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# Revolutionary Reform in German Constitutional Law

BY STEPHAN JAGGI<sup>1</sup>

## Introduction

In his article “Three Paths to Constitutionalism – and the Crisis of the European Union” Bruce Ackerman argues that the Federal Republic of Germany stands for a way to constitutionalism in which “ordinary citizens remain passive while political and social elites construct a new constitution”.<sup>2</sup> Ackerman calls this model “elitist constitutionalism”<sup>3</sup> and distinguishes it from two other models, the *revolutionary model* where successful revolutionary outsiders embed their revolutionary principles in a new constitution, and the *insider model* in which pragmatic insiders undermine revolutionary movements by enacting landmark reform legislation that brings about fundamental change but keeps the insiders in power.<sup>4</sup> The German Federal Constitutional Court (BVerfG), according to Ackerman, has contributed to resolving the German Constitution’s legitimacy problem not by referring to revolutionary achievements of the constitutional past but by projecting itself “as the preeminent guardian of Germany’s post-1945 foundational commitments.”<sup>5</sup>

My thesis is that, since German unification in October 1990, this diagnosis of constitutionalism in Germany is only partly true. I will show

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1. Associate Professor of Law, Peking University School of Transnational Law, and formerly a Judge at the Supreme Court of the State of Schleswig-Holstein/Germany. The topic of this article is part of a broader analysis of the East German 1989 Revolution and its 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 and Nomos, 2016)

2. Bruce Ackerman, *Three Paths to Constitutionalism – and the Crisis of the European Union*, B.J.Pol.S. 45, 705 (2015).

3. *Id.*, at 707.

4. *See id.*, at 707 et seq.

5. *Id.*, at 711.

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that, in the wake of German unification, the BVerfG acted within Ackerman's *revolutionary model* and did refer to revolutionary achievements of the constitutional past. Contrary to Ackerman's evaluation, the Court engaged in what I call "revolutionary reform" of German constitutional law by taking up revolutionary constitutional achievements of the East German 1989 Revolution and integrating them into the existing constitutional order under the West German Basic Law (Grundgesetz; GG). It is through revolutionary reform, I will argue, that the BVerfG has brought important change to unified Germany's constitutional law.

It is right that popular sovereignty did not amount to more than idle talk during the adoption of the GG in 1949. Since then, the West German party system has successfully kept democracy strictly representative and has reduced the people's political role to that of voters on Election Day. The East German 1989 Revolution, however, confronted Germans with a completely new political experience: popular sovereignty can work, not only as a theoretical concept to legitimize the existing political order but as a practical experience of political action. I have shown elsewhere that East Germans with their 1989 Revolution not only abolished a party dictatorship and threw open the door to German unification. They adopted an own set of constitutional principles and succeeded in transferring at least some of these principles to unified Germany.<sup>6</sup> In this article, I will demonstrate how unified Germany's institutions in general and the BVerfG in particular integrated these principles into the existing constitutional order under the GG in acts of revolutionary reform.

After briefly summarizing the East German revolutionaries' constitutional achievements and their transfer to unified Germany, I will first give a brief overview of how unified Germany's legislature mostly failed at integrating these achievements into unified Germany's constitutional order. One exception to this rule is the principle of constitutional environmental protection, which the legislature integrated successfully. A case analysis will then show how it was primarily the BVerfG who used constitutional interpretation as a means to successfully integrate revolutionary achievements into the existing constitutional order under the GG and bring some important change to Germany's constitutional law.

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6. Stephan Jaggi, *Revolutionary Constitutional Lawmaking in Germany - Rediscovering the German 1989 Revolution*, 17 GERMAN L.J. 579 (2016).

## A. Revolutionary Achievements and their Transfer to Unified Germany

As I have elaborated elsewhere, the East Germans used their revolution to develop a distinct constitutional agenda the core elements of which may be summarized as individual empowerment and environmental protection.<sup>7</sup> Individual empowerment stands for a set of constitutional social rights and principles that seek to realize individual rights—to make them a social reality rather than merely a formal legal position. For example, the revolutionaries demanded a right to decent housing, a right to labor, free access to public education, and a right to a system of social security aimed at enabling people to live a life of equal opportunity and independence. They, moreover, called for real equality for women, for example through a government obligation to promote equal treatment of women on the job and in public life, in education, in the family, and in the field of social security, as well as a right to a “self-determined pregnancy” and a government obligation to protect the unborn life through public welfare.<sup>8</sup> Constitutional environmental protection establishes constitutional government obligations to protect the environment and provide individual rights to that effect. For example, the revolutionaries demanded a constitutional obligation of the government and all citizens to protect the natural environment as a “foundation of life for present and future generations”.<sup>9</sup> The government’s environmental policy must prevent damage to the environment and make sure that natural resources are used moderately, and everybody who claims that her health is endangered by environmental destruction shall have a right of access to environmental data of her living environment.<sup>10</sup>

In a next step, the revolutionaries used the so-called Unification Treaty (UT)<sup>11</sup>, a treaty that the first freely elected East German government entered into with the West German government that determined the conditions of German unification, as well as the constitutions of the newly established East German states to transfer these principles to unified Germany.<sup>12</sup>

Once transferred, the traditional and most obvious way of integrating

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7. See Jaggi, *supra* note 6, 582 et seq., 585 et seq., 595 et seq.

8. *Id.* at 597.

9. *Id.*

10. *Id.*

11. The Treaty’s official name is *Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands - Einigungsvertrag* - v. 31. August 1990 (BGBl II S. 889).

12. For a detailed analysis, see *Id.*, at 612 et seq.

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revolutionary achievements into the existing West German constitutional order under the GG was to either amend the GG or to adopt a completely new constitution. These were the two options referred to in Art. 5 UT, which “recommended” that, within two years after unification, the “legislative institutions of unified Germany” deal with questions of amending or complementing the GG that were raised “in the context of unification”. Art. 5 UT listed particular questions the legislature was encouraged to tackle, such as the question of adding state-goal provisions to the GG and the question of adopting a new constitution through a plebiscite.<sup>13</sup>

It soon became clear, however, that unified Germany’s federal legislature was reluctant to touch the GG. Since amending the GG requires a 2/3 majority in both chambers of the federal legislature, conservatives managed to prevent many of the changes referred to in the UT. Yet, where the legislature failed, the BVerfG stepped in and integrated revolutionary achievements into the existing West German constitutional order through constitutional interpretation.

In what follows, I will first briefly summarize the legislature’s mostly futile attempts to integrate revolutionary achievements into unified Germany’s constitutional order in order to then show where and how the BVerfG mastered the integrative challenge.

## **B. Integration Through the Legislature**

Most authors argue that the legislature was completely free in deciding whether or not to follow Art. 5 UT’s “recommendations” to deal with questions of amending the GG in order to integrate revolutionary achievement.<sup>14</sup> They, moreover, argue that any change of the existing constitutional order, including the decision to adopt a new constitution through a plebiscite, had to be made in compliance with the GG and thus required a 2/3 majority in both chambers of the federal legislature.<sup>15</sup> Facing a conservative majority in the Bundestag<sup>16</sup>, the chances for constitutional change through the legislature were low.

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13. *See* Art. 5 UT.

14. *See* Klaus Stern, Die Wiederherstellung der staatlichen Einheit, in: Klaus Stern & Bruno Schmidt-Bleibtreu (eds.), *Verträge und Rechtsakte zur Deutschen Einheit*, Band 2: *Einigungsvertrag und Wahlvertrag*, 3, 47 (1990) with further references.

15. *See id.* at 47 et seq. with further references.

16. The German federal legislature consists of two chambers, the Bundestag which is the federal parliament, and the Bundesrat which is the chamber representing the state governments.

The federal legislature started several initiatives to pursue the task embedded in Article 5 UT. The most serious one was the so-called “Board of Trustees for a democratically constituted Federation of German States” (“Kuratorium für einen demokratisch verfaßten Bund deutscher Länder”) (Kuratorium),<sup>17</sup> a citizens’ initiative founded in Berlin on June 16, 1990 and consisting of 200 members with different backgrounds from East and West Germany.<sup>18</sup> The Kuratorium’s goal was to call a Constitutional Convention to draft a new constitution for unified Germany, which should then be put to a plebiscite by the German people.<sup>19</sup> The Kuratorium produced a draft constitution<sup>20</sup> that clearly reflected revolutionary achievements by promoting individual empowerment through social rights (rights to labor, social security, and housing),<sup>21</sup> affirmative action for women, and a right to abortion and well as environmental protection by placing “the conservation of nature” for present and future generations as well as “nature in its own right” under particular protection.<sup>22</sup> The Draft was presented to the public on June 16, 1991, in Frankfurt, but then died a silent death because of its inability to muster the necessary 2/3 majority in the federal legislature necessary to put it to a plebiscite.

The next initiative was undertaken by the Bundesrat who established a “Commission Constitutional Reform of the Bundesrat” (“Kommission Verfassungsreform des Bundesrates”) consisting of representatives of all 16 states.<sup>23</sup> The Commission proposed to add to the GG environmental protection as a goal to be pursued by the government<sup>24</sup> but was unable to agree on anything with respect to social rights or equality for women.<sup>25</sup>

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17. For an overview of the Kuratorium and its work, see Gerald Häfner, *Denkschrift zum Verfassungsentwurf des Kuratoriums für einen demokratisch verfassten Bund deutscher Länder*, in: Erich Fischer & Werner Künzel (eds.), *Verfassungsdiskussion und Verfassungsgebung 1990 bis 1994 in Deutschland, Kommentare und Dokumente*, Band I, 53 et seq. (2005); Bernd Guggenberger & Ulrich Preuß & Wolfgang Ullmann (eds.), *Eine Verfassung für Deutschland* (1991).

18. See Erich Fischer, *Vom Runden Tisch zum Grundgesetz*, in: Fischer & Künzel, *supra* note 17, 36.

19. See *id.* at 57 et seq.

20. See The Kuratorium’s Draft Constitution of June 29, 1991 (Kuratorium’s Draft), reprinted in: Fischer & Künzel, *supra* note 17, Band II, 259 et seq.

21. See Art. 12a, 12b, and 13a Kuratorium’s Draft.

22. See Art. 20a Kuratorium’s Draft; Häfner, *supra* note 17, 62, 74, 75.

23. For this and the following, see Fischer, *supra* note 18, 48.

24. See Bericht der Kommission Verfassungsreform des Bundesrates of May 14, 1992, reprinted in: Fischer & Künzel, *supra* note 17, Band II, 420 et seq., 451.

25. *Id.* at 444 et seq., 450 et seq.

Finally, Bundestag and Bundesrat decided to establish a joint commission, the so-called Joint Constitutional Commission (Gemeinsame Verfassungskommission, GVK) to tackle Art. 5 UT's "recommendations". It consisted of 64 representatives, 32 from each chamber,<sup>26</sup> only eleven of which were East Germans.<sup>27</sup> From the outset the GVK emphasized that its task was not only Art. 5 UT but more generally to "examine the constitutional questions regarding the necessity to amend the GG that had come up in the political discussion".<sup>28</sup> The GVK, too, operated under a 2/3 majority requirement to adopt any proposals, and despite the fact that social rights, such as labor, housing, and social security mustered majorities in the GVK they could not overcome the 2/3-hurdle.<sup>29</sup> Most of the GVK's proposals were thus related to furthering Germany's European integration and to improving the relationship between the federal government and the states.<sup>30</sup> Still, the GVK succeeded in making two proposals with respect to integrating revolutionary achievements. It proposed to add to the GG (i) a state goal of environmental protection and (ii) a new sentence to Art. 3 II GG according to which the government furthers the implementation of equal rights for women and men and promotes the removal of existing disadvantages.<sup>31</sup> Based on these proposals the federal legislature on September 23, 1994 adopted the following amendments to the GG:<sup>32</sup>

Art. 3 II, 2 GG: The government shall promote the implementation of

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26. See Eckart Busch, *Die Gemeinsame Verfassungskommission von Bundestag und Bundesrat - eine neuartige Institution in der 12. Wahlperiode*, in: Fischer & Künzel, *supra* note 17, 96 et seq.

27. This is pointed out by Hans-Jochen Vogel in a speech during the meeting of the Bundestag on Feb. 4, 1994; see the Stenographic Report of the meeting, reprinted in: Fischer & Künzel, *supra* note 17, Band II, 694 et seq. (701).

28. See GVK Report, in: Fischer & Künzel, *supra* note 17, Band III, 522; the original reads: "Sie [the GVK] sah es auch als ihre Aufgabe an, in der politischen Diskussion aktuell gewordene verfassungsrechtliche Fragen im Hinblick auf die Notwendigkeit einer Änderung des Grundgesetzes zu untersuchen."

29. See GVK Report, in: Fischer & Künzel, *supra* note 17, Band III, 589; Peter Quint, *The Imperfect Union*, Constitutional Structures of German Unification, 117 (1997).

30. For a list of the amendments to the GG proposed by the GVK, see Recommendations of the Common Constitutional Commission on Changing and Complementing the Grundgesetz, reprinted in: Fischer & Künzel, *supra* note 17, Band III, 684 et seq. For the extended version of the GVK recommendations, including annotations, see GVK Report, in Fischer & Künzel, *supra* note 17, Band III, 527 et seq.

31. Fischer & Künzel, *supra* note 17, at 684.

32. September 23, 1994 is the day on which the Bundesrat accepted the GG-amending law as adopted by the Bundestag on September 6, 1994; see *Beschluß des Bundesrates v. 23.09.1994*, reprinted in: Fischer & Künzel, *supra* note 17, Band III, 1002. For the GG-amending law, see *BGBI I 1994*, 3146.

equal rights for women and men and take steps to eliminate existing disadvantages;

Art. 20a GG: Mindful of its responsibility towards future generations, the government shall protect the natural foundations of life by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.<sup>33</sup>

East Germans were disappointed with these results. Roland Resch, for example, Minister from the East German state of Brandenburg, complained that revolutionary experiences demands had not been sufficiently taken into account.<sup>34</sup> Konrad Elmer complained that the debate within the GVK had been neither sufficiently public nor sufficiently open to new arguments and that East German concerns had not sufficiently been considered.<sup>35</sup> But also the West German Hans-Jochen Vogel complained that the changes were minimal and signified a missed opportunity to modernize and improve the GG.<sup>36</sup> Conservatives, on the other hand, welcomed the lack of major change.<sup>37</sup>

Despite many revolutionaries' disappointment, I think that the new Article 20a GG must be considered a successful integration into the GG of the revolutionary demand for constitutional environmental protection.

As regards Art. 20a GG's content, it is undisputed that it establishes environmental protection as an objective constitutional goal, not as a subjective individual right.<sup>38</sup> As such, it is binding on all governmental institutions but does not grant an individual right to bring a law suit based on the claim that Art. 20a GG has been violated. It is also uncontroversial that

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33. This version entered into force on Nov. 15, 1994. The state goal of animal protection was added in 2002 (BGBl I 2002, 2862); see Rupert Scholz, in Theodor Maunz & Günther Dürig, Grundgesetz, Art. 20a, para. 1 (62 ed. 2011).

34. See Resch, in: GVK Final Session Protocol, in: Fischer & Künzel, *supra* note 17, Band II, 508, 509.

35. See Elmer, in: GVK Final Session Protocol, in: Fischer & Künzel, *supra* note 17, Band II, 509.

36. Hans Jochen Vogel, Aus dem Wesen nichts Neues, *Neue Justiz (NJ)*, 145 et seq., 149 (1994).

37. See the statements of CDU/CSU and FDP representatives, in: GVK Final Session Protocol, in: Fischer & Künzel, *supra* note 17, Band II, 494 et seq. and in: Stenographic Report of the 209. Meeting of the Bundestag on Feb. 4, 1994, in: Fischer & Künzel, *supra* note 17, Band III, 694 et seq.; from the literature, see, for example, Josef Isensee, Mit blauem Auge davongekommen - das Grundgesetz - Zu Arbeit und Resultaten der Gemeinsamen Verfassungskommission, *Neue Juristische Wochenschrift (NJW)* 1993, 2583, 2584; Quint, *The Imperfect Union*, *supra* note 28, 116.

38. See for this and the following Scholz, *supra* note 33, Art. 20a, para. 32 et seq. with further references.

Art. 20a GG marks the first time that the GG includes an explicit state goal of environmental protection.<sup>39</sup>

Conservatives hold the view that Art. 20a GG's adoption was, regardless of its outward connection with Art. 5 UT, "not really caused by unification" and had no "immediate-substantive relation" with it.<sup>40</sup> They deny any meaningful connection between the 1989 Revolution, unification, and the introduction of environmental protection into the GG. Instead, they to explain Art. 20a GG as the product of a constitutional debate that had been going on in West Germany for many years.<sup>41</sup> This opinion's bottom line is that all political parties in West Germany agreed on constitutional environmental protection; it only took them until 1994 to finally find a common formulation and adopt the new Art. 20a GG.<sup>42</sup>

I think that this is wrong. Emphasizing the deep roots of constitutional environmental protection in West German political discourse, conservatives are unable to answer an important question: Why had West German parties been unable to agree on constitutional environmental protection prior to German unification, but were able to adopt Art. 20a GG in 1994 four years after German unification as the result of a constitutional debate based on Art. 5 UT?

Most authors avoid that question.<sup>43</sup> One author at least concedes some correlation between Art. 20a GG, the 1989 Revolution, and German unification. Michael Kloepfer writes that "[w]ith unification the climate with respect to constitutional amendments at the federal level changed, particularly regarding environmental protection . . . ." He, moreover, refers to the fact that both the Treaty on the Currency, Economic, and Social Union and the UT stipulated environmental protection as a goal of unified Germany.<sup>44</sup> Kloepfer considers this an acknowledgement of "the outstanding role that citizens' and environmental groups had played in overthrowing the

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39. *Id.* para. 30.

40. *See* Rupert Scholz, *supra* note 33, Art. 20a para. 1.

41. *See* Scholz, *supra* note 33, Art. 20a paras. 3 et seq.

42. *See* Scholz, *supra* note 33, Art. 20a paras. 19 et seq., 25; Nicolai Müller-Bromley, *Verfassungsentwicklung zum Umweltschutz in Deutschland 1990-1194*, in: Fischer & Künzel, *supra* note 17, 269 et seq.

43. Scholz, for example, does not say a word as to *why* an agreement had finally become possible; *see* Scholz, *supra* note 33, Art. 20a GG; similarly Müller-Bromley, *supra* note 42, 267 et seq.

44. Michael Kloepfer, in: Rudolf Dolzer & Wolfgang Kahl & Christian Waldhoff et al. (eds.), *Bonner Kommentar zum Grundgesetz*, 116. Aktualisierung, April 2005, Art. 20a para. 7; also Michael Kloepfer, *Umweltschutz als Verfassungsrecht: Zum neuen Art. 20 a GG*, *Deutsches Verwaltungsblatt (DVBl)* 1996, 73.

GDR regime”.<sup>45</sup> He hints at “political pressure” on unified Germany’s federal legislature, which had increased in the aftermath of unification and speculates that the legislature saw constitutional environmental protection as a chance to lend some “glamour” to the otherwise “dry” project of reforming the GG.<sup>46</sup>

I want to provide a more specific and a more specifically constitutional explanation. My thesis is that Art. 20a GG is the result of a popular mandate that the revolutionary East Germans had given unified Germany’s legislature. Environmental protection featured prominently on the revolutionaries’ constitutional agenda, it was transferred to unified Germany, and the new Art. 20a GG integrated it into the existing GG.

The East German citizens’ movements had made environmental protection an important goal of the new government they had wanted to establish through their peaceful revolution.<sup>47</sup> That can already be seen in the citizens’ movements’ “Call for an independent GDR”, published in November 1989. The call mentioned environmental protection right next to revolutionary goals, such as peace, individual freedom, and social justice.<sup>48</sup> Reconciling a market economy with democracy, individual rights, social justice, and environmental protection had been at the heart of the citizens’ movements’ constitutional agenda.<sup>49</sup> Environmental protection groups had been among the first opposition groups in the GDR in the 1980s.<sup>50</sup>

The *people in the streets* had adopted environmental protection as an important constitutional goal of their Revolution. Pictures of Monday demonstrations in Leipzig, for example, show banners warning against “progress without ecology” and “ecological death” and demanding “more ecology in industry and the agrarian economy” right next to banners calling for the SED government’s resignation, free elections, and German unification.<sup>51</sup> Tetzner, a regular participant in these demonstrations, writes that “the stinking rivers” and “the often toxic air in the city” were among the

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45. Klopfer, in: Dolzer & Kahl & Waldhoff et al. (eds.); *supra* note 44, Art. 20a para. 7; GDR stands for “German Democratic Republic”, East Germany’s name prior to German unification.

46. *Id.*

47. *See* Jaggi, *supra* note 6, 583 et seq., 587.

48. *Id.* at 585.

49. *Id.* at 583 et seq.

50. *See* Rainer Tetzner, *Leipziger Ring, Aufzeichnungen eines Montagsdemonstranten 1989/90*, 53 (2004).

51. These banners are visible on pictures of Monday demonstrations in Leipzig on display in Zeitgeschichtliches Forum Leipzig, Grimmaische Strasse 6, 04109 Leipzig.

demonstrators' major concerns.<sup>52</sup>

The revolutionaries' early efforts at drafting a new constitution for East Germany featured a modernized individual rights catalogue including, among other things, environmental protection.<sup>53</sup>

East Germany's first freely elected government, too, had emphasized its commitment to environmental protection by formulating the goal of establishing an ecologically responsible social market economy and presenting environmental protection as a key element of a planned economic cooperation with West Germany and the European Community.<sup>54</sup>

Art. 5 and 34 UT as well as the new state constitutions had transferred the revolutionary achievement of constitutional environmental protection to unified Germany.<sup>55</sup>

Against this background, the revolutionary East Germans had given unified Germany's federal legislature a clear mandate to introduce environmental protection into the GG; the West Germans had agreed by signing the UT. Viewed from this perspective, the fact that controversies that had prevented the introduction of environmental protection into the GG for more than 20 years could be overcome in 1994 acquires a new meaning. What conservatives try to present as the result of pure chance or "political pressure" starts to appear as a legislative act of integrating the revolutionary achievement of constitutional environmental protection into the existing constitutional order under the GG.

Signs of this integrative effort are visible in the text of the new Art. 20a GG. The responsibility for "future generations" is a clear reference to the revolutionaries' early draft constitution, the so-called Round Table Draft (RTD), which was the first constitutional document in Germany to refer to "future generations" in connection with environmental protection.<sup>56</sup> As a result of integration, the revolutionaries' original demand for a judicially enforceable constitutional right to environmental protection (as expressed in the constitutional right to information about environmental data and in the

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52. Tetzner, *supra* note 50.

53. See Jaggi, *supra* note 6, 597.

54. See Government Declaration delivered by Minister President Lothar de Maiziere to the GDR Parliament (Volkskammer) on Apr. 19, 1990, published as CDU Texte 3/90 by the Geschäftsstelle des Parteivorstandes der Christlich-Demokratischen Union Deutschlands (CDU), Charlottenstrasse 53/54, Berlin 1086, p. 11.

55. See Jaggi, *supra* note 6, 620. Art. 16 of the Treaty on the Establishment of a Currency, Economic, and Social Union of May 18, 1990, had already stipulated environmental protection as a goal of the contracting parties (i.e., the GDR and West Germany). Referring to this Art. 16, Art. 34 UT states that environmental protection is the legislature's task.

56. See Art. 33 (1) RTD; Jaggi, *supra* note 6, 596; Müller-Bromley, *supra* note 42, 268.

right of environmental groups to bring law suits)<sup>57</sup> has given way to environmental protection as a purely objective government goal. There is no doubt that the new Art. 20a GG's text reflects a "formula compromise" that enables the political opponents to interpret it in a way that it says whatever they want it to say.<sup>58</sup> Still, Art. 20a GG manifests the revolutionary achievement of constitutional environmental protection in an explicit provision of the GG for the first time in the GG's history. It is thus more meaningfully described as a successful legislative act of integrating a revolutionary constitutional achievement than as political happenstance.

The success with respect to environmental protection, however, must not obscure the fact that the legislature mostly failed in its attempts to integrate transferred revolutionary achievements into unified Germany's constitutional order. This is why the BVerfG stepped in and took over the integrative function. In what follows I will explain major BVerfG decisions in the aftermath of German unification neither doctrinally nor as acts of judicial politics but as attempts to integrate revolutionary achievements into the existing constitutional order under the GG through constitutional interpretation.

### C. Integration Through the BVerfG

In the aftermath of German unification, the BVerfG decided a number of major cases that mark clear changes compared to what the Court had been saying prior to unification. All changes are related to topics that featured prominently on the 1989 Revolution's constitutional agenda. It started with *Bodenreform I*<sup>59</sup> in 1991, where the Court upheld the confirmation of the so-called *Bodenreform*-expropriations in Art. 143 III GG. Then came *Nacharbeit*<sup>60</sup> in 1992, where the Court established a government obligation to realize equality for women two years before the legislature managed to confirm that obligation in the new Art. 3 II, 2 GG. It followed *Abortion II*<sup>61</sup>

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57. See Art. 33 (3) RTD and some of the new states' constitutions, see Jaggi, *supra* note 6, 625.

58. That is particularly conspicuous in Scholz's annotation of Art. 20a GG, where Scholz tries to interpret an anthropocentric orientation as well as a "Gesetzgebungsvorbehalt" into the provision, even though these were the points on which the CDU had compromised; see Scholz, *supra* note 33, Art. 20a paras. 38 et seq. and 41 et seq.

59. BVerfG Urteil v. 23.04.1991, 1 BvR 1170, 1174, 1175/90; *NJW* 1991, 1597 et seq.

60. BVerfG Urteil v. 28.01.1992, 1 BvR 1025/82, 1 BvL 16/83, 1 BvL 10/91, BVerfGE 85, 191-214; see *infra*, 249 et seq.

61. BVerfG, Urteil v. 28.05.1993, 2 BvF 2/90, 2 BvF 4/92, 2 BvF 5/92, *NJW* 1993, 1751 et seq.; see *infra*, 273 et seq.

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in 1993, which gave up the requirement of criminal punishment of abortions during the first twelve weeks of the pregnancy after counseling. Finally, also in 1993, the Court introduced the protection of a tenant's right to ownership in the rented apartment as property under Art. 14 I, 1 GG.<sup>62</sup>

In all these cases, most authors have either denied any changes or have tried to explain them either doctrinally or as acts of judicial politics. This is what I want to call the traditional understanding of the cases. My thesis is that the traditional understanding overlooks the 1989 Revolution as an event with a substantial meaning for unified Germany's constitutional law. I will argue that the Court's decisions are more realistically and more meaningfully explained as acts of integrating revolutionary achievements into the existing constitutional order under the GG through constitutional interpretation.

### I. *Bodenreform*

One of the most hotly debated topics of German unification was the treatment of expropriations<sup>63</sup> initiated by the Soviet occupying force on the territory of the Soviet occupation zone (later the GDR) between 1945 and 1949 (the so-called *Bodenreform*-expropriations, or *Bodenreform*).<sup>64</sup>

Viewing the big landowners in East Germany (the so-called Junkers) as pillars of the Nazi regime, the Soviet Union wanted to fundamentally restructure German society in the occupied territory after the end of World War II. One means to this end was what came to be known as the

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62. BVerfG, Beschluss v. 26.05.1993, 1 BvR 208/93, BVerfGE 89, 1-14; *see infra*, 297 et seq.

63. Many authors think the term "expropriations" does not properly describe the facts of the case. Such authors argue that expropriations are governmental takings for the common good while the *Bodenreform*-takings were directed against a specific class of property holders for political reasons. They were thus "confiscations"; *see*, for example, Hans-Jürgen Papier, Verfassungsrechtliche Probleme der Eigentumsregelung im Einigungsvertrag, *Neue Juristische Wochenschrift (NJW)* 1991, 193, 194; Hartmut Maurer, Die Eigentumsregelung im Einigungsvertrag, *Juristenzeitung (JZ)* 1992, 185; Otto Kimminich, Auswirkungen des Einigungsvertrags auf die Eigentumsgarantie des Grundgesetzes, in: Jörn Ipsen et al. (eds.), *Verfassungsrecht im Wandel* (1995), 82; Günther Felix, Vielleicht eine verdeckte Junkerabgabe, *Neue Juristische Wochenschrift (NJW)* 1995, 2697. I use the term "expropriations" because that is the term the Court used.

64. The official name of these expropriations is: "Enteignungen auf besatzungsrechtlicher bzw. besatzungshoheitlicher Grundlage (1945 bis 1949)"; *see* Gemeinsame Erklärung der Regierungen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik zur Regelung offener Vermögensfragen vom 15 Juni 1990 (Joint Declaration), reprinted in: Stern & Schmidt-Bleibtreu, *supra* note 14, 823 et seq. (indent No. 1 on p. 823).

*Bodenreform*: the expropriation of both every estate exceeding 100 hectares (approximately 250 acres) as well as the property of everyone who was suspected to have supported the Nazis.<sup>65</sup> 3.2 million hectares, or one third of the available agricultural lands in the GDR, were thus expropriated.<sup>66</sup> Peter Quint writes that “[m]any owners were forced to leave their property on a few days’ notice taking only the possessions that they could carry with them.”<sup>67</sup> The expropriated owners were not compensated in the East, but those who made it to the West received compensatory payments from the West German government.<sup>68</sup> Expropriated property was distributed, mostly in small plots of seven to nine hectares, among former landless peasants, workers, and refugees from the territories east of the Oder-Neisse line. As a result of the *Bodenreform*, around 550,000 people received around 2.2 million hectares of land.<sup>69</sup>

When German unification was on the horizon in early 1990, expropriated owners of *Bodenreform*-property began to lobby for a return of expropriated property.<sup>70</sup> They were supported by the West German government, who wanted to undo these expropriations to the extent possible. The GDR government, on the other hand, worried about the rights of those who had received expropriated lands. This prevented an agreement on property matters in the *Treaty on the Currency, Economic, and Social Union* of May 18, 1990.<sup>71</sup> On June 15, 1990, however, the governments of East and West Germany signed a “Joint Declaration on the Regulation of Open Property Questions” (Joint Declaration),<sup>72</sup> declaring *Bodenreform*-expropriations irreversible and determining that a future legislature of unified Germany may decide on possible “governmental compensatory

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65. I have taken this and the following from Quint, *The Imperfect Union*, *supra* note 28, 125.

66. See Annex III to the UT, with annotations by Schmidt-Bleibtreu, in: Stern & Schmidt-Bleibtreu, *supra* note 14, 826.

67. Quint, *The Imperfect Union*, *supra* note 28, 125.

68. The payments were based on the “Lastenausgleichsgesetz”; see Quint, *The Imperfect Union*, *supra* note 28, 125.

69. See Annex III to the UT, with annotations by Schmidt-Bleibtreu, in: Stern & Schmidt-Bleibtreu, *supra* note 14, 826.

70. See Quint, *The Imperfect Union*, *supra* note 28, 127.

71. *Id.*

72. Anlage III zum *Einigungsvertrag*, Gemeinsame Erklärung der Regierungen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik zur Regelung offener Vermögensfragen vom 15 Juni 1990, in: Stern & Schmidt-Bleibtreu, *supra* note 14, 823 et seq.

payments.”<sup>73</sup> The Joint Declaration, at the same time, determined a fundamentally different treatment of property expropriated by the GDR after 1949 (i.e. not *Bodenreform*-property), which “in principle” must be returned to the former owners or their heirs.<sup>74</sup> The Joint Declaration equally applied the principle of restitution to property taken as a result of racial, political, religious, or ideological persecution by the Nazi regime between 1933 and 1945 in the GDR territory.<sup>75</sup> The Joint Declaration was incorporated into the UT by Art. 41 (1) UT and into the GG by Art. 143 III GG.<sup>76</sup>

Furious about this outcome, former owners of *Bodenreform*-property and their heirs, respectively, appealed to the BVerfG. Art. 143 III GG, they argued, violated, among others, the principles of human dignity and protection of property and thus did not fit into the GG.<sup>77</sup> They argued that Art. 143 III GG was an “unconstitutional amendment of the GG” because it violated Art. 79 III GG, the so-called “eternity clause,”<sup>78</sup> by violating the fundamental principles of human dignity and property. The plaintiffs concluded that the West German government was obliged to return *Bodenreform*-property to them.

### 1. The Decisions

On April 23, 1991, in *Bodenreform I*, the BVerfG’s First Senate held Art. 143 III GG constitutional.<sup>79</sup> Procedurally, the Court accepted the

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73. See Joint Declaration, Indent No. 1, in: Stern & Schmidt-Bleibtreu, *supra* note 14, 823.

74. See Joint Declaration, Indent No. 2 et seq., in: Stern & Schmidt-Bleibtreu, *supra* note 14, 823 et seq.

75. See Joint Declaration, *id.*, in connection with § 1 (6) of the Act for the Settlement of Open Property Issues (Gesetz zur Regelung offener Vermögensfragen) (BGBl II 1990, 1159).

76. According to Art. 41 (3) UT, West Germany will not adopt any legal provisions that contradict the Joint Declaration.

77. See BVerfG, *NJW* 1991, 1598.

78. Art. 79 III GG prohibits constitutional amendments that “affect” fundamental principles of the GG. It reads: “Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 shall be prohibited” (“Eine Änderung dieses Grundgesetzes, durch welche die Gliederung des Bundes in Länder, die grundsätzliche Mitwirkung der Länder bei der Gesetzgebung oder die in den Artikeln 1 und 20 niedergelegten Grundsätze berührt werden, ist unzulässig”).

79. See BVerfG, Urteil v. 23.04.1991, 1 BvR 1170, 1174, 1175/90; *NJW* 1991, 1598 et seq.

plaintiffs' direct appeal to the BVerfG because of the matter's "general importance".<sup>80</sup> Substantively, the Court held that Art. 143 III GG did not violate Art. 79 III GG.

Referring to "the principles laid down in Art. 1 and 20 [GG]", Art. 79 III GG withdraws the principles of human dignity and human rights, the principle of equality, as well as the basic principles of the rule of law and the social state from constitutional amendment.<sup>81</sup> The Court argued that at the time when Art. 143 III GG (confirming the *Bodenreform*) had been adopted the former owners had not held an enforceable proprietary position that the *Bodenreform's* confirmation could have deprived them of.<sup>82</sup> According to the law in force on Soviet occupied territory at the time of the *Bodenreform*, the expropriations were considered legal or at least incontestable.<sup>83</sup> The West German government, the Court argued, was not responsible for the expropriations since its power had neither factually nor legally extended to the territory on which the expropriations had taken place.<sup>84</sup> The expropriations could not be evaluated according to the GG because the GG had not been in force at the time the expropriations occurred.<sup>85</sup> Even West German law did not give the former owners an enforceable proprietary position because it accepted expropriations undertaken by another state as lawful as long as the expropriating state remained within the limits of its own authority (principle of territoriality).<sup>86</sup> The Court argued that it did not need to decide whether the former owners had had public-international-law based claims against the Soviet occupying force, which might have been destroyed through Art. 143 III GG's confirmation of the expropriations, because such claims would have been unenforceable and thus all but worthless.<sup>87</sup>

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80. See § 90 II, 2 Bundesverfassungsgerichtsgesetz (BVerfGG); see BVerfG, *NJW* 1991, 1598.

81. See BVerfG, *NJW* 1991, 1599.

82. *Id.*

83. *Id.*

84. See *id.*

85. *Id.*; the GG entered into force at the end of the day of May 23, 1949, see Art. 145 II GG.

86. BVerfG, *NJW* 1991, 1599, 1600.

87. See BVerfG *NJW* 1991, 1600. In a decision on Oct. 26, 2004, the Second Senate confirmed the First Senate's holding. It held that West German government could not be held responsible for the *Bodenreform*-expropriations, public international law did not oblige West Germany to return *Bodenreform*-property, and West German government had been entitled to conclude that repealing *Bodenreform*-expropriations would have contradicted the goal of

The Court emphasized that, based on the social-state principle (Art. 20 I GG), the West German government was *obliged* to balance people's burdens resulting from WWII. Yet, the legislature had broad discretion in devising such a balance and was not obliged, as a matter of Art. 79 III GG, to return property expropriated by a foreign power.<sup>88</sup>

Confirming *Bodenreform*-expropriations but not expropriations undertaken before 1945 and after 1949, the Court argued, did not violate the principle of equality as protected by Art. 79 III GG because the West German government was entitled to assume that confirming *Bodenreform*-expropriations was necessary to get the Soviet Union and East Germany to agree with German unification.<sup>89</sup> The Court held, however, that the principle of equality prevented the legislature from excluding all compensation for *Bodenreform*-expropriations.<sup>90</sup>

When the plaintiffs asserted that the Court, in *Bodenreform I*, had decided on the basis of incorrect facts, the BVerfG's First Senate, on April 18, 1996, handed down another decision on the constitutionality of the *Bodenreform*'s confirmation (*Bodenreform II*) in which it fully confirmed its first decision.<sup>91</sup>

In a third decision, the Court's First Senate decided a case brought against provisions of a law regulating compensatory payments for victims of *Bodenreform*-expropriations.<sup>92</sup> The Court held that West Germany's obligation to pay compensations for financial losses that had been caused by a government that was not bound by the GG could not be based on specific basic rights of the GG, but could result from the GG's social-state principle found in Art. 20 I, 28 I GG.<sup>93</sup> Regulation of such compensation must comply with the rule of law and the principle of equality.<sup>94</sup> The social-state principle, the Court argued, required everybody to participate in burdens that

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German unification; see BVerfG Beschluss v. 26.10.2004, 2 BvR 955/00, 1038/01, beck-online version, BeckRS 2004 26155, p. 15, ind. 2. For a legitimate critique of the Second Senate's majority opinion, see Gertrude Lübke-Wolff's dissent in BVerfG, id., pp. 22 et seq. Lübke-Wolff argues that the Second Senate's opinion is superfluous because the First Senate had already decided all relevant questions and the Second Senate did not reach different conclusions.

88. See BVerfG, *NJW* 1991, 1600.

89. *Id.* at 1600, 1601.

90. *Id.* at 1601.

91. BVerfG, Beschluss v. 18.04.1996, 1 BvR 1452/90, 1459/90, 2031/94; *NJW* 1996, 1666 et seq.

92. BVerfG, Urteil v. 22.11.2000, 1 BvR 2307/94, *VIZ* 2001, 16 et seq.

93. BVerfG, *VIZ* 2001, 18.

94. *Id.* at 18, 19.

resulted from a common destiny and that, more or less by chance, only affected individual citizens. The legislature enjoys broad discretion in compensating for such burdens and may consider its financial capacities and future obligations, among other things, in determining the appropriate compensation.<sup>95</sup> Based on these principles, the Court held the contested provisions constitutional.<sup>96</sup>

Finally, even the European Court of Human Rights (ECHR) confirmed the BVerfG's holding that the West German government was not responsible for expropriations undertaken in the Soviet occupation zone.<sup>97</sup> Therefore, the ECHR held that it had no jurisdiction to examine these expropriations' legality.<sup>98</sup> It further held that the former owners had had no claims at the time of German unification that could have been protected by the European Convention on Human Rights and that West German government might have violated by confirming the *Bodenreform*-expropriations.<sup>99</sup>

## 2. Traditional Understanding

The traditional understanding of these decisions may be divided into polemical, doctrinal, and political.

The decisions' polemical critique shows the extremism with which some authors engaged in the debate. Wolfgang Graf Vitzthum, for example, calls the expropriated property "bloody booty" and the new owners "thieves".<sup>100</sup> He implies that the *Bodenreform*-expropriations were part of a broader Soviet strategy aiming at the economic, social, psychological, and physical "extermination"<sup>101</sup> of the German "Junkers", and that "the Junker" may well be regarded as "the Jew" of the German east under Soviet occupation.<sup>102</sup> Another author refers to the Bible ("thou shalt not steal") to

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95. *Id.* at 18.

96. BVerfG, *VIZ* 2001, 19 et seq.

97. ECHR, *NJW* 2005, 2532, 2533.

98. *Id.* at 2533.

99. ECHR, *NJW* 2005, 2533 et seq.

100. Wolfgang Graf Vitzthum, *Das Bodenreform-Urteil des Bundesverfassungsgerichts, Analyse und Kritik*, in *Stern*, infra note 109, 3.

101. He actually uses the word "Vernichtung", see Vitzthum, *supra* note 100, 14.

102. *Id.*; in an attempt to distance himself from his own statement, Vitzthum argues that his comparison of the extermination of "the Junkers" with the extermination of "the Jews" would be "much too daring" ("viel zu gewagt"). Another author who eagerly compares the *Bodenreform*-expropriations with measures of the Nazi regime is Walter Leisner, *Das Bodenreform-Urteil des Bundesverfassungsgerichts - Kriegsfolge- und*

attack the constitutionality of the compensation rules and the BVerfG's decision.<sup>103</sup>

Many authors deny that the *Bodenreform's* confirmation was a *conditio sine qua non* for German unification.<sup>104</sup> They doubt the Soviet Union's insistence on the expropriations' confirmation as a prerequisite for its acceptance of German unification.<sup>105</sup> Some even accuse the West German government of lying to the Court about the Soviet Union's insistence on the *Bodenreform's* indefeasibility.<sup>106</sup> Another argument is that the GDR was not powerful enough to impose conditions on West Germany.<sup>107</sup> Yet, after trying to undermine the factual basis for the government's case, the authors often imply that, from a constitutional point of view, the Court was eventually right to defer to the government's decision to accept the *Bodenreform's* confirmation.<sup>108</sup> Some argue the Court should have fully and openly based its decisions on the principle of judicial self-restraint since that would have increased the decisions' pacifying effect.<sup>109</sup>

Some authors criticize the Court for not sufficiently specifying and applying Art. 79 III GG's requirements and limits in general and the principles of human dignity (Art. 1 I GG) and equality (Art. 3 I GG) in particular.<sup>110</sup> One author argues that the *Bodenreform*-expropriations were acts of arbitrariness, inhumanity, and brutality and, as such, violated the human-dignity core inherent in the protection of property.<sup>111</sup> Having thus turned the taking of property into a violation of the principle of human dignity, the argument considers the *Bodenreform*-expropriations violations

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Eigentumsentscheidung, *Neue Juristische Wochenschrift (NJW)* 1991, 1569 and *id.*, Verfassungswidriges Verfassungsrecht, Nach dem Bodenreform-Urteil des BVerfG, *Die Öffentliche Verwaltung (DÖV)* 1992, 435.

103. Klaus Märker, Der Staatsräson verpflichtet! Zur Entscheidung des Bundesverfassungsgerichts über die Verfassungsmäßigkeit des Entschädigungs- und Ausgleichleistungsgesetzes, *Zeitschrift für Vermögens- und Immobilienrecht (VIZ)* 2001, 233, 238.

104. See, for example, Kimminich, *supra* note 63, 84 et seq. with further references.

105. *Id.*; Maurer, *supra* note 63, 189.

106. Felix, *supra* note 63, 2697 et seq.

107. See Maurer, *supra* note 63, 189 note 35; Johannes Wasmuth, Restitutionsausschluss und Willkürverbot, *Deutsch-Deutsche Rechtszeitschrift (DtZ)* 1993, 335.

108. See Vitzthum, *supra* note 100, 11.

109. Stern commenting on Vitzthum, in: Klaus Stern (ed.), *Deutsche Wiedervereinigung, Band II, Zur Wiederherstellung der inneren Einheit, Teil I, Vermögensfragen öffentlicher Dienst, Universitäten* (1992), 36.

110. Maurer, *supra* note 63, 190 et seq.; Vitzthum, *supra* note 100, 13.

111. Vitzthum, *supra* note 100, 13 et seq.

of Art. 1 I GG and thus of Art. 79 III GG. As regards the principle of equality, it is argued that neither the Soviet Union's nor the GDR's insistence on the *Bodenreform's* confirmation suffice as a good reason for the different treatment of *Bodenreform*-expropriations on the one hand and expropriations before 1945 and after 1949 on the other.<sup>112</sup> Both arguments result in the new Art. 143 III GG's unconstitutionality.

Other authors consider the *Bodenreform* a violation of public international law.<sup>113</sup> Under the Hague Convention, they argue, the USSR was not authorized to take private property in occupied Germany.<sup>114</sup> They conclude that the West German government was obliged to return the expropriated lands to the former owners.<sup>115</sup>

Finally there are authors who anticipated and approve of the Court's doctrinal arguments.<sup>116</sup> In particular, they argue that Art. 79 III GG in connection with the basic principles of human dignity and the rule of law do not oblige West Germany to undo property violations by other states.<sup>117</sup> They say, moreover, that the West German government was constitutionally entitled to treat *Bodenreform*-expropriations and expropriations before 1945 and after 1949 differently because the government stayed within the limits of its broad discretion in political questions when it assumed that confirming the *Bodenreform* was necessary to achieve German unification.<sup>118</sup>

Other authors characterize the Court's decisions as acts of judicial politics. Quint, for example, writes, ". . . the Constitutional Court sought to settle one of the most important constitutional and political questions arising from unification. In so doing, the Court seemed to *employ a mediating technique* in which it chose no clear winners or losers but rather *sought to create a political structure that embodied a compromise.*"<sup>119</sup> Others accuse the Court of trying to protect state finances.<sup>120</sup>

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112. Maurer, *supra* note 63, 190 et seq.

113. See, for example, Kimminich, *supra* note 63, 80; Wasmuth, *supra* note 107, 334 et seq. with further references; von der Beck, 247 et seq.

114. Otto Kimminich, *Die Eigentumsgarantie im Prozess der Wiedervereinigung: Zur Bestandskraft der agrarischen Bodenrechtsordnung der DDR* (1990), 76, 77.

115. *Id.* at 77.

116. Papier, *supra* note 63, 193 et seq. with further references; Hans Jürgen Papier, in Theodor Maunz & Günther Dürig, *Grundgesetz*, Art. 14 paras. 273-277.

117. Papier, *supra* note 63, 196.

118. Papier, *supra* note 63, 196, 197.

119. Quint, *supra* note 28, 138.

120. Märker, *supra* note 103, 234, 236, 241; Karl Doehring & Peter Ruess, *Die Entscheidung des BVerfG zur Entschädigung von Opfern der Bodenreform im Lichte der*

I think the traditional understanding is unable to convincingly explain the Court's decisions. The doctrinal understanding, be it critical or affirmative of the Court's decisions, appears too technical and too much guided by the desired outcome. The Court's holding that West Germany was not responsible for the *Bodenreform* since its power had not extended to the territory in which the expropriations had taken place is a case in point. If one would focus not on the expropriations but instead on the *Bodenreform's* confirmation, West Germany was responsible. It was the West German government who decided to confirm these expropriations. So, would it have been indefensible to argue that the *Bodenreform's* confirmation violated Art. 79 III GG because it corroborated a situation that had been brought about by fundamental human rights violations? Another example is the Court's holding that the West German government could assume that the USSR and the GDR had insisted on the expropriations' confirmation as a condition for German unification. In fact, official statements on this matter are contradictory.<sup>121</sup> Gorbachev, for example, said that ". . . [o]n my level as President of the USSR, that question was not dealt with, and neither can it be said that there was an alternative: either the restitution or the Big Treaty."<sup>122</sup> Did the Court really examine whether or not the West German government had been *evidently* wrong to assume that the Soviet Union had insisted on the expropriations' confirmation? Wouldn't the Court have had to hear Gorbachev as a witness in order to verify Staatssekretär Dr. Kastrup's statement that the Soviet Union would have refused to sign the *Two-plus-Four Treaty* without a prior confirmation of the *Bodenreform* by West Germany?<sup>123</sup> These examples suffice to show that, based on doctrinal arguments, the Court might well have come out the other way.

So, why did the Court decide as it did? Judicial politics after all? The attempt to find a political middle ground to facilitate unification and give East Germans the feeling that at least some of their concerns were taken into account? Another attempt to bolster the Court's popularity and reaffirm its

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EMRK – Rechtssicherheit oder mit Sicherheit Unrecht?, *Neue Juristische Wochenschrift (NJW)* 2001, 640, 642, all commenting on the Court's EALG decision of Nov. 22, 2000.

121. See Maurer, *supra* note 63, 189; Felix, *supra* note 63, 2697 et seq.; Kimminich, *supra* note, 84 et seq.

122. That was Gorbachev's answer on July 5, 1994, to a question by the Oxford historian Prof. Norman Stone whether it ". . . is true or not that the USSR, during the negotiations over German unification, has made the prohibition of a restitution (a return of property that was confiscated during that time [1945-1949]) an unalterable condition? Is it true that you in particular insisted on the prohibition of such restitutions in the future?", quoted in: Felix, *supra* note 63, 2697, 2698.

123. See BVerfG, *NJW* 1996, 1666, 1670.

institutional standing as a voice of reason? To assume that would be giving up too quickly on the possibility to explain the Court's decisions in terms of constitutional interpretation.

The traditional understanding's problem is that, even though some of its arguments take history into account, it ignores the 1989 Revolution's impact on unified Germany's constitutional law. In what follows I will argue that the Court's decisions can only be understood once one takes into account that, by the time the Court decided, there had been a successful revolution in East Germany, the *Bodenreform's* confirmation had been an important revolutionary achievement, and the UT had transferred this achievement to unified Germany, where the institutions were now faced with the challenge of integrating it into the existing structures of West German constitutional law. Unified Germany's federal legislature had tried to meet this challenge by adopting Art. 143 III GG, but the Court saw that a proper integration of Art. 143 III GG into the existing constitutional order required the compensation of former owners.

### 3. My understanding: the decisions as acts of integration

My thesis is that the Court's *Bodenreform* decisions are more realistically and meaningfully understood, not as acts of doctrinalism or judicial politics, but as acts of constitutional interpretation with which the BVerfG self-consciously confronted the revolutionary achievement of confirming the *Bodenreform* and tried to integrate it into existing structures of West German constitutional law.

During the 1960s most of the *Bodenreform*-lands had been concentrated in so-called LPGs,<sup>124</sup> even though, formally, individual farmers and members of the LPGs had remained owners of these lands. The owners' right to dispose of this property, however, had been strongly limited.<sup>125</sup> As a result of the 1989 Revolution, the lands were turned back into "real" private property by repealing all former limitations and declaring the GDR Civil Code applicable.<sup>126</sup> When the GDR was headed towards German

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124. Landwirtschaftliche Produktionsgenossenschaften (Farmers' Cooperatives).

125. The property was termed "Working Property" ("Arbeitseigentum") and could, for example, not be sold but, under certain conditions, be passed on to heirs. For details, see Steffen Siewert, *Zum Eigentum an den Bodenreform-Grundstücken*, *Neue Justiz (NJ)* 1992, 155 et seq.

126. See §1 Gesetz über die Rechte der Eigentümer von Grundstücken aus der Bodenreform v. 06.03.1990 (GBl. DDR I 1990, 134); see also Dieter Dörr, EMRK - Bodenreform, Report on the EGMR's decision (Section III.), Urteil vom 22.01.2004 -

unification, it had quickly become clear the people's *Bodenreform*-property would soon be challenged by the former owners, mostly West Germans. The East Germans' call for protection of property had therefore increasingly included a call for confirming the *Bodenreform*. This call had caused institutional reactions. Wolfgang Ullman, member of an early reform-government in the GDR (the so-called Modrow "government of national responsibility"), said that

as a member of the [Modrow] government, I had to consider how we would handle the issues that resulted from World War II. I was of the opinion that one consideration must be that certain things would not be undone. For me, one of these things had always been the *Bodenreform* and the expropriation of groups in society that had contributed very significantly to Hitler's seizure of power and to the preparation of World War II.<sup>127</sup>

Ullmann himself, a prominent representative of the citizens' movement, had urged the Modrow government to ask the Soviet Union to insist on the irreversibility of *Bodenreform*-expropriations during the *Two-Plus-Four-Treaty* negotiations.<sup>128</sup> The Modrow government, says Ullmann, acted in accordance with his request.<sup>129</sup>

A further institutional reaction to, and legal manifestation of, the East Germans' call for the protection of *Bodenreform*-property was an early draft constitution which had declared the *Bodenreform* "inviolable." The goal had been "to preserve social peace and to secure vested social rights" of GDR citizens.<sup>130</sup> Ulrich Preuß, a West German law professor advising the revolutionaries, said the provision must be considered "a gesture of self-confidence [by the East Germans], which West Germany should wisely respect."<sup>131</sup> Statements by the first freely elected GDR government also reflect the East Germans' will regarding *Bodenreform*. Prime Minister De Maiziere argued vigorously in favor of confirming the *Bodenreform* in order

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46720/99, 72203/01, 7255/01 (Jahn u.a./Deutschland), *Juristische Schulung (JuS)* 2004, 808 et seq.

127. Wolfgang Ullmann, *Verfassung und Parlament*, 23 (1992).

128. *Id.*

129. *Id.*

130. See Klaus Michael Rogner, *Der Verfassungsentwurf des Zentralen Runden Tisches der DDR*, 98 (1993).

131. Ulrich Preuß, *Auf der Suche nach der Zivilgesellschaft*, in: Bernd Guggenberg & Tine Stein (eds.), *Die Verfassungsdiskussion im Jahr der Deutschen Einheit*, 365, 366 (1991).

to prevent social unrest in the GDR after unification.<sup>132</sup> The first freely elected East German parliament agreed.<sup>133</sup>

The West German government had respected the East Germans' will in both the Joint Declaration of June 15, 1990, and in the UT. The West German legislature had implemented that will with the necessary 2/3 majority in the new Art. 143 III GG.

When considerable arguments were made that Art. 143 III GG did not fit into the GG, it became the BVerfG's task to properly integrate the revolutionary achievement into the existing constitutional order under the GG.

The Court's basis for integration was Art. 79 III GG. Since the *Bodenreform's* confirmation had been manifested in a constitutional amendment (Art. 143 III GG), the question of whether or not it fit into the GG had to be examined on the basis of the GG's most fundamental principles as listed in Art. 79 III GG. According to Art. 79 III GG, constitutional amendments must not violate these core principles.

Within its Art. 79 III GG examination, the Court self-consciously refers to the respect that West Germany owes to the revolutionaries' will and makes this a core argument for Art. 143 III GG's integration into the existing constitutional order under the GG. The Court argues that:

If the unity should be realized in an orderly fashion and *be accepted by the people of the GDR as a result of their self-determination, the West German government, in the negotiations, had to take seriously the will of the first democratically elected representation of the [GDR] people and the government elected by it. To ignore their wishes would, in any case, have contradicted the respect that West Germany owed to the people in the GDR and could have considerably endangered the orderly process of reunification.*<sup>134</sup>

The argument shows that the factor requiring, and thus constitutionally justifying, the *Bodenreform's* confirmation was neither the GDR's

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132. Government Declaration, *supra* note 54, pp. 8, 18; BVerfG, *NJW* 1991, 1601; BVerfG, *NJW* 1996, 1669; *supra*, 147.

133. See Protocol of the 15th Meeting of the Volkskammer on 17.06.1990, reprinted in: Fischer & Künzel, *supra* note 17, Band II, 179 et seq., petition by Abg. Holz (DBD/DFD) on p. 199, de Maiziere's response on pp. 202 et seq., and finally the VK's decision to refrain from writing the confirmation of the *Bodenreform*-expropriations into the VGG on p. 203.

134. BVerfG, *NJW* 1996, 1668, 1669 (my italics).

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contractual bargaining power nor its ability to prevent unification. It was “the respect that West Germany owed to the people in the GDR”. Disrespect of that will might have reactivated the revolutionary people and might have developed into “social dynamite of the first order” endangering German unification.<sup>135</sup>

Finally, the Court activates the GG’s core principles, i.e., the social-state principle, the rule of law, and the principle of equality, in order to integrate the East Germans’ will to confirm the *Bodenreform* into the existing constitutional order under the GG. Based on these core principles, the Court develops a constitutional government obligation to provide for compensatory payments to former owners of *Bodenreform* property. This obligation to compensate former owners is a means to fit the *Bodenreform*’s confirmation into the GG.

## II. Gender Equality

Another hotly debated topic during the 1989 Revolution and the process of German unification was gender equality. As I have shown, individual empowerment through, among others, the establishment of real-social instead of only formal-legal equality for women was an important revolutionary achievement.<sup>136</sup> This achievement was transferred to unified Germany through Art. 5 UT and Art. 31 (1) UT, according to which unified Germany’s legislature should further develop legislation facilitating the equal protection of men and women.<sup>137</sup> All new state constitutions include provisions explicitly establishing an active government obligation to make gender equality a social reality.<sup>138</sup> On this basis, in 1994 the GVK proposed, and unified Germany’s legislature adopted, a new sentence 2 to Art. 3 II GG stating that the state shall promote the actual implementation of equal rights for women and men and take steps to eliminate existing disadvantages.<sup>139</sup>

Interestingly, most authors argue that the new Art. 3 II, 2 GG did not bring any change. Scholz, for example, writes that the new Art. 3 II, 2 GG

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135. *Id.* at 1669.

136. *See* Ackerman, *supra* 2, at 707.

137. *See* Scholz, *supra* note 33, Art. 3 Abs. 2 para. 58.

138. *See* Constitutions of Brandenburg, Art. 12 III, 48 III, 2; Mecklenburg-West Pomerania, Art. 13; Saxony, Art. 8; Saxony-Anhalt, Art. 34; Thuringia, Art. 2 II; and Berlin, Art. 10 III.

139. *See supra*, 214.

is only a “clarification” of what the BVerfG had already decided.<sup>140</sup> Even the Court itself, in *Feuerwehrrabgabe*,<sup>141</sup> calls the new Art. 3 II, 2 GG an explicit clarification of what it had already decided in *Nachtarbeit* in 1992.<sup>142</sup> Does that mean the Court already knew in 1992 what the legislature would do in 1994? What exactly did the Court say in 1992?

In *Nachtarbeit*<sup>143</sup> the Court, for the first time, said that according to Art. 3 II GG, the legislature was not only *authorized* but constitutionally *obliged* to realize gender equality as a fact of social reality.<sup>144</sup> Prior to that decision, e.g. in *Altersruhegeld* (1987), the Court had considered the legislature merely *authorized* to realize gender equality and had explicitly left open whether the government was also *obliged* to do so.<sup>145</sup> So, the real change seems to have taken place in 1992: from the government’s constitutional *authorization* to realize gender equality to its constitutional *obligation* to do so. If that is true, the question is: why did the Court change its approach to gender equality? And why already in 1992 and not after the GG had been amended in 1994?

There are authors who simply deny any change in the Court’s approach to gender equality in 1992. Michael Sachs, for example, argues that the Court’s statement on Art. 3 II GG in *Nachtarbeit* merely summarized its former holdings.<sup>146</sup> Others, while more exact and differentiating in their reading of what the Court said in 1992, still do not answer what exactly changed and why.<sup>147</sup>

My thesis is twofold: (i) the Court’s approach to gender equality changed profoundly in 1992; and (ii) the reason for this change is the 1989 Revolution, its constitutional achievement with respect to gender equality, and the Court’s attempt to integrate this achievement into the existing constitutional order under the GG. I will argue that, when the Court decided

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140. Scholz, *supra* note 33, Art. 3 Abs. 2 GG para. 71.

141. BVerfG Beschluss v. 24.01.1995, 1 BvL 18/93, 1 BvL 5/94, 1 BvL 6/94, 1 BvL 7/94, 1 BvR 403/94, 1 BvR 569/94, BVerfGE 92, 91-122.

142. BVerfGE 92, 91, juris-version, rec. 68.

143. BVerfG Urteil v. 28.01.1992, 1 BvR 1025/82, 1 BvL 16/83, 1 BvL 10/91, BVerfGE 85, 191-214.

144. BVerfGE 85, 191, juris-version, rec. 53.

145. BVerfG Beschluss v. 28.01.1987, 1 BvR 455/82, BVerfGE 74, 163-182, juris-version, rec. 45, 46.

146. Michael Sachs, Anmerkung zum BVerfG Urteil v. 28.01.1992, *Juristische Schulung (JuS)* (1992) 876.

147. See Manfred Löwisch, Anmerkung zum BVerfG Urteil v. 28.01.1992, *Juristenzeitung (JZ)* (1992) 917 et seq.

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*Altersruhegeld* in 1987, it was still able to leave open whether or not the government was constitutionally obliged to realize gender equality. In 1987, the Court still lived in the old, strongly conservative West Germany. West Germany's constitutional order was determined by a, generally, formal-legal approach to gender equality under which *authorizing* the legislature to compensate women for past discrimination was the most the Court considered itself authorized to do. In 1992 that was no longer the case because a profound change had taken place in 1989/1990. The 1989 Revolution had demanded, among other things, a constitutional government obligation to realize gender equality.<sup>148</sup> Unified Germany's legislature, whom Art. 5 and Art. 31 (1) UT had obliged to "further develop" the law on gender equality, was politically deadlocked.<sup>149</sup> In this situation, it was the Court who felt obliged to take on the issue. It did so in an *obiter dictum* in *Nacharbeit*, where it stated what it considered to be the 1989 Revolution's impact on unified Germany's constitutional law. This explains why the Court, without possessing a crystal ball, was able to say in 1992 what the legislature would add to the GG only in 1994.

In what follows, I will analyze the change in the Court's approach to gender equality from 1987 to 1992, outline the traditional understanding of that change, and then explain my own understanding.

### 1. The Decisions: *Altersruhegeld* (1987) and *Nacharbeit* (1992)

Prior to 1987, the Court's approach to gender equality based on Art. 3 II, III GG was, generally, a formal one.<sup>150</sup> As long as an unequal treatment was formulated in gender-neutral terms, it was generally considered constitutional. If not, it was generally considered unconstitutional, unless objective biological or functional differences between the sexes justified the

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148. See Jaggi, *supra* note 6, 178 et seq.

149. See *supra*, pp. 6 et seq.

150. Ute Sacksofsky, *Das Grundrecht auf Gleichberechtigung, Eine rechtsdogmatische Untersuchung zu Artikel 3 Abs. 2 des Grundgesetzes*, 26 et seq. (1991); Claudia Eckertz-Höfer, in Erhard Denninger et al. (eds.), *Kommentar zum Grundgesetz für die Bundesrepublik Deutschland, Reihe Alternativkommentare, Band 1, Art. 3 Abs. 2, 3 paras. 26 et seq.* (3rd ed. 2001); Kerstin Schweizer, *Der Gleichberechtigungssatz - Neue Form, alter Inhalt?*, 110 et seq. (1998); for the few exceptions to this principle, see Sacksofsky, *id.*, 95 et seq. and Schweizer, *id.*, 112; for an overview of adjudication and literature, see Sacksofsky, *id.*, 23 et seq. and 101 et seq.

unequal treatment.<sup>151</sup> The Court later modified this formula, so that gender-based differentiations were justified if they were indispensable to solve problems that, according to their nature, could only occur with either men or women.<sup>152</sup> Applying this formula, the Court focused on making sure that the law was facially gender neutral. The Court was, generally, not concerned about laws that were facially gender neutral but still had discriminatory effects in practice.<sup>153</sup> Despite the interpretive rule that provisions with different texts must not be assumed to have identical meaning, both the BVerfG and most authors interpreted Art. 3 II GG as merely confirming the prohibition of gender discrimination stated in Art. 3 III GG<sup>154</sup>.

The Court's formal approach to gender equality has been criticized for a long time. As early as 1974, it was F.J. Säcker who argued that Art. 3 II GG in combination with the social-state clause imposed a government obligation to adopt necessary measures to make equality of women a *social reality*.<sup>155</sup> Karl Heinrich Friauf stated in 1981 that Art. 3 II GG, interpreted in the light of the social-state principle, obliged the government to actively further equality for women.<sup>156</sup> However, led by Manfred Löwisch, most authors insisted that Art. 3 II GG merely stipulated formal-legal equality.<sup>157</sup> Accordingly, Art. 3 II GG only prohibited gender-based legal differentiations without including an order to actively promote women's real emancipation.<sup>158</sup> Based on this principle, many authors in the 1980s' considered structural social discrimination against women, such as unequal distribution of work in the family, a purely private matter with which

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151. That had been the standard test since BVerfGE 3, 225, 242; 52,369, 374; 63, 181, 194; 68, 384, 390; 71, 224, 229; see Eckertz-Höfer, *supra* note 150, para. 27; Schweizer, *supra* note 150, 111.

152. Eckertz-Höfer, *supra* note 150, para. 31.

153. Schweizer, *supra* note 150, 112; Sacksofsky, *supra* note 150, 27.

154. Eckertz-Höfer, *supra* note 150, paras. 3 and 26; Sacksofsky, *supra* note 24 and 150; Schweizer, *supra* note 110 and 150; Art. 3 II GG read: "Men and women shall have equal rights"; Art. 3 III GG read: "No person shall be favored or disfavored because of sex, . . . ."

155. F.J. Säcker, Referat auf dem 50. Deutschen Juristentag zum Thema: Welche rechtlichen Massnahmen sind vordringlich, um die tatsächliche Gleichstellung der Frauen mit den Männern im Arbeitsleben zu gewährleisten?, Verhandlungen des 50. Deutschen Juristentages, 1974, Band II, L 9, p. 25.

156. Karl Heinrich Friauf, Gleichberechtigung der Frau als Verfassungsauftrag, Rechtsgutachten erstattet im Auftrag des Bundesministeriums des Innern, 29 (1981).

157. Manfred Löwisch, Referat auf dem 50. Deutschen Juristentag zum Thema: Welche rechtlichen Massnahmen sind vordringlich, um die tatsächliche Gleichstellung der Frauen mit den Männern im Arbeitsleben zu gewährleisten?, Verhandlungen des 50. Deutschen Juristentages, 1974, Band. I, D 11, p. 42; Schweizer, *supra* note 150, 116.

158. *Id.*

government must not interfere.<sup>159</sup>

The Court's view of Art. 3 II GG started to change in 1987 with *Altersruhegeld*. Here, for the first time, the Court explicitly attributed constitutional relevance not only to legal but also to factual, social discrimination against women.<sup>160</sup> The Court examined under Art. 3 II GG a legal provision according to which women were entitled to pensions from the statutory pension insurance upon their 60s birthday, while men needed to be older.<sup>161</sup> The Court held the provision constitutional and stated that the legislature was constitutionally authorized to compensate women in a generalizing way<sup>162</sup> for such factual discriminations that could be traced back to biological differences.<sup>163</sup> Such compensatory measures, the Court argued, could not be considered gender-based discrimination.<sup>164</sup> Reasons that may justify women's preferential treatment, according to the Court, were social factors that typically disadvantaged women, such as women's dual burden of child-raising and professional work, educational disadvantages, lower salaries, and fewer career opportunities. All these factors, the Court argued, were typically rooted in traditional perceptions of women as mothers, which could be traced back to biological differences.<sup>165</sup>

In the same decision, the Court took up another question that it had not decided previously: was the legislature constitutionally not only authorized but obliged to actively generate the prerequisites for "factual gender equality"?<sup>166</sup> The Court emphasized that, so far, the principle of gender equality had been applied mainly as an individual defense against discriminations by the government. Explicitly referring to Friauf's 1981 study, the Court pointed out that it had recently been discussed whether Art. 3 II GG also established a positive government obligation to actively

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159. See Schweizer, *supra* note 150, 117, 118 with further references; note the similar differentiation between state and society in this argument and in the majority's argument in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

160. So, too, Juliane Kokott, Zur Gleichberechtigung von Mann und Frau - Deutsches Verfassungsrecht und Europäisches Gemeinschaftsrecht, *Neue Juristische Wochenschrift (NJW)* 1995, 1050, 1054; Sacksofsky, *supra* note 150, 74 et seq.; Schweizer, *supra* note 150, 113; Christine Fuchsloch, Das Verbot der mittelbaren Geschlechtsdiskriminierung, Ableitung, Analyse und exemplarische Anwendung auf staatliche Berufsausbildungsförderung, 77 et seq. (1995).

161. BVerfGE 74, 163, juris-version, rec. 1.

162. That means without the need of evidence for discrimination in a specific case.

163. BVerfGE 74, 163, juris-version, rec. 46; Schweizer, *supra* note 150, 113.

164. *Id.*

165. BVerfGE 74, 163, juris-version, rec. 49.

166. *Id.* at rec. 46.

promote the realization of gender equality.<sup>167</sup> Yet, the Court explicitly left the question open because its decision did not depend upon it.<sup>168</sup>

The next time the Court took up the question was in 1992 in *Nacharbeit*. And despite the fact that the Court's decision, again, did not depend upon it, the Court nonetheless decided to answer the question in an *obiter dictum*. The Court stated that Art. 3 II GG's additional content, i.e., the content that went beyond the prohibition of gender discrimination that was already stated in Art. 3 III GG, was "that it postulates an order to equal protection and it expands this order to apply also to social reality."<sup>169</sup> What exactly does that mean? Some authors argue, as I have mentioned before, that the Court only summarized what it had already said in *Altersruhegeld* and earlier decisions.<sup>170</sup> Others think the Court "only assigned to the legislature a set of questions and considerations to decide on."<sup>171</sup> If that was true there would be no need to examine why the Court did what it did. A mere summary of what had already been said before or the assignment to the legislature of a set of questions and considerations would not justify further analysis.

I think these authors are wrong. Prior to *Nacharbeit* the Court had never said that Art. 3 II GG's additional content was "an order to equal protection" and an expansion of that order to include "social reality." The decisions the Court cited in *Nacharbeit* do not contain such statements and none of them says anything about a government obligation to actively realize gender equality. Moreover, in a case decided later that year (*Kindererziehungszeiten*, decided on July 7, 1992),<sup>172</sup> the Court explicitly clarified what it had meant in *Nacharbeit* with the expression "order to gender equality" was a constitutional government obligation to actively realize

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167. *Id.* at rec. 45.

168. *Id.* at rec. 46.

169. BVerfGE 85, 191, juris-version, rec. 53; the original reads: "Der über das Diskriminierungsverbot des Art. 3 Abs. 3 GG hinausreichende Regelungsgehalt von Art. 3 Abs. 2 GG besteht darin, daß er ein Gleichberechtigungsgebot aufstellt und dieses auch auf die gesellschaftliche Wirklichkeit erstreckt."

170. Sachs, *supra* note 146, 876; see *supra*, 33; this view must be distinguished from, for example, Di Fabio's view, according to which a "profound and systematically highly important change in the interpretation of basic rights" has occurred, but who holds this change to be deeply wrong; see Udo Di Fabio, Die Gleichstellung von Mann und Frau, *Archiv des öffentlichen Rechts (AöR)* 1997, 404, 408 et seq., 441 et seq.

171. Scholz, *supra* note 33, Art. 3 Abs. 2 GG para. 64.

172. BVerfG Urteil v. 07.07.1992, 1 BvL 51/86, 1 BvL 50/87, 1 BvR 873/90, 1 BvR 761/91, BVerfGE 87, 1-48.

gender equality.<sup>173</sup> It is undisputed that the Court had never said anything like that before *Nacharbeit*.<sup>174</sup>

The decision shows that the argument according to which the Court did not *decide* on a government obligation to realize gender equality but, by way of *obiter dictum*, only assigned questions and considerations to the legislature<sup>175</sup> is only partly true. To be sure, the Court used an *obiter dictum* to establish the new government obligation, which was thus not part of the holding in the technical sense. Nonetheless, the Court stated a clear government obligation and did not merely “assign a set of questions and considerations”. This can no longer be doubted, at least since the Court explicitly confirmed it in *Erziehungszeiten*.<sup>176</sup>

It can thus safely be said that *Nacharbeit* profoundly changed the Court’s interpretation of Art. 3 II GG by reading into it, for the first time, a government obligation to actively realize gender equality.<sup>177</sup>

The remaining question is: why did the Court do that? Unfortunately, the Court does not explain itself. It generated its *obiter dictum* on the new meaning of Art. 3 II GG in *Nacharbeit* out of thin air. In what follows I will therefore first present and criticize the traditional understanding of the change in order to then present my own view.

## 2. Traditional Understanding

The traditional understanding can be divided into doctrinal and judicial-politics arguments.

The traditional doctrinal view argues that, like every basic right, Art. 3 II GG has an objective value core, which, in connection with the social-state

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173. The Court explicitly cited *Nacharbeit* in support of a statement according to which “the clearly higher concernment of women causes the legislature’s *obligation* [Pflicht] emanating from Art. 3 II GG to work towards an equalization of the living conditions of women and men”; see BVerfGE 87, 1, juris-version, rec. 140 (my italics).

174. Verwaltungsgericht (VG) Bremen in 1987 had concluded from the BVerfG’s holdings that Art. 3 II GG comprised not only an individual defensive right but also an “objective value decision” (“objektive Wertentscheidung”) and an “objective value measure” (“objektiver Wertmaßstab”), respectively; see VG Bremen, *NJW* 1988, 3224 et seq., 3225; not even the VG Bremen, however, asserted that the BVerfG had explicitly stated a constitutional *obligation* of the state to actively realize gender equality.

175. Scholz, *supra* note 33, Art. 3 Abs. 2 GG para. 64.

176. BVerfGE 87, 1, juris-version, rec. 140.

177. This conclusion is shared, for example, by Schweizer, *supra* note 150, 114; and Di Fabio, *supra* note 170, 408 et seq., 441.

principle, establishes a government obligation to actively realize gender equality, not just as formal-legal equality but as a fact of social reality.<sup>178</sup> Säcker and Friauf already presented this argument in the 1970s and early 1980s.<sup>179</sup> However, regardless of what one thinks of it, it does not answer the question of why the Court changed its view in 1992. If one believes in the doctrinal explanation, why did it take the Court until 1992 to follow it? Why didn't the Court apply it in 1987, when it decided *Altersruhegeld* and had already brought up the question only to leave it open? If one does not believe in the doctrinal explanation, then why *did* the Court bring about the change in 1992? What had happened between 1987 and 1992?

A traditional judicial-politics argument for the Court's change is that the change was overdue because the European Court of Justice (ECJ) and several EC Directives had been saying for a long time that the principle of gender equality authorized state measures to actively realize gender equality.<sup>180</sup> West Germany had signed several public international law agreements that imposed obligations on signatory states to realize gender equality and adopt measures of affirmative action to make up for disadvantages suffered by women as a result of gender discrimination.<sup>181</sup> Several EU Directives, ECJ decisions, and the EU Treaty itself have required positive government measures to make gender equality a social reality.<sup>182</sup> Some authors argue that EU law decisively influenced the development of gender equality in West Germany.<sup>183</sup> But again, even if one would follow this argument, the question remains: why did the Court not follow these leads prior to 1992?

Other authors emphasize the BVerfG's role as a moral and political leader in West Germany. The Court, the argument goes, has been an engine of gender equality in West Germany and far ahead of a *Zeitgeist* that has been dominated by traditional perceptions of gen

der roles.<sup>184</sup> Christine Hohmann-Dennhardt, for example, speculates

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178. See, for example, Friauf, *supra* notes 28, 29, and 156.

179. See *supra*, p. 35 et seq.

180. See Eckertz-Höfer, *supra* note 150, paras. 20 et seq.; Schweizer, *supra* note 150, 229 et seq.

181. For details, see Eckertz-Höfer, *supra* note 150, para. 19.

182. For details, see *id.* paras. 20 et seq.

183. Explicitly Eckertz-Höfer, *supra* note 150, para. 23.

184. Christine Hohmann-Dennhardt, Das Bundesverfassungsgericht und die Frauen, in: Robert Christian van Ooyen & Martin Möllers (eds.), *Das Bundesverfassungsgericht im politischen System*, 257 (2006).

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about the reasons for the Court's moral and political leadership and examines the extent to which female justices of the BVerfG may have guided the Court towards promoting gender equality.<sup>185</sup> Even though Hohmann-Dennhardt concedes the difficulty of determining which justice has exercised what influence in specific decisions, she still tries to show how female justices of the BVerfG have contributed to the Court's adjudication on gender equality.<sup>186</sup>

None of these arguments sufficiently considers constitutional interpretation to explain the change. None of them even mentions the 1989 Revolution and its possible implications for unified Germany's constitutional law in general and the development of gender equality in particular. This is even more surprising in the light of the fact that two historical events took place in Germany between 1987 (*Altersruhegeld*) and 1992 (*Nachtarbeit*), the 1989 Revolution and the 1990 Unification. Pure coincidence? I want to argue otherwise.

### 3. My Understanding: *Nachtarbeit* as an act of integration

In 1992, the Court found itself in a peculiar situation. In 1987, it could still afford to leave open the question of whether there was a constitutional government obligation to realize gender equality. The question had been an issue since the mid-70s, but nothing of constitutional importance had materialized. The Court had been practicing its traditional formal-legal approach to gender equality since the 1950s, most authors had agreed, and the changes that this approach had necessitated in the field of family law had been upsetting enough for many a staunch West German traditionalists.

The dominant opinion on gender equality had always been very conservative in West Germany. Heated discussions and a popular movement had been necessary to even get the principle of gender equality into the GG in 1949 in the first place.<sup>187</sup> An early draft of the GG had not contained a provision for gender equality, and the first proposal by the Parliamentary Council had limited gender equality to equal political rights and obligations. Massive pressure by feminist groups and others had been necessary to force the simple statement "men and women have equal rights" into the GG.<sup>188</sup>

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185. See Hohmann-Dennhardt, *id.*, 257 et seq.

186. *Id.* at 258 et seq.

187. See Eckertz-Höfer, *supra* note 150, para. 5; Kokott, *supra* note 160, 1050.

188. Art. 3 II GG old version; for this and the following; see Eckertz-Höfer, *supra* note 150, para. 5; Kokott, *supra* note 160, 1050.

The dominant opinion at the time had sharply distinguished between state and society and had argued that gender equality in the social sphere was none of the government's business. Whether women should pursue professional careers, or become housewives the argument went, was exclusively for the family to decide. Government, according to this view, was only authorized and obliged to deal with legal and political equality. Wolfgang Abendroth writes that it took the BVerfG<sup>189</sup> until 1959 to enforce the application of Art. 3 II GG in the area of family law against a majority in the Bundestag and against the German Supreme Court (BGH).<sup>190</sup> Met with so much resistance, the BVerfG had already taken a courageous step in 1987 by holding the legislature authorized to adopt laws that compensated women for discriminatory disadvantages. To go even further and establish a government obligation to realize gender equality as a fact of social reality did not seem viable in 1987.

The situation had changed fundamentally by 1992. A successful revolution had taken place in East Germany in the fall of 1989. One of the revolutionaries' claims had been the establishment of real gender equality through active government intervention. More generally, the principle of individual empowerment, i.e., a constitutional government obligation to actively develop a social environment in which constitutional individual rights can become a social reality for everyone instead of remaining only formal-legal rights, had been at the heart of the Revolution's constitutional agenda. The citizens' movements had emphasized the importance of women for the Revolution's success and had demanded the adoption of real equality for women as an explicit constitutional principle.<sup>191</sup> The people in the streets had agreed and had expressed this agreement, for example, in a poll in which they held the GDR to be superior to West Germany when it comes to equal protection of women.<sup>192</sup> The GDR Constitution of 1968/1974 had guaranteed equal treatment of the sexes in all areas of social, political, and personal life and had made the advancement of women a government obligation.<sup>193</sup> Yet, when it came to social reality, women had been victims of discrimination in the GDR as well. Even though there had been many women with professional careers, for example, women had been strongly underrepresented in important leadership positions in business, government,

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189. BVerfGE 10, 59, decided on 29. July 1959.

190. See Wolfgang Abendroth, *Das Grundgesetz, Eine Einführung in seine politischen Probleme*, 66 (3rd ed. 1972).

191. See Jaggi, *supra* note 6, 586 et seq.

192. See Jaggi, *supra* note 1, 70.

193. See Eckertz-Höfer, *supra* note 150, para. 6.

and academics.<sup>194</sup> Against this background, the revolutionaries had demanded real gender equality by including in the Social Charter the equal treatment of the sexes, comprehensive provision of day care, equal representation of men and women in all sectors of professional life, and a woman's right to abortion.<sup>195</sup> The draft of a new constitution for the GDR had established a government obligation to make gender equality a social reality by stating in Art. 3 (2) that the state is obliged to work towards equal treatment<sup>196</sup> of women in the profession and in public life, in education and vocational training, in the family, and in social security.<sup>197</sup> Finally, the first freely elected government in East Germany had emphasized the importance of realizing equal treatment of women in the professional world as well as in society in general.<sup>198</sup> These had been clear statements demanding a constitutional government obligation to actively realize gender equality.

This demand had been transferred to unified Germany by several means. Art. 5 UT had provided that unified Germany's legislature shall deal with questions of amending the GG that had been raised by German unification. Since the question of a constitutional government obligation to realize gender equality had been viewed differently in the post-revolutionary GDR on the one hand and in West Germany on the other, it had been an important question raised by unification.<sup>199</sup> Art. 5 UT had thus transferred the topic as well as the East Germans' opinion on it to unified Germany. Art. 31 (1) UT had specified the transfer by postulating that unified Germany's legislature must further develop the law on gender equality.<sup>200</sup> Finally, all new state constitutions contained an explicit government obligation to

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194. See Pamela Heß, *Geschlechterkonstruktionen nach der Wende, Auf dem Weg einer gemeinsamen Politischen Kultur?*, 265 (2010) with further references; Schweizer, *supra* note 150, 64.

195. See Jaggi, *supra* note 6, 595 et seq.

196. For the somewhat confusing and hairsplitting differentiation between equal rights (Gleichberechtigung) and equal treatment (Gleichstellung), see, for example, the GVK Report, in: Fischer & Künzel, *supra* note 17, Band III, 561 et seq.; and Scholz, *supra* note 33, Art. 3 Abs. 2 GG paras. 59 et seq. The term "equal rights" (Gleichberechtigung) seems to be preferred by defenders of the formal-legal approach to gender equality, whereas the defenders of the concept of real-social equality seem to prefer the term "equal treatment" (Gleichstellung). The BVerfG does not ascribe different legal meaning to the terms, see BVerfGE 74, 163, juris-version, rec. 45, 46, 51.

197. See Jaggi, *supra* note 6, 596, 597.

198. See Government Declaration, *supra* note 54, p. 20; *supra*, 147.

199. Scholz writes that the question of gender equality did not stand in "immediate relationship" with unification; still he considers Art. 5 UT to be the basis for the new Art. 3 II, 2 GG; see Scholz, *supra* note 33, Art. 3 Abs. 2 GG, para. 58.

200. See Jaggi, *supra* note 6, 618 et seq.

actively realize gender equality as a fact of social reality.<sup>201</sup>

In this situation, it was no longer possible for the Court in 1992 to ignore the East Germans' will. As opposed to 1987, when the Court had decided *Altersruhegeld*, in 1992 it was no longer only a minority opinion in the literature that argued for a constitutional government obligation to realize gender equality. The revolutionary East Germans had spoken as *pouvoir constituant*, and they had demanded, among other things, an active realization of gender equality. The West Germans had accepted this demand by signing the UT. What the BVerfG was confronted with in 1992 were no longer mere doctrinal or political arguments for a specific interpretation of Art. 3 II GG. It was a forceful revolutionary statement by an important part of the German people, which had caused institutional reactions, had found legal manifestations, and had been transferred to unified Germany.<sup>202</sup> When the Court decided *Nachtarbeit* on January 28, 1992, a change of constitutional dimensions had taken place, and unified Germany's institutions needed to respond.

The legislature, however, the institution primarily in charge of integrating revolutionary achievements into the GG,<sup>203</sup> did not seem up to the task. Even though Art. 5 UT had provided a time frame of two years as of October 3, 1990, the GVK, which finally proposed the new Art. 3 II, 2 GG in its Report in November 1993, had merely been founded on November 28/29, 1991.<sup>204</sup> The Bundestag had not taken up the Kuratorium's Draft Constitution, according to which "[t]he government is obliged to bring about and secure the equal participation of the sexes in all areas of society" (Art. 3 (2)), and "[m]easures promoting women in order to compensate them for existing disadvantages are no favoritism based on gender" (Art. 3 (4)).<sup>205</sup> Moreover, Art. 79 II GG required 2/3 majorities for amendments of the GG. And indeed, the legislature turned out to be unable to perform the integrative task. The Bundesrat's Commission's proposal of May 14, 1992, for an amended Art. 3 II GG proves this impressively. After more than a year of negotiations, the Commission's proposal read "[w]omen and men have equal

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201. *See id.* at 621 et seq.; see also the Constitutions of Brandenburg, Art. 12 III, 48 III, 2; Mecklenburg-West Pomerania, Art. 13; Saxony, Art. 8; Saxony-Anhalt, Art. 34; Thuringia, Art. 2 II; and Berlin, Art. 10 III.

202. For the details of this process of revolutionary constitutional lawmaking, see Jaggi, *supra* note 6, 582 et seq.

203. *See* Art. 5 UT and Art. 31 UT in general and Art. 31 (1) UT in particular.

204. *See supra*, 7 et seq.

205. Schweizer, *supra* note 150, 54, 55 with further references.

rights” as opposed to the original “[m]en and women have equal rights.”<sup>206</sup> Some commentators called this proposal “ridiculous” in the light of persistent real discrimination against women in Germany.<sup>207</sup> It took the GVK until October 1993 to agree on a proposal for the new Art. 3 II, 2 GG, and it took the legislature until September 23, 1994 to adopt it.<sup>208</sup> The new Art. 3 II, 2 GG entered into force on November 15, 1994.<sup>209</sup> Critics still call the amendment a “formula compromise,” which enables all sides to assert that it means what they want it to mean, leaving the meaning’s final determination to the Court.<sup>210</sup>

At the same time, the actual need for government action fighting discrimination against women had become increasingly urgent, particularly in the new East German states. While the female employment rate in the GDR prior to German unification had amounted to 91% in 1989 as opposed to only 55% in West Germany,<sup>211</sup> the number of employed women in the new states had decreased significantly since the summer of 1990.<sup>212</sup> By the end of 1992, 64.9% of 1.1 million unemployed in the new states were women.<sup>213</sup> Within three years, from 1990 to 1993, only about half of the households that prior to unification had had both partners employed still had both partners employed.<sup>214</sup> The partner still employed was usually male.<sup>215</sup> This development reestablished women’s traditional economic dependencies.<sup>216</sup> Finally, women in the new East German states had been hit particularly hard by some of the legal changes in the wake of German unification. For example, unified Germany’s legislature had repealed the additional consideration of times of child-raising for the acquisition of

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206. See Bericht der Kommission Verfassungsreform des Bundesrates of May 14, 1992, in: Fischer & Künzel, *supra* note 17, Band II, 420 et seq. (444).

207. Representative Ulrike Mascher, in: Jutta Limbach & Marion Eckertz-Höfer (eds.), *Frauenrechte im Grundgesetz des geeinigten Deutschland*, 28 (1993).

208. See Beschluß des Bundesrates v. 23.09.1994, 834/94 (Beschluß), reprinted in: Fischer & Künzel, *supra* note 17, Band III, 1002.

209. See Art. 2 of the GG-amending law (BGBl I 1994, 3146).

210. See Isensee, *supra* note 37, 2583, 2585. Isensee calls the text a “dilatorischen Formelkompromiss”; see also Schweizer, *supra* note 150, 84; and Jutta Limbach, in: Limbach & Eckertz-Höfer, *supra* note 207, 299 et seq., 300.

211. Friedericke Maier, The labour market for women and employment perspectives in the aftermath of German unification, *Cambridge Journal of Economics* 1993, 268.

212. *Id.*, at 273 et seq.

213. *Id.*, at 274.

214. Schweizer, *supra* note 150, 63.

215. *Id.*

216. *Id.*

pension claims, had reduced women's rights to be excused from work to tend to sick children, and had reduced the availability of day care.<sup>217</sup>

In this situation of legislative deadlock in combination with increasing dissatisfaction of East Germans with how revolutionary achievements were being treated in unified Germany, the Court's *obiter dictum* in *Nachtarbeit* acquires a new meaning. When the Court, for the first time in the GG's history, stated that "the meaning of Art. 3 II GG that goes beyond the meaning of Art. 3 III GG is that it postulates "an order to equal protection and expands this order to apply also to social reality,"<sup>218</sup> it engaged in an attempt to integrate the revolutionary achievement of a constitutional government obligation to realize gender equality into the existing constitutional order under the GG. Even though the Court did not explicitly justify its new interpretation of Art. 3 II GG, it clearly shows signs of the integrative effort. The Court takes the old Art. 3 II GG and gives it a new meaning that reflects what the revolutionary East Germans had fought for and had successfully transferred to unified Germany.

The integrative pattern reoccurs in the Court's later decisions on gender equality. For example, in *Kindererziehungszeiten*<sup>219</sup> the Court held constitutional the provisions of two laws dealing with the consideration of times of child-raising for purposes of acquiring rights in the statutory pension insurance. The provisions examined by the Court allowed for the consideration of times of child-raising for purposes of acquiring rights in the statutory pension insurance only under certain restrictive conditions.<sup>220</sup> Under the traditional formal-legal approach to gender equality, these conditions would have been unproblematic because they applied equally to women and men.<sup>221</sup> The fact that, in reality, women mostly devoted their time to child raising and were thus more strongly affected by the restrictive conditions (less insurance times meaning lower pensions) would have been irrelevant.

After 1990, however, it was no longer possible to apply the formal-legal approach. The revolutionary East Germans had clearly demanded a constitutional government obligation to make gender equality a social

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217. Minister Marianne Birthler (Brandenburg), in Limbach & Eckertz-Höfer, *supra* note 207, 36.

218. BVerfGE 85, 191, juris-version, rec. 53.

219. BVerfG, Urteil v. 07.07.1992, 1 BvL 51/86, 1 BvL 50/87, 1 BvR 873/90, 1 BvR 761/91, BVerfGE 87, 1-48.

220. For the details, see BVerfGE 87, 1 juris-version, rec. 20.

221. See BVerfGE 87, 1, juris-version, rec. 5 et seq. referring to §§ 1227a RVO and 2a AVG, which applied to "mothers and fathers" equally.

reality. Against this background, the Court had to confirm its statement in *Nacharbeit*, this time, however, no longer in a mere *obiter dictum* but as part of the holding.<sup>222</sup> “However, the insufficient consideration of periods of child-raising in the statutory pension insurance does *in fact* mainly disadvantage *mothers* because, to this very day, it is mostly they who take over child-raising and therefore limit, suspend, or give up their professional careers.”<sup>223</sup> This fact, the Court concludes, “causes the *legislature’s obligation based on Art. 3 II GG to work towards an equalization of the living conditions for men and women.*”<sup>224</sup>

Another example for the Court’s integrative efforts in the field of gender equality is its decision in *Arbeitgeberzuschuss zum Mutterschaftsgeld*<sup>225</sup> The Court had to decide the constitutionality of a law that obliged employers to contribute to payments for women during six weeks before and eight weeks after childbirth. During this time, the law prohibited a woman from working to protect her and her child against “dangers of the workplace, excessive demands, and health problems”.<sup>226</sup> Formally, the law was nondiscriminatory because the differentiation could be justified with the biological difference of pregnancy. As a matter of social reality, however, the employers’ obligation to contribute to women’s payments during a time in which they were not allowed to work threatened to disadvantage women in the job market since employers, trying to avoid these contributions, were less likely to hire women.<sup>227</sup> The Court itself pointed out that, in an earlier decision on the same topic in 1974, it had considered the law’s merely indirect impact on women’s job opportunities irrelevant in terms of gender discrimination.<sup>228</sup> It had argued that employers were free to choose whether or not to hire women and thereby incur the legal

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222. The Court held the provisions constitutional but made the decision’s reasons part of the holding (“nach Maßgabe der Gründe”).

223. BVerfGE 87, 1, juris-version, rec. 140 (my italics).

224. See BVerfGE 87, 1, juris-version rec. 140 (my italics), where the Court explicitly cites *Nacharbeit* in support of this statement. The Court confirms the statement in *Kindererziehungszeiten II*, BVerfG Beschluss v. 12.03.1996, 1 BvR 609/90, 1 BvR 692/90, BVerfGE 94, 241-267, juris-version, rec. 52.

225. BVerfG Beschluss v. 18.11.2003, 1 BvR 302/96, BVerfGE 109, 64-96.

226. BVerfGE 109, 64, juris-version, rec. 1 et seq.

227. *Id.*, rec. 217, 218, 222–226; the Court saw a violation of Art. 3 II GG in the fact that the obligation to contribute to an insurance (Ausgleichs- und Umlageverfahren) that would cover the expenses for women during the relevant time was limited to small enterprises. Larger enterprises did not have to participate in the insurance scheme, so that they were less likely to hire women, because their expenses for pregnant women and mothers, respectively, would not be covered by the insurance; see *Id.*

228. BVerfGE 109, 64, juris-version, rec. 191.

obligation to contribute to the payments.<sup>229</sup>

In 2003, however, this argument was no longer feasible because, as the Court explicitly said, the law with respect to gender equality had changed.<sup>230</sup> The Court referred “in particular” to the new sentence 2 of Art. 3 II GG, added to the GG in 1994.<sup>231</sup> What the Court referred to substantively, however, was the new constitutional government obligation to realize gender equality. Yet, this new obligation had not been established in 1994 by the amendment of Art. 3 II GG but by the Court itself in 1992 in *Nachtarbeit* as a product of its integrative efforts. It is this substantive change which the Court in *Arbeitgeberzuschuss zum Mutterschaftsgeld* makes the basis for a legislative obligation to come up with a regulation that, as a matter of social reality, equalizes women’s job opportunities.<sup>232</sup>

In summary, my analysis offers a new perspective on why the Court developed a new approach to gender equality in 1992, at a time when the adoption of the new Art. 3 II, 2 GG was still more than two years away and very unsure. Realizing that unified Germany’s legislature was getting nowhere in its attempt to integrate revolutionary achievements on gender equality into the existing constitutional order under the GG, the Court took over by interpreting Art. 3 II GG as establishing a government obligation to realize gender equality. This understanding takes both constitutional interpretation and constitutional history more seriously.

### III. Abortion

Abortion has been a highly controversial political and legal issue in Germany for a long time.<sup>233</sup> The controversy has centered on the balancing of two competing constitutional rights: (i) the unborn child’s right to life<sup>234</sup> and (ii) the woman’s right to self-determination. Based on this controversy, there were, prior to 1993, basically two models for the legal treatment of

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229. BVerfGE 37, 121, juris-version, rec. 23; BVerfGE 109, 64, juris-version, rec. 191.

230. BVerfGE 109, 64, juris-version, rec. 191.

231. *Id.*

232. *Id.*, rec. 192, 225, 231, 232.

233. For an overview, see, for example, Quint, *The Imperfect Union*, *supra* note 28, 154 et seq.; Donald Kommers, *Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective*, *BYU L. REV.* 371, 391 et seq. (1985); KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY*, 335 et seq. (2nd ed. 1997).

234. For an explanation of this concept, see Kommers, *BYU L. REV.* 371, 393 et seq. (1985).

abortion in Germany: (i) the so-called indication model, which emphasizes the unborn child's right to life and (ii) the so-called time-phase model, which emphasizes the woman's right to self-determination, at least during the first twelve weeks of the pregnancy.

The indication model makes abortion a crime and only provides for exceptions if specific indications are ascertained. The indications are: (i) the mother's life or health is in danger (the so-called medical indication); (ii) the pregnancy is the result of a crime, such as rape or incest (the so-called ethical indication); (iii) the unborn child is diagnosed with birth defects (the so-called eugenic indication); and (iv) the pregnant woman suffers from social and psychological conflicts that are as damaging to her as any of the other indications (the so-called social indication). The time-phase model, on the other hand, grants the pregnant woman a right to abortion during the first twelve weeks of the pregnancy under the condition that, prior to the abortion, she participates in so-called "preventive counseling".<sup>235</sup>

In 1975, in *Abortion I*,<sup>236</sup> the BVerfG repudiated a legislative attempt to introduce a time-phase model in West Germany. The Court declared the law unconstitutional and argued that it did not provide for an effective protection of the unborn child. Based on the GG, the Court argued, criminal punishment of abortion throughout the entire pregnancy was necessary to effectively protect the unborn child.<sup>237</sup> In 1993, in *Abortion II*,<sup>238</sup> the Court

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235. That the woman has a right to an abortion during the first twelve weeks of the pregnancy is the *time-phase model's* characteristic criterion. This is its main difference compared to the Court's *counseling model*, under which the woman, during the first twelve weeks of a pregnancy, *does not have a right* to an abortion but is only *free from criminal punishment* if she has an abortion. Preventive abortion counseling "means that the woman is „instructed about the public and private assistance available for pregnant women, for mothers, and children, especially such assistance that facilitates the continuation of the pregnancy and eases the conditions of mother and child“. In addition, the woman must be counseled on the medical aspects of an abortion by a physician; see § 218c (1) of the Abortion Reform Act of June 18, 1974 (5. Strafrechtsreformgesetz v. 18.06.1974, BGBl I 1974, 1297 – 1300).

236. BVerfG, Urteil v. 25.02.1975, 1 BvF 1-6/74, *NJW* 1975, 573 et seq.

237. See BVerfG, *NJW* 1975, 579: "Durch die völlige Aufhebung der Strafbarkeit ist jedoch eine Schutzlücke entstanden, welche die Sicherung des sich entwickelnden Lebens in einer nicht geringen Anzahl von Fällen gänzlich beseitigt" and 581: "Jedoch vermögen weder die gegenwärtig angebotenen und gewährten Hilfen dieser Art noch die im 5. StrRG [Strafrechtsreformgesetz] vorgesehene Beratung den individuellen Lebensschutz zu ersetzen, den eine Strafnorm grundsätzlich auch heute noch in den Fällen gewährt, in denen für den Abbruch einer Schwangerschaft kein nach der Wertordnung des Grundgesetzes achtenswerter Grund besteht" and "Er [der Gesetzgeber] muß vielmehr den ernsthaften Versuch unternehmen, durch eine Differenzierung der Strafandrohung einen wirksameren Lebensschutz . . . zu erreichen."

238. BVerfG, Urteil v. 28.05.1993, 2 BvF 2/90, 2 BvF 4/92, 2 BvF 5/92, *NJW* 1993, 1751 et seq.

changed its mind. After unified Germany's legislature, in an attempt to fulfill its obligation under Art. 31 (4) UT, had adopted another time-phase model in an act dating from July 27, 1992,<sup>239</sup> the Court declared that during the first twelve weeks of the pregnancy criminal punishment of abortion was no longer required by the GG to effectively protect the unborn child. Instead, the Court now considered a specified model of counseling sufficient.<sup>240</sup>

Again, the question is how to explain this change? As in the previous cases, there are authors who simply deny any change. Other authors provide the typical doctrinal explanations of judicial restraint and deference to the legislature. Again, others think of the change as a product of judicial politics trying to find a compromise between the different East and West German abortion models. Finally, there are authors who think the Court's opinion is simply paradoxical and wrong.

Again, I want to offer a new explanation. Putting *Abortion II* into historical perspective, I will show that it should be understood as the Court's attempt to integrate the revolutionary achievement of individual empowerment with the traditional West German emphasis on the protection of the unborn child, the social function of criminal law, and women's traditional role in society.

In what follows, I will first outline the similarities and fundamental differences between the Court's constitutional treatment of abortion in 1975 on the one hand and 1993 on the other. I will then summarize the traditional understanding of *Abortion II* and show why it is not convincing. Finally, I will present my own understanding of *Abortion II* as the Court's attempt to integrate revolutionary achievements into the existing constitutional order under the GG.

#### The Decision: *Abortion II* (1993)

In *Abortion II* the Court decided on the constitutionality of a new law on abortion adopted in July 1992.<sup>241</sup> The new law was the legislature's response to Art. 31 (4) UT, which had made it "the task of unified Germany's legislature, by December 31, 1992, the latest, to adopt a law that better

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239. Art. 13 Schwangeren- und Familienhilfegesetz of 27.07.1992 (BGBl I 1992, 1398) amended §§ 218 et seq. StGB.

240. See BVerfG, NJW 1993, 1756 et seq.

241. The law's official name is Gesetz zum Schutz des vorgeburtlichen/werdenden Lebens, zur Förderung einer kinderfreundlicheren Gesellschaft, für Hilfen im Schwangerschaftskonflikt und zur Regelung des Schwangerschaftsabbruchs (Schwangeren- und Familienhilfegesetz) v. 27.07.1992 (BGBl I 1992, 1398).

provides for the protection of the unborn life and for the support of pregnant women . . .”.<sup>242</sup> The law introduced a time-phase model, i.e. it declared abortions undertaken during the first twelve weeks of the pregnancy “not illegal” if the woman had participated in specified counseling prior to the abortion. The Court held § 218a Abs. 1 StGB of the new law unconstitutional arguing that the GG does not permit to declare “not illegal” abortions undertaken during the first twelve weeks of the pregnancy under the stated requirements. The Court, moreover, held that the specific regulation of the counseling violated the GG.<sup>243</sup> Finally, the Court issued an enforcement order entering its own counseling model into force for as long as the legislature would need to come up with a new law that complied with the holding.<sup>244</sup> The enforcement order prevented the continued application of the GDR’s time phase model in the new East German states based on Art. 31 (4) last sentence UT.<sup>245</sup>

Analytically, *Abortion II* can be divided into two parts: part 1 confirming principles established in *Abortion I* and part 2 developing a new approach.

In part 1 the Court confirms the following basic positions of *Abortion I*: A fetus is an “unborn human life” that possesses human dignity and has an own right to life. This right must be protected by the government against dangers emanating from other individuals, including the mother.<sup>246</sup> Effective protection of the fetus requires the legislature to establish, as a matter of principle, the mother’s legal obligation to carry the child to term.<sup>247</sup> This legal obligation may only be suspended under exceptional circumstances when compliance with the obligation is “intolerable.” These are circumstances in which the aforementioned medical, ethical, eugenic, or social indications have been ascertained.<sup>248</sup> Criminal law is the *ultima ratio* to prevent conduct that is so harmful that its prevention is particularly urgent. Therefore, the criminalization of abortion, regularly, is the right means to establish a woman’s legal obligation to carry the child to term.<sup>249</sup> However,

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242. *See infra*, 67.

243. BVerfG, *NJW* 1993, 1752.

244. *Id.*, 1752, 1773, 1774.

245. *See infra*, 67, 68; see also Rüdiger Breuer, Der verfassungsrechtliche Schutz des Lebens - Integrationsprobleme im Wiedervereinigten Deutschland, in: Jörn Ipsen (ed.), *Verfassungsrecht im Wandel*, 25, 39 (1995).

246. BVerfG, *NJW* 1993, 1753.

247. *Id.*, 1753, 1754.

248. BVerfG, *NJW* 1993, 1754.

249. *Id.*, 1754, 1755.

the criminalization of abortion is not required if and to the extent to which other, less invasive, means can provide constitutionally sufficient protection of the unborn life. If that is the case, it may suffice to express a woman's general obligation to carry the child to term by legal means other than criminal law.<sup>250</sup>

In part 2 the Court develops rules for how the state may discharge its constitutional obligation to protect the unborn child. These rules manifest a fundamental shift in the Court's constitutional concept of unborn-child protection compared to its 1975 abortion decision. Conceptionally, there is a shift from *repression* of abortion through criminal law to *prevention* of abortion through combining a timely limited freedom to have an abortion with abortion counseling. Moreover, there is a shift from a concept of *imposition* that tried to force the woman to carry the child to term to a concept of *empowerment* that tries to motivate the woman to carry the child to term by offering support. In what follows I will summarize these concepts' characteristics and fundamental differences.

*From repression to prevention.* In *Abortion I* the Court held that even though criminal punishment was the legislature's sharpest sword and must only be applied as *ultima ratio*, its application was constitutionally required to prevent abortions. In the Court's view, it was uncertain whether other, less invasive means, such as the time-phase model, would be at least equally effective in protecting the unborn child.<sup>251</sup> Even though the criminal law's effectiveness in protecting the unborn child was equally unproven and it was "generally acknowledged" that criminal law as applied until 1975 had lacked effectiveness,<sup>252</sup> the Court nevertheless insisted on the criminalization of abortion. It argued that the existing empirical information did not allow for a definite conclusion regarding the time-phase model's effectiveness in reducing the number of abortions.<sup>253</sup> In this situation, the Court argued, the importance of the child's right to life required the strongest measure of protection and did not allow for experiments.<sup>254</sup> The legislature, already in 1975, had argued that a time-phase model in combination with preventive

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250. *Id.*, 1755.

251. BVerfG, *NJW* 1975, 577, 578, 580, 584.

252. *Id.*, 578; the original reads: "Es ist allgemein anerkannt, dass der bisherige § 218 StGB, gerade weil er für nahezu alle Fälle des Schwangerschaftsabbruchs undifferenzierte Strafe androhte, das sich entwickelnde Leben im Ergebnis nur unzureichend geschützt hat"; see *id.*, D. II. on p. 578.

253. BVerfG, *NJW* 1975, 580.

254. *Id.*; the original reads: "Experimente sind aber bei dem hohen Wert des zu schützenden Rechtsgutes nicht zulässig."

counseling would be more effective in protecting the unborn child. The threat of criminal punishment, the argument went, drives women into illegality and thus keeps them from participating in preventive counseling that would protect the unborn child.<sup>255</sup> Already in 1975, the dissenting justices Wiltraut Rupp-v. Brünneck and Helmut Simon argued that the time-phase model was constitutional unless it was proven to be ineffective in protecting the unborn child. They argued it would violate the principle of proportionality to insist on criminal punishment of abortion unless it was proven that criminal punishment, i.e. the *ultima ratio*, was able and necessary to protect the unborn child.<sup>256</sup> However, the Court's majority in 1975 decided to "reverse the burden of proof"<sup>257</sup> and required the legislature to prove that its time-phase model was "at least" as effective as, or even more effective than, criminal punishment in protecting the unborn child.<sup>258</sup> Since the legislature was unable to prove that, the time-phase model was held unconstitutional.<sup>259</sup> The Court thus insisted on criminal law as a means to repress abortions.

This approach changed fundamentally in Abortion II. In Abortion II, the Court declared a model constitutional that renounced the criminalization of abortions undertaken during the first twelve weeks of the pregnancy after specific preventive counseling (the Court calls it the "counseling model").<sup>260</sup> The Court argued that it "appeared defensible" that the counseling model provided effective protection of the unborn child,<sup>261</sup> even though the model's actual effectiveness remained unproven (as it had been in 1975). The Court, thus, just dropped the *Abortion I* requirement according to which the legislature had to prove the counseling model's effectiveness. It was undisputed that the indication model as it had been applied so far had not been effective.<sup>262</sup> However, that was the case in 1975, too.<sup>263</sup> Still, in 1975

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255. BVerfG, *NJW* 1975, 578.

256. *Id.*, at 584.

257. *Id.*

258. *Id.*

259. *Id.*, at 578, 580, 581.

260. See for example, BVerfG, *NJW* 1993, 1757 et seq.

261. BVerfG, *NJW* 1993, 1756, 1757; on p. 1756 the Court argues that it examines whether the legislature's prognosis that its concept of protection is sufficiently effective is "defensible" ("vertretbar"); on p. 1757 the Court states that the legislature's "appraisal" according to which the state has a better chance to protect the unborn child if it cooperates with the mother "appears justified" ("lassen die Einschätzung berechtigt erscheinen").

262. BVerfG, *NJW* 1993, 1757.

263. BVerfG, *NJW* 1975, 578: "It is generally acknowledged that the previous § 218 StGB . . . has in the end only insufficiently protected the developing life."

the Court stated that “[i]t is constitutionally unobjectionable and must be accepted if the legislature tries to comply with its obligation to provide *a better protection of unborn life* through preventive measures, including a counseling that strengthens the woman’s own responsibility.”<sup>264</sup> That sounded fundamentally different in 1993:

It is, however, controversial, scientifically as well as politically, whether a counseling model for abortions in the early phase of the pregnancy provides a better protection for the unborn life than the previous regulation [i.e., the previous indication model]. . . . In the face of the demonstrated reasons that speak against the continuation of the previous indication model, however, *such uncertainties do not prevent the legislature, as a matter of principle, from introducing a counseling model.*<sup>265</sup>

Had the Court stuck to its 1975 principles, it would have had to conclude that, because of the remaining uncertainties regarding the counseling model’s effectiveness, criminal punishment was still constitutionally required.<sup>266</sup> But the Court did not, in 1993, the Court was content with the fact that the legislature’s assessment of the counseling model’s effectiveness was “defensible.”<sup>267</sup> The Court, thus, allowed for a conceptual shift from the criminal *repression* of abortions to the *prevention* of abortions through counseling.

*From imposition to empowerment.* Another profound difference between *Abortion I* and *Abortion II* lies in the Court’s psychological and sociological concepts to protect the unborn child. *Abortion I* stands for an authoritarian *imposition* of a traditional mother role upon women by threatening them with criminal punishment in case of non-compliance. *Abortion II*, while holding on to a legal obligation to carry the child to term, emphasizes a concept of *empowering* the woman to decide in favor of the child. It does so by respecting the woman’s decision to have an abortion

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264. BVerfG, *NJW* 1975, 578 (my italics).

265. BVerfG, *NJW* 1993, 1757 (my italics).

266. In 1975 the Court held that the legislature may only refrain from criminal punishment of abortion if another legal sanction would be at its disposal that would prevent abortions as effectively as criminal punishment; see BVerfG, *NJW* 1975, 577, 578.

267. BVerfG, *NJW* 1993, 1756; the original reads: “. . . die verfassungsrechtliche Prüfung erstreckt sich . . . darauf, ob der Gesetzgeber . . . seinen Einschätzungsspielraum ‘in vertretbarer Weise’ gehandhabt hat.”

during the first twelve weeks of her pregnancy after counseling and at the same time supporting her, through public welfare and counseling, in deciding in favor of the child.<sup>268</sup>

In both decisions, the Court stated a *theoretical* priority of *empowerment* over *imposition*, i.e. of social support over criminal punishment.<sup>269</sup> However, the Court's elaborations on active governmental support in *Abortion I* were cursory, at best. After stating that the government must "primarily" apply "social-political and welfare means" to protect the child,<sup>270</sup> the Court revealed that the goal of such means was not to empower the woman to make a decision in favor of the child but to force upon her the conviction that it is her duty to carry the child to term: "the main goal will be to strengthen the future mother's willingness to . . . accept her pregnancy and to carry the child to term."<sup>271</sup> "to reawaken the mother's willingness to protect the child . . . and if necessary to strengthen it should be the premier goal of the state's efforts to protect life."<sup>272</sup> The Court considered social support as slow and ineffective in shaping a woman's attitude while it emphasized the effectiveness of criminal law in shaping social perceptions and protecting the unborn life.<sup>273</sup> While the Court cursorily addressed the need to inform about how to prevent unwanted pregnancies and how to access effective social support,<sup>274</sup> it emphasized what it apparently considered to be the real problem: "there are many women . . . who do not suffer from economic plight or a serious conflict. They reject their pregnancy because they are not willing to endure the encompassing hardship and to accept *the natural motherly duties*."<sup>275</sup> The most effective means to correct such attitudes was, according to the Court, the threat of criminal punishment because ". . . already the pure existence of such a threat . . . has

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268. Breuer writes that the state must act "cooperatively and persuasively" with respect to the participants in the conflict; see Breuer, *supra* note 245, 48.

269. See BVerfG, *NJW* 1975, 576.

270. *Id.*; the original reads: "Es ist daher Aufgabe des Staates, in erster Linie sozialpolitische und fürsorgliche Mittel zur Sicherung des werdenden Lebens einzusetzen."

271. *Id.*; the original reads: "Dabei wird es hauptsächlich darauf ankommen, die Bereitschaft der werdenden Mutter zu stärken, die Schwangerschaft . . . anzunehmen und die Leibesfrucht zum vollen Leben zu bringen."

272. *Id.*; the original reads: "Den mütterlichen Schutzwillen . . . wieder zu wecken und erforderlichenfalls zu stärken sollte das vornehmste Ziel der staatlichen Bemühungen um Lebensschutz sein."

273. BVerfG, *NJW* 1975, 576 et seq., 579.

274. *Id.*, 581.

275. BVerfG, *NJW* 1975, 579 (my italics).

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an effect on the peoples' perception of values and on their conduct."<sup>276</sup> These arguments reflect the Court's perception of a government that *imposes* a traditional role upon pregnant women and tries to enforce this role by threatening with criminal punishment in case of non-compliance.

The Court's perception changed fundamentally in *Abortion II*. To be sure, the Court held on to the pregnant woman's legal obligation to carry the child to term. However, to achieve compliance with this obligation, the Court allowed the legislature to refrain from threats of criminal punishment during the first twelve weeks of the pregnancy and to respect the woman's decision to have an abortion during that time. The Court further wanted to *empower* the woman to make a responsible decision in favor of the child by obliging the government to actively generate a social environment that encourages a woman to carry her child to term. The Court emphasizes that the government must protect the unborn child not only against dangers emanating from other people but must also "stand up to such dangers . . . that are rooted in *the actual and foreseeable real circumstances of the life of the woman and her family . . .*"<sup>277</sup> Where *Abortion I* laconically referred to the insight that it was the government's foremost obligation to prevent abortions by way of information and effective social support,<sup>278</sup> *Abortion II* elaborates in great detail on an active government obligation to make sure that abortions are not undertaken because of an "economic emergency."<sup>279</sup> For example, the Court argues that the government must prevent disadvantages that women may suffer as a result of the pregnancy with respect to vocational training and professional development.<sup>280</sup> The government must examine factors that may burden pregnant women or mothers and must make an effort to repeal or alleviate difficulties. The government must actively promote a child-friendly society through, among other things, appropriate regulation of employment, landlord-tenant relationships, and pensions.<sup>281</sup> With respect to the latter, the Court explicitly refers to *Kindererziehungszeiten*.<sup>282</sup> Finally, the Court gives detailed instructions to the legislature on how to regulate abortion counseling.<sup>283</sup> These elements reflect a concept of *empowering* women to decide in favor of the child.

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276. *Id.*

277. BVerfG, *NJW* 1993, 1755 (my italics).

278. BVerfG, *NJW* 1975, 581.

279. BVerfG, *NJW* 1993, 1755.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*, 1760 et seq.

### Traditional Understanding

Authors differ as to what the Court said in *Abortion II* and how that is different from what it had said in *Abortion I*. Alec Stone Sweet's, for example, simply denies a change in the Court's constitutional abortion requirements from 1975 to 1993. According to Stone Sweet, the BVerfG in 1993 essentially upheld its 1975 ruling.<sup>284</sup> Other, more differentiated, opinions emphasize either doctrinal or judicial policy aspects.

Some authors approve of *Abortion II* as a return to judicial restraint. They argue that, where the Court in 1975 had acted like a legislator by insisting on a criminalizing of abortion, in 1993 it deferred to the legislature's basic decision to forego criminal punishment during the first twelve weeks of the pregnancy after counseling.<sup>285</sup> Others criticize *Abortion II* for a lack of judicial restraint, arguing that the Court's detailed prescriptions, in particular with respect to counseling, are a "usurpation" of the legislative function.<sup>286</sup>

Still others consider *Abortion II* an act of *judicial politics*. Quint, for example, views the Court's counseling model as a political compromise between West Germany's indication model and the GDR's time-phase model.<sup>287</sup> Some authors imply that the Court surrendered to the *Zeitgeist*,<sup>288</sup> while others complain that the Court did not sufficiently consider GDR positions in the compromise.<sup>289</sup>

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284. Alec Stone Sweet, *Governing with Judges, Constitutional Politics in Europe*, 112 (2000).

285. For the argument, see Justices Rupp-v. Brünneck and Simon dissenting in *Abortion I*, *NJW* 1975, 582, 583.

286. See Hans-Peter Schneider, *Die Vollstreckungskompetenz nach § 35 BVerfGG - Ein Notverordnungsrecht des Bundesverfassungsgerichts*, *Neue Juristische Wochenschrift (NJW)* 1994, 2591.

287. Quint, *The Imperfect Union*, *supra* note 28, 159 et seq., 163 et seq.; Quint concludes that "the underlying result of the parliamentary legislation – as modified by the Court's decision – is actually closer to what might have been expected in a new constitution, adopting certain ideas from east and west under article 146. . . . In the end . . . the east kept a remnant of its own position on this matter – a view derived from the old regime but also endorsed in the Round Table's draft constitution"; see *id.*, 164, 165; similarly Breuer, *supra* note 245, 47.

288. See Willi Geiger, *Menetekel - An die Adresse des Bundestags, der Bundesregierung und des Bundesverfassungsgerichts*, *Schriftenreihe der Juristenvereinigung Lebensrecht e.V. zu Köln*, Nr. 10, 33 et seq. (1993); and Hans Faller, *Beratung und Hilfe statt Strafe, Die Urteile des Bundesverfassungsgerichts zum Schwangerschaftsabbruch von 1975 und 1993*, *Frankfurter Allgemeine Zeitung (FAZ)* v. 08.06.1993, 12.

289. Anita Gradke, *Anmerkungen zum Urteil des BVerfG zu § 218 StGB*, *Neue Justiz*

Finally, there are authors who are simply confused by the Court's decision and call it contradictory and paradoxical.<sup>290</sup> This criticism is reflected in the statement that “the majority opinion, at the end of the day, prohibits an act and declares it illegal but at the same time allows it and regulates it legally.”<sup>291</sup>

None of these explanations are satisfactory. Stone Sweet's approach can be rejected offhand because it simply ignores the described fundamental changes from *Abortion I* to *Abortion II*. Whatever one thinks of the decisions' details, it seems impossible to deny the following change. Prior to *Abortion II*, the Court had insisted on criminal punishment of abortion throughout the pregnancy as part of the indication model. As of *Abortion II* the Court has accepted a so-called counseling model according to which women can have an abortion during the first twelve weeks of the pregnancy after preventive counseling without being threatened with criminal punishment.<sup>292</sup> If that is no fundamental change, I don't know what is.

The arguments for or against *judicial deference* are inconclusive because they focus on individual aspects of *Abortion II* and ignore the bigger

(*NJ*) 1993, 347, 348 criticizes that “the exclusive basis for the Court's deductions is the old states' indication model” and that the Court doesn't take the GDR's model, described as “time-phase model with support concept” (“Fristenlösung mit Hilfskonzept”), into consideration. Moreover, in Gradke's view, the Court does not consider that under the GDR law the number of abortions had decreased since the 1980s and that the birth rates in the GDR have always been higher than in West Germany; see Gradke, *id.*, 348. Gradke argues that the Court's new concept is a limitation of liberty and self-determination for women in the former GDR, who had been hoping for more freedom as a result of unification, see *id.*

290. Monika Frommel, § 218 StGB: Straflös aber rechtswidrig; zielorientiert aber ergebnisoffen - Paradoxien der Übergangsregelung des Bundesverfassungsgerichts, *Kritische Justiz (KJ)* 1993, 327, 329.

291. Gradke, *supra* note 289, 347.

292. Except for Stone Sweet, most authors seem to recognize this fundamental difference between *Abortion I* and *Abortion II*, see, for example, Christian Starck, Der verfassungsrechtliche Schutz des ungeborenen menschlichen Lebens, *Juristenzeitung (JZ)* 1993, 818, who writes that the Court's holding in 1993 reflects the general acceptance of the time-phase model as the new model of protecting the unborn child; or Frommel, *supra* note 290, 330, who writes, “In terms of criminal law, there is a time-phase model in the form of the so-called counseling model in force since July 16, 1993”; Breuer, *supra* note 245, 45 et seq. calls *Abortion II* a “paradigm change” (“Paradigmenwechsel”) and a “changed adjudication” (“gewandelte Rechtsprechung”); see also the Court itself, who writes in BVerfGE 98, 265, 302 about a change “. . . from criminal law as a governmental reaction to abortions to a concept of protection through counseling safeguarded by criminal law” (“. . . vom Strafrecht als staatlicher Reaktion auf Schwangerschaftsabbrüche zu einem strafrechtlich abgesicherten Konzept des Schutzes durch Beratung”); Quint, *The Imperfect Union*, *supra* note 28, 160 writes: “. . . in a very significant theoretical shift, the Court for the first time moved away from a general requirement for the criminal penalization of abortion” (my italics).

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picture. As a matter of fact, the Court partly deferred to the legislature and partly did not. It deferred to the legislature's general decision to replace criminal punishment with social support and counseling during the first twelve weeks of the pregnancy. It did not defer to the legislature's specific implementation of this new model and, at great length and detail, developed its own counseling model, which applied until the legislature came up with a model that fulfilled the Court's demands.

Finally, characterizing *Abortion II* as an act of *judicial politics* that, more or less successfully, compromises between West German and East German abortion models gives up too easily on the possibility of explaining the changes in terms of constitutional interpretation.

#### My Understanding: *Abortion II* as an act of integration

My thesis is that *Abortion II*, just like the other decisions that I have analyzed so far, is better, i.e., more realistically and meaningfully, understood as an act of constitutional interpretation in the sense of integrating revolutionary achievements. The Court, confronted with a legislature that had failed to properly integrate into the existing constitutional order under the GG the 1989 Revolution's achievements regarding abortion, took over the integrative task and developed its own counseling model as a means of integration.

*Abortion I* (1975) clearly stands for West Germany's constitutional approach to abortion. Its characteristics were repression and imposition.<sup>293</sup> It emphasized the constitutional protection of the unborn child and tried to achieve it by requiring the repression of abortions through criminal law. Where it included governmental support for women as a means to protect the unborn child, this means was of subordinate and limited importance, as can be seen in the brevity with which the Court mentioned it.<sup>294</sup> The approach saw the government as authoritatively imposing a traditional role upon pregnant women and enforcing this role through criminal law.<sup>295</sup>

One of the 1989 Revolution's constitutional achievements is the principle of individual empowerment, which comprises of (i) a constitutional government obligation to establish a social environment in which constitutional rights can become a social reality for everyone; (ii) the promotion of real-social (as opposed to only formal-legal) equality for

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293. *See supra*, 57 et seq., 60 et seq.

294. *See* BVerfG, *NJW* 1975, 576; *supra*, 283.

295. *See supra*, 61.

women; and (iii) a woman's right to abortion.<sup>296</sup> With respect to abortion, the principle of individual empowerment aims at preventing abortions by *empowering* women through governmental support, counseling, and the liberty, during the first twelve weeks of the pregnancy, to make a free and responsible decision for or against the unborn child. During this early period of the pregnancy, individual empowerment's clear emphasis is on the woman's right to self-determination, not on the protection of the unborn child. A woman's right to abortion was an important demand by the people in the streets, expressed in chants, such as "Hätte Frau Marx abgetrieben, wär uns viel erspart geblieben".<sup>297</sup> This demand found its legal manifestation in both the Social Charter and the RTD. The Social Charter granted women a right to abortion.<sup>298</sup> Art. 4 (3) of the revolutionaries' draft constitution gave women the right to a self-determined pregnancy and obliged the government to protect the unborn child by providing social support.<sup>299</sup> East Germany's first freely elected government emphasized the necessity of economic and moral support, particularly for women, in order to protect the unborn child.<sup>300</sup> Moreover, in direct response to the people in the streets, the government decided to preserve the GDR's time-phase model instead of taking over West Germany's indication model.<sup>301</sup> The UT transferred these achievements to unified Germany. Art. 31 (4) UT obliged unified Germany's legislature to improve the legal protection of the unborn child *particularly through legally guaranteed claims for women, particularly to counseling and social help*.<sup>302</sup> It underlined the importance of the task by stating that the GDR's abortion law would remain in force in the new states until unified Germany's legislature would come up with an improved concept.

*Abortion II* must be understood as integrating several principles: (i) West Germany's emphasis on the protection of the unborn child with the revolutionaries' emphasis on the woman's right to self-determination; (ii) West Germany's concept of repressing abortions through criminal law with the revolutionaries' concept of preventing abortions through governmental support and counseling; and (iii) West Germany's authoritative imposition

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296. *See supra*, 3, 4.

297. "If Mrs. Marx had had an abortion we would have been spared a lot," quoted in: Tetzner, *supra* note 50, 132.

298. *See Jaggi, supra* note 6, 595 et seq.

299. *Id.*, 597.

300. *See* Government Declaration, *supra* note 54, p. 19.

301. *See Jaggi, supra* note 6, 609. For a brief summary of the GDR's time-phase model, see Breuer, *supra* note 245, 34.

302. My italics.

of a traditional role upon women with the revolutionaries' principle of individual empowerment through active governmental support.

(i) Abortion II holds on to the pregnant woman's legal obligation to carry the child to term, so that abortions remain illegal throughout the entire pregnancy. Hence, the Court had to hold unconstitutional the legislature's attempt to declare abortions undertaken within the first twelve weeks of the pregnancy "not illegal." I consider this the result of the Court's attempt to integrate the revolutionaries' emphasis on the woman's right to self-determination with the West German emphasis on the unborn child's right to life. Trying to harmonize these two conflicting constitutional positions, the Court argues that the unborn child's right to life prevents the typical balancing in which each legal position gives way a little.<sup>303</sup> It is impossible to gradually reduce or temporarily suspend the right to life because a reduction or suspension of that right necessarily means the individual life's complete destruction.<sup>304</sup> This is why the Court holds it "impossible to find a balance that protects the unborn life and at the same time grants the pregnant woman a right to abortion, because abortion is always killing the unborn life."<sup>305</sup> Against this background the Court holds it impossible to let the woman's right to self-determination prevail over the unborn's right to life even for a limited period of time.<sup>306</sup> The Court is thus only willing to grant a right to abortion in cases in which carrying the child to term is intolerable.<sup>307</sup> These are the cases in which the aforementioned indications have been ascertained.<sup>308</sup> Whatever one thinks of these arguments,<sup>309</sup> they clearly show the Court's self-conscious effort to harmonize West Germany's emphasis on the protection of the unborn life with the revolutionaries' emphasis on the protection of the woman's right to self-determination. That the revolutionary principle had to step back because the Court found it impossible to compromise the unborn's right to life is no evidence to the contrary. It must rather be explained with the fact that the right to life is protected, *inter alia*, by Art. 1 I, 1 GG (human dignity), the GG's most

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303. In German constitutional law this is known as the establishment of "practical concordance" ("praktische Konkordanz"); see Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, paras. 317 et seq. (20 ed. 1999).

304. BVerfG, *NJW* 1993, 1754.

305. BVerfG, *NJW* 1993, 1754 (my italics).

306. *Id.*

307. *Id.*

308. *Id.*

309. For a critique, see, for example, the dissenters Justices Mahrenholz and Sommer in: BVerfG, *NJW* 1993, 1774 et seq.

important principle.

(ii) While the unborn child's right to life cannot be subjected to proportional balancing with the woman's right to self-determination, the Court has always recognized a higher degree of flexibility when it comes to devising the means with which to protect the right to life. Based on West Germany's concept of repressing abortions through criminal law, the Court in 1975 insisted on criminal law as the only effective means of protecting the unborn life (indication model). The 1989 Revolution has favored a different concept. Based on the principle of individual empowerment, it has promoted a woman's right to abortion during the first twelve weeks of her pregnancy in combination with social support and counseling to enable the woman to make a responsible decision (time-phase model). In *Abortion II* the Court takes up both concepts and tries to integrate them by replacing, during the first twelve weeks of the pregnancy, the concept of criminal punishment with the concept of counseling, however, without granting a right to abortion, except in cases in which an indication is present. The Court itself explains this new "counseling model" as a product of integration by self-consciously putting it into historical perspective and explicitly referring to both the UT and the will of the revolutionary East Germans in order to justify it:

[A] new regulation of the questions related to abortion has been prompted by Art. 31 IV UT;<sup>310</sup> unified Germany's legislature may argue in favor of the counseling model that it may appear to be better suited *to bring together the eastern and western legal orders that had so far been characterized by a time-phase model on the one hand and an indication model on the other, as well as the different legal perceptions of the people that have been shaped in different ways by these two different concepts.*<sup>311</sup>

This language demonstrates that, instead of only engaging in judicial politics, the Court tries to integrate two different legal concepts from two different eras of German constitutional history.

(iii) Finally, the Court's shift from a concept of authoritative imposition upon women of a traditional role by threatening with criminal punishment to a concept of empowering women to make a responsible decision, preferably in favor of carrying the child to term, is also best understood as a product of interpretive integration. In 1975, the Court had insisted on criminalizing abortions as the most effective means to shape people's attitudes and

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310. BVerfG, *NJW* 1993, 1756.

311. *Id.* (my italics).

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convince women to accept their “natural motherly duties.”<sup>312</sup> In 1993, after the revolutionary East Germans had successfully fought for the principle of individual empowerment and this principle had been transferred to unified Germany, imposition by criminalization was no longer feasible. To be sure, the unborn child’s right to life still required protection and could not be compromised. However, in the light of the revolutionary principle of individual empowerment, women’s social reality, including their psychological and economic reality, needed to be taken into account more strongly.

This is reflected, for instance, in the Court’s arguments supporting the counseling model: “the woman experiences her conflict as a personal one and refuses an appraisal by third parties”<sup>313</sup>; “[t]he more third parties are trying to influence the woman, the more she withdraws into illegality”;<sup>314</sup> and “giving the woman the final say provides the best chances to open her up for counseling” and thus for carrying the child to term.<sup>315</sup> It is also reflected in the Court’s insightful elaborations on the necessities of counseling. Accordingly, counseling must be goal-oriented (towards protecting the unborn child), but open as to the result; encouraging, but not intimidating; awakening understanding, but not indoctrinating.<sup>316</sup> The government must convey to the woman her legal duty to carry the child to term but must not impose this value upon her but must take her and her conflict seriously and must try to convince her through reasonable information and active help.<sup>317</sup> Finally, the Court clearly refers to individual empowerment by explicitly putting the government in charge of building a child-friendly society, realizing equality for women, and providing women with the social support necessary to make a free and responsible decision in favor of the child. The Court’s “changed perception [*in Abortion II*] of the personality and dignity of the woman”<sup>318</sup> strongly reflects the principle of individual empowerment, a constitutional achievement of the 1989 Revolution.

Against this background, I think my analysis draws a much more realistic and meaningful picture than the traditional understanding of why the Court changed the abortion model in 1993. It shows that the Court

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312. *See supra*, 61.

313. BVerfG, *NJW* 1993, 1756.

314. *Id.*

315. *Id.*, at 1757.

316. BVerfG, *NJW* 1993, 1760, 1761.

317. *Id.*

318. *See* the dissenters Justices Mahrenholz and Sommer in BVerfG, *NJW* 1993, 1774.

engaged in an interpretive effort that takes the achievements of the 1989 Revolution seriously and tries to integrate them into the existing constitutional order under the GG.

#### IV. Housing

It is finally a decision by the BVerfG on May 26, 1993 that features another remarkable change in the Court's treatment of an important constitutional topic in the wake of German unification.<sup>319</sup> In this decision the Court, for the first time, considers a tenant's right to ownership in the rented apartment property in the sense of Art. 14 I, 1 GG.<sup>320</sup> It thereby elevates the tenant to the same level of constitutional protection under Art. 14 GG as the landlord. Prior to the decision, the tenant's protection under Art. 14 GG had been weaker than the landlord's because only the landlord had enjoyed property protection, while the tenant was only protected by the landlord's property's social obligation under Art. 14 II GG.<sup>321</sup>

Like the decisions on gender equality and abortion, the decision on tenant protection came at a time when unified Germany's legislature proved unable to integrate revolutionary achievements into the existing constitutional order under the GG. Bernd Rüthers, for example, writes that just when the GVK had turned out to be unable to agree on proposing a constitutional right to housing as an amendment to the GG, the Court introduced this right "through the backdoor" by holding the tenant's right to ownership in the rented apartment to be property in the sense of Art. 14 I, 1 GG.<sup>322</sup> The decision not only provides tenants and landlords with equal constitutional protection under Art. 14 GG. It also makes every legislative attempt to cut down on existing tenant protection subject to the strict requirements of property protection under Art. 14 I GG.<sup>323</sup> Tenants' Art. 14 I GG rights must, moreover, be considered in the interpretation and application of

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319. BVerfG, Beschluss v. 26.05.1993, 1 BvR 208/93, BVerfGE 89, 1-14.

320. Art. 14 I GG states: "Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws."

321. Art. 14 II GG states: "Property entails obligations. Its use shall also serve the public good."

322. Bernd Rüthers, Ein Grundrecht auf Wohnung durch die Hintertür?, *Neue Juristische Wochenschrift (NJW)* 1993, 2587; similarly Otto Depenheuer, Der Mieter als Eigentümer? - Anmerkungen zum Urteil des BVerfG v. 26.05.1993, *Neue Juristische Wochenschrift (NJW)* 1993, 2561, 2564.

323. See Depenheuer, *supra* note 322, 2564.

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every ordinary law, public and private.<sup>324</sup>

As in the cases that I have analyzed so far, the question is: Why did the Court do that? And why in 1993 and not, for example, in 1989 or 1990 when it also had opportunities to do so? Again, there is a traditional understanding based on doctrinal as well as judicial policy arguments, which, again, I will show is unconvincing. And again, I will demonstrate why the change should be understood as a product of the Court's attempt to integrate revolutionary achievements into West Germany's constitutional order. I will argue that the East German revolutionaries, expecting large-scale privatizations of government-owned apartments in the GDR upon German unification, had called for strong constitutional tenant protection. This call had been transferred to unified Germany, where it collided with stronger constitutional landlord protection under Art. 14 I GG. My thesis is that the Court's decision is best understood as an attempt to integrate the two competing positions in the light of the legislature's inability to do so.

In the following I will analyze the decision, present and criticize the traditional understanding of the change it has brought about, and finally present my own view.

### 1. The Decision

In its May 26, 1993 decision, BVerfG rejects a tenant's argument that a district court's verdict confirming the tenant's obligation to vacate the apartment violates the tenant's basic rights, in particular her right to property based on Art. 14 I, 1 GG.<sup>325</sup> Still, the BVerfG uses the case to say something that it had never said before: the tenant's lease-based right to ownership in the rented apartment is property in the sense of Art. 14 I, 1 GG.<sup>326</sup> In doing so, the Court, for the first time, perceives of the tenant's right to ownership as property and thus provides equal constitutional protection for landlords and tenants under Art. 14 GG.<sup>327</sup>

Prior to this decision, the Court had considered the tenant's right to ownership only within the landlord's property's social obligation under Art.

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324. See Horst Sendler, *Unmittelbare Drittwirkung der Grundrechte durch die Hintertür?*, *NJW* 1994, 709 et seq. with examples from the field of private law; Matthias Schmidt-Preuß, *Nachbarschutz des Mieter-Eigentümers?*, *NJW* 1995, 27 et seq. with a public law example.

325. BVerfGE 89, 1, juris-version, rec. 16 et seq.

326. *Id.*, rec. 19.

327. For a historical overview, see Helmut Rittstiegl, *Eigentum als Verfassungsproblem* (1976).

14 II GG.<sup>328</sup> As a result, landlords had enjoyed stronger constitutional protection than tenants because tenant protection was considered an intrusion into the landlord's property, which could only be justified if it was necessary for the public good.<sup>329</sup>

The decision is interesting for several reasons. First, it was not necessary for the Court to elaborate on the property quality of the tenant's right to ownership in order to decide the case. The Court could have left the question open because, regardless of whether or not the tenant's right to ownership was property, in the specific case the Court concluded that it had not been violated because the district Court had undertaken all necessary considerations to justify the lease's cancellation and the tenant's eviction from the apartment.<sup>330</sup> Second, leaving the question open would have been exactly what the Court had been doing before.<sup>331</sup> Why did the Court break with this tradition? The Court itself states its key argument as follows:

The apartment is everybody's center of private existence. The individual depends upon its use for the satisfaction of fundamental needs in life as well as for the protection of his freedom and the development of his personality. A large part of the population, however, cannot resort to property in order to satisfy its need for housing but is forced to rent. Under these conditions *the tenant's right to ownership fulfills functions that are typically fulfilled by property in goods.*<sup>332</sup>

Interestingly, in previous decisions the Court had already considered the apartment's importance as a "center of human existence"<sup>333</sup> and as "the spatial center of private life".<sup>334</sup> It had also considered that most people cannot afford to buy but have to rent.<sup>335</sup> However, such considerations had never led the Court to establish a functional equivalence between the tenant's right to ownership and property in goods. Instead, it had always considered

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328. See Peter Derleder, in: Gert Brüggemeier & Rudolf Wassermann et al. (eds.), *Kommentar zum Bürgerlichen Gesetzbuch*, Band 3, Besonderes Schuldrecht, Reihe Alternativkommentare, Vorbemerkung zu §§ 535 et seq. para. 55 (1979).

329. See BVerfGE 18, 121, juris-version, rec. 29, 30; BVerfGE 82, 6, juris-version, rec. 34; and BVerfGE 83, 82, juris-version, rec. 15.

330. BVerfGE 89, 1, juris-version, rec. 32; see also Depenheuer, *supra* note 322, 2561, 2562.

331. See, for example, BVerfGE 18, 121, juris-version, rec. 29; and BVerfG 83, 82, juris-version, rec. 18.

332. BVerfGE 89, 1, juris-version, rec. 21 (my italics).

333. BVerfGE 18, 121, juris-version, rec. 30.

334. BVerfGE, 82, 6, juris-version, rec. 34.

335. *Id.*, rec. 33 with further references.

the tenant's interests within the framework of the landlord's property's social obligation under Art. 14 II GG, i.e., as justifications to interfere with the landlord's right to property.<sup>336</sup> What accounts for the change?

The Court tries to explain it doctrinally: "The essential criterion of property in the sense of Art. 14 GG is that a proprietary right is assigned to its holder for exclusionary private use and disposal as is the case with respect to property in goods."<sup>337</sup> Protected as property are thus "all proprietary rights that are assigned to their holder by the law in a way that the holder is allowed to exercise all entitlements flowing from these rights for his private benefit according to his own responsible decision."<sup>338</sup> The tenant's right to ownership, the Court argues, fulfills these requirements. It gives the tenant an exclusive right to use and dispose of the apartment by, for example, subletting it to others, even if the right to sublet depends on the landlord's consent and is thus limited.<sup>339</sup> The Court concludes that, since the tenant's right to ownership fulfills the definitional requirements of property, it must be considered property.<sup>340</sup> So far, so good.

The problem is that these requirements for the consideration of a proprietary right as property in the sense of Art. 14 I, 1 GG were not new in 1993.<sup>341</sup> Moreover, the tenant's right to ownership based on West Germany's law has always fulfilled them. Why then did the Court wait until 1993 to draw its conclusion? The question becomes even more puzzling if one considers that Johann Friedrich Henschel, the justice in charge of landlord-tenant issues on the Court's First Senate at the time, had published an article in 1989 in which he emphasized that he saw no reason why the tenant's right to ownership in the rented apartment should be considered property.<sup>342</sup> Henschel argued that tenants were sufficiently protected under the landlord's property's social obligation.<sup>343</sup>

The literature offers different traditional arguments for what the Court did and why.

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336. See BVerfGE 18, 121, juris-version, rec. 30; BVerfGE 82, 6, juris-version, rec. 33, 34 with further references; and BVerfGE 83, 82, juris-version, rec. 15 with further references.

337. BVerfGE 89, 1, juris-version, rec. 20.

338. BVerfGE 89, 1, juris-version, rec. 20.

339. *Id.*, rec. 23, 24.

340. *Id.*

341. The Court explicitly refers to BVerfGE 83, 201, 208, 209, 210; see BVerfGE 89, 1, juris-version, rec. 20, 23, 24.

342. Johann Friedrich Henschel, Eigentumsgewährleistung und Mieterschutz, *NJW* 1989, 937, 938 et seq.

343. *Id.*, at 939.

## 2. Traditional Understanding.

The literature's response to the Court's decision is mixed but mostly critical.<sup>344</sup> Again, doctrinal and judicial policy arguments may be distinguished.

One author denies Art. 14 GG's applicability to landlord-tenant relationships.<sup>345</sup> If the legislature wants to protect the tenant, the argument goes, it must do so within the constitutional framework of freedom of contract (Art. 2 GG), human dignity (Art. 1 GG), and the social-state clause (Art. 20 I, 28 I GG).<sup>346</sup> Tenant protection, it is argued, interferes with the landlord's freedom of contract, not with her property.<sup>347</sup> Neither does tenant protection serve the "public good" in the sense of Art. 14 II, 2 GG; it only serves tenants.<sup>348</sup> Another argument brought forth against the property quality of the tenant's right to ownership is that a tenant cannot dispose of the apartment because a sublet requires the landlord's consent.<sup>349</sup> Finally, it is argued that the Court's decision splits property in the apartment into the tenant's property comprising the right to use the apartment on the one hand and the landlord's property comprising the right to dispose of the apartment on the other.<sup>350</sup> Split property, however, is said to be unknown in German law and "would be a source of steady conflict".<sup>351</sup>

I think these arguments are easily refutable. If the legislature limits the landlord's right to cancel a lease and evict the tenant, it does not only interfere with the landlord's freedom of contract but also with her right to use her property.<sup>352</sup> The latter is an important right protected under Art. 14 I, 1 GG. Tenant protection, on the other hand, does serve the public good because a vast majority of the people depend on renting. Hence, asserting that tenant protection has nothing to do with Art. 14 GG ignores an important constitutional aspect of the problem. Regarding "the right to disposal" as a

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344. See, for example, Depenheuer, *supra* note 322, 2561; Rütters, *supra* note 322, 2587.

345. See Gerd Roellecke, Das Mietrecht des Bundesverfassungsgerichts - Kritik einer Argumentationsfigur, *NJW* 1992, 1649, 1652 et seq.

346. *Id.*, at 1652-54.

347. *Id.*, at 1652.

348. *Id.*, at 1652-53.

349. *Id.*, at 1653; Depenheuer, *supra* note 322, 2563.

350. Roellecke, *supra* note 345, 1653; Depenheuer, *supra* note 322, 2563.

351. Roellecke, *supra* note 345, 1653.

352. For example, by living in the apartment herself.

property requirement, the Court rightly points out that the tenant does have a limited right to dispose of the apartment by, for example, subletting it with the landlord's consent. The Court is, moreover, right in that it has never required an unlimited right to disposal in order to consider a proprietary right property.<sup>353</sup> Neither is there a "substantive" reason to add such a requirement now.<sup>354</sup> That German law supposedly does not know split property and that split property will turn out to be a source of steady conflict is hardly convincing either. First, based on the Court's decision, the tenant does not hold property in the apartment but in her right to ownership in the apartment. Hence, doctrinally speaking, there is no split property in the apartment. Second, it is hard to see why protecting tenant and landlord equally under Art. 14 GG might cause more conflict than protecting the tenant under Art. 14 II GG and the landlord under Art. 14 I GG. The conflict between the two remains the same because it is based on their conflicting interests. What has changed is the weight that the Court is willing to attribute to the tenant's constitutional position in this conflict; this weight has been increased, which I think is a necessary consequence of equal protection.

A more fundamental critique attacks the Court's main argument that the tenant's right to ownership must be deemed property because it "fulfills functions that are typically fulfilled by property in goods." Voices in the literature reject the idea that a right's function may justify its constitutional protection because that would damage the protection of freedom.<sup>355</sup> "The protection of property," the argument goes, "safeguards the possession of goods for the purpose of freedom";<sup>356</sup> if the constitutional protection of freedom depends on the function for which that freedom is used, the freedom becomes an obligation.<sup>357</sup>

I think this argument is wrong for two reasons. First, a widely accepted original justification for the constitutional protection of property is functional. The protection of property has the "function" of securing the individual's economic freedom in order to enable her to autonomously shape

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353. The Court explicitly refers to BVerfGE 83, 201, 209, where it had said that before; see BVerfGE 89, 1, juris-version, rec. 24.

354. BVerfGE 89, 1, juris-version, rec. 24.

355. Depenheuer, *supra* note 322, 2563; similarly Walter Leisner, Eigentum, in: Josef Isensee & Paul Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Band VI, § 149 paras. 90 et seq. (1989) with further references.

356. Depenheuer, *supra* note 322, 2563.

357. *Id.*

her life<sup>358</sup> and participate in society.<sup>359</sup> That does not mean that property is only protected if it is actually used in this way. It means that the fundamental justification and legitimization of constitutional property protection is based on the property's function for the individual's life and participation in society. It is this concept that the Court applied in its May 1993 decision to justify why a tenant's right to ownership should be protected as property. If authors want to criticize this concept, they must come up with a new justification for why private property should be constitutionally protected. As far as I can see, none of the critics has done that.

The second reason is that the authors' claim that only proprietors of goods are protected under Art. 14 I GG is arbitrary. Art. 14 GG's text does not provide any basis for it. It only protects property without specifying what must be considered property.<sup>360</sup> In fact, the authors' assertion expresses a specific, a liberal understanding of individual rights. According to this understanding, individual rights serve to prevent government interference with society.<sup>361</sup> By arbitrarily limiting the constitutional protection of property to proprietors of goods, these authors try to constitutionalize a laissez-faire ideology. They ignore social requirements for the realization of individual freedom and try to preserve the social status quo in favor of a property-holding economic elite.<sup>362</sup> The Court rejects this ideology and explicitly takes social reality into account when it argues that "[a] large part of the population . . . cannot resort to property to satisfy its need for housing but is forced to rent. Under these circumstances the tenant's right to ownership fulfills functions that are typically fulfilled by property in goods."<sup>363</sup>

There is nothing in the text of the GG that requires, or even justifies, a purely liberal understanding of constitutional property protection.<sup>364</sup> To the

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358. See Papier, in Theodor Maunz & Günther Dürig, *Grundgesetz*, Art. 14 para. 1 with references to the BVerfG's established case-law.

359. See *Id.*, para. 4.

360. The GG does not define property; see BVerfGE 36, 281, 290; BVerfGE 42, 263, 292, 293.

361. See Ernst-Wolfgang Böckenförde, *Staat, Verfassung, Demokratie*, 119 et seq. (2nd ed. 1992).

362. See Rittstieg, *supra* note 326, 296 et seq. with a fitting referral to Holmes' dissent in *Lochner v. New York*, see *id.*, 297.

363. BVerfGE 89, 1, juris-version, rec. 21.

364. In this respect, I profoundly disagree with Böckenförde, who writes that the civil-liberal theory reflects the basic normative intention of the basic rights of the GG in response to fundamental violations of freedom during the Third Reich; see Böckenförde, *supra* note 361, 143. Rittstieg has demonstrated that a civil-liberal understanding of constitutional

contrary, a liberal understanding of property protection was prevalent in Germany at a time when economic elites were trying to use property protection under Art. 153 of the Weimar Constitution (WRV) in order to protect their possessions and the social status quo against an increasingly democratic legislature.<sup>365</sup> It is the concept of constitutional property protection developed by a Reichsgericht (RG) controlled by conservative forces starting in 1921.<sup>366</sup> The Bundesgerichtshof (BGH) further developed the RG's concept after 1949 in order to prevent alternative property concepts promoted by social-democratic forces in West Germany.<sup>367</sup> Many conservative voices still see the preservation of the economic, social, and political status quo as an important function of property protection under Art. 14 I GG.<sup>368</sup> However, alternative property concepts were, and are, possible under the GG. Art. 14 I GG explicitly states, "Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws."<sup>369</sup> It is this authority of the legislature to specify property protection that the BVerfG refers to in its May 1993 decision when it argues that the legislature has taken account of the apartment's social function for the tenant by designing the tenant's right to ownership in the apartment in a way that this right is assigned to the tenant like property in goods.<sup>370</sup> On this basis, it can be concluded that the Court only respects, and gives constitutional expression to, the legislature's design of the tenant's right to ownership in the apartment when it concludes that this right must be considered property in the sense of Art. 14 I, 1 GG.

Other authors blame the Court for engaging in judicial politics by putting the tenant's right to ownership on a new constitutional basis even though that was not necessary to decide the case.<sup>371</sup> Otto Depenheuer, for example, complains that the Court has succumbed to the *Zeitgeist* that has

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protection against a democratic legislature has less to do with the Third Reich than it is the continuation of an economic elite's strategy to preserve the social status quo against the potential of a democratic legislature; see Rittstiegl, *supra* note 326, 286 et seq.

365. See Rittstiegl, *supra* note 326, 252 et seq., 269-271; more generally Ingeborg Maus, *Bürgerliche Rechtstheorie und Faschismus*, 47 et seq. (1980).

366. See Rittstiegl, *supra* notes, 252 et seq., 256 et seq. referring to RGZ 102, 161, and note 326.

367. See Rittstiegl, *supra* note, 286 et seq., 288, 289 et seq., and 326.

368. See Papier, *supra* note 358, Art. 14 para. 5.

369. My italics.

370. See BVerfGE 89, 1, juris-version, rec. 21, 22.

371. See Depenheuer, *supra* note 322, 2562; the original reads: "Nicht aus juristischer Not geboren, erweist sie [die Entscheidung] sich als Akt rechtspolitischen Wollens: Verfassungsgebung durch Verfassungsrichterspruch."

called for a “basic right to housing” or an equivalent state goal.<sup>372</sup> A different judicial-politics criticism blames the Court for a lack of economic understanding. Its main point is that by increasing tenants’ constitutional protection the Court alienates potential investors in the housing market and thus contributes to the lack of affordable housing.<sup>373</sup> Apart from the fact that these authors do not provide any empirical data to support their views, they obviously overlook the possibility that the Court may have engaged in constitutional interpretation to reach its conclusion.

Finally, there are doctrinal as well as judicial-politics arguments supporting the Court’s decision. One argument is that housing’s social importance requires stronger constitutional tenant protection.<sup>374</sup> Another argument is that tenants’ and landlords’ legal positions are so similar that equal constitutional protection is justified.<sup>375</sup> Helmut Rittstiegl, finally, has been demanding property protection for tenants since 1975. He argues that the tenant’s right to ownership in the apartment is a proprietary right based on which the tenant has immediate control over the apartment and uses it as her “space of freedom for independent activities”. The BVerfG has always held the protection of such a right to be the purpose of property protection under Art. 14 I GG.<sup>376</sup> Hence, Rittstiegl, already in 1975, pointed to the rented apartment’s social function in order to justify the protection of the tenant’s right to ownership as property.<sup>377</sup>

Whatever one may think of these arguments, none of them can explain why the Court had not taken them up between 1975, when they were first voiced, and 1993. Moreover, they cannot explain why in May 1993 the Court, all of a sudden, did follow Rittstiegl’s argument and granted tenants property protection under Art. 14 I GG. As in the previous cases, the traditional understanding is thus unable to convincingly explain the constitutional change.

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372. *Id.*

373. See Rütters, *supra* note 322, 2588, 2589; also Henschel, *supra* note 342, 943.

374. See Derleder, *supra* note 328, para. 56.

375. See Rudolf Gärtner, Wohnungsmietrechtlicher Bestandsschutz auf dem Weg zu einem dinglichen Recht?, *Juristenzeitung (JZ)* 1994, 446; Udo Wolter, Mietrechtlicher Bestandsschutz: historische Entwicklung seit 1800 und geltendes Wohnraum-Kündigungsschutzrecht, 396 et seq. (1984).

376. Rittstiegl, *supra* note 326, 331 referring to BVerfGE 24, 367, 389, 400.

377. In fact, Lorenz von Stein, already in 1850, wrote that “[e]very possession . . . is . . . the body of real personal freedom and freedom’s outer condition” (emphasis added) (“Jeder Besitz . . . ist . . . der Körper der wirklichen persönlichen Freiheit und ihre äussere Bedingung”); see Lorenz von Stein, *The History of the Social Movement in France, 1789 - 1850*, Bd. 2, p. 57 (Kaethe Mengelberg ed. & transl., Bedminster Press 1964).

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The following analysis will show that things become much clearer once the decision is put into historical perspective. As soon as one takes into account that a successful revolution had taken place in the GDR in 1989, that a constitutional right to housing had been an important achievement of this Revolution, and that this achievement had been transferred to unified Germany where the institutions were then confronted with the task of integrating it into the existing constitutional order under the GG, a new and more meaningful understanding of the Court's decision will emerge.

### 3. My Understanding: the decision as an act of integration

My thesis is that with its decision the Court tried to integrate the revolutionary achievement of a constitutional right to housing into West Germany's constitutional order under the GG, which had granted stronger constitutional protection to landlords than to tenants.

In West Germany, only the landlord's position had been protected as property under Art. 14 I GG. Tenant protection had been considered an interference with landlord property and thus required justification as serving the public good (Art. 14 II, 2 GG). This had resulted in a weaker constitutional protection of tenants, even though the Court had taken into account both the rented apartment's function as the center of human existence and the fact that most people depended on renting. On this basis, the Court had left the question of whether or not a tenant's right to ownership in the rented apartment must be considered property in the sense of Art. 14 I, 1 GG explicitly open as late as November 1990.<sup>378</sup>

A change of constitutional dimensions had taken place in the fall of 1989 with the successful Revolution in the GDR and in October 1990 with German unification. The Revolution's call for a constitutional right to housing had its conceptual basis in the citizens' movement's concept of individual empowerment, which had been translated into, *inter alia*, a call for constitutional social rights, not only as objective state goals but as judicially enforceable individual constitutional rights.<sup>379</sup> Underlying was the insight that appropriate housing is one of the most fundamental necessities that need to be fulfilled to make human freedom a reality.<sup>380</sup>

The people in the streets had supported the citizens' movement's

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378. See BVerfGE 83, 82, juris-version, rec. 15, 18; the decision dates from Nov. 13, 1990, 1 BvR 275/90; see also BVerfGE 18, 121, juris-version, rec. 29, 30.

379. See *supra*, 62 et seq., 106 et seq., 115 et seq.

380. See *supra*, 58 et seq.

concept of individual empowerment, including the call for a constitutional right to housing. This is reflected, among others, in the fact that 90% of the East Germans had been in favor of including a constitutional right to housing in a new constitution for unified Germany.<sup>381</sup>

The popular call for a constitutional right to housing had found its legal manifestation in the revolutionaries' Social Charter and in their draft constitution.<sup>382</sup> The Social Charter demanded a "basic right to housing and effective tenant protection" in the light of strong insecurity with respect to property questions upon unification.<sup>383</sup> Against this background, the Social Charter put a stronger emphasis on rent regulation and tenant protection against arbitrary lease cancellations than on the provision of new housing.<sup>384</sup> The draft constitution included detailed provisions on a right to housing.<sup>385</sup> Art. 25 (1), 1 of the draft guaranteed every citizen a "right to appropriate housing". Art. 25 (1) stated that legal protection against lease cancellation must be provided. Art. 25 (1), 3 explicitly elaborated on how to balance landlords' and tenants' interests: "When balancing tenants' and landlords' interests against each other, *special weight must be accorded to the apartment's outstanding importance for living a life in human dignity.*"<sup>386</sup> The draft constitution, thus, accorded particular constitutional weight to the tenant's interests based on the rented apartment's function for the tenant's life.<sup>387</sup> Finally, Art. 25 (1), 4 strengthened the tenant's position even further by stating that a tenant may only be evicted from an apartment once a substitute apartment is available.<sup>388</sup>

An institutional reaction to the revolutionaries' call for a constitutional right to housing had come from the post-revolutionary GDR's first freely elected government. The government's coalition agreement stated that "[w]hen 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."<sup>389</sup> The government declaration of April 19, 1990, emphasized the government's responsibility for appropriate

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381. See Jaggi, *supra* note 1, 70, 71.

382. See Jaggi, *supra* note 6, 594 et seq.

383. Markus Bremers, Soziale Staatsziele und soziale Grundrechte: Arbeit, Wohnen, soziale Sicherung, in: Fischer & Künzel, *supra* note 17, 141; Jaggi, *supra* note 6, 595, 596.

384. Bremers, *supra* note 383, 141.

385. See also Jaggi, *supra* note 6, 596 et seq.

386. My italics.

387. See Bremers, *supra* note 383, 147; Rogner, *supra* note 129, 92.

388. *Id.*

389. See Jaggi, *supra* note 6, 606 et seq. (my italics).

housing, tenant protection, and rent control.<sup>390</sup>

The importance that constitutional tenant protection had acquired during the 1989 Revolution must be seen in the light of the fact that most people in the GDR had been tenants. It was mostly the government who had acted as landlord, and even private landlord-tenant relationships had been strongly regulated.<sup>391</sup> Facing unification, East Germans feared the impact on their leases of West Germany's so-called social market economy with its foreseeable privatizations of government owned apartments. For East Germans, tenant protection was thus much more important than the provision of new housing. In that situation, a constitutional right to housing aimed at forcing even the most conservative legislature to provide for strong tenant protection upon German unification.

The UT and most of the new state constitutions had transferred the revolutionary achievement of a constitutional right to housing to unified Germany.<sup>392</sup> As a matter of principle, West German landlord-tenant law entered into force in the new states upon German unification on October 3, 1990.<sup>393</sup> Yet, the UT provided for important exemptions, for example, by keeping in force in the new states specified provisions of the GDR's tenant protection law.<sup>394</sup> For leases signed in the GDR prior to unification the landlord's right to cancellation remained much more limited than it would have been under the Civil Code in West Germany.<sup>395</sup> A cancellation of such leases for the landlord's own use, for instance, was, as a matter of principle, only possible after December 31, 1995.<sup>396</sup> Moreover, the UT temporarily limited the landlord's right to increase rents.<sup>397</sup> For example, it stipulated that a GDR regulation of June 25, 1990, according to which rent increases were allowed only under very limited conditions remained in force until December 31, 1991, for already existing residential property.<sup>398</sup> Finally, Art.

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390. *See Id.*, 607 et seq.

391. Generally on the legal position of tenants in the GDR, see Eckard Pahlke, *Die Rechtsstellung des Mieters von Wohnraum in der DDR* (1983).

392. *See Jaggi, supra* note 6, 617 et seq.

393. *See* Art. 232 § 2 Abs. 1 EGBGB in the UT's version of 31.08.1990 (BGBl II 1990, 885, 943).

394. Volker Emmerich, in: J. von Staudinger, *Kommentar zum Bürgerlichen Gesetzbuch, Zweites Buch, Recht der Schuldverhältnisse*, §§ 535 - 563, Vorb. zu §§ 535, 536 paras. 31, 34 (13th ed. 1995).

395. *See* Art. 232 § 2 Abs. 2 - 4 EGBGB.

396. *See* Gesetz zur Verlängerung der Wartefristen v. 21.12.1992 (BGBl I 1992, 217); Emmerich, in: Staudinger, Vorb. zu §§ 535, 536 para. 32.

397. *See* Emmerich, *supra* note 394, paras. 33 et seq.

398. *See* UT, Anlage II z. EVertr, Kapitel V, Sachgebiet A - Allgemeines Wirtschaftsrecht,

5 UT “recommended” to unified Germany’s legislature to think about adopting a right to housing as a constitutional state goal.

Most new state constitutions contained a right to housing in the sense of a government obligation to protect tenants against unreasonable rent increases and arbitrary lease cancellations.<sup>399</sup> In addition, the state of Brandenburg’s constitution had taken over the revolutionaries’ draft constitution’s provision according to which special consideration must be given to the apartment’s importance for the tenant to live a life in human dignity when weighing the tenant’s and the landlord’s interests against each other.<sup>400</sup> The Brandenburg constitution further increased tenant protection by taking over the draft constitution’s provision according to which a tenant may only be evicted from an apartment once a substitute apartment is available.<sup>401</sup>

Again, unified Germany’s legislature was failing to answer the call. The most promising attempt to integrate the revolutionary achievement of a constitutional right to housing into a new constitution for unified Germany had been undertaken by the Kuratorium. Art. 13a of the Kuratorium’s Draft stated:

The government protects the right of every human being to appropriate housing. It promotes the construction and preservation of social and ecological housing. It ensures affordable rents and provides protection against lease cancellation, which duly considers the outstanding importance of housing for living a life in human dignity.

This proposal, however, had not become law. Neither had the Bundesrat’s Commission<sup>402</sup> or the GVK<sup>403</sup> been able to agree on a constitutional right to housing or on any other constitutional social right, for that matter.

This was the situation when the Court, in May 1993, decided to grant constitutional property protection to the tenant’s right to ownership in the rented apartment. The Court had still been able to leave open the question

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Wirtschaftspolitik, Wettbewerbs- und Preisrecht, Abschnitt III, Nr. 1 lit. a dd); Emmerich, *supra* note 394, paras. 34, 35 listing further limitations.

399. See CONSTITUTIONS OF BRANDENBURG, Art. 47 I; SAXONY, Art. 7; SAXONY-ANHALT, Art. 40; and MECKLENBURG-WEST POMERANIA, ART. 17 II; and Jaggi, *supra* note 6, 623 et seq.

400. CONSTITUTION OF BRANDENBURG, Art. 47 II.

401. *Id.*

402. See Report of the Bundesrat’s Commission Constitutional Reform, in: Fischer & Künzel, *supra* note 17, Band II, 450, 451.

403. See GVK Report, in: Fischer & Künzel, *supra* note 17, Band III, 587 et seq., 591 et seq.

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in a decision on November 13, 1990.<sup>404</sup> Even though the revolutionary people had already spoken, a little more than a month after unification it had been difficult for the Court to know what exactly they had said. Moreover, in November 1990 the Court had not been able to know whether or not the legislature would live up to the task of integrating the revolutionary achievements into the existing West German constitutional order. The political debate over what to make of the 1989 Revolution and its impact on unified Germany's constitutional law had still been in an early phase. The UT, even though it had provided for a transfer of specific tenant protection provisions from the post-revolutionary GDR to unified Germany, had left the decision of whether or not to adopt constitutional social state goals to unified Germany's legislature (Art. 5 UT). The UT had given the legislature until the end of 1992 to decide the issue. Against this background, in November 1990 it had still been reasonable for the Court to leave the question open.

By May 1993, however, the situation had changed fundamentally. Not only was it clear by now that the revolutionary East Germans had achieved a constitutional right to housing. It had also become clear that unified Germany's legislature was not getting anywhere with its efforts to integrate this revolutionary achievement into the West German constitutional order under the GG.<sup>405</sup> At the same time, rents in the new East German states were exploding. Where rents for residential housing in the GDR had been less than one East Mark per square meter, they had increased to an average of seven West Marks per square meter by 1993.<sup>406</sup>

In this situation, it was no longer possible for the Court to close its eyes to the revolutionaries' demands. It had to do what the legislature had turned out to be unable to do: integrate the revolutionary achievement of a constitutional right to housing into the GG. Confronted with an East German claim to weigh the tenant's constitutional position stronger than the landlord's and West Germany's GG under which the tenant's constitutional position was weaker than the landlord's, the Court decided to grant both tenant and landlord equally strong constitutional protection under Art. 14

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404. BVerfGE 82-83, juris-version, rec. 18.

405. See Depenheuer, *supra* note 322, 2564 referring to Mitteilung des Sekretariats der GVK über die Abstimmungsergebnisse zu den Themenkomplexen "Staatsziele und Grundrechte" v. 24.02.1993, S. 3.

406. Joachim Tesch & Klaus-Jürgen Warnick, Staatliche Wohnungsversorgung und kapitalistischer Wohnungsmarkt - Vom DDR Wohnungsbauprogramm zum Stadtumbauprogramm Ost, *Forum Wissenschaft* 2/2004.

GG.<sup>407</sup>

The Court's strongest argument for this decision is remarkably close to the revolutionaries' draft constitution's justification for a constitutional right to housing. Both are explicitly based on the rented apartment's social function to help realize the tenant's individual freedom and personal development.<sup>408</sup> Both are rooted in the principle of individual empowerment, according to which social reality must be taken into account in order to make constitutional individual rights a social reality for everyone. The Court's reasoning also reflects the revolutionary constitutional concept of equality of freedom<sup>409</sup> by granting landlord and tenant equal constitutional protection based on their rights' equal social function to realize individual liberty and personal development. Another important respect in which the Court has brought to bear the revolutionaries' achievement of a constitutional right to housing is that the Court has granted the tenant her own constitutional right. Even if there had been different versions of this idea in the catalogue of revolutionary demands (from a judicially enforceable individual constitutional right to a constitutional state goal), the revolutionaries had clearly wanted the tenant's constitutional position to be more than only a social-obligation annex to the landlord's property protection. This revolutionary demand is reflected in the Court's decision to consider the tenant's right to ownership in the apartment to be property in the sense of Art. 14 I, 1 GG, i.e. an individual constitutional right.<sup>410</sup> This individual right provides for particularly strong constitutional tenant protection in the light of the fact that, under the GG, individual rights may be interpreted as individual claims against the legislature to provide for effective individual rights protection. The Court, in its decision on May 26, 1993, has brought all these elements from the revolutionaries' constitutional agenda to bear on unified Germany's constitutional law, even if the Court did not explicitly refer to the 1989 Revolution in its reasoning.

Against this background, it no longer appears as a "timely coincidence"

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407. The Court explicitly emphasizes this, *see* BVerfGE 89, 1, juris-version, rec. 29 ("Namentlich folgt aus dem Eigentumsschutz des Besitzrechts nicht, daß im Konflikt beider durch die Verfassung geschützten Eigentumspositionen das Bestandsinteresse des Mieters in jedem Falle vorgeht").

408. *See* Art. 25 (1) RTD.

409. *See* Jaggi, *supra* note 6, 586.

410. Depenheuer writes that "... demands for a 'basic right to housing' or the introduction of a respective state goal reflect the tendency of a constitutional upgrade of tenants' interests," *see* Depenheuer, *supra* note 322, 2562. However, he does not establish the connection between this "tendency" and specific constitutional demands by the revolutionary East Germans; *see Id.*

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that the Court acted as a “substitute legislature” hardly more than three months after the GVK had rejected the introduction of a constitutional state goal to protect a tenant’s right to housing.<sup>411</sup> By integrating the revolutionary achievement of a constitutional right to housing into unified Germany’s existing constitutional order under the GG the Court, once again, engaged in integration through constitutional interpretation.

#### D. Conclusion

This article has demonstrated that unified Germany’s constitutional law experienced important changes upon German unification. A state goal of environmental protection was added, the *Bodenreform*-expropriations were confirmed, a government obligation to realize gender equality was adopted, the requirement of criminal punishment of abortion during the first twelve weeks of the pregnancy was given up, and the tenant’s right to ownership in the rented apartment was granted property protection under Art. 14 I GG.

The article has also demonstrated that traditional arguments are unable to convincingly explain these changes. They cannot explain why the changes occurred when they occurred. Doctrinal arguments appear arbitrary and strongly determined by the desired outcome. Judicial politics arguments give up too quickly on the possibility of explaining the changes as results of constitutional interpretation. All traditional arguments have in common that they ignore the possibility of the 1989 Revolution’s impact on unified Germany’s constitutional law.

My analysis shows that the changes reflect the attempt by unified Germany’s institutions to integrate revolutionary achievements into the existing constitutional order under the GG. The legislature’s adoption of environmental protection as a state goal, for example, shows signs of an integration of the revolutionary call for a constitutional right to environmental protection into a constitutional order that did not know constitutional environmental protection. The BVerfG’s decision to uphold the confirmation of the *Bodenreform*-expropriations appears like the integration of the revolutionary demand to confirm the *Bodenreform* into a constitutional order that requires to return illegally expropriated property to former owners by adding to Art. 143 III GG a governmental obligation to compensate former owners. The introduction of a government obligation to

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411. See Depenheuer, *supra* note 322, 2564 referring to the Mitteilung des Sekretariats der GVK über die Abstimmungsergebnisse zu den Themenkomplexen “Staatsziele und Grundrechte” v. 24.02.1993, S. 3.

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realize gender equality shows clear signs of integrating the revolutionary call for real equality for women into a constitutional order that took a formal-legal approach to gender equality. The development of a counseling model for the legal treatment of abortion appears like the integration of the revolutionary principle of individual empowerment and a woman's right to abortion into a constitutional order that is unable to compromise the unborn child's right to life. And finally, the introduction of property protection for the tenant's right to ownership in the rented apartment can be explained as the integration of a revolutionary call for a constitutional right to housing into a constitutional order that provided for stronger constitutional protection of landlords. Contrary to the traditional understanding, these explanations take account of both the 1989 Revolution's constitutional meaning for unified Germany and the possibility of constitutional interpretation.

My analysis, thus, demonstrates that, despite Ackerman's thesis of Germany as an example for "elitist constitutionalism," the German BVerfG has not only projected itself "as the preeminent guardian of Germany's post-1945 foundational commitments".<sup>412</sup> After German unification in 1990, it has engaged in revolutionary reform through constitutional interpretation. Some of the 1989 Revolution's constitutional achievements have thus had a substantive impact on unified Germany's constitutional law, which, therefore, is, at least to some extent, a co-production between the revolutionary East Germans and West Germany, even without a formal plebiscite on a new constitution for unified Germany. Unified Germany's constitutional law is thus also an example for the revolutionary model.

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412. *See supra*, p. 2.

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