliance and determined its political profile and agenda.

An important and often overlooked fact is that the East CDU was fundamentally different from the West CDU. The East CDU was strongly rooted in the GDR and felt obligated to preserve the East Germans' identity and dignity throughout the process of unification. The East CDU's political profile and its development is strongly reflected in Lothar de Maiziere's political development after taking over the party's leadership on November 10, 1989.¹³⁵ De Maiziere was a lawyer, member of the Synod of the Federation of the Protestant Churches in the GDR, and had not previously held any political offices in the CDU (or in other political parties).¹³⁶ It seems that the West CDU had no influence on him being asked to lead the East CDU into the parliamentary elections.¹³⁷ His political development can be described as a gradual distancing from socialism and the preservation of a sovereign GDR and of embracing German unification under preservation of the revolutionary East Germans' identity and achievements.¹³⁸ The concepts of individual empowerment and environmental protection, combined with a critical attitude towards the FRG system, were core elements of de Maiziere's political agenda.

In his early public statements as chair of the East CDU, de Maiziere presented himself as a socialist in favor of reform.¹³⁹ On November 17, 1989, he was one of the CRT members who joined the Modrow government, where he became Minister for Church Issues and Vice Minister President.¹⁴⁰ In the East CDU's guidelines of November 18, 1989, he argued for

¹³³ See WINKLER, *supra* note 11, at 5, 59.

¹³⁴ For these election results, see WINKLER, *supra* note 11, at 559.

¹³⁵ WINKLER, *supra* note 11, at 532.

¹³⁶ *Id.* See generally WOLFGANG JÄGER & MICHAEL WALTER, DIE ALLIANZ FÜR DEUTSCHLAND, CDU, DEMOKRATISCHER AUFBRUCH UND DEUTSCHE SOZIALE UNION 1989/90 1 (1998).

¹³⁷ LOTHAR DE MAIZIERE, *Anwalt der Einheit*, 60, 61 (1996); JÄGER & WALTER, *supra* note 136, at 17 *et seq.*

¹³⁸ For this and the following, see WINKLER, *supra* note 11, at 533; JÄGER & WALTER, *supra* note 136, at 21 *et seq.*

¹³⁹ JÄGER & WALTER, *supra* note 136, at 22.

¹⁴⁰ *Id.* at 29.

“socialism out of Christian responsibility.”¹⁴¹ In an interview on November 19, 1989, he declared that “socialism is one of the nicest visions of human thinking” and that he does not share the view that “demanding democracy means demanding the abolition of socialism.”¹⁴² When de Maiziere met with the West CDU’s Secretary General (Generalsekretär), Volker Rühle, for the first time on November 24, 1989, he clearly articulated his reservations towards capitalism and the market.¹⁴³

De Maiziere’s language started to change when, on December 16, 1989, he declared at the East CDU’s party convention in Berlin that the term socialism must no longer be used.¹⁴⁴ In a declaration adopted at the same convention, the East CDU committed itself to a “market economy with a social obligation and ecological responsibility” as well as to unification with the FRG.¹⁴⁵ Still, deep rifts remained between the East CDU and the West CDU. The West CDU was highly concerned about how its eastern counterpart had not been newly founded but instead had participated in the SED regime;¹⁴⁶ the East CDU remained clearly distanced from the West CDU’s free-market politics.¹⁴⁷ This is why the West CDU initially refrained from extending an offer to the East CDU to cooperate in the March 1990 elections. Kohl waited until late January 1990 before meeting with de Maiziere for the first time.¹⁴⁸ At this point, the elections were less than two months away and the polls predicted a landslide victory for the SPD.¹⁴⁹

¹⁴¹ *Id.*

¹⁴² Lothar de Maiziere, *quoted in* Horst Teltschik, “*De Bärn is g’schält*,” *Helmut Kohls Weg zur deutschen Einheit (I): Der Zehn-Punkte Plan*, DER SPIEGEL, Sept. 23, 1991, at 96, 114.

¹⁴³ WINKLER, *supra* note 11, at 533.

¹⁴⁴ *Id.*

¹⁴⁵ WINKLER, *supra* note 11, at 533 (citation omitted).

¹⁴⁶ JÄGER & WALTER, *supra* note 136, at 24 *et seq.*

¹⁴⁷ *Id.* at 29.

¹⁴⁸ DE MAIZIERE, *supra* note 137, at 73–74. For earlier contacts between the East CDU and the West CDU at lower levels, see JÄGER & WALTER, *supra* note 136, at 25 *et seq.*

¹⁴⁹ Opinion polls taken in early February 1990 showed 54% for the SPD, followed by the PDS with 12% and the CDU with 11%. See Manfred Görtemaker, *Der Weg zur deutschen Einheit*, BUNDESZENTRALE FÜR POLITISCHE BILDUNG, DEUTSCHE TEILUNG — DEUTSCHE EINHEIT, <https://www.bpb.de/geschichte/deutsche-einheit/deutsche-teilung-deutsche-einheit/43745/der-weg-zur-einheit> (last visited July 26, 2016). De Maiziere basically confirms this, saying that the polls predicted 53% for the SPD. See DE MAIZIERE, *supra* note 137, at 75.

Even then, however, de Maiziere refused to take over the FRG system,¹⁵⁰ and he was not happy with the West CDU's attempt to impose her rules on the East CDU.¹⁵¹ About Erwin Huber—at the time Secretary General of the CSU, the West CDU's sister party and member of the West German government—de Maiziere said that he considered him “strongly right-wing” (“*sehr rechts*”).¹⁵² When the West CDU urged de Maiziere to leave the Modrow government, his reaction was to reject “advice from outside that does not fully comprehend the GDR's reality.”¹⁵³

De Maiziere's critical attitude towards an unconditional adoption of the GG and the FRG's social and economic system also becomes manifest in a book that he co-authored with Thomas de Maiziere and Lutz Wicke in late 1989/early 1990.¹⁵⁴ The book was published shortly after de Maiziere was elected Minister President of the GDR.¹⁵⁵ Thomas de Maiziere was spokesman of the CDU Berlin, Lutz Wicke member of the executive board of the CDU Berlin at the time.

De Maiziere's core position on the Revolution's meaning for unified Germany is reflected in the book's preface: “[I]n today's Federal Republic of Germany the peaceful revolution in the other part of Germany should be considered a mandate to correct, during the process of growing together into a unity, own mistakes and to reconstruct the social market economy into an eco-social market economy.”¹⁵⁶

The authors argued for overcoming socialism but at the same time for admitting and eliminating the faults of the FRG's “so-called” social market economy.¹⁵⁷ The same attitude is reflected in de Maiziere's statement that he does not see the breakdown of the GDR and of “real socialism” as a victory of western liberalism and the market economy.¹⁵⁸

¹⁵⁰ *Id.* at 67.

¹⁵¹ *Id.* at 68.

¹⁵² *Id.* at 67.

¹⁵³ THAYSEN, *supra* note 119, at 86 (quoting de Maiziere); see DE MAIZIERE, *supra* note 137, at 73.

¹⁵⁴ LOTHAR DE MAIZIERE, THOMAS DE MAIZIERE & LUTZ WICKE, ÖKO-SOZIALE MARKTWIRTSCHAFT FÜR OST UND WEST (1990).

¹⁵⁵ DE MAIZIERE, *supra* note 137, at 110.

¹⁵⁶ DE MAIZIERE ET AL., *supra* note 154, at I. *et seq.* (preface) (author translation).

¹⁵⁷ *Id.*

¹⁵⁸ DE MAIZIERE, *supra* note 137, at 72.

The authors demanded improvement of the social market economy, in particular: Participation of workers in the productive capital of enterprises, protection against the infringement of competition through monopolies and cartels, codetermination of workers in important decisions in enterprises, further improvement of social security, and the improvement of environmental protection.¹⁵⁹ They said that eastern as well as western states must implement reforms in order to satisfy material necessities of life, social justice, and the people's immaterial environmental needs.¹⁶⁰ The authors were critical of social security in the FRG not providing sufficient services and not covering everyone. Moreover, they said that decent housing must be provided to the homeless and the reintegration of long-time unemployed into work life must be furthered, "if need be by the state."¹⁶¹ The authors also argued that unemployment must be reduced by environmentally protective investments, worker qualification, flexible reduction of working hours, and improved measures to integrate "problem groups" (such as the disabled) in the workplace.¹⁶² They emphasized that the distribution of wealth in the FRG "hardly complies with the principle of fair wealth distribution."¹⁶³

The weight of these political and constitutional statements is further enhanced by the fact that de Maiziere and parts of his party made them in open defiance of what they knew the FRG government expected from them.¹⁶⁴ For example, de Maiziere told Rühle openly that the East CDU was committed to a social and ecological economy that must not be equated with the market economy.¹⁶⁵ Under de Maiziere's leadership, the East CDU rejected the West CDU's program.¹⁶⁶ The FRG government, in contrast, did not appreciate criticism of the FRG's system. Conservative western elites did everything to prevent any influence of eastern thought on the western system. They wanted the western system to be perceived as the winner of the historical battle between capitalism and communism, and they were

¹⁵⁹ DE MAIZIERE ET AL., *supra* note 154, at 4. Part A. of the book (pages 1-167) is written by Lutz Wicke and Thomas de Maiziere, and Part B (pages 169-79) by Lothar de Maiziere. The authors emphasize in the book's preface, however, that all three authors stand behind the basic arguments of the entire book.

¹⁶⁰ *Id.* at 5.

¹⁶¹ *Id.* at 72-73.

¹⁶² *Id.* at 83.

¹⁶³ *Id.* at 87.

¹⁶⁴ For political statements like de Maiziere's by other leading members of the East CDU, see JÄGER & WALTER, *supra* note 136, at 20. Voices within the East CDU that wanted the party to be closer to the West CDU's party line were mostly represented by Martin Kirchner, the East CDU's new Secretary General, see JÄGER & WALTER, *supra* note 136, at 49 *et seq.*, 53. These voices did not prevail. See *id.*, at 49 *et seq.*

¹⁶⁵ *Id.* at 33.

¹⁶⁶ *Id.* at 42.

convinced that the winners did not need the losers to make reform proposals. De Maiziere stated that “[i]t was not appreciated to talk about mistakes or necessary reforms of the western system.”¹⁶⁷ The fact that de Maiziere still defended his political course shows that he perceived the people to have given his government a strong mandate to do so.

In summary, de Maiziere’s and the East CDU’s political agenda displayed a strong emphasis on individual empowerment and environmental protection. It explicitly transcended the FRG’s GG with its emphasis on civil rights and its comparatively weak elements of real-social—as opposed to formal-legal—equality, social justice, and environmental protection. The agenda, finally, was openly critical of the FRG’s social and constitutional order and called for specific reforms. It must therefore be concluded that the vote for the Alliance for Germany, led by the East CDU and Lothar de Maiziere, cannot be interpreted as a vote for an unconditional adoption of the GG. It must instead be interpreted as a popular mandate for unification and the general adoption of the GG, but at the same time for the preservation and transfer to unified Germany of core elements of the revolutionary constitutional agenda—individual empowerment and environmental protection.

This popular movement found a commensurate institutional reaction.

2. Institutional Reactions

The GDR institution that reacted to the popular movement during the Revolution’s second phase was the newly elected government. Its reactions reflect the constitutional goals of the popular movement—German unification under preservation of the constitutional principles of individual empowerment and environmental protection.

The de Maiziere government expressed itself as an institutionalization of the people’s revolutionary achievements in the coalition agreement between the parliamentary groups of the parties that formed the government.¹⁶⁸ The new government used this agreement to explicitly connect with a major manifestation of revolutionary achievements, the Round Table Draft Constitution (RTD). Referring to the GDR’s constitutional situation during the transitory period until unification, the coalition agreement says that “[w]hen it comes to the further shaping of the constitution, the coalition is in favor of transitory provisions that consider the Constitution of 1949 as well as the Draft Constitution of the Round Table [the

¹⁶⁷ DE MAIZIERE, *supra* note 137, at 111 (author translation).

¹⁶⁸ See the coalition agreement, “Grundsätze der Koalitionsvereinbarung zwischen den Fraktionen der CDU, der DSU, dem DA, den Liberalen, DFP, BFD, FDP und der SPD” of Apr. 12, 1990, [hereinafter *Coalition Agreement*] reprinted in Ingo von Münch (ed.), *DOKUMENTE DER WIEDEVEREINIGUNG DEUTSCHLANDS, QUELLENTEXTE ZUM PROZEß DER WIEDERVEREINIGUNG VON DER AUSREISEWELLE AUS DER DDR ÜBER UNGARN, DIE CSSR UND POLEN IM SPÄTSOMMER 1989 BIS ZUM BEITRITT DER DDR ZUM GELTUNGSBEREICH DES GRUNDGESETZES DER BUNDESREPUBLIK DEUTSCHLAND IM OKTOBER 1990*, 163 *et seq.* (1991).

RTD].¹⁶⁹ The government followed up on this by establishing a commission to draft a new constitution based on the GDR's 1949 Constitution, keeping the RTD in mind.¹⁷⁰ The newly elected government, thus, understood itself as having a popular mandate to at least consider the constitutional principles manifested in the RTD as constitutional principles of the GDR for the transitory period until unification.

The coalition agreement explicitly states that an important aspect of the revolutionary principle of individual empowerment shall be embedded in the constitution: "Social security, particularly an obligation to promote labor, shall be embedded in the constitution."¹⁷¹ It, moreover, explicitly refers to a possible amendment of the GG that would integrate the principle of individual empowerment:

When elaborating a new GDR Constitution or, if that should not be undertaken, *when amending the GG, it is the government's goal to introduce social rights as non-enforceable individual rights. This applies primarily to the right to labor, housing, and education.* These rights will be guaranteed as state-goal provisions [*Staatszielbestimmungen*].¹⁷²

Even though this was less than what the CRT's Social Charter and the RTD had demanded, because they wanted judicially enforceable individual rights, not mere state-goal provisions, it still shows that amending the GG by transferring revolutionary constitutional principles to unified Germany was the de Maiziere government's explicit goal. The government considered this part of the popular mandate given to it by the voters in the March 1990 elections.

De Maiziere confirmed this attitude in his government declaration of April 19, 1990, in which he stated, "We have a democratic mandate. The people of the GDR have given it to us and nobody else."¹⁷³ After referring to the sovereign people's revolutionary act and stating that this act constituted the basis of his government, de Maiziere emphasized the revolutionary act's meaning not only for the GDR but for a unified Germany: "The people have become aware of themselves [*Das Volk ist sich seiner selbst bewußt geworden*] And out of the

¹⁶⁹ *Id.* at 169 (author translation).

¹⁷⁰ See Fischer, *supra* note 104, at 31.

¹⁷¹ Coalition Agreement, *supra* note 168, at 169 (author translation).

¹⁷² *Id.* at 163 (emphasis added) (author translation).

¹⁷³ See Lothar de Maizière's Government Program (Apr. 19, 1990), http://germanhistorydocs.ghi-dc.org/sub_document.cfm?document_id=242.

shout ‘We are the people!’ grew the shout ‘We are one people!’ The people in the GDR constituted itself as part of a people, as part of that one German people that shall grow together again.”¹⁷⁴

With these words, de Maiziere highlighted that the East Germans had acted as the *pouvoir constituant*, and that they had acted not for the GDR but as part of a much more comprehensive “one German people that shall grow together again.” He, thus, clearly underlined the constitutional meaning of the East Germans and their revolutionary achievements for the entire German people and for unified Germany—a fact that he wanted to see reflected in unified Germany’s constitutional law.

The East Germans’ constitutional meaning for unified Germany is also expressed in another part of the government declaration. On page 9, de Maiziere said that German unity shall be achieved “in a contractually agreed upon way” according to Article 23, 2 GG (a.F.).¹⁷⁵ This is an important modification of the simple accession based on Article 23, 2 GG (a.F.), which does not speak of a contract. Insisting on a contract was de Maiziere’s way of making sure that the East Germans were considered as equal partners in the project of German unification. A contract was his legal instrument for transferring the people’s revolutionary achievements to unified Germany. De Maiziere reiterated and specified this point when he said that the people of the GDR had something to contribute to German unity. They would contribute “established values,” their “sensitivity for social justice,”¹⁷⁶ and their “identity” and “dignity.”¹⁷⁷ He emphasized that the East Germans would have a decisive voice in determining the way to German unity¹⁷⁸ and that “[b]oth German governments agree that the goal of the negotiations cannot be a business partnership but must be a real community [*eine wirkliche Gemeinschaft*].”¹⁷⁹ These statements are clear institutional reactions to the East Germans’ will to preserve and transfer to unified Germany their revolutionary achievements.

With regard to specific goals of his government and specific contents of his popular mandate, de Maiziere pointed out the need to replace the “state-determined command economy with an ecologically oriented social market economy.”¹⁸⁰ It is important to note,

¹⁷⁴ *Id.* at 3.

¹⁷⁵ *Id.* at 9 (author translation).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 10.

¹⁷⁸ *Id.* at 3.

¹⁷⁹ *Id.* at 26 (author translation).

¹⁸⁰ *Id.* at 11.

however, that he did not promote an adoption of the FRG's economic, social, and constitutional regime. Instead, he emphasized the revolutionary constitutional achievements of liberation, individual empowerment, and environmental protection and pointed out the need for the FRG to reform by arguing for the establishment of an "ecologically obliged social market economy," which he planned to develop "in cooperation with the FRG and the EC."¹⁸¹ A key element of an aspired economic union between the GDR and the FRG was environmental protection.¹⁸² De Maiziere, moreover, emphasized the government's responsibility for safeguarding appropriate *housing* for all citizens, protecting tenants, and controlling rents.¹⁸³ He further pointed out that the public vote obliged the newly elected government to promote employment and provide jobs, particularly for women.¹⁸⁴ With regard to abortion, de Maiziere was cautious at first. He said he knew and understood the problems that lead to a decision against the unborn life and stated that "we need more decisions for life."¹⁸⁵ Accordingly, he emphasized the necessity for economic and ideal help that would contribute to women making pro-life decisions.¹⁸⁶ In De Maiziere's view, providing day care, more flexible and shorter working hours, and more part-time jobs was necessary to prevent abortions.¹⁸⁷ Realizing equal treatment (as opposed to mere equal rights; *Gleichstellung* as opposed to mere *Gleichberechtigung*) of women in the professional world as well as in society in general was an important goal of the new government.¹⁸⁸ How strongly de Maiziere and his government considered themselves representatives of the revolutionary people was confirmed yet again when, with respect to abortion, they immediately responded to the people in the streets. After forceful demonstrations had reminded the new government that the people were not willing to compromise on certain constitutional issues, including abortion, the government decided to preserve the GDR's time-phase model instead of taking over the FRG's indication model.¹⁸⁹

¹⁸¹ *Id.* at 8, 11.

¹⁸² *Id.* at 8 ("[D]ie Gewährleistung einer lebenswerten und lebensfähigen Umwelt.").

¹⁸³ *Id.* at 17.

¹⁸⁴ *Id.* at 19.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 20.

¹⁸⁸ *Id.*

¹⁸⁹ KUKUTZ, *supra* note 16, at 164.

3. *Manifestation Through Law*

The constitutional achievements' legal manifestation during the Revolution's second phase was determined by the challenge to combine the achievements' preservation with the preparation of German unification. The most important laws the newly elected VK adopted to meet this challenge were the Constitutional Principles Law (Verfassungsgrundsätzegesetz, VGG),¹⁹⁰ the Municipal Constitutional Law (Kommunalverfassungsgesetz),¹⁹¹ and the Law for the Introduction of States (Ländereinführungsgesetz, LEG).¹⁹²

The VGG, adopted on June 17, 1990, was the product of a compromise between Bündnis 90, PDS, and parts of the SPD, who wanted to adopt the RTD as a new GDR constitution, and CDU, DA, and DSU, who rejected a new GDR constitution and instead wanted a fast accession to the FRG.¹⁹³ As a result of the compromise, the VK did not formally adopt a new constitution for the GDR but instead adopted the VGG, which built upon the existing GDR Constitution of 1968/1974 and modified it fundamentally in order to account for the revolutionary achievements.¹⁹⁴ The VGG's character of compromise is reflected in its preamble. It explicitly refers to "the peaceful and democratic revolution"¹⁹⁵ that had taken place in the GDR in the fall of 1989 and points out that the VGG "complements the GDR Constitution for a transitory period"¹⁹⁶ in anticipation of fast German unification. At the same time, it emphasizes that all constitutional principles that contradict the VGG are void.¹⁹⁷ By establishing binding principles for the interpretation and application of all laws in the GDR, including the GDR Constitution, the VGG practically became the supreme law of the land.¹⁹⁸

Substantively, the VGG combined principles of the GG with the revolutionary principles of individual empowerment and environmental protection. For example, Article 1, Section I VGG committed the GDR to be a free, democratic, federal, social, and ecological state bound

¹⁹⁰ GESETZBLATT DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK [GBI DDR] 1990, I, at S. 299 *et seq.*

¹⁹¹ *Id.* at S. 255 *et seq.*

¹⁹² *Id.* at S. 955 *et seq.*

¹⁹³ Würtenberger, *supra* note 92, at para. 30.

¹⁹⁴ *Id.*

¹⁹⁵ GESETZBLATT DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK [GBI DDR] 1990, I, at S. 299 *et seq.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See Art. 1 Sec. 2 VGG and Würtenberger, *supra* note 92, at para. 32.

by the rule of law. Article 2 VGG provided for the protection of private property, the use of which must serve both the public good and the conservation of nature. Article 3, Section I VGG protected economic freedom and personal autonomy (*Privatautonomie*). Except for the ecological elements, these civil rights were also protected by the GG. Revolutionary achievements were embedded in Article 6 VGG, which protected the natural environment, and Article 7 VGG, which established a state obligation to protect labor and to “promote the individual’s right to lead a dignified life in social justice and economic freedom through work.” Moreover, Article 7 VGG explicitly obliged the state to establish the necessary framework conditions to realize this social right.¹⁹⁹ Article 9 VGG prepared German unification by granting a two-thirds majority in the VK the authority to amend the constitution through state treaties, a possibility that was applied to the Treaty on the Currency, Economic, and Social Union, as well as to the Unification Treaty (UT).²⁰⁰ Finally, Article 10 VGG provided that the VGG would remain in force until “a” GG (“*ein*” GG) would enter into force. The explicit referral to “a” GG—instead of “the” GG—can be seen as additional evidence for the VK’s unwillingness to unconditionally adopt “the” existing GG. The wording seems to indicate that the VK distinguished between an unconditional adoption of “the” GG on the one hand, and the aspired unification based on Article 23, 2 GG (a.F.), which was hoped to bring about the entering into force of “a” reformed and amended GG on the other.

The Communal Constitution Law, adopted on May 17, 1990, guaranteed communal self-determination and became the legal manifestation of the Revolution’s break with the previous GDR’s centralist communal constitutional law.²⁰¹

Finally, Paragraph 1 of the LEG, adopted on June 22, 1990, established the new states of Mecklenburg-West Pomerania, Brandenburg, Saxony-Anhalt, Saxony, and Thuringia as well as requirements for their accession to the FRG.²⁰²

In sum, my analysis of the 1989 Revolution shows that the East Germans had a clear constitutional agenda, expressed through highly differentiated acclamations and made durable through institutional reactions and legal manifestations. They changed this agenda between the Revolution’s first and second phases. During the first phase, the people pursued liberation from the SED tyranny, individual empowerment, and environmental protection in an effort to establish a new form of government for a new sovereign GDR. During the Revolution’s second phase, the people gave up on a sovereign GDR and instead,

¹⁹⁹ For a similar conclusion, see Würtenberger, *supra* note 92, at para. 31 and Ritter, *supra* note 101, at 88.

²⁰⁰ Würtenberger, *supra* note 92, at paras. 34 *et seq.*

²⁰¹ *Id.* at para. 23.

²⁰² *Id.* at para. 37; see PETER QUINT, THE IMPERFECT UNION, CONSTITUTIONAL STRUCTURES OF GERMAN UNIFICATION 105 (1997).

in the first free VK elections on March 18, 1990, voted for fast accession to the FRG and the adoption of the GG. Yet, contrary to the dominant opinion, my analysis also shows that the people did not vote for an unconditional adoption of the GG. Instead, the people wanted to preserve and transfer to unified Germany the constitutional principles of individual empowerment and environmental protection. The following section will show how the East Germans succeeded in transferring these revolutionary achievements to unified Germany.

D. Transfer of Revolutionary Achievements to Unified Germany

Constitutionally, the dominant opinion reduces German unification to Article 23, 2 GG (a.F.), based on which the GDR ceased to exist upon its accession to the FRG and the GG entered into force in the territory of the former GDR.²⁰³ According to this view, the UT between the GDR and the FRG of August 31, 1990, merely took care of technicalities that were necessary to bring about German unification and the “legal unity between the two German states” as quickly as possible.²⁰⁴

My thesis is that German unification was much more than an unconditional adoption of the GG. It was a process during which the East Germans applied legal instruments in order to preserve revolutionary constitutional achievements and transfer them to unified Germany. These legal instruments were the UT and the constitutions of the new states. They included revolutionary constitutional principles that were not in—and sometimes even contradicted—the GG and transferred them to unified Germany’s constitutional order. This transfer occurred not because it was necessary for unification in the sense of a *conditio sine qua non* but because it was the will of an important part of the German people, who had spoken in a constitutional voice and whose statement demanded respect. In what follows, I will describe the legal instruments, outline the constitutional principles they include, and show how the instruments were used to transfer the constitutional principles to unified Germany.

²⁰³ See, e.g., Hans Hugo Klein, *Kontinuität des Grundgesetzes und seine Änderung im Zuge der Wiedervereinigung*, in Josef Isensee & Paul Kirchhof (eds.), *HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND*, VIII, § 198 paras. 14 et seq. (1995); Lerche, *supra* note 119, at paras. 55 et seq.; Heckel, *supra* note 7, at para. 4; Josef Isensee, *Rechtsstaat—Vorgabe und Aufgabe der Einigung Deutschlands*, in Josef Isensee & Paul Kirchhof (eds.), *HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND*, IX, § 202 paras. 16 et seq. (1997).

²⁰⁴ See Heckel, *supra* note 7, at para. 38; Görg Haverkate, *Rechtseinheit als Aufgabe*, in Josef Isensee & Paul Kirchhof (eds.), *HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND*, IX, § 209 paras. 1 et seq., 6 et seq., 9 et seq., 21 et seq. (1997); Klein, *supra* note 203, at paras. 23 et seq.; DIETMAR WILLOWEIT, *DEUTSCHE VERFASSUNGSGESCHICHTE, VOM FRANKENREICH BIS ZUR WIEDERVEREINIGUNG DEUTSCHLANDS*, 425 (3. Auflage 1997); Heitmann, *supra* note 113, at 220 et seq. See generally sources cited *supra* note 203.

I. The Unification Treaty (UT)

After the Revolution was over and the sovereign people of the GDR had spoken their last constitutional word in the federal elections on March 18, 1990 and the communal elections on May 6, 1990, the newly established institutions in the GDR went to work to preserve the people's revolutionary achievements. Because one of these achievements was German unification, the GDR institutions were faced with a seeming contradiction; they had to make revolutionary achievements durable while realizing German unity. This could hardly be done by adopting, for example, the RTD as a new GDR Constitution. A new GDR Constitution would have established a new sovereign GDR, something the people—at least since the Revolution's second phase—obviously did not want. The task at hand required an instrument that was able to combine the preservation of something new, with the accession to something existing. A contract was the perfect means to this end. It provided the parties with both the necessary flexibility to do something that had never been done before, and the reliability that only a legally binding mutual promise could provide. A contract was able to bring about unification while preserving revolutionary achievements as conditions of that unification.

My thesis that the UT did not only bring about German unification but also served as an instrument to preserve revolutionary achievements by transferring them from the GDR to unified Germany is supported by two factors: first, the UT's sheer existence and, second, its content.

1. The UT's Existence

If the goal had been German unification through the GDR's accession to the FRG and an unconditional adoption of the GG, a unification treaty would not have been necessary. Based on Article 23, 2 GG (a.F.), a one-sided declaration by the GDR would have sufficed.²⁰⁵ All technicalities, such as entering the GG and all FRG laws into force in the new states, could have been achieved through unified Germany's legislature. This is what had occurred in 1956, when the Saarland had acceded to the FRG through a one-sided declaration based on Article 23, 2 GG (a.F.).²⁰⁶ Peter Quint writes that western conservative majorities preferred this way of German unification because it would have further increased their political influence upon unification.²⁰⁷ When the UT was signed on August 31, 1990, the GDR's VK

²⁰⁵ See HERMANN VON MANGOLD & FRIEDRICH KLEIN, *DAS BONNER GRUNDGESETZ, BAND I 654* (2. Auflage 1966); Peter Badura, *Die innerdeutschen Verträge, insbesondere der Einigungsvertrag*, in Josef Isensee & Paul Kirchhof (eds.), *HANDBUCH DES STAATSRICHTS DER BUNDESREPUBLIK DEUTSCHLAND*, VIII, § 189 para. 1 (1995); Lerche, *supra* note 119, at paras. 27, 32.

²⁰⁶ See v. MANGOLD & KLEIN, *supra* note 205, at 654.

²⁰⁷ QUINT, *supra* note 202, at 103.

had already declared the GDR's accession to the FRG on August 23, 1990.²⁰⁸ Because this declaration was one-sided and unconditional,²⁰⁹ a simple federal law handling the "unification-induced" details would have sufficed. Against this background, the fact that the GDR and the FRG decided to enter into a treaty to bring about German unity implies that unification must have been more than the GDR's accession to the FRG and the entering into force of the GG and other FRG law in the new states.

The newly legitimized GDR government wanted the treaty as an instrument to implement its popular mandate: Preserving the people's revolutionary achievements by transferring them to unified Germany. This is accounted for by Wolfgang Schäuble, the FRG's Minister of the Interior (*Innenminister*) at the time, and the FRG's chief negotiator of the UT.²¹⁰ Schäuble writes that it was de Maiziere who insisted on the UT as a "necessary condition" for the GDR's accession to the FRG and who wanted the treaty to specify the conditions under which the accession was to take place.²¹¹ According to Schäuble, de Maiziere not only wanted to secure "the rights and claims of his GDR citizens in a unified Germany through binding provisions,"²¹² but also contributed significantly to the 1989 Revolution's "*continuation into German unity*" through the UT.²¹³ The UT was de Maiziere's legal instrument to achieve the Revolution's continuation into German unity by transferring to unified Germany as many revolutionary achievements as possible.

Possibly even stronger evidence for the UT's function as a legal instrument for transferring revolutionary achievements to unified Germany is the FRG's willingness to accept the treaty.²¹⁴ The dominant opinion argues that the FRG's willingness to accept the UT was based on the fact that the GDR and the Soviet Union had made it a *conditio sine qua non* for unification.²¹⁵ My thesis is that the FRG was willing to accept the UT because the West German institutions had recognized and decided to respect that an essential part of the German people had spoken in a constitutional voice that was binding not only on GDR

²⁰⁸ Badura, *supra* note 205, at para. 15; Lerche, *supra* note 119, at paras. 40 *et seq.*; WILLOWEIT, *supra* note 204, at 425.

²⁰⁹ Badura, *supra* note 205, at paras. 1, 2, 21; Lerche, *supra* note 119, at para. 27.

²¹⁰ See generally WOLFGANG SCHÄUBLE, DER VERTRAG. WIE ICH ÜBER DIE DEUTSCHE EINHEIT VERHANDELTE (1991).

²¹¹ *Id.* at 37, 38; see also NEUBERT, *supra* note 11, at 410 *et seq.*

²¹² SCHÄUBLE, *supra* note 210, at 14.

²¹³ *Id.* at 35 (author translation) (emphasis added).

²¹⁴ QUINT, *supra* note 202, at 103.

²¹⁵ Bundesverfassungsgericht, BVERFG 82, 316, juris-version para. 11; Bundesverfassungsgericht, BVERFG 84, 90, juris-version paras. 108, 118.

institutions but also on FRG institutions. After the people of the GDR had decided for fast unification in the March 18, 1990 elections, and de Maiziere had approached Helmut Kohl to make it happen, the FRG government changed its mind and was willing to accept a treaty, which it had not seen the need to do before.

Initially, the FRG government was reluctant to make any constitutional concessions to the East Germans. It considered the GG to be a superior constitution which had to be protected against eastern influence. Western conservatives were convinced that the GG was the best the East Germans could hope for and was in fact what the Revolution had been all about.²¹⁶ Moreover, from a purely contractual point of view, the GDR was not in a position to insist on any conditions for unification. Similarly, the FRG was not in a position to be forced to accept any conditions. Schäuble writes that, based on their obligation to work towards German unification, the FRG's institutions had full discretion over whether to accept the GDR's wishes to amend the GG.²¹⁷ He argues that there was a "typical situation of negotiation and balance" that suggested putting unification into the form of a treaty.²¹⁸ Yet, one needs only to look at the economic pressure weighing on the GDR at the time in order to see that the GDR's and the FRG's situation prior to unification was anything but a "typical situation of negotiation and balance."²¹⁹ The GDR was headed towards economic breakdown and the FRG offered what was considered the only way out—fast unification. Moreover, the East Germans had already decided in favor of fast unification in the March 18, 1990 elections. In this situation, the GDR government had hardly any "bargaining" or negotiating power. Similar objections may be raised with respect to the Soviet Union's position.²²⁰ Moreover, with regard to the Soviet Union's position on the UT, there was Gorbachev's declaration of February 1990 that the Germans must determine the conditions of their unification themselves.²²¹

Against this background, the "contractual" explanations for the FRG's willingness to accept the UT are spurious at best. Moreover, these explanations too quickly dismiss the possibility of a constitutional explanation that accounts for the meaning of the 1989 Revolution as an act of political freedom by the East Germans as an important part of the entire German people.

²¹⁶ See Scholz, *supra* note 118, at 66.

²¹⁷ See Schäuble, *supra* note 3, at 289.

²¹⁸ *Id.*

²¹⁹ See QUINT, *supra* note 202, at 104.

²²⁰ For an overview of the controversy with respect to the Soviet Union's position on German unification, see Bundesverfassungsgericht, BVERFG 94, 12, juris-version paras. 7 *et seq.*, 94 *et seq.*

²²¹ Badura, *supra* note 205, at para. 4.

The notion that the FRG's willingness to accept the UT must be seen as a sign of respect for the East Germans' constitutional will is already reflected in the UT's preamble. The preamble states that the FRG and the GDR have agreed to conclude the UT "in grateful respect for those who have helped freedom to break through by peaceful means."²²²

The same conclusion is implied by the statements of important FRG institutions as well as Schäuble and de Maiziere about the FRG's motivation to enter into the UT. Both the FRG's federal parliament (*Bundestag*) and federal government (*Bundesregierung*) have defended the FRG's decision to enter into the UT by stating that the UT "is considerate of the self-understanding of the people of the GDR and the respect for them as a partner in the process of re-unification."²²³ The Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*) has stated that the FRG government had to take the will of the first freely elected VK and its government seriously if it wanted the East Germans to accept German unification as a result of "their self-determination."²²⁴ To ignore the East Germans' will would have contradicted "the respect that the Federal Republic owed to the Germans in the acceding territory . . . and could have seriously endangered an orderly process of unification."²²⁵ As early as July 6, 1990, Schäuble had emphasized that a treaty was not necessary, and that a one-sided declaration by the GDR would suffice for the GDR's accession to the FRG based on Article 23, 2 GG (a.F.).²²⁶ Yet, he stated that the FRG's respect for the revolutionary East Germans' constitutional will convinced the FRG to enter into a treaty nonetheless:

However, because the GDR wants a treaty, we are willing to accept that. Out of an understanding of partnership, because we want the unity, and because we want it to be good. *We respect that the people of the GDR want to find themselves in the unified Germany. This is why primarily the GDR must determine the topics of the treaty.*²²⁷

²²² Treaty of Unification [Eingangsformel], East Germany – West Germany, Aug. 31, 1990, [hereinafter Unification Treaty] (author translation).

²²³ See Bundesverfassungsgericht, BVERFGE 82, 316, juris-version para. 5.

²²⁴ See Bundesverfassungsgericht, BVERFGE 94, 12, juris-version para. 85.

²²⁵ *Id.*

²²⁶ SCHÄUBLE, *supra* note 210, at 123, 125.

²²⁷ *Id.* at 125 (author translation) (emphasis added).

Schäuble points out that both sides were partners with a common goal, namely German unity.²²⁸ He understood his role as having to represent the GDR's interests equally to the FRG's interests.²²⁹ Schäuble's account is confirmed by de Maiziere, who writes that the negotiations over the UT changed the agreement more in favor of the GDR, even though the GDR's economic situation was deteriorating, which increased the pressure upon the GDR to push for fast unification.²³⁰ Thus, the UT manifests the FRG's respect for the constitutional will of the revolutionary East Germans instead of being a *conditio sine qua non* of German unification.

2. The UT's Content

In addition to its existence, the UT's content shows the treaty's purpose to preserve revolutionary achievements by transferring them to unified Germany.

It starts with the achievement of the newly founded states, which Article 1(1)(1) UT transfers to unified Germany by declaring that, as of the entry into force of the GDR's accession to the FRG on October 3, 1990, the new states become states of the FRG. Article 1(1)(2) UT explicitly declares the GDR's *Ländereinführungsgesetz* (LEG),²³¹ which founded the new states and determined their borders, applicable.

The UT, moreover, reflects the revolutionary achievements of liberation, individual empowerment, and environmental protection.

Liberation was preserved by enacting the GG in the new states upon unification.²³² The GG's catalogue of basic rights guarantees the traditional civil liberties for which the revolutionary people had fought.

But, Article 3 UT refers to more than the GG. It explicitly states that the GG only enters into force "with the amendments resulting from Art. 4" and only "insofar as this treaty does not provide otherwise."²³³ What exactly does this mean? Many provisions of Article 4 UT focus on purely technical changes necessitated by unification. For example, Article 4(1) UT amends

²²⁸ *Id.* at 125–26.

²²⁹ *Id.* at 139.

²³⁰ See Lothar de Maiziere, *Anwalt der Einheit*, in Joachim Heise, Helma Kreysig, Marianne Regensburger (eds.), *ÜBER DEUTSCHLAND UND DIE DEUTSCHEN* 90, 97 (2. Auflage 2003).

²³¹ GESETZBLATT DER DEUTSCHEN DEMOKRATISCHEN REPUBLIK [GBl DDR] 1990, 955.

²³² Unification Treaty, Art. 3.

²³³ (Author translation).

the GG's preamble by stating that the Germans in both parts of Germany have completed Germany's unity, so that the GG now applies to the entire German people. Spectacular in the sense of transferring revolutionary achievements to unified Germany, however, is Article 4(5) UT. It provides for the amendment of the GG by adding, inter alia, a new Article 143(1) GG. According to the new Article 143(1) GG, law in the new states may even violate the GG for a limited period of time—until December 31, 1992—“insofar and as long as a complete adjustment [of the law in the new states] to the order under the GG cannot be achieved due to differing conditions.”²³⁴ The only requirement that deviating law in the new states needed to fulfill was that it must not violate core principles of the basic rights as well as the fundamental principles of federalism, human dignity, democracy, social justice, and the rule of law according to Article 79(3) GG.²³⁵

The most prominent application of the new Article 143(1) GG was the GDR's law on abortion. It is a paradigm example for the UT's function of transferring even those revolutionary achievements to unified Germany that clearly violated the GG at the time. It is also a paradigm example for the UT as a means to unconventionally adapt the GG to the demands of the revolutionary East Germans.²³⁶ A woman's right to abortion had been an important element of the East Germans' revolutionary agenda and part of the principle of individual empowerment.²³⁷ It was a revolutionary achievement that the people of the GDR, as well as the GDR institutions, were determined to preserve.²³⁸ The problem was that under the GG, as interpreted by the BVerfG in its first abortion decision of 1975, the GDR's time-phase model, which gave women the right to have an abortion during the first twelve weeks of the pregnancy, was unconstitutional because it did not sufficiently protect the unborn child.²³⁹ Nevertheless, the new Article 143(1) GG allowed the GDR's time-phase model to remain in force in the new states upon unification until December 31, 1992. Moreover, even though, according to the dominant opinion, unification was about the FRG's law entering into force in the new states as quickly as possible, Article 31(4) UT required unified Germany's legislature to come up with a new, “better” solution to the issue of abortion than was in force in both the GDR and the FRG at the time. Article 31(4)(1) states that

²³⁴ Grundgesetz [GG] [Basic Law] Art. 143(1), translation at http://www.gesetze-im-internet.de/englisch_gg/index.html (author translation).

²³⁵ See Unification Treaty, Art. 4(5)(1).

²³⁶ See Klein, *supra* note 203, at para. 38; Georg Brunner, *Fortgeltung des Rechts der bisherigen DDR*, in Josef Isensee & Paul Kirchhof (eds.), *HANDBUCH DES STAATSRICHTS DER BUNDESREPUBLIK DEUTSCHLAND*, IX, § 210 para. 9 (1997); Rupert Scholz, in Theodor Maunz & Günther Dürig, *GRUNDGESETZ*, Art. 143 GG paras. 11 *et seq.* (62. Auflage 2011).

²³⁷ See WOLFGANG ULLMANN, *supra* note 28, at 50.

²³⁸ *Id.*

²³⁹ See Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], Feb. 25, 1975, *NEUE JURISTISCHE WOHENSCHRIFT* [NJW] 1 BvF 1-6/74, NJW 1975, 573 *et seq.*; Brunner, *supra* note 236, at paras. 9 *et seq.*

[i]t is the task of the all-German legislature, by December 31, 1992 the latest, to adopt a law that better provides for the protection of the unborn life and for the support of pregnant women in finding a solution to their conflict in ways compatible with the constitution, particularly through legally guaranteed claims for women, in particular to counseling and social help, than is the case in both parts of Germany at the moment.²⁴⁰

The FRG, thus, admitted that its own abortion law needed improvement. Article 31(4) UT did not stop there either: its last sentence constituted a violation, not only of the GG as interpreted by the BVerfG at the time, but also of the new Article 143(1) GG.²⁴¹ Article 31(4)(4) UT stated that if unified Germany's legislature was unable to adopt a new abortion law by December 31, 1992, the GDR abortion law remains in force in the new states. That means that, even though the new Art. 143(1) GG declared that GDR law in violation of the GG could only remain in force until December 31, 1992, Art. 31(4)(4) UT nonetheless determined that the GDR's unconstitutional abortion law could remain in force in the new states even beyond that date.²⁴² In fact, the GDR's time-phase model remained in force until June 15, 1993, because the BVerfG, in its second abortion decision of May 28, 1993, introduced its own abortion model and enacted it across unified Germany as of June 16, 1993.²⁴³

To fully understand the truly revolutionary character of these UT provisions on abortion, it must be noted that the new Article 143(1) GG and Article 31(4)(4) UT did not merely violate the GG as interpreted by the BVerfG at the time; they arguably violated the GG's most important and fundamental principle: Human dignity, as stated in Article 1(1) GG.²⁴⁴ The BVerfG, in its first abortion decision of 1975, had held that a time-phase model violates, among others, human dignity as protected by Article 1(1) GG.²⁴⁵ The application of the GDR's time-phase model in the new states upon unification may thus be considered a plain violation of Article 1(1) GG. It may, thus, also be considered a violation of the so-called

²⁴⁰ Unification Treaty, Art. 31(4)(1) (author translation).

²⁴¹ Scholz, *supra* note 236, at para. 12.

²⁴² Brunner, *supra* note 236, at paras. 9 *et seq.*; Scholz, *supra* note 236, at para. 12.

²⁴³ Klein, *supra* note 203, at para. 38; Bundesverfassungsgericht, BVERFGE 88, 203.

²⁴⁴ See Brunner, *supra* note 236, at paras. 9 *et seq.*; Klaus Stern, *Der verfassungsändernde Charakter des Einigungsvertrages*, DEUTSCH-DEUTSCHE RECHTS-ZEITSCHRIFT 289, 291 *et seq.* (1990); Klein, *supra* note 203, at para. 38.

²⁴⁵ See Bundesverfassungsgericht [BVERFG] [Federal Constitutional Court], NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1975, 573, 575; see also Stern, *supra* note 244, at 291, para. 11.

eternity clause of Article 79 (3) GG, which prohibits the amendment of the GG in a way that violates Article 1 GG. Finally, it may be considered a violation of the new Article 143(1) GG, which provided that GDR law that remained in force after unification must not violate the principles included in Article 79(3) GG.

Many violations, indeed, for a treaty that supposedly only aimed at making western law applicable in the east as fast as possible. Whatever one thinks of the UT's unconventional adaptations of the GG, they demonstrate one thing very clearly: German unification was anything but an unconditional adoption of the old GG by the new states. The constitutional changes brought about by the UT were anything but "mere technicalities" to apply western law in the east. To the contrary, abortion is a paradigm example for how the FRG went to great lengths to allow for the transfer to unified Germany of the East Germans' revolutionary achievements, the old FRG's existing constitutional law notwithstanding.²⁴⁶

Another important example of the UT as an unconventional means to transfer revolutionary achievements to unified Germany is Article 31 UT, which gave unified Germany's legislature several assignments aiming at preserving and transferring some of the most important revolutionary achievements. One was the already mentioned assignment to improve the legal treatment of abortion stated in Article 31(4) UT. Another assignment involved the establishment of real-social as opposed to only formal-legal equality for women. Article 31(1) UT states that it is the legislature's task to "further develop legislation on equal rights of men and women." Acknowledging unequal legal and institutional starting positions for fathers and mothers in the job market, Article 31(2) UT states that unified Germany's legislature must shape the law with a view to making family and career compatible. According to Article 31(3) UT, unified Germany's federal government was obliged to participate in financing day care in the former GDR for a transitory period until June 30, 1991. All these provisions reflect the revolutionary principle of real-social equality for women, particularly with respect to the job market.²⁴⁷

Transferring the revolutionary principle of environmental protection to unified Germany, Article 34 UT explicitly states that the protection of nature is the legislature's task.²⁴⁸

²⁴⁶ For the integration of the revolutionary achievement regarding abortion into unified Germany's constitutional order, see Stephan Jaggi, *THE 1989 REVOLUTION IN EAST GERMANY AND ITS IMPACT ON UNIFIED GERMANY'S CONSTITUTIONAL LAW 202 et seq.* (Hart & Nomos, 2016).

²⁴⁷ See *Aide Memoire, On Art. 31 in FISCHER & KÜNZEL, supra* note 102, at Bd. II, 223 *et seq.*, 240 (showing that UT's Aide Memoire states that the goal is to further develop equal rights of the sexes in "all areas of society and life") (author translation).

²⁴⁸ Unification Treaty, Art. 34(1).

Vaguely, but nonetheless in a visible attempt to preserve and transfer revolutionary achievements to unified Germany, Article 5 UT finally states “recommendations” by the GDR and the FRG to unified Germany’s legislature to, within two years, “deal with questions, raised in the context of German unification, of amending and complementing the GG,” in particular “with considerations regarding the introduction of state goals into the GG”.²⁴⁹ In light of the East Germans’ revolutionary constitutional agenda, this was an invitation of unified Germany’s legislature to deal with the revolutionary East Germans’ will to entrench in unified Germany’s constitution social rights, such as rights to labor, decent housing, and social security, as well as environmental protection.²⁵⁰

It, thus, must be concluded that the UT served as an unconventional means to transfer to unified Germany the revolutionary achievements of the new states, liberation, individual empowerment, and environmental protection.

II. State Constitutions

Another way of preserving and transferring revolutionary achievements to unified Germany was to adopt state constitutions for the newly founded states.²⁵¹

The new state constitutions’ suitability for this purpose appears limited at first because their applicability is limited to the respective state. As a matter of principle, federal law, including federal constitutional law, trumps state law.²⁵² Yet, as long as state constitutions grant basic rights that do not contradict the GG, they remain in force.²⁵³ In practice, this means that state constitutions may grant either more or fewer basic rights than the GG. If they grant more rights, they do not contradict the GG. If they grant fewer rights, the citizens are still protected by the rights guaranteed in the GG, which is binding on state institutions.²⁵⁴

State constitutions were nonetheless appropriate instruments for the preservation and transfer of revolutionary achievements for three reasons: (1) the new state constitutions

²⁴⁹ *Id.* Art. 5.

²⁵⁰ See Heitmann, *supra* note 113, at 220–21 (showing that Heitmann denies this and asserts that Art. 5 was only added to the UT because the western SPD and Die Grünen had insisted on it in pursuance of their own political agenda and both parties’ votes were necessary for the 2/3 majority to adopt the UT, a view that contradicts everything Schäuble and de Maiziere have said about the UT).

²⁵¹ For an overview of the new state constitutions, see e.g., HANS VON MANGOLDT, DIE VERFASSUNGEN DER NEUEN BUNDESLÄNDER (1993).

²⁵² GRUNDGESETZ [GG], Art. 31.

²⁵³ *Id.* Art. 142.; see also BODO PIEROTH & BERNHARD SCHLINK, STAATSRECHT II, GRUNDRECHTE, para. 64 (26. Auflage 2010).

²⁵⁴ See *id.*

had the people's support²⁵⁵ and reflect the people's revolutionary achievements; (2) the new state constitutions set valid constitutional law in unified Germany's new states, an important part of unified Germany; and (3) the state constitutions' content may have an impact on federal constitutional law, for example, when the *BVerfG* considers it as a "systematic" argument in its interpretation of the GG.²⁵⁶

East Germans have always felt strong regional loyalties, a feeling which survived the states' effective abolition by the SED regime in 1952.²⁵⁷ The 1989 Revolution reactivated these loyalties, and draft constitutions for the new states started to appear as early as March 1990.²⁵⁸ These drafts already saw the new states as parts of a unified Germany, not as parts of a new GDR.²⁵⁹ The new state parliaments, elected on October 14, 1990—shortly after German unification on October 3, 1990—played the role of constituent state assemblies. Drafting and adopting new state constitutions was one of their most important tasks.

The debates surrounding the drafting processes reflect the constitutions' significance as an instrument for transferring revolutionary achievements to the already existing West German constitutional order. These debates were highly controversial because "a specific East German constitutional consciousness confronted more traditional western views."²⁶⁰ The controversies mostly centered on provisions that were not in the GG but had been in the RTD.²⁶¹ People in the new states wanted "a document that could reflect the history and experience of the 1989 Revolution," while conservative western politicians approached the drafting "principally as a 'legal-technical' problem of conformity with the [West German] Basic Law [GG]."²⁶² Still, and even though four out of five states were governed by the CDU

²⁵⁵ See QUINT, *supra* note 202, at 83, 88, 89 (showing that the constitutions of Brandenburg, Mecklenburg-West Pomerania, and Thuringia were adopted by plebiscites); see *id.* at 79 *et seq.* (showing that the constitutions of Saxony and Saxony-Anhalt were adopted by a 2/3 majority in the respective state parliament after extensive public hearings and discussions); Bremers, *supra* note 100, 160; For a different view, see Heitmann, *supra* note 113, at 226.

²⁵⁶ See PIEROTH & SCHLINK, *supra* note 253, at paras. 62, 63.

²⁵⁷ See QUINT, *supra* note 202, at 74.

²⁵⁸ See Christian Starck, *Die Verfassungen der neuen Länder*, in Josef Isensee & Paul Kirchhof (eds.), *HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND*, IX, § 208 para. 3 (1997) (showing that the first draft constitutions were presented in Saxony in late March 1990, in Saxony-Anhalt on June 29, 1990, and in Thuringia on Aug. 30, 1990); Württenberger, *supra* note 92, at para. 37.

²⁵⁹ See Starck, *supra* note 258, at para. 3.

²⁶⁰ QUINT, *supra* note 202, at 76.

²⁶¹ *Id.* at 77.

²⁶² *Id.* at 86–87.

or CDU-led coalitions, all new state constitutions contain provisions on individual empowerment and environmental protection that parallel both the Social Charter and the RTD. This is also true for the new constitution of the city state of Berlin. Even though Berlin was not considered a “new” state because it resulted from the unification of East and West Berlin, its new constitution is a paradigm example of a state constitution transferring revolutionary achievements to the existing West German constitutional order. The product of this transfer was “a heavily revised constitution for the unified city state.”²⁶³

The new state constitutions reflect liberation in that they basically have adopted the GG’s traditional civil rights, including the freedoms of speech, assembly, profession, and religion.²⁶⁴ Mecklenburg-West Pomerania’s constitution simply refers to the basic rights as listed in the GG.²⁶⁵ All other new states insisted on having their own lists of basic rights in order to explicitly manifest the revolutionary achievement of liberation.²⁶⁶

The principle of individual empowerment is reflected in the new constitutions’ lists of social rights or state goals. For example, Article 7 of the Constitution of Saxony states, that “[t]he state recognizes as a state goal the right of every human being to a life of dignity, particularly rights to labor, appropriate housing, appropriate means of subsistence, social security, and education.”²⁶⁷ Another constitution states that the state is obliged, within the framework of its capacities, to see to the realization of the right to labor,²⁶⁸ to appropriate housing,²⁶⁹ and to social security.²⁷⁰ Moreover, the state is obliged to provide for public education²⁷¹ aimed at developing a free personality that is tolerant, capable of independent thought and action, and that feels responsibility for others.²⁷² In regard to housing, one constitution specifies

²⁶³ Quint, *supra* note 99, at 311.

²⁶⁴ CONST. OF SAXONY, Art. 14-38; CONST. OF BRANDENBURG, Art. 7-24; CONST. OF SAXONY-ANHALT, Art. 4-23; CONST. OF THURINGIA, Art. 1-16, 34, 35, 39.

²⁶⁵ CONST. OF MECKLENBURG-WEST POMERANIA, Art. 5, III.

²⁶⁶ Starck, *supra* note 258, at paras. 56 *et seq.*

²⁶⁷ CONST. OF SAXONY, Art. 7, I (emphasis added); CONST. OF MECKLENBURG-WEST POMERANIA, Art. 17, I-II; CONST. OF BERLIN, Art. 20, I.

²⁶⁸ CONST. OF BRANDENBURG Art. 48, I; CONST. OF SAXONY-ANHALT Art. 39, I; CONST. OF THURINGIA Art. 36.

²⁶⁹ CONST. OF BRANDENBURG Art. 47, I; CONST. SAXONY-ANHALT Art. 40; CONST. OF MECKLENBURG-WEST POMERANIA Art. 17, II; CONST. OF THURINGIA Art. 15.

²⁷⁰ CONST. OF BRANDENBURG Art. 45, I.

²⁷¹ CONST. OF BRANDENBURG Art. 29, II.

²⁷² CONST. OF SAXONY-ANHALT Art. 27, I; CONST. OF BRANDENBURG Art. 28; CONST. OF SAXONY Art. 101, I.

that a tenant may only be evicted from an apartment if a substitute apartment is available.²⁷³ With respect to labor, another constitution stipulates that the state must work to establish more humane labor conditions and promote individual self-fulfillment.²⁷⁴ As part and parcel of the constitutional concept of individual empowerment, all state constitutions provide for the establishment of real-social instead of only formal-legal equality for women. Women not only have the same rights as men but must moreover be provided with equal opportunity as a matter of social reality. It is the state's obligation to work towards that end by practicing affirmative action. Some state constitutions express this obligation in moderate tones by stating, for example, that "[t]he advancement of the legal and factual equal treatment of women and men is the state's task."²⁷⁵ Others are more progressive and detailed, stating that "[m]en and women have equal rights. The state is obliged to make sure, through effective measures, that women and men are treated equally in the fields of occupation, in public life, in education and training, in the family, as well as in the field of social security."²⁷⁶ One provision gives men and women a claim to equal compensation for equal work.²⁷⁷ In some states, as part of the effort to increase real equality, the state is obliged to promote the provision of day care for children²⁷⁸ and the possibility to combine childcare with a professional career.²⁷⁹

By often not strictly differentiating between judicially enforceable individual rights and purely objective, judicially non-enforceable state goals but instead combining the two concepts, new state constitutions contradict West German constitutional doctrine, which strictly distinguishes between individual rights and state goals. This has been met with sheer indignation by West German doctrinalists.²⁸⁰ In fact, however, the new state constitutions' technique of combining the two concepts may serve as more proof of the East Germans' attempt to use state constitutions to transfer revolutionary achievements to the existing West German constitutional order. As reflected in the Social Charter and the RTD, the revolutionary East Germans originally wanted social rights in their most effective form,

²⁷³ CONST. OF BRANDENBURG Art. 47, II.

²⁷⁴ CONST. OF SAXONY-ANHALT Art. 39, II.

²⁷⁵ CONST. OF SAXONY Art. 8.

²⁷⁶ CONST. OF BRANDENBURG Art. 12, III. For similar provisions, see the CONST. OF SAXONY-ANHALT, Art. 34; MECKLENBURG-WEST POMERANIA, Art. 13; THURINGIA, Art. 2 II; and BERLIN Art. 10 III.

²⁷⁷ CONST. OF BRANDENBURG Art. 48, III.

²⁷⁸ CONST. OF THURINGIA Art. 19, III.

²⁷⁹ CONST. OF BERLIN Art. 12, VII.

²⁸⁰ Starck, *supra* note 258, at paras. 58 *et seq.*; Bremers, *supra* note 100, at 153 *et seq.*

namely as judicially enforceable individual rights.²⁸¹ However, confronted with the old FRG's constitutional order, which does not include explicit social rights and considers the social-state clauses contained in Article 20(1) and Article 28(1) GG objective state-goal provisions,²⁸² some new state constitutions decided to grant individual rights as state goals. For example, Article 7 of the Saxon Constitution states that "[t]he state recognizes *as a state goal* the right of every human being to a life in dignity."²⁸³ That an "individual right" may be recognized as a "state goal" is unthinkable for West German doctrinalists, for whom something is either an individual right or a state goal but not both.²⁸⁴ Viewed in the light of revolutionary reform, however, the combination of both concepts may be yet another unconventional attempt to transfer the revolutionary achievement of social rights to an existing constitutional order that only knows social state goals. An "individual right as a state goal" may be an attempt to combine the two concepts in order to increase the weight of social rights without overstating it. In the process of weighing conflicting constitutional principles against each other, an "individual right as a state goal" could weigh heavier than a simple state goal but could nevertheless be judicially non-enforceable. From this perspective, combining the two concepts may be seen as enriching western constitutional doctrine instead of violating or ignoring it.

Finally, it is the revolutionary achievement of constitutional environmental protection that state constitutions have taken up as state goals. In addition to making environmental protection a state obligation,²⁸⁵ some state constitutions grant "acknowledged environmental groups" the right to participate in administrative proceedings and oblige states to give them the right to sue in environmental cases.²⁸⁶ Some constitutions grant an individual right to receive environmental data concerning the individual's living environment.²⁸⁷

²⁸¹ *Supra*, at 595, 596.

²⁸² *See, e.g.*, KONRAD HESSE, *GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND*, para. 208 (20. Auflage 1999).

²⁸³ CONST. OF SAXONY Art. 7, I (emphasis added); CONST. OF MECKLENBURG-WEST POMERANIA Art. 17, I-II; CONST. OF BERLIN Art. 20, I.

²⁸⁴ Starck, *supra* note 258, at paras. 58 *et seq.*; Bremers, *supra* note 100, at 153 *et seq.*

²⁸⁵ *See, e.g.*, CONST. OF SAXONY Art. 10, I; CONST. OF BRANDENBURG Art. 39, I; CONST. OF SAXONY-ANHALT, Art. 2, I; CONST. OF MECKLENBURG-WEST POMERANIA Art. 12.

²⁸⁶ CONST. OF SAXONY Art. 10 II; CONST. OF BRANDENBURG Art. 39, VIII (containing provisions that go back to Art. 33 (3) of the RTD).

²⁸⁷ CONST. OF BRANDENBURG Art. 39, VII; CONST. OF SAXONY-ANHALT Art. 6, II; CONST. SAXONY Art. 34; CONST. OF THURINGIA Art. 33.

This part of the Article discussed how the East Germans used both the UT and the new state constitutions as legal instruments to preserve and transfer to unified Germany their revolutionary achievements of liberation, individual empowerment, and environmental protection. The fact that the UT amended the GG and called for further amendments of both the GG and other laws of the FRG in the light of revolutionary achievements refutes the dominant opinion that the FRG's constitutional order was unconditionally adopted by the new states. The same is true for the new state constitutions, which include principles of individual empowerment and environmental protection that clearly transcend the GG.

E. Conclusion

The goal of this Article was to reinterpret the 1989 Revolution and its constitutional meaning in order to keep both from being forgotten. According to Arendt, the danger of forgetting important historical events is twofold: One is that the truth, manifest in historical facts, will eventually disappear if the facts are no longer remembered.²⁸⁸ The other is that the meaning of a historical event cannot even begin to materialize without remembrance.²⁸⁹

The 1989 Revolution in the GDR is one of the most important historical events in recent German history. Yet, it is hardly talked about in terms of constitutional law. The dominant opinion in Germany reduces its meaning to bringing about German unification through an unconditional adoption of the West German GG by the East German states. This understanding furthers the forgetting of the 1989 Revolution and its constitutional meaning. This Article has demonstrated that the dominant opinion is wrong and that the 1989 Revolution brought about constitutional principles that went beyond the West German GG and were successfully preserved and transferred to unified Germany. These historical facts must not be forgotten because they will help us to better understand unified Germany's constitutional law.²⁹⁰

²⁸⁸ See ARENDT, *supra* note 26, at 25 (stating that "facts . . . do not disappear when historians or sociologists refuse to learn from them, though they may when everybody has forgotten them").

²⁸⁹ For Arendt's concepts of truth and meaning, see HANNAH ARENDT, *THE LIFE OF THE MIND, PART ONE/THINKING, PART TWO/WILLING*, 53 *et seq.*, 57 *et seq.* (1978).

²⁹⁰ For an analysis of the 1989 Revolution's impact on unified Germany's constitutional law, see STEPHAN JAGGI, *THE 1989 REVOLUTION IN EAST GERMANY AND ITS IMPACT ON UNIFIED GERMANY'S CONSTITUTIONAL LAW* (Hart & Nomos, 2016).