

Chapter 8

Testing the “Veil of Ignorance” Hypothesis in Constitutional Choice: Evidence from the German *Grundgesetz*

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1 Introduction

Deriving evidence for the existence or the texture of a veil of ignorance¹ from the content of a constitution is a challenging task. The Veil of Ignorance Project (VOIP) proposes to extract units of investigation, called power relations, from the constitution and examine whether those units are linked to uncertainty. The method used is a coding procedure of the constitution following the codebook of the project. The basic idea is that some power relations can be linked to uncertainty, while others not. Imbeau and Jacob (2015) assume that power relations dealing with uncertainty are made behind a veil of ignorance. The more power relations deal with uncertainty, the more opaque was the veil of uncertainty at the drafting process.

Examining the content of the German constitution, the so-called *Grundgesetz*, in order to find evidence confirming the existence of a veil of uncertainty is demanding. The historical development of the constitution after World War II (WWII) and the large number of involved actors and veto players—the allied forces and the German states, the *Bundesländer*²—impose hurdles on the endeavour to link the content of the *Grundgesetz* to uncertainty.

¹ The veil of ignorance and the veil of uncertainty describe a similar situation; however, a distinction has to be made. Ignorance means a “lack of knowledge”, uncertainty is a particular kind of missing information. While ignorance encompasses missing information on individual characteristics or the like, uncertainty creates a lack of knowledge not about individual characteristics, but more on future benefits or losses. This study will use the term veil of uncertainty as it is exactly that what the VOIP tries to measure.

² The abbreviation *Länder* will be used throughout the text.

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This study aims to investigate whether it is possible to find evidence for the veil of ignorance from the content of the *Grundgesetz* and whether the proposed method of the VOIP produces adequate results. After shortly describing the methodology used by Imbeau and Jacobs, it summarises the historical setting of the drafting and adoption of the *Grundgesetz*. This section will also discuss the sources of uncertainty at the time of interest, the drafter's motivations, as well as the evolution of the drafting process at the two constitutional assemblies in Germany, the Herrenchiemsee Convent and the Parliamentary Council (PC). The third section presents the analysis of the statistical findings from the coding of the *Grundgesetz* following the codebook of the VOIP. The last section discusses the findings.

2 The Methodology and Theory of the Veil of Ignorance Project

The unit of analysis of the VOIP is a power relation. Constitutions organise the distribution of power within the nation state. In the constitutional text, power is fixed in the form of power relations. A power relation defines an agent and the capacities ascribed to, or taken from, this agent. The agent may have the power over *something* or over *someone*. Power is therefore defined as the capacity to bring about a particular outcome, either by oneself or by using the capacity to make someone to bring about the outcome (Imbeau and Jacob 2015).

The VOIP proposes three interpretations of the power relations as follows:

Political power is more volatile than economic or preceptoral power. In the presence of uncertainty, constitutional drafters will base power relations mainly on authority and not on wealth or knowledge. The first proposition of the VOIP therefore reads as follows: *(P 1) the more authority-based power relations identified in the constitution, the thicker was the veil of uncertainty.*

Power may be either *the capacity to do something* or having the means *to make someone do something*. In the first case, it is spoken about instrumental power relations and in the second case, about social power relations. Constitutional drafters are concerned with the protection of their current power position; therefore, they implement more social power relations than instrumental power relations. The second proposition of the VOIP therefore reads as follows: *(P 2) the more social power relations identified in the constitutional text, the thicker was the veil of uncertainty.*

An agent may be given the capacity to do something or he may have some capacity explicitly taken away. In case he is given the capacity, he has the power to do something or to make someone do something: the power relation

is positive. If the capacity is taken from the agent, he is denied the power to do something or to make someone do something: the power relation is negative. The drafters of a constitution will rather limit power than ascribe it, in case they face uncertainty. The third proposition of the VOIP is as follows: *(P 3) the more negative power relations found in the constitutional text, the thicker was the veil of uncertainty.*

The power relations are identified in all constitutions of the project and are coded in three variables for each power relation. The first variable *V1* captures the source of power of the power relation, which can either be authority, wealth or knowledge. The second variable *V2* records whether a power relation is social or instrumental, and the third variable *V3* captures the direction of the power relation, which is either positive or negative (Imbeau and Jacob 2015).

3 The Historical Context of the Drafting and Adoption of the German *Grundgesetz*

Unlike other constitutions, the creation of the *Grundgesetz* was not initiated by the Germans themselves. On the contrary, after the loss of WWII, the occupation powers triggered the drafting process. This created a special situation which has to be taken into consideration if one plans to evaluate the veil of uncertainty hypothesis on the basis of the *Grundgesetz*. The following section provides the reader with the historical background of the *Grundgesetz* and its drafters. It will display incentives of the involved actors and developments which influenced their expectations and choices.

The drafting and adoption process of the *Grundgesetz* is probably one of the best documented and analysed constitutional geneses worldwide, as the Germans and the Allies kept records of all actions. The reason may be found in the situation of Germany in the community of states after 1945, the occupation and the problem of creating a new political system after a complete breakdown. A huge body of the literature exists in historical and political science. The following section, dealing with the historical context of Germany from 1945 until 1949, is based on Niclauss (1998), Spevack (2001), Möllers (2009), Bommarius (2009), Frotscher and Pieroth (2010). Very important sources are the edited and published protocols of the Herrenchiemsee Constitutional Convent and the PC of the *Deutscher Bundestag* (2009). The Bundeszentrale für politische Bildung (2012) in cooperation with the Stiftung Haus der Geschichte der Bundesrepublik Deutschland (2012) Bonn offers a profound evaluation of original sources when it comes to biographies of the members of the PC and their work.

3.1 *The Preparation of a German Constitution*

3.1.1 German Constitutional History

A glance on German constitutional history is necessary to understand the foundations of the *Grundgesetz*, which can be traced back to Germany's early democratic movement in the nineteenth century. The *Grundgesetz* is influenced by three German constitutions dated before 1945, of which only two were democratic: the constitution of St. Pauls Church of 1849, which was never implemented, the constitution of the German Empire from 1871 and the Weimar constitution of 1919. The constitution of 1849 influenced constitutional texts in Germany with regard to the basic rights it foresaw and the bicameral legislative system (Frotscher and Pieroth 2010). The *Grundgesetz* reflects the division of competences between the Federation and the Länder developed in the Weimar constitution in 1919 (Frotscher and Pieroth 2010). It addresses specifically the weak points identified in the Weimar constitution, such as the critical position of the president, the state of emergency legislation and the non-existence of constitutional review. It is necessary to understand how the political system of the Weimar constitution was gradually transformed from a parliamentary towards an authoritative presidential system in the late years of the Weimar Republic, in order to understand the preferences of the drafters of the *Grundgesetz*. The seizure of power by the Nazis was made possible by a number of important constitutional changes which took place before 1933. The Enabling Act finally transferred the legislative power including the authority of constitutional change to the executive branch. What followed was a period of political *Gleichschaltung* and subversion of the basic rights, which finally led to the unification of all authority of the state in the person of the "Führer" and a de facto abolition of the basic rights until 1945 (Frotscher and Pieroth 2010).

3.1.2 German Sovereignty After World War II (1945–1947)

After the unconditional surrender on 8 May 1945 of all German forces, the governmental and organisational powers were submitted to the four Allies who divided Germany into four zones of occupation. The Allies installed a Control Council in Berlin to coordinate their actions, which governed Germany (Frotscher and Pieroth 2010). Thus, Germany was no longer a sovereign nation state (Spevack 2001). The occupation shaped the drafting process and the lack of sovereignty and the increased number of veto players influenced the constitutional text. In contrast to a sovereign nation state, where the constituency adopts a constitution, an occupied nation state has an additional veto player. The new constitution faces not only the ratification by the people, but also requires the consent of the occupation powers. The preferences of all veto players influence the drafting process.

The question then is as follows: To which extent does the new constitution reflect the constitution of the occupier? (Elkins et al. 2008). On the one hand, the drafters already anticipate the preferences of the veto players in the drafting, and

on the other hand, the occupation power has the means to influence the process and the deliberations directly (Elster 1995). It is obvious that one major incentive of the Western Allies was the maintenance of their influence on German politics. This was realised by the Occupation Statute which did not end with the ratification of the *Grundgesetz*. It was binding for all German government besides the constitution. As the occupation powers themselves were not subject to the constitution and because their particular interests were guaranteed by the Occupation Statute, it can be assumed that the implementation of individual interest did not play a major role for them. Elkins et al. (2008) find that constitutions written under occupation do not simply replicate the constitutional tradition of the occupier. They argue that for the new constitution to be successful, it is more important that it is accepted by the constituency in order that the constitutional rules are self-enforcing (Elkins et al. 2008). Their evaluation of the Japanese case shows that directly after WWII the interest of the USA was not to export its own institutions, but to find those institutions fitting the local situation (Elkins et al. 2008). It is not too far-fetched that the USA followed this policy as well for Western Germany and that the two other occupiers France and Britain, while having different ideological positions did not oppose this goal in general. The major point that led to controversies between the Western Allies and the German drafters was the degree of federalism that should be implemented by the *Grundgesetz*.

3.1.3 The Events Preceding the Constitutional Convent at Herrenchiemsee 1948 and the Parliamentary Council 1948–1949

Directly after the war, Germany was devastated and in disorder. Many cities were completely destroyed by bombings and “the entire country was in a state of collapse” (Spevack 2001). It was internationally isolated and early plans of the Allies foresaw that it should never again become a member of the international community. On the other hand, the population suffered from the permeation of Nazi thought and the aftermath of the Holocaust. The denazification undertaken by the Allies could not capture the whole problem. The situation in post-war Germany was unstable and uncertain, among other reasons due to the negligible economic production and foreign occupation. In addition, the old forces of the Nazis still persisted to a certain degree and it was an important question for the Western Allies and the upcoming German elite of how to limit the influence of the old regime to a minimum, knowing that a complete erasure of Nazi ideology would not be possible.

At the Potsdam Conference in 1945, the Allies had decided to rebuild German self-government first on the local level and then on the level of the *Länder*. Therefore, they began to appoint mayors and district administrators (*Landräte*) and allowed the formation of political parties on district level. Those parties focussed in the beginning more on *Länder* politics, because early on, the Allies hindered national associations. In 1946, the USA had already authorised the

appointed prime ministers for the *Länder* of their zone of occupation to initiate the constitutional process for the *Länder*. The other Allies followed this example (Frotscher and Pieroth 2010). The first German constitutions after WWII were the constitutions of the *Länder*. For them, the creation of the *Grundgesetz* meant a reduction of their competences. Thus, their governments focussed on the maintenance of as much independence of the *Länder* as possible in the *Grundgesetz*. In addition, some of the drafters of the *Grundgesetz* gained experience in the drafting process of a *Landesverfassung*. They most likely had valuable insight in the workings of a constitutional assembly, and they already had experience in the debates on constitutional provisions. Furthermore, the *Grundgesetz* may have been influenced by the contents of the *Landesverfassungen* more than through constitutional export from the Western Allies.

The Western Allies planned to strengthen Germany's economy, namely through the Marshall Plan and the monetary reform (Spevack 2001). In opposition to that the Soviet Union favoured an agricultural Germany shaped in a communist system. It made clear that it was not willing to give up Eastern Germany from Soviet control. The increasing tensions from the struggle for world dominance led to the break of the former wartime alliance against the Nazi Regime in Germany into two parts. The conflict between East and West evolved fast and climaxed for the first time with the Berlin Blockade in June 1948, a Soviet reaction to the monetary reform in West Germany, a reform of which the Soviet sector had been left out by the Western Allies (Spevack 2001). The Berlin Blockade and the Airlift drew the West Germans towards the Western Allies and probably increased the incentives to enter into compromises in order not to lose the protection of the Western Allies and especially the USA. Another basis for the westward orientation had already been laid down during the Nazi Regime, where the Slavic nations were denounced by the Nazis as "communist sub-humans", an ideology which was not completely erased in Germany by the denazification.

In early 1948, the Western Allies met together with the Benelux States for the London Six Powers Conference without inviting the Soviet Union, and as a result, the Allied Control Council broke up in March 1948. The Military Governors of the Western Allies handed three documents from the London Conference to the Prime Ministers of the *Länder*, which advised the creation of a German constitution, authorised the reconsideration of the borders of the *Länder* and announced an Occupation Statute organising competences between the Allies and the Germans (Niclauss 1998). The Prime Ministers wanted to avoid the division of Germany which would result from the creation of a western state and therefore only reluctantly followed the allied instruction. They argued for a provisional constitution which left the way open for a reunification with the Soviet zone in the future. The Western Allies however made clear that the provisions of the Frankfurt documents were non-negotiable. It is obvious that the chance to take the German fate back into their hands finally led the Prime Ministers to relent in general (Niclauss 1998). However, they further insisted on the term "*Grundgesetz*" for the created construct, with a suggested translation to "Basic Constitutional Law" which satisfied the German wish for a transitional construct and the Allied wish for a stable

constitution (Frotscher and Pieroth 2010). It was one of the occasions, where Allied and German interests conflicted. The fact that the Germans prevailed shows that the Western Allies were willing to give as much freedom to the drafting process as possible.

The limited time horizon available for the completion of the *Grundgesetz* had an important influence on the expectations of the drafters and adopters. Most likely, they were willing to enter into more compromises with each other, as well as with the Western Allies, while expecting a quick reunification and a new constitutional drafting process within a few years. The uncertainty about the effects of the constitutional rules on the future positions of individual drafters may have been heavily reduced, and in the case that negative effects were expected, those were thought to be limited to the time span the constitution would endure; the same holding true for the positive effects.

3.2 *The Drafting Process 1948–1949*

The drafting process of the *Grundgesetz* was accompanied by the Cold War which dominated world politics in 1948–49. The Soviet Union expanded its influence on the Eastern European states through the strengthening of communist parties and the implementation of socialist regimes. After the monetary reform in West Germany, the Soviet Union reacted with the Berlin Blockade. The West answered with the Berlin Airlift in June 1948, which lasted until May 1949 (Spevack 2001). The question of nuclear proliferation accelerated the East–West tensions. It is clear that Germany was only “the focal point of a struggle for influence that was being fought in comparatively more remote places, such as eastern Europe and Asia” (Spevack 2001). As such, the West Germans could not be sure how future events would affect them and their position with the Western Allies. It is possible that they perceived themselves to be chess pieces in a world game, and these observations were most likely true.

The delegates at the Herrenchiemsee Convent and the PC might have followed the provisions of the Western Allies willingly, in order to maintain their patronage and protection. As such, they were inclined to implement rules which stabilised the political system in West Germany against the influence of socialist or communist regimes. Otherwise, the Western Allies were not willing to give up Western Germany to the Soviets. Germany was a very important strategic location for their troops, especially for the USA. As well, it was assumed that the power governing Germany would have major influence in Europe, despite the precarious situation of Germany after the war (Spevack 2001). Resulting from that situation the involved actors, the German Prime Ministers and the drafters of the constitution on the one hand and the Western Allies on the other hand, had strong incentives to make each other believe that abandoning the negotiations for the constitution was a real option. However, it was quite clear that the threat of the other actors was only weakly credible. Delays of the negotiations or a blockage of them therefore

was part of the actors' strategies to get as much of their position realised as possible. However, it is very likely that a definite failure of the negotiations would have been avoided by both sides.

3.2.1 The Constitutional Convent at Herrenchiemsee

The *Grundgesetz* was written in two steps. A first was the meeting of drafting committee consisting of constitutional experts at Herrenchiemsee. The second, the official drafting body, was the PC in Bonn. Each one will be discussed separately, beginning with the Herrenchiemsee Constitutional Convent.

After the Western Allies had demanded the Prime Ministers to constitute a council for the drafting of a constitution for the western zones of occupation from 1 September 1948, the Prime Ministers held a meeting of constitutional experts in the old castle on the island Herreninsel in the Chiemsee in August 1948, in order to maintain the influence of the *Länder* in the future constitution of Germany (Bauer-Kirsch 2005). The goal was to create a draft which would dominate the negotiations and would serve as the most influential document for the German constitution.

The convent was organised in plenary sessions and committees. The first committee dealt with fundamental, the second with jurisdictional and the third with organisational questions. The participation in these committees varied markedly, and minutes were not systematically taken for all meetings (Bauer-Kirsch 2005). After 2 weeks of work, the representatives of the *Länder* approved an unofficial proposal for a constitution. However, the final report was prepared by the editorial committee only afterwards. It is remarkable that the members of the Constitutional Convent did not vote again on the final report which was given to the Prime Ministers of the *Länder* (Bauer-Kirsch 2005). The final report contained a draft constitution which foresaw 149 articles and a 50 page documentation of the discussions as well as a detailed commentary, which displayed the opinion of the convent on several articles. In many fundamental questions where a final decision was not reached, the convent offered several alternative wordings. They left all negotiations on disputable articles or wordings for the PC (Bauer-Kirsch 2005).

In contrast to several other drafts of a German constitution which already existed prior to 1948, the draft of the Constitutional Convent had the advantage that it was commissioned by the Prime Ministers of the *Länder* and therefore could claim a higher grade of legitimacy, as in 1948 the parliaments of the *Länder* were the highest, directly elected authorities in Germany (Bauer-Kirsch 2005). The Prime Ministers gave the draft of the *Grundgesetz* from the Constitutional Convent at Herrenchiemsee to the PC on 31 August 1948. They emphasised that the PC was free to choose how it dealt with the draft. However, as it was the only complete draft and the delegates of the PC knew that the parliaments of the *Länder* would finally have to ratify the constitution, it was the basis for most of the debates of the PC (Bauer-Kirsch 2005). The strong influence of the Herrenchiemsee draft on the work of the PC can as well be explained by the

membership of some delegates in both drafting bodies. They contributed to the sustainability of the negotiations from the Herrenchiemsee Constitutional Convent to the PC, as they brought the discussions from the Convent to the negotiations in Bonn.

3.2.2 The Members of the Constitutional Convent in Herrenchiemsee

The Prime Ministers appointed representatives for each of the 11 *Länder* qualifying for the task of writing a constitution with their expertise in constitutional law. Each of them held at least a doctoral degree and many worked in academia or occupied high positions within the judicial system of their *Land* (Markovitz 2007). Every representative was accompanied by a number of assistants, who were as well all constitutional experts from academia or the public sector.

The assistants outnumbered the representatives from the *Länder* and had strong influence on the content of the *Grundgesetz*. This resulted from the fact that they actively participated in the commissions. The members of the Convent defined themselves as scientific working group. Their goal was to propose several solutions to constitutional problems and not to find political compromises (Bauer-Kirsch 2005). “Above all, they wanted to avoid what they saw as “the serious structural mistakes” of the Weimar constitution, and this professional approach was echoed in the debates of the PC” (Markovitz 2007). Still, it was important for the *Länder* representatives to implement the interests of the *Länder* they represented in the constitution.

3.2.3 The Parliamentary Council

Directly after the meeting of the Constitutional Convent in Herrenchiemsee, the PC constituted itself on 1 September 1958 in Bonn. Within the first week, the PC organised its committees (Niclauss 1998).

In considering the timeline of the deliberations, four phases can be distinguished. The first marks the early and fast work of the PC in the committees (Niclauss 1998). It was dominated by the wish to quickly present a constitutional draft, under the impression that the generosity of the Allies might be rather short-lived. In the second phase, a first intervention of the Allies redirected the work of the PC and it became more apparent that the positions of the parties conflicted heavily with regard to the propositions of the Allies. The third phase of the PC is characterised by the long inter-party negotiations (Niclauss 1998). Regardless of the heavy debates between the parties, the military governors rejected a compromise the parties had finally found. This rejection opened the fourth phase of the *Grundgesetz* debates. A new proposal, however, was also rejected by the occupiers and the negotiations had to be restarted. The SPD, in particular, was not willing to enter compromises going further than the ones already presented (Niclauss 1998).

Finally, in April 1949 the Allies published the Washington Declaration, which presented a more lenient position of the occupiers towards the *Grundgesetz* and towards the propositions from the German drafters. The negotiations took a new turn and the PC worked together with the liaison officers of the Allies on a new compromise. The delegates of the PC voted on the *Grundgesetz* on 8 May 1949 by name. It was accepted with 53 versus 12 votes. The delegates from the DP, the Zentrum, the KPD and six members of the CSU delegation rejected the draft (NiCLAUSS 1998).

The Allies intervened several times in the work of the PC. They published a first statement on the constitutional rules governing public finances in October 1948. A second memorandum followed in November, and in December, a conference between the military governors and a delegation from the PC took place in Frankfurt, where the allies assumed the role of arbitrators between the parties.

With the objection to the big compromise between the parties and the rejection of the second compromise, both in March 1949, the Allies induced a long period of hard negotiations. On 12 May 1949, the Allies agreed to the draft of the *Grundgesetz* from the PC. With the ratification of the *Grundgesetz* in the majority of the Länder parliaments, only Bavaria³ rejected the draft; on 23 May 1949, the *Grundgesetz* came into effect.

This development raises the question of whether there was any scope for the delegates of the PC to pursue individual interest. The problem that a compromise had to be found, which satisfied the interest all involved actors shaped the options of the delegates in Bonn decisively. The regular intervention of the Western Allies also raises the question how much constitutional export took place.⁴

3.2.4 The Delegates at the Parliamentary Council

The American journalist Theodore White described the Members of the PC as “a collection of waifs, strays, victims, outcasts and resistant to Hitler’s politics more devoted to liberty, republicanism and democracy even than ourselves” (Spevack 2001). According to him, the German drafters of the *Grundgesetz* were completely powerless marionettes of the Allies, having gone through several stages of denazification (Spevack 2001). Not only did the Allies intervene with the drafting process of the *Grundgesetz* to shape it after their wishes, but also the members of the PC were, although elected by the Länder parliaments, personalities approved by the Allies and some had strong personal links to their occupiers, e.g. due to migration.

Each *Land* delegated a number of representatives equivalent to their population share. The distribution of seats in the PC for the parties was proportionate to the number of votes they received in total (Möllers 2009). The PC had 65

³ The Bavarian government has been led by the CSU, which had voted against the *Grundgesetz* also in the PC. They were not content with the degree of centralisation foreseen by the *Grundgesetz*.

⁴ An issue which cannot be solved in this study, as it would require a careful comparative analysis of all constitutions coming into question.

members entitled to vote and five delegates from Berlin with observatory status. The Christian Democrats (CDU/CSU) and the Social Democrats (SPD) each sent 27 delegates, the Liberal Party (FDP) five and the Communist Party (KPD), the Center Party (Z) and the German Party (DP) each two. Several replacements occurred during the drafting process. Among the drafters were only four women. The majority of 47 of the members were public servants or had been in the past. The majority of 32 delegates had a judicial background and 11 were economists. More than half of the delegates held a doctoral degree. The average age of the drafters was 55. The Nazi Regime had attracted mainly the young adults; their generation was less represented in the PC after several stages of denazification (Möllers 2009). The background of the members concerning their history in the Nazi regime is of course not representative for the Germans. The majority of the members of the PC had internally or externally migrated or had been part of the active or passive resistance (Möllers 2009). Many came from an intellectual and bourgeois background (Markovitz 2007). “The debates in the PC reflected the elevated class background and education of the members; historical references and literary quotations were bantered back and forth” (Markovitz 2007). They had already experience from the drafting of the Länder constitutions. Three members of the PC had already been involved in the drafting process of the Weimar constitution.

3.3 *On the Interests of the Drafters of the Grundgesetz*

Economic theory has long established that individual characteristics influence behaviour of constitutional drafters. Previous studies found that special interests, either partisan or regional, shape the behaviour of the drafters (Raudla 2010).

Party membership is the best predictor of the interests in the German case, assuming that the individual drafters supported their party’s opinion and were selected by their parties, which of course was the case. While the Constitutional Convent at Herrenchiemsee was initiated by the Minister Presidents to guarantee Länder interests in the *Grundgesetz*, the PC was the arena of the parties. The two big parties, the CDU/CSU and SPD, had the greatest weight; yet, their view for a new West German state could not have been more different. On the one hand, the CDU/CSU preferred a federalist, capitalist economic system and a bourgeois democracy. They managed to reconcile their goals to those of the USA. An integration of a West German state into the western sphere was the main goal of the Union parties. The SPD on the other hand supported a socialist organisation of Germany and opposed capitalism in general. Britain, with its Labour Government at the time, was the preferred partner of the SPD. They opposed the division of Germany and were in favour of a more centralised government (Spevack 2001). The FDP objected to the notion of a provisional *Grundgesetz* but favoured a stable and earnest constitution. Under Theodor Heuss, they regularly took a conciliatory position. The DP favoured conservative positions. The Centre Party had a long

tradition as a Catholic party in Germany with conservative Christian positions. With the creation of the CDU after the war, it lost its influence dramatically. They supported many of the CDU positions, but were however slightly more socially oriented. Rather marginalized were the members of the Communist party KPD. “In the debates, nobody listened to the Communists. Their surest way of catching the assembly’s attention was by way of catcalls” (Markovitz 2007).

It was an early agreement between the CDU/CSU and the SPD that the new constitution should be based on a broad consensus (Elster 1995). This was mainly motivated by the fact that both parties were equally strong in the PC and held the government in an equal number of the *Länder*. Thus, they had to compromise their positions because no party would have been able to gather a sufficiently large majority otherwise.

After party affiliation, the *Länder* were and are definitively the other important interest group in Germany. They exerted their influence mainly at the Herrenchiemsee Constitutional Convent, although the delegates of the PC were dispatched by their *Länder* parliaments. In addition, the ratification of the new constitution was in the hand of the *Länder* parliaments. The interests of the *Länder* were mainly related to the organisation of the federation and associated with the independence of the *Länder* in as many policy areas as possible. The territorial interests were divided between those of the rural population in some of the *Länder*, such as Bavaria or Lower Saxony, and the population in the industrialised regions of Germany, such as the Ruhr area in North Rhine-Westphalia. These interests were taken up by the political parties. The SPD was rather successful among the urban population—the major cities in the Ruhr area as well as Bremen and Hamburg were ruled by SPD governments in 1948—while the CDU was more successful with the bourgeoisie and the conservative rural population. The regional interests did not per se play a dominant role during the negotiations on the *Grundgesetz*; however, they were not completely absent.

4 Description of the Content of the Constitution in Terms of a Power Relation Framework

The following section describes the findings of the content analysis following the coding rules of the codebook of the VOIP.

4.1 Description of the Formal Aspects of the German Grundgesetz

The English version of the *Grundgesetz* counts 21,093 words which is an average length compared to the other constitutions in the project. It has 146 paragraphs and is structured in 14 sections. The *Grundgesetz* has two main parts. The first

covers the basic rights from Art. 1 to 19 *Grundgesetz*. It is a particularity of the *Grundgesetz* that the drafters created a section for the basic rights in the very beginning of the constitutional text. This was done to clarify the relationship between the state and the citizen, even before the organisational structure of the state was laid down. In the second part, Art. 20–146 *Grundgesetz*, the organisational standards of the Federal Republic of Germany are formulated (Möllers 2009).

4.2 *Presentation of the Statistical Results from the Content Analysis Following the Coding Procedure Presented by the Codebook of the Veil of Ignorance Project*

The coding of the German *Grundgesetz* identified in total 1,114 power relations. Among them, 79.2 % have authority as source of power. Wealth and knowledge play a considerably lesser role, which is not surprising in the first place (cf. Table 1). A high share of authority-based power relations would be expected as constitutions structure authorities.

The German constitution has a share of authority-based power relations which is slightly above the mean of the constitutions in the whole project. The question is, whether this high share of authority-based power relations is related to uncertainty.

Table 1 further shows that social power relations have only a small numerical advantage over instrumental power relations in the *Grundgesetz*. Both the types of power and the value from the *Grundgesetz* are above the mean of the constitutions in the project. This leads to the findings for the third variable V3. A significant majority of the identified power relations have a positive direction in the *Grundgesetz*. Only 2.8 % of them deny the agent the use of a power resource. The

Table 1 Distribution of power relations in the German *Grundgesetz* by source, type and direction of power (%)

<i>Source of power</i>	
Authority [V1 = 1]	79.2
Wealth [V1 = 2]	6.5
Knowledge [V1 = 3]	5.6
Indeterminate [V1 = 8]	8.8
Total (N)	100.1 (1,114)
<i>Type of power</i>	
Social [V2 = 1]	51.4
Instrumental [V2 = 2]	48.6
Total (N)	100.0 (1,114)
<i>Direction of power</i>	
Positive [V3 = 1]	97.1
Negative [V3 = 2]	2.8
Indeterminate [V3 = 8]	0.1
Total (N)	100.0 (1,114)

Table 2 Type of power per source of power in the German constitution (%)

	Social power	Instrumental power	Total (N)
Authority	43.4	35.8	79.2 (882)
Wealth	3.1	3.3	6.4 (72)
Knowledge	1.8	3.8	5.6 (62)
Indeterminate	3.1	5.7	8.8 (98)
Total (N)	51.4 (573)	48.6 (541)	100.0 (1,114)

puzzle concerning the relevance of the variables grows with this finding. Why would one find support for uncertainty according to P1 and P2, even though it is limited, but not according to P3? The very intuitive answer to this question is that one or more of the variables do not capture uncertainty.

Under closer examination, Table 2 shows that in those cases where the power is based on authority, the share of social power relations is higher than the share of instrumental power relations. For the power relations drawing on wealth or knowledge as source of power, this is reversed. The VOIP argues that under uncertainty, constitutional drafters are more concerned about protecting themselves from the abuse of power by others. Therefore, they implement a higher share of authority-based power relations and they are specifically concerned with social power relations. What is found in the German case is a combination of both. Imbeau and Jacob argue that this combined measure is a measure for the opaqueness of the veil of ignorance (Imbeau and Jacob 2015).

A basic proposition of the VOIP is that under uncertainty, constitutional framers will implement rules to avoid a future abuse of power by others. It is interesting to analyse only the basic rights, because they deal without any doubt with the protection of individuals from the abuse of state power. The protection of the individual from state coercion lies obviously in the interest of all citizens and especially in the interest of those who are at the lower end of the power distribution. The *Grundgesetz* has two parts. The first covers only the basic rights and the second part deals with the state organisation of Germany. Thus, it seems to be a suitable endeavour to focus the analysis on basic rights provisions. Even though one could argue that the creation of a whole section concerned only with the protective rights of citizens may be evidence enough for the fact that the framers were indeed very keen to protect individuals from the abuse of power.

Very strong support for the propositions of the VOIP can be expected from the separate analysis of the statistical findings for these parts. Explicitly comparing the first part of the *Grundgesetz* (the basic rights) to the second part (the state organisation), the share of authority-based power relations should be higher in the first part than in the second part, the share of social power relations should be increased in the first part in comparison with the second part and the share of negative power relations should as well be larger in the first part than in the second.

As one can see in Table 3, only 110 power relations were identified in the basic rights section. They show a pattern which is distinct from the overall findings as

Table 3 Distribution of power relations in the basic rights section of the *Grundgesetz* by source and direction of power (%)

<i>Source of power</i>	
Authority [V1 = 1]	69.0
Wealth [V1 = 2]	1.0
Knowledge [V1 = 3]	9.0
Indeterminate [V1 = 8]	21.0
Total (N)	100.0 (110)
<i>Direction of power</i>	
Positive [V3 = 1]	89.0
Negative [V3 = 2]	11.0
Total (N)	100.0 (110)

expected. Authority is in the first part of the *Grundgesetz* only a source of 69 % of the power relations compared to a share of 80 % in the second part. The share of indeterminate sources is considerably higher in the first section of the *Grundgesetz*. Thus, the first expectation concerning the source of power is not met. A very simple explanation for this is that many of the capacities defined in the basic rights section are based on the individual per se and are not derived from his/her political, economic or preceptoral entitlements. The share of social power relations has increased slightly by 1.6 % points. This is as expected but compared to the difference between the two parts of the *Grundgesetz* for V1, the result seems negligible.

However, the share of positive power relations also diminishes considerably when only the first part of the *Grundgesetz* is analysed. The protection of the basic rights requires the restriction of state powers. The increase of negative power relations thus is as expected. However, the positive power relations still dominate the text.

The pattern of the variables in the second part of the *Grundgesetz* is in line with the findings for the overall constitution; therefore, a deeper analysis of these findings is omitted here.

The suggestion that the basic rights section yields different results for the variables than the second part of the *Grundgesetz* and the overall text is confirmed. We expected to observe more authority-based power relations in the basic rights part of the *Grundgesetz* than that in the second part of the constitutional document, but we did not find that. This raises the question of how to interpret the result. According to P1, a high share of authority-based power relations is a result of uncertainty, as drafters under uncertainty will implement rules which protect them from the abuse of power by others. The considerations made above, in contrast, suggest that authority-based power relations are either not linked to uncertainty or that there was no uncertainty on the drafters' side during the drafting process.

On the other hand, the share of negative power relations is increased in the first part of the *Grundgesetz* compared to the second part. This difference is as expected and confirms P3, which states that under uncertainty, constitutional framers implement rules to protect individuals from the abuse of power.

Still the results are conflicting and even more puzzling. Why are less authority-based power relations observed in the basic rights section of the *Grundgesetz* than in the state organisational provisions in the second part? Why does the share of social power relations not change at all? Why is the share of negative power relations higher in the basic rights section, although the share of authority-based power relations is reduced? And how can the different findings be reconciled with the theory? Obviously, one or more of the variables does not capture uncertainty and one or more of the propositions of the VOIP has to be reconsidered.

First of all, the share of authority-based power relations may be lower in the basic rights sections, since in this section, the rights of individuals are defined, not the rights of authorities. Thus, even though the basic rights deal with the protection of individuals from the abuse of power, the goal is not served by only analysing this section. Perhaps, it is the fact that this section was created and put ahead of all further provisions which proves more than the content analysis is able to. Second, it is plausible that the share of social power relations may have nothing to say about uncertainty during the drafting process. The findings for the *Grundgesetz* in total are insignificant, and for the basic rights section, it is the same. Third, the negative power relations may be higher in the basic rights part, since basic rights are defensive rights and therefore formulated differently than provisions for the organisation of the state. Still, the share of positive power relations dominates as well in this part of the *Grundgesetz*. Finally, negative power relations may be used in the basic rights section to protect citizens from the abuse of state power, but not in the section of the organisation of the state. There the drafters may have focussed more on defining authority as source of power. However, the VOIP has not yet formulated how the different propositions may be connected.

5 Critical Discussion of the Findings

5.1 *About the Different Actors in the Drafting Process*

One factor in the discussion is how much room for manoeuvre the delegates had during the drafting process. They knew that not only the majority of the *Länder* parliaments had to accept the draft and that the allies had to consent to it. The Western Allies intervened regularly in the work of the delegates of the PC. There could have been limited scope for the agents to follow their own interest, when this interest was conflicting with the Allies interests, and the Allies had heterogeneous interests as well. Their interactions prove that the matter of the German constitution was highly controversial among them. While the French for example were sceptical towards a unified West German state and preferred a loose federation of the *Länder*, the USA was in favour of a federation following their own model. Both models were not enough for the British, however, who were rather in favour of a strong central organisation. The CDU/CSU was very successful in combining their interest with those of the Americans. In addition, the delegates

had to keep in mind that the *Grundgesetz* had to be adopted by a majority of the *Länder*. Thus, a deviation too far from the Herrenchiemsee draft was seen as problematic. The blocking position of the SPD from March 1949 until the end of April 1949 shows that the drafters were not willing to write a constitution only to the liking of the Western Allies. Although some voices in the public often stated that the delegates of the PC were only marionettes of the Allies, it would have been fatal if this critique would have led to the conviction among the Germans that their new constitution was dictated by the occupiers (Elkins et al. 2008).

The regular intervention of the Western Allies influenced the *Grundgesetz*. It is not easy to distinguish from the final constitutional text, to which degree the variables of the VOIP reflect the existence of a veil of ignorance and to which degree they reflect the compromises from the interests of the different veto players.

5.2 Time Considerations

A classic argument in constitutional economics is that the long-term perspective of constitutional rules has the effect that drafters are uncertain about future effects of the rules they implement and that therefore decision-makers approach general interest and may reach agreements more easily in contrast to a situation when all of them try to implement their individual interest (Brennan and Buchanan 1985). It seems that this function is sometimes subsumed under the veil of uncertainty. However, considering the time horizon for rules separately from the veil, the picture becomes complex. Vermeule (2001) counter-argues that it is not obvious from the beginning whether durability of constitutional rules really serves the purpose of distorting individual interests, because it may still be rational for the individual to ignore the future effects and it may be hard to find consent on rules which are hard to change ex post (Vermeule 2001).

It is possible that only the transitory character of the *Grundgesetz* made compromises feasible, which would have been out of reach in case the drafters had expected the *Grundgesetz* to last. The delegates at the Herrenchiemsee Convent and at the PC were perhaps willing to accept formulations or provisions they normally would not have agreed to if they had planned the *Grundgesetz* to be a lasting constitution. It seems likely that the expectation of a quick reunification and therefore a new drafting process of a constitution influenced the behaviour of the drafters and therefore the constitutional text.

6 Conclusion

The test of the Veil of Ignorance Hypothesis suggested by Imbeau and Jacob (2015) analysing the content of a constitution gives only mixed evidence in the German case. The findings from the content analysis of the *Grundgesetz* and

the historical background are ambiguous. First evidence from the *Grundgesetz* shows that primarily authority is used as source of power and that the share of social power relations is indeed higher in the constitutional text than the share of instrumental power relations. The advance is, however, so small that it is unclear whether it is relevant. That a constitution would rather limit power than ascribing it is not supported by the findings from the content analysis of the *Grundgesetz*.

Overall a content analysis is an attractive tool to find evidence for a veil of ignorance in the text of a constitution. However, even if evidence could be found that the constitution satisfies the general interest, the complicated structure of the drafting process does not allow for the simple conclusion that the drafters faced a very opaque veil. On one hand, the interaction between several veto players leads to a compromise of the different positions and it is not trivial to evaluate how uncertainty contributed to it. On the other hand, the interpretation of the suggested variables can be questioned. None of them convincingly leads to uncertainty. Authority is what a constitution creates per definition and a constitution organises the competences of the constitutional actors and their relationship. Cultural or language conventions may be the source of the variance and not uncertainty. In addition, there is no objective function formulated. It is not clear what a high share of authority-based power relations is or how much advance social power relations should have over instrumental power relations. Thus, an interpretation of the findings seems arbitrary. Finally, the median voter's interest is not time and space invariant. Each and every society has its own median voter. Comparing the findings over several constitutions would require that one has an idea what the general interest in any society is. Consequently, the observed tendency of the drafters of the constitution to approach the median voter's position cannot be compared between countries. An interesting approach would be to define what could be expected as the interest of the ideal median voter. Defining a median voter for each and every society and measuring how far the different constitutions deviate from this position. Whether this endeavour is promising or accomplishable should be discussed at another instance.

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