

FROM THE STATE OF GREATER HESSE TO THE STATE OF HESSE:
THE POLICY TURNING POINT OF AMERICAN OCCUPIERS, THE CREATION OF THE
CONSTITUTION OF HESSE, AND THE ADOPTION OF DEFENSIVE DEMOCRACY

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Bowen Hou

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The following faculty members have examined the final copy of this thesis for form and content, and recommend that it be accepted in partial fulfillment of the requirement for the degree of Master of Arts, with a major in History.

Keith Pickus, Committee Chair

Patrick Proctor, Committee Member

Robin Henry, Committee Member

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ABSTRACT

This thesis explores the historical significance of the State of Hesse and its Constitution by examining its political context in 1945, the constitutionalizing process of 1946, and its pivotal role in shaping the German Basic Law in 1948 and 1968.

It analyzes the challenges that the American occupation of Germany faced, including conflicting policies, total war devastation, and internal administrative chaos. It determines a policy turning point led by Lt. General Lucius D. Clay in late 1945 through solving jurisdictional disputes and cooperating with occupied German civilians to participate in politics, marking the birth of states and the beginning of constitution-making processes.

It discovers the use of defensive democracy, also known as militant democracy, during the constitutional deliberations in Hesse as a concept to prevent the emergence of radical political factions in a population grappling with shortages and potential resentment. Defensive democracy emerged as the solution and was embraced by both left- and right-wing factions, albeit with distinct interpretations. Although conflicts during the constitution-making process almost derailed democratization, shared aspirations for self-determination and democratic renewal facilitated compromises, culminating in the creation of the Hessian Constitution.

It examines the influence of the Hessian Constitution on the German Basic Law concerning defensive democracy. Foundational elements, protective clauses, and gender equality from the Hessian Constitution and delegates were integrated into the Basic Law. Of particular importance was the combination of entrenched clauses and the right to revolution, creating a mechanism theoretically capable of preserving the constitutional order through radical methods.

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LIST OF ABBREVIATIONS

ACC	Allied Control Council
ASC	Advisory State Committee (<i>Beratender Landesausschuss</i>)
CAD	Civil Administration Division
CDU	Christian Democratic Union (<i>Christlich-Demokratische Union</i>)
CIC	Army Counter Intelligence Corps
COSSAC	Anglo-American Combined Chiefs of Staff
DPs	Displaced Persons
FBI	Federal Bureau of Investigation
FDR	Franklin D. Roosevelt, 32 nd President of the United States
FSP	Free State of Prussia (<i>Freistaat Preußen</i>)
G-5	Civil Affairs section of an American tactical unit
GG	Basic Law for the Federal Republic of Germany (<i>Grundgesetz für die Bundesrepublik Deutschland</i>)
HICOG	High Commission for Occupied Germany (<i>Alliierte Hohe Kommission</i>)
HV	The Constitution of the State of Hesse (<i>Hessische Verfassung</i>)
ICD	Information Control Division
IMT	International Military Tribunal
JCS	Joint Chiefs of Staff
KPD	German Communist Party (<i>Kommunistische Partel Deutschland</i>)
LDP	German Liberal Democratic Party (<i>Liberal-Demokratische Partei Deutschlands</i>)
MG	Military Government
MGO	Military Government Official

OMGGH	Office of Military Government Greater Hesse
OMGH	Office of Military Government Hesse
OMGUS	Office of Military Government United States
RGCO	Regional Government Coordinating Office
SHAEF	Supreme Headquarters Allied Expeditionary Force
SMAD	Soviet Military Administration in Germany
SPD	German Socialist Democratic Party (<i>Sozialdemokratische Partei Deutschland</i>)
UNRRA	United Nation Relief and Rehabilitation Administration
USFET	United States Forces, European Theater
USGCC	U.S. Group Control Council, Germany
VV	Final Draft of the Hessian Constitutional Preparatory Committee (<i>Der Verfassungsentwurf des Vorbereitenden Verfassungsauss</i>)
WRV	Weimar constitution (<i>Weimarer Reichsverfassung</i>)

CHRONOLOGY

1918

November 9: The People's State of Hesse (*Volksstaat Hessen*) (1918-1945) was established after the Grand Duke Ernest Louis of the Grand Duchy of Hesse and by Rhine was deposed.

1919

January 26: The People's State of Hesse started the election as a constituency of the Free State of Prussia (*Freistaat Preußen*). SPD won the majority by 40.2 percent.

1923

Maurice Haurious created the concept of super-constitutionality.

1928

Carl Schmitt published his magnum opus *Constitutional Theory*.

1932

Carl Schmitt published his book *Legality and Legitimacy*.

1933

January 30: President Paul von Hindenburg appointed Adolf Hitler as the Chancellor.

February 27: The Reichstag Fire.

February 28: The Reichstag Fire Decree suspended the civil liberties in the Weimar Constitution, and it witnessed Hitler's Seizure of Power through legal methods.

- March 24: The Enabling Act of 1933 was passed.
- March 31: The Provisional on the Gleichschaltung of the Länder and the Reich (*Vorläufige Gesetz zur Gleichschaltung der Länder mit dem Reich*) was passed. The state parliaments were forced to dissolve and reorganize based on the results of state elections on March 5.
- April 7: The Second Law on the Gleichschaltung of the Länder and the Reich (*Zweites Gesetz zur Gleichschaltung der Länder mit dem Reich*) was passed. It introduced the office of Reich Governors into the states, who had the authority to appoint state governors or dissolve state parliaments.
- May 5: The beginning of Nazification in the Hesse administration offices was when Jakob Sprenger became the Reich Lieutenant (*Reichsstatthalter*). The state government started losing power.
- 1934
- January 30: The Law Regarding the Restructuring of the Reich (*Gesetz über den Neuaufbau des Reichs*) abolished all state parliaments and transferred sovereignty from states to the Reich. State governments became the local administration offices of the Reich, and the federalism in Weimar Germany was officially destroyed.
- August 2: Hitler became the *Führer* by combining the Office of Reich President and Reich Chancellor.

1937

Carl J. Loewenstein created the theory of defensive democracy/militant democracy in the United States.

1939

September 1: The Invasion of Poland signaled the beginning of World War II in Europe.

1943

January 14: Allie leaders met at Casablanca and formulated the unconditional surrender policy for Germany, Italy, and Japan between January 14 and January 24.

April: Anglo-American Combined Chiefs of Staff (COSSAC) approved CCS 551, calling for an interventionist military government.

1945

Karl Popper published his book *The Open Society and Its Enemies* with the paradox of tolerance.

February: Yalta Conference. Allies agreed that their nations shall possess “supreme authority with respect to Germany.”

April: Final Version of JCS 1067 was published.

April 8: Lucius D. Clay was appointed as the Deputy Military Governor in Germany and the Commanding General of USGCC.

May 8: V-E Day.

- June 5: Berlin Declarations: Allied government “hereby assume supreme authority with respect to Germany, including all the powers possessed by the German government, the High Command and any state, municipal or local government or authority.”
- June 10: Marshal of the Soviet Union Georgy Zhukov, first commander of the Soviet Occupation Zone in Germany, issued “Order No. 2,” which officially authorized the recreation of anti-fascist parties on the same day.
- July 14: Supreme Headquarters Allied Expeditionary Force (SHAEF) dissolved, and American forces in Germany fell under United States Forces, European Theater (USFET).
- July 17: Potsdam Conference (July 17-August 2); established political and economic principles to govern the occupation territories of Germany.
- August 27: Local-level political party organizations were permitted in Hesse. Four Parties were legally formed: German Socialist Democratic Party (SPD), Christian Democratic Union (CDU), German Communist Party (KPD), and Liberal Democratic Party (LDP).
- August 31: Office of Military Government, Greater Hesse (OMGGH) was formed.
- September 19: The State of Greater Hesse was established by U.S. Group Control Council, Germany (USGCC). It included Upper Hesse, Starkenburg, Kurhessen, and part of Nassau.

- September 23: Military Government Law #8, which mandated sweeping denazification, was promulgated.
- September 28: General George Patton was released from the position of Military Governor in Bavaria due to his controversial speech.
- September 29: According to General Order No. 59, the political reorganization of the American military authority began. USGCC was redesignated Office of Military Government, United States (OMGUS). The duties of OMGUS and USFET were reset.
- October 5: Clay ordered local Military Government (MG) detachments to retreat from any direct role in German local governments.
- October 5: The *Länderrat* was established as an interstate cooperation organization in the U.S. occupation zone.
- October 7: Patton's duty as commanding general of the Third Army was released.
- October 12: The First Organizational Directive of Greater Hesse (*Organisationsverfügung Nr. 1*) appointed Wiesbaden as the civilian capital of Greater Hesse. Karl Geiler was appointed by OMGUS as the Minister-President of Greater Hesse.
- November 22: The Basic Law of Greater Hesse was formed.
- December 31: The Basic Law of Greater Hesse was signed by Minister-President Karl Geiler and Minister of Justice Georg August Zinn and was published on the same day.

1946

- February 19: The 12 members of the Advisory State Committee (ASC), who were equally selected from 4 parties, were appointed by Minister-President Geiler.
- March 12: The Hessian Constitutional Preparatory Committee started drafting the basic concept of the Hessian Constitution (HV).
- May 13: Walter Jellinek submitted his constitutional draft to the committee.
- May 28: The Preparatory Committee made the resolution of renaming the State of Greater Hesse as the State of Hesse.
- June 18: The Hessian Constitutional Preparatory Committee presented their final draft of the Hesse Constitution (VV).
- June 30: The general election for members of the State Constitutional Advisory Assembly began. SPD and CDU won the majority part. (SPD 44.3 percent, CDU 37.3 percent, KPD 9.7 percent, LDP 6 percent).
- July 15: The State Constitutional Advisory Assembly began and lasted from July 15 to November 30.
- August 5-6: The first reading of the Constitutional Committee.
- August 7-21: The first six community meetings of the Constitutional Committee.
- August 27-September 20: The six meetings of the Committee of Seven.
- September 23-26: The Combat votes between the left and right wings.

- September 30: The constitutional compromise was made between SPD and CDU, and the Constitutional Committee completed the final draft of the Hesse Constitution.
- December 1: The referendum on the Constitution of Hesse was passed.
The referendum on Article 41 was passed.
The Constitution of Hesse was signed.
The General Election of the First Parliament of Hesse began. As a result, the coalition government of SPD and CDU was formed.
- December 4: The State of Greater Hesse redesignated the State of Hesse.
- December 19: The first free-elected Parliament of Hesse opened.
- December 20: Christian Stock, an SPD politician, was elected as the Prime Minister of Hesse.
- 1947
- January 1: Economic fusion of American and British zones was made official (Bizonia).
- January 6: Prime Minister Stock made the first government statement and the cabinet presentation. Minister-President Karl Geiler resigned and gave a farewell speech.
- January 7: The democratically elected government of Hesse was sworn into office.
- Jun 5: George Marshall, the Secretary of State of the United States, announced European Recovery Program (Marshall Plan) at Harvard University.

July 11: JCS Directive 1779 superseded JCS 1067.

December 12: The Constitutional Court of Hesse was established in Wiesbaden.
1948

March: In response to the London Six-Power Conference, USSR walked out of Allied Control Council (ACC), and the Berlin Crisis began in April.

July 1: The Minister-Presidents in the Western Occupation Zones received the Frankfurt Documents from the Allied Occupation Forces. The preparation of creating the Basic Law and establishing the Federal Republic of Germany began.

August 10: The Constitutional Convention at Herrenchiemsee began and lasted until August 23.

September 1: The Bonn Parliamentary Council began.
1949

May 8: The Bonn Parliamentary Council passed the Basic Law.

May 12: The Basic Law was approved by the three commanders of Western Allie Forces.

May 23: The Basic Law of the Federal Republic of Germany was officially promulgated.

August: Germans in the three occupation zones started free general elections.

December: Office of Military Government, United States (OMGUS) officially dissolved, and the remaining duties were transformed into High Commission for Occupied Germany (HICOG).

1955

May 5: Under the terms of the Bonn-Paris Conventions, the Federal Republic of Germany was declared “fully sovereign,” and HICOG ceased to function.

1968

June 24: A political compromise brought the right to resistance into the German Basic Law.

Introduction

October 16, 1945, was both a typical and unusual day in post-World War II Wiesbaden, a German city occupied by the U.S. Army. For most people, it was another day to seek food and shelter because survival was the only priority in the war desolation. Unusually, it was also the day when the first government officials of a new state, the State of Greater Hesse, took the oath of office. There were neither brass bands playing nor confetti streaming from windows. To scholarly, non-partisan, and American-selected Minister President Dr. Karl Geiler, it was more apprehension than rejoicing. He and his hand-picked cabinet members were well aware they would lead the critical process of creating a democratic state constitution for future generations.

Intellectual labor for drafting a democratic constitution began. On November 22, 1945, The Basic Law of the Greater Hesse was enacted to authorize the creation of the constitution. From March to June 1946, the Constitutional Preparatory Committee finished a primary design based on Dr. Walter Jellinek's work, introducing defensive democracy to prevent radical factions from rising, and handed it over to the elected State Constitutional Assembly in July. The assembly laid down the final draft on October 20. Although it contained controversial Article 41 for industrial socialization, Lieutenant General Lucius D. Clay, the Deputy Military Governor, let the people choose their future. The Constitution of Hesse passed two separate referendums for the constitution and Article 41, and it officially took effect on December 1, 1946. Surrounded by a cheering crowd, Geiler transferred his position to Christian Stock, the first elected Minister-President of a renamed state, the State of Hesse. The one-year period between the State of Greater Hesse and the State of Hesse became a small but indispensable part of a great event: the policy transformation of the American military authorities and the beginning of German legal democratization after WWII.

Why is Hesse?

Many might question the historical importance of Hessian formation and the Hessian Constitution. Such doubt is understandable. Four states were in the post-WWII American occupation zone: Bavaria, Bremen, Hesse, and Württemberg-Baden. Other than the city-state of Bremen, Hesse possibly had the least academic attraction. Bavaria had a large geographic size and population. In addition, General George S. Patton, a world-renowned war hero, served as the Military Governor of Bavaria for a short period. Württemberg-Baden was the first state in the American zone and all of Western Germany to enact a democratic constitution. Hesse had no important figure like Patton and was neither the biggest nor the earliest.

However, the creation of Hesse played a significant role in history. It was the only state built by the United States with the oldest remaining democratic constitution in Germany. Bavaria was well-preserved and had a strong sense of localism and conservatism. Württemberg-Baden was a temporary solution for the border conflicts between the American and French occupation zones. It soon dissolved in 1952 by combining with Baden and Württemberg-Hohenzollern as Baden-Württemberg. Hesse was separated into multiple pieces in 1568 and became three regional territories in 1945: the People's State of Hesse, the Prussian Province of Nassau, and the Prussian Province of Kurhessen. Although there were many attempts to reunite Hesse, such as the Revolution of 1848, the speeches of Archduke Ernst Ludwig, and the Greater Hesse movement after WWI, the U.S. Army was the first organization that successfully brought the state back together (Franz 1996, 71-90, 72-73, 76, 79-81, 90). Therefore, Hesse is a prime case for examining the results of American democratization in Germany, which could lead to three topics: the background and exercise of state formation by the American occupiers, the legislative actions of the occupied Germans, and the lessons learned from the Nazi regime.

Thesis Argument

This thesis aims to provide a fuller picture of the Hessian Constitution's historical roles by describing and analyzing its political background, constitutional-legalization processes in 1946, and importance when the German Basic Law was created in 1948. The American occupation operation in Germany did not start successfully. Military government officers (MGO) were faced with difficulties from multiple directions: JCS 1067, a self-contradictory policy focused on revanchism instead of actual military doctrines of occupation, the unexpected level of destruction after total war, and issues within the chaos occupying authorities. Therefore, it would be unwise to assert that the American military enforced a single static policy. The sign of improvement began with General Clay's actions in jurisdiction conflicts against tactical forces and authorizing the process for self-determinations of occupied German civilians, which started with the establishment of states and the beginning of constitutional-making processes. Based on local elites' advice, Clay recreated a state of Hesse, becoming the first democratic cooperation between the occupiers and occupied Germans.

During the constitution process in Hesse, the most critical question that the framers faced was to prevent another radical political faction from rising when many ordinary people lived in shortages of necessities and possibly smoldering resentments against their occupiers. Therefore, the concept of defensive democracy was adopted as the solution by Walter Jellinek and both the left- and right-wing factions in the constitutional assembly, even though their understanding differed. The different understandings of democracy and its defensive mechanism within the assembly and between the assembly and Clay led to sharp contradictions, almost causing democratization to fail. Fortunately, based on the same goal of self-determination and rebuilding democracy, factions within the assembly, as well as the assembly and Clay, were able to make compromises, eventually leading to the creation of the Constitution of Hesse and the first popular elected state government in Hesse after WWII.

The conclusion described the possible impacts of the Constitution of Hesse on the German Basic Law in terms of the democratic defensive mechanism during the Constitutional Convention at Herrenchiemsee and the Bonn Parliamentary Council. The founding parents of Basic Law adopted the constitutional structures and protective clauses from the Hessian Constitution. Gender equality was passed through the efforts of Elisabeth Selbert as a method to protect the majority of voters in domestic issues. Many new legal inventions in the Hessian Constitution, such as the rights to human dignity, action, and revolution, were consolidated into the Basic Law during the parliamentary council in 1948 and the amendment-making in the 1960s. More importantly, combining entrenched clauses and the right to revolution created a mechanism that could theoretically protect the constitutional order even after an anti-democratic radical political faction took over the public authority. However, since it was based on the distrust of both German public authorities and its people, the reason for creating such a mechanism might not be positive. The aftermath of the thesis briefly introduced the connection between the research and three heated tensions in recent years: the January 6 United States Capitol attack in 2021, the Ukraine War in 2022, and the Israeli-Palestinian conflict in 2023. These ongoing tragedies brought new meaning to the research by allowing a topic that lacked academic attention in the past to be valuable for further intellectual investment.

Literature Review

The historical literature on Hesse falls into three sub-topics: The American military authorities' policies, the entrenched clause, and the constitution's impacts. While the scholarly works about American policies are overall fruitful, further research is necessary. In "Planning the Peace: Operation Eclipse and the Occupation of Germany" (1995), Dr. Kenneth O. McCreedy introduced an operation of the Supreme Headquarters, Allied Expeditionary Forces (SHAEF) and showed the value of investing in staff resources to plan the war-peace transition early in a conflict. Dr. Walter M. Hudson's M.A. thesis "The U.S. Military Government and Democratic Reform and Denazification in Bavaria, 1945-47" (2001) demonstrated the essential role of organizational restructuring, ultimate diminishment, and denazification in achieving German politically democratic autonomy. Dr. Louis A. Dimarco, in his Ph.D. thesis "Restoring Order: The U.S. Army Experience with Occupation Operations, 1865-1952" (2010), examined the connections of pre- and post-WWII occupations, in which continuities in military doctrines, cultures, and individuals led to the success in Germany. Dr. Raymond A. Millen examined the military implementation of civil affairs and military governments in "*Bury the Dead, Feed the Living:*" *The History of Civil Affairs/Military Government in the Mediterranean and European Theaters of Operation during World War II* (2019). He pointed out many difficulties, such as friction inside the Roosevelt administration, harsh realities, and the spreading of diseases, which were conquered by the outstanding works of the American military.

Dr. Andrew Szanajda's Ph.D. thesis "The Restoration of Justice in Hesse, 1945-1949" (1997) was the first and only known English language work on reconstructing Hesse's judicial administration. It largely depended on secondary sources and focused on introducing Nazi legal theories, the American denazification actions, and legal institution reconstructions.

Most academic works largely focused on the difficulties outside the American military authorities, such as interferences from civil administrations, harsh post-war realities, and ruthless Russian actions. The authors, consciously or unconsciously, hinted that the American military in Germany had perfect leadership and consistent will without internal conflicts. Dr. Edward N. Peterson's *The American Occupation of Germany: Retreat to Victory* (1977) had a different point of view. Peterson argued that the success of American occupation in Germany was neither due to a united leadership nor a consistent plan. Instead, it resulted from a successful retreat from an American dictatorship to democratic cooperation between Americans and Germans. However, none of these works thoroughly discuss the roots of revanchism against Germany, which led to the creation of the Morgenthau Plan and internal conflicts in the Roosevelt administration. The evolution of American occupation policies in Germany still has value for further research.

The Hessian constitution was one of Germany's earliest practical examples of the defensive democracy theory, which emphasized taking actions to defend a democratic order from being overthrown by radical political groups from the inside based on the lessons during the downfall of the Weimar Republic. On the one hand, the most common method of defensive democracy was the concept of entrenched clause. It argues that specific clauses in a written constitution are key to maintaining the current regime, and they should be entrenched to prevent any constitutional structural shift. On the other hand, an uncommon method was providing the right of resistance to fight against any anti-constitutional attempts. The German Basic Law adopted both methods by creating a powerful Federal Constitutional Court to exercise judicial review in the amendment-making process and allowing people to use violent methods against unconstitutional authorities. Therefore, discussing the root of defensive democracy in the creation of the Hessian Constitution is valuable.

Academic works in English regarding the entrenched clause focus on whether the judicial branch should hold such power. In a provocative book, *Democracy and Legal Change* (2007), Dr. Melissa Schwartzberg criticized the entrenched clause by using an array of dazzling examples that span millennia from classical Greek to the creation of German Basic Law. She ignored state constitutions and suggested that the entrenched clauses officially appeared in the Basic Law for the first time from directorships of allied military governments, questionable legal theories, and internal struggles. In her view, the Basic Law lacked legality and had no democratic feature due to its coercive nature from American and other military occupiers (155-156, 153-154). Dr. Yaniv Roznai, in his Ph.D. thesis “Unconstitutional Constitutional Amendments: A Study of the Nature and Limits of Constitutional Amendment Powers” (2014), described the historical background and evolution of the entrenched clause with a new theory. Roznai argued that the entrenched clause’s development had historical backgrounds. It was a tool for both democratic and anti-democratic purposes, and such clauses in the Basic Law directly responded to the history of Nazism rising. However, he also did not address its early development before the Basic Law in Germany.

Patrick Nitzschner, in his article “On Militant Democracy’s Institutional Conservatism” (2023), introduced the concept of institutional conservatism into the narrative of the creation of defensive democracy by tracing the theories of Carl Schmitt, Karl Loewenstein, and Karl Popper. He argued that it was a preference for institutions to restrain transformation. However, he failed to emphasize the instrumental nature of institutional conservatism and omitted Maurice Hauriou and his theory of super-constitutionality into consideration. Therefore, it is possible to examine the nature of defensive democracy by combining institutional conservatism and super-constitutionality.

Almost no academic work in English discusses the Hessian Constitution's impact in the future, specifically its role during the creation of the German Basic Law regarding defensive democracy. Dr. William Fleming's two articles, "German Post-War Constitutions I and II" (1948), partially touched on the topic by summarizing the American zone state constitutions during the ongoing Basic Law creation. He introduced them but doubted whether democracy could stand. In "The Hessian Constitution—Godfather and Model of the Basic Law?" (*Die Hessische Verfassung – Pate und Vorbild des Grundgesetzes?*), Ulrich Bachmann analyzed the Hessian constitution's impact during the Basic Law creation by recording every time it was referenced and argued that it was not very critical due to the use of other state constitutions. The three articles created arbitrary conclusions and failed to analyze the constitution's impact case by case. Martin Will's book *The Emergence of the Constitution of the State of Hesse in 1946 (Die Entstehung der Verfassung des Landes Hessen von 1946)* discusses the creation of the Hessian Constitution and briefly analyzes its impacts during the drafting of the German Basic Law. He argues that while it shaped the fundamental structure of the Basic Law, the two differed notably in civil rights, with the Basic Law holding fewer social and economic rights (2009, 548-549). It is an overall narration, and it does not examine Walter Jellinek's early academic thoughts, which leaves room for further detailed research.

Chapter 1.

The Background before the Hessian Constitution Creation

In *Hesse: A New German State*, American military correspondent Dexter L. Freeman recorded a complaint from an unknown Military Government (MG) officer about their plights:

“Everything was out of order,” related a gruff Public Safety officer who had spent years on the New York police force. “We were expected to have the wisdom of Solomon, the strength of Samson, and the patience of Job!” (Freeman 1948, 27)

The officer ironically described the situations he and his colleagues faced in the land of Hesse and other occupied German territories in 1945. There was no longer any trace of the highly centralized police state which Adolf Hitler and his senior lieutenants used to terrorize individuals and atomize society. Instead, self-preservation became the only law left for Germans and newly freed displaced persons (DPs), the former involuntary laborers of the Nazi war machines, in a land in ruins. The questions of survival, rebuilding cities, criminal actions, hatred between locals and DPs, and possible Nazi guerrillas created significant instabilities. Furthermore, the early MG system, which was based on the wartime G-5 and local detachment structure, did not fit with the postwar circumstances. Some MG officers and combat soldiers could not treat the locals properly because of a lack of ability, difference between civilians and military, or controversial actions. The burden of reconstruction alone was too much for the MG to accomplish without assistance from local elites.

The U.S. Army partly recognized such difficulties before the war. Based on early experiences regarding military occupation, especially the Rhineland occupation in 1918, they understood that a MG was a temporary replacement for a civil administration. The key to success was to build a positive relationship with locals and pay the responsibility for supervising the existing institutions to maintain local infrastructures. However, the ideas that connected the rise of Nazism and the German race were popular, especially after the news about the mass murder of Jews arrived in America.

Therefore, the American public was not interested in any cooperation with Germans. The revanchism against Germany led to the creation of the Morgenthau Plan and the internal conflicts between American leadership. Eventually, the Morgenthau Plan became the JCS 1067, a compromise solution that balanced military doctrine and popular ideas for punishment.

This chapter examines the background of the American occupation and its possible difficulties before the creation of Hessian Constitution in 1946, including pre-surrender view of intellectuals and plans about military occupation and the realities in postwar German territories. First, developing the German occupation plan was not a smooth operation. Instead, the result was a compromise to deal with conflicts between Germanophobia and military doctrines between 1944 and 1945. Second, the realities in post-war Germany were far worse than what the American military expected before the administration took place, which included harsh environmental issues, side effects from strict denazification policies, and the internal issues of the American military authorities.

1.1 Early Thoughts about the Post-war American Occupation in Germany.

Before describing the difficulties that the American occupation forces faced in Germany, which eventually led to the creation of the Hessian Constitution in 1946, it is necessary to emphasize the intellectual developments in American society, military, and politics surrounding the military occupation before the soldiers landed on German soil and formally took control. Key issues were Germanophobia, developments in American military doctrine for occupations, and the conflicts between the two during the creation of the occupation plan. During World War II, the popular way to explain the rise of Nazism in Germany often made connections between German culture, philosophy, and race. The idea of Germanophobia existed since the Franco-Prussian War, was fortified by wartime propaganda in WWI, and became unbreakable in WWII due to Nazi war crimes.

The discussion became increasingly radical when news of the mass murder of Jews was first made public around 1943. Many Americans argued that Germans, as a racial group, were mentally unstable, and the Morgenthau Plan posited using harsh punishment to make Germany harmless in the future. On the other hand, the dominant military doctrine emphasized social stabilization by taking over civil responsibility through cooperation between occupiers and the occupied populace. The doctrine, in the manual FM 27-5, was based on military occupations in American history, especially the Rhineland Occupation between 1918 and 1923. These ideas and the policy, CCS 551, gained opposition when the public and some government members sought punitive or vengeful solutions. The compromise between harsh and soft plans led to JCS 1067, the first formal plan for postwar military occupation in Germany, representing the gaps between popular thought and military doctrine.

1.1.1 Define “German Problems.”

It is important to describe the intellectual views regarding the rise of Nazism since occupation plans reflected the understanding of the roots of Nazism and WWII. The academic and popular views in America at the time led to the rise of anti-German sentiment, also known as Germanophobia. It began as a direct reaction to the Franco-Prussian War. Benjamin Disraeli, two-time Prime Minister of the United Kingdom, was possibly the first to sow the seeds of suspicion. During a speech to the House of Commons on February 9, 1871, he pointed out that the newborn German Empire would become the most significant economic and military threat to Great Britain (Warkentin 2016, 7). The following political, economic, and military competitions between the two nations led the suspicion to grow uncontrollably. In *The Anglo-German Problem*, Charles Sarolea argued that German militarism and “perverted, exclusive, and aggressive nationalism” were based on the Nietzschean “will to power” (1912, 182, 351).

The theory reached its fevered pitch in 1914 when people started to allude that the “German Problem” was based on psychological rather than philosophical issues. The British propaganda campaigns during WWI helped shape negative views regarding Germany and its people in the Anglo-Saxon world, which was supported by a secret broadcast unit that targeted American audiences. Between 1914 and 1918, American media was bombarded with images of the Prussian Ogre and Beastly Hun, who had an enormous girth, snake-like saber belt, and symbolic pickelhaube. These blood-thirsty barbarians busily crucified soldiers, violated women, mutilated babies, and looted churches. Furthermore, the most infamous atrocity story was the “German Corpse-Conversion Factory” in 1917. After the United States joined the war, the British presses and authorities repeatedly accused Germans of using dead humans during soap manufacture without objective evidence (Taylor 2013, 180-181). The wartime racial demonization propaganda successfully created the image of the brutal Hun and entrenched it as a stereotype that Germans were mentally defective monsters. Yet, ironically, such wartime propaganda turned back and reshaped British and American intellectuals by encouraging them to connect war crimes and racial characteristics in WWII.

The outbreak of WWII witnessed the transformation of Germanophobia from stereotypes to an unbreakable preconception. The “German Problem” discussions became increasingly radical when the Third Reich’s brutal crimes became obvious to the Allied public in 1943. One of the most vociferous figures who claimed that Germans suffered from collective psychosis was Lord Robert Vansittart from Great Britain. Vansittart was Permanent Under-Secretary at the Foreign Office from 1930 to 1938 and relocated to Chief Diplomatic Advisor due to his hostility to Neville Chamberlain’s appeasement policy (Warkentin 2016, 7). In *Black Record: Germans Past and Present* (1941), Vansittart described Nazism as the continuous record of German military aggressions since the classical Roman Republic, and their public enthusiastically supported Hitler’s wars (19, 51-52).

In 1943, Vansittart hinted that the entire German population was incurable, which made it meaningless to differentiate their people between religions, political identities, or social status. The solutions to German problems were either death or a violent crushing of their military powers, followed by generations of re-education programs (Vansittart 1943, 13-155, 198-202, 233-235).

Vansittart was not the only one who tended to use harsh methods for the “German Problems.” Louis Nizer was a famous British-born American lawyer with a reputation for patriotic speeches during Liberty Loan in WWI. In *What to do with Germany* (1944), Nizer argued that Germans had a long history of aggression and bloodlust. The defeat of WWI made Germany a seedbed of hatred, and the invasion plan for WWII, through capital and industrial infiltrations, operated before Hitler seized power. Therefore, Nizer believed that the best way to cure Germany was by putting the entire nation into the “protective custody” of the United Nations to deprive all industrial and military abilities (18-38, 153-164, 111-139, 91-106). He also introduced other popular curing methods that had gained traction in America, which he called “medicines without a cure,” including extermination war or national sterilization, racial selective breeding, political dismemberment, and compulsory migration. Nizer opposed such methods more based on cost and efficiency than humanitarian issues (3-11).

It was not only the Americans and British who believed Germans had psychological defects. Some German intellectuals held similar feelings regarding their compatriots. Gerhart Seger and Siegfried Marck, two Social Democrats in exile since 1933, joined the discussion in 1943. Although they did not suggest that the German collective psyche was incurable, they implied that Germans might share a neurotic approach toward outsiders. Such a neuroticism might be based on their unique historical experience and following philosophical theories (Seger and Marck 1943, 15-16). The racial identity and professional reputations of Seger and Marck, both Germans, played an important role in advising the American government, provided credibility to the German problems.

If the German mental attitude was pathological, it is unsurprising that psychiatrists joined the discussion of the German problem. Richard Max Brickner, an Assistant Professor of Clinical Neurology at Columbia University, provided his diagnosis and treatments regarding what he called “collective paranoia” in Germany in his book *Is Germany Incurable?* (1943). First, Brickner argued that the Third Reich’s domestic and foreign policies, which overly emphasized “unjust treatment,” “encirclement,” “living space,” megalomania, the sense of mission, the fanatic violence, and irrationality of methods, were the classic symptoms of paranoia (111-201). Second, such a collective paranoia had infectivity in German society based on their culture, meaning most newborn babies would be inflected and leaving only a few immune (90-99). Third, Adolf Hitler’s authority and war resulted only from a progressive accumulation of paranoid symptoms over centuries. Therefore, Brickner believed the solution should be from within, led by Germans immune to the collective paranoia to change the culture. However, the resources and environment that allowed the solution must come from outside through a massive re-education led by locals and allied forces (296-309).

In conclusion, the theory of Germanophobia proliferated after the Franco-Prussian War, was fortified by wartime propaganda in WWI, and finally became an academic and popular fact in WWII due to the Nazi crimes and revanchism of the Allied public. The only question left for the American government was to find the treatment to cure German collective psychosis rather than debate whether the mental illness was real. As a result, the post-war occupation plans emphasized controlling a predicted guilty race and ensuring they would never return to their evil past. “The best way to kill rats,” said one disciple of the “hard peace” school of thought, “is to burn down the whole house.” “When we go into Germany,” said another official who held a key position, “this will be our policy: Germany will be in flames. We will be the fire department and we won’t turn on the water!” (Friedrich 1948, 212-213).

1.1.2 The Development of American Military Occupation Doctrine

Based on the historical analysis, the academic theories of American military occupation during WWII heavily emphasized the importance of cooperation with local civil administrations. As a result, the differences between the popular Germanophobia and academic theories of military occupation led to the unique debates between the American government and the military during the creation of German occupation policies.

Regarding the military occupation issues, the essential document of the American military was *Basic Field Manual: Military Government* (FM 27-5) in 1940. In the document, the author pointed out the importance of winning locals' minds during the occupation: "military government is executed by force... it is incumbent upon those who administer it to be strictly guided by... justice, honor, and humanity." On the other hand, "a military occupation marked by harshness, injustice, or oppression leaves lasting resentment" (War Department, 3-4). It reflected a popular occupation theory in the nineteenth century: a military government (MG) was a social contract between the occupier and the occupied. The occupier treated locals humanely with little interference, and the occupied locals followed military rules (Kehoe 2019, 21).

The document was written primarily based on American experiences in three historical events: the Mexican-American War, the Civil War, and the Rhineland occupation after WWI. During the Mexican-American War, General Winfield Scott faced a significant challenge after he moved further into Mexico, where the entire American deployment numbered around thirty thousand soldiers and was faced with local uprisings. Scott controlled the situation by imposing strict martial law while leaving Mexican institutions and government intact. Therefore, his occupation force was never more than ten thousand (Carney 2005, 16, 26).

During the Civil War, President Abraham Lincoln promulgated General Order 100 based on the ideas of scholar Francis Lieber, a wounded Prussian veteran at Waterloo concerned with the possibility that Union soldiers might gain local hostility by brutalizing occupied people. The order created occupation rules in Confederate territory, including minimum intervention and showing respect for the local population and institutions (Kehoe 2019, 23). Although occupations in Mexico and the Confederacy were controversial in practice, they provided early experiences of military occupation before the Rhineland occupation after WWI.

The Rhineland occupation between 1918 and 1923 was the most important historical reference for the development of FM 27-5, in which local Germans and the American forces created a cooperative relationship. Therefore, the American military gained more success in controlling local society than its counterparts from Britain, Belgium, or France because its zone had much less looting, rioting, and racial tensions. Colonel Irvin L. Hunt and Colonel Harry A. Smith, two officers in charge of civil affairs of American forces in Germany, credited the results to the occupation officers with activeness and the independence of military governors from the regular chain of command. They also acknowledged that the American MG operations at least partly reflected the experiences in the Mexican-American War and the Civil War (Smith 1920, 11-12). However, Hunt criticized using regular soldiers in civil affairs because he argued that their potential combat role hindered their ability to build positive relationships with locals. Instead, he asked for more officers trained in governance and building indirect controls in the occupied area. His suggestions were adopted by FM 27-5 and created specialist training schools for MGOs in WWII (Hunt 1943, 333-335; Kehoe 2019, 23).

The training for future occupation officers began in May 1942, when the first Military Government Training School was established at the Charlottesville campus of the University of Virginia. Its goal was to help military government officers (MGO) understand the knowledge regarding military occupation and acquire skills to deal with unforeseen circumstances. The faculty team contained career officers, uniformed professionals, and academic experts, such as Major General Thomas H. Green, anthropologist Major General David P. Barrows, and political scientist Joseph P. Harris. Many students had urban white-collar working backgrounds, joined a six-month curriculum designed by Yale and Johns Hopkins experts, and graduated with a diploma (Kehoe 2019, 19).

Many instructors developed theories and concluded a fundamental theme. Barrows criticized the American military's popular view, focusing only on combat rather than political factors. Instead, he argued that the MG development should be based on governmental policies. The future MG operation would be a limited complement of combat operation, existing only when the fighting continued. Although martial law, military orders, and tribunals were the core to make sure locals would not cause negative impacts on combat operations, they must be based on the support of the occupied communities. Brigadier General C. W. Wickersham, an instructor at Charlottesville, described the complex legal nature of military occupation in a speech at the American Bar Association. He argued that the meaning of MG was to prevent social disorder that could impact frontline combatants, and the way to achieve it was to pay social duties, which included security, food supply, and medical services. Although Wickersham did not directly talk about cooperation with locals, he implied that occupation was based on the minimum intervention of local political and social structures (Kehoe 2019, 20-21). Therefore, a successful MG operation included serving the political policies and combat operations, using martial laws to control local populations, and trying to gain support from occupied communities by allowing them to assist MG in social responsibilities.

In conclusion, tension existed between the popular theory of Germanophobia and the theoretical ideas regarding military occupation in the United States. Germanophobia emphasized that Germans had a neurotic attitude towards outsiders based on their aggressive history, and the Third Reich's crimes only illustrated their desires for territorial expansion and brutal actions. Germans were mentally ill people who needed re-education and harmless treatments. On the other hand, the historical experiences and doctrines regarding military occupation in the United States were based on trust, cooperation, minimum intervention, and contracts between military occupiers and occupied communities. It was difficult, if not impossible, for the MG to take social responsibility as a functional administration institution without assistance from local elites and existing civil governments. Consequently, the conflict appeared to center around whether the local Germans, especially the elites, could be trusted to cooperate with the MG. Such a conflict between Germanophobia and military occupation theories reflected the evolution of American occupation plans in post-war Germany.

1.1.3 The Evolution of American Occupation Plans in Germany

The conflicts between Germanophobia and military occupation theories in the United States during WWII led to the evolution of the occupation plans, including CCS 551, the Morgenthau Plan, and JCS 1067. In December 1943, General Dwight D. Eisenhower asked for a concise plan for post-war Germany when he assumed command of Operation Overlord. Therefore, the Anglo-American Combined Civil Affairs Committee drafted a directive for pre-surrender policies with support from the State, Treasury, and Navy Departments. *The Directive for Military Government in Germany Prior to Defeat or Surrender* (CCS 551) became the first authoritative document of the American military occupation plan in Germany. It was swiftly distributed to the tactical commanders and civil agencies through handbooks and papers as a pre-surrender recommendation guide (Tøllefsen 2006, 29-30).

CCS 551 was a moderate policy that reflected doctrines of military occupations in the United States. The document emphasized the four crucial goals of the military authorities in occupied Germany: to aid military operations, to destroy Nazism and the Nazi hierarchy, to maintain and preserve law and order, and to restore “normal conditions among the civilians” as soon as possible. Therefore, German industries and infrastructures would be intact for feeding people and paying for occupation, freedom of speech would be allowed, and civil administrations would be restored. In addition, although political activities would be prevented, the Allied Command allowed “the formation of a democratic trade union movement and other forms of free economic association,” and the directive did not ask for an absolute ban on hiring Nazis (Tøllefsen 2006, 30). CCS 551 was based on the American occupation experiences, especially FM 27-5, the report of Hunt, and the orders of General John J. Pershing, in which his soldiers were neither despoilers nor oppressors, but “simply the instruments of a free government that brought benefits to German people” (Dimarco 2010, 269).

Such a “soft policy” for Germany would lead to objections when Germanophobia was widespread, and the most famous opponents were Treasury Secretary Henry Morgenthau and President Franklin D. Roosevelt (FDR). Although Morgenthau expressed a negative view of German militarism in 1918, he did not become radical on German issues until the Holocaust news arrived in the United States (The New York Times 1918, 7). As a result, he became the proponent of a harsh peace with Germany due to his Jewish background.¹ Not surprisingly, Morgenthau was shocked after he accessed CCS 551. Although it was only a pre-surrender instruction, he believed it would easily become the post-war policy and realized the gap in perception between departments.

¹ In his diaries, Morgenthau described his pain and radicalization when the news of the Holocaust arrived in the United States. Therefore, it is safe to say that the Holocaust and following revenge mode changed Morgenthau’s attitude toward German issues. “The American Occupation of Germany: A Representative Case of Nation-building?” (Master’s thesis, University of Oslo, 2006) 31.

Morgenthau handed FDR a copy of CCS 551 with his notes, and FDR also gave a negative response because it was not punitive. In August 1944, he noted to Army Secretary Henry L. Stimson:

This so-called “Handbook” is pretty bad. I should like to know how it came to be written and who approved it down the line. . . . It gives me the impression that Germany is to be restored just as much as the Netherlands or Belgium, and the people of Germany brought back as quickly as possible to their pre-war state (Hudson 2010, 245).

Morgenthau introduced his “Suggested Post-Surrender Program for Germany” three months later, which focused on punishing Germany as the priority, including deindustrialization, demilitarization, denazification, agriculturalization, and disassembly of the Reich. It asked to destroy every machine, collapse every mine, and wipe out entire military capabilities. Approximately, it would kill 40 percent of the German population since agriculture could not feed everyone (Morgenthau 1944; Hull 1948, 1617). Although it was unacceptable from diplomatic and military viewpoints since Germans would never accept such a hopeless future, FDR and Morgenthau successfully pushed the plan and minimized opposition of the State and War Departments by threatening Winston Churchill with postwar financial aid during the Quebec Conference (Tøllefsen 2006, 35).

FDR supported Morgenthau’s plan based on their friendship and shared viewpoints regarding Germans with many Americans, which greatly complicated the policy development. Based on his experiences, he believed that changing evil German culture would take generations rather than a rapid event by legal or military orders (Dimarco 2010, 268). In addition, numbers of polls in 1942 suggested most Americans sought to win the war by destroying Nazism, fundamentally changing their society, and even genocide, including 13 percent wanting to annihilate all Germans (Kehoe 2019, 34). Their influence on FDR was unknown, but it was clear that a soft plan might not be popular. It was hard for an elected head of the state to oppose popular views openly. The mixed reactions between a radical cabinet member, personal impressions, and popular viewpoints shaped the direction of the occupation.

Ironically, the Morgenthau Plan was being shelved, also because of the popular view. It had been used by Joseph Goebbels, the Nazi propaganda minister, as evidence of a coming genocide by Allied Forces and led to the increase of resistance. The pressures from American military leadership, important civil officials, and Republican president-nominee Thomas E. Dewey, who openly attacked the Morgenthau Plan during the election in 1944, forced FDR to retreat from the plan by denying any relationship with it (Beschloss 2002, 144-145, 149). The complicated circumstance that soft and harsh policies were both politically unacceptable led to JCS 1067, the first formal post-war occupation plan.

The Joint Chiefs of Staff Directive 1067 (JCS 1067) was a compromise solution between different departments and completed by the Army's Civil Affairs Division and Assistant Secretary of War John McCloy. According to McCloy, it was similar to the Morgenthau Plan but deflected its most radical measures and purposely contained clauses that allowed commanding officers to avoid some limitations if necessary.² However, its stern tone reflected viewpoints of FDR and many Americans regarding their goal in the occupied Germany.

It should be brought home to the Germans that Germany's ruthless warfare and the fanatical Nazi resistance have destroyed the German economy and made chaos and suffering inevitable and that the Germans cannot escape responsibility for what they have brought upon themselves (Dimarco 2010, 263).

What is so striking about JCS 1067 was not that it was a punitive document—it could not have been otherwise—it was exclusively punitive. Its primary goal was not to provide social stability but to ensure that Germany would never again be a threat via deprivation of their economic capability for war and setting up severe denazification methods.

² If you read 1067...there's a clause in every paragraph, "except in case of emergency" or "except in case of" something or other, so you did have some leeway there. ... And we were responsible, or I was responsible, for putting in the "unless you have to." ... But when you consider what move that was from the Vidictus of the original Treasury plan, and the original State Department plan, you can see how far away it was from that. Walter M. Hudson "The American Way of Postwar", 2010, 247-248.

JCS 1067's economic goals kept the Morgenthau style of harsh statements, presenting "looking toward the economic rehabilitation of Germany or designed to maintain or strengthen the German economy." Specifically, it asked the commander to ignore any support for increasing German living standards, which should not be higher than any neighboring United Nations' members, and actively took measures to decrease their living standards if necessary. It set the total prohibitions of industrial and economic activities except for agricultural productions or preventing acute crises. It aimed to minimize their war capacity by indiscriminately punishing the entire population. It held even more harsh clauses for denazification. By emphasizing Germany's hostile identity, it required MG officials to be "just but firm and aloof" in administrations and prohibited fraternization with any Germans hinting that everyone was potential Nazis. The directive also instructed severe methods for identifying active members of the Nazi party and purged them from civil service positions. The stringent denazification policy in civil services was an entrenched clause that overlaid any so-called flexibility for military authority to conduct in actual circumstances.

Most importantly, JCS 1067 hinted that the occupation authority had no responsibility for Germans, and such a feeling was encouraged. Carl J. Friedrich, a top advisor of the American MG, recorded the following story in his book: At one of the field headquarters, a large group of MG officers was being oriented to the policy prior to its entry into Germany. A thoughtful one asked, "Doesn't this mean that it will be impossible to do a good job of administration in Germany?" the lecturer was temporarily stumped until someone hit the keynote. "Does it really matter if we do a good job of administration?" "That's it," responded the lecturer. "After all, isn't it true that what the Germans need is a good dose of bad administration?" One scarcely needs to comment on what becomes of the morale and tone of an organization that officially disclaims moral purpose and has a sense of power and privilege exceeding its sense of responsibility (1948, 233-234).

1.1.4 Conclusion

New ideological enemies and total war methods redefined the measure of victory in WWII. Success could not be brokered, compromised, or diplomatically mediated when a great moral contest occurred between civilized people and barbarians. Therefore, there was no politically viable way to end the war if the Third Reich regime could survive, and all German people would also be punished collectively for the disasters they brought after the peace came. Although the American military had a long history of military occupations and developed theoretical ideas for improvement, the knowledge only stayed at the tactical level and never went into the sights of strategic planners. The evolution of occupation plans for post-war Germany was an example of such an information gap between tactical commanders and strategic designers. The creation of JCS 1067 only represented the gap that existed rather than its healing, and the gap would continuously play a role when the American military officials started to take control of the communities in Germany.

On the other hand, military doctrines, the Morgenthau Plan, and JCS 1067 might not fully recognize the destruction brought on by Allied air superiority and land combat in a total war scenario. Although the updated FM 27-5 in 1943 argued that post-war Germany might face challenges from the destruction of infrastructure, it also underestimated the difficulties of the denazification processes when a wasteland needed powers from experts for reconstruction in post-war Germany. Unlike the occupation in Rhineland after WWI, the occupation of Germany after WWII possibly was the first time when the American military had to deal with a practically ruined and theoretically hostile land when they were solving internal issues at the same time.

1.2 Post-war Difficulties in American Controlled Territory

After WWII, the American military authorities in Germany faced difficulties from three elements: harsh environments, denazification policies, and internal issues. First, during WWII, the total war scenario between industrialized countries with the massive use of strategic bombings caused destruction that no one had seen before. Therefore, the decline in physical infrastructures, governmental structures, economic systems, public security, and social bonding in Germany became the American military authorities' first difficulty. Second, the increasingly strict rules in denazification created additional questions regarding an artificial shortage of manpower, unexpected opportunities for former Nazis to gain economic privileges, conflicts between MGOs and local public servants, and public concerns about the goal of Americans and their ability to control. Third, the American military authorities had internal issues about low efficiency and bureaucratic issues from complicated structures, criminal actions from soldiers, questionable attitudes toward legal practices, and their negative impact in German society.

1.2.1 Harsh Environment.

Richard Preston, historian at Duke University, defined total war as:

Fighting with all resources and all kinds of weapons without any restrictions imposed by humanity or by expediency, killing all prisoners and civilians without respect for age or sex, disregarding completely the rights of neutrals, and using psychological techniques to wipe out individual personality and to obliterate all standard (Preston 2001, 11).

Given this definition, WWII was possibly the first complete total war of industrialized nations when Hitler and his followers started to intimidate or extirpate others for their living space. It also was the war when allied bomber pilots soared above German cities with smoldering anger and revenge, and their dauntless comrades repulsed Nazis on land.

Allied combat actions left around 600,000 civilians dead and 7.5 million homeless. In cities with more than 100,000 inhabitants in 1939, about 50 percent of their built-up areas were wiped out when Germany surrendered in May 1945 (Diefendorf 1993, 11). In the Hessian area, Frankfurt lost 70 percent of its buildings and all old towns, Kassel lost 80 percent of residential homes in the outskirts and 97 percent of the old town, and Darmstadt lost more than 80 percent of the old town.³ Refugees and Displaced People (DPs) flooded between cities or from one village to another without guidance or management when civil administrations in Germany essentially lost capabilities for functioning. Under these circumstances, the Third Reich and even the German nation-state physically disappeared. The harsh environment in Germany after a total-war scenario, which devastated the local political, economic, criminal, and social factors, was the first issue that the American MG had to face.

The Allied bombings severely impacted the local civil administrations. Most cities initially pretended to be normal and imminently cleared ruins and rebuilt cities after attacks. However, the increasing number of bombing actions violently overwhelmed their ability to keep order and eventually forced to abandon cities (Diefendorf 2001, 10-11). When Germany surrendered, no major city kept its government structure. The most significant impacts of abandoned cities were the severe infrastructure damage, lack of shelters, and massive ruins that occupied the districts due to the political vacuum. Cities could not provide enough services for residents and outside refugees. Seven thousand broken water mains reduced Frankfurt's water service by more than half; electrical cables endured far more damage than underground pipelines; gas, heating, and public transportation services became impossible. In addition, the significant loss of administration files in public buildings due to the allied bombings created great difficulties in reorganizing local communities (Diefendorf 2001, 16-17).

³ "Luftkrieg," *Landesgeschichtliches Informationssystem Hessen*, 12-15, 22-28; "Bombenangriffe auf Frankfurt 1940-45-zerstörungen," Internet Archive, picture.

Bombings that targeted residential areas also caused housing problems. According to a 1946 census by the Association of German Cities (*Deutscher Städtetag*), more than 40 percent of houses were destroyed in Berlin and cities with more than 20,000 inhabitants in the western part of Germany on May 17, 1939. In 1945, the urban dwellings were 4.3 million less than the estimated requirements for civilians and refugees (Vonyó 2018, 57-58). A significant number of ruins in German cities created another problem. Frankfurt had more than eleven cubic kilometers of ruins occupying urban areas. If they were placed on a field 100 yards by 40 yards, the pile would be 2.17 miles tall (Diefendorf 2001, 15). German urban reconstructions, such as infrastructure repairs, house buildings, and ruin removals, would be only possible when the authorities formed.

The second negative impact of the harsh environment in Germany was the total economic collapse. When the guns went silent, ordinary Germans who might hold the wish for a prosperous future were only left defeated, disillusioned, and demoralized. Their families were separated or became bitter memories when the bombs dropped, their homes and working locations disappeared, their savings became almost worthless, and their only necessary economic action was trading for food.

The collective memory of the post-war generation in Germany was possibly centered around poverty and desperation, but hunger stood out as the towering nightmare. The mass slaughter of animals in 1945 drastically reduced the fat and protein supply, and the occupation restrictions of using grains as fodder exacerbated the situation. The result was a significant diet imbalance among Germans. In 1947, bread and potatoes still comprised more than 80 percent of the calorific supply, and animal meat and fats only accounted for five and four percents (Vonyó 2018, 19). Moreover, damaged processing machinery and transportation system, millions of DPs who needed 2,000 kilocalories per day, and the involuntary laborer exodus severely compromised the food supply (Millen 2019, 172).

The American official food rations in 1945 were around 900-1,200 kilocalories per day, but the actual rations were much lower. Civilians of Berlin and other major urban areas sometimes subsisted on only 600 to 800 kilocalories per day, 50 percent of newborn babies in Berlin in August died, and 30 percent of children in the American zone died during the first year of military occupation (Peterson 1977, 118). Black markets became necessary to gain enough nutrition.

The black markets, mainly barter trade, played significant roles in Germany by providing living supplies, necessary materials, and services since 1944. Although their price was much higher than the official standard, it was economically necessary to provide timely supplies instead of suffering from a shortage. They provided food and valuable animal products, which accounted for only 10 percent of domestic trade but occupied 80 percent of consumer spending. The MG authorities reported that illegal food exchanges amounted to 20 percent of all trades in November 1945 and grew to 50 percent for certain goods after six months. Farmers refused to sell products even when local officials accompanied by armed American soldiers ordered them to do so (Bignon 2009, 5).

The black-markets could also provide workers and equipment for those with goods. Albert Speck, a famous construction contractor who worked for the American military and gained heavy equipment, was one of many experts in such services. He dispatched one excavator and some trucks to work for a coal producer, then sold coal to a cement factory for cement, and finally used them for his illegal building projects (Diefendorf 2001, 34-36). However, the black markets barely helped improve living conditions. Malnutrition and lack of shelter direly decreased urban public health in all zones. Tens of thousands were killed by hunger, frostbite, and the spread of diseases. Desperate people used illegal methods to acquire food and basic supplies, which led Cardinal Frings, the archbishop of Cologne, to promise salvation for those who committed theft out of necessity during his 1946 New Year mass (Vonyó 2018, 39). The fighting for minimal supplies created more misery after the war.

Another acute problem was the criminal issues, which included chaos before the occupation and DP-related issues. Since 1944, the local Nazi squads became increasingly hysterical and executed individuals at the slightest provocation based on the fear of defeat and racial criminology. Their brutalities radicalized the self-preservation of ordinary people who committed crimes to support themselves or their families. Some cities fell into anarchy due to authority disappearing and threats from Nazi extremists. After arrival, the MG officials dismissed “fantastic reports” about Darmstadt, Hesse, which was only destroyed by 80 percent, and the reality was far worse. The city was awash with gangs and criminals as rioting, looting, rape, and murder was rampant in ruins. Between 1944 and early 1945, looting became too common to control effectively (Kehoe 2019, 49-53).

Furthermore, criminal issues related to DPs had become an increasing threat. The sympathy for involuntary laborers and survivors in camps led the US Army to release them immediately. About eight million DPs, representing 20 percent of the German workforce, abandoned their locations and ignored Allied requests to keep them in place. Some DPs soon exacted revenge on local people through lootings, murders, rapes, and arsons (Millen 2019, 174). Although today’s research suggests that violent crimes committed by DPs were possibly much less than people believed, the trend linked foreigners to crime because of DP's alien status. In mid-July 1945, the Darmstadt chief of police reported 49 bicycle thefts and thirteen other criminal cases to MG. Despite identifying four German perpetrators, he assumed foreigners committed all other crimes. The Bavarian Rural Police claimed that DPs committed capital crimes such as murder, attempted murder, robbery, gang crime, and rape, were between thirteen and fifty-eight times higher than Germans in 1945 (Kehoe 2019, 91-92).

The total war devastated German society and individuals, and the massive suicide wave in Germany between 1944 and 1945 reflected that. When people faced with the imminent social collapse, great uncertainty, and the fear of revenge and retribution, death became an attractive option. The desperation in Eastern Germany spread wildly when millions of vengeful Soviet troops marched in with terrible brutality. Women in particular saw no way out of the nightmare but to kill themselves. On the other hand, such collective suicide, not as many as in the East, also happened when the US Army started to take over Germany. In the Hessian regime, a fifteen-year-old boy wrote memoirs about how his teacher poisoned himself with his wife when the Americans entered the town of Giessen. The authorities of Upper Bavaria recorded suicides in April and May 1945 were ten times higher than the same months in previous years (Huber 2019, 85, 88-89). It is hard to know the scale of suicide because of chaos and increasing indifference. The US Army tried to find the cause by examining the connection between strategic bombings and the morale decline. Although the research failed to prove its theory, their attempt confirmed that massive suicide numbers were great enough to gain the attention of occupiers, and the direct cause of the suicide wave was the destruction of German society (The United States Strategic Bombing Survey 1947, 175-176, 178).

In conclusion, Germany was severely damaged by the total war destruction when WWII ended. The controversial wartime actions created a harsh post-war environment that led to the collapse of local politics, the lack of supplies, the rising of black markets, the wild spread of criminal activities, and a desperate society. The duty of keeping people in order was on the shoulders of the American military authorities. However, the destruction of Germany was, by and large, because of their brutal territorial expansion in the name of German living space. Therefore, the American MG had to find a solution to prevent history from repeating, and the solution was the strict denazification policies.

1.2.2 Denazification Negative Impacts

Based on the Germanophobia theory, people usually assumed that the entire German population had an aggressive nature, and Nazism only reflected it. The JCS 1067 set the principles for the military occupation to eliminate the aggressiveness, known as the “Four Ds:” denazification, demilitarization, decentralization, and democratization. The Allies, especially the United States, believed that the “Four Ds policy,” especially the policy of denazification, would make Germany harmless. It became the priority of the MG and overridden the goal of maintaining social stability.

The American-controlled denazification process was expanded by magnifying its definition stricter each time. It was the only entrenched clause in JCS 1067, preventing the MG from hiring former Nazis under any circumstance. On November 9, 1944, the Allied Supreme Headquarters (SHAEF) directed to remove those who joined the Nazi Party before January 1933 from public office. On July 7, 1945, Headquarters United States Forces, European Theater (USFET) listed 136 categories for exclusion, asking for the removal of Nazis who joined the party prior to May 1, 1937, or joined its affiliated organization from “more than minor importance” in public offices and commercial, agricultural, and financial “positions of importance.” On September 26, 1945, MG Law No. 8 extended denazification over the entire economy except agriculture and criminalized Germans who failed to remove Nazis from their position (Gimbel 1960, 83-105, 85-86).

However, exercising denazification in the American zone created additional problems besides the harsh environment. Repeated purges in the public services created an artificial shortage of experts, decreased stability, and led to counterstrikes from local administrations. It also created unexpected results by helping former Nazis to gain privileges in black markets. The connection between racial character and Nazism hindered the relations between American occupiers and occupied people. These actions increased negative opinions regarding American capability in German society.

The denazification political purges, led by enthusiastic agents from the Army Counter Intelligence Corps (CIC) and communist survivors, created an artificial shortage of manpower. The CIC agents were outside the commanding structures and usually ignored the local MGOs' concerns. During the two train crashes in the Kulmbach district in June 1945, they purposely hindered relief efforts and pushed the purge simultaneously. Their actions forced the local MG to repeatedly restaff offices, hospitals, and banks, which decreased stability. In July, Major Hamilton in Nuremberg complained that the number of dismissed police officers and civil servants far exceeded his agreement with agents, eventually driving him to recall everyone when criminal activities got out of control (Kehoe 2019, 70-80). CIC actions forced local MGOs to disobey openly or rely on tactical units to maintain stability, which was the second option that often led to more issues.

Many members of the German Communist Party (KPD) gained power in local denazification issues under the sympathy and support of the American military. The revanchism and ideology made them hardcore supporters. In Marburg, Hesse, the US Army appointed a communist police chief and instructed him to purge former Nazis in urban offices, and communists also dominated the positions in MG denazification investigators. Of the eleven investigators in Marburg, only two persons were not communist or socialist, but one of the two investigators was an opportunist. As a result, the Marburg MG purged 56 percent of civil servants and 90 percent of mayors from the county. In addition, 30 percent of officials from the urban district administration, the police department, and the city saving bank were also removed. Around 7,800 people in Marburg were directly affected, and over 2,700 were unemployed by denazification (Gimbel 1960, 86-87).

The denazification and the collective guilt of the German race theory possibly based on the trust crisis during the growing fear of guerrilla warfare from 1944 to 1945. Although the Nazi guerrilla unit, known as Werewolf, was never realized, Goebbels's last propaganda created the image that a planned general assault would occur soon. The mixture of reactions to possible guerrilla attacks and Germanophobia led the American military to view anyone as a potential threat. In *Pocket Guide No. 10*, American GIs were informed that Germans were untrustworthy and threatened them with the possible consequence, which WWII was based on their fathers' failure during the Rhineland Occupation in 1918. *Army Talks* emphasized to GIs that they were conquerors instead of liberators. Armed Forces Radio bombarded soldiers with the racial theory that all Germans were Nazis or underground Nazis. The "Special Orders for American-German Relations," famous nonfraternization edit based on JCS 1067, instructed GIs that "Germans have a lesson to learn, they must learn the lesson well, each of us must teach them" (Fritz 2004, 287-289). Under this circumstance, it was impossible to build any positive relationship between occupiers and occupied communities.

The results of the idea that all Germans were Nazis negatively affected legal practice. During the denazification purges, MGOs commonly held the theory of presumption of guilt, which assumed all individuals were Nazi loyalists unless they had evidence to prove they were not. Denazification could also be used controversially. Captain Logan in Obernhurg rural district had an excellent reputation for helping people. However, after he received a complaint about a local ferry crew showing "somewhat of a sullen attitude toward a lieutenant of the 79th Division," he lambasted all crew members and asked them to expiate on Nazi crimes because "even though they were not Nazis, they were still Germans." Then Logan fired everyone on the ferry (Kehoe 2019, 85-86).

On the other hand, the strict denazification policies created an unexpected result in economic issues that helped many Nazi members gain economic privileges through the black-market trades. Although it became increasingly strict in 1945, it never prevented former Nazis from agricultural labor work. Many unemployed Nazis could spend as much time as they wished in the nearby countryside, bartering with farmers for desired food, valuable items, and construction materials. Because such trade often took several transactions for popular goods, such as a pound of butter or a sausage, those who spent more time than others would take most profits. A Bavarian minister assumed that around 40 percent of all materials in black markets, and an American expert believed 60 percent of completed buildings acquired materials outside official allocation (Diefendorf 2001, 34).

In addition, unemployed former Nazis used their economic privileges to entrench their social status. Many traded with or served American soldiers to exchange the de facto currency: American cigarettes. Individuals in Marburg believed an unemployed person who spent one day at the railway station carrying bags for American soldiers might earn cigarettes equivalent to several months' income (Gimbel 1960, 91). Predictably, those with close relationships with the American military would be protected because one American cigarette was usually worth 40 Marks in black markets, daily food supplies usually cost 5 to 10 Marks, and radio needed 3,000 Marks (Vonyó 2018, 48-49). Although former Nazis were theoretically denied from building permits, they were usually the earliest who could gain construction licenses (Diefendorf 2001, 38). The increasingly strict policies between barely caused negative influences on many former Nazis' lives. Instead, they created a myth that they were the victims of reckless American policies. In Marburg, many of them could keep their social status, make profits from illegal trades, and gain promises for back to work from influential figures. None of the removed officials suffered adverse effects, and a few reported that they had gained more prestige and respect through sympathy in the local community (Gimbel 1960, 88-89).

The denazification policies between 1944 and 1945 created negative impressions by questioning the American future goals and management abilities in occupied German territories. Because the primary supporters of the policy commonly were KPD members, a rumor that the United States and other Western Allies would transfer their control in Germany to the hand of the Soviet Union became increasingly popular. Many local MGOs in different districts tried to stop its spread but only gained minimum results. People also started to argue that if the United States was never willing to give up Germany, their actions proved that the American soldiers were either leftists or lacked the ability to discover the communist plot. Local intellectuals argued that Americans were too arrogant to realize its democratization goal in Germany was incompatible with the actions to oppress people. The uncertainty further reduced the morale of the people and damaged reconstruction processes in vast areas, especially Ruhr coal mining (Gimbel 1960, 95; Vonyó 2018, 43-44). Gradually increased denazification actions failed to punish former Nazi members in German society, creating additional problems for American MG in administration, economy, and building relationships with locals.

1.2.3 Issues inside the American Military Authorities.

Other than the difficulties from the harsh post-war environment and denazification issues, the internal issues of the American military in Germany between 1944 and 1945 also caused negative impacts to control the local situations. They were the administration problems, criminal activities, legal practices, and their social impacts. The American MG authorities were infamously complicated with labyrinthic divisions. In general, there were three systems: the tactical troops, local MGs, and central administration. The tactical force was stationed under the two military districts: the Seventh Army in the West and the Third Army in the East. MG had five levels of detachments: E-regional, F-urban districts, G-medium cities or rural areas, H-towns, and I-villages (Weisz 1996, 8-11, 328-341).

The central authority changed from the Supreme Headquarters Allied Expeditionary Force (SHAEF) to United States Forces European Theater (USFET), USFET was slowly replaced by U.S. Group Control Council (USGCC), and USGCC transitioned to the Office of Military Government (OMGUS) in October. The structural complexity encouraged unclear duties, arbitrary decisions, self-contradictory records, internal political conflicts, and inefficiency (Weisz 1996, 12-29, 348-349).

The population movement of DPs and refugees sometimes reflected the administration chaos from top to bottom. Charles H. Andrews in Nuremberg's rural district recorded that "eight cars of German refugees arrived from Kiefersfelden, Austria, with the passes signed by both French and Americans authorizing them to travel into the British area... (but) Third Army directed that these people be shipped back to the point of origin." His befuddlement was apparent about the decision to deport refugees who gained approval twice in the record. Major Cofran in Augsburg received word that a train carrying seven hundred German soldiers to a demilitarization camp stopped at the local railway station without reason for the delay, departure plan, and supplies. He organized assistance, whined about the frequency of such events, and condemned the "ineptitude" of MGOs in other districts (Kehoe 2019, 83-84). Although bureaucratic difficulties barely caused any threat to stability, they certainly created additional workloads and unpredictable challenges to local detachments.

The second apparent internal problem of the military authorities was the criminal activities committed by the American soldiers. Although such actions, especially robbery, existed during the war without enough punishment, army historian Earl F. Ziemke noticed the explosion of crimes in Germany after the Japanese surrender, such as unprovoked violence, robbery, and murder. American-perpetrated sexual assault peaked at the time, forcing Eisenhower to warn his forces about the relationship between the United States' reputation and their behavior (Kehoe 2019, 55).

The continuation of supply shortages provided criminal opportunities for American soldiers in black markets. They soon became the primary sources of illegal food, coal, and valuable currency—American cigarettes. In late 1945, the Provost Marshal linked the high civilian demands for controlled goods to a “mounting pilferage rate” of soldiers. They felt that the supply from army stores or packages from home were insufficient to earn more profits, and they started stealing supplies from supply trains or trucks. However, German police were unable to protect their citizens because MG law prevented them from arresting Allied personnel, and sometimes they became the prey. MG detachments had few methods for solving criminal activities because many were tactical units that belonged to another chain of command. They often escaped before the local MP arrived, or even worse, they were the law enforcement due to the lack of police officers. In MGOs’ view, the tactical forces became “a dirty, dark, drunken mass” (Kehoe 2019, 107-111, 162-163).

The third problem was the controversial daily legal practice in American military authorities. First, the American MG detachments generally neglected judicial justice, due process, and civil rights issues. Even when the legal division of the US Army provided a recommendation guide in March 1945, local MGOs usually ignored them. Instead, they were more willing to demonstrate their power over ordinary Germans. For example, twenty-one people were charged and sentenced for violating the curfew despite German civilian time being one hour behind American military time in the earliest case in Nuremberg. And thirty-two people were sentenced for the same reason in another case. In addition, MGOs often failed to record actual crimes and reason for sentences, casually using different charges for the same behavior, or exercise mass arrests and protective custodies (Kehoe 2019, 63-65).

Second, legal practice was only one of many methods MG used to control local stability. If necessary, MG detachments did not reject using controversial methods when legal practice did not get the predicted results, such as harassment, uncharged detention, the threat of negative consequences, battery, and even murder. Examining the actual scale of such replacement action is hard due to its illegal nature, and DPs or other minorities in communities brought most cases. However, an example might provide some side information: In an internal investigation for CIC's misbehaviors in criminal interrogations, special agent Justin A. Reich concluded with no evidence of such things in his organization and claimed that abusing prisoners was regular in MG detachments. Although Reich's investigation had credibility issues because all sources denied their previous statements after his interviews and the journalist who wrote the news was threatened with criminal charges, it helped to show the pervasiveness of using other methods to replace legal practice (Kehoe 2019, 139-140).

Third, the American military authorities had the issue of treating individuals based on identities in legal practices. Many American soldiers who committed crimes could escape, and MPs would more likely go after African Americans in uniform because of their "poor intelligence" and "lack of honor." If an action involved American troops and Germans, then Germans were the criminals, especially females. In Eschwege, Hesse, two young women were arrested and imprisoned for five days in front of a GI club where they were hired as bartenders because they "stopped and talked with the GIs on the street." The conflicts between Germans and foreign DPs would usually result in the DPs' guilt. Franz Wlodarczyk was charged with illegally owning weapons and murder after using his permissible pistol to kill a German male who drew a blade upon him in a coffee shop (Kehoe 2019, 114, 145, 110, 123, 98).

The problems regarding the legal practice of MG were possibly due to the different thoughts between civilian and military authorities regarding their duties. In the United States, although many social issues regarding race, gender, and sexual orientation did not solve, the government had a representative system, elections selected leaders, and its ruling legality came from the public. It had to pay responsibility for its people. On the other hand, MG was the extension of the US military as a conquering regime of the enemy territory. Therefore, its ruling legality came from the authorization of the US civilian government and its only goal was to stabilize the local situation. In addition, the military valued loyalty, obedience, self-sacrifice, and a consequentialist approach instead of civil rights or judicial justice because it served as the violent tool of a nation. The value differences between military and civil authorities made the MG willing to ignore the negative effects of its actions.

The internal problems of the American military authorities negatively impacted German society. These problems helped to continue the German conservative concerns about the moral weakness of certain races. The administrative chaos about DPs and refugees and MPs' actions targeted African American soldiers helped to consolidate the racial narrative about "greedy Jews," "violent Slavs," and "brutish, sex-crazed Africans" (Kehoe 2019, 101). The MG's attitude regarding its duties also contributed to increasing gender inequality. German society had a long-held patriarchal view that women were inferior because they were mentally weaker than men, and it increased when many women had to use their bodies in exchange for survival food. Although MGOs were most likely to witness criminal actions against women, they generally showed little interest in such issues and never talked about wife beating or child abuse. It was possibly based on the American military's racial and misogynistic environments and Western culture's patriarchal society (125-126). It also reflected their essence, a regime whose power did not come from the local population. It was not responsible for pushing social reform, especially since homeland still legalized Jim Crow and racial segregation.

The MG's failure in racial issues and indifferent attitude about female abuse encouraged victim-guilt theory and gender inequality in legal practices by local law enforcement. In Friedberg, Hesse, local police reported that they "chastised" two women who asked for help after being raped by African American soldiers. Police believed the case resulted from the women's inappropriate actions in inviting the black soldiers—racially inferior males—into their homes to spend time with their daughters (Kehoe 2019, 99). The event tapped the racial and gender narratives in legal practice.

1.2.4 Conclusion

Besides extraordinary civilian lives and property casualties in combat, WWII also brought great ideological difficulties during the reconstruction. Unlike General Pershing who made his army a liberator of the Kaiser's tyranny, his student, General Eisenhower, emphasized the identity of the American military as conquerors but not oppressors in his famous speech. Germanophobia and revenge thoughts annihilated differences between individuals and encouraged allied soldiers to consider all Germans equally guilty. The creation of JCS 1067 and strict denazification clauses reflected that the new rulers sought post-war liquidations, increasingly heating tensions.

The difficulties in the American zone eventually forced the central administration to unleash locals from the restrictions, transferring politics from complete American control to cooperation. In August 1945, Lieutenant General Lucius D. Clay, the de facto governor of the American MG in Germany, officially allowed the recreation of political parties in the American zone. On September 19, 1945, the State of Greater Hesse was founded after a series of debates in MG offices and among local German elites. Two days later, Clay instructed the local MG detachments and all German state governments to prepare for the political elections and the creation of state constitutions in January 1946. Although Clay faced opposing opinions from almost every direction, he persisted in doing so.

Chapter 2

The Turning Point.

During the Potsdam Conference, but the exact time was unknown, U.S. Secretary of Army Henry Lewis Stimson had lunch with American MG Governor General Dwight David Eisenhower and his Deputy Governor, Lieutenant General Lucius Dubignon Clay, in Frankfurt. Many years later, Clay recalled the old politician's wisdom who had served as Secretary of the Army since Taft's day:

“Mr. Stimson, in his very calm way, was really talking primarily to me, because I think he knew this was not a job at which General Eisenhower would stay any great time. And he said, ‘No matter how vindictive the American people may feel now, no matter how stringent your orders may be, just remember that in the long run, unless you restore an economic life to these people under which they have some hope, you will be repudiated by the very people who have given you these instructions’” (Smith 1990, 268).

Whereas Chapter One discussed the background and development of the American occupation plan in post-WWII Germany, Chapter Two focuses on the turning point in late 1945, when a visionary and unusual career officer changed his methods for approaching the goals of the United States in Germany when the difficulties occurred simultaneously. The officer was Lucius D. Clay, the deputy military governor in Germany. His early life forged him into a career soldier who specialized in construction, governmental projects, and politics. He also held an iconoclast mind and sympathy toward ordinary people's lives. After the early attempts from April to August did not meet his goals, he gradually moved to hand over powers to local elites following the Potsdam Agreement and the fallout from General George Smith Patton's speeches in September 1945. Clay's actions led to a shift from an American military dictatorship to cooperation between American occupiers and occupied Germans. The creation of a new German state, Greater Hesse, was an event that occurred during this shift and led to early preparations for creating a democratic constitution started in February 1946.

2.1 Lucius D. Clay: Early Life and the Appointment

According to John Kenneth Galbraith, Lucius D. Clay was “one of the most skillful politicians ever to wear the uniform of the United States Army” (Smith 1990, 12). His outstanding visions and leadership helped the American MG to overcome the difficulties from multiple directions and start the democratic transition in Germany. Clay was an unusual officer in the U.S. Army because he never saw a single fight but became one of the youngest American generals in WWII and the Deputy Military Governor in Germany. Clay’s appointment was credited to most American politicians based on his reputation during the New Deal and WWII. Even Morgenthau agreed that “the most able fellow around this town (Washington, D.C.) is General Clay” (U.S. Congress 1965, 1129).

Unlike those colleagues on the battlefield with sharp personalities and reputations, such as Eisenhower, McArthur, and Patton, Clay was a uniformed expert who specialized in building things up rather than smashing them apart. During the Great Depression and WWII, he served as director or de facto executive of many federal-level construction programs, such as the Denison Dam, the largest rolled-earth fill dam in the world, 457 new airports for military and civilian purposes, and war production of the U.S. Army and later the entire armed forces. He respected democratic importance in society, understood political and economic issues, and was well-suited for cooperating with civil experts more than any other careered officer (Smith 1990, 12-146). Clay was also an expert in conflicts over jurisdiction. Although he was a career officer and shared a comradeship with other soldiers, his appointment, at a certain point, represented the will of civil leadership in Washington instead of tactical commanders in SHAEF. His experiences during the Great Depression gave him a strong sense and sympathy for ordinary people’s living standards in a harsh environment. He was also a well-known iconoclast who viewed directives as suggestions rather than unbreakable truths.

As a result, Clay tended to support the occupied people's living by changing policies instead of following instructions under any circumstances, which made him a great nominee for postwar reconstruction. However, he had a significant disadvantage in his new position. He never worked on occupation policymaking and had little understanding of the background discussions regarding German policies in the future. He and his advisors did not receive JCS 1067 until they were on the trip to Europe, and he soon realized the jurisdiction issues were much more complicated than expected.

2.2 Transformation

In April 1945, Lucius D. Clay, this freshly promoted lieutenant general, became the Deputy Governor of the Military Government and the Commander of the United States Group Control Council (USGCC), the US government's representative body in the joint occupation in Germany. However, he soon realized that the duty was the most challenging one he ever had, and his weakness, lack of knowledge about ongoing German issues, would catch him off guard. In the first months he failed to make changes in pushing for economic reconstruction and winning the jurisdiction conflicts due to the restrictions from JCS 1067 and opposition from tactical forces from top to bottom. Even worse, many of his employees were low on morale in an unfavorable and chaotic position.

To outside observers, Clay was fighting a losing battle, but he was determined not to lose it, not on his watch. Such a firm will for victory helped him conquer many difficulties and would help him repeatedly when he was stationed in Germany. He started to change his hostile attitude to sympathy for ordinary people and eventually concluded he had a duty to govern them after witnessing destruction in Berlin. The example of political reconstruction in the Soviet zone coupled with his iconoclast mind convinced Clay the local administration should return to the Germans.

When opportunities were brought by the Potsdam Agreement and the negative consequences of George Patton's controversial speech in August and September 1945, Clay went on to end the jurisdiction conflicts and start the economic recovery by reorganizing military authorities and handing over more duties to German civil institutions. It became a policy turning point in 1945, which began cooperation between the military occupiers and the occupied locals. More importantly, it became the foundation for rebuilding the states and forming democratic constitutions in the American zone.

2.2.1 Clay's Early Attempts

Clay realized the difficulties and initiated reforms focused on rebuilding the economy for locals and the jurisdiction issues. However, his actions were limited by JCS 1067 and faced the opposition of American tactical forces. As a result, the early attempts of USGCC fell into disaster without actual achievement in the first few months between April and August 1945.

Clay's first attempt, possibly the most important one in his eyes, was the economic recovery in Germany, which was being restricted by the existing policy. His early life led him to believe that his mission would only succeed once the locals were fed (Smith 1990, 16). Therefore, although Clay and his advisors did not receive JCS 1067 until they were going to Europe, they immediately opposed it. He argued that it reflected the gap between the realities and American politicians' imaginations, which made it impractical. His chief political advisor Robert D. Murphy, economic advisor Brigadier General William H. Draper, and financial advisor Lewis Douglas reached the same conclusion. Douglas outspokenly exclaimed: "This thing was assembled by economic idiots! It makes no sense to forbid the most skilled workers in Europe from producing as much as they can for a continent which is desperately short of everything" (Dimarco 2010, 263-264).

As a result, Clay's first reaction was to work on getting JCS 1067 changed by sending Douglas back to Washington and contacting his colleagues at home for additional support. In a letter sent to Major General John H. Hilldring, Chief of the Army's Civil Affairs Division, he pointed out:

Washington must revise its thinking relative to destruction of Germany's war potential... the war has accomplished that end... the industry which remains, with few exceptions, even when restored will suffice barely for a very low minimum living standard in Germany... we must have freedom here to bring industries back into production (Peterson 1977, 60).

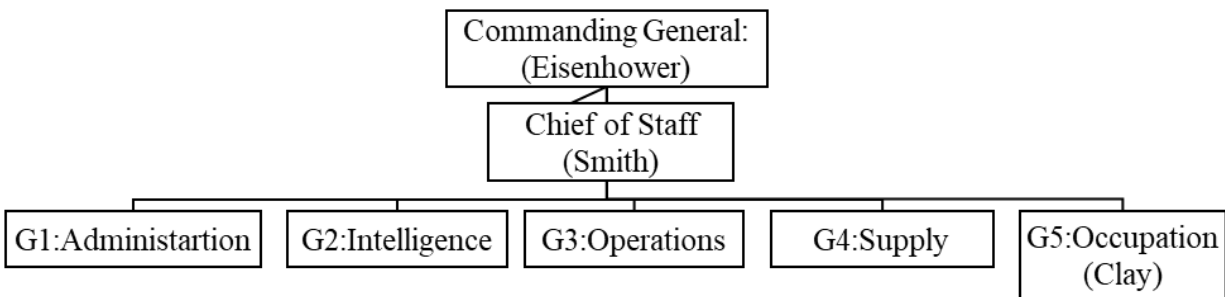
Clay might have thought that Douglas's identity, the brother-in-law of McCloy, and his letters would help to modify the directive. However, revanchism was still prevalent. Douglas was dejected and quietly resigned. Hilldring responded that no directive would be written as he wished because they would increasingly move away from his opinion. Therefore, a long-range policy had "to bubble up out of the fact you uncover in Germany." By June 16, 1945, Clay took the advice and agreed that "like all general directives, JCS 1067 can be interpreted in many ways." In an order on June 9, he addressed the directive as a "Bible" that must be implemented as quickly as possible, and all directors should submit plans to him regarding its implementation. Although he still believed Americans were not vindictive, he had to wait (Peterson 1977, 60, 99, 61; Smith 1990, 266). Meanwhile, Clay had another tough topic: the jurisdiction issue between his USGCC and G-5 in tactical forces.

Clay's second attempt was to solve the jurisdiction conflicts between USGCC and the general staff departments in the tactical forces. In his mind, during the transition period from wartime to post-war occupations, the chaos in the American military authorities was possible because of unclear responsibility. General staff members in SHAEF, especially G-5: Civil Affairs Division, emphasized their leadership in wartime civil affairs and military governments. The future MG in Germany should belong to the G-5 by appointing Clay as its head. However, Clay and politicians in Washington argued that a postwar MG should separate from the tactical forces. The American MG should be an institution directly reporting to Eisenhower and the Department of War (Smith 1990, 247-250).

Experts in the field might have different explanations. Raymond A. Millen praised the G-5 division’s wartime achievements for controlling MG detachments and claimed that “no civilian agency ever relieved the U.S. military government of the occupation mission during and after the war” (Millen 2020, 47-60, 53). Although it was theoretically correct, he failed to clarify that Clay and American politicians never wished to continue allowing G-5 divisions to lead the MG in the postwar period, and the MG would increasingly share similarities with civil institutions (Smith 1990, 247).

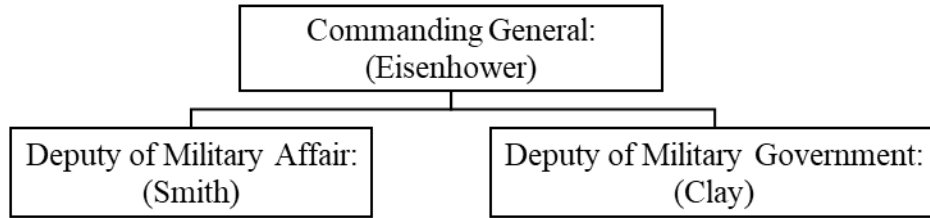
The internal conflicts of jurisdiction began during Clay’s appointment and continued when he reported to SHAEF headquarters at Reims on April 8, 1945. He eventually persuaded Eisenhower that the traditional G-5 system was not designed for postwar missions and asked for full control of civil issues in a new system with two deputies: Smith for military and Clay for civil administrations (Smith 1990, 258-260). On April 25, Eisenhower sent a directive clarifying the relationship between USGCC, G-5, and SHAEF, meeting Clay’s needs. When the four occupation powers signed the agreement officially taking over German authority, SHAEF-USFET’s tactical headquarters stayed in Frankfurt. Clay and USGCC moved to Berlin between June and August 1945 (Weisz 1994, 15, 18).

Chart One: General Staff Organizations and Smith’s Idea.⁴



⁴ Jean Edward Smith. *Lucius D. Clay* (1990), 258-259.

Chart Two: Clay's Plan (Accepted by Eisenhower).⁵



However, Clay was still faced with great resistance from general staff members in the headquarters and tactical units. In SHAEF-USFET headquarters, Smith openly disliked Clay's plan and repeatedly tried to put Clay under control (Smith 1990, 261). The legal and financial subdivisions in SHAEF G-5 still felt entitled to commanding influence. Those sub-divisions continued to dictate policies and plans in their field and regularly interfered with the regional and local governments, German civil services, and public safety. In the Armies, military doctrine in tactical independence caused a negative impact. In his book published in 1946, Harold Zink recorded that tactical commanders regularly exercised power to "reexplain" upper instructions and were generally unwilling to surrender such political privileges. Many local MG detachments had parallelly executed three different denazification policies, one from the SHAEF headquarters and the others being modified versions from lower levels. Army, corps, divisions, and even regiment commanders prevented representatives from higher headquarters from entering their territories and refused to report local information (1097-1112, 1109-1110). In 1948, Carl J. Friedrich pointed out, "At their worst... they duplicated planning, hoarded and raided personnel, monopolized documents, sabotaged their rivals' efforts, and maintained veritable espionage systems against one another" (219).

⁵ Ibid.

Many SHAEF members believed that USGCC and Clay should only be responsible for a few general matters under the Allied Control Council (ACC), which served as a department of state for combat forces, and they succeeded. Clay had difficulties cooperating within the G-5 in SHAEF-USFET and could not build a stable connection with local MG detachments. USGCC in Berlin had little control over policy implementation. It could only send a recommendation to Frankfurt with a request that it be forwarded (Peterson 1977, 85-86). Clay was able to report directly to Eisenhower and control an independent USGCC, but it was almost impossible to exercise any actual authority in the civil administration. It is hardly an exaggeration to state that several months of the efforts of the USGCC and SHAEF-USFET's G-5 were neutralized by conflict as to the jurisdiction of the two.

Under the circumstances of failed economic reconstruction and jurisdiction issues, many trained MG officials were dispirited. They found themselves in a place without needing their knowledge from academies or their passion for helping locals. Therefore, USGCC officers were changed too quickly to control actual issues, and meanwhile, the organization was strangely focused more on personal factors than work programs. For example, USGCC initially had no subdivision dealing with regional and local government and civil service. When it was eventually authorized, it was put under a functional division called Internal Affairs and Communications. Later, a separate functional division was created to place an arriving general. The general departed after a few months, and the subdivision was abolished as a separate division and combined with communications. After a period, it was re-established as a ranking division (Zink 1946, 1102). The outside restrictions were not the only matter that stopped USGCC from functioning as the civil administration headquarters because the organization itself was not able to take on the duty in reality.

2.2.2 No Longer Enemies

When Clay faced his unsuccessful beginning as Deputy Military Governor and Commander of USGCC, he also thought about how to change the current situation. He believed that the best solution was to return the responsibility for local government back to the Germans.

First, Clay changed his attitude toward Germans from hostile to sympathetic. He used to believe that his primary duties determined to punish Germans and get along with Russians (Peterson 1977, 66). However, his opinions slowly shifted after witnessing the harsh conditions in the occupied nation. In a letter to McCloy, he became concerned about the hard-working ordinary people:

The Germans are an industrious people... I do not say this out of sympathy with the Germans... I feel that the Germans should suffer from hunger and cold as I believe such suffering is necessary to make them realize the consequences of a war which they caused. Nevertheless, this type of suffering should not extend to the point where it results in mass starvation and sickness (Peterson 1977, 59).

Berlin, “the city of dead” in his language, was where he viewed the firsthand devastation from a total war and was genuinely shocked. “I must confess that my exultation in victory was diminished as I witnessed this degradation of man.” The experience greatly turned his hatred and hostility toward Germans into sympathy or pity. He eventually realized his goal: “I decided then and there never to forget that we were responsible for the government of human beings,” he said (Smith 1990, 16).

Clay’s sympathy toward people in desperate conditions was important in postwar Germany. Possibly encouraged by revanchism and JCS 1067, some high-ranking officers held little respect for their duties. They pulled every known string in the Army to get assigned in Germany because they saw no difference between running an MG headquarters and “operating a truck drivers’ school or an airfield” at home (Friedrich 1948, 28-30). Compared to those who only wanted to keep their temporary ranks, Clay’s sympathy led him to seek a solution in the unfavorable situation when the occupation faced difficulties from harsh environments, denazification, internal issues.

Second, Clay had a clear mind for focusing on what was suitable for the goal of occupation in Germany instead of mindlessly executing the policy. Over the long run, the American public would not tolerate an indefinite military occupation and eventually force Washington to change its attitude from harsh to soft. As Stimson hinted, if he loyally followed JCS 1067 in the narrowest way of explanation, he would probably be scapegoated by the same group who made the policy and forced him to obey. Therefore, the current jurisdiction chaos must end. Local Germans must start taking part of the responsibility from the occupiers for preparing the final political retreat and gaining public support at home. He also recognized that his officers sometimes showed a strong desire for control, creating additional issues. “They want to be czars,” he said, “they resent very bitterly when they suggest to the Germans that certain things be done and the Germans don’t do them” (Smith 1990, 268, 277). Although he attributed their actions to the strong motivation to help locals and consistently protected them from outside criticism, he knew that MG detachments created negative impacts.⁶

Lastly, regarding whether Germans were politically trustworthy, Clay believed the question would consistently exist if the MG never tried to allow locals to take charge (Smith 1990, 277). Political reconstruction in the Soviet zone became a positive example that supported his thoughts. Before the Potsdam Conference and a day after the creation of the Soviet Military Administration in Germany (SMAD), Marshal Georgy Zhukov issued “Order No. 2,” officially authorized the recreation of anti-fascist parties on June 10, 1945. Four “cooperating national parties” were organized in the area: the German Communist Party (KPD), the Social Democratic Party (SPD), the Christian Democratic Party (CDU), the Liberal Democratic Party (LDP), and a joint meeting was held in Berlin on July 18. Although Clay did not report the news on time, he used it in his “Condition in Germany” report of August 18, 1945, as a reason for issuing political activities (Clay and Smith 1974, 60).

⁶ Clay claimed “no carpetbaggers in the military government” in a press conference. Smith 1990, 272.

It is hard to accurately assume when Clay started to think about giving the duty of self-administration back to Germans. However, such a thought might show up no later than mid-July after he relocated USGCC to Berlin and witnessed the war destructions and political reconstructions in the Soviet occupation zone. Therefore, he just needed to wait on outside factors to help him change the economic restrictions and win the jurisdiction conflicts. Luckily, those factors arrived in a few months.

2.2.3 Opportunities and Solutions

Two important events occurred in late 1945 that allowed Clay to work on political cooperation between American occupiers and occupied Germans. One was the Potsdam Conference of the Allied leaders between July 17 and August 2, 1945, which contributed to evolving strategic policy toward Germany. It led to the implementation by the Allies of the machinery for Allied control in the form of ACC in Berlin, as well as allowing Clay to bypass the political restrictions from JCS 1067. Another significant event was a publicity embarrassment to the American MG in Germany caused by General George Patton in September. It helped Clay push for the separation between the duties of tactical commands and civil administrations, which began the reorganization of occupation institutions. The two essential events opened the following transformation from complete American military dictatorship to American-German political cooperation in the American occupation zone.

During the Potsdam Conference, Allied national leaders, including President Harry Truman, General Secretary Joseph Stalin, and British Prime Minister Winston Churchill and successor Clement Attlee, met at Cecilienhof Palace in Potsdam, outside Berlin, to plan the postwar peace. In German issues, the agreement authorized establishing an interim government's principles. It officially divided the nation into four zones where the zone commanders exercised sovereignty, and ACC in Berlin implemented German national power (Office of Historian 1945, 1-6, 24, 38-42).

The agreement also allowed local self-government restorations based on democratic principles and encouraged the formation of democratic political parties and rights of assembly. The Big Three agreed to treat Germany as an economic unit and establish common policies. Occupation forces needed to ensure economic production and maintenance to meet the local population's needs so they could survive without external assistance when paying reparations (Office of Historian 1945, 47-69).

The Potsdam Agreement was much less severe and restrictive than the statements in JCS 1067 regarding political and economic policies. It asked the occupation forces to sequentially hand over the civil administration to Germans at the local level, required the occupation forces to become involved in economic development, and hinted that the irresponsible attitudes of MG officials towards the occupied population would no longer be tolerated. In the following days, Clay, in his report, overlaid the agreement on top of the JCS 1067 to remove its restrictions, rendering it non-essential. Compared with the previous Carthaginian tone, the main thrust of U.S. policy shifted to recovery and creating democratic self-determining governments, which made the American governance mission in Germany more achievable (Clay and Smith 1974, 54-56, 59-60; Smith 1990, 429-430).

Through the method of root democracy from bottom to top, in late August, Clay officially issued a directive to aim at the development of political parties in the American zone along essentially democratic lines based on a local level, but such action was still prevented at the regional level. Three months later, Clay allowed for political activities on the state level, and such actions on the zone level were released after another three months. He also asked for a four-party system, two left and two right wings, to prevent repeating the mistakes of the Weimar period. Four parties were approved in the Hessian region between August and December: SPD, KPD, CDU, and LDP (Clay and Smith 1990, 60; Will 2009, 33).

After creating political parties in the American zone, Clay continued to ask for elections to be held on the *gemeinde* level (any community with fewer than 20,000 people and the smallest territorial division in Germany) by January 1946. Most of his advisors, senior German politicians, and tactical commanders opposed this suggestion. They argued the combination of winter, the shortage of basic necessities, and the lack of time for political campaigns and adequate voting organizations would keep participation low. He determined to return local politics to Germans immediately and believed that the only way to learn democracy was through continual practices. Therefore, he ignored all counterviews and said: “you don’t learn how to swim until you’re thrown into the cold water.” The results favored Clay’s judgment. Around 84.9 percent of qualified voters in the Hessian area who were not members of the National Socialists before May 1, 1933, joined the election. About 75 percent voted for centrist parties, including 44.5 percent for SPD and 31 percent for CDU. KPD and LDP only got less than 10 percent of the total votes together. Other areas in the American zone also gained similar results, in which people tended to choose moderate centrists instead of more radical left or right wings (Pollock 2014, 88; Dimarco 2010, 282; Will 2009, 40-42). The results of the countryside elections encouraged Clay to move forward by asking them to make state constitutions in February 1946 with a compact timeline. Comparing the leisurely pace in other zones, Clay rapidly moved on to political localization.

The public relations crisis in the American MG in Germany that Patton caused in September became an opportunity for Clay to push further on ending the jurisdiction conflicts between USGCC and local tactical units. General George S. Patton, the well-known wartime hero, had a questionable reputation when he served as the Military Governor in Bavaria and the Third Army commander. He never trusted outside experts and preferred loyalty much more than ability in civil administrations, so he used his tactical officers for almost all purposes and even forbade the MG detachments from entering his territory initially (Zink 1946, 1097-1112).

Although Patton eventually submitted to pressure due to the incompetence of his men and severe criticism from outside, he never provided reasonable support to the local MG officials. The MG detachments in Patton's territory continued getting harassed by the tactical units, and it was "extremely difficult" to handle their job effectively (Zink 1946, 1110-1111).

Patton's lack of experience in civil administration and politics, which was severely different from rules in the military, eventually got him burned, and it became a chance for Clay to push his policies. On September 22, a reporter asked Patton about the reason for former Nazis retaining critical governmental positions in Bavaria during a press conference held in his headquarters. He responded that too many local civil administration experts joined the Nazi Party, he could not fire everyone and went on: "The way I see it, this Nazi question is very much like a Democratic and Republican election fight..." (Time 1945, 1-5). Understandably, such a speech became the headlines instantly and led to public indignation about the army being "soft" towards their evil, defeated enemies. Although both Clay and Patton viewed JCS 1067 as an obstacle, Clay saw the crisis as an opportunity to remove the tactical forces in the MG administration. Based on the advice of his childhood friend, Major General Clarence L. Adcock, he started working to push Patton away from the Bavarian MG:

It wasn't just (Patton's statement) that made me do it. It was my firm belief that military government should not be under an Army commander. So I was relieving General Patton not just because of that statement, but because I would have like to have gotten all of the Army commanders out of the picture—and did. They did not belong in it (Smith 1990, 28).

Patton was released from the position of Military Governor in Bavaria on September 28, and his duty as commanding general of the Third Army was also terminated on October 7. Eisenhower and Clay never restored the administration position to Patton's successor in the Third Army. Instead, Brigadier General Walter Muller became the head of the Bavarian MG and directly reported to Clay. Removing Patton was the beginning of the separation between tactical and MG duties in Germany.

On September 29, 1945, according to General Order No. 59, the political reorganization of the American military authority headquarters in Germany officially began. The USGCC in Berlin became the Office of Military Government, the United States (OMGUS), and the G-5 division in USFET became the subordinate of OMGUS, the Office of Military Government-US Zone (OMGUSZ), both under Clay's command. Adcock, the head of USFET G-5, became Clay's deputy and commanding general of OMGUSZ, where Clay stayed in Berlin and Adcock was stationed in Frankfurt. USFET recreated a new G-5 division and held some duties they thought did not belong to OMGUS, such as caring for displaced people from allied nations, cooperating with the United Nations Relief and Rehabilitation Administration (UNRRA), and protecting local Americans. After the reorganization, tactical units and USFET had no direct role in MG except coordination with OMGUS, in theory. On October 5, Clay ordered local MG detachments to retreat from any direct role in local government. From that point forward, local detachments were only allowed to advise and supervise appointed German officials. If they failed to carry out policies, MG officers needed to report the discrepancy to the state MG commanders, and it would be solved by informing the German state governments (Weisz 1994, 28-29; Dimarco 2010, 278-279).

The achievements in jurisdiction immensely helped Clay move further on economic issues by allowing cooperation across the American zone without anyone dragging their feet. Although the Potsdam Agreement's clause establishing a united economic institution across four zones failed due to French obstruction, he built a collective conference known as the *Länderrat* in the American zone on October 5, based on the ideas of his advisor, James K. Pollock. The *Länderrat* included Bavaria, a state kept intact after the war, two newly created states—Greater Hesse and Württemberg-Baden—and the city-state of Bremen. The four states' leaders would meet regularly to guarantee the unity of political activities and cooperate on inter-state economic reconstructions.

The first *Länderrat* meeting was convened in Stuttgart on October 17, 1945. Meanwhile, a communication office of the American MG, the Regional Government Coordinating Office (RGCO), was set up and run by Pollock on the 25th.⁷ In December, Clay handed the power of the railroad system, originally run by the military, over to the *Länderrat*. His military chief of transportation opposed and predicted that the railroad would collapse as soon as the Army gave up control. Clay rejected his opinion and believed Germans were competent enough to direct their rail operations. As a result, the German civil administrations removed several thousand Nazi employees whom the Army found indispensable to adequate service. Passenger traffic and freight tonnage increased in the first month (Smith 1990, 277). By doing so, Clay confirmed the capacity of newly formed German civilian administrations in maintaining infrastructures as well as their hostile attitude against Nazis.

Although Clay failed to persuade people in Washington to increase German living standards when he asked for food in November 1945, he gained assistance from Major General Morrison C. Stayer, the Chief Surgeon of USFET, a veteran who joined the Rhineland Occupation. Stayer raised the issues of “disease and unrest” authorization in JCS 1067 and the climbing numbers of suicides to Clay in December, which allowed the MG to direct food to Germans from military and international stocks (Tent 1982, 58). The action temporarily relieved the pressures on ordinary people’s lives.

The American occupation in Germany from April to December 1945 was not a smooth and ordered transformation between one operation phase and the next. Instead, chaos occurred from pre-operation policymaking to the actual performance in a postwar environment. Although Clay failed to make changes initially, he started to develop sympathy towards ordinary people, analyze the current situations, and observe the example of political reconstruction in the Soviet zone.

⁷ Three of the four states: Bavaria, Greater Hesse, and Württemberg-Baden, were officially formed based on “Proclamation No. 2” of Eisenhower on September 19, 1945. And Bremen became a city-state in 1947. “*Proclamation No. 2: To the German People in the American Zone!*” September 19, 1945; Christoph Weisz. *OMGUS-Handbuch* (1994), 33-34.

Therefore, Clay used the Potsdam Agreement and the crisis of Patton's speech between August and September to push for policies that would benefit American national interests, such as ending the jurisdiction conflicts and giving the local administration duties back to Germans. As Zink noticed, the last days of 1945 saw the abandonment of command channels in military government and the establishment of technical channels that permitted direct communication between military government agencies (Zink 1957, 35). On the other hand, the rapid actions to transfer politics to Germans occurred simultaneously, including consolidating the American military authorities as OMGUS, creating states and the Länderrat, and generally retreating from local administrations. Clay's importance during the first year of the military occupation cannot be overstated: if he explained the harsh political and economic restrictions in JCS 1067 in the narrowest way and lost the jurisdiction conflicts with tactical forces, it would be tough to extend the postwar reconstruction move forward from simply burying bodies and rebuilding houses. While Clay allowed space for Germans to regain autonomy, the creation of Greater Hesse and the preparation of the Hessian Constitution occurred.

2.3 The State of Greater Hesse

The process of rebuilding states in the Hessian area started in September 1945. After almost four hundred years, the recreation of a united state in the area, Greater Hesse, represented early political cooperation between American military occupiers and occupied German civilians as opposed to another instruction dictated by OMGUS. Therefore, it was an essential step in American occupation policies, which was influenced by Germanophobia, from distrust to trust. In addition, the nature of the newborn state government was determined based on the regulations in three critical documents and rules in daily political practices. The Greater Hesse would serve as the caretaker of the Hessian people, whose primary goal was to create a democratic constitution.

2.3.1 The Creation of Greater Hesse

Based on Harold Zink's description in 1957, excepting Bavaria, the state surrendered to the American military entirely and was kept intact; the western part of the American Zone was "made up of such an assortment of legs, arms, fingers, ears, and other stray pieces of a dismembered body that one could hardly believe one's eyesight" (177). Although it was hard to proceed very far with regional government organizations in the area until something could be done to reduce the confusion inside MG and tactical forces, Greater Hesse was formed in September and operated in October, which was an early example of political cooperation between the MG leadership and the local population.

When the U.S. Army entered the Hessian area in 1945, there were three regional institutions: the People's State of Hesse, the Prussian Province of Nassau, and the Prussian Province of Kurhessen. The People's State was created after WWI, and the two Prussian states came from the Nazi's separation of Prussian Hesse-Nassau in 1944. At the Yalta Conference in February 1945, the United States, the United Kingdom, and the Soviet Union did not include France as an occupier initially, which led to strong opposition from General Charles de Gaulle, the leader of Free France. After France became the fourth power, its zone was carved from land held by the United States and the United Kingdom, including four regions in the Hessian east of the Rhine (Weisz 1994, 4-5; Perrein-Engels 1994, 1-3). The French zone's creation left many artificially broken administration regions.

The question of how many states needed to be built in the American zone was hotly debated. It was clear that Bavaria would be re-established, but the MG had three plans for the western part. First, the single-state plan would consolidate Württemberg, Northern Baden, and three Hessian states. Second, the three-state plan would organize Württemberg-Baden and two Hessian states—just as the Hessian area looked like before Hitler came to power. Third, the two-state plan included forming Württemberg-Baden and one Hessian state that united all territories (Will 2009, 22).

The American military authorities initially attempted to recover the order of 1933 by building two states in the Hessian area. In Darmstadt, former history professor and resistance fighter Ludwig Bergsträsser worked on forming the “Starkenburger Provinzregierung” under the supervision of the E-1 detachment in April, and it was renamed the “Hessische Landesregierung” in June. In theory, it controlled the People’s State’s territories on the East bank of the Rhine. In Marburg, Colonel Charles T. Johnson and his E-2 detachment were ordered to rebuild the Government of Hesse-Nassau in early July. After talking with local intellectuals, clergy, and civil servants, Johnson believed Ferdinand Friedensburg should be the minister-president, but he failed to provide a specific plan for building a government until September 1945, which angered the MG headquarters (Franz 1996, 71-90, 88).

Although many influential individuals in the MG and the German civil administration, such as Pollock and Bergsträsser, urged Clay to reunite the Hessian area as a single state from July to August, they failed to persuade him until a new argument arrived in September. In a report on September 13, Pollock extended arguments away from politics and the economy by pointing out that representatives from local administrations, politics, businesses, universities, and churches presented the people’s wish to build one Hesse, and it was accepted by Clay the next day (Pollock 2014, 80, 90; Will 2009, 23-24).

Walter L. Dorn, another advisor of Clay, presented a similar report around the same time. In June, Dorn met Gerhard Anschütz, a dominant critic of the Weimar Constitution and an expert of the *Länderrat*. Anschütz introduced the history of the Hessian region to Dorn with a number of primary documents regarding the Greater Hesse Movement in the Weimar period. Anschütz argued that the boundaries in the area were nothing but “unnecessary remains of the past.” In the following months, he interviewed more local elites such as the CEO of Metallgesellschaft AG, Richard Merton, Frankfurt University Professor in History Friedrich Giese, the Hessian league’s president Willi Wilbrand, Hessian CDU founder Werner Hilpert, and Bergsträsser (Franz 1996, 71-90).

Dorn witnessed overwhelming support: “I do not recall at this moment of writing a single dissenting voice.” Therefore, he convinced Adcock, who delivered his report to Clay on September 15 (Dorn 1958, 191-196). Although it is still a debatable topic regarding whether Pollock or Dorn played a bigger role in rebuilding Hesse, Clay informed McCloy of his final decision in the Hessian area on September 16 in his “Condition in Germany” report:

Last June, in setting up the military districts we divided the Western District into three Leander: Hessen, Hessen-Nassau, and Wuerttemberg-Baden, largely on the advice of the Political Division. The separation of Land Hessen from the former Prussian province of Hessen-Nassau was intended to maintain their historical status... Further study has also shown that, up to 1933, the Germans themselves sought to consolidate these two units, and considered their separation merely a historical accident... Both Dr. Pollock and Dr. Dorn believe that we will assist the creation of a sound federal Germany by combining the entire Hessen area into one Land government (Clay and Smith, 1974, 80).⁸

The most interesting part of the report was that it listed people's willingness as one of the essential factors instead of only focusing on the economy and politics, significantly different from Clay's many decisions. Clay, like many other MG officials, made many reckless decisions without any concern about locals' opinions or any historical and cultural factors. For example, after riding a horse, he wearied of seeing the German streets, parks, and other public places bearing the names of Hitler, Bismarck, Frederick the Great, and other figures of the past. He issued an order forbidding the use not only of names of Nazis but of any names associated with German history without consulting anyone. Again, due to unknown reasons, he decided to prevent German officials from carrying titles such as president, trustee, commissioner, and director by ignoring the fact that they have long been used in Germany, the United States, the United Kingdom, and the Soviet Union (Zink 1947, 27). Compared to other decisions made by Clay and MG officials, paying attention to people's opinions in forming Hesse was considerable progress in American policymaking during the German occupation.

⁸ Regarding who played more roles in rebuilding Hesse, Dorn tried to glorify himself and removed Pollock from the topic in his citation. Therefore, many historians disagreed with Dorn's conclusion. Whether Pollock or Dorn played a more important role is still debatable. Martin Will. *Die Entstehung der Verfassung des Landes Hessen von 1946*, (2009), 24.

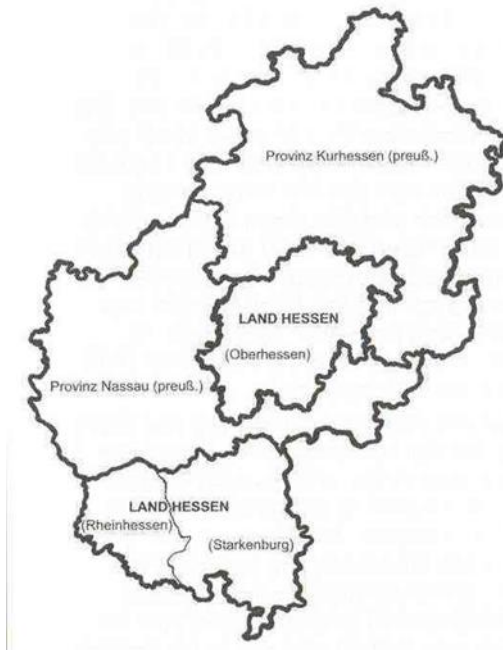
Eisenhower also complimented the plan since it could bring more weight to the states for creating a federal system in the future of Germany. On September 19, 1945, he signed and published “Proclamation No. 2,” which announced the birth of three states in the American occupation zone: Bavaria, Greater Hesse, and Württemberg-Baden, and they were officially established on October 8. The Americans set Greater Hesse’s boundary, which included Kurhessen, Hesse-Starkenburger, Oberhessen, Rheinhesse in the Rhine’s east bank, and a part of Nassau.⁹ The state’s name described a bigger Hessian state and referenced the Greater Hesse movement after WWI, bringing legality to the occupier’s decision by connecting it with the occupied people’s history (Will 2009, 23).

The proclamation did not appoint the capital city of Greater Hesse or the first minister-president’s candidate, which was chosen by the American occupiers. Many cities were on the list, such as Frankfurt, Darmstadt, and Marburg, and OMGUS chose Wiesbaden as the capital because of Colonel James R. Newman’s efforts. Newman commanded the E1A2 detachment in Wiesbaden, took back Frankfurt from the SHAEF G-5 division, and was promoted to take charge of E-5 in August. A month later, he replaced Johnson and became the most influential MG officer in the Hessian area by commanding E-5 and E-2 simultaneously (Weisz 1994, 324-325). He asked to appoint Wiesbaden as the capital of Hesse because it was less damaged (33 percent) than most cities. Although Bergsträsser hinted that he wanted to be the first minister-president, Newman recommended lawyer Karl Geiler, a non-partisan distinguished professor at Heidelberg who lost his job by protecting his Jewish wife in the Nazi regime. Clay accepted his two proposals. After the Hessian MG detachments were joined as the Office of Military Government in Greater Hesse (OMGGH), Newman officially ordered the creation of Greater Hesse, in which the capital city was Wiesbaden on October 12, and Geiler was appointed as the first minister-president by Clay on the 16th.

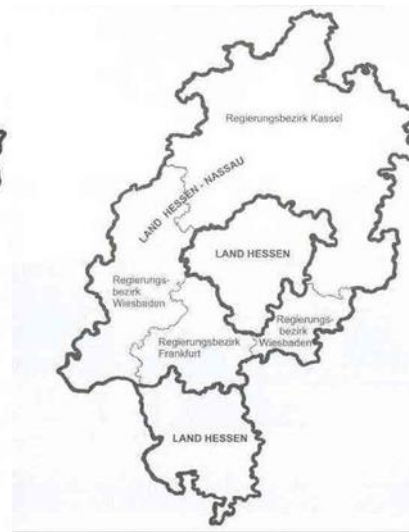
⁹ Nassau’s exclaves, and Oberwesterwald, Unterwesterwald, Unterlahn, and Sankt Goarshausen districts were excluded from the Greater Hesse. Military Government in Germany, American Zone, “*Proclamation No. 2*” September 19, 1945, 3.

The creation of Greater Hesse presented the early cooperation between the American military and the German people. Unlike many decisions Clay and other MG officials made, which ignored the historical and cultural factors in Germany, the final decision for the one-state plan was primarily based on local popularity, and it eventually convinced Clay through the reports from Pollock and Dorn. The condition report from Clay to McCloy on September 16, 1945, also emphasized such change from complete American control to shifting some weights to the local population's opinions. On the other hand, many following decisions were published through direct orders, such as the Hessian boundary, its capital city, and the nominee for the first minister-president. It was possibly because the locals could not make such decisions for the rest of 1945 since they had not started their first election yet.

Map 1: The Hessian Area in April 1945



Map 2: The two-states plan in the Hessian Area¹⁰



Karte 3: Hessen nach der Direktive von 24. Juni 1945 - zwei Länder: Hessen-Nassau und Hessen (-Darmstadt).

Map 1 showed the Hessian area in April 1945, in which it was divided into three separated regions: The People's State of Hesse (Land Hessen), the Prussian Province of Nassau, and the Prussian Province of Kurhessen.

Map 2 showed the two-states plan in the Hessian area in June 1945. Notice that it also showed the disappearance of Western parts in Nassau and the People's State of Hesse, which had been given to the French zone in July 1945 and consolidated as the State of Rhineland-Pfalz on August 30, 1946.

¹⁰ Ulrich Dreßler. "50 Jahre Parlamentsvorsteher in der HGO - das unbekannte Jubiläum," *Hessrische Städte- und Gemeinde-Zeitung*, No. 9, September 2000, 300-302.

2.3.2 Structures and Early Constitution-Making Preparation

Three documents significantly impacted the formation of Greater Hesse: Proclamation No. 2, the Basic Law of Greater Hesse, and the “Election in the U.S. Zone” directive, which collectively became the de facto constitution. They created a caretaker government. It held a powerful minister-president who theoretically only responded to OMGUS for creating a democratic state constitution. Therefore, constitution-making processes began in the American zone, and the Constitutional Preparatory Committee (*Vorbereitenden Verfassungsausschusses*) was created in Greater Hesse.

The proclamation was a direct order signed by Eisenhower and sent to local administrations on September 9, 1945. Other than creating states, it established relationships between states and the occupation force. Article II ruled that those German laws that OMGUS or ACC did not abend would continue to be applicable. Article III allowed state sovereignty in the newly created states by authorizing them with legislative, judicial, and executive powers under the supreme authority of OMGUS. It also regulated that “before establishing a democratic system,” the validity of state legislation would only need to be approved by the minister-presidents. Therefore, the document created theoretically powerful state governments that were only required to respond to OMGUS and hinted at establishing democracy in the future (Greater Hesse State Ministry 1945).

In reality, the power of minister-president was restricted by Americans and Geiler himself.. The *Länderrat* could restrict legislative and executive actions in Greater Hesse for interstate cooperations under indications from RGCO. OMGGH could also influence the Hessian government. Geiler’s first minister of justice, Robert Fritz, was found guilty due to his Nazi past during the denazification process and resigned after getting pressure. Even though Geiler made a speech that emphasized his role in a temporary cabinet meeting on October 19, 1945, he did not act as a dictator. He followed the majority of decisions in his cabinet with a handful of exceptions (Will 2009, 29-32).

The successes in the countryside elections across the American occupation zone in January 1946 encouraged Clay to move further in political democratization by asking for the beginning of constitution-making processes. On February 4, in his "Elections in the U.S. Zone" directive, Clay set up a compact schedule for constitution-making processes. Before February 22, Geiler would appoint the Constitutional Preparatory Committee, a small group of experts, for early theoretical preparations before the Constitutional Assembly. The committee would form laws for the assembly elections on April 1 and present a working report for Geiler on May 20. The assembly, composed of publicly elected representatives, would draft a constitution before September 15. Furthermore, OMGUS was authorized to deny it partially or entirely if it went against democracy, American policies, or the future Reich structures. After OMGUS's approval, the final draft would be sent to a public referendum, followed by the general elections on November 3, 1946 (Breding and Lange 1996, 4-6).

The Constitution Preparatory Committee started its first meeting on March 12, 1946, in which their priority was drafting election laws for the Constitutional Assembly. After a series of debates, it was presented on March 31, approved by OMGUS on May 5, and enacted after a month. The assembly would comprise ninety delegates through elections with a complex system. Sixty-four seats were determined by the popular voting results in the sixty-four political zones that owned equal numbers of the population. The remaining twenty-six seats would be based on a prorated system, in which parties who gained a minimum of 5 percent total votes could send their legal experts as delegates into the assembly. Therefore, the committee designed a system that combined popular votes, a prorated system, and a minimum requirement to prevent any less-popular parties with extreme thoughts from joining the assembly (Breding and Lange 1996, 46-48).

2.3.3 Conclusion

Before examining the actual process of constitution-making in Greater Hesse, it is essential to describe its background regarding occupation difficulties and solutions. Otherwise, it would be difficult to determine the reason for creating states. Around September 1945, Lt. Gen. Lucius D. Clay, Deputy Military Governor, led a policy turning point to end the full dictatorship of the American military authorities. It aimed to encounter difficulties from the harsh environment, denazification policies, and internal issues by cooperating with local Germans and clarifying jurisdiction problems.

The American MG's policy turning point, which was led by Clay and started between August and December 1945, was a topic without enough attention in previous academic works. Without any detailed explanation, McCreedy partly touched on the topic in the conclusion of his thesis (1995) by arguing that chaos in German political reconstruction was due to SHAEF general staff's failure to answer the transition between wartime and peacetime during Operation Eclipse and the unclear goals for the future during the policy-making process in the American political leadership.¹¹

Many recent works refused to mention or suggestively deny the existence of the early failures and Clay's turning point in 1945. Hudson narrated MG's actions in Bavaria in 1945 as a smooth operation without severe friction between tactical forces and USGCC. Clay was the designer of democratic reforms in Germany without any direction from political institutions in Washington. Therefore, by emphasizing Clay's identity as a career soldier, lack of direction at home, and narrating a smooth MG operation, Hudson minimized discussions regarding early internal conflicts within American military authorities and hinted that no turning point existed.¹²

¹¹ "Confusion of chain of command and purpose slowed the process of establishing a functioning indigenous political administration during the first several months of the occupation." Kenneth O. McCreedy, "Planning the Peace: Operation Eclipse and the Occupation of Germany," diss. (United States Army Command and General Staff College, 1995), 40-41.

¹² "Obviously, the break between tactical and military government units had to be deftly managed to avoid friction between the two." "To avoid" could be explained as avoiding things that have happened or not yet. The sentence describes the appointment of Muller as director of Bavarian MG after the removal of Patton in September 1945, and the "friction" happened many times before. Such a narrative did not help clarify whether a turning point existed. Given the circumstance

This narrative style was encouraged in Dimarco and Millen's works. Dimarco's Ph.D. thesis mentioned Clay's political attempt to control the MG operation and reorganize American military authorities in October 1945. It ignored Eisenhower's direction on April 24 and suggested no policy turning point existed because Eisenhower designedly suspended Clay's attempt until situations in Germany "subsided" (Dimarco 2010, 278). Millen's book strongly criticized many factors outside U.S. Army leadership, such as Roosevelt's failures, JCS 1067, war destructions, brutalities and voracity of the Soviet authority, and illegal conduct of American soldiers and DPs. It contained a repetitive narrative logic from describing outside difficulties to solving the problems by outstanding military leadership without anything related to a policy turning point. As a result, the American MG "represented one of the most successful and little-noted enterprises of WWII" (Millen 2019, 222).

Based on the final achievements of the American military occupation of Germany after 1945, in creating a democratic system in a nation previously drowning in Nazism and post-war decline, it was undoubtedly a successful operation. However, an overall successful operation does not mean it was successful in every stage. Clearly, the beginning of the occupation witnessed many difficulties ranging from the harsh environment and denazification results to issues within the MG system. In his 1977 book, Peterson noticed that the American occupation's final success was based on the action led by Clay that gradually returned administrations back to the Germans. However, he examined the topic over a more extended period instead of discussing the beginning of 1945. Examining the reasons for turning a chaotic beginning into a successful end is valuable, especially in defining its starting point.

of such a way of describing things that occurred multiple times, it is reasonable to argue that the author tried to hint that no policy turning point existed. Walter M. Hudson, "The U.S. Military Government and Democratic Reform and Denazification in Bavaria, 1945-47," MA diss, (U.S. Army Command and General Staff College, 2001), 18.

Lucius D. Clay was the most important American military authority in post-war Germany. His decisions and leadership led to the democratic political reconstruction in the area. He faced difficulties from multiple directions between April and August 1945 because his early attempts to start the economic reconstruction and end the jurisdiction conflicts in Germany were unsuccessful due to JCS 1067 restrictions and the opposing factors from tactical forces. Meanwhile, he started to sympathize with the German people in the harsh living conditions and was determined to help them. Clay rapidly moved to political democratization from bottom to top and generally handed powers to civil administrations after the Potsdam Agreement and the controversial speech of Patton in September. This marked the turning point from the American military dictatorship to the cooperation between American occupiers and occupied German civilians. More importantly, it led to Greater Hesse's creation in late 1945 and laid the groundwork for the Hessian constitute processes in early 1946.

The Greater Hessian government was a temporary institution for drafting a democratic constitution. It created an expert committee to form an election law and early constitutional research. A popularly elected assembly would be charged to draft a constitution for OMGUS and referendum approvals. The Preparatory Committee finished the election law and discussed constitutional concepts. The two most significant topics lay before the committee members: The methods for preventing an extreme political party from seizing national power in the future and the measures for maintaining people's living conditions under the current harsh circumstances. Eventually, the two topics would find solutions through the committee's discussion on Walter Jellinek's Hessian constitutional draft.

Chapter 3

The Early Defensive Democracy in Hesse

Walter Jellinek's Hessian constitutional draft commenced with a concise yet profound preamble before civil rights, which underscored the significance to both people and communities:

After years of unbearable tyranny, the people recall the inalienable human rights. The assurance of these rights makes life worth living and generates that voluntary integration into the state community. Without them, no state can endure in the long run (Breding and Lange 1996, 153).

After drafting an election law for the Constitutional Assembly, organizing the concepts for the new democratic constitution became the top priority for the Hessian Preparatory Constitutional Committee. Starting in April 1946, the committee would set up the basic draft regarding the state, its governmental structures, and the rights of citizens for further discussion. Undoubtedly, the members were deeply influenced by the ongoing postwar reconstruction and the despairing living standards of ordinary people at the time, which brought the reflections regarding war and peace, governmental duties, and people's roles in politics back to them. Therefore, in their expectation, the future Hessian state constitution served an important purpose: to prevent another radical political party from seizing the national power in the future. It included designing a defensive method to protect constitutional spirits and setting conditions for improving ordinary people's livings.

In the Preparatory Constitutional Committee the legal scholar Walter Jellinek, played an indispensable role. On May 13, 1946, Jellinek presented his constitutional draft to the committee, which became the primary debated topic, eventually leading to the Constitutional Assembly and the final draft. Therefore, Jellinek was one of the primary founding parents of the Hessian Constitution, the oldest surviving democratic constitution in Germany, in 1946. Even though Jellinek's draft shared similarities with the Weimar Constitution, he introduced a new mechanism, defensive democracy.

Defensive democracy, also known as militant democracy, argues that certain rights in a democratic society should be limited. These rights include presenting a range for constitutional amendment making, as well as authorizing civilians with unusual rights, such as the right to revolution and the right to protect the state's existence, democratic structures, and the rights of minorities. It began as Karl Loewenstein's reaction to the Nazi's seizure of power in 1933 based on Carl Schmit's institutional conservatism and Maurice Hauriou's super-constitutionality theory. After WWII, Karl Popper expanded defensive democracy as a method of protecting the democratic system from radical political movements based on the paradox of tolerance. This paradox states that if a society shows its tolerance without limitation, it will eventually be suspended, ceased, or replaced by intolerant groups, especially during a national economic or political crisis.

Walter Jellinek, a Jewish German legal scholar who had previously believed that maintaining a nation's social order and legal unity was paramount, began to reevaluate his theories after witnessing the tyranny of the Nazis. The Hessian Preparatory Constitutional Committee membership allowed him to design a new constitution to avoid the failures of the Weimar Republic by introducing defensive democracy into his draft. Although his work initially faced criticism from other committee members, they eventually chose to modify his draft significantly by increasing the number of civil rights and refining the language of defensive democracy with the concerns of another radical political party from seizing the state authorities during the harsh post-war reconstruction.

3.1 Defensive Democracy and Walter Jellinek

Patrick Nitzschner enlighteningly introduced institutional conservatism, which uses constitutional enforcement to protect democracy and is a “theoretical preference for institutions that restrain transformation” (2023, Abstract). Carl Schmitt, Karl Loewenstein, and Karl Popper became the founders of a theory that would eventually block further democratic improvement. However, Nitzschner’s focus on conservative elements within defensive democracy made him overlook its instrumental nature and French legal scholar Maurice Hauriou’s theory of super-constitutionality. Despite this, institutional conservatism offers valuable insights into Jellinek’s theoretical continuity between 1933 and 1946. Prior to 1933, Jellinek emphasized the government’s role in maintaining social order and legal consistency in his academic works. After witnessing tragedies brought by the Third Reich’s order, it is understandable that Jellinek designed a defensive democracy mechanism in his constitutional draft aimed at preventing the rise of another radical political faction to power.

3.1.1 Development of Defensive Democracy

Carl Schmitt was a highly controversial figure due to his role in the Nazi regime, but his theory played an essential role in protecting current governmental orders and legal consistency that eventually led to defensive democracy. In *Constitutional Theory* (1928), he argued that a constitution included constitutions and constitutional laws. Constitutions in the constitution are basic structures of the target nation that have been formed, such as parliamentary democracy and parliamentary monarch, and constitutional laws are the legal regulations to support the framework. In his theory, Article 76 of the Weimar Constitution (WRV), the amendment clause, was only a constitutional law that provided regulations of the amendment process instead of the basic frame of the constitution. Therefore, it has no authority to change the original constitutional structure (Schmitt, 2008, 59, 74).

Schmitt continued to cry out for the consistency of constitution during the 1932 Prussian *coup d'état* in *Legality and Legitimacy* (1932), emphasizing “fundamental principles:”

I agree with Hauriou that every constitution recognizes such fundamental “principles,” that these principles belong to what Carl Bilfinger terms the “constitutional system,” which is, in principle, unalterable. We are also in agreement that it is not the intent of the constitutional provisions concerning revision of the constitution to open a procedure for the elimination of the system of order that should be constituted through the constitution (Schmitt 2004, 58).

Although Schmitt seemingly followed French legal scholar Maurice Hauriou in super-constitutional principles in the book, he tried to exempt a given system of order from the constitutional scope. The Weimar Constitution had two major sections: the first section was the governmental structures of the Weimar Republic, and the second section consolidated civil rights, duties, and obligations. According to Schmitt, the Second Principal Part of WRV only had limited legality, which lasted from 51 percent of legality in individual liberties to 67 percent in the churches’ rights. The entire section, half of the constitution, was overall “complete heterogeneity” from the constitution (Schmitt 2004, 58).

Based on the separation between civil rights and the constitution, Schmitt concluded that if a constitution was not dear to take a side between “recognition of the substantive characteristics and capacities of the German people” and “retention and extension of functionalist value neutrality” and chose “illusion” of civil rights instead of “substantive order,” it would self-destruct its legality and legitimacy. As possibly the most famous anti-parliamentarian at the time, he thought anything that could lead to uncertainty in the dominant position of the actual governing institution was a threat to the order and, therefore, a threat to the nation and its people. Therefore, the Reich President, the figure of the German people’s will in his theory, should exercise unlimited power in protecting so-called constitutional consistency by completely ignoring civil rights and the legislative branch (Schmitt 2004, 58, 93-94, xxxvii-xxxix).

Many scholars noticed Schmitt's preference for keeping current orders through legal practices of determining and eliminating possible threats to political stability and homogeneity. Legal scholar Sarah Schulz pointed out Schmitt's opposition to WRV's "formal" and "legalistic" characters, which took sides with National Socialism by emphasizing the "substantive" constitutional values. Legal scholar Jens Meierhenrich traced Schmitt's "cumulative radicalization" and believed that Legality and Legitimacy were beginning from "pragmatist institutionalism to extremist institutionalism," which left a "short step to justifying Nazi dictatorship." Nitzschner argued that Schmitt's theory in institutional conservatism might be the earliest theoretical reference to militant democracy (2023, 4-6). However, he failed to clarify institutional conservatism's instrumentality, which could be used in democratic and anti-democratic meanings. More importantly, he ignored Mauriou's super-constitutionality theory, another critical theoretical root of defensive democracy in the early twentieth century.

If Schmitt's achievement regarding defensive democracy was to protect a de-facto ruling system from any threat to its national homogeneity, then Maurice Hauriou would be the earliest figure to argue the importance of keeping democratic meanings away from dangerous amendment actions. As early as 1923, he pointed out a separation between constituent power and amendment powers. Constituent power was the founding legislative power that should be exercised by a national assembly expressly selected to elaborate the constitution and submit its work to a referendum. Amendment powers had two parts: total modification and partial revision. The first was similar to a constituent power due to its impact generally greater than adding amendments to the text, so it should be processed by a special popular-elected constitutional assembly and approved by a public referendum. The second was a limited power that could be exercised by the legislative branch under the regulations of the amendment clause of the constitution (Polzin 2021, 45-61).

Hauriou also argued that certain principles held such important status, to the point that they should have a higher priority in legitimacy than the written constitution itself, irrespective of whether they were clearly contained in its language. Because the law itself was an organized system (*système organisé*), those key concepts that kept the law together would have the highest legitimacy—super constitutionality—and constituted the constitutional legitimacy. In France, such examples of critical principles could be the fundamental rights and the republican national structure, and they should be entrenched. Furthermore, Hauriou believed the importance of judicial oversight in the amendment-making process and implied that judges should review amendments’ constitutionality. His colleague, Léon Duguit, agreed and argued that the Declaration of the Rights of Man and of the Citizen in 1789 was the fundamental principle due to its historical uniqueness (Polzin 2021, 51-54).

Although many academic works built the basis of defensive democracy, Carl J. Loewenstein created it in 1937 as a reaction to the Nazi seizure of power. During exile in the United States, he published “Militant Democracy and Fundamental Rights I and II” in *The American Political Science Review*, which began by analyzing fascist natures. First, fascism was not an ideology but a political technique that focused on mobilizing the masses by emotional coercion to build an anti-socialism, anti-democracy, and anti-minorities totalitarian regime. Second, fascism had its generality, and its movements crossed European nations with different backgrounds, which means that democracy was not a solution to prevent fascism from rising. Instead, fascist victories were based on using democratic legal methods to overthrow the system. Third, democratic nations faced an “underground war on the inner front.” Although conflicts occurred in democratic systems, they were animated by “common loyalty towards the fundamentals of government.” Fascist movements were political conflicts that targeted the destruction of such principles for building totalitarian regimes. Therefore, fascist groups were enemies of democracy instead of active players (June 1937, 417-432, 418-424, 428).

Loewenstein introduced a series of solutions for preventing fascism based on its identity as an enemy of democracy that had success through mobilizing the masses. Regarding constitutional issues, he argued that democracy, as a “rational system,” could not provide enough emotional influence like fascism. Therefore, “in politics also the defense is shape according to the fighting methods of the assailant” (August 1937, 638-658). If fascist success was based on emotionally mobilizing the masses in a democratic system, preventing extreme political parties from joining the legislative branch and limiting the right to speech from subversive propaganda would limit its influence (642-644, 650-652). Nitzschner argued that Loewenstein used the enemy’s weapon by sharing similarities with Schmitt’s institutional conservatism that politics were “too precious to be entrusted to the people.” His theory contained the “emotional masses in a disciplined or authoritarian democracy” by putting procedures of participation in government as equal to substantive civil liberties in a constitution (2023, 6-9).

Nitzschner is correct about Loewenstein’s performance regarding institutional conservatism, but it is questionable to conclude that Loewenstein viewed substantive order as equal to civil liberties in a constitution. Hauriou’s super-constitutionality argued that certain specific ideas held higher legitimacy in a written constitution. Reading through the two articles, Loewenstein focused on the harmfulness of fascism toward democracy instead of emphasizing the importance of democracy. In his eyes, the advantages of democracy in a modern nation were self-evident without any necessity to point them out expressly. Therefore, it is reasonable to argue that he followed Hauriou’s theory by viewing democracy as a super-constitutionality concept and trying to entrench its system integrity using institutional conservative methods. Loewenstein’s defensive democracy could be seen as a theoretical consolidation between institutional conservatism and super-constitutionality.

In 1945, Austrian-British philosopher Karl Popper introduced his theory in *The Open Society and Its Enemies*, which expanded the definition of democratic enemies and introduced the paradox of tolerance. It was a polemic directed at Plato, Hegel, and Marx regarding their utopian tradition and historical inevitability. Popper argued that utopian ideologies, such as Marxism, were prescriptive, deterministic, irrational, methodologically unsound, and amendable to authoritarian abuse. They were used historically to justify oppressive and tyrannical practices. On the other hand, an open society is characterized by values such as freedom, justice, and tolerance in disseminating knowledge, values, and beliefs, and therefore the pursuit of happiness. Direct liberal democracy could be a form of government that allows institutional improvements through piecemeal social engineering without massive violence and bloodshed (Nitzschner 2023, 6-9). Furthermore, he introduced the paradox of tolerance that suggests a tolerant society is not a defenseless society. Tolerance in a society has limitations because a society with unlimited tolerance would eventually be destroyed by intolerant groups from the inside. Therefore, a tolerant community should be prepared to use intolerant methods, even by force, against those who are intolerant of social tolerance (Popper 1974, 265).

Popper's ideas were the last puzzle piece that fulfilled the integrity of defensive democracy. He related democracy with incremental and reformist improvements and emphasized denying utopian ideologies to prevent totalitarian tyranny from taking power. Fascism and any ideology of rapid social change would be enemies of democracy. The paradox of tolerance provided a logical and relatively compelling explanation for limiting the civil rights of certain groups. Defensive democracy was expanded from a method against fascist infiltration to an institutional conservative idea helping democratic nations prevent radical thoughts from exercising rapid social or political transformation. It would be valuable during the Hessian constituent process when intellectuals still held fresh and profound memories regarding the Nazi's seizure of power and following disasters.

3.1.2 Walter Jellinek: Early Academic Thoughts and Lives

Walter Jellinek was a productive legal scholar in administration law, writing more than 120 articles, theses, and books. Since examining every piece of his works in a limited time was not practical, researching his motivation for designing defensive democratic clauses should be based on essential works, personal experiences, and secondary sources. He was the son of Georg Jellinek, a Jewish-German legal professor. He received his doctoral degree in 1908 under Paul Laband and a constitutional and administrative law degree under Otto Mayer in 1912 (Ziekow 219-230).

The core of Jellinek's academic thoughts was Laband's school of legal positivism that the primary duty of a nation is to prevent orders from being interrupted by chaos. However, unlike Labandists, who ignored historical, political, or economic discussions, Jellinek paid attention to outside factors regarding legal issues, possibly influenced by his father and Mayer. He argued that law is the "minimum ethical standard" (*ethischen Minimum*) used to stabilize the community, and legislation actions had two driving factors: the logical creations for change and the factual normative power. The community members had to obey and voluntarily agree with the law, which could not be possible without consistent opinion. Therefore, consistency in applying the law was the fundamental factor. A law applied differently to the same facts is no law at all, and a commonly accepted incorrect interpretation of a law has its original legal effect even if it prevented the correctly understood from coming into force. The actions that deviate from the legal text should not be based on any particular just decisions in any situation, which would damage the legal unanimity due to its unpredictability (Ziekow 1986, 225; Jellinek 1931, 124-149). As a result, in the question of whether to choose chaos or injustice, Jellinek would choose injustice without a doubt. Nations had the great privilege of making mistakes in keeping an orderly society (21).

Jellinek served as an artillery officer during WWI and immediately worked on protecting Wilhelm II through legal methods against the Treaty of Versailles, which asked for the prosecution of the former Kaiser as a war criminal. In an article on *Deutsche Juristen-Zeitung*, Jellinek argued that Wilhelm II was a former Prussian officer who lost his officer status after being enthroned as the Kaiser of the German Empire and lost his position in the military after abdicating the throne. Therefore, Wilhelm II was a German civilian in the Netherlands and had no responsibility to the government. Jellinek further pointed out that the nation's injustice did not equal its ruler's injustice, and Wilhelm II could not be persecuted (Rath 2019, 1-2). His actions aimed to preserve social unity in an environment where the German public strongly disapproved of the Treaty of Versailles.

Regarding WRV, Jellinek focused on the legal structures in dictatorship authorizations. During the debates about whether Article 87, the clause of funding authorization, could be replaced by Article 48, the clause of emergency, he pointed out that the debates should be based on politicians' viewpoints. For solving problems, the Reich President should have freedom of action when the situation requires it unless there were constitutionally valid opposite opinions. During the 1932 Prussian *coup d'état*, he used a method similar to Schmitt's by deconstructing the constitution to support the argument. Jellinek argued that the decree was unconstitutional according to the first paragraph of Article 48 but constitutional according to the second. Such a decree could preserve the Prussian government's integrity and the Reich President's prestige without compromising the state's organizational concept. On the other hand, the Reich Supreme Court should not investigate possible motives of the action because any accusation of untruthfulness would highly undermine the Reich's moral authority. The Reich Supreme Court made the final decision regarding the coup, similar to Jellinek's argument that capitulated to the political facts and tolerated the breach of the WRV by protecting the actual institutional orders instead of the constitutional order (Ziekow 1986, 227-228).

The Nazi seizure of power in 1933 changed his mind. Although he tried to justify their actions initially nor flee the nation like other legal experts, he was removed from teaching at Heidelberg University and lived in seclusion since 1935.¹³ His privileged mixed marriage and protection from Hans Frank, Hitler's attorney, prevented him from wearing the infamous yellow badge or being sent to camps (Bockelmann 2005, 418-433). Still, his siblings were not as lucky. His brother was killed by Gestapos, and his sister was a survivor at Theresienstadt Camp (Rath 2019, 2). He had limited academic activities. He authored a special edition of his most famous textbook, Administrative Law (*Verwaltungsrecht*), in 1934 by briefly incorporating Nazi legislative actions and introducing their impacts with citations from Hitler, Schmitt, and Roland Freisler. The special edition seemed to suggest his support for the current authority, but its sole purpose was to continue publishing his book. Birthe Pasemann noticed that Jellinek, a Jewish scholar, exhibited an overly positive attitude, to the point of ironic exaggeration, when describing Nazi racial policies. He subtly hinted his opposition to Nazism to knowledgeable readers and maintained a distance from the current regime (2005, 432-433).

Jellinek was returned to Heidelberg in 1945. In September, the Mannheim district leader, Heinrich Köhler, reversed his forced retirement and recognized 1936 and 1945 as "pensionable service" to compensate for the injustice. However, neither the regional district authority nor the university addressed the issue due to discrimination, and the threat to his life persisted. Even worse, he never directly faced the Holocaust nor was involved in exile, which led his Jewish compatriots to consider him a Nazi victim to a limited extent (Bockelmann 2020, 1, 7). Under the situation, Jellinek's appointment to the Preparatory Constitutional Committee gave him a chance to design a legal remedy.

¹³ In March 1933, Jellinek sent a letter to Carl J. Friedrich, who escaped to the United States from Hitler's regime: "The present mood in Germany is not hostile to foreigners but to Jews, which is in the sense of economic existence instead of a threat to life. You have probably learned by now from the newspapers that the atrocity tales are fabricated." (*Die augenblickliche Stimmung in Deutschland ist nicht ausländer- sondern judenfeindlich, letztes nicht im Sinne einer Bedrohung des Lebens, sondern der wirtschaftlichen Existenz. Daß die Greuelmärchen erfunden sind, haben Sie wohl inzwischen aus den Zeitungen erfahren*), "Walter Jellinek," *Heidelberger Geschichtsverein e.V.*, 21.

3.1.3 Conclusion

The defensive democracy founded by Loewenstein was a theoretical consolidation between institutional conservatism and super-constitutionality that provided a framework for safeguarding democratic values and preventing the rise of fascism. Karl Popper expanded the scope of democracy by associating it with incremental, reformist improvements and introducing the paradox of tolerance. As a result, defensive democracy emerged as a mechanism to protect not only against fascist infiltration but also against any ideology that could lead to rapid and radical societal transformation.

Based on Jellinek's academic thoughts, actions in protecting Wilhelm II, and explanations defending the emergency clause, he demonstrated a commitment to maintaining legal unity within a community, even to the extent of sacrificing the principles of justice or a correct interpretation of the law when necessary. He could be characterized as an institutional conservative. On the other hand, family tragedies and personal experiences during and after the Third Reich convinced him of the importance of democracy and the government's role as a guardian of just order.

Although OMGUS did not request the Preparatory Constitutional Committee to present a constitutional draft in the previous February order, the committee decided to do so. On April 30, 1946, Geiler asked for the inclusion of a list of civil rights in the draft during the sixth committee meeting, specifying that they should be consolidated in a different way from the WRV (Breiding and Lange 1996, 24-25). On May 13th, Jellinek submitted his draft to the committee, which became the topic for the following discussions of the committee and the foundation of its report to the Constitutional Assembly. More importantly, he designed a mechanism of defensive democracy in the draft, which eventually became one of the first practical examples of state constitutions in Germany.

3.2 Jellinek's Draft

Jellinek's constitutional draft for Greater Hesse had significant implications for further developments during the Hessian constitution-making process, as it provided the initial legal framework for the committee. It consisted of three parts: twenty-nine civil rights clauses outlining people's rights and their regulations; sixty-eight state organization articles set the structure of Greater Hessian public authorities; and twenty-seven amendment articles for supplements and corrections.

One of the draft's primary duties was to prevent the recurrence of tragedies led by the Third Reich. The draft embodied Jellinek's solution to the legal gaps in the Weimar Constitution (WRV) and Nazi tyranny. Defensive democracy comprises democracy and its defensive mechanisms, which involves comparisons between the draft, WRV, and the experiences of legal enforcement during the Third Reich. They were largely based on modifications to WRV, with additional articles addressing the injustices perpetrated by the Nazis in the judicial system and proposing solutions to contemporary challenges stemming from resource shortages. These methods represented active measures against any attempts to undermine constitutional order based on the ideas of Loewenstein and Jellinek.

3.2.1 Jellinek's Civil Rights

The civil rights articles in Jellinek's constitutional draft differed from WRV in three key areas. First, by emphasizing the importance of civil rights in format and actual practice, Jellinek modified many articles to address the civil rights loopholes during the Weimar Republic. Second, Jellinek consolidated legal remedies into his constitutional draft to prevent the recurrence of tyrannical experiences during the Third Reich's law enforcement practices. Lastly, despite not a lot, Jellinek recognized the harsh living conditions of ordinary Germans in the postwar reconstruction period and tried to offer solutions at the constitutional level.

The first noticeable difference between Jellinek's draft and WRV was the importance of civil rights. Unlike WRV, which placed civil rights articles as the second part, Jellinek began his work with civil rights. By placing civil rights clauses in front of the state organizational clauses of the governing institutions, the draft emphasized their supreme status through text structures (Breding and Lange 1996, 153-157; Article 109-165 WRV). Although both WRV and Jellinek's draft placed the equality clause at the beginning, compared with popular theories during the Weimar regime that argued civil rights could only be used to regulate the application of laws instead of the legislation, he stressed that such clauses were direct limitation to the legislative, judicial, and executive branches. Regarding racial and gender equality, the article pointed out that any separation based on racial background would be forbidden except to remedy previous injustice legally. He removed WRV's limitation "in principle" (*grundsätzlich*) in gender equality but only applied in public life (*öffentlichen Leben*), hinting that men and women were still not equal at home (Breding and Lange 1996, 153; Art 109 WRV).

As a reflection of the Nazi's seizure of power in 1933, Jellinek made several modifications to cover the constitutional loopholes in WRV. He offered new duties to the public authorities to prohibit false propaganda and actively oppose lies and slander, asserting that insulting groups would be punished like insulting individuals. It contrasted the Weimar legal theory that insulting a group instead of individuals did not constitute an abuse of freedom of speech (Breding and Lange 1996, 154; Loewenstein August 1937, 651). He outlined limitation procedures on civil rights under specific circumstances. In contrast to WRV, which granted the legislative branch unlimited power to redefine civil rights, he introduced a series of regulations in his draft. He guaranteed that the core of civil rights should be entrenched even if they were limited by valid procedures, such as amendment legislation by public referendums or the legislative branch. In addition, emergency decrees would no longer hold the authority to change the meaning of civil rights (Breding and Lange 1996, 157).

Furthermore, Jellinek imposed general restrictions regarding civil rights limitations with precise regulations by defining the scope of civil rights limitations. The minister-president could only temporarily suspend a few rights during emergencies regarding freedoms of action, speech, privacy in communications, and protest, while all others remained entrenched. To balance the power of the legislation and executive branches, he designed a constitutional remedy by allowing anyone, even unrelated individuals in certain circumstances, to file cases of civil rights violations with the state supreme court (Breding and Lange 1996, 157).

Based on the experiences in the Third Reich, Jellinek consolidated some legal principles into the constitutional draft to prevent another police state from being established in the future. They were public authorities' duty for a legal basis when interfering with individual rights as well as providing reasons within 48 hours to individuals subject to law enforcement or their relatives; the right of individuals to do or refrain from doing in the range of legal order; and the criminal justice principles, including the presumption of innocence, *non-bis in idem* (no double prosecutions or punishments), *nulla poena sine lege* (no penalty without law), and *in dubio pro reo* (no punishment in cases of doubt) (Breding and Lange 1996, 153).

Due to the same lessons, Jellinek set a series of legal prohibitions to limit public authorities. No one could be held for treason or other crimes if they drew attention to circumstances that violated international obligations, killed without a direct court decision, or held responsible for actions that were not their responsibility. The right of home protection explicitly prohibited anyone from establishing segregated communities or isolating themselves from others. Lastly, he set that any limitation to the freedom to form labor unions would be unconstitutional, and no one could compel others from joining such associations through coercion, referencing Loewenstein's theory regarding the rise of fascism (Breding and Lange 1996, 154-156).

Jellinek realized the harsh living conditions of ordinary individuals in Germany at the time by inventing several constitutional clauses and listing them in the civil rights of his draft. Based on the French constitutional draft in April 1946. A clause pointed out that no one should be prevented from pursuing legal claims because of inadequacy. It secured everyone the right to legally enjoy all civil rights listed on the draft regardless of financial status and also hinted that public authorities should take necessary actions to maintain such equality. Regarding the lack of living necessities, the solution was ownership regulations through the interventions of public authorities. First, he stipulated that interventions in ownership should be subject to full compensation based on court decisions. Second, he compensated owners when certain economic enterprises were nationalized, hinting at the legalization of collectively owned industries. Third, he authorized state supervision and confiscation as punishment for monopoly companies under judicial review (Breiding and Lange 1996, 156-157).

3.2.2 Jellinek's Defensive Democracy in State Organizations of Greater Hesse

The second part of Jellinek's constitutional draft included articles that involved the definition of Greater Hesse and the settlement of state organizations. They were organized into twelve minor chapters and six of them were related to defensive democracy: II, III, IV, V, VI, and XI. They were the super-constitutionality of specific concepts and the actively protective methods of democracy.

Chapter II confirmed the availability of approved international legal rules by emphasizing that any laws contradicting them or internationally binding treaties for Greater Hesse would be invalid (Breiding and Lange 1996, 158). It defined two types of international rules that held constitutionality—current and future international laws and treaties—would be entrenched, given that the state would passively accept them without any option to change. It hinted that international orders would be super-constitutionality, referencing Hauriou's theory.

Chapter III set the democratic principle of the Greater Hessian government by declaring that all authorities were imprescriptibly (*unveräußerlich*) belonged to the people, which made it another super-constitutionality concept in the draft. Instead of a pale political statement without actual meanings, Jellinek regulated two methods for people to join political issues: direct actions by public referendum and indirect actions by voting for members in constitutionally valid institutions. Public referendums could independently participate in legislation that does not involve constitutional changes or ask to dissolve the state parliament (Breding and Lange 1996, 159-160).

Chapter IV contained a unicameral state parliament considering the indirect involvement of the Greater Hessian people in legislation. State parliament members enjoyed specific legal immunity when carrying out their duties, except for cases involving insults. The limitation was based on the experiences during the Weimar Republic and Loewenstein's two articles on militant democracy, aiming to restrict legislative branch members from abusing their freedom of speech for anti-democratic purposes (Breding and Lange 1996, 160; Loewenstein August 1937, 650). In addition, Chapter V authorized the parliament to bring legal cases against the state government cabinet members for violations of the constitution in the state supreme court (Breding and Lange 1996, 166).

Jellinek detailed the boundaries between regular legislative and constitutional amendment actions in Chapter VI to prevent anyone from seizing authority by abusing legislative power during an emergency. A complex procedure for the amendment-making process was set up by altering the constitution text or adding additional articles to the text, which would be approved by the state parliament and a public referendum (Breding and Lange 1996, 167).

Chapter XI, Protection of the Constitution, was crucial in Jellinek's state organizations concerning defensive democracy. It defined protecting the constitution as everyone's civil duty by firmly keeping the constitutional authority, exemplary following the constitutional regulations, and manfully (*mannhaftes*) standing up against any attempt to weaken, break, or abolish the constitution. No constitutional amendment could undermine fundamental democratic principles or establish dictatorship. Amendment proposals that violated this provision would be legally forbidden from taking votes or enactment. The limitation could not be the subject of any constitutional amendment (Breiding and Lange 1996, 171). It hinted at the duties of civil servants and people to oppose any direction to break the constitution through amendment-making processes, which became one of the earliest examples of the right to resistance. The chapter also regulated the process of constitutional review by the judicial branch. Various entities, including a group of valid voters, the legislation, and the executive branch, could bring the constitutionality case straight to the state supreme court. If a lower court considers a law crucial to the pending decision of a legal dispute hold constitutionality issue, it should communicate its concerns to an upper court to bring it to the state supreme court (Breiding and Lange 1996, 171).

3.2.3 Conclusion

The civil rights in Jellinek's Hessian constitutional draft witnessed his theoretical continuity and changes and were a part of defensive democracy's actual practices. Although Jellinek was still concerned that a government's primary duty was to keep social order, he focused on creating a constitutional system that provided legal justice and social equality for everyone instead of any order that tolerated an unscrupulous ruling authority. Civil rights became the most important part of his draft through text structures, and their protective measurements—defensive democracy—were necessary.

First, civil rights in Jellinek's draft became entrenched clauses, which the minister-president could only temporarily suspend a few of them with restrictions during an emergency. It also created a separation between laws and decrees, which decrees from the executive branch no longer held constitutional impacts. Second, the suspension or edition of civil rights clauses required formal legislative actions with explicit language. Third, unlike the Weimar Constitution, in which civil rights were essentially legal principles without actual effects, civil rights in Jellinek's draft could be directly used as legal codes. As well as the state supreme court was authorized to hear cases regarding the violation of civil rights by victims or others. Lastly, Jellinek asked people to actively protect their civil rights, which would be a necessary civilian duty instead of an optional decision. The idea of letting people involved with the defensive democracy would continue to be present in the language of the second part, state organizations, of Jellinek's draft.

The draft also represented Jellinek's legal thoughts on defensive democracy. The languages indicated his performance keeping a legally united community in that all members voluntarily followed the constitutional order. Comparing them with the civil rights articles and articles of the legislative referendum, they also showed the idea regarding a social contract between rights and duties, in which if the constitution provided civil rights on legal and social supports equally for everyone, then the people had the responsibility to protect the constitution when it was under threat. Such a contract has similarities with people's duties when the nation is in total war, which Loewenstein made the comparison between defending the constitution and the actual nation. Therefore, Jellinek's draft could be seen as one of the earliest defensive democratic constitutions.

In terms of actual defensive methods, Jellinek's draft took a more active approach in judicial reviews compared with the United States, the founder of the system. Unlike the method in the United States, which passively operated by bringing the legal case to the Federal Supreme Court for making decisions regarding the constitutionality of laws, the draft contained four different methods. First, since civil rights could be directly used. In reality, everyone in Greater Hesse had the responsibility, instead of the right, to report the actions of civil rights violations. Second, the key definitions in the constitution, such as civil rights, international orders' legality, anti-dictatorships, and amendment-making procedures, were entrenched without any method to be removed. Third, judges in the lower courts were responsible for reporting their suspension regarding the constitutionality of specific laws when pending their cases. Lastly, Jellinek did not limit the method regarding the meaning of "manfully standing up against any attempt to weaken, break, or abolish the constitution." Therefore, it could be explained that he hinted that the people in Greater Hesse had the right to use violence against any anti-constitution revolution attempts as the last option when other solutions failed.

On the other hand, however, Jellinek's civil rights were primarily based on similar articles in WRV by drawing lessons from the legal shortcomings of the predecessor. From the perspective of the defense of democracy, the emphasis on fundamental individual rights in the constitutional text was a method of protecting ordinary people, both citizens and non-citizens, from the abuse of power by public authorities, especially the legislature and law enforcement. Only Article 23, prohibition of forced participation, and Articles 24 and 26, the solution of lacking materials, targeted the non-governmental organizations such as the rapid expansion of political parties, trade unions, and large corporations. As a result, he failed to expand the definition of civil rights beyond the classical liberties that had existed since the era of the Bill of Rights, which would lead to criticism from his colleagues on the committee, especially those from the SPD.

3.3 Final Draft of the Preparatory Constitutional Committee

After Jellinek submitted the civil rights section of his constitutional draft to the Hessian Preparatory Constitutional Committee, it initially received almost no positive reaction. Minister-President Geiler praised it as “excellent legal work,” but at the same time, he politely expressed concerns that it might be “too legalistic.” Bergsträsser commented the draft in his diary on May 13, 1946, describing it as “legally shoddy and editorially ineffective,” and criticized its notable lack of political meanings during the meeting on the same day. Erwin Stein, who later joined the Hessian Constitutional Assembly as a CDU member, described that Jellinek's draft was too focused on the experiences of the Third Reich to take care of the current harsh realities, and it was no longer justifiable to base the fundamental rights of 1946 on 18th-century concepts. Martin Will, in his book published in 2009, argued that the draft largely lacked the social vision that Hessian politicians almost unanimously aspired to, given the current supply distress of the population after the catastrophe brought by the National Socialist regime (88-91).

Despite the draft receiving criticism from various directions, the committee still discussed issues based on the framework of Jellinek, possibly due to time constraints, and Jellinek was the only one who presented a complete constitutional draft. During the first reading meetings on May 23 and 28, 1946, the committee reorganized, rewrote, and greatly expanded the civil rights from Jellinek's draft. The meetings on May 28 and 31, as well as June 4, 1946, were dedicated to further refining the state organizations in the draft. After the second reading meeting on June 11, the committee eventually produced the Final Draft of the Hessian Constitutional Preparatory Committee (VV), which was passed during the third reading meeting on June 18, 1946 (Will 2009, 104-113).

If Jellinek's draft was influenced by the experiences of the Weimar Republic and the Nazi era, VV was based on Jellinek's work. The most significant difference between Jellinek's and VV was the substantial expansion of civil rights articles. These transformed from being nearly two steps away from traditional, passive, defensive civil rights to active rights promoting social equality among civilians, as well as so-called "third-generation rights," such as the right to development and participation in social and economic life. Defensive democracy in VV became stricter in education and the protection of the constitution, compared to Jellinek's draft. Therefore, defensive democracy, along with the referendum cancellation and difficult living conditions, reflected the committee's lack of confidence in their people's loyalty regarding democracy and preventing another radical political faction from rising.

3.3.1 Civil Rights in VV

The Hessian Preparatory Constitutional Committee significantly expanded the number and definition of civil rights in their final draft. Chapter I, Equality before the Law, underwent a revision with more precise language compared to Jellinek's draft. This medicated revision not only prohibited discrimination based on race or background but also explicitly forbade discrimination based on political or religious beliefs. The exception allowing differential treatment as a remedy for past injustices was removed. Nevertheless, it still implied inequality between men and women in domestic matters. Chapter II consolidated all civil liberties of the people in Hesse. Included in this discussion was the assertion that people are born free until death, emphasizing the right to take general actions with more positive language than Jellinek's draft (Breiding and Lange 1996, 174-175).

In Chapter II, any violation of individual rights by public authorities must be supported by legal evidence, and the concept of the inviolability of human life could only be deprived through judicial decisions, thereby hinting at the legalization of the death penalty. It also addressed all the legal principles in criminal justice and significantly narrowed the scope of limitations on civil rights compared to Jellinek's draft. Instead of Jellinek's language in protecting "the core of civil rights," the committee pointed out that all civil rights must be preserved even during an emergency. In addition, the authority to declare an emergency was moved from the minister-president to the state parliament (Breiding and Lange 1996, 176-177, 154-157).

Chapter III outlined the social and political rights of individuals as well as their societal duties. The language established the civic duty that everyone capable of working should be part of the workforce and, conversely, individuals had the right to work assignments and receive unemployment benefits when unable to work. Everyone would be legally protected from the negative impacts of diseases, pregnancy, accidents, disabilities, and aging. The right to form labor unions and prohibiting the coercion of others to join these unions was articulated in this chapter. (Breiding and Lange 1996, 177, 156). Based on Jellinek's suggestion of collective ownership, the draft moved further for economic socialization. It called for progressive taxation to rectify the unreasonable distribution of property and income and for earned and inherited properties to be taxed at different rates. It not only inherited Jellinek's concept of building a state supervision system for economic activities but also allowed the parliament to authorize compensated or uncompensated transfer of entrepreneurs' private properties to public ownership when necessary (Breiding and Lange 1996, 157, 178).

Jellinek's Chapter X, which covered Marriage and Family, Religious, and Religious Societies, was separated and moved to the civil rights section in VV. These articles draw heavily from WRV Articles 135 to 138 but without granting the legislative branch a blank check for further regulations. The last minor chapter for civil rights addressed education and school-related issues. Educating the youth to promote "a sense of community and physical and mental fitness" was their parents' right and duty, except overridden by a court decision. The entire educational system would be under the state government's supervision. Higher educational institutions should be accessible to everyone based on their abilities with the support of state and local authorities (Breiding and Lange 1996, 179).

The last chapter also introduced creative and intriguing education. It mandated that history lessons should primarily focus on the development of nations and cultures worldwide, highlighting "great benefactors of mankind" (*großen Wohltäter der Menschheit*) instead of military commanders, wars, and battles. In addition, schools were assigned an additional duty beyond imparting knowledge: fostering a love for neighbors, promoting democracy, and actively opposing dictatorship. The concept of tolerance was underscored as a fundamental principle in the classroom. Teachers were expected to present religion and ideologies objectively and consider their students' feelings. Simultaneously, they needed to emphasize to their students that those who were intolerant of tolerance shall not be tolerated, a concept reflecting Karl Popper's paradox of tolerance. Obviously, such a system was very different from the Nazi education. On the other hand, religious education would be consolidated into the school system as ordinary classes and under the legal framework. The decision for children's participation in the classes would be decided by their parents, and the giving of such instruction would be left to the teachers' discretion (Breiding and Lange 1996, 179-180; Will 2009, 122).

3.3.2 The Committee's Defensive Democracy in State Organizations

Besides relocating family and religious issues into civil rights, the committee adopted the fundamental structure of Jellinek's draft for the state organizations. The most significant changes in the state organizations happened in the legislative branch. Although the democratic principles and people's participation methods seemingly maintained a description similar to Jellinek's language, Jellinek's article for calling a public referendum, was removed from VV. It was based on the decision to remove the public referendum from regular legislative activities entirely during the first reading meeting on May 13, 1946 (Breiding and Lange 1996, 180-181; Will 2009, 107). After the change, public referendums could only be used during the amendment-making process.

In Chapter X, Protection of the Constitution, some modifications were made to improve the concept of defensive democracy and render the language more precise compared to Jellinek's draft. The VV defined protecting the constitution as a civil duty but replaced Jellinek's provocative language in protecting the constitution with more moderate terms. Furthermore, anyone who failed the duty or belonged to the political groups that opposed the principles of democracy would lose certain civil rights based on court decisions. It emphasized the civil duty to oppose unconstitutional public authorities and asked people to file a complaint with the higher regional court actively. More importantly, it represented the legal innovation by the committee, ruling that anyone who participated in revolutionary actions to overthrow the constitution would be held accountable once the contrary state of affairs had been remedied. In addition, the entrenched clauses were expanded from protecting democratic principles to the government form of a parliamentary republic, making any attempt to create a parliamentary monarch impossible. Since Bavaria attempted to return to the monarchy during the American occupation between 1945 and 1946, it was possibly used to prevent any action of potential monarchists in Hesse. (Breiding and Lange 1996, 191-192, 171; Hudson 2001, 41, 45).

3.3.3 Conclusion.

The committee's most significant modification was the expansion of civil rights. According to the definitions provided by Czech legal scholar Kare Vasak in 1979, there are three generations of civil rights. The first generation comprises passive and defensive rights, protecting against aggressive public authorities. These include freedom of religion, speech, and political participation, which were Jellinek's focus. The second generation comprises active rights, demanding economic and social equality to fulfill people's basic needs, such as fair wages and adequate employee living standards. Lastly, the third generation of rights takes another step forward, encompassing broad class rights, including liberties for ethnic and religious minorities (Reid 2019, 1-9). Without a doubt, the legal innovations in Chapters III, IV, and V in the civil rights of VV moved almost two steps forward from Jellinek's traditional civil rights. These new rights encompassed individual social equality and the rights of groups within the community, which reflected the committee's progressive thoughts.

However, the increasing number of civil rights and improvements in defensive democracy also reflected the committee members' concern that the future constitutional order might face a clear and present danger from another radical political group instigating people to seize power. Under the current harsh living conditions described in Chapter One of the thesis, improving civil rights could provide a legal remedy for ordinary people. It was also a method to win public confidence and prevent them from sliding into radical thoughts. As Clay once stated, "There is no choice between being a communist on 1,500 calories a day and a believer in democracy on a thousand" (Smith 1990, 17-18). The consideration regarding the democratic reliability of ordinary German people in the difficulties of lacking living necessities would continue to be present during the Constitutional Assembly, and its solutions would become the most significant dispute between the left and right wing factions.

Turning to the defensive democracy methods in VV, Karl Popper's concept of tolerance and intolerance gained prominence in both Chapter V on civil rights and Chapter X on state organizations. Chapter V on civil rights required educational institutions to teach students actively about the paradox of tolerance. However, this education also implied to children that internal enemies still existed and that they might need to exhibit "intolerance" in certain circumstances. According to Article 126, protecting the constitution was a civil duty for everyone. Anyone who failed in this duty and those associated with anti-democratic groups would lose certain civil rights based on court decisions. The draft also explicitly stated that anyone attempting to overthrow the constitutional order in the future would be prosecuted under Article 128. When combined with Article 4, which suggests the use of the death penalty through the judicial branch, these articles represented threats directed at potential extremists, particularly former Nazis, and anyone who might align with them.

Because of the tight timeline, the committee requested OMGUS twice to extend the deadline for submitting their work, eventually setting it for June 18, 1946. The committee passed its final draft on the same day after three reading meetings. In the preamble, they noted that while the members' views largely agreed on many issues, there were significant differences of opinion on some points. These differences were so pronounced that it did not seem practical to express these views, for instance, in juxtaposed articles with different formulations. This primarily pertained to the highly contested articles concerning economic and social order and the relationship between the state and the church. In order not to preempt the deliberations of the Hessian Constitutional Assembly, it was decided to leave the decision on these matters open (Will 2009, 114-115).

After receiving it, OMGUS immediately started translating the constitution draft into English for comprehensive assessment. Throughout the Hessian Preparatory Constitutional Committee, OMGUS hardly interfered with drafting issues, as it was considered a preliminary work without binding impact. The only notable one was Clay's statement at the *Länderrat* on June 4, 1946. He emphasized that the minister-presidents in the American zone should ensure their constitutions included a clause allowing for the future transfer of sovereign powers from the states to a federal government or initially to the *Länderrat* (Will 2009, 114-115). Such a hands-off approach would end after the state constitutional assembly operated, especially towards the issue of collective industries.

Chapter 4

Positions of the Four Parties and Defensive Democracy

The second stage of the constituting process in Hesse started with the public election of the 90 delegates in the State Constitutional Advisory Assembly (*Verfassungberatende Landesversammlung*) on June 30, 1946. It served as both the constituent and temporary parliament body, and 29 framers of the Constitutional Committee in the assembly took responsibility for constitutional drafting issues. The election was generally successful in both participation and outcomes due to high involvement, in which the process engaged 71 percent of the total eligible voters, of whom two-thirds were women. The SPD secured 44.3 percent of the vote, winning 42 of the 90 total seats and 13 of 29 seats in the constitutional committee, while the CDU garnered 37.3 percent with 35 seats total and 10 committee seats. The KPD and LDP won 9.7 percent and 8.1 percent of the vote, securing seven and six seats in total and three committee seats each, respectively. Notably, most voters favored the SPD and CDU, two moderates, instead of the relatively radical KPD and LDP. Their distribution ensured that the final draft must be a coalition work--better between the SPD and CDU (Will 2009, 276).

Since the four parties controlled the constituting process, it is pivotal to concentrate on the interaction between defensive democracy and the harsh living conditions of the people to delve into the actual drafting process. An examination of the position documents of the four parties reveals a consensus on harnessing defensive democracy to shield the constitutional framework, but through varied approaches. The SPD and KPD emphasized enforcing social and economic equality to provide primary motivation to encourage the public to support the system voluntarily. The CDU and LDP focused on building a balance of powers to prevent majority rule and exercising Christian education at the schools to cultivate independent thinkers who might be immune from possible incitement under the circumstances, even though they did not entirely exclude the possibility of using socialization.

4.1 Positions of the Four Parties in Hesse.

After the final draft of the Hessian Constitutional Preparatory Committee was published on June 18, 1946, the parties needed to take a position regarding the most critical issues in the future constitution for their election campaigns on June 30. However, even after the election of the State Assembly, they were still working on submitting constitutional drafts for further internal discussions to summarize their specific basic ideas into manageable text for coming negotiations during the assembly. The SPD and CDU, the two most influential parties in Hesse, presented several competing drafts that targeted each other's major points. On the other hand, the KPD and LDP participated rather reluctantly in the constitution-making process, only published documents on important questions, and did not present their quasi-official draft until the beginning of August. It is necessary to examine the basic positions on constitutional legislation of the four parties regarding defensive democracy before moving the topic to the Constitutional Consultative Assembly's deliberations on the texts and the actions of OMGUS.

4.1.1 The Position of Social Democratic Party (SPD)

The Social Democratic Party (SPD) was the earliest to begin constitutional discussions within the party, which produced one resolution and two different constitutional drafts representing its positions in the State Constitutional Advisory Assembly. They were the Hochwaldhäuser Resolution on May 30, the Edited Draft of Caspary, and the Draft of Zinn and Arndt, both published in July 1946 (Will 2009, 143, 151, 162). Regarding defending a democratic system, the SPD members generally viewed equal economic protection as the foundation of democracy, especially in the postwar reconstruction period. They also emphasized people's political participation through referendum, voting for deputies of the state parliament and acting positively in constitutional crises..

At the end of March 1946, a constitutional committee was established within the SPD when the Preparatory Constitutional Committee operated. It included Friedrich Caspary and Adolf Arndt, as well as members of the preparatory committee: Bergsträsser, Fritz Hoch, Hans Venedey, and Zinn, which produced the Hochwaldhäuser Resolution on May 30 (Breding and Lange 1996, 193, 198, 220; Will 2009, 142-144). It contained several important points of the SPD, such as the economic and political unification of Germany, civil rights, and protection of democracy. It emphasized the status of future Germany as a socialist democratic republic (*sozialistischen und demokratischen Republik*) that included Hesse, and future national laws would override state laws. Individual rights contained entrenchment of legal equality, lives, health, works, freedom of action, belief, settlement, press, privacy, and assembly. State-church relations and education issues took the majority part. It asked for a total separation between state and church and prohibiting moral coercion by churches, especially for political purposes. It also emphasized parents' right and duty for kids and free schools and colleges based on the rule of loving neighbors (Breding and Lange 1996, 193-194).

The state organizations and defensive democracy were consolidated in the resolution. It denied creating a popular-elected state president (Staatspräsident) but asked for a one-house parliament with a parliament-elected minister-president. The state parliament held a dominant position over the state government and could be dissolved through public referendums to balance the power. In a defensive mechanism, ruling house members before 1918 were prohibited from holding public offices, and minority parties had to pass five percent of eligible votes before submitting electoral proposals. An amendment must be passed in both the parliament and two separate referendums. Any civil rights clauses and the democratic republic form were entrenched. Only the parliament could declare an emergency after securing a two-thirds majority vote and then suspend rights to action, mail privacy, assembly, and the press based on a simple majority (Breding and Lange, 1996 194-196).

The resolution primarily focused on its socialist statements regarding a planned economy and collectivization of essential industries. Labor unions could declare strikes in every business. Worker committees were appointed in all workplaces regarding wages and conditions. Private-owned companies would apply representatives to check documents and approve production changes except based on state plans. All mining, steel, financial, energy, postal, railway, radio industries, large-scale monopolies, large forests, and large agricultural manors were transferred from private to collective properties, which only guaranteed property protection of small manors, handicrafts, and businesses (Breiding and Lange 1996, 196-198).

The SPD committee concluded their resolution with the reasoning for advocating Germany's political unification and a socialist economy to promote world peace and foster understanding among people. Most importantly, they believed that the current circumstances, marked by the great impoverishment of their people and the destruction of the state, posed a clear and present danger to peace. Therefore, they believed that building a new Germany, which united its people through social democratic principles rather than militarist and capitalist traditions, would lay the precious foundation for future supranational organizations in Europe and worldwide (Breiding and Lange 1996, 198).

The conclusion reflects the SPD committee members' understanding of protecting democracy. If a democratic system can stand on its own, it must provide specific social welfare to its people on top of civil rights. By doing so, the people would willingly support the system when it faces the danger of being overthrown. In the ongoing harsh living conditions, industrial socialization and social equality articles would play the role of indirect mechanisms in defensive democracy by providing public motivation to unite people. Otherwise, if a system does not guarantee basic living standards for its people when the masses were struggle with poverty, it should be defined as a defensive oligarchy or something else rather than a defensive democracy.

After the resolution passed, two drafts were produced within the SPD: Caspary's second draft and the draft of Zinn and Arndt. Caspary submitted his second draft on July 2, incorporating elements of his first draft and the resolution. Following the resolution's format, it defined Hesse as a people's socialist republic within Germany and pointed out the super-constitutionality of international orders, the United Nations, and future German laws. The draft moved to third-generation rights by expanding it to community peace and protection to Nazi victims: Anyone who lost half of the income ability would receive lifetime compensation equal to a public servant's minimum annuity. The resolution's socialist clauses were supplied with additional prohibitions of using child labor, producing war materials, and taxation on groceries during current difficulties. (Breiding and Lange 1996, 199-207).

Caspary's state organizations allowed direct public political participation through public petitions, referendums, and amendment approvals. Political parties were defined as "constitutional organizations" (*Verfassungorgane*) with duties to protect people and their interests based on democratic positions and mutual respect to conquer barriers in social classes, races, and beliefs. Otherwise, they would be dissolved by the state supreme courts' decisions. The draft allowed rights to copyrights, property, company and labor, state supervision of land use, and compensation subject to amendment editions but with a complicated process through two separate reviews and votes in the parliament with a two-thirds majority before the referendum (Breiding and Lange 1996, 217-218).

Surprisingly, the draft set a harsh punishment for anti-constitution and anti-democracy actions. Articles 99 and 100 defined high treason and attempted high treason. Those who violated the constitution or tried to prevent citizens or public servants from carrying out rights and duties would be sentenced to more than ten years of imprisonment or death. Those who attempted such actions would be disciplined by imprisonment, and both high treason and attempted high treason had additional sentences to forfeiture of honor and property. (Breiding and Lange 1996, 219-220).

Due to Zinn's involvement in both organizations, Zinn and Arndt formed another draft within the SPD by combining the resolution and the preparatory committee's final draft. It began with articles defining Hesse in a broader context. After narratives of the international order back to the Atlantic Charter and the United Nations Charter, the authors claimed they inherited the ideas by creating peace and prosperity, prohibiting war, providing remedies for Nazi victims, and transferring German sovereignty to a future European Union. It began its civil rights chapter with a conspicuous description: "The legislative, executive, and judicial powers shall comply with the eternal principle of laws and justices." The context referred to natural law theory, which emphasized specific moral standards' super-constitutionality and was reintroduced as the reflection and opposition of legal positivism--the dominant legal theory during the German Reich and the Weimar Republic. More importantly, Zinn and Arndt radicalized the concept of Jellinek's public resistance by introducing revolution, in which everyone had the right and duty to resist anti-constitutional authorities by any means necessary, including using arms and sacrificing lives (Breiding and Lange 1996, 221, 224).

The draft held improvements regarding social issues. Article 27 expanded the definition of the state supreme court's judicial review to religious groups. The right to association was limited to employees only to prevent monopolies or elite interest groups from forming. Possibly due to a lack of resources, Article 38 categorically made lockouts illegal, and Article 43 expanded Caspary's tax exemption to all indirect tax and tariffs on food to minimize the financial pressure on ordinary people. Therefore, it created a separation of powers system between a legislative branch that consolidated with a one-house parliament and referendum, an executive branch formed by a parliament-elected minister-president, and a judicial branch with active reviewing power in political, social, and cultural lives. However, it set the minimum vote for a new party to join the parliament at ten percent, leading to issues of minority protection (Breiding and Lange 1996, 208, 224-228, 229, 233, 240).

The amendment procedure reflected a theoretical combination between Hauriou and Schmitt. Zinn and Arndt separated it into two sub-topics: adding amendments or editing the text. Adding amendments could only be achieved by adding additional constitutional laws (Verfassungsgesetz) enacted by a two-thirds majority in the parliament. The constitutional edition would ask for approvals from the parliament and referendum like the preparatory committee's draft. Similar to Caspar, they also defined a series of actions as high treason and attempted high treason, but the death penalty was prohibited, except as a punishment for Nazi criminals (Breiding and Lange 1996, 235-236, 241-242).

4.1.2 The Position of the Christian Democratic Union (CDU)

The Christian Democratic Union (CDU), the second-largest party in Hesse, did not have an officially organized thought on paper during the State Constitutional Advisory Assembly general election. They eventually came up with two brief constitution drafts and a working principle for the assembly, which were the Königstein Draft, Karl Kanka's draft, and the Wiesbaden Design. Unlike the SPD, they focused on defending a constitution by power separation and Christian education.

The Königstein Draft (July 1946) was written by historian Ulrich Noack, a preparatory committee member and advisor of Geiler, along with Paul Kremer, but faced criticism due to its complex nature, spanning around 70 pages. Although the condensed 13-page version still failed to receive general acceptance, it became the basis for the Wiesbaden Design (Will 2009, 192-195, 218-219). The draft reflected the CDU's ideologies as a polemic against the SPD's collectivist and majority-ruled concept. It began with a Christian-based narrative of European history, so a total state-church separation was pseudo. People should have conscience-based religious freedom, inviolable roles of parents, and Christian education in all schools. Monopoly should be eliminated, but creating state capitalism would further damage individuals and society (Breiding and Lange 1996, 290-292).

Regarding rights and duties, it listed inalienable first-generation civil rights almost no different from Jellinek's draft, including the hidden limitation in gender equality. It also listed a group of public duties that reflected the harsh environment and Christian ideologies, such as duties to operate charity activities, join volunteer works, farm on their land, work for public interests, educate children and themselves, loyal to the constitutional spirits, and treat rights of others like their own (Breiding and Lange 1996, 293). Furthermore, a comprehensive power balance was designed to prevent tyranny of the majority for protecting minorities in state organizations. They added a public-elected state president as the head of the state, a minister-president as the head of the government, a state supreme court, and both a house of the senate and a house of representatives in the state parliament. In their visions, the house of senate would serve as an expert committee that consolidated with clergies, intellectuals, and others appointed by the state president. (Breiding and Lange 1996, 293-296).

The draft's final section aimed to justify their emphasis on a democratically constitutional order. It referred to pre-state civil rights based on natural law, emphasizing that such an order's purpose was not merely to protect interests but to actualize the laws. It argued that even an actual totalitarian democracy, where state power represents the majority's will, is still a threat to genuine freedom as it lacks the necessary organizational elements for a well-structured formation. They should be established from the outset on a democratic foundation, as attempting to create them later would be nearly impossible. Therefore, such a duty was laid under the ongoing constitution-making process. Establishing the second house in the state parliament and the state president's office became necessary to build a legal structure and protect minorities. An ideal balance of power was based on the interactions between the two houses, their power to oppose the executive branch, as well as a politically neutral state president to limit the minister-president daily and keep the public authority during crises (Breiding and Lange 1996, 297-300).

Moreover, the risks posed by mobilized masses could not be underestimated, particularly in the current environment. These dangers were believed to stem from the anonymity and individualism prevalent in modern urban society. Therefore, Christian education was seen as a defensive democracy mechanism in transforming individuals into responsible thinkers, preventing manipulation by those seeking to overthrow the constitutional order. Historical lessons from the defeated National Socialist movement served as a cautionary example, as did the potential for future communist movements.

The second draft of the CDU was written by Karl Kanka with 34 articles that covered the most critical fields. It began with a general equality clause of the civil rights section that guaranteed equal protection in birth, nationality, race, class, and gender, except for “special regulations” in family and marriage laws. The following civil rights set a series of protection in lives, health, “integrity of bodies and souls,” individual freedom, commerce and professions, religions and their actions, speech, assembly, and privacy. Surprisingly, it authorized the state to actively protect such rights, which hinted at a welfare state system. Article 11 provided an additional guarantee for private ownership of properties and civil rights, except for abusing them. It also legalized state supervision or collective ownership for necessary businesses after reasonable remedies. (Breiding and Lange 1996, 311-312).

Kanka’s state organizations followed the CDU’s power balance by creating the state president and a two-house state parliament. The differences were that the senate was renamed to “the state council” (*Staatrat*) and consisted of leaders from independent cities, churches, labor unions, commerce, and universities. The draft also maintained a comparatively neutral tone in state-church relations by only referencing it to education issues, which must be “full of Christian spirit.” The amendment-making procedure was de facto invalid by asking for a two-thirds majority quorum in the parliament and unanimity in the state council. It also pointed out the super-constitutionality of the international orders, MG orders, and laws of future Germany (Breiding and Lange 1996, 313-318).

Although the author and specific production date of the Wiesbaden Design were unknown, it became the core negotiation basis of the CDU delegate group in the State Constitutional Advisory Assembly in August 1946 and was most likely based on drafts of Königstein and Karl Kanka. The design consisted of 69 brief articles that covered civil rights and duties, state organizations and duties, state and churches, and a conclusion (Will 2009, 226, 238).

The Wiesbaden Design began with an ambitious and possibly pessimistic preamble, in which the highest goal of all politics, at least in the CDU members' eyes, was to realize the Kingdom of God on Earth (*das Reich Gottes auf Erden*) through weak mortals' infinite approximation. Therefore, a group of guarantees was listed to protect equality, lives, honors, health, freedom to action, faith, assembly, associate, privacy, and freedoms to settle and work. Like the SPD's drafts, the CDU members also realized the difficulties by adding equal protection between rich and poor, dignity at work, and social welfare for unemployment. On the other hand, Article 15 stipulated that protections related to life, honor, health, and dignity could be invalidated by the judicial branch as punishment for crimes, implying that the death penalty was permissible (Breiding and Lange 1996, 300-302).

The Wiesbaden Design had the same separation of powers as other CDU drafts. The only difference from other CDU drafts was that the senate-house (*Landesrate*) was divided into the economic and culture committees with total of thirty members from city governments, commerce, churches, and universities. It did not explicitly refuse the concept of collective industries by allowing the state to establish them under the current unique circumstances and legal regulations with proper compensation, possibly due to the harsh environment and room for negotiation with the SPD. Furthermore, it was much more realistic than the Königstein Draft on religious issues by stating that schools should provide optional religious education, and both churches and the state had a duty to maintain peace in the communities (Breiding and Lange 1996, 307-309; Will 2009, 230).

Similar to Kanka's draft, the Wiesbaden Design also established an amendment procedure requiring a two-thirds vote in the representatives and unanimous approval in the senate. While the CDU's drafts didn't explicitly entrench articles like the SPD, the stringent amendment process made such changes virtually impossible, which safeguarded the inviolability of the constitutional order. In terms of defense mechanisms, it advocated using the death penalty for anti-constitutional actions and called for a public duty to actively oppose authorities if the constitution were overthrown, implying the right to revolution (Breiding and Lange 1996, 317, 309).

4.1.3 The Positions of the Communist Party (KPD) and the Liberal Democratic Party (LDP)

Due to the size of the parties and strict timeline resulting in lack of preparations, the German Communist Party (KPD) and the Liberal Democratic Party in Hesse (LDP) did not have much fruitfully organized thoughts regarding the future state constitution similar to the SPD and CDU. Still, they still held unique positions and ideas that opposed each other during the State Constitutional Advisory Assembly, which could be traced from their documents.

The KPD generally held an opposing viewpoint regarding creating the Hessian constitution, possibly due to the lack of personnel and the LDP's supporting position. The party contended that such a move was premature, citing the limited independence under military occupation, the lack of political maturity among the parties and the people, and potential threats to German unification, jeopardizing their plan for building a total democratic regime. On the other hand, however, they did passively participate in the State Constitutional Advisory Assembly, asserting that they would vote in favor of a state constitution if certain conditions were met, which listed in their documents, including "The Open Letter from the KPD on the Election of the Constituent Assembly" (Will 2009, 240).

KPD's fundamental principles were German unification, total democracy, legal and social equality of people, and protections in ownership and democracy. German unification in the future was the priority of all matters. The state constitution must clarify that Hesse was part of Germany, and the legal unity should be based on national laws. The people should control all authorities entirely, so any power balance to prevent majority tyranny, such as a two-house parliament and a state president, was unacceptable. It also means that the people would have the freedom to decide the ruling system they pleased--possibly providing room for a future communist regime. They asked for entrenched civil rights as applicable laws based on total equality by prohibiting privileges of judges and civil servants, exercising complete separation between state and church, and guaranteeing economic and social protections by providing social welfare and dignity at work. Surprisingly, the party supported the protections of private ownership and democracy, which socialized private corporations based on the "absolute necessity of social interests" and proper compensation, as well as a public duty of all citizens to recover the constitutional order by every means necessary during an emergency also needed to be secure (Breiding and Lange 1996, 356-368).

In contrast, the LDP strongly supported the constitute process. The most influential draft in the party was written by August Martin Euler, the founder and General Secretary of LDP in Hesse, as well as a prominent member of the State Constitutional Advisory Assembly. He presented it as a party's quasi-official proposal on August 5 by combining the Preparatory Committee's final draft with few additional modifications. It followed the LDP's economic liberalism by guaranteeing rights in inherited properties, economic freedom, and protection of the middle class, and it also prohibited arbitrary strikes and greatly limited collective ownership practices. The solutions to current difficulties were provided by supporting families with multiple children, war and tyranny victims, and DPs and refugees from the East (Will 2009, 246; Breiding and Lange 1996, 377-378).

The balance of power differed from the CDU by introducing a powerful senate without a state president. Like the Königstein Draft, the draft emphasized Christianity's leadership in society. The limitation on keeping churches away from state issues was complemented by keeping the state from religious issues. The tolerant education at schools was supplemented with a special class in every subject that introduced the "religious and spiritual content of Christianity and its significance to the Western mankind's development" (Breding and Lange 1996, 378-383).

4.1.4 Conclusion

Regarding the positions of the four parties, a prominent detail was their unanimous agreement on using defensive democracy to prevent another radical political party—even including the KPD, the potential democratic enemy in Popper's theory. According to the documents, the four parties were all severely concerned about the harsh living conditions of people from the lack of necessities and the devastated economy in the postwar period. These concerns represented their commitment to serve the public. Based on the Weimar experience, this also alludes to an underlying apprehension regarding another anti-democratic faction from seizing public authority in Germany.

The four parties held different positions regarding the methods for building the system. The SPD and KPD believed that defending democracy should be based on a full democracy and a solid economic and social equality foundation due to the people's difficult living conditions. The CDU and LDP, the details might vary, argued that a balance of power within the public authorities to prevent the majority's tyranny with additional Christian education would solve the issues of possible anti-constitutional uprising in the future. A noticeable detail was that they agreed with using industrial socialization under the harsh environment. Even the LDP did not entirely exclude it as an opinion despite making it too difficult to exercise in Euler's draft.

4.2 The First Reading of the Constitutional Committee between August 5 and 6 in 1946

On July 15, 1946, 84 of 90 elected delegates assembled at the first meeting of the State Constitutional Advisory Assembly in Wiesbaden, attended by Colonel Newman representing OMGGH, Minister-President Geiler, and his cabinet. Postwar material shortages led to difficulties; Wiesbaden City Palace, the parliament's official location, failed to rebuild on time, requiring it to convene in a school auditorium. While OMGGH additionally offered the Taunus Hotel for meetings and accommodation, the delegates had to bring their bedsheets to stay (Will 2009, 276-277).

Even though difficulties existed, many delegates worked passionately in the constituting and temporary legislative institution. The Constitutional Committee was the most influential of the eleven committees, and its members would repeatedly appear in following processes.¹⁴ While OMGUS set a tight schedule, the actual proceedings of the Constitutional Committee faced delay nearly a month after the opening ceremony. During the first reading on August 5 and 6, the four parties, ordered by the number of seats they held in the assembly, adhered to legislative traditions to delegate a representative presenting position daily, and the state delegate made the last speech (Will 2009, 282). This occasion marked the first time these parties directly confronted each other and highlighted their shared focus on the reality and strategies for maintaining a stable system.

¹⁴ The SPD framers were Bergsträsser, Caspary, Elisabeth Selbert, Ludwig Metzger, Willi Wittrock, Ludwig Richter, Rudolf Freidhof, Erich Altwein, Martin Nischalke, Fritz Precht, Heinrich Zinnkann, Christian Stock, and Albert Wagner. The CDU were Heinrich von Brentano, Erwin Stein, Georg Stieler, Cuno Raabe, Erich Köhler, Joseph Wagenbach, Walter Jansen, Karl Joseph Schlitt, Richard Graf Matuschka, and Jakob Husch. The KPD were Leo Bauer, Karl Wilmann, and Walter Fisch. Heinrich Rademacher and Wilhelm Feutner replaced Wilmann and Fisch after the first reading. The LDP were Euler, Ernst Landgrebe, and Karl Theodor Bleek Martin Will, *Die Entstehung der Verfassung des Landes Hessen von 1946*, (Berlin: Mohr Siebeck, 2009), 280,

On August 5, Wilhelm Knothe, the SPD chairman in Hesse and of the party group in the assembly (though not a committee member), opened his speech by contrasting the bourgeoisie's failures with the SPD's honorable strides towards a socialist future. He argued that the unlimited tolerance to reactionaries led to the Weimar's collapse, so anti-democratic judges shall not return, and large corporations should be under collective ownership. He expressed discontent with the conditions by reporting the dire straits of 22,000 elementary students in Mannheimer: over three-quarters had no breakfast or were inadequately fed, over half had one pair of shoes, and a quarter had one outfit. He publicly appealed to women and mothers worldwide to wake up their consciences to the suffering children because they were innocent of the Nazi's crimes, especially since many of their parents were underground resistance fighters. He also asked the committee to build a new social welfare system and a humane and peaceful education to minimize the sense of revenge and legally clarify state-church relations, although he did not give further information (Breding and Lange 1996, 413-423).

Köhler, the CDU leader in the assembly and the committee, took the floor after Knothe and began by listing the crises in food and housing, the economy, and conditions in POWs, DPs, and teenagers. However, he argued, these painful issues from the extinct disastrous regime proved the necessity of a constitution as the fundamental democratic tool. Since Christianity was the foundation of Western laws and liberties, a constitution must recognize God-human relations in a federal system with legal equality between majority and minority to oppose total democracy and state-church separation. Köhler focused on equal political participation of employers and employees in a bicameral state parliament and sharing executive powers between a state president and a minister-president. The state and churches must become mutual support friends, and education issues should be based on parents' opinions. Ultimately, Köhler asked for support from his SPD colleagues regarding his demands. (Breding and Lange 1996, 423-434).

Bauer, the most active KPD delegate on the committee, stressed that foreign powers, not the Germans, had conquered the Nazis. Given this context, he questioned the purpose of drafting a constitution, arguing that it could not guarantee a future, civil rights would pale under the military occupiers, and solving the current toxic political environment should be the priority. Bauer outlined the KPD's demands for German unification, practical civil rights with full gender equality, and a strict separation between state and church. He dismissed the CDU's concept of power balance, arguing that extra bureaucracy would hinder decision-making in emergencies, and expressed support for a strong, unicameral parliament. (Breiding and Lange 1996, 434-446).

Euler's (LDP) speech, marked by its polemical points hinting that both left and right wings posed equal threats in totalitarianism, was interrupted by catcalls and jeers from the SPD and KPD. Despite that, he proposed solutions to the Weimar Constitution's flaws by rebuilding a constitutional democracy by recovering conscience. He underscored Christian education's role in building the moral, spiritual, and ethical standards of the next generations. He also contradicted Bauer's skepticism by pointing out that creating a constitution with civil rights under the current circumstance was necessary for rebuilding the nation's conscience and serving the purpose of making others realize Germany's change in reality (Breiding and Lange 1996, 446-455).

The meeting on August 6 moved to interparty debates. Bergsträsser of the SPD first countered Bauer by indicating that the constituting process was an opportunity for democratization and further capacities of self-governance because the MG would not actively join the ongoing transformation from a caretaker to a parliamentary democracy. He criticized the CDU and LDP's demands that a state president would potentially threaten to reunite Germany and a senator chamber would be a reactionary elite club built by anti-parliamentary amateurish action, which balance of power was to form a state by allowing two locomotives to collide together (Breiding and Lange 1996, 455-459).

Bergsträsser (SPD) stressed industrial socialization but opposed state capitalism to prevent a de facto dictatorship from monopolizing political and economic powers. Hence, he asked to find a new collective ownership for public interest. Although using education to defend democracy was advisable, teaching tolerance instead of religion could be the best choice. In addition, He argued that a state-church separation would benefit both sides, and he promised the CDU and LDP that the left wing never be willing to repeat French mistakes in 1905 by using harassment to separate the state and churches. Ultimately, he questioned Bauer's willingness to vote for a constitution if it fits the KPD standard and pointed out that the SPD would negotiate with the CDU to achieve a constructive agreement (Breding and Lange 1996, 455-464).

Kanka (CDU) began his speech by thanking Bergsträsser's willingness to compromise and moved on to three key topics: the state's form, duties, and church relations. According to Weimar's failures, he emphasized that creating a state president and a bicameral parliament would stop a political coalition dictatorship in a unicameral parliament. He refuted arguments about additional spending and bureaucracy by indicating the expensive Nazi regime and dismissing the legislative urgency. In response to Bergsträsser, he argued that no one claimed the United States and Switzerland, two nations with senate houses, were not democratic, and a unicameral parliament could not represent everyone: many people never participate in elections (Breding and Lange 1996, 465-468).

Therefore, Kanka stressed creating a bicameral parliament in which the second chamber would support democracy by consolidating factions outside political parties, such as labor unions and industrial associations. He agreed with the SPD's idea of industrial socialization and anti-state capitalism and pleaded for trusted cooperation between the state and churches on moral, spiritual, and psychological issues, as well as the right for parents to decide on children's education. Furthermore, he asked for the right to revolution to defend democracy (Breding and Lange 1996, 468-472).

Krüger, a KPD member outside the committee, began with a sharp statement: Capitalism repeatedly dragged German people into tragedies, but those main culprits still sit in the industrial meeting rooms and play politics (Breding and Lange 1996, 472-473). Therefore, the majority shall have the right to make workplace decisions to prevent economic crises and war production and guarantee for regulating income and price. He answered Bergsträsser's question that the KPD would vote in favor of any progressive constitution that would not interfere with the Reich reunification and contain a clause to attack anti-democratic enemies by any means necessary. Unsurprisingly, he denied the idea of a state president and the second chamber because many elites had controversial pasts, and parties always chose their best candidates to serve in the parliament. Instead, he called for women's rights by asking for equal pay for the same work (Breding and Lange 1996, 472-476).

Bleek, the LDP Mayor of Marburg, announced that his party would focus on guaranteeing individual freedom and their relationship with the state. In his description, the state's role was to serve humans and ensure no one could abuse freedom to gag freedom of others. The state could not address people's metaphysical needs, and churches should abstain from state matters. However, given Germany's historical and cultural context, achieving a complete state-church separation akin to the United States is unattainable. Bleek used Bergsträsser's locomotives metaphor by rhetorically asking him if he was willing to sit in a train without brakes. The second chamber might not be reactionary. Many democratic elites could have served but were blocked from seats in the unicameral parliament because they did not fit with the parties. He denied the CDU's proposal for a state president because they never needed it since there would be no diplomatic missions. He criticized the Preparatory Committee draft's Article 21, claiming it legalized involuntary servitude. Lastly, Bleek presented discontent by satirizing that although civil rights would not limit OMGUS, they would be precious enough by limiting German police (Breding and Lange 1996, 476-480).

The first reading ended with a speech by Hermann Brill, the State Secretary of Greater Hesse, for responding and supplying the delegate's viewpoints from the perspective of the public authority. He first confirmed the constituting process's necessity by describing the current dual authority between occupiers and occupied people, so state constitutions were essential to restore a federal Germany. He addressed hiding discontent to the MG in the assembly by citing examples emphasizing their greater respect for civil rights compared to the Third Reich. Therefore, instead of simply listing rights as legal principles like Weimar's theories did, framers should draft them as practical laws that directly limit the three branches to protect democracy (Breding and Lange 1996, 481-483).

Brill began his opinions on the heated question in state organizations by criticizing the idea of viewing majority democracy in a unicameral legislature as dictatorship by citing the power of opposite parties, legal system, and civil rights. Although he refused to take a stand about the second chamber, he opposed any attempt to organize it along the lines of the estates. A chamber that distributed seats between clergy, mayors, industrial leaders, and academic elites could make people associate with the Estates General before the French Revolution. Furthermore, he came up with a point neglected in the meetings: whether it was necessary to include the structure of political parties in the constitution or the electoral law. The opinion that parties could not represent all forces was possibly due to wrong organizing and could be corrected through legislative measures. Lastly, Brill pleased the delegates to focus on drafting a constitution that would be accepted by most people and OMGUS, hinting at the need for interparty political compromise since no political wing could control the absolute majority in the assembly or public (Breding and Lange 1996, 483-485).

4.3 The Meaning of Standpoints of the Four Political Parties in Defensive Democracy

The constitutional drafts within the four parties and debates during the Constitutional Committee's first reading on defensive democracy highlighted a unanimous agreement on its use to prevent the emergence of another radical anti-democratic faction in Germany. However, the reason behind the sense was considerably more complex than reflecting the failures of the Weimar Republic. According to the materials, the harsh living conditions of ordinary people led to deep concerns among framers regarding the clear and present danger of another radical anti-democratic political faction rising by inciting public dissatisfaction. They were possibly also fearing that such an incident might lead to unpredictable reactions from the military occupiers. Therefore, it was incomplete to argue that the early exercises of defensive democracy in Germany were only based on historical issues.

On the other hand, although all four parties reached a consensus, they all had different focus points based on their political ideologies. The SPD emphasized the removal of anti-democratic personnel from public offices, industrial socialization, a new social welfare system, and new education to protect a democratic system by reducing resentment among the public under the current situation. The CDU focused on establishing Christian education in public and religious schools and a balance of power system by inculcating forgiveness in people's minds and preventing the tyranny of the majority to protect democracy. The KPD questioned the purpose of creating a constitution under the military occupation but was still willing to vote in favor of a constitution if it fit with their requirements for total democratic equality, and the LDP agreed with Christian education and introduced their version of power balance by creating a senate house but no office of state president. Consequently, the four parties in the Constitution Committee were broadly divided into two factions: the left-wing comprised of the SPD and KPD, and the right-wing consisting of the CDU and LDP.

Chapter 5

Debates, Failed Negotiations, Compromise, and Final Approval

On October 1, 1946, the Constitutional Committee Chairman Ludwig Bergsträsser (SPD) represented the SPD and CDU parties to introduce the constitutional compromise they made on September 30 to the plenary session of the State Constitutional Advisory Assembly, he said:

Both parliamentary groups attach far-reaching significance to this result in terms of state policy, not only concerning the state order in the future and cooperation in the state of Hesse but also for the reconstruction of an all-German republic, which should also be supported by the consent of the overwhelming majority of the German people. The parliamentary groups are firmly convinced that the Hessian people would understand and approve the decision as the expression of a common will to take responsibility and create the basis for a happy future (Breding and Lange 1996, 1002).

The official constituent process was divided into three stages: the first, second, and third readings. During the first reading, which took place on August 5 and 6, 1946, the four parties outlined their positions and defended them against objections. The second reading encompassed the actual drafting process, drawing from debates in the Constitutional Committee and the draft of the Constitutional Preparatory Committee (VV). This draft then underwent primary approval in a full assembly meeting, after which it would be sent to the OMGUS headquarters for further evaluation. This second stage was set to conclude at the beginning of October. The third reading, which marked the final approval process, involved voting in the State Constitutional Advisory Assembly, followed by a public referendum. This took place on October 29 and December 1. However, the second reading was marred by conflicts over political structures, industrial socialization, state-church relations, and educational issues. These disagreements led to the breakdown of initial negotiations, a sequence of combat votes, and a last-minute compromise on September 30.

In addition, since the assembly began, OMGUS started to pay close attention to their efforts but kept a proper distance to secure a German-made democratic constitution being produced. Clay limited who could contact the framers and communication methods to prevent misunderstanding. He explicitly authorized Keith Dayton, Harold W. Landin, and Samuel L. Wahrhaftig to serve them as outside advisors in an informal and friendly environment rather than representatives of the occupying force (Will 2009, 268-274). However, the conflict between the committee and OMGUS still occurred during the approval process, especially around Clay's criticism of Article 41 due to the cultural difference, the socialization clause in the mining, iron and steel sectors, and energy and transportation. As a result, two conflicts occurred during the second reading of the Constitutional Committee, which made it the most dramatic stage in the Hessian constituent process between August and November for the year 1946: The ideological disputes between left and right wings and the cultural argument between foreign military occupiers and local occupied civilians.

This chapter focuses on the legislative actions during the second and third readings related to the articles of defensive democracy, civil rights, and the major controversial issues. While the committee meetings achieved consensus on less controversial topics, the primary disputes remained stagnant. This led to the creation of the Committee of Seven, a small group to deal with interparty negotiations. However, the final breakdown led to confrontations in which the left-wing tried to use combat votes to bulldoze beneficial proposals. As a result, the threat of CDU and OMGUS to delay the democratization and self-determination forced the SPD back to the table for the final compromise on September 30, the last day to submit the draft. Another contested issue was the cultural difference between the Hessian framers and Clay, which led to a dispute on industrial socialization that nearly bred a political disaster for both sides. Fortunately, the efforts of American liaisons successfully mediated this issue, paving the way for the enactment of the Hessian Constitution.

5.1 Debates, Negotiations, and Breakdown

The second reading in the Constitutional Committee faced difficulties in moving forward because of the different understanding of defending a democracy between the left and right wings. The left-wing faction, including the SPD and the KPD, focused mainly on using political and economic equality and tolerance education to provide additional protection for a fully democratic system. The right-wing faction, comprised of the CDU and LDP, argued a balance of power in the three branches of government, prohibiting the tyranny of the majority and emphasizing the role of Christianity would protect the future constitutional order from being sabotaged by mobs led by anti-democratic instigators.

Under the circumstances, framers passed many less debatable articles during the committee meetings from August 7 to 21, but those controversial topics, such as a second chamber, industrial socialization, social rights and duties, state-church relations, and educational issues, showed no sign of progress. Therefore, a small committee, known as the Committee of Seven, was established based on a proposal of Köhler (CDU) that took the responsibility of actual drafting. The smaller committee, with only seven delegates, made many compromises between the left and right regarding the socialization issues and economic and social rights in the first couple of meetings. The relegated Constitutional Committee increasingly became a façade institution for ceremonial duties.

The early cooperation attempt came to a bitter end due to the lack of agreement on the second chamber issue, the public criticism of Euler (LDP) on September 17, and the drama between the left and right in voting for the second chamber on the 23. Furthermore, the tight schedule of OMGUS became increasingly challenging for the framers. As a result, the Committee of Seven was closed with little achievement. The hostility within the committee led the left wing to give up any cooperation attempt with the right wing and decided to ram the votes for passing the bills.

5.1.1 The First Six Meetings of the Constitutional Committee from August 7 to 21

The first six meetings of the Constitutional Committee reflected the similarities and differences between Hesse's four major political parties. On the one hand, the framers focused on using VV and the CDU's Wiesbaden Design as the basis for further discussing those concepts with less controversial issues that have been written down and making decisions on whether they need to rewrite, remove, or pass. On the other hand, the critical topics, such as industrial socialization and governmental structures, failed to move forward from the first reading because neither party was willing to take one step back. As a result, the slow process led to a proposal from Köhler (CDU) during the committee meeting on August 21 to create a smaller committee for further negotiations and compromises, which eventually became the Committee of Seven.

On the evening of August 6, 1946, OMGUS liaisons Dayton, Landin, and Wahrhaftig met with the delegates to the Constituent Assembly for the first time, leaving advice or mild concerns. In the following days, they would meet with the assembly delegates at least once weekly to receive the latest progress and more often as the constituent process drew close. At the meetings, intimate MG officials always prepared schnapps, cigarettes, coffee, and sandwiches, which made many delegates grateful and willing to accept MG advice when they generally suffered from a lack of necessities (Will 2009, 273, 485). The second reading officially began on the next day and centered around defining Hesse. After facing opposition of the MG, the committee decided to exclude the term "Reich" due to its imperialist meaning. Therefore, Hesse was recharacterized as a segment of the German Republic, a definition enshrined in Article 64 of the Hessian Constitution (HV). Wittrocks (SPD) asked to label Hesse from a "parliamentary democratic republic" to a "parliamentary socialist democratic republic," which spurred extensive debates and eventually tabled the discussion until debates on economic and social matters commenced (Breding and Lange 1996, 486-492).

The second committee meeting on August 8 mainly passed the super constitutionality of international laws and state powers, which became Articles 67, 68, and 70 of HV (Breiding and Lange 1996, 493-501). However, the third meeting on August 14 was the first time ideological differences between the left and right wings of the committee emerged. The drafting process revived intense interparty debates without progressing from the first reading. Consequently, the discussions on governmental structures remained largely stagnant and failed to move forward, with only Bergsträsser (SPD), chairman of the committee, hinting at a potential compromise on a democratic second chamber towards the debate's conclusion (Breiding and Lange 1996, 521-536).

Since the debates on a second chamber ended without a result, the committee moved to the topic of civil rights for the rest of the day. After Kanka (CDU) criticized the lengthy civil rights in VV and supported by Caspary (SPD), the committee agreed to bring civil rights articles from VV to compare the CDU's Wiesbaden Design for the final decision (Will 2009, 327-329). Several articles regarding individual rights were passed without too many changes. The most significant change was that the equality clause became Article 1 of HV by removing the discriminate term "public life" (*öffentlichen Leben*) based on the opposition from Bauer (KPD) and the MG liaisons. However, articles of social and economic rights were tabled (Breiding and Lange 1996, 537-539).

On August 16, the framers discussed civil rights limitation due to a proposal of Caspary (SPD) that entrenched civil rights as unchangeable active laws to regulate the three branches of government and limited the range of application to only those who respect the constitution, hinting Popper's paradox of tolerance. They also passed Euler's (LDP) idea of limiting rights to assembly, organizing, and speech and leaving wordings to the drafting commission after debating a balance between abusing civil rights for anti-democracy and preventing dictatorship (Breiding and Lange 1996, 539-568).

The fifth committee meeting on August 20 worked on civil rights limitation and social rights. The entrenched clause about civil rights' immutable limitation towards the entire government was passed as Article 26 of HV, becoming the most crucial article by officially moving away from the Weimar style of using civil rights as principles without actual limitation. After the committee passed social rights articles protecting laborers, working conditions, women, and children, Bauer (KPD) asked to prohibit employers from building economic associations, which sparked opposition to the CDU and led to industrial socialization (Breiding and Lange 1996, 568-573, 595-614).

On August 21, Köhler (CDU) pointed out similarities and differences between CDU and SPD's concepts. Corporations that could lead to monopolies should be supervised, but anything further to state capitalism was not allowed. Energy, water, big banks, transportation, coal, steel, and insurance industries were supervised, but small banks, building materials, chemical and pharmaceutical industries, cinemas, and broadcasting industries were excluded. After debates between Bauer and Euler (LDP), Caspary (SPD) responded to Köhler that the left wing's appeal to industrial socialization was to solve current issues and abuse economic freedom in capitalist history. Collective ownership, a concept between ineffective state supervision and dictator state capitalism already tested in the French energy industry, became the perfect choice. (Breiding and Lange 1996, 614-625).

Köhler's rebuttal speech expressed great concern about stalled progress by vividly pointing out that a wall was growing on top of the ideological trenches between the parties. Even before the controversial topics of education and state-church relations, the negotiation was in danger, so making critical compromises became the priority. He proposed forming a smaller committee to reach partial agreements, leading to cautious approval from Bergsträsser (SPD) (Breiding and Lange 1996, 625-639). The lack of agreement on significant differences led to the creation of the Seven Committee, which took over the actual drafting process only a couple of weeks after the second reading began.

5.1.2 The Committee of Seven and the Negotiation Breakdown

The Committee of Seven (*Siebener-Ausschuß*) was responsible for reaching agreements on controversial topics between the four parties in six meetings from August 27 to September 20, 1946. Meanwhile, the Constitutional Committee gradually focused on less controversial topics or ritual duties, such as civil rights and public presentations. However, the efforts broke on September 23 due to the stalled discussion on a second chamber, the LDP's public opposition, and the confrontation.

The first meeting of the Committee of Seven occurred as early as August 27, and the members agreed to create a state-wide social insurance system and guarantee the right to association for everyone, except for economic concentration or abuse of economic powers. Although the right to strike within legal frameworks was affirmed, framers shelved the topic due to a lack of agreement about the illegalization of lockouts. More importantly, the conferees reached a consensus to continue negotiations within the smaller circle after getting approval from the Constitutional Committee, which presented the Committee of Seven's value in reaching consensus (Will 2009, 357-358).

The eighth meeting of the Constitutional Committee was held on August 30 and only lasted an hour for defining duties of the Committee of Seven. All controversial topics would be debated within the Committee of Seven as well as consolidated rights of properties and heritages in the draft (Will 2009, 359-360). The actual discussion during the second reading was officially transferred to the Committee of Seven. On September 4, the Committee of Seven convened for industrial socialization issues. After a debate to put socializing properties under state supervision or collective ownership, Köhler (CDU) offered a compromised three-step policy: state supervision, administration, and collective ownership. Caspary (SPD) accepted additional things to the form of collective ownership but opposed the form of state supervision and administration becoming the rule. Instead, the only rule should be collective ownership (Breiding and Lange 1996, 641-648).

After Euler (LDP) claimed that industrial socialization would block German unification, Bauer (KPD) led the discussion back to compensation. As a result, Köhler (CDU), Caspary (SPD), and Kanka (CDU) agreed to define collective properties as people's properties, and it was submitted to the drafting committee (Breiding and Lange 1996, 648-651). Notice that Euler insisted on opposing it by arguing that socialization should only applied through legislation instead of a constitution, which would lead to his open criticism during a public presentation.

The next day, the ninth committee meeting of the Constitutional Committee was held under the advice of OMGUS, which served as a public show at the Wiesbaden opera house to demonstrate the process of drafting a democratic constitution for the people in Greater Hesse. Such a decision led to significant criticism of Bergsträsser in his diary (Will 2009, 364). It indicated that the committee had become a façade institution. The industrial socialization discussion continued during the Committee of Seven on September 10, when the SPD, KPD, and CDU made mutual compromises. The SPD agreed to use state supervision as a possible solution for those inappropriate industries for collective ownership and removed the building material industry and post offices from the list. The CDU agreed with the SPD and KPD in using collective ownership, replacing the word "may" with "must" and including railway and overhead lines into the catalog (Breiding and Lange 1996, 652-675).

The meeting also compromised on other vital issues. The SPD guaranteed the right to property in the constitutional text if it did not interfere with socialization or expropriation. The CDU agreed with land reform if it did not hinder production or lead to political abuse of ownership concentrations. The next meeting on September 12 began by reading and approving the drafting committee's articles about social rights, labor agreement, and compromises that were discussed previously (Breiding and Lange 1996, 676-680). The Committee of Seven successfully reached principal agreements on the core issues of the previously hotly disputed section on social and economic rights and duties.

During the meeting on September 13, the committee debated the second chamber. Köhler cleared that if the committee could make a deal to create the second chamber, then the CDU would be happy to compromise by giving up the request for a state president. Unfortunately, the proposal still faced opposition from the KPD, claiming the institution lacked rationality at the state level (Breiding and Lange 1996, 681-695). The September 13 meeting was a turning point from cooperation to the breakdown of negotiations.

The interparty conflict became public for the first time during the tenth meeting of the Constitutional Committee on September 17. A press conference presented the achievements of the Committee of Seven in social and economic rights and duties. Without any sign, Euler (LDP) openly attacked the deals between the SPD, KPD, and CDU in front of the press and public audiences by listing almost all compromises between the three parties, including social insurance, worker representatives, constitution-based socialization, supervision of banks and insurance companies, the right to strike, and the eight-hour day. Since they were duties of the Reich and many different systems existed in the American zone, he called the public to vote against the constitutional draft to protect German unification from threats. Although Euler's opposition did not prevent interparty compromises from passing during the meeting, Selbert's (SPD) proposal on a general statement for organizing the economy through socialist principle was tabled (Breiding and Lange 1996, 711-721).

Three days after the dramatic opposition, the Committee of Seven held the last meeting to discuss the second chamber issues, the educational system, and other topics, but none of them were resolved, rendering the committee useless. Even worse, tensions arose between the delegates since they needed to finish drafting on September 30 (Will 2009, 383-388). The cooperation breakdown forced delegates from left and right to seek other solutions to gain an advantage during the constitution making process since their colleagues from the other side were no longer trustworthy.

On September 23, 1946, the eleventh committee meeting began with Jellinek's attendance to advise on the state's definition, super-constitutionality of international laws, and individual liberties, most of which were accepted. The debates on industrial socialization in the afternoon heated the tension between the left and right wings. Caspary (SPD) proposed an edited version of Selbert's proposal regarding the socializing statement, but Köhler (CDU) rejected it. Furthermore, he rejected an agreed compromise of industrial socialization. By bringing an achieved deal back to the table, Bergsträsser (SPD) viewed the actions as discreditable behavior, immediately leading to a counterstrike from the left-wing delegates by asking to delete the entire compromise in financial articles regarding the veto power of the minister-president and financial minister when budget overrun (Breiding and Lange 1996, 722-727).

The tension between the two sides became a total confrontation when the discussion went back to the second chamber. After summarizing arguments from both sides in the Committee of Seven, Bergsträsser asked for a vote on the bicameral system. If the voting process had begun, the result would have been a rejection since the leftists held a majority. However, Köhler shouted, "Agreed!" (*Einverstanden!*) and other right-wing members did not question his action. Without a doubt, the proposal was rejected by twelve negative votes against nine (Breiding and Lange 1996, 727-728). After the vote, Köhler asked for a break based on the reason that his faction had not prepared for it, and he came back as speaker of the CDU and LDP to strongly criticize it as the tyranny of the majority to ram over minorities, which shifted the topic to attack Bergsträsser and other left-wing framers. (Will 2009, 384-395). Predictably, the rest of the meeting was filled with recriminations without progressive debates (Breiding and Lange 1996, 728-735). Any interparty cooperation seemed to become impossible.

5.2 The Combat Vote, the September 30 Compromise, and Approvals

The drama of LDP during the final meeting and of the Committee of Seven led to a confrontation between the left and right wings, which the left decided to ram the proposals through based on their minor advantages in delegate seats and public votes. Historian Stephanie Zibell named the three-day voting procedure from September 24 to 26 as a “combat vote” (Kampfabstimmung) due to the increasing abstentions from the CDU delegates (Will 2009, 397). The combat votes lasted only a short time because SPD and CDU were able to reach a compromise on the last day for submitting the draft to OMGUS and the Constitutional Assembly.

The critical compromise settled the controversial topics of social and economic rights and duties, state organizations, educational issues, and state-church relations. Industrial socialization, social insurance, and the right to strike were conditionally approved. It agreed to leave the possibility of a civil servant system and create a second chamber. Religious schools and supporting students at all levels of education were conditionally allowed. The churches’ independence was guaranteed by prohibiting the state from intervening (Breiding and Lange 1996, 964-967).

In spite of this progress, Clay questioned Article 41 of HV, the industrial socialization clause, and asked for change. It led to a conflict between the Constitutional Assembly and OMGUS and almost ended in a disaster during the circumstance when another wave of conflict occurred between OMGUS and USFET. After a series of negotiations between MG liaisons and framers, Clay and the assembly agreed to submit the article independently for the public referendum, leading to the final voting process for approval of the constitution. The period of the combat vote, compromise, and approval led to three questions: the reasons for settling down interparty hostilities in four days, the interactions between occupiers and occupied people about Article 41, and the different views and publicities of the four parties to the final constitutional draft, and the result of the vote.

5.2.1 The Combat Vote

After the meeting between the MG and the framers on September 10, OMGUS headquarters posted a new schedule on 17 that the Constitutional Committee would submit their draft by September 30 to the Civil Administration Division of OMGGH so they could review and send it to the OMGUS headquarters for approval before October 10. The assembly and public referendum approvals would be by October 19, 1946 (Will 2009, 388-389). Such a tight schedule led the committee to hold meetings every day from September 24 to 26 for the remaining articles. However, the total attack on settled deals by the CDU led to the SPD and KPD using combat votes to ram through controversial topics. In addition, the time pressure and shared willingness of the left and right wings to recreate a democratic system helped them to exercise minimum cooperation even under the hostilities, leaving the possibility of cooperation open.

At the beginning of the twelfth committee meeting on September 24, Bergsträsser emphasized the tight schedule by reading a letter from Brill. With the second reading at the plenary session of the Constitutional Assembly set for September 26, he urged swift debates to vote to present a complete draft. Leveraging their numerical advantage, the left-wing framers aimed to force resolutions on unresolved issues (Will 2009, 397). The first combat vote was based on a proposal of Caspary (SPD) that the government could only take over its duties after the *Landtag* passed a special resolution for its confidence to protect democracy by giving more power to the legislative branch. It was rejected by the CDU and LDP but pushed through by the SPD and KPD in a combat vote with fifteenth to twelve votes and became Article 101 of HV (Breding and Lange 1996, 736-737).

The following two combat votes were issues of public referendum and prohibiting churches from interrupting them. Euler (LDP) strongly opposed the referendum by arguing it would make public legislative participation too often to attract the people and used by anti-democratic groups to incite the masses. In contrast the SPD and KPD were staunch proponents, viewing it as a means for citizens to exert direct influence over the state. Caspary (SPD) asked that a legislative referendum hold the power to dissolve the *Landtag* automatically when it passed a bill previously denied by the legislative branch. The referendum principle was passed by a sixteen to twelve vote for drafting. Kanka (CDU) asked to delete the prohibition of pastoral interference from the electoral invalidation but was rejected by the SPD and KPD by fifteen to eleven votes (Breiding and Lange 1996, 752-761).

Some interparty agreements were made on September 24. Both sides unanimously agreed to deprive the right to hold public offices from individuals of the ruling aristocratic houses of the German Reich, disregarding the issue of equal protection. The CDU, KPD, and LDP successfully protected the state government's right to call emergencies from Caspary's objection by pointing out the possibility of natural disaster emergencies. According to a proposal of Bauer (KPD), the complex rule of amendment-making process in VV that ruled for at least one two-thirds majority approval in the legal numbers of *Landtag* members and legal voters in referendum votes was replaced by two simple majority approvals. (Breiding and Lange 1996, 736-740).

On September 25, the most revolutionary action of the day was Bauer's (KPD) proposal to remove the German civil servant tradition from Hesse. Based on arguing the role of civil servants in destroying the Weimar Republic, he asked to replace civil servants entirely with "public employees" who shared social equality with working-class people. Such a proposal sparked a number of debates between two factions and within the left wing but eventually passed by a closely contested combat vote: eleven votes in favor and ten for denial. (Breiding and Lange 1996, 761-762; 788-801).

On the same day, the cooperation agreements between the left and right were made on civil rights limitation and independence from the judicial branch. Based on the concern of limiting civil rights too easily, Caspary went against a proposal of Bauer (KPD) for declaring an emergency by a simple majority in the *Landtag* and asked for a proposal that the state emergency could only be passed by over two-thirds of a quorum in the *Landtag*. The CDU and LDP asked for additional civil rights limitations in an emergency, from only press and assembly to general actions and mail privacy. As a result, the emergency clause was passed based on the SPD and CDU's concepts and became Article 125 (1) of HV (Breiding and Lange 1996, 762-764).

Bauer strongly opposed judicial independence by emphasizing it was one of the culprits for the rise of Hitler, ongoing judicial injustices, and the tortures he had suffered during the Third Reich. He asked to select judges from the *Landtag* delegates and eliminate any special privilege. During the lengthy debates between Bauer (KPD) and other framers, Raabs (CDU) brought a breakthrough by pointing out his experience of being removed from office in 1933 and imprisoned based on unjust arrest warrants. He agreed with Bauer's points about the judicial branch in Germany, which had been reactionary since 1918 and fully supported Nazism after 1933. However, he argued, if a necessary precaution needs to be taken to prevent the torments we had experienced from repeating, electing judges by a committee within the *Landtag* purely based on political considerations should be the last option since it would definitely shake the constitutional foundation. Establishing a committee under the Minister of Justice to cooperatively appoint judges would be the best solution. Bauer accepted the proposal, and it became the committee's resolution. After the debates regarding judicial review and OMGUS's requirement for guaranteeing individuals' right to seek remedy regarding civil rights, the state supreme court's concept was established, which would consist of eleven justices, including five professional justices and six members of the *Landtag* (Breiding and Lange 1996, 764-788).

At the meeting on September 26, the left-wing faction dominated discussions on social and economic rights, state-church relations, and education through combat votes. Instead of discussing articles in VV, economic and social issues were based on the compromises during the Committee of Seven, and most of them were passed during the voting procedures. Selbert's (SPD) statement in organizing an economy based on socialist principles was passed after replacing "socialist principles" with "accelerating public economy." More importantly, the compromise between the SPD and CDU regarding the range of industrial socialization was broken by adding large chemical industries to the list based on Bauer's proposal, which passed by the SPD and KPD's sixteen votes against eleven votes from the CDU and LDP (Breiding and Lange 1996, 803-808).

The topic of state and church relations from Articles 32 to 36 of VV witnessed increasing abstentions from the CDU. Although Stein held a speech describing the CDU's values and asking for state-church equality, churches' right to criticize the state, freedom of belief, and rights of parents, the following debates were based mainly on the proposals of the SPD and KPD and sometimes from the LDP. The CDU abstained whenever voting started, possibly because they believed they would undoubtedly lose the votes. Only a few from the CDU were accepted, such as associating churches, religious, and ideological communities, prohibiting forced participation, guaranteeing Sundays as a holiday, and allowing worship in hospitals and prisons. Under the circumstances, Köhler distinctly emphasized that the CDU's abstentions did not mean that such proposals had been passed with unanimous consent. (Breiding and Lange 1996, 808-817).

The CDU's passive stance continued during the debates on educational issues, to the point that it refused to join any discussion, leading the LDP to become the primary opponent of the SPD and KPD. Euler's (LDP) request to introduce the importance of Christian religious and spiritual values in the development of Western humanity sparked a heated debate (Breiding and Lange 1996, 817-818).

Bauer (KPD) contradicted the proposal by arguing that many moral concepts existed far earlier than Christianity and that the questionable term “Western humanity” might encourage a split between the Eastern and Western worlds. The LDP’s proposal to create Christian schools was defeated. Introducing Christian education to prevent revanchism among youth was replaced by the SPD style of tolerant education and honest historical narration (Breding and Lange 1996, 817-828).

Perhaps the sole topic that gained unanimous approval was the mechanism to protect the democratic constitutional system in the future. The CDU became more engaged and actively participated, which reflected that the defensive democracy concept was generally accepted. Articles 126 to 129 of VV set the direct protection clauses of the constitution, and most were accepted unanimously. Based on SPD’s request, the state constitutional court could deprive the civil rights of anti-democratic individuals. Von Brentano (CDU) re-edited that the right to file a complaint would be based on anti-constitutional actions instead of civil rights violations. The clause that set those guilty of an anti-constitutional coup to be held accountable was added with a formulation by Bauer that they would be regulated by law. Article 79 of VV prevented parliament members from abusing their right to press for publishing seditious information based on the Weimar Republic’s experience and Loewenstein’s papers. A modified version was adopted in response to Bauer’s criticism that it would endanger parliamentary immunity. (Breding and Lange 1996, 801-803, 828-832).

Clearly, the SPD and KPD gained great success in passing controversial articles based on their political opinions during the three days of combat votes, which led the CDU to become increasingly passive during the voting process. The number of abstentions in voting hinted that they might plan against the draft in the final referendum. Given the close poll of the two sides, there was a significant risk. If the CDU and LDP opposed the constitutional draft in the assembly and public referendum, the final approval was likely in jeopardy. This looming possibility paved the way for compromise.

5.2.2 The September 30 Compromise

By the end of the meeting on September 26, the Constitutional Committee's draft was near completion. As Will pointed out, it might be an overreach to suggest that the draft's entirety hinged on the three-day combative voting sessions. However, it was evident that the contentious topics were steered by the left wing's stances, leading to the CDU becoming progressively less engaged in the meetings (2009, 448-449). Under the circumstances the CDU prepared for a counter-measurement to threaten the majority back to the interparty negotiations, which was the Vollrads Constitutional Draft. Simultaneously, the stance of OMGUS on September 16 posed a real risk of postponing the return of sovereignty and self-governance. The combined pressures from the CDU and OMGUS ultimately compelled the SPD to pursue another round of bipartisan compromise with their primary political rival, leading to the compromise on September 30, 1946, the last day for submitting the draft.

The Vollrads Constitutional Draft was written by Kanka and Stein and submitted by Köhler to the fifth Constitutional Assembly on September 28, 1946, which planned to discuss the state election and voting laws. The Vollrads draft was more simplified than the committee's draft and copied most articles from the committee draft with only a few differences by completely leaving out the relationships between state, religious, and ideological groups, educational issues, and individual rights articles related to those topics (Will 2009, 449-452). If the CDU was genuinely willing to use the Vollrads draft to replace the complete committee draft, they should provide counter solutions against the resolutions of the SPD and KPD. Therefore, the CDU's incomplete draft was not a replacement for the committee draft but an attitude to resist the current committee. It also sent a message to the SPD and KPD that these blank articles were still negotiable. By doing so, the CDU opened the door to second cooperation.

The direction from OMGUS on September 16th added external pressure that intensified the stakes for the Constitutional Assembly. It pointed out that if the finished constitutional draft was rejected in the public referendum, the newly elected *Landtag* would be responsible for a new constituent process, which meant recovering democratization and self-determination in the state would be delayed due to the incomplete constituent. The process of drafting a constitution was not just a matter of internal political disagreements but also had implications for Hesse's path toward democratization and regaining sovereignty (Breiding and Lange 1996, 1061-1063). Mühlhausen argued that the threat of OMGUS was the primary cause of the following compromise (2006). Furthermore, the failed constitutional-making process in France, which was passed by the constituent institution but denied during the public referendum, was a living example of framers in Hesse (Will 2009, 453). In this context, the SPD, even with their majority, had to be cautious. While they might have had the votes to push through their vision of the constitution, the threat of rejection in the public referendum and the ensuing delays would have significant consequences. This situation forced the SPD to reconsider their stance and give more weight to the CDU's proposal.

During the Constitutional Assembly plenary meeting on September 28, when the CDU delegates asked the SPD for further negotiations, Bergsträsser indicated that he would be willing to engage in further discussions with the CDU but not with Köhler because of past events, the CDU would need to send other delegates to the meeting. The formal proposal of the CDU for another inter-party meeting between the CDU and the SPD was submitted on September 29, sending three delegates per party. An SPD document listed the possible compromise fields: civil rights, *Landtag* organizations, educational issues, and relationships between the state and churches. In order to prevent a democratic crisis, the document emphasized making a bilateral compromise for the current conditions in Hesse instead of the best theoretical solutions (Breiding and Lange 1996, 958-960).

The special negotiation meeting was held between the SPD and CDU on the morning of September 30, 1946, attended by three delegates per party, including Bergsträsser, Caspary, and Stock on the SPD side, as well as Köhler, Kanka, and Stieler on the CDU side. To prevent unexpected complications, all attended delegates agreed that there would be no meeting record but only publish an agreement that passed unanimously, and the two smaller parties, the KPD and LDP, would not be invited. They also agreed to launch a publicity campaign to support the constitution in the referendum should a final compromise be reached during the meeting (Will 2009, 455-456).

The final compromise protocol focused on social, economic, religious, and educational issues. A unified social insurance system was ensured within the social and economic domain. It shifted from a singular, collectively owned insurance provider to competition between collective and private companies. The right to strike was narrowed to permit only labor unions to declare strikes, so wildcat strikes were prohibited. The article on establishing public service organizations for the economy was removed, as was the explicit reference to entrepreneurs and their associations prohibiting economic freedom abuse. Finally, the large-scale chemical industry was excluded from the socialization list again, which primarily impacted the Merck Group since OMGUS had seized IG Farben's assets (Breiding and Lange 1996, 965; Will 2009, 457).

Regarding state-church relations, the article prohibiting forced participation was supplied with prohibiting interference with worship activities. The definition of religious and ideological groups was expanded with churches. The prohibition of religious groups from interfering with state issues was supplied with the prohibition of the state from interfering with churches' issues. The articles prohibiting the exercise of compulsion of conscience and electoral interference by pastors were deleted, as well as the possibility of taking legal action against religious committees before the state constitutional court (Breiding and Lange 1996, 965-966).

In the section on education, the public community school system was kept but supplemented with an additional text for further legislative actions to prevent schools from violating the religious and ideological principles that the legal guardians wanted the children to be educated. The CDU also realized its goal of authorizing private education institutions in the constitution. The right was to restore the conditions that had existed on 30 January 1933 and subsequently could be changed if most of the educators in the school so desired. It was intended to give parents in Hesse, where denominational schools were abolished by the National Socialist, especially in the district of Kassel, the chance to reestablish them, provided that this did not result in students at non-denominational schools being treated less favorably. Furthermore, forcing teachers to teach religious knowledge and stop missionary work was prohibited. The tuition would be free at all levels of educational institutions and except at universities (Breding and Lange 1996, 965-966).

Regarding the governmental structures, the two parties agreed to hint at recovering the civil servant tradition and establishing the second chamber. According to Bergsträsser (SPD), the traditional removal was a favorable surprise brought by the KPD, so he did not feel any loss for recovering it. Therefore, civil servant and public employee terms were removed from the draft to leave the possibility of continuing the tradition of professional civil service. (Will 2009, 460, 462). Although the creation of the second chamber failed to materialize, a clause in the transitional provision was added to allow a constitutional amendment to establish an additional institution based on democratic election. It was targeted at appeasing second chamber hard-liners in the CDU and saving the party's face in public on this issue (Breding and Lange 1996, 966-967; Will 2009, 460). The debates within the two parties on the same afternoon of the day eventually led to it being passed (Will 2009, 461).

During the October 1, 1946, assembly meeting, the KPD and LDP registered their objections towards the compromise. The KPD emerged as the most significant loser from this compromise since many of their key proposals were overturned the day before. Given this, it is understandable that Bauer delivered a particularly bitter speech opposing the agreement. He lambasted the two major parties, arguing they should bear responsibility for the stalled negotiations that had dragged on for weeks and explicitly condemned the SPD, accusing them of treachery due to profound compromises, which deviated the constituent process from its objectives. Therefore, the compromise was nothing less than a resounding victory for the CDU. While Euler (LDP) did not criticize the CDU as vehemently as Bauer did the SPD, he still disapproved of the compromise. He hinted at a betrayal, remarking that for the CDU, a Christian political party, to abandon their firm commitment to establishing Christian schools was a deplorable move. However, unlike the KPD, Euler represented his party and claimed that giving up a clear promise to build Christian schools would lead to the LDP's denial during the third reading and public referendum (Breding and Lange 1996, 1003-1009).

The compromise of September 30 between the SPD and CDU was a significant event during the constituent process. Based on the compromise, a constitutional draft emerged with the support of the two most important parties in the state, which had received 81.6 percent of the vote during the assembly election on June 30, 1946. The likelihood that the constitution would be approved in the assembly but rejected in the referendum was significantly reduced. Furthermore, a sense of unity was recreated, providing benefits for democratization. In public, democracy moved from a meaningless squabble to productive, which positively impacted building and defending a democratic climate of the new state. The compromise also built unity between the SPD and CDU delegates. It would play a role when Clay asked to modify the industrial socialization clause.

5.2.3 Approvals

The drafting of the Hessian Constitution neared completion after reaching a compromise on September 30, 1946. The remaining tasks of the framers included finalizing a few outstanding articles, primarily concerning transitional provisions during military occupation. Subsequently, they would need to pass the draft in the second reading at the plenary session of the assembly, obtain feedback from OMGUS, pass the draft in the third reading, and finally present the constitution to the public for approval in the public referendum. Two significant events that marked this period were the debates between Clay and the Constitutional Assembly over Article 41, the industrial socialization clause, and the preparations for and execution of the public referendum on December 1.

On the morning of October 1, 1946, the Constitutional Committee deliberated on OMGUS's recommendations, which included adding provisions for freedom of information and ensuring that a justice could not simultaneously serve as a legislative delegate. Both proposals were approved. The next day, the super-constitutionality of MG directions was also adopted. After resolving the remaining undecided articles, the assembly convened a plenary session for the second reading, initiating the voting process on October 2 (Breiding and Lange 1996, 967-973).

Before the voting process of the second reading, the most noticeable event were the speeches of Bauer (KPD) and Euler (LDP). Both minor parties declared they would abstain from voting due to the previous event. However, it would not be the final decision of the parties, and they would vote for support or against it based on the following actions of the assembly. As a result, the constitutional draft was adopted by a roll call vote with 69 votes in favor and eleven abstentions, which marked the completion of the second reading. The Chairman concluded the session by pointing out that the third reading would take place in plenary on October 11, according to the plan. However, it could be delayed if the negotiations with MG were to drag on (Breiding and Lange 1996, 1028-1032).

OMGUS headquarters in Berlin received the final draft on October 4, two days after the second reading passed. Due to the close communication between the American liaisons and German framers through the entire constituent process, the draft faced little resistance in the OMGUS Civil Administration Division (CAD). As CAD director Henry Parkman pointed out in his report, there was no need to consolidate additional clauses into the text, and the only necessary modification was to prevent judges from serving in the *Landtag*, which had been corrected (Will 2009, 486-487).

At the same time, Clay, as the de-facto commanding general of OMGUS, was working hard to improve the deteriorating situation in the entire U.S. zone from a dire shortage of food supplies since the onset of 1946 as well as a new wave of political attack from USFET, possibly stemming from their discontent about German self-determination or having to submit the occupation budget list in August. On October 8, 1946, when the three state-constituent processes in the American zone was almost completed, the new USFET chief of staff ignored Clay's instruction to report to him and directly informed the War Department that the Germans were showing "increasing disregard for Allied authority. There is no evidence of true growth of democratic spirit" (Smith 1990, 403-410, 442-443).

Clay rebutted the criticism from tactical forces in a blistering message to Frankfurt that the accusation was an absurd attempt to undermine OMGUS's efforts. However, he also had to deal with administration agencies in Washington, D.C., where the State Department officials asked the pending constitution drafts for detailed changes to conform closely with U.S. political cultures. He reluctantly sent them together with the changes sought by OMGUS, the tight schedule, and many letters to his associates and the War Department that presented his attitude in resisting any direct intervention of American occupiers in German democratization. (Will 2009, 488; Smith 1990, 443-445). Eventually, Clay won a victory against his compatriots in the military and civil administrations for defending the German people's right to choose their democratic future without too much foreign influence.

However, Clay's efforts to protect German self-determination nearly ended in disaster due to the conflict with the Hessian Constitutional Assembly regarding Article 41, the industrial socialization clause. Through Clay's lens, the socialization of private industries was perceived as a significant threat to individual liberty according to the United States constitutional traditions. For instance, in the Tenth Article of the Bill of Rights, imposing excessive bail or fines was equated with cruel and unusual punishments. Moreover, Clay believed that organizing the economy should fall under federal jurisdiction rather than being a state matter, a perspective possibly shaped by his earlier experiences during the Great Depression. Thus, it was not unexpected when Clay advocated for the revision. On October 8, he explicitly demanded that the "shall" in its wording, "upon entry into force of this constitution.... shall be transferred into collective ownership," be replaced by a "may" when he met with delegates from the Constitution Assembly (Will 2009, 494-495; Smith 1990, 445).

In response, CAD director Parkman suggested Clay withdraw the demand in his letter on October 14 by pointing out that it would be impossible to ask the framers to edit the word except by using the power of OMGUS to order them to do so, which would be totally against the goal of German self-determination. In this case, there was a danger that the Americans would appear as friends and supporters of the reactionary since many large industries had deep Nazi connections. Three days later, he repeated his warning, emphasizing that the Constitutional Assembly would not change anything without a direct order (Breiding and Lange 1996, 1068-1069; Will 2009, 496).

Clay's stance prompted a strong response from the Constitutional Committee, in which most delegates opposed his demand, except for Euler and the LDP. Both the SPD and KPD immediately objected to amendment Article 41 since immediate socialization was one of their core demands. Although some CDU members met with sympathy with Clay, the party decided to prize the hard-won compromise and unity with the SPD, and they eventually stood with the left wing (Will 2009, 496).

As a compromise solution, Clay retreated one step by offering a deal with the Hessian framers: to hold a separate public referendum for Article 41 after the constitutional referendum. It was possibly also Clay's method for testing the democratization in Hesse, in which he wanted to know whether the delegates represented their people on the topic. However, the framers still refused the proposal, and the most potent opposition surprisingly came from the CDU, which delegate von Brentano (CDU) asked for a general strike to stop the referendum protesting Clay's unreasonable interference. Although the SPD did not present such a trenchant criticism, Bergsträsser demonstrated his discontent regarding "a general in politics" in his diary (Will 2009, 498).

After negotiations with MG liaison Wahrhaftig ended without any result, it seemed that the conflict of Article 41 would lead to a disaster in German democratization. Fortunately, Dayton saved the entire situation from failing into a confrontation between American occupiers and occupied Germans during the meeting on October 28, 1946, one day before the third reading. Wahrhaftig asked to relocate the article into transitional provisions and add a clause that the socialization legislation would be complete before February 28, 1947, which angered the SPD delegates. Many of them joined von Brentano's strike proposal. Dayton took over the duty and eventually persuaded most SPD members to accept Clay's proposal to form a separate referendum of Article 41. Although the CDU still failed to make an agreement with the MG liaisons, they eventually agreed with another referendum during the third reading meeting on October 29 (Will 2009, 498). The tension between OMGUS and the Constitutional Assembly was resolved, which could lead to another policy turning point because of its dangerousness during the ongoing conflict between OMGUS and USFET. If this resulted in a confrontation between the military occupiers and the occupied civilians, the USFET's report to the War Department on October 8 could have had unpredictable repercussions, possibly jeopardizing the rebuilding of democracy in Hesse and even the entire American zone.

The final approval letter of OMGUS arrived at the assembly when the third reading was held on October 29. In the letter, Clay represented OMGUS and recognized that the constitution expressed the will of the state as determined by the elected representatives of the citizens. He was convinced of the apparent aspiration of the draft that the constitution should embody the foundations of democracy and secure the rights of the individual. Therefore, it was approved for submission to the people with the submission of Article 41 to a separate vote (Breiding and Lange 1996, 1072-1073). After statements were presented by Euler (LDP), Bauer (KPD), Köhler (CDU), and Knothe (SPD) representing their respective parties—with only the LDP still in opposition—a roll-call vote was conducted for the final approval. Consequently, the Constitution of the State of Hesse was adopted in the State Constitutional Advisory Assembly with 82 of 90 votes in favor by the delegates of the SPD, CDU, and KPD; only the LDP had six votes against (Breiding and Lange 1996, 1090-1112).

After the assembly approved the Hessian Constitution, the final step was to present it to the public. The date of the two public referendums and election for the first *Landtag* were set during the assembly meeting on October 29, which would be held on December 1, 1946. Despite the prevailing hardships of cold, hunger, and a shortage of necessities, OMGUS and the four political parties engaged in public outreach to motivate people to participate actively in the referendum. OMGUS published the Constitution in newspapers to familiarize the public with its contents. During the campaigns for the constitutional referendum and the election of the first *Landtag* delegates, the two smaller parties launched attacks against the larger parties in hopes of garnering more support within their political factions. The KPD labeled the SPD as traitors who blocked the creation of a more progressive constitution, while the LDP positioned itself as the sole anti-communist faction in Hesse, aiming to attract more voters from the CDU (Breiding and Lange 1996, 1146-1160).

The four political parties were not the only players in the election. Churches in Hesse, both Catholic and Protestant, united with the LDP party to encourage people to deny the overly communist constitution in the referendums. Bishops of Mainz, Fulda, and Limburg proclaimed from the pulpits on the voting day that contained strong criticism of the constitution by arguing it failed to provide a strong guarantee for establishing Christian schools. Therefore, bishops asked followers to “strengthen the truly Christian forces in the *Landtag* to avoid what pains us about the present constitution.” Their actions seemly confirm the concerns of the SPD and KPD regarding interference by the churches in politics (Breiding and Lange 1996, 1163-1164).

The opposition from the churches did influence the public referendum, but its impact was minimal. During the vote on the constitution, 76.8 percent of valid votes were in favor, while 23.2 percent were against it. Separately, Article 41, which pertains to the immediate industrial socialization clause, underwent an independent referendum and secured approval from 72.0 percent of the voters.

Table One: Voting Results in the American and French Occupation Zones in 1946 and 1947.¹⁵

States in the American and French Zones	Vote Results in Assemblies	Referendum Results
US Zone: Bavaria	90.7% For	70.6% For; 29.4% Against
US Zone: Hessen	93.2% For	76.8% For; 23.2% Against
US Zone: Württemberg-Baden	98.9% For	86.8% For; 13.2% Against
French Zone: South Baden	76.9% For	67.9% For; 32.1% Against
French Zone: Württemberg-Hohenzollern	80.7% For	69.8% For; 30.2% Against
French Zone: Saarland	98% For	No Referendum
French Zone: Rhineland-Pfalz	69.3% For	52.9% For; 47.1% Against

Compared to the constitutional referendums in other states within the American and French zones during 1946 and 1947, the voting result in Hesse was positive in both the assembly and referendum. (Will 2009, 507-508; Pfetsch 2013, 35-38).

¹⁵ The exhibit was a brief summary of Tables 4 and 5. Frank R. Pfetsch. *Ursprünge der Zweiten Republik: Prozesse der Verfassungsgebung in den Westzonen und in der Bundesrepublik*. New York: Springer-Verlag. 2013. Google. 32.

Noticeably, positive support in Württemberg-Baden was based on a general agreement in their constitutional assembly and the public that the state existed as a temporary solution until a German Reich was reunited and the state of Württemberg-Baden would be dissolved. Hesse was the most popular state that was created under cooperation between OMGUS, the state civil administration, and ordinary Germans. The decision to create a united Hessian state and its constitution-making processes for legal reconstruction could be considered a democratic success, representing possibly one of the finest examples of a postwar military occupation in the history of the United States.

In the *Landtag* elections held simultaneously, 73.2 percent of eligible voters participated, the SPD obtained 42.7 percent of the vote, the CDU 30.9 percent, the LDP 15.7 percent, and the KPD 10.7 percent. The LDP's outstanding result was based on its anti-constitutional campaign and indirect cooperation with churches to gain votes from the CDU camp. The CDU was one of two losers of the election, with a loss of votes of more than six percent compared to the elections to the constitutional assembly (Will 2009, 508). Another loser was the KPD since it became the least noticeable party.

Nonetheless, the cooperation between the SPD and the CDU that began with the constitutional compromise on September 30, 1946, would continue in state politics by establishing an SPD-CDU grand coalition since December 19, led by the elected Minister-President Christian Stock (SPD), who was a tobacco worker, social insurance specialist, and a member of the Constitutional Committee. On March 1, 1947, General Joseph T. McNarney, the second American Military Governor in Germany, published Proclamation No. 4 to assign full legislative, executive, and judicial authorities to the three states in the American occupation zone: Hesse, Württemberg-Baden, and Bavaria. The Establishment of the State of Hesse was finally completed (Will 2009, 509-510).

Chapter 6

The Conclusion

Surrounded by the musty stuffed owls, elephant skeletons, and glass-eyed bears at Koenig Museum in Bonn, state ministers, senior public servants, and legal academics met on September 1, 1948. An unknown correspondent of Time magazine caught the precious moment:

Drafting a constitution for a Western German state at the suggestion of the Western powers was an act of political courage. The Communist argument that a Western German government would split the nation has been losing ground ever since the Russians laid brutal siege to Berlin. Westphalia's Minister President Karl Arnold spoke of the Germans now under Russian domination: "We must be sure that what we construct will some day be a good house for all Germans" (Time magazine 1948, 30, 3).

In his speech, Karl Arnold compared the future Basic Law to a good house for all Germans, which was a precise metaphor in legal and historical meanings. The Basic Law, which served as the de facto and temporary constitution of West Germany, was designed to keep all German people away from the threat of a monster. The monster of Nazism did not try to break in through the door in 1933. Instead, it slipped into the previous house, the Weimar Constitution, from loopholes in the ceiling, dragging the nation's entire population into the darkest enthusiasm and brutal nightmare.

The monster was exiled from Germany after a great sacrifice by the Allies in 1945, but there was a heavy price to pay. The *Deutsches Reich* no longer existed in reality. Its remaining territories were split into pieces and controlled by the United States, the Soviet Union, Great Britain, and France. The conflicts between WWII Allies provided an opportunity for Germans who lived in the Western occupation zones to rebuild a democratic nation. However, they still had to face the question of political extremists seizing power. If the missions of the West German founding parents were to reconstruct the fundamental legal orders and prevent the threats of extremism, the creation of state constitutions played essential roles as references.

One of the earliest democratic constitutions at the state level, the Constitution of Hesse (HV) and its defensive democratic concepts were taken up during the Basic Law (GG) drafting processes, including the Constitutional Convention at Herrenchiemsee and the Bonn Parliamentary Council from 1948 to 1949. This chapter summarizes and analyzes the articles of HV that impacted the creation of GG regarding defensive democracy.

First, the Basic Law adopted the constitutional structures and protective causes from the Hessian Constitution by making sure that civil rights could hold the dominant position in the text and practice as functional codes to directly limit the actions of legislative, judicial, and executive branches of the government. Second, total gender equality was passed in the Hessian Constitution based on the proposals of Bauer and American liaisons, and it was consolidated into the Basic Law due to the efforts of Elisabeth Selbert in the council as well as on the street, which protected the right of majority voters during the reconstruction period.

Third, three major civil rights inventions of the Hessian Constitution were included in the Basic Law. They were rights to human dignity, action, and revolution. Although these rights are still debatable today, the right to revolution represented the idea of defensive democracy by combining it with the entrenched clauses, in which a “dead-hand” mechanism was formed to protect the democratic order even after an anti-democratic radical political faction took over the public authority. On the other hand, however, the defensive mechanism also reflected the popular idea of connecting the German race with Nazism, which was based on the distrust of both the future public authorities and the willingness of the German people to protect a democratic order.

6.1 Constitutional Structures

Reacting to the failure of the Weimar Constitution, the Basic Law inherited from the Hessian Constitution was the emphasis on civil rights. Legal experts and courts during the Weimar period often underestimated the importance of civil rights in actual legal practice, and it was debatable whether civil rights could limit the legislature's power. On the other hand, civil rights in the Hessian Constitution and the Basic Law were executable laws rather than general legal principles or political statements. Instead of putting civil rights articles in the middle of the text or the amendments as an attachment, the two constitutions put them at the very beginning of the documents.¹⁶ By putting civil rights clauses in front of the organizational and operational clauses of the governing institutions, the two constitutions emphasized the supreme status of civil rights through text structures.

The Hessian Constitution set the protective and limited clauses for ensuring the articles of civil rights could be directly used as legal codes in daily practice. Articles 17 to 26 are usually called the part for “limitation and protection of human rights” in the Hessian Constitution, which included many technical details that limited both individuals and the state authorities regarding the daily exercising of civil rights. Article 26 clearly stated that civil rights legally bind the legislature, executive, and judicial institutions; Article 63 claimed that civil rights themselves must stay untouched when legislative actions restrict or define their meanings; and Article 110 prevented the possibility for the legislature to pass unconstitutional laws during the state emergency. By entrenching the legal enforcement of civil rights, the protective and limited clauses in the Hessian Constitution ended the discussions about whether they had legal effects on legislatures during the Weimar period.

¹⁶ Art 1-69 HV; Art 1-19 GG; Art 98-127 BV.

The Hessian Constitution's advantages were noticed by many delegates during the Constitutional Convention at Herrenchiemsee. On August 17, 1948, the Third Subcommittee of Organizational Issues (*Unterausschuss III: Organisationsfragen*) referenced Article 22 of the Hessian Constitution, as well as similar clauses in the Constitutions of Bavaria, Württemberg-Baden, and Württemberg-Hohenzollern, in their report and articulated draft constitution. On August 19, 1948, during the sixth meeting of the First Subcommittee of Principal Issues (*Unterausschusses I: Grundsatzfragen*), Brill proposed to write down clauses in the draft, which held similar effects to Articles 26, 63, and 110 in the Hessian Constitution. His advice was accepted by the committee and written down as Article 21 of the Constitutional Convention Draft (Art. 21 HChE). During the Bonn Parliamentary Council, Bergsträsser was the most active member of the Principal Committee who joined every meeting and referenced the Hessian Constitution many times (Bachmann 1997, 104-105). As a result, the Basic Law included the method in the Hessian Constitution, as protecting and limiting descriptions of civil rights can be found in Articles 1, 18, 19, and 104. The Hessian Constitution served as the realistic model of the Basic Law in terms of using civil rights in daily legal activities (Denninger 1989, 12). The purpose was to prevent the possibility that civil rights became the façade articles like what happened in the Third Reich and the Soviet Union, in which they theoretically existed but were deactivated by legislative or political actions. Furthermore, the Basic Law inherited some defensive democracy concepts from the Hessian Constitution, such as the super-constitutionality of international orders and the limitations in amendment-making.

The structures that both the Hessian Constitution and the Basic Law shared were due to the similar concepts that the post-war intellectuals learned from their experiences during the rising of Nazism. These concepts behind the legal frameworks include the combination of positive and natural law and the prevention of façade constitutions.

The idea that combined positive and natural law was the direct response to the Nazi seizure of power in 1933, and it was the direct denial of the previous leading legal theory in the nation: legal positivism. Legal positivism, an idea that has existed since the 18th century, often held the following factors: Laws are commands of human beings, and they only represent the wills of authority. No relationship between laws and moralities, which a policy would be just, wise, efficient, and prudent, is never a convincing reason for naming it as a law, and vice versa. A legal system is a closed logical system without reference to social or moral considerations. However, this does not mean that the legal positivists supported unjust laws in general, and they only desired to create an entirely objective jurisprudence and legal science by determining what a law is rather than what a law should be (Green and Adams 2019, 1). This theory was concerned with the opposite side of natural law due to its indifference to moral issues. The theory of legal positivism and its German version, Statutory Positivism, became popular due to Paul Laband's efforts during the Prussian Kingdom period. It was the dominant legal theory during the Weimar Republic.

At the time of legal reconstruction in Germany after the Second World War, many legal scholars blamed legal positivism as the culprit of the Nazi Seizure of Power in 1933 because it made the judicial branch too passive to stop anything.¹⁷ Gustav Radbruch was the most important figure to criticize legal positivism who introduced his famous Radbruch Formula in the article "Statutory Injustice and Supra-Statutory Law" (Gesetzliches Unrecht und übergesetzliches Recht) in 1946.

¹⁷ On the other hand, however, current scholars often criticized the idea that blamed legal positivism as a chief culprit. They believed that Hitler and his Nazi followers ran against the principle of legal positivism in their actions. They also argued that overly blaming legal positivism was a possible method to help the legal elites of the Third Reich to get rid of responsibility during the judicial murders and Holocaust. Martin Borowski. "Gustav Radbruch's Critique of Legal Positivism." *The Cambridge Companion to Legal Positivism*. Cambridge University Press 2021. Pp. 627-650. Cited from the summary paragraph.; Douglas G. Morris. "Accommodating Nazi Tyranny? The Wrong Turn of the Social Democratic Legal Philosopher Gustav Radbruch After the War." *Law and History Review*. Volume 34, Issue 3, 2016. Cambridge University Press. Pp. 649-688. Cited from the summary paragraph.

Radbruch tried to provide an explanation about a conflict between current legal rules and the moral standing of law enforcement employees. According to his analysis, if the conflicts between positive law and moral justice reach an “intolerable degree,” the document would lack the very nature to be called a law. Then, the authority officials would have no responsibility to follow such orders (Radbruch 1946, 1-11). Based on the widespread attacks on legal positivism at the time, the founders of the Hessian Constitution and the Basic Law decided to combine positive and natural laws. In this combination, positive law would be used for daily legislative, executive, and judicial activities due to its emphasis on terminology and logic, and natural law would limit their range of activities to be sure the legal actions would be within the range of civil rights.

The second legal concept that the Hessian Constitution and the Basic Law shared was preventing façade constitutions in which the written laws no longer march with the realities in society. During the time of legal reconstruction in Germany, the popular idea was that a lawless state existed during the Nazi regime (Lavis 2020, 92-116). Many current scholars also argued that the Nazi regime was a system of dual nation, in which Nazi elites created an independent authority inside the Third Reich instead of a lawless state. Both the theory of a lawless state and dual nation theory emphasized the powerlessness of the judicial system against privileged Nazi elites and the tyrannical rules of the judicial system against ordinary people in Germany due to a façade constitution. As a solution, the two constitutions tried to put their languages into practical use in daily legal activities.

6.2. Gender Equality

Article 1 of HV explicitly safeguarded gender equality by removing the hidden restriction due to the pressures from Bauer (KPD) and American liaisons. Yet, passing the gender equality clause in the Basic Law still met with difficulties. Eventually, it was adopted by the strenuous efforts of Elisabeth Selbert (SPD), a long-time women's rights fighter since the beginning of the Weimar Republic, as well as a member of the Hessian Preparatory Constitutional Committee and the Constitutional Committee of the State Constitutional Advisory Assembly.¹⁸

The Weimar Constitution theoretically upheld the gender equality clause, but it was largely treated as a mere political statement, similar to many other civil rights declarations, and was never implemented. In reality, discrimination against women in German society was as pervasive as air. For example, Selber was one of the first female students who was allowed to study at law school. She was forced to transfer because of her gender, and her professor forbade her from entering the classroom when discussing sexual crimes. She was one of the few, if not the only, female lawyers who successfully kept her license during the Third Reich. Nevertheless, as a legal expert on marriage, family, and labor issues, she deeply understood the unfavorable position of women in Germany at the time. Her knowledge, experience, and position made her feel she had an important responsibility to push for gender equality in the Basic Law (Schultz 2003, 54-60).

¹⁸ Elisabeth Selbert (1896-1986) was one of four founding mothers of the Basic Law (*Mütter des Grundgesetzes*). She joined SPD in 1918, became a women's rights activist, and joined the first national women's conference in 1920. Selbert gained her doctorate degree at the University of Göttingen Law School in 1930. In her thesis "Dislocation as Grounds for Divorce" (*Zerrüttung als Ehescheidungsgrund*), she criticized the "principle of guilt," in which women had no right during a divorce at the time. Selbert and her family were in difficult situations during the Nazi regime because her husband was placed in protective custody and lost his job. As a result, she had to fight for her lawyer license and feed her family alone until 1945. Selbert played a role during the creation of the Hessian Constitution in 1946. During the Bonn Parliamentary Council, she joined the meeting as an SPD delegate from Lower Saxony because no more delegate places in Hesse were left for her. Ulrike Schultz, "A quasi-storm and washing baskets full of submissions: The history of Article 3 (2) of the Basic Law" (*Ein Quasi-Stürmlein und Waschkörbe voller Eingaben: Die Geschichte von Art. 3 Abs. 2 Grundgesetz*) *Die Aktionswochen der kommunalen Gleichstellungsbeauftragten*. (Düsseldorf 2003). 54-60. 55.

Even in her deepest nightmare, Selbert possibly would never have realized that she would gain a unanimous opposition in a post-war constitutional convention when she proposed the idea of gender equality.¹⁹ The opponents included three of four female delegates in the council who were concerned that passing the proposal would lead to the unconstitutionality of the family law enacted in the nineteenth century, which already presented the nature of gender discrimination, and other opponents simply denied the proposal. Selbert did her best to persuade other female colleagues and important SPD members. When she recognized that their power was still too weak to pass the clause, she started to mobilize supporters on the streets. Although most of the women at the time had no interest in the creation of the Basic Law at all, Selbert still found allies from female politicians, union members, and members of female associations. After countless protest letters were sent and debates during the meetings, a simple sentence, “Men and women shall have equal rights,” was finally written down on the Basic Law, but with a compromise clause, which allowed the laws of female discrimination to continue until March 31, 1953, for leaving time of legislation (Schultz 2003, 54-60).

German women’s social and political positions were still at a disadvantage, which had been ignored in the political field and had almost no place in the historical records for many years. One reason was the lack of interest of women who were born and raised during the Third Reich era and who lost the confidence to participate in social and political issues actively. Selbert herself also paid the price for pushing the proposal and being isolated by the SPD. Although she applied for many positions, from federal justice to city judge, she lost all applications and became invisible until historians rediscovered her efforts in the 1980s (Langer 1989, 104-105).²⁰

¹⁹ In my wildest dreams I did not expect that the application would be rejected.... The woman who stood on the rubble during the war years and replaced the man at work has a moral claim today to be valued in the same way as the man. (*In meinen kühnsten Träumen habe ich nicht erwartet, dass der Antrag abgelehnt werden würde... Die Frau, die während der Kriegsjahre auf den Trümmern gestanden und den Mann an der Arbeitsstelle ersetzt hat, hat heute einen moralischen Anspruch darauf, so wie der Mann bewertet zu werden.*) Ulrike Schultz, “A quasi-storm and washing baskets full of submissions,” 2003, 56.

²⁰ “Elisabeth Selbert,” *FemBio Frauen Biographieforschung*. 6.

The relationship between protecting women's rights and defending democracy is rooted in the distinctive economic and political climates of Germany's postwar reconstruction period following WWII. In the aftermath of the war, a significant portion, if not the majority, of the available workforce was composed of women. This was mainly due to the absence of many men who had served in the Nazi military and subsequently found themselves in demilitarization camps throughout Germany and other countries and possibly because women were generally cheaper than men in labor markets. In 1945, around 35 percent of physically demanding workers responsible for rubble clearance in urban areas were women. Sometimes, the percentage would be much higher (Diefendorf 1993, 73-75, 82). Furthermore, the denazification significantly reduced the number of eligible male voters. As a result, the role of women in the political sphere became even more pronounced. During the election for the constitutional assembly in Hesse, 71 percent of eligible voters participated, of which two-thirds were women. (Will 2009, 276). In the Parliamentary Council, Selbert pointed out, "For every 100 male voters, there will be 170 female voters" (Schultz 2003, 56).

Despite the prominent role women played during this period, the push for a gender equality proposal still met significant resistance from the male-dominated leadership within the Bonn Parliamentary Council. Hence, Selbert's success in rallying women to ensure their equal protection rights was not just about gender justice; it was about defending democracy. By advocating for the rights of the majority voters, she was preventing their potential oppression by a minority on domestic issues. Thus, achieving gender equality was intrinsically linked to the very defense of democracy.

6.3 Expansion of Civil Rights

The third method of ensuring democracy in the two constitutions was to expand the definition of civil rights to include the rights of human dignity, action, and revolution. While the Basic Law did not extend the definition to the social and economic level as the Hessian Constitution did, the academic and judicial debates about these newly added civil rights continue today. More importantly, the right to revolution may have been shaped by the framers' lack of confidence in both the future public authorities and the public's willingness to defend the democratic system, which led to the question of building democracy in a place that might not understand its meaning.

The Hessian Constitution was the first constitution that mentioned the concept of human dignity in Article 3.²¹ Although many other state constitutions, like the Bavarian Constitution, mentioned the right of dignity, the Hessian Constitution was the oldest state constitution that created the concept in Germany, and the Constitution of Württemberg-Baden, which was older than the Hessian Constitution, did not include such description. The Basic Law continuously emphasized the concept and put it into the supreme position in Article 1. The inviolability of human dignity became the unique factor of the Basic Law and legal invention of post-WWII legislative actions. However, the debates about the definition of human dignity still persist today, such as the right to abortion being denied twice by the Federal Constitutional Court in 1975 and 1993 due to the legal protection of fetus dignity.²² According to the two decisions, the protection of fetuses was a direct response to the crimes of the Third Reich, and it made the right to abortion without proper reason illegal.

²¹ Art 3, HV: The life, health, dignity, and honor of man are inviolable.

²² BVerfGE 39 1; 2 BvF 2/90, 2 BvF 4/92, and 2 BvF 5/92.

The general right to action was the second legal creation in civil rights definition, which the Basic Law inherited from the Hessian Constitution. It guaranteed the constitutional protection to do anything in the range of legal order. On September 23, 1948, the language from Article 2 of the Hessian Constitution was adopted by the delegates during the fourth meeting of the Principal Committee, in which everyone has the right to do or not to do anything that does not violate the rights of others or the constitutional orders. After many rewrites, the General Editorial Committee (*Der Allgemeine Redaktionsausschuß*) finalized the language about the general right to action, and it became Article 2 of the Basic Law. (Bachmann 1997, 106-107). Unlike most other civil rights that provide legal protection on a specific action, Article 2 of the Basic Law could be explained as general protection of all actions of humans that are not illegal. As a result, whether it should narrow or expand its explanations has been a controversial topic until recent years (Pieroth 1990, 33-44).

The last and possibly the most controversial expansion of civil rights that the Basic Law inherited from the Hessian Constitution was the right to resistance, which theoretically prevented the possibility of an authoritarian regime from rising. Articles 146 to 150 of the Hessian Constitution set the rights and duties for everyone against unconstitutional legislative or political forces in Hesse. They prohibited anyone from voting, printing, and following the laws or orders considered unconstitutional, authorized the public to resist if necessary, and allowed the prosecution of anyone who joined the anti-constitution revolution after the constitutional order had been restored. It was written in the Basic Law as an amendment through political compromise on June 24, 1968, when West Germany drafted emergency clause amendments and faced massive public protest. (Böckenförde 1970, 168-169). It was not the direct product of the Bonn Parliamentary Council but inherited from the Hessian Constitution and proposals of Hessian delegates. The arguments around the right to resistance made it controversial because it lacked practical examples and could be dangerous to social stability.

Combined with the entrenched clauses, the right to resistance constitutes what can be described as a “dead-hand” mechanism. The term “dead-hand” originates from the Cold War era. It referred to the myth of a purported automatic nuclear weapons control system believed to have been established by the Soviet Union and, later, the Russian Federation. This system was designed to ensure that any remaining nuclear capability would be launched, even if every member of both civil and military leadership had been incapacitated by an enemy’s first strike. In this study, the term “dead hand” is metaphorically employed to describe a mechanism designed to trigger the democratic system’s self-defense reflexes, even in the scenario where anti-democratic factions have gained control over the German government.

The nature of such a mechanism is understood by examining the position of an anti-democratic agitator. Through a speech by Joseph Goebbels, Nazi leadership clearly recognized the democratic weakness, which tolerated anti-democracy parties from joining political activities:

“When democracy granted democratic methods for us in the times of opposition, this was bound to happen in a democratic system. However, we national socialists never asserted that we represented a democratic point of view, but we have declared openly that we used democratic methods only in order to gain the power and that, after assuming the power, we would deny to our adversaries without any consideration the means which were granted to us in the times of opposition.”²³

The dead-hand mechanism was a direct reflection of the Nazi Seizure of Power. By specifying that certain core sections of the constitution cannot be altered, the entrenched clauses aim to prevent a dominant political faction, possibly under a charismatic leader, from damaging democracy by passing self-serving constitutional amendments. To achieve an anti-democratic goal, such a faction might resort to violent or military means. The right to resistance legally empowers political opponents and the public to resist such a majority, even if it requires drastic measures.

²³ “Means Used by the Nazi Conspirators in Gaining Control of the German State (Part 8 of 55).” *A Teacher’s Guide to the Holocaust*. 2005. Accessed on January 9, 2023.

The mechanism raises the theoretical possibility of civil unrest, mass disobedience, or civil war after the anti-democratic faction has taken over the public authority. Article 148 in HV hints at the accuracy of such a suspicion, as it calls for those who joined in anti-constitutional revolutionary acts to be held accountable once the constitutional order is restored. In addition, it might also come from Germanophobia through adopting the presumption of guilt towards both the German government and its people. By threatening the entire society with the possibility of a civil war or massive social unrest, the framers tried to encourage people to join political activities to protect their constitutional democracy actively. In other words, they assumed the majority would never voluntarily be against tyranny if there was no direct threat since such a distrust against the German people was popular. For a similar reason, the founding parents of the German Basic Law refused to submit their draft to a public referendum. The only referendum presented in the Basic Law was for passing a new constitution after German reunification, which never happened (Schiffers 2002, 65-76). Germanophobia and its question, how to build a democratic system in a group of people not worth trusting, possibly helped to create the dead-hand system in the defensive democracy.

The Basic Law, which served as the de-facto constitution in West Germany, reflected the tragic experiences during the rise of national socialism. To prevent a repeat of the past in which a constitution was too weak to protect the democratic system and itself, the founding parents introduced legal improvements to the Basic Law language. More importantly, such modifications were not formed in a vacuum. The legal reconstructions at the state level impacted the German legislatures. The study on the creation of the Hessian Constitution would help to discover the early legal development after the war, which led to the partial structures of a good house for all German people.

Aftermath

During the Hessian constitution-making process, renaming the State of Greater Hesse as the State of Hesse was a resolution passed during the Constitutional Preparatory Committee meeting on May 28, 1946. The committee decided to draft articles and titles under the name “Hesse” instead of the currently used name “Greater Hesse” (Breiding and Lange 1996, 35). Similar to many other articles passed by the preparatory committee, no record was left to explain the reason behind it. Historian Martin Will (2009) narrated the event by pointing out that the decision was far-reaching without any further explanation or reference, which led to infinite reverie (94).

The selection of an official name is always a serious task with complex considerations based on an examination of the current status, which can sometimes lead to conflicts. The most recognizable example was the Koblenz Decisions on July 10, 1948, when minister-presidents from the three Western occupation zones refused to name the future West German fundamental legal basis as a constitution. Instead, they named it “the Basic Law” (*Grundgesetz*) to not further deepen the division of Germany, which led to a short conflict with Clay and OMGUS. (Berghahn and Poiger 2003, 1). This instance demonstrates that German politicians under occupation considered the task of naming so crucial that it led to conflicts with their occupiers. Although any possible debates and exchanges of views regarding the reason to rename Hesse were concealed in the short, neutral-tone resolution, there was one thing can be sure: After hundreds of years, Hesse, a newly created German state, abandoned a name entitled by occupiers and embraced a new name for a new future. It marked a modest yet crucial moment in Hesse in 1946, signifying the policy shift of the American military authorities and heralding the start of legal reconstruction and democratization in Germany post-WWII.

A Small but Indispensable Event

The significance of a historical event is often open to interpretation and can vary greatly depending on the perspective from which it is viewed. The possible connections with future essential events and new information that come to light can play a role in gaining the weight of an event that might seem less important. In terms of the creation of the Constitution of Hesse and early policy transformation in the American military authority, they were not very important events from the point of view of their contemporaries. In the U.S. occupation zone, Hesse was insignificant compared to Bavaria, which was at least twice its size in terms of geography, population, and economy. Creating a democratic constitution and a self-determination state government in Hesse did not provide immediate remedies for the ordinary people. Many people still lacked nutrition in 1947, black markets were still popular, and the shortage of building materials continued when the overall production increased (Diefendorf 2001, 90-95). Even jurisdiction conflicts between OMGUS and USFET still existed, which would last until Clay replaced McNarney and abolished USFET in 1947 (Smith 1990, 454).

Comparing the current international and domestic events as well as the questions this research brought to the table, the MG policy transformation and creation of a defensive democratic constitution in Germany became valuable for further academic examinations. Unlike many people might think about, research on military occupation is still necessary in today's world. The current circumstances worldwide could potentially plunge humanity into an increasingly perilous and bleak nightmare. Suppose the bloodshed in Ukraine and the Gaza Strip continues. In that case, the possibility that the United States will have another total conflict with a major power and postwar military occupation will remain. The question of whether the successful American military occupation experience in Germany after WWII can be replicated again becomes relevant in the eyes of the decision-makers.

Based on this thesis, the answer would be determined on a case-by-case basis, depending on whether the target nation has had a democratic experience within past generations. If the nation had democratic experiences in the past, similar to the relationship between the Weimar Republic and the Third Reich, the answer would be positive because the military occupier could mobilize democratic supporters and former politicians returning to their positions. During the creation of the Hessian Constitution, most of the delegates were former democratic elites who had either academic or political positions in the Weimar Republic. If the military occupiers needed to operate in a nation that never had any democratic experience or the experience passed too far away from preserving any collective memory of democracy or democratic supporter, the experience of American military occupation in Germany could not be exercised efficiently. When Selbert tried to mobilize women for gender equality during the creation of Basic Law, most German women who grew up during the national socialist regime showed an aloof attitude, if not total denial. Women who supported the proposal were more likely those who had political experience during the Weimar period (Langer 1989, 112).

Another example was the compromise between the SPD and CDU on September 30, 1946, which was one of the most important events during the constitutional-making process in Hesse. The compromise was based on threats from the CDU and OMGUS that if the final draft was denied during the public referendum, the democratization and self-determination process would be delayed. Since most of the SPD delegates were democratic activists during the Weimar Republic, and some were even underground resistance during the Third Reich, such a threat could work. It would not be effective in an environment where local elites did not have experienced democracy under the previous regime. As a result, replicating the success of American military occupation in Germany required a case-by-case basis because democracy (*dēmokratía*) means people's rule, so it could not stand by itself when there are no people (*demos*) to rule (*kratos*).

This thesis also shows that defensive democracy can be defined as an institutional mechanism in the constitution helping nations that view democracy as a super-constitutional concept prevent radical factions from taking control of the regime, possibly led by attractive leaders pushing for rapid transformation during crises more than incremental and reformist attempts. However, it shows the value of further research according to the domestic events that happened in the United States in the past years, especially after the Capitol attack on January 6, 2021, and its violent aftermath, such as the gun shooting against the FBI building in Cincinnati, Ohio, on August 11, 2022 (Balsamo and Hendrickson 2022, 1-13). Although it is impertinent to suggest a former American president as a potential Nazi, Communist, or other types of political extremist, and this thesis has no intention to focus on such a topic, it is indisputable that there was bloodshed on the day when a mob of supporters attacked Capitol Hill, as well as a deluded armed soul paid the price with his life for attacking a federal property. Based on the experience of the Weimar Republic and Popper's theory, in which an unlimited tolerance community would be destroyed by intolerant forces from the inside, it is necessary to examine the boundary of freedom and tolerance continuously.

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