Conference Report

FIFTY YEARS OF GERMAN BASIC LAW

THE NEW DEPARTURE FOR GERMANY

American Institute for Contemporary German Studies
The Johns Hopkins University

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C O N T E N T S

Foreword.....v

About the Authors.....ix

THE BASIC LAW: A FIFTY YEAR ASSESSMENT
Donald P. Kommers.....1

THE ROLE OF THE FEDERAL CONSTITUTIONAL COURT
Jutta Limbach.....9

THE PROTECTION OF HUMAN DIGNITY (ARTICLE 1 OF THE BASIC LAW)
Ernst Benda.....35

FIFTY YEARS OF THE BASIC LAW – MIGRATION, CITIZENSHIP AND ASYLUM
Kay Hailbronner.....47

STATE AND MARKET IN THE CONSTITUTIONAL ORDER
Fritz Ossenbühl.....71

Conference Agenda.....89

FOREWORD

The fiftieth anniversary of the founding of the Federal Republic of Germany in May of 1999 was the occasion for the American Institute for Contemporary German Studies, in cooperation with the Dräger Foundation, to organize a conference that addressed the development of Germany's Basic Law since 1949. The agenda of the conference included a number of issues, which were presented in a comparative context with developments influencing the interpretation of the U.S. Constitution. The role of the Federal Constitutional Court, balancing the equation between the state and the market place, controlling asylum and immigration policies, and responses to the increasingly comprehensive global economy were among the topics of discussion. In addition, the particular impact of German unification on the Basic Law was a focus of the conference.

The contributions in this volume represent several of the perspectives presented on these issues. They provide assessments of the parameters of German approaches to the interpretation and application of the Basic Law to the continually changing environment in Germany during the past five decades. They also raise questions concerning the anticipated challenges Germany faces in its domestic environment and within the European Union as an increasingly important factor in the legal environment.

We are pleased that the current and past presidents of Germany's Federal Constitutional Court, Prof. Dr. Jutta Limbach and Prof. Dr. Ernst Benda have contributed their thoughts and analysis to this volume, along with three leading scholars: Professor Donald Kommers, University of Notre Dame, Prof. Dr. Kay Hailbronner, University of Konstanz, and Professor Fritz Ossenbühl, University of Bonn. It is particularly important for Germans and Americans to understand the common challenges we face in adjusting to the changes and challenges generated in our societies and within the global community. Germany's Basic Law shares many of the values and principles laid down in the U.S. Constitution. How we interpret them may differ based on our different political and social history. Yet it is clear that the basis for two healthy

and innovative democracies is the German and American commitment to the preservation of the constitutional framework.

These essays will be of value to those who wish to understand and pursue the development of Germany's most successful experiment in democracy in its often turbulent history. The fiftieth anniversary of the Federal Republic also coincided with the tenth anniversary of the fall of the Berlin Wall, which represented another milestone in German democracy. Taken together, these two memorable turning points give hope and encouragement to those seeking to build on the democratic principles, which help to rebuild the Federal Republic in 1949 and to accomplish a bloodless revolution forty years later.

We are grateful for the cooperation of the Dräger Foundation in preparing this conference, to all the participants and to the German Program in Transatlantic Relations for its generous support.

Jack Janes
Executive Director November 1999

ABOUT THE AUTHORS

Professor Dr. Ernst Benda is the past president of Federal Constitutional Court in Karlsruhe, of which he was a member from 1971-1983. Since 1984 he has been a professor for Constitutional Law at the University of Freiburg. He is currently chairman of Media Council of Berlin-Brandenburg since 1992.

Prof. Dr. Kay Hailbronner, LL.M. is director of the Center for International and European Law on Immigration and Asylum and Chairman ILA Committee on Refugee Procedures. From 1988 - 1992 he was Judge at the Administrative Appeal Court of Baden-Württemberg. In 1990 he served as legal counsel for the federal government in Asylum and Immigration Cases at the Constitutional Court and the European Court, Luxembourg.

Professor Donald P. Kommers is the Joseph and Elizabeth Robbie Professor of Government and Law at the University of Notre Dame. He has spent several years of his academic career in Germany, most recently as a senior fellow at the Max Planck Institute of International and Comparative Public Law (Heidelberg). He has authored numerous books and articles on American and comparative constitutional law, including *American Institutional Law: Essays, Cases, and Comparative Notes* (1998, coauthored with John Finn).

Professor Dr. Jutta Limbach is the first woman to be elected president of the German Constitutional Court. In 1971 she received a chair of law at the Free University of Berlin and worked there as professor for civil law, commercial law and legal sociology until 1989. In 1989 Ms. Limbach became Senator of Justice of the City and State of Berlin. In March 1994 she was elected justice and vice-president of the German Constitutional Court and then president in September 1994.

Professor Dr. Fritz Ossenbühl he has been full member of the North Rhine Westphalian Academy of Sciences since 1998. Since 1984 has been member of the Selection Committee of the Alexander-von-

Humboldt Foundation. From 1984-1996 he was member of the Permanent Delegation of the German Convention of Lawyers (*Deutscher Juristentag*). His main areas of specialization are constitutional and administrative law and state liability law.

THE BASIC LAW: A FIFTY YEAR ASSESSMENT

Donald P. Kommers

In 1949, fifty years ago, Germany embarked upon a fascinating constitutional experiment. In that year, with the consent of the three occupying powers, the United States, France and Great Britain, German leaders in the western zone of occupation drafted a new constitution that created the Federal Republic of Germany (FRG).[1] They called it the Basic Law (*Grundgesetz*) to highlight its provisional character. The more dignified term "constitution" (*Verfassung*) would be reserved for the time when Germany as a whole would determine its own future. Accordingly, the Basic Law by its own terms was to cease to exist on the day a reunited Germany replaced it with a real constitution freely adopted by all the German people.[2]

The Basic Law raised as many questions as it tried to answer. Could a newly minted constitution—mere words on paper—breathe new life into a people devastated by war? Would it serve as a framework of government? Would it promote respect for human rights and popular government? Would it foster internal political unity? And if the FRG were to reach the half-century mark—as it would in 1999—how much of its success would be attributable to the values, rights, and powers laid down in the Basic Law? No one would have dared to answer these questions in 1949. Now, however, on the Basic Law's fiftieth anniversary, we are able confidently to respond to most of them.

1. THE ORIGINAL DOCUMENT: ITS MAIN FEATURES

The sixty-one men and four women who framed the Basic Law—in an assembly known as the Parliamentary Council—did so in the shadow of the Third Reich and in the presence of a Communist dominated East Germany. With these experiences burned into their souls, the sixty-five delegates, whose median age was fifty-five, proceeded to create a constitutional democracy that would rebuild the *Rechtsstaat*, secure political stability, protect human rights, and maintain peace.[3]

In reconstituting themselves as a free people, the framers did not—and could not—reject their own democratic tradition, one best represented in the Weimar Constitution of 1919. Many of its individual rights provisions and institutional arrangements were taken over by the Basic Law. In important respects, however, the Basic Law also broke new ground. In broad outline, the gulf between Weimar and Bonn (now Berlin) represented a major shift from a popular democracy to a **constitutional** democracy, emphasizing limits on the exercise of political power and constraints on majoritarian political institutions.

The most interesting parts of the Basic Law have to do with these limits and constraints. They make up what might be called Germany's "new constitutionalism."[4]

The cornerstone of the new constitutionalism is to be found in an enforceable bill of rights. These rights include all the classical civil and political freedoms of the western political tradition; but they also include communal values—e.g., marriage, family, motherhood, and the right of parents to have their children exposed to religious education in the public schools[5]—that the state is obligated to protect and promote. Together with the fundamental liberties of speech, association and religion, the Basic Law confers a general right to "personal freedom" as well as a more specific right to "life and physical integrity."[6] These general rights of liberty, like several other guaranteed rights, may be limited by law; in no case, however "may the essence of a basic right be encroached upon."[7] Overarching and informing all of these rights and values is the principle of human dignity which the first article of the Basic Law declares "inviolable." In fact, Article 1 makes it the duty of "all state authority to respect and protect" human dignity at all times. In accentuating the primacy of human dignity and the state obligations that derive from it, the Basic Law—far more than the U.S. Constitution—speaks in the language of responsibilities as well as rights.

In addition, the Basic Law lays down structural principles of political order. These include popular democracy, federalism, separation of powers, the rule of law, party competition, and certain principles of political obligation.[8] **Democracy** manifests itself in representative institutions; **federalism** in strong state governments and local self-government; **separation of powers** in the division of authority between the constitutional organs of the national government; **rule of law** in a judiciary independent of the executive and the legislature; **party competition** in open, free and direct elections; and principles of **political obligation** in the ban on activities aggressively opposed to the values and principles of the constitutional order. Equally constitutive of this order is the principle of the social welfare state (*Sozialstaat*).[9] Finally, and no less important, the Basic Law (in its original version) looked to a unified Germany while committing the Federal Republic to serving peace "as an equal partner in a united Europe."[10]

What differentiates these rights, values and principles from previous German constitutions is their supremacy and permanence. The Basic Law represents the **fundamental** law of the nation. As such, it derives its authority directly from the people, but all governmental authority is in turn derived from the constitution. Accordingly, the Basic Law serves as the **supreme** law of the land; it is a **binding** document and, as several of its provisions attest, it controls

the entire legal order, categorically rejecting Weimar's principle of parliamentary supremacy in all things. The Basic Law declares that its rights and values "shall bind the legislature, the executive, and the judiciary as directly enforceable law."[11] To remove all doubt about this, the Basic Law provides a judicial remedy for any violation of a basic right and creates a powerful constitutional court to guard and protect the constitution as a whole.

Besides its supremacy, the Basic Law establishes its core principles in perpetuity. They are **permanent**. Article 79 (3)—the so-called "eternity clause"—bans any constitutional amendment that would affect or undermine the dignitarian principles of Article 1 or the basic structural principles of the constitutional order set forth in Article 20 (i.e., federalism, separation of powers, rule of law, and the social welfare state). Putting an eternity clause into a provisional constitution seemed jarringly incoherent. The framers nevertheless believed that the best way to safeguard human dignity and preserve the "democratic and social federal state," now and in the future, was to place certain principles of government beyond the capacity of the people to amend—in short, to freeze history. These principles include severe restrictions on anti-democratic activities, one of the most important of which is the Basic Law's prohibition of political parties seeking "to impair or abolish the free democratic basic order."[12]

The political system created by the Basic Law was a bold experiment in constitutional engineering, designed above all to combine popular democracy with political stability. In short, the framers set out to correct the faults and close the loopholes believed to have contributed to Hitler's rise to power and Weimar's destruction in 1933. One major change was the Basic Law's lack of any reference to popular referenda or initiatives on national issues. A related change was the weakening of the office of president. Under Weimar's Constitution, the president of the Reich was elected by all the people and regarded as the embodiment of their will. He could dissolve parliament, dismiss the chancellor, exercise emergency powers, command the armed forces, suspend legislation, and submit laws to a referendum.[13] Under the Basic Law presidents can do none of these things, and they no longer compete with the chancellor in the exercise of governmental power. What is more, they are elected indirectly by a convention of state and federal parliamentary delegates and serve as relatively powerless and ceremonial heads of state.

The Basic Law lodges real executive power in the hands of the chancellor. It puts him in charge of the government and makes him its chief policymaker. Although the chancellor is elected by and responsible to parliament, parliament is unable to dismiss him unless it simultaneously elects his successor. This so-called "constructive vote of no-confidence" gives the chancellor considerable

leverage over parliament. In the Weimar Republic parliament could dissolve itself and trigger new elections, with the result that no parliament survived the full term for which it was elected. Under the Basic Law, by contrast, parliament may not dissolve itself. Members of parliament are elected for a fixed term of four years in universal adult suffrage. New elections can be held prior to the expiration of this four-year period only if the chancellor loses a vote of confidence that **he initiates** and then **only** if the federal president decides to call for new elections at **his** or **her** (i.e., the chancellor's) request.[14] These arrangements help to account for the relative stability of German governments over the last fifty years.

In still another break with the past, the Basic Law recognizes political parties as major organs of parliamentary representation. On the other hand, Article 21 (2) declares unconstitutional those parties "which by reason of their aims or the conduct of their adherents seek to impair or abolish the free democratic basic order." This prohibition and related provisions of the Basic Law, such as Article 9's ban on associations directed against the constitutional order, establish what has come to be known as Germany's "guarded" democracy. It obliges the state to oppose persons and groups who would use their rights to subvert or destroy democracy.[15] Whatever else may be said about these provisions, they certainly dampen, as was intended, popular pressures for revolutionary reform.

Germany's electoral system is both a reflection as well as a determinant of its party system. In setting up an electoral system, the framers returned to Weimar's system of proportional representation, but with a difference. They adopted a two-ballot system that combined single-member districts with proportional representation, along with the rule that bars legislative representation to political parties failing to get at least 5 percent of the national vote, a rule designed to rid Germany of the splinter parties that undermined effective parliamentary government in the Weimar Republic.[16] Neither the electoral system nor the 5 percent rule is specified in the text of the Basic Law. But their solid anchorage in German electoral law (both state and federal) since 1949, and their canonical status in the jurisprudence of the Federal Constitutional Court, has virtually elevated proportional representation and the five percent rule into established constitutional practices.[17]

Perhaps the most daring institutional innovation of the Basic Law is the creation of the Federal Constitutional Court, a judicial tribunal empowered to resolve constitutional disputes between branches and levels of government and to review the constitutionality of federal and state law. As **the** guardian of the Basic Law, the Court was designed to serve as the umpire of the federal system, the custodian of party democracy, and the protector of all guaranteed values and

rights.[18] In short, Germany's older parliamentary democracy had been transformed into a new juridical democracy, solidifying the *Rechtsstaat* by keeping popular majorities from exceeding the limits of the constitution.

2. A TOO FLEXIBLE CONSTITUTION?

John Marshall, the great chief justice of the United States Supreme Court, once remarked that a constitution by its nature "requires that only its great outlines should be marked [and] its important objects designated."[19] He later sharpened the point by saying that "a constitution is designed to approach immortality as nearly as human institutions can approach it."[20] In measuring the Basic Law against these standards, we confront a document far less lapidary than our description of the new constitutionalism might suggest. In its original form, the Basic Law consisted of a preamble and 146 articles (151 if we include the five articles of the Weimar Constitution on church-state relations absorbed into the Basic Law under Article 140). At least sixty of these articles dealt directly or indirectly with federal-state relations. The detail in these provisions is as much a result of Allied insistence on constitutionalizing the rights of the states in the fields of tax policy and public administration as of any German penchant for precision and thoroughness.

By 1999 the Basic Law had ballooned into a document of 181 articles—185 if we again include the Weimar religious articles. It had been amended forty-six times, almost one major amending act per year, introducing changes into 58 articles and 110 paragraphs of the original constitution.[21] Over and above these changes, 41 new articles were put into the constitution, 21 paragraphs and clauses of which were in turn amended or repealed in subsequent years. (These 41 articles are about one-third the length of the original constitution.) The United States Constitution, by contrast, had been amended a miserly seventeen times between 1791 and 1999, an average of one amendment every twelve years. The Basic Law was obviously not a perfect constitution. (What constitution is?)

A modern-day John Marshall would probably trace the Basic Law's imperfection to its preoccupation with detail or to its failure to distinguish between what he called "great outlines" and "minor details." It is within the intent of a constitution, Marshall wrote, "to endure for ages to come, and consequently to be adapted to the various **crises** of human affairs."[22]

On the other hand, Americans should be slow to accept the Marshallian critique of the Basic Law. After all, we Americans, along with the British and the French, did not allow the Germans to adapt their constitution to the various crises of human affairs. It was not a document created for ages to come but for

a transitional period. It was a seasonal document quickly drafted under Allied pressure and in the face of mushrooming hostility between East and West. It was likewise the product of a divided and occupied Germany, reflecting the absence of sovereign nationhood and requiring transitional provisions on such matters as citizenship, refugees, elections, former Nazis, the status of Berlin, and the organization of the federal territory. Little wonder that the Basic Law would be in need of substantial amendment as West Germany gradually regained her national sovereignty. As time passed it would be necessary to fill gaps and correct flaws in the original document. (The transitional provisions just mentioned required some seventeen changes over the years.)

3. MAINTAINING THE CONSTITUTION

Most of the repair work on the Basic Law took place during the years 1954-56, 1968-69, and 1990-94. The first round of amendments adjusted the Basic Law to the restoration of West German sovereignty and remilitarization; the second round reflected the FRG's concern with internal and national security; the final round sought to harmonize the Basic Law with Germany's reunification and membership in the European Union. Each of these periods represented transformative moments in German constitutional politics. In addition, each round of amendments took place in legislative periods in which it was relatively easy to garner a two-thirds vote necessary to amend the Basic Law. In the first period (1953-57), the Adenauer-led coalition parties were at the top of their strength in both houses of parliament; in the second (1965-69), a grand coalition between Social and Christian Democrats ruled the country; in the third (1990-94), Germany reveled in the nation's reunification. The three rounds of changes affected, respectively, 24, 61 and 38 articles of the Basic Law.

The First Round. West Germany's first great constitutional debate opened with the Adenauer government's decision in 1952 to join the European Defense Community (EDC).[23] Would the Basic Law permit Germany to establish a conscript army? The parliamentary opposition answered with an emphatic "no." Social Democrats and their supporters saw the Basic Law as a peace constitution, one born of the Allied decision to demilitarize Germany. They argued, correctly, that it conferred no explicit authority to build an army and banned any preparation for military aggression. In response, the government insisted that the "military aggression" clause conferred an implied power to create an armed force for **defensive** purposes. In 1954, after two years of debate, and following the 1953 election, all doubts about the legitimacy of Germany's membership in a defense alliance were removed. The government succeeded in amending the Basic Law to authorize the federation to provide for the country's

defense and a military draft. In 1956, finally, twelve additional articles were amended to meet the requirements of a defense establishment.

The dispute over rearmament was a major chapter in the constitutional politics of the FRG. It was also an important symbol of West Germany's commitment to constitutional governance and the rule of law. Unable initially to resolve the conflict politically, the parliamentary opposition, the government, and the federal president took turns in petitioning the Federal Constitutional Court for a ruling on whether the FRG's membership in EDC would be constitutionally permissible. The 1954 amendments, however, obviated the need for a judicial ruling. What is important for present purposes is that all sides in the dispute accepted the supremacy of the Basic Law and, equally significant, the legitimate role of the Federal Constitutional Court in its interpretation. This was an encouraging sign for the future development of German constitutionalism.

The Second Round. The years 1968 and 1969 actually represented successive waves of constitutional change, the first centering on procedures for declaring and managing a national emergency, the second on domestic policy concerns and the federal-state relationship. The 1968 emergency amendments, which added sixteen new articles to the document and repealed three old ones,[24] extended the powers of the federation to pass bills, issue directives, and take other measures to meet a foreign invasion or major civil disturbance. What is interesting about these new provisions is the meticulous care taken by their authors to limit the duration of any emergency, to require the *Bundesrat*'s consent to emergency measures passed by the *Bundestag*, and to curtail civil liberties no more than necessary. In fact, Article 115g provides that the powers and functions of the Federal Constitutional Court may not be set aside or changed during a state of emergency. To this extent, the changes in the Basic Law gave the lie to German critics who regarded the emergency amendments as a license for governmental oppression and dictatorship.

Fierce opposition greeted the emergency amendments when originally debated, triggering violent street demonstrations and other forms of unrest.[25] The broader context of German politics helps to explain the opposition. The mid-to-late 1960s were transitional years in German politics. A cultural revolution was in the making. Universities were under siege. The Cold War was heating up. Anti-Americanism, spawned by the Vietnam War, was on the rise, and anti-militarism was one of its consequences.[26] In the mind of its critics, moreover, Bonn's grand coalition (1966-69) subverted the democratic process by virtually eliminating an effective parliamentary opposition. The result was the birth of an extra-parliamentary "New Left" movement that would grow in numbers and stridency in the years ahead.

The 1969 wave, on the other hand, followed the end of the grand coalition, marking still another turning point in Germany's constitutional development. Helped by the "New Left" movement, the Social Democratic Party (SPD), led by Willy Brandt, came to power in Bonn for the first time in the postwar period. The constitutional emphasis now shifted to the domestic scene. Two amending acts affecting some twenty articles of the Basic Law dealt mainly with budgetary and fiscal affairs, reaffirming and concluding West Germany's emancipation from all Allied dictates over the relationship between the federation and the states. Constitutional changes awarded new powers to the federation over the field of higher education, loosened certain restrictions on budgetary planning, modified guidelines for the apportionment of tax revenues among levels of government, and conferred discretionary instead of mandatory authority on the federation to modify state boundary lines. In short, the authors of these amendments had realigned the federal-state relationship in favor of more power at the center and in conformity to perceived social and economic needs.[27]

The trend toward constitutionalizing central legislative power continued in the 1970s. Additional amending acts during these years expanded the federation's authority over several domestic policy areas, the most controversial of which was police activity. The political turmoil that started with the emergency amendments of 1968 had not subsided, and internal security remained high on the constitutional agenda. Accordingly, the Basic Law was amended to authorize a greater federal role in police investigation, in compiling data on subversive activity, in securing the loyalty of public servants, and in controlling commerce in weapons and explosives.[28]

The internal security amendments were deemed necessary to combat domestic terrorism as well as less dangerous forms of anti-state activity. Several other amendments, however, expanded West Germany's democracy and reinforced political accountability. They did so by lowering the voting age to eighteen, by requiring political parties to publicly account for the uses (as well as the sources) of their funds, and by providing for a parliamentary petitions committee to hear the complaints of ordinary citizens.[29] These changes supplemented a 1969 amendment that conferred a **constitutional** right on all persons to file individualized complaints with the Federal Constitutional Court to vindicate their guaranteed rights against any interference by the state.[30] The Basic Law had changed in substantial ways to meet the needs of internal security, but it was also being amended to reinforce its underlying principles of democracy and *Rechtsstaatlichkeit*.

The Third Round. The extension of the Basic Law to the five new *Länder* of the old German Democratic Republic (GDR) required considerable constitutional surgery. The Unity Treaty wielded the scalpel. We may pass over

amendments that repealed Article 23 (extending the Basic Law's reach to new territories) and expunged all other references in the Basic Law to the goal of unity or the recovery of other lost German territory. Article 23's repeal effectively froze Germany's present borders, legally foreclosing any further claims to territory lost in World War II. We may also pass over changes required in the structure of the *Bundesrat* as well as an article temporarily releasing the new *Länder* from obedience to certain constitutional provisions. More important for present purposes are Treaty provisions amending Article 146 and recommending future changes in the Basic Law,[31] matters taken up below in the discussion of constitutional reform.

A series of amendments passed in 1993 and 1994 brought the Basic Law into accord with the Maastricht Treaty on European Union, expanded the authority of the federation over new activities and operations, clarified the rights of the *Länder* in European affairs, and enlarged their powers of consent in the *Bundesrat*. The most significant of these changes was a new seven-paragraph Article 23 permitting the transfer of sovereign power to the European Union. A related change in Article 88 authorized the Federal Bank to transfer its responsibilities and powers to the European Central Bank. Another amendment conferred on foreign nationals of the European Union the right to vote in local elections,[32] a change that reversed a decision of the Federal Constitutional Court invalidating the right of non-citizens to vote in such elections.[33]

Other amendments in the 1990s authorized the privatization of the railroads, air transport, postal services, and other operations directly administered by the federation. The national government's power was also expanded to include concurrent jurisdiction over genetic engineering and human transplants, not to mention new authority to lay down guidelines for preventing the transfer abroad of cultural property. (It is worth noting that nearly every major extension of the *Bundestag*'s legislative authority was accompanied by provisions requiring the *Bundesrat*'s consent to the exercise of such authority.) Article 20a, a new provision, contained a directive requiring the state to protect "the natural sources of life." Still other changes reallocated tax revenue, modified legislative procedures, and authorized state boundary changes.[34]

4. CHANGE AND CONTINUITY

Constitutional change in the Federal Republic shows that the Basic Law had been transformed into a document very different from the version adopted by the Parliamentary Council in 1949. Our modern-day John Marshall might say that the difference is in the details or "minor ingredients." He might be inclined to suggest that the Basic Law has been distended into an unwieldy bulk

that mocks the contrast between triviality and fundamentality. Indeed, he could point out that 50 percent of all constitutional changes in the written document modified the minutiae of sections dealing with public administration, court organization and jurisdiction, taxation and public finance, a state of emergency, and transitional provisions. But this all too American perspective overlooks and ignores the culture of the German *Rechtsstaat*, a culture that requires, in deference to the rule of law, that legal documents provide as much guidance as possible to their interpretation by the judiciary and other government agencies.

The three rounds of constitutional amendments are equally important for what they have not changed. In particular, they have not touched the **fundamental** principles and structures of the Basic Law. Democracy, federalism, separation of powers, the rule of law, the *Sozialstaat*, and the multiparty state have remained largely undiminished. Their integrity, moreover, can be said to have been enhanced by the decisions of the Federal Constitutional Court. Also largely untouched by amendments were the Basic Law's sections on parliament, *Bundesrat*, federal presidency, chancellor, and cabinet, and the Federal Constitutional Court, each of which is a major constitutional organ of the Federal Republic. Even the twenty-nine textual changes in the section on federal legislative powers failed to alter the **essential** character of German federalism,[35] as the increasingly important role of the *Bundesrat* tended to show.

More serious were the textual changes in the bill of rights (arts. 1-17). But even here nine of the original seventeen articles that protect fundamental rights remain unamended. These include the general right to "personal freedom" as well as the more specific right to "life and physical integrity" (art. 2). The unamended articles also include those guaranteeing freedom of religion (art. 4), freedom of speech (art. 5), freedom of assembly (art. 8), and the right to property (art. 14), along with articles providing for the protection of marriage and family (art. 6) and parental rights in education (art. 7). Eight articles of the bill of rights, however, have been altered in some fashion. (By contrast, the American Bill of Rights has never been amended.) Amendments to four of these articles actually expanded the guaranteed right affected,[36] whereas several other changes adjusted the bill of rights to remilitarization and emergency defense requirements. But any emergency justifying a limitation on a guaranteed right would have to be declared by the *Bundestag* and consented to by the *Bundesrat*, a significant political protection against any arbitrary invasion of a basic liberty. Article 12a, the result of remilitarization, actually secured the right to refuse military service involving armed combat but it required conscientious objectors to perform alternative service.

Amendments that caused the most alarm among German civil libertarians restricted the right of privacy and the right to asylum. Articles 10 and 13 secured the inviolability, respectively, of the secrecy of the mails and of the home. The former was amended in 1968, the latter in 1998, the first to allow interferences with private communications, without the knowledge of the affected parties, when necessary to protect the free democratic order; the second to allow law enforcement agencies to employ electronic surveillance when they suspect serious criminal activity that endangers individuals or the public. Did these amendments encroach on the "essence" of a basic right in violation of Article 19 (2)? As for Article 10, the Federal Constitutional Court said "no" even in the face of the provision that barred judicial review of restrictions on private communications.[37] The Court's 5-3 decision struggled to reconcile the principle of human dignity with the need for Germany's "guarded democracy" to protect itself against foreign and domestic enemies. Whether these amendments were necessary to achieve their stipulated ends is an open question. After all, the rights guaranteed in Articles 10 and 13, like many basic rights, are subject to limitation by ordinary laws and these laws in turn are subject to judicial review.

The third amendment (Article 16a, ratified in 1993) seriously qualified the right to asylum. The original right was a powerful expression of Germany's political morality in the light of the nation's past. It granted an absolute right to asylum to all "persons persecuted on political grounds." In the early 1990s, however, hundreds of thousands of asylum seekers were clamoring at the nation's gates, causing severe pressures on the domestic economy and on administrative courts. Article 16a was designed to deal with this problem; it limits the former unlimited right in part by making neighboring countries responsible for handling asylum claims. An asylum claimant can now be held up at an international airport if he or she has not sought asylum in certain neighboring countries.[38] Although the subject of enormous controversy, the new article had no impact on the rights of German citizens or resident aliens. The right to asylum was cut back substantially, but most commentators regarded it less as a German than a European problem that would have to be resolved by European institutions.

In short, while the German constitution changed in substantial ways over the years, the changes did not erode the **essential** nature of the constitution as a charter of limited government and individual rights. Some amendments may have posed potential threats to civil liberties, but in each case the Federal Constitutional Court handed down rulings curtailing abuses arising from them. The Court has not only been an effective instrument in protecting the essence of basic rights; it has also played a significant role in adapting the constitution to

changing conditions. At the end of the day, these judicial adaptations seem more important than formal constitutional amendments. The Constitutional Court has been at the epicenter of Germany's system of government—the Basic Law put it there—influencing the shape of its politics, guarding its institutions, circumscribing its powers, promoting the constitution's political morality, and securing the effective enjoyment of basic rights.[39] What is more, the record of official compliance with the Court's decisions, even in highly controverted cases, has been extraordinary. To this extent, Germany's *Rechtsstaat* continues to thrive.

5. CONSTITUTIONAL REFORM

The last fifty years have been punctuated by decennial evaluations of the Basic Law and occasional calls for its total revision.[40] The evaluations led to few if any changes, and all appeals for major constitutional revision have been rejected. By 1989, most commentators believed the Basic Law had survived the test of time. The institutions it created were functioning pretty much as planned. Stability and peace had been accomplished under its auspices. The *Rechtsstaat* and the *Sozialstaat* coexisted in relative harmony. Civil liberties were generally respected and jealously guarded by the courts, as the decisional law of the Federal Constitutional Court demonstrates. Meanwhile, the Constitutional Court had created a legacy fully comparable in volume and sophistication to the postwar jurisprudence of the U.S. Supreme Court. This legacy included four decades of constitutional scholarship as voluminous as it was distinguished. In short, a growing and vibrant constitutional tradition had been created, infusing the Basic Law with the character of a document framed to last in perpetuity.

Then the unanticipated happened. Germany reunified, offering 64 million West Germans and 16 million East Germans a chance to reconstitute themselves as a people under a new, or at least substantially revised, constitution. The Unity Treaty itself held out hope of major constitutional change. It instructed the soon-to-be-chosen all-German parliament to have the Basic Law reviewed in the light of national unity and to consider submitting it, at long last, to a popular referendum. In fact, the treaty retained the Basic Law's contingent status. Although it declared the Basic Law valid for the entire nation, it kept the language of Article 146 calling for its termination when the German people freely adopt a new constitution.[41]

Parliament made good on the promise to review the Basic Law. It established a sixty-four member legislative commission on constitutional revision comprised of an equal number of members from the *Bundestag* and *Bundesrat*. Over a period of fifteen months (from January 1992 to March 1993)

the joint commission solicited and considered proposals for constitutional renewal from a wide circle of governmental and non-governmental sources, including dozens of constitutional scholars. Hundreds of proposals were received, seeking mainly to realign the federal-state relationship, to grant more autonomy to local communities, to incorporate state objectives into the Basic Law, to introduce social and economic rights, and to open the political system to more citizen participation, including the adoption of initiatives and referenda at the federal level. Perhaps the most favored of all proposals was the submission of the Basic Law itself to a popular referendum.

Nearly all these recommendations were rejected, including the referendum on the Basic Law.[42] Constitutional changes that won the joint commission's approval included several provisions authorizing Germany to participate in the European Union. As noted earlier, they also included a new amendment obliging the state to protect the environment. Egalitarian impulses from East and West Germany, particularly among women's groups, resulted in an amendment to Article 3, paragraph 2, which in its original version secures equal rights to men and women. A new sentence authorizes the state to adopt measures for doing away with existing inequalities between men and women. Another change added "physical disability" to the list of forbidden legislative classifications under paragraph 3.

The defeat of proposals to introduce methods of direct democracy was a major letdown for persons appalled and disillusioned by what they regarded as an increasingly frozen political system governed by entrenched elites and ossified party structures. The joint commission did not wish to modify the **representational** character of Germany's political order. Nor did the commission see any value in proposals to allow parliament to dissolve itself or to abolish the 5 percent clause governing federal and state elections. Constitutional experts inside and outside parliament felt that such changes would pose the danger of fragmenting the electorate and thus undermine the stability and balance that constitutional arrangements adopted in 1949 were designed to secure.

6. CONCLUSION

The questions posed at the beginning of this essay can, for the most part, be answered in the affirmative. The Basic Law has served as a relatively stable framework of government; it has resulted in the effective realization of human rights; it has served as a rallying cry for Germany's reunification; and it has contributed to the growth of German democracy. All the major elements of a modern large-scale democracy are present. These include parliamentary

representation; free, fair and frequent elections; freedom of expression; sources of information not under governmental control; and a civil society made up of independent associations and interest groups. This is not to say that German democracy is perfect. It is imperfect, as are all existing democracies. It is sufficient to suggest that German democracy is as durable and stable as any other long-lasting democracy in the western world.

Whether the Basic law is the principal cause of Germany's stability and durability over the last fifty years is a harder question. It has often been said that German democracy owes its success to peace and prosperity. There is little doubt that social and economic conditions have been highly favorable to the stability of Germany's democratic institutions. But it would be foolhardy at this late date to suggest that the Basic Law has not had a significant influence on the development of Germany's constitutional democracy. We lack exact measurements of the Basic Law's influence, but this uncertainty should not obscure the fact that German democracy would look differently if it were not for the normative principles and constitutional arrangements prescribed by it.

What does seem certain is the constitution's influence on German public attitudes. The constitution's legitimacy is no longer contested, even by those who would liked to have seen the Basic Law ratified in a popular referendum. Obscured by popular indifference in the early 1950s, the Basic Law has emerged as the vital center of Germany's constitutional culture. It is invoked repeatedly in parliamentary debates and resorted to in litigation by parties and politicians of all colors, which is one sign of the unity and integration it has managed to produce. It has guided multiple transformations in the country's political and social life; by any standard, it has been as adaptable to change as it has been successful in maintaining democracy and the rule of law. In fact, the Basic Law has evolved into one of the world's most respected and imitated constitutions. This alone is a major achievement that could not have been realized without the success the Basic Law has enjoyed in Germany.

The Basic Law's success is in no small measure owing to the institution of constitutional review and the work of the Federal Constitutional Court. Indeed, the constitution's fundamentality has been reinforced by fifty years of authoritative interpretation and scholarly commentary, overlaying the Basic Law with the silver plates of both permanence and esteem. In saying this, we need to emphasize once again that the Basic Law is not perfect. This essay has pointed out several of its imperfections, not the least of which is its prolixity and the relative ease with which it can be amended. Constitutional politics should not be confused with ordinary politics. This is a distinction that frequency of amendment often overlooks. Many of the minor ingredients of the Basic Law

could well be eliminated without doing any damage to its integrity as the fundamental law of the nation.

When Benjamin Franklin emerged from the American constitutional convention in 1789, he was asked what kind of government had been created. He replied, "A republic if you can keep it." Fifty years later, in 1839, in a discourse delivered at the request of the New York Historical Society, John Quincey Adams, the sixth president of the United States, was able to report that the Constitution had indeed survived the test of time and that "its results have surpassed the most sanguine anticipations of its friends." The same judgment could be made about the Basic Law in 1999, fifty years after its birth.

ENDNOTES

[1] See "Final Communique on London Talks Regarding Germany" (June 1, 1948), *Documents on the Creation of the German Federal Constitution* (Civil Administration Division: Office of Military Government for Germany [U.S], September 1, 1949): 42.

[2] *Grundgesetz für die Bundesrepublik Deutschland* (Basic Law for the Federal Republic of Germany, 1949 [hereafter cited as GG]), art. 146.

[3] For accounts of the proceedings of the Parliamentary Council see "Entstehungsgeschichte der Artikel des Grundgesetzes," 1 *Jahrbuch des Öffentlichen Rechts* (n.f.) (1951); Werner Sörgel, *Konsensus und Interessen* (Stuttgart: Ernst Klett Verlag, 1969); John Golay, *The Founding of the Federal Republic of Germany* (Chicago: The University of Chicago Press, 1958); and Peter H. Merkl, *The Origin of the West German Republic* (New York: Oxford University Press, 1963). See also Erhard M. Lange, *Die Würde der Menschen ist unantastbar* (Heidelberg: Decker & Müller, 1993).

[4] See Donald P. Kommers, "German Constitutionalism: A Prolegomenon," 40 *Emory Law Journal* (1991): 845-855.

[5] GG, arts. 6 and 7 (2).

[6] Ibid., art. 2.

[7] Ibid., art. 19 (2).

[8] For a detailed discussion of the jurisprudence related to these principles, together with citations to relevant publications, see Klaus Stern, *Das Staatsrecht der Bundesrepublik Deutschland* (Munich: C.H. Beck'sche Verlagsbuchhandlung, 1984) I: 555-871.

[9] See Hans F. Zacher, "Das soziale Staatsziel," in *Handbuch des Staatsrechts* (Heidelberg: C.F. Müller Juristisches Verlag, 1987), I: 1042-1112.

[10] GG, preamble.

[11] Ibid., art. 1 (3).

[12] Ibid., art. 21 (2).

[13] For the full text and discussion of the Weimar Constitution, see Elmar Hucko, *the Democratic Tradition: Four German Constitutions* (Leamington Spa: Berg, 1987): 147-190.

[14] GG, art. 68. This procedure has been used only twice in the Federal Republic's history, first by Willy Brandt in 1972 and then by Helmut Kohl in 1983. In each instance, the chancellor engineered his defeat in the hope that new elections would increase his parliamentary majority. The strategy worked for both chancellors.

[15] See "Die wehrhafte Demokratie des Grundgesetzes," in *Handbuch des Staatsrechts* (Heidelberg: C.F. Müller Juristisches Verlag, 1992), VII: 309-359 and Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd ed. (Durham: The Duke University Press, 1997): 217-237. See also Judith Wise, "Dissent and the Militant Democracy: The German Constitution and the Banning of the Free German Workers Party," 5 *University of Chicago Law School Roundtable* (1998): 301-343.

[16] For a comprehensive study of the German electoral process, see Uwe W. Kitzinger, *German Electoral Politics* (Oxford: Clarendon Press, 1960).

[17] See Kommers, supra note 15, at 181-196.

[18] For a general discussion of the status, proceedings, and decisions of the Federal Constitutional Court, see Klaus Schlaich, *Das Bundesverfassungsgericht* (Munich: C.H. Beck'sche Verlagsbuchhandlung, 1991).

[19] McCulloch v. Maryland, 17 U.S. (Wheat.) 316, 407 (1819).

[20] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 387 (1821).

[21] For a list of all amendments to the Basic Law and the articles, paragraphs, and clauses affected thereby, see Angela Bauer and Matthias Jestaedt, *Das Grundgesetz im Wortlaut* (Heidelberg: C.F. Müller Verlag, 1997): 53-65.

[22] McCulloch v. Maryland, 17 U.S. (Wheat.) 316,415 (1919).

[23] For a treatment of the events surrounding this debate see Karl Loewenstein, "The Bonn Constitution and the European Defense Community Treaties: A Study in Judicial Frustration," 64 *Yale Law Journal* (1955): 805-839. See also Eckart Klein, "Der innere Notstand," in *Handbuch*, supra note 21, at 390-405.

[24] See table of amendments and subsequent changes in the text of the Basic Law in Bauer and Jestaedt, supra note 21, at 53-65.

[25] Dennis l. Bark and David R. Gress, *Democracy and Its Discontents 1963-1991* (Cambridge, MA: Blackwell, 1993): 120-121.

[26] Ibid., 121-136.

[27] Bauer and Jestaedt, supra note 21, at 57-60.

[28] See, respectively, GG (1972), art. 73 (10); GG (1972), art. 87 (1); GG (1971), art. 74a; and GG (1972), art. 74 (4a).

[29] See, respectively, GG (1970), art. 38 (2); GG (1983), art. 21 (1); and GG (1975), art. 45c.

[30] GG (1969), art. 93 (1) [4a].

[31] These treaty provisions and other changes adjusting the Basic Law to reunification are discussed in Donald P. Kommers, "The Basic Law Under Strain: Constitutional Dilemmas and Challenges," in Christopher Anderson et al. (eds), *Domestic Politics of*

German Unification (Boulder, CO: Lynne Rienner, 1993): 135-154. See also Donald P. Kommers, "The Basic Law and Reunification," in Peter Merkl (ed.), *The Federal Republic of Germany at Forty-Five* (New York: New York University Press, 1995): 187-204.

[32] GG (1992), art. 28 (1).

[33] 83 BVerfGE 37 (1990).

[34] See Bauer and Jestaedt, supra note 21, at 62-64.

[35] Some observers would disagree with this view. The original version of the Basic Law conferred numerous and important powers on the states. Developments over the years eroded many of these powers, however. By the 1960s, the Federal Republic was being described as a "unitary (*unitarische*) federal state., i.e., one with strong centralizing features. By the early 1970s, it was also characterized as a system of cooperative federalism and, by the late 1970s, as a system of *Politikverflechtung*, a complex form of joint decision making among many centers of power and influence. Many commentators came to believe that federalism, despite the eternity clause, had become a facade for an increasingly centralized state, especially in regard to public finances, and that the states had lost much of their relevance as legislative bodies. This assessment is flawed, however. In spite of certain losses of power by the states, they remain important political and administrative units in a relatively decentralized governmental system, particularly in view of recent constitutional amendments requiring the *Bundesrat*'s consent to European policies affecting vital local interests.

[36] See, respectively, GG (1956), art. 1 (3); GG (1994), art. 3a; GG (1968), art. 9 (3); and GG (1968), art. 12.

[37] 30 BVerfGE 1 (1970).

[38] See 94 BVerfGE 49 (1996) (Federal Constitutional Court decision upholding this policy.)

[39] See Donald P. Kommers, *Jurisprudence*, supra note 15, at (?) and David Currie, *The Constitution of the Federal Republic of Germany* (Chicago: University of Chicago Press, 1994).

[40] See Paul Kirchhof, *Brauchen wir ein erneuertes Grundgesetz* (Heidelberg: C.F. Müller Verlag, 1992).

[41] The new version reads: "This Basic Law, which since the achievement of the unity and freedom of Germany applies to the entire German people, shall cease to apply on the day on which a constitution freely adopted by the German people takes effect."

[42] See Helga-Lothar Batt, *Die Grundgesetzreform nach der deutschen Einheit* (Opladen: Leske + Budrich, 1996).

THE ROLE OF THE FEDERAL CONSTITUTIONAL COURT

Jutta Limbach

1. THE REPUTATION OF THE COURT

In speeches and articles on the occasion of the fiftieth anniversary of the Basic Law, the Federal Constitutional Court (FCC) has been praised sumptuously. It was claimed the Court has unfolded and empowered the Basic Rights. Very figuratively one could read: "The Basic Law, strongly polished by the Federal Constitutional Court, has been given splendor and radiance." Another excerpt from the text illustrates how difficult the road to a democratic constitutional state was:

> Slowly, very slowly the Germans learned how to read their Basic Law. Probably they would never have succeeded if the Federal Constitutional Court had not tirelessly exercised the constitutional alphabet with them. Part of this was that the politicians had to learn what an abundance of competences they had conferred upon the Court.

And indeed the Federal Constitutional Court has for many years enjoyed notable respect. On a question about citizens' trust in twelve institutions of public life in the Federal Republic of Germany, the Court has for many years been ranked at the top. Despite strong public criticism in recent years, it currently shares first place with the police. The government and the political parties, by contrast, occupy the bottom places on the scale of trust.[1]

The frequency with which citizens invoke the Court seems to confirm these opinion-research findings. Using the constitutional complaint, anyone claiming to have had a fundamental right infringed by an act of the authorities may seek protection from the Federal Constitutional Court. The constitutional complaint may be directed against an executive, judicial or (less commonly) legislative action. In only a few years the constitutional complaint became an extraordinarily popular legal remedy. This popularity continues. Since reunification some 5,000 constitutional complaints have been lodged annually. Admittedly, only around 2 percent of constitutional complaints are successful. But the low success rate ought not to make one underestimate this right of appeal. It is the paradigmatic effect of the decisions that is important for the future conduct of politicians, officials and judges.

2. IMPACT ANALYSIS

Do these survey data and court statistics suffice, though, to draw conclusions as to the Federal Constitutional Court's central role in constitutional practice? Does the Germans' pride in the Basic Law already show they are patriots of the constitution? What about the Court's influence on the courts and on political practice? Has the Federal Constitutional Court managed to bring politics under the law? What does it achieve in the context of political culture in the Federal Republic? All these questions can be answered only through careful analysis of research into its impact. This means legal sociological studies of the effectiveness of the Court's decisions. But legal sociological analysis of the impact of court decisions is something still in its infancy.[2]

Initial theoretical studies are dealing with questions of the effectiveness, implementation and evaluation of the Federal Constitutional Court's case law. They are developing parameters or dimensions whereby the effects of decisions can be described and analyzed. Among things treated as such parameters are, for instance, knowledge of the case law, how far addressees of decisions conform with the Court's objectives, and the influence of the decisions on social values and political culture.[3] Empirical studies are to date only fragmentary, especially on the questions of knowledge of the law, political culture and change in values. The preferred field for this sort of research is mainly the criminal law, sometimes labor law, but only very rarely the Federal Constitutional Court, which has remained in the main an object for sociology of the legal profession only.

I cannot accordingly base what I have to say about the effects of the Federal Constitutional Court's decisions on empirical studies. In accordance with the state of research, I shall therefore merely select a few aspects of the history of the Federal Constitutional Court's impact and illustrate them. In doing so I shall distinguish between the legal, political and social effects of the decisions.

3. THE FEDERAL CONSTITUTIONAL COURT AS LEGAL FORCE

What can best be shown is how the Federal Constitutional Court acts as a legal force. For its interpretation of the constitution affects the parliament's lawmaking and the courts' legal practice. A constitutional norm explicitly stipulates that decisions of the Federal Constitutional Court are binding on all constitutional bodies, courts and authorities.

Allow me to make things specific, by showing the effect, reaching far beyond the individual case, of an early decision of the Federal Constitutional

Court: the Lüth decision.[4] This decision has also contributed in a major way to refining the machinery and articulating the standards and methods of protecting fundamental rights.[5] It set the course for the radiating effect of fundamental rights in all other areas of law.

According to this decision Basic Rights are not only defensive rights of individuals against the state. Furthermore they influence the relations between the citizens amongst themselves. For the constitution has—so the Court ruled—created an objective value system through the catalogue of Basic Rights. They are not only subjective rights, but also objective principles. This objective value system spreads to all sections of the law. Thus no statute may be in discordance with the value system of the Basic Rights, but has to be interpreted in its spirit.[6]

The decision focused attention on the so-called **radiating effect** of fundamental rights. The Court thus developed a variety of **affirmative or protective duties**, which oblige the State, especially the legislature, **to protect human rights against threats from private individuals or groups**. In the course of more than forty-eight years of jurisprudence, the Court has drawn several conclusions from the premise that human rights are also objective principles.

This fundamental finding has not been welcomed by everybody. Because the borderline between constitutional law and ordinary law blurs when the Basic Rights penetrate the whole legal and social order. And in fact this decision leads to an "omnipresence of the fundamental rights in the process of interpreting and applying ordinary statute law."[7] This has proved enormously broad in consequences, especially for civil law. For the thinking in private law has changed fundamentally since the beginning of the century. Certainly, private autonomy continues to be the guiding principle of the civil law. But alongside this principle, the principle of the Social State is termed one of the main pillars of the civil law. Under the influence of the fundamental rights and the Social State clauses, a social law of obligations has developed through an interaction between case law and legislation. What this means is a kind of law that takes the power gap or power imbalance between contractual partners into account and protects the economically inferior, the socially weak. Examples of this are socially just tenancy law and consumer protection laws.

The Court's most recent decision concerns the law of suretyship. The case concerned a young woman who had become hopelessly over indebted through a surety bond. She had stood surety for a high bank credit to her father, although she had only a small income (DM 1,150 per month). The Federal Constitutional Court decided that the civil courts ought to monitor the content of such contracts and where necessary declare them void, provided always that there has to be a

structural inferiority of the guarantor and that the suretyship has to be an unusually heavy burden on him or her.[8]

The Federal Constitutional Court's case law on the radiating effect of the fundamental rights has not only been applauded. Recently, in particular, it has been heavily criticized. The crisis of the Social State promotes the desire to set bounds on a case law seen as paternalistic. On the other hand, the case law on the radiating effect of the fundamental rights favors a great breadth and intensity of supervision. It enlarges the potential of control for the Federal Constitutional Court, thus curtailing the competencies of the ordinary courts. In addition it leads to a loss of parliamentary power and gain of court power, all in the name of human rights.

4. THE POLITICAL INFLUENCE

That brings me to the political impact of the Federal Constitutional Court's case law. There is no doubt that the Federal Constitutional Court is an outstanding factor in the political process. The Court adjudicates in the name of the Basic Law. Its operation extends into the political sphere because it criterion is the constitution of a political community. As we all know, the checking of power is necessarily a power in itself.[9]

What I am interested in here is the question of the influence the decisions have on political debate and decision-making. Let us take a look at the political debates inside and outside parliament. Here it becomes apparent that already during the legislative procedure participants in the debate orient themselves on future and likely forthcoming decisions of the Federal Constitutional Court. Members of Parliament mostly engage lawyers to interpret the relevant decisions right down into the details. The experts then sometimes play the part of the Delphic Oracle if they have to foresee coming decisions of the Court. Especially in the political debate on parity codetermination (equal representation for management and labor on supervisory boards of firms), politicians and lawyers alike referred not just to the Basic Law, but primarily to the Federal Constitutional Court's case law. Rarely has a threatened, or intimidatingly aired, action before the Federal Constitutional Court had such far-reaching pre-emptive effects, in terms of anticipated reactions and adjustments, on the legislative process.[10] When Federal Chancellor Helmut Schmidt was asked by workers in 1974 when the Codetermination Act was finally going to be passed, he answered: "The question is whether that damned pettifogging CSU lot aren't going to drag it all before the Federal Constitutional Court again."[11]

This tendency towards anticipatory obedience has if anything got stronger over the years. We as judges can be proud if this omnipresence of the Federal Constitutional Court in the political debate points to a sensitivity towards fundamental rights on the part of politicians. But that is only true to a limited extent. In the upper and lower House and among the public, political argument is daily being seasoned by using the accusation of the alleged unconstitutionality of a planned decision. The threat of taking the road to Karlsruhe is now part of the ritual stock-in-trade of politics in Germany. This anticipation of a constitutional risk, or a risk from the constitutional court, leads to risk-aversion and hostility to innovation. Anticipatory obedience is harmful to the social imagination and tends to cripple the legislator's delight in deciding.

4.1 The Limits of Judicial Review

Such obedience, which hurries ahead, does not come about without cause. The critics of the Federal Constitutional Court would instantly point out that it is the consequence of judicial activism. They reproach the judges for knitting the net of constitutional preconditions tighter and thus restricting the scope of action for politics. As a member of the scolded court I will not discuss this reproach. I would rather discuss the questions whether adjudication can at all be separated with logical distinctness from the field of political action. Despite contradictory views, it is still readily held that: "Judging means finding, not shaping." This is to assert a qualitative difference between adjudication and lawmaking: in the ideal pattern, finding the law is a matter for adjudication, while making the law is by contrast a task for politics.

The debate on the judge's creative relationship to the law is older than the Federal Constitutional Courts jurisdiction. Montesquieu's saying that the judge is the mouth that utters the words of the law is still often quoted, but only to fix a cheap point of attack for doubts. Over a century ago, enlightened jurists were already rejecting the view of the judge's task as a "purely intellectual operation, like any other judgement; a logical operation with the statutory provision as major term and the facts to be adjudicated on as minor term." If that were so, the judge would need nothing but "a reliable edition of the law, the art of reading, care, and sound, clear human reason."[12] Yet the legal order is neither without lacunae, free of contradiction, linguistically unambiguous nor above social change.[13] This is particularly true of constitutional law, which is marked by a low density of regulation and vague wordings.[14]

Not just general clauses but a multiplicity of undefined legal concepts delegate actual norm making to the judge. They open up semantic room for maneuvers, allowing for not just one correct decision. Judicial decision is not only finding, but always also law-making. "In every act of judicial application

of law . . . cognitive and volitional elements form an indissoluble combination."[15] The judge creates law in the process of finding a decision. Adjudication accordingly always has a political dimension too.

This is certainly true of constitutional jurisdiction. For the articles of the Basic Law are marked by a low degree of definiteness. They are norms with great openness, and margins of interpretation that are hard to delimit.[16] The Basic Law essentially contains—apart from the law on the organization of the State—principles that must first be spelled out before they can be applied.[17] One example is the constitutional principle that the Federal Republic is a social State (Art. 20 <1> Basic Law). But in the fundamental-rights context too, terms are used whose content can be made definite only by using interpretation or even evaluation, sometimes through recourse to extra-legal notions and historical experience.[18] Consider, say, the dignity of the person protected by Article 1 of the Basic Law, or the family, which by Article 6 of the Basic Law enjoys the special protection of the State. The openness and breadth of the Basic Law ought not to be pointed to as defects. On the contrary: a constitution can generally be regarded as successful if it is couched tersely and vaguely. For a constitution that were not open and therefore "to some extent capable of ever-new interpretation" would, as Willy Geiger rightly says, "inevitably soon come into hopeless contradiction with its object, and reach the critical point where the only choice left open would be to break it, i.e., to disregard it, or else continually and very quickly adapt it formally to changing needs."[19]

4.2 Judicial Self-restraint

The maxim often recommended to the Court, judicial self-restraint is, if taken literally, more misleading than persuasive. The call for judicial self-restraint serves neither to locate grey areas of law and politics, nor to clear them up. Nor can restraint be a general strategy for a court whose prime duty is to check power and assert the protection of fundamental rights. The latter task may, as Konrad Hesse rightly stresses, call for resolute intervention rather than restraint—even at the risk of affronting some other constitutional organ.[20] As regards the formula of judicial self-restraint, Benda rightly calls it an attitude or a virtue: the court cannot limit its own power and function, but has to carry out its tasks. Of course, it may not extend these either, having regard to the principle of separation of powers that has to be respected.[21] The slogan of judicial restraint is just as correct in practice as the contrary call on lawmakers to display more "political self-confidence."[22] Both maxims have no informative function: they merely formulate a problem, but do not offer any criteria for solving it.

4.3 The Case Law of the FCC

The Federal Constitutional Court has to follow a precisely formulated catalogue of competences. Once an application is admissible, it must be decided on. For the question that then arises as to the content of the decision, it may certainly be important that, let us say, a question under discussion cannot be decided on the basis of legal criteria and considerations, or concerns areas of activity belonging to the sphere of responsibility of other constitutional bodies.

This sort of conflict situation has repeatedly been discussed in decisions of the Federal Constitutional Court. Constitutional theorists have sought, on the basis of these—self-restraining—judicial utterances to derive normative guidelines. But in this attempt to mark the boundaries of the judicial areas of responsibility, they have not managed to demonstrate a system of criteria and methods, but only to name some problematic groups of cases.[23] These relate either to particular decisional structures or to subject areas. Thus, the Court exercises restraint, and is expected to, in cases involving forecast decisions or expediency considerations. The same applies to the review of acts of the legislature or executive in the sphere of foreign or economic policy.

The most prominent example of a forecast decision is the Federal Constitutional Court's Kalkar decision on the Nuclear Act. This regulates the peaceful use of nuclear energy and protection against its hazards. The background to the decision was the protest by a citizen against the building of a nuclear power station. The Federal Constitutional Court was presented with the question whether parliament had regulated the permit procedure sufficiently precisely. Was it enough to hold the authority, in relation to the dangers, only to the given state of scientific and technical progress? Or ought the legislators to have set more precise standards and unambiguously marked the boundary of the bearable residual risk?

The Federal Constitutional Court answered the second question negatively, and found that the basic decision for or against the legal admissibility of the peaceful utilization of nuclear energy was a matter for the legislature alone. Its primacy resulted not just from the far-reaching repercussions of the decisions for the citizens, but also from the limits to human cognitive capacity. In such a "situation necessarily loaded with uncertainty" it lay "primarily in the political responsibility of the legislature and the government . . . to take the decisions they saw fit. Given this position it is not the Court's task to stand in for the appointed political institutions with their own assessment. There are no legal criteria for that."[24] Of course, uncertainty as to the side-effects of a law "in an uncertain future" does not require refraining from enacting the law. For the assessment of the hazards of nuclear energy the Court points to practical reason, which it evidently sees as better left up to the legislator.[25]

The non-binding nature of the criteria postulated in the codetermination judgement can readily be shown on the basis of other case-law examples listed there. Take the area of foreign policy, often cited as an example of judicial self-restraint. Thus, in the judgement on the Basic Treaty with the GDR the Court wished neither to exercise criticism nor to express its views on the prospects for the then federal government's reunification policy. Responsibility for choosing the political ways and means towards this State objective of the Basic Law lay with the political bodies alone.[26] By contrast, in the Maastricht judgement the Court discussed the political ways and means chosen by the federal government towards the goal of European integration entirely critically.[27] The Maastricht decision is a good example, as a voice in the academic sphere put it, "of how the Federal Constitutional Court copes with the German tendency to constitutionalize foreign policy questions.[28] As a prominent example where the importance of the object of legal protection at issue demanded intensive judicial review, the protection of nascent life intended by the abortion law is readily cited.[29] By contrast, in the Kalkar decision the Court, despite the far-reaching repercussions of the option in favor of the peaceful use of nuclear energy for the life and limb of citizens,[30] saw no occasion for an intensive review of the Nuclear Act.

We need not go into whether other viewpoints have justified judicial self-restraint or activeness in this or that case. We wish only to show that the principle of judicial self-restraint the Court strove for in the codetermination judgement has indeed been properly described in its generality. It "is aimed at keeping open for the other constitutional organs the room for free political action guaranteed them by the constitution."[31] Yet it has not been possible to give this precept shape against the background of the leading cases with a catalogue of criteria. The formula of judicial restraint offers nothing more than a rhetorical structure of argument that only gives information about the problem to be solved and the intellectual effort proposed.

4.4 Functional Limits to Constitutional Jurisdiction

Even the Court's most passionate critics have so far not managed to draw a line between the overlapping competencies of legislation and jurisdiction. This is not, say, a consequence of intellectual laziness, but has to do with the amalgamation of law and politics, which cannot be puristically dissolved. Attention is increasingly being paid to the constitutional principles, whose infringement is continually alleged in cases of boundary disputes, mainly the principle of the separation of powers and the democratic principle. Of course, this approach does not offer a simple answer either.

4.4.1 The Separation of Powers

Attention should be directed first to the principle of separation of powers, which is not to be understood in the sense of a strict separation of legislature, executive and judiciary. It distributes power and responsibility and puts bearers of power under control. Surely, the freedom-guaranteeing aspect of the separation of powers, aimed at moderating the use of power and protecting the citizen against government interference is of particular importance. But for our problem the functional aspect is more helpful: The principle of separation of powers is aimed primarily at having "government decisions taken as correctly as possible, that is, by the organs best meeting the requirements for them, because of their organization, composition, function and procedures." This allocation of tasks is made according to priority areas, but without any claim to exclusivity. Functional overlaps, for instance in creative legal interpretation by courts, are part of it from the outset. Creative and therefore social-patterning elements in constitutional case law are thus not per se illegitimate either. Nonetheless, the Court must always bear in mind that the Basic Law has made the legislature the "central actor" in shaping the political community. Its autonomy of action is comprehensive and it can, by contrast to the Federal Constitutional Court, act of its own volition. The Court can only act on the basis of an external impetus, reactively, to review decisions already taken. While the legislature can observe the effects of its decisions and, should these be undesirable, make corrections if necessary, the method of trial and error is not open to the court. It cannot revise its judicial pronouncements by itself.

4.4.2 The Democratic Principle

This principle requires respect, notwithstanding its aspect of separation-of-powers, particularly when legislative measures come onto the test-bench of the Federal Constitutional Court. It is not the Federal Constitutional Court's business to decree a detailed regulatory program qua Basic Law. The narrower-meshed the Court makes the net of constitutional postulates and requirements, the more it restricts the legislature's possibilities of action and cripples its political imagination.

The openness of the political process is essential to democracy. For in all areas not adequately provided for in constitutional law, as Grimm says, "the democratic principle requires that only those who can be held accountable through the vote may decide."

Response by the citizens in regular elections does not apply to the members of the Federal Constitutional Court. The judges stand outside the day-to-day political struggle. Their personal and material independence, guaranteed in the Basic Law, is intended to make them immune specifically to political

requirements, and guarantee that the law alone counts. Judgement as to the optimum realization of the common welfare is by contrast a matter for politics.

4.4.3 Value Conflicts in the Pluralist Social Order

If conflicts between values are made the object of abstract constitutional review, then account has also to be taken of the fact that the Basic Law has opted for a pluralist social order. In conflict situations where fundamental rights positions clash, the verdict on the constitutionality of a law is not a matter purely of judicial acuity or the art of constitutional interpretation. Instead, what is called for is a weighing, an evaluation.

As an example we may take the conflict on abortion law, which occupied the Federal Constitutional Court in 1993: here the constitutionally protected right to life of the unborn and the mother's fundamental rights position had to be weighed against each other. The legislature had resolved this value conflict in 1992 with a time-limit concept. According to this, termination of pregnancy within twelve weeks of conception was not unlawful and therefore exempt from punishment. Hardly any statute has been so thoroughly debated in the *Bundestag* or so massively underpinned academically by the securing of expert opinions as this one. The final text of the act was a hard-fought compromise in the federal parliament based on many competing preliminary drafts.

The Federal Constitutional Court, invoked by the defeated minority in the parliament, nonetheless quashed the law and decided that termination of pregnancy is to be treated as wrong for the whole duration of the pregnancy. It declared admissible a consultative model that combined the time-limit solution with compulsory counseling. The parliamentary majority defeated in court responded—it could hardly do otherwise—with the accusation that the Court in Karlsruhe was once again presuming to do the legislators' job.

Certainly, it is the task of the Federal Constitutional Court to decide authoritatively on the question of the constitutionality of provisions brought before it. Yet it must be mindful of the fact that the answer to the question of a law's constitutionality is the outcome of a multi-layered process of evaluation. There is no absolute correctness of the decision; or at least it is not attainable for us here on earth. The dissenting opinions of judges on many decisions are proof for this perception.

Differences of opinion among judges are not just random. Historical, cultural and socially divergent views as to values held by those adjudicating play a part. We all know that there is a prior understanding that also more or less consciously influences the acquisition of law. This has nothing to do with bias or prejudice. Instead, we are all marked by this sort of basic attitude preceding any legal cognition, which is more experienced with intuitive conviction than

acquired rationally. It is a mixture of moral, legal, philosophical, and political convictions, that include a particular conception of reality.

The Court has accordingly to bear in mind that the election of parliamentary representatives has ensured a particularly broad spectrum of such interpretations. This compels reticence in relation to the products of parliamentary work. Therefore in a case of conflicting value judgements the Federal Constitutional Court ought to pay attention not so much to the outcome as to the procedure of lawmaking; that is, the process of political opinion-forming and decision-making that led up to the statute that is under examination.

Intellectual honesty compels us to state that there is no usable catalogue of criteria that could serve as a signpost in the ridge-walking between law and politics. The two fields of action partly overlap and cannot unambiguously be separated from each other. As the constitutional review body, the Court has a share in politics. The problem to be considered is the scope of the Court's area of responsibility. The test criteria, or better maxims, are the structural principles of the Basic Law, which have as their object the interplay and contrary motion of judicial review and political activity. These are necessarily very abstract, and denote only stages in a thought process. The horizon of reflection marked out by the principle of separation of powers and the democratic principle has to be paced off in thought for **every** decision. Although these principles are only topoi of reflection, they ought not to be misinterpreted as being more or less non-binding appeals to constitutional judges. For what is at stake here is not voluntary self-restraint, but the fulfilment of a constitutional precept. The sensitive definition of its own sphere of responsibility is a self-evident duty for an organ of government which according to the Constitution must, through the separation of governmental powers, watch over their balanced exercise.

5. THE SOCIAL IMPACT OF PROTECTING FUNDAMENTAL FREEDOMS

Let me draw your attention to the thesis that the Court's jurisdiction concerning fundamental rights promoted the development of a civic society in Germany. Herewith I mean a society of participating citizens who know their constitutional rights and defend them against infringements of the state. An individual may file a constitutional complaint, claiming that public authority has violated one or more of his or her constitutionally guaranteed rights. In these cases the primary object of review is usually the decision of a lower court. But, if necessary, the original government act and the law on which the decisions are based may also be evaluated, since no act or court decision can be constitutional

when the underlying law is unconstitutional. The complaint may be lodged against any official action, including judicial decisions or administration regulations.

A constitutional complaint requires acceptance for adjudication. It must be accepted if it is firstly **of fundamental constitutional importance**, if secondly the claimed infringement of fundamental rights is **of special severity**, or thirdly **if the complainant would suffer particularly severe detriment** from failure to decide the issue (§ 93a BVerfGG). The FCC itself has to decide as to the prerequisites for acceptance before deciding the constitutional complaint.

The Federal Constitutional Court has certainly been active in terms of unfolding and developing the fundamental rights. It has developed through a series of individual cases for example a law of privacy, especially the right of informational self-determination, and principles of fair trial. The Court's case law concerning the basic rights of freedom of speech contributed significantly to the shape of the Basic Law and to the **development of the free, democratic, rule-of-law state** of the Federal Republic of Germany. Furthermore, it attests to the readiness of the Germans to learn from the failure of the Weimar Republic and the reign of terror between 1933 and 1945. This jurisdiction—starting with the *Lüth Case (1958)* and concluding with the *Auschwitz Denial Case (1994)*—clearly illustrates how the court has tried to grapple with a disastrous past.

I am convinced that the citizens have understood that they are called to be the guardians over the Constitution by way of the right to file a complaint. Due to their attention, their sense of law and last but not least their mind to oppose, the Federal Constitutional Court was capable to act as guardian of the Basic Rights. With its jurisdiction on the Basic Rights the Court broke with authoritarian traditions and outlined the principle of the free and democratic rule-of-law state. On the one hand the decisions on freedom of speech and of the press have to be mentioned. These decisions rendered the Basic Rights of communication to be essentially constitutive for a free and democratic stately order, because it is through them that the constant intellectual debate is possible, which is the characteristic element of democracy. On the other hand the jurisdiction on the principles of due process and fair trial have to be mentioned. These rule-of-law principles are to guarantee that all decisive facts and aspects of case come up and that the accused or the person seeking justice is not degraded to be an object of the procedure. Last but not least these decisions also intend to show to the citizens as well as to the public persons involved that the Basic Rights are directly applicable law.

The history of the Federal Constitutional Court's impact is a story of success. This is true irrespective of the fact that it has repeatedly unleashed a barrage of critical fire with its decisions. That has never been able to

permanently shake the people's trust in the Court. It may be said without exaggerating that the Federal Constitutional Court has become a citizens' court par excellence.[32] Such popularity is not raised up above all doubt. This is true especially when the other institutions that guarantee pluralism (the variety of opinion) suffer from a decline in trust. For instance, the press, the trade unions, employer associations, the churches, the federal government, and parliament and the political parties are all mainly in the negative zone of the scale of trust in public institutions in the Federal Republic of Germany.

Does the unbroken great trust in the authority of constitutional jurisdiction point to, say, some political mistrust of democracy? As Häberle rightly warns, "The German faith in constitutional jurisdiction must not be allowed to turn into lack of faith in democracy."[33]

ENDNOTES

[1] Bundesverband Deutscher Banken (ed.), INTER/ESSE, Wirtschaft und Politik in Daten und Zusammenhängen, 11/97, p.2.

[2] Thomas Gawron/Ralf Rogowski: "Effektivität, Implementation und Evaluation—Wirkungsanalyse am Beispiel von Entscheidungen des Bundesverfassungsgerichts," in: *Zeitschrift für Rechtssoziologie*, 2/96, 177-220, 178.

[3] Cf. Gawron/Rogowski, loc. cit. fn. 3, p. 179-185.

[4] BVerfGE 7, 198.

[5] *The facts* of the Lüth-Case: Veit Harlan was a popular film director under the Nazi regime and the producer of the notoriously anti-Semitic film *Jud Süss*. In 1950 he directed a new movie entitled *Immortal Lover*. Erich Lüth, Hamburg's director of information and an active member of a group seeking to heal the wounds between Christians and Jews, was outraged by Harlan's reemergence as a film director. Speaking before an audience of motion picture producers and distributors, he urged his listeners to boycott the movie *Immortal Lover*. In his view, the boycott was necessary because of Harlan's Nazi past: he was one of **the important exponents of antisemitism.** And Lüth was concerned that Harlan's reemergence would strongly renew the distrust against Germany. The film's producer and distributor secured an order from the Superior Court of Hamburg forbidding Lüth to call for a boycott. The Court regarded Lüth's action as an incitement in violating the law of torts. Lüth **successfully** filed a constitutional complaint asserting a violation of his basic right to free speech by the Superior Court of Hamburg.

[6] The Court said in the Lüth decision (BVerfGE 7, 198 <204 f.>: "The primary purpose of the basic rights is to safeguard the liberties of the individual against interferences by public authority. They are defensive rights of the individual against the state... It is equally true, however, that the Basic Law is not a value-neutral document. Its section on basic rights establishes an objective order of values, and this order strongly reinforces

the effective power of basic rights. This value system, which centers upon dignity of the human personality developing freely within the social community, must be looked upon as a fundamental constitutional decision affecting all spheres of law (public and private). It serves as a yardstick for measuring and assessing all actions in the areas of legislation, public administration, and adjudication. Thus it is clear that basic rights also influence the development of private Law. Every provision of private law must be compatible with this system of values, and every such provision must be interpreted in its spirit." Translation by Donald P. Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany., 2. Ed. 1997, p. 363.

[7] Thus Ossenbühl, "Verfassungsgerichtsbarkeit und Fachgerichtsbarkeit," in: *Festschrift für H.P. Ipsen*, 1977, p. 129-138.

[8] BVerfGE 89, 214.

[9] As Adolf Arndt tellingly puts it in relation to judging in general: Das Bild des Richers, Karlsruhe 1957, p. 15.

[10] On the "pre-emptive effect" of Federal Constitutional Court decisions, cf. Christine Landfried, *Bundesverfassungsgericht als Gesetzgeber*, *Wirkungen der Verfassungsrechtsprechung auf parlamentarische Willensbildung und soziale Realität*, Baden-Baden 1984, p. 52 ff.

[11] Cited from the *Frankfurter Rundschau* for 21 October 1974, p. 2.

[12] Oskar Bülow, *Gesetz und Richterarm*, Leipzig 1885, pp. Ivf., 14.

[13] Dieter Grimm, "Politik und Recht," in: *Grundrechte, Soziale Ordnung und Verfassungsgerichtsbarkeit*, Heidelberg 1995, pp. 91, 99.

[14] Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20th ed., Heidelberg 1995, p. 11.

[15] Grimm, op. cit. fn. 12, p. 100.

[16] Hesse, op. cit. fn. 13, p. 20, and Wolfgang Zeidler, in: *Verfassungsgerichtsbarkeit, Gesetzgebung und politische Führung, Ein Cappenberger Gespräch*, Köln 1980, p. 46.

[17] Ernst-Wolfgang Böckenförde, "Die Methoden der Verfassungsinterpretation," in ***idem***, *Staat, Verfassung, Demokratie*, 2nd ed., Frankfurt a.M. 1992, pp. 53, 58, and Willi Geiger, *Verfassungsentwicklung durch Verfassungsgerichtsbarkeit*, Düsseldorf, p. 4.

[18] Geiger, ibid.

[19] Geiger, ibid., p. 5.

[20] Konrad Hesse, "Funktionelle Grenzen der Verfassungsgerichtsbarkeit," in: *Recht als Prozeß und Gefüge, Festschrift für Hans Huber*, Bern 1981, pp. 261 ff., 264.

[21] Ernst Benda, "Constitutional Jurisdiction in West Germany," in: *Columbia Journal of Transnational Law*, Vol. 19 (1981), pp. 1, 11 f.

[22] Christine Landfried, *Bundesverfassungsgericht und Gesetzgeber*, Baden-Baden 1984, p. 175.

[23] Cf. e.g., Gunnar Folke Schuppert's worthy attempt at classification, in: *Self-restraints der Rechtsprechung*, in: DVBl 1988, 1191, 1194.

[24] BVerfGE 49, 89 <127, 131>.

[25] The Court stresses that in view of the limited empirical knowledge one could not demand of the legislator a regulation that would rule out endangerment of fundamental rights with absolute certainty. Cf. BVerfGE 49, 89 <143>.

[26] BVerfGE 36, 1 <18>.

[27] BVerfGE 89, 155.

[28] Vgl. Juliane Kokott, "German Constitutional Jurisprudence and European Integration," in: *European Public Law*, Volume 2, Issue 3, 413, 416.

[29] BVerfGE 39, 1 <51>; cf. also BVerfGE 88, 203 <340 f.>.

[30] BVerfGE 49, 89 <127>.

[31] BVerfGE 50, 1 sub 2.

[32] Häberle, "Verfassungsgerichtsbarkeit als politische Kraft," in: *idem*, *Verfassungsgerichtsbarkeit zwischen Politik und Rechtswissenschaft*, 1980, p. 59, 79.

[33] Ibid.

THE PROTECTION OF HUMAN DIGNITY (ARTICLE 1 OF THE BASIC LAW)

Ernst Benda

"*The dignity of man is inviolable. To respect and protect it shall be the duty of all public authority.*" (Art. 1 Sec. 1 Basic Law)

I. THE PRINCIPLE AND CONSEQUENCES OF THE PAST

The interpretation of Article 1 of the Basic Law (Protection of human dignity) in one of the most prestigious commentaries on the German Basic Law, the five-volume "Maunz-Dürig," was written by Günter Dürig in 1958, forty years ago. So far, it has never been updated. The "Maunz-Dürig" is a loose-leaf publication which issues updates twice a year. Somehow it failed, or found it unnecessary to amend the comments on what is considered to be the central provision of the Basic Law. Dürig died in 1996, and apparently no one so far has been able to provide a more updated interpretation. Forty years have passed; we have had countless efforts to interpret the clause on human dignity, we have the jurisdiction of the Federal Constitutional Court, but the most prominent book on the Basic Law refers to an interpretation of another era. Dürig, of course, is still highly readable, but his viewpoint is that of the fifties, and not of the end of our century. Modern problems such as privacy in the electronic age, bio-ethics, gene-transfer and cloning—fields in which the reference to human dignity is now commonplace did not exist then.

When, in 1985, the Law Faculty at Tübingen celebrated Dürig's sixty-fifth birthday, Graf Vitzthum pointed out that Dürig's "restrictive interpretation of Art. 1 GG is no longer sufficient": "Recent developments affecting not only the already existing concrete person but potentially the person per se, the human being in itself. . .In the field of genetic engineering we enter a territory in which the danger concerns not the individual and his dignity but the destruction of what is violable."[1] Vitzthum called for a new dogmatic approach which, he said, will need a personality "with the passion, status and dignity of Günter Dürig."

This remark rightly points to the changing relevance of Article 1. Until recently, it has been generally accepted that the principle of the protection of human dignity deals with the concrete human individual, with an existing person whose dignity may be at risk. What, in this opinion, Art. 1 does not mean is mankind as such.[2] To be protected in his dignity is, according to this position, an **individual** fundamental right enforceable by a constitutional complaint before the Federal Constitutional Court.[3] Dürig denied that fundamental-right character of Article 1, but the Constitutional Court found otherwise. If we had

to deal only with a possibly nice but in the last instance finally empty and unenforceable proclamation of a lofty ideal, no further discussion would be necessary. But this has never been the position of the Basic Law. When the Parliamentary Council, in discussing the new West German constitution, referred, in Art. 1 Sec. 2 ("The German people therefore uphold human rights as inviolable and inalienable and as the basis of every community, of peace and justice in the world") to the United Nations Universal Declaration of Human Rights of December 1948,[4] it recognized the difference between an international law declaration and a constitutional provision. In the United Nations, reference to the principle of human dignity is frequent. One recent example is the Unesco's "Universal Declaration of the Human Genome and Human Rights" of November 1997. It says, for instance, that "research [in this field] should fully respect human dignity," and it deals, in Section A, with many applications of the principle of human dignity to various aspects of the human genome.[5] All these, no matter how noble, are general principles and non-binding declarations. Article 1 of the Basic Law means much more than that. It guarantees protection of an individual's human dignity; it is both "the supreme constitutional principle" and a fundamental right.[6] Therefore, it does not deal with an abstract idea of mankind but with concrete existing men and women. These are the people who need protection and assistance in their dignity, and never more obvious than in this century of barbarism. Whatever the concrete human being may lack in the light of an idealistic concept, however imperfect he or she may be, his dignity may not be denied. In Immanuel Kant's words: "*Der Mensch ist zwar unheilig genug, aber die Menschheit in seiner Person muß ihm heilig sein.*"[7] I believe this means that by respecting everybody's dignity we also pay respect to the nature of mankind.

The Basic Law of 1949 was obviously an answer to the system of National Socialism. On May 8, 1945, the Third Reich finally collapsed. Germany was destroyed, defeated, humiliated. Four years later, the western part of the divided country, on orders of the occupation powers, undertook the task of establishing a constitution. Since the Parliamentarian Council hoped for reunification in a near future, it intended to create—as the Preamble of the Basic Law said—"a new order for a time of transition." However, by establishing the principle of protection of human dignity at the very beginning and as the central guiding principle of the Basic Law, unchangeable under the "eternity clause" of Article 79 Section 3 GG even by a qualified majority, a much higher claim was made. If one takes seriously the principle laid down in Article 1—and there is no doubt that this is the purpose of the provision, and it is also the clear jurisdiction of the Constitutional Court—then it is not an idea for a period of transition but an fundamental guideline for all times. It could be abolished only by a revolution.

When unification finally came, much later than was expected in 1949, and yet as a complete surprise when it happened, it was consequential not to give up the fundamental law in favor of a new constitution—as Article 146 GG provided for—but to have the former GDR "join the Basic Law" under Article 23 GG.

The Parliamentarian Council passed the Basic Law on May 8, 1949 (it was officially proclaimed on May 23, 1949 after the state parliaments had approved it). The date was no accident; the Council intentionally chose this day to recall the unconditional surrender exactly four years earlier. The meeting started at 3 p.m. and, as it turned out, it was near midnight when a number of members still wanted to speak, and the final vote was not yet taken. In this situation, Konrad Adenauer, the Council's president, asked everybody to be as short as possible "so that we can have the vote, as many members want, on this 8th of May." A few minutes before midnight Adenauer proposed to take the vote first and continue the discussion afterwards, and so it happened, and the Basic Law was passed on the 8th of May, 1949.[8] Theodor Heuss referred to this date, saying: "I am not sure how to grasp the symbolic meaning of this date. This 8th of May, in essence, is the most tragic and questionable paradox in our history. Why? Because we have, at the same time, been redeemed and destroyed."[9]

This is the historic background of Article 1 GG, and of the whole new constitution. This is essential for a correct understanding of the Basic Law. At an earlier conference of the Dräger Foundation on the German Basic Law, W. Cole Durham, in discussing the Basic Law from an American point of view, remarked[10] on the influence of the different thoughts, values, positions, and socio-economic structures: similar ideas can produce different cultural results. Thus, he said, the meaning of human dignity has a somewhat different content in the German and in the American culture: "In the USA, dignity is connected with self-confidence. If here one talks about dignity, one example is the worker living close to poverty but not prepared to accept public support. To treat everybody with dignity means to help them and to respect them but not to undermine their self-confidence. In Germany the concept of dignity has more to do with duty—the ideal of the moral law as seen in Kant's philosophy. To take a more concrete example—in the USA, the right-to-life discussion in the American abortion cases does not imply the recollection of the Nazi atrocities as in the German abortion controversy."

It is true that in this and other examples the memory of the Nazi past influences the general political discussion, and also the Constitutional Court jurisdiction. In one of its early decisions, in Volume 1 in the official collection of the cases, the Court rejected the claim that the principle of human dignity supports a right to social assistance for the needy: "If Article 1 states that the dignity of man is inviolable it intends only a negative protection against attack.

The second sentence, . . . it is the obligation of all state authority to respect and to protect it does oblige the state to the positive action of protection. This does not mean, however, protection against material needs but protection against attacks on the dignity by others, like humiliation, torture, prosecution etc. . ."[11] This obviously referred to the experience of the Nazi past. Only a later jurisdiction acknowledged that human dignity can also be impaired by material need, and Article 1 therefore gives everybody the claim to have at least the minimum standard of living depending on the generally accepted level.

In its decision of 1975 declaring the liberalization of abortion unconstitutional, the Court said: "The Basic Law contains principles . . . which can only be explained by the historical experience and by the moral-ethical recollection of the past system of National Socialism. The almighty totalitarian state demanded limitless authority over all aspects of social life and, in pursuing its goals, had no regard for individual life. In contrast to this, the Basic Law established a value-oriented order which puts the individual and his dignity into the very center of all its provisions . . . The [Basic Law] demands the unconditional respect for every life, however seemingly without 'social value'; it is therefore unconceivable to take this life without justifying reasons . . . This does not reflect in a derogatory way on other legal systems which did not have the experience with an unjust system and which decided otherwise on the basis of a different historical development and state-philosophical conceptions."[12]

The dissenting opinion of two members of the Court sharply rejected this argument. The dissenters pointed out that obviously Article 1 and Article 2 (the right to life) were a reaction against the inhuman ideology and practice of the Nazi time. However, they said, it would be a complete misunderstanding to derive from this a constitutional necessity to prevent abortion by criminal law; on the contrary, the principal decision of the Basic Law to distance itself from the totalitarian National Socialist state should lead to a more cautious approach to criminal law "the abuse of which has led to unending suffering in the history of mankind."[13]

Even today, more than fifty years after the end of the Nazi regime, this experience still influences German constitutional thinking. But as the abortion case proves different and contrary conclusions can be drawn from it. Another example is the discussion on whether "history" teaches that Germany should refrain from military actions as in the NATO Kosovo case or, on the contrary, one should conclude that never again should deportation and "ethnic cleansing" be tolerated and, therefore, military intervention is necessary if other means fail.

II. ADOPTING TO THE NECESSITIES OF OUR TIME

In fifty years since the establishment of an new order in Germany the republic has developed into a stable modern democracy. It is a country respected in the world, a member of the United Nations, a partner in the NATO alliance, and its democratic character and the respect for rule of law has never been in doubt. The Basic Law is the binding guideline for all state authority, including, of course, the central provision of Article 1. Human dignity is respected primarily not because the constitution demands it but because the political and social order provides the climate and the cultural setup which prevents any repetition of what has happened before this time in our country and what still happens, unfortunately, in other parts of the world. Of course, every country has to avoid being too overconfident that "it could not happen here" or "it could not happen in our time." One of the reasons why it did happen in Germany is that many of the educated groups and classes in the population, including a number who, because of their optimism and their confidence that it "could not happen here," became victims, believed that the existing high standard of civilization and culture would prevent a totalitarian regime. But if anything can be predicted about an uncertain future, we can be fairly sure that the democratic constitutional order established in 1949 will continue to be stable and strong.

This means, in the context of Article 1, that the constitutional safeguards against the recurrence of acts of barbarisms like those mentioned by the Constitutional Court in Volume 1 are not obsolete but there is no actual need for it. To this extent, one might say that Art. 1 GG deals with virtual but not with actual dangers, and we can hope that this will be the situation in any foreseeable future. Of course, offenses against the dignity of man are still possible, and they happen, but they are not part of the system as in the time of dictatorship. If they happen, the Constitutional Court can be called upon by a constitutional complaint. In fact, in the many instances of constitutional complaints—more than 100,000 since the establishment of the Court in 1951—quite often a violation of Article 1 is claimed, often in combination with the alleged violation of other fundamental rights, but only in a very few cases did the Court find that such claims have merit. The risk that the high principle of protection of human dignity deteriorates into "small change," sometimes in a more or less ridiculous context, is greater than the danger that any serious violation of the principle passes undetected, or without sanction. The Constitutional Court had to deal with the claim that the changing of the official titles of judges from, e.g., "*Verwaltungsgerichtsdirektoren*" to the simpler and unified title "Presiding judge at the administration court" violated Article 1 because it meant, according

to the claim, a "degradation."[14] The Court rejected the claim that the statute providing for the obligation of certain traffic offenders to attend a traffic instruction course, even if not necessary under the circumstances of the case, violates human dignity,[15] or that there is an obligation to bury the urn of a deceased person not in a private garden but in a cemetery.[16] Another example for such petty claims is the seriously considered opinion in a law journal that it violates human dignity if one has to obey traffic lights because human actions are regulated by a soulless automatic machine.[17] Many similar unfounded claims, sometimes very close to the ridiculous, could be added.[18] If one compares these petty cases with the historical origins of, and the reasons for, Article 1, one could be relieved to find that problems of this kind are apparently the most pressing concerns of our times.

This does not mean, however, that human dignity is not in danger, in Germany or in any other country. Again, the historical developments, the cultural diversity and the principal value conceptions of a society contribute to define the content and the borderlines of human dignity. This applies even to societies which share a common cultural and religious heritage, as in the case of the U.S. and Germany. While in the United States the death penalty is under dispute but, at least in principle and in the practice of part of the states, it is not considered to be an offense against human dignity, the Basic Law abolished it in the light of the Nazi experience (Art. 102 GG). I share the opinion that even the qualified majority for a constitutional amendment could not reestablish the death penalty because Article 1 GG prohibits it[19] and because Art. 1 demands that everyone convicted even of a major crime should if at all possible be re-socialized. The Constitutional Court upheld, under Article 1, the obligatory life sentence in murder cases but added the condition that after a lenghty period of imprisonment there should be a review whether, according to the personality structure of the offender and considering society's right to be protected against violent criminals, the individual should be released.[20] Clearly, this does not quite reflect public opinion. After a series of cases against child murders, according to a public opinion poll, last year, a majority of 55 percent demanded the re-introduction of the death penalty.[21]

Criminal law and criminal procedural law are major fields for the defense of human dignity. These are the real test cases for a principle which is easily applicable to people living up to the ideal concept of man dignified by his ability to make a free ethical decision. This is one of the criteria for the uniqueness of human beings and the foundation of their claim to dignity.[22] Any closer definition is difficult. According to Theodor Heuss, the Basic Law thesis of human dignity is "not interpreted."[23] As the philosopher Hans Jonas said, all we can achieve is the "*Heuristik der Furcht*": "*Wir brauchen die Bedrohung des*

Menschenbildes, um uns im Erschrecken davor des wahren Menschenbildes zu versichern . . . Die Erkennung des malum ist uns unendlich leichter als die des bonum. Was wir nicht wollen, wissen wir viel eher als was wir wollen..."[24] And how does one define the dignity of socially unadjusted persons, the mentally insane, the uncorrectable criminals? A more modest definition restricts itself at least to the at least potential and abstract ability to live in dignity and with responsibility.[25] The people most in danger are the racial or religious minorities, the people living on the borderlines of society, the unadjusted. Under the dignity clause, even in hopeless cases the states should not pass the final verdict on anyone but must try, however difficult it may seem, to save at least the rest of dignity hidden in every human being. In practice, this has consequences in the field of the treatment of criminals or of socially unstable or mentally ill people. Again, the conclusions are somewhat different from the practice in the U.S. Thus, according to the Constitutional Court's and the Supreme Criminal Court's jurisdiction, the lie detector and similar means of finding out the truth by the forced cooperation of the accused violate Art. 1 and are therefore prohibited even if the accused person wishes to establish his innocence.[26]

In the field of privacy the American and the German concepts are in much closer proximity. The modern state has the tendency to invade, to an ever expanding extent, into its citizens' personal affairs. To administer problems of social security, of taxing, or of other fields covering a large part of the population, and to attend to individual justice which takes into consideration the different personal aspects of a relevant situation, the state needs ever more detailed information, and the modern technical means in the computer age make this possible. This means that all necessary informations, and also information which is not necessary for the government agencies, or is necessary only for some of them but not for others, can be brought together and be collected in a very short time, and can be abused. Data protection, therefore, is one of the most urgent tasks of our time. The Constitutional Court has established the principle that, under Article 1, everyone has the right to what has been called "informational self-determination." The American term "privacy" expresses much better the right to protection of the individual private sphere. The "right to be let alone," the "right of the individual to decide for himself, with only extraordinary exceptions in the interests of society, when and on what terms his acts should be revealed to the general public"[27] are, according to the Constitutional Court's jurisdiction, a necessary consequence of the state's obligation to respect individual dignity.

Of course, exceptions are unavoidable. If a modern State is to provide, in cases of need, the means of subsistence for people unable to live by their own efforts in accordance with a minimum standard—and the State, under Article 1,

has also this obligation—, it cannot avoid intruding into very personal matters. In particular a social state cannot evade the necessity to learn much about its citizens, and their very personal matters. This is one of the dangers of the European-style welfare state, and it indicates one of the constitutional limits to this type of state. The problem is how to define the line between information the state needs to fulfil its legitimate duties and the collection of datas which are unnecessary or too extensive, and how to prevent that an information which may be legitimate for one agency can be transferred to another without valid reasons. Not the single information as such is the main problem if this is necessary for a legitimate and clearly defined purpose. The main problem is the "dysfunctional" information which does not serve such a purpose and which can be transported uncontrolled.[28]

The Constitutional Court's decision containing these principles makes an important and more general observation: If, the Court notes, the citizen is uncertain who knows what, when and on what occasion about him, he will become cautious, he will hesitate to exercise his citizen's rights, and will generally distrust the state. This impedes the individual's development as a citizen; but it also works against the interests of the community: "Self-determination is a necessary functional precondition of a liberal and democratic community depending on the ability of its citizens to act and to participate in the public affairs."[29] This is one of the foundations of Article 1: A free society depends on the freedom, and the dignity of its citizens. The respect for human rights, as Article 1 Sec. 2 says, is "the basis of every community, of peace and justice in the world."

III. ARTICLE 1 - FUTURE DEVELOPMENTS

Under the conditions existing in 1949, the creators of the Basic Law could not foresee the later developments in the fields of science which since have changed the face of at least the developed countries. Computers, genetics, bio-chemistry and much more open up new opportunities, and at the same time new risks, to humanity. In politics, in the social, economic, and cultural sphere the world, and Germany, are completely different from the situation fifty years ago. When unification came in 1990, it was said that the Basic Law—forty years old at this time—would be "too old" to serve as the constitution of the united country. This was—political considerations aside—the argument of Thomas Jefferson who wanted a new constitution every twenty years. In the U.S. Constitution's case, it can be claimed that a 200-years old constitution created for a small rural society is not quite the answer to the problems of the leading industrial power in the world of the 20th century. Still, continuity has its merits,

creating, in particular, a sense of history and tradition and thereby the citizens' loyalty. But changing circumstances need to be accommodated. If the constitution is to answer the needs not only of the past but—much more important—of the present and of the future, it has to be flexible, it should be able to adopt to the changing circumstances. The idea of "original intent" discussed in the U.S. during the Reagan period misunderstands the idea of the constitution as a "living organism." The Constitution, in the words of Justice Brandeis, being "a living organism" "is capable of growth, of expansion and of adaptation to new conditions. Growth implies changes. . . . political, economic, and social . . . Because our Constitution possesses the capacity of adaptation, it has endured as the fundamental law of an ever developing people."[30]

The concept of human dignity claims necessarily universal validity, applying to every human being regardless of race, color, citizenship or any other factor. It also must claim validity in any time; it is either valid no matter how circumstances may change, or it is not valid at all. Article 1 obviously was the answer to the violations of human dignity known during the time of the Nazi regime. These dangers do not exist any more, at least in principle, and hopefully they will not reappear. But new dangers exist or may exist in the future. If the goal of protecting human dignity is still valid—which the Basic Law claims for "all eternity" (Art. 79 Sec. 3 GG)—it is necessary to consider the new and future risks, and to react to them no matter whether the creators of the Basic Law have, or could have, foreseen them in 1949. If the concept is to function under the changing conditions, it has to adopt to the change and has to realize the historical conditions under which human dignity may be endangered. Thus, as the Constitutional Court said, "the judgment on what conforms with the dignity of man depends on the current state of insight; it cannot claim timeless validity."

It is true that the completely new questions concerning the manipulation of human genes could not be foreseen when the Basic Law was written, and the makers of the constitution could not have realized the problems the new techniques may pose in the light of Article 1, and therefore it was not in their "original intent" to answer these problems. However, the conclusion that therefore these are not constitutional questions at all but have to be decided by the political bodies alone[31] is not correct. Article 1 intends protection against any form of danger to human dignity, and it does not matter whether any particular form of danger existed in 1949.

But then we have to re-examine what the object of protection in Article 1 is. As mentioned in the beginning, the opinion was widely shared that Article 1 GG deals with real existing persons, not with an abstract idea of what mankind is supposed to be. Article 24 of the UNESCO "Universal Declaration of Human Rights and the Human Genome" of November 1997 invites the Bioethics-

Comitee of the Unesco to identify "practices that could be contrary to human dignity, such as germ-line interventions," and more explicitly, the Declaration declares, in Article 11, that "practices which are contrary to human dignity, such as reproductive cloning of human beings, shall not be permitted." These are two of the new questions of human genetics which are widely discussed in many countries, and it is remarkable that, after a very intensive and controversial discussion, a consensus on these problems could be achieved among the representatives of almost every country in the world. The non-binding declaration appeals to the member countries to develop legislation appropriate to this position. In Germany, such legislation exists since 1990.[32] New developments, in particular in the fields of cloning, indicate that these are not science-fiction scenarios but clear and present dangers threatening not so much any individual but the future of mankind as a whole. Apparently the temptation exists to "improve" the less-than-perfect human being. But the object of such manipulation, and therefore the object of protection, is not an abstract notion of what should define human beings in the future—human "Dollys" or different, individual personalities. In trying to protect the human nature with all its imperfections[33] our legislation takes Article 1 seriously. It protects not only a vague idea but future generations which have a right to be not the product of social and genetic engineering, or cloned copies of somebody else but individual personalities, with all their weaknesses and imperfections.

To some scientists, these ideas seem to be completely naive, old-fashioned ideas not up to modern times and moreover fruitless efforts to stop what is considered to be the inevitable progress of mankind, the speed of which and the direction will be decided not by political bodies and certainly not by some out-of-date constitutional lawyers but by science and its disciples. In other countries, notably in the United States, Canada and Australia, the reluctance to go full-speed into whatever seems possible from a technical point of view seems outright reactionary. We share the same cultural heritage, come from the same religious beliefs, and have, on the whole, similar conditions in our political and social scene. Yet after attending a number of international conferences on questions like those connected with human genetics, one has to conclude, hesitantly, that there is not really a common concept of what dignity of man means even though this is the subject of countless international resolutions and declarations. It is not surprising that autoritarian regimes—even those who signed the United Nations Universal Declaration on Human Rights in 1948—have, at least in their practice and often in their ideology as well, quite different concepts of human dignity, pointing, for instance, more to group rights, and referring to social needs more than to the individual fundamental rights we take seriously, and generally agree upon. Yet, when talking about human dignity this

often has quite a different meaning even in the countries of the western world. This may be understandable in the light of our respective history and the present cultural and social conditions. It is comparatively easy to agree on the necessary defense of individual rights against the oppressions so familiar in this century, and in particular, so frequent and so bitter in Europe only a few years ago, and even today. But to understand, and to agree on what are the limits of the seemingly "humane" means of improving man, and mankind as a whole—this will be the main battlefield of human dignity in the future. We should make a serious effort to begin to form a consensus on this. This will not be easy, but we should begin it now.

ENDNOTES

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[5] UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION: UNIVERSAL DECLARATION ON THE HUMAN GENOME AND HUMAN RIGHTS

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[12] BverfGE 39, 1 (67).
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FIFTY YEARS OF THE BASIC LAW – MIGRATION, CITIZENSHIP AND ASYLUM

Kay Hailbronner

INTRODUCTORY REMARKS

Germany is one of the largest immigration countries in the world. In 1998 approximately 7.32 million foreigners were living in Germany making up approximately 9 percent of the total population.[1] In a European comparative perspective Germany ranks fourth after Luxembourg, Switzerland and Belgium.[2] The number of foreigners has increased since 1960 from 686,000 to 7.32 million in 1998, an average yearly increase of 200,000 to 300,000. Most foreigners come from Turkey (28.8 percent), the Federal Republic of Yugoslavia (9.8 percent), Italy (8.4 percent), Greece (5 percent), Poland (3.9 percent), Croatia (2.9 percent), Bosnia (2.6 percent), and Austria (2.5 percent). Only 25.1 percent of all foreigners living in the Federal Republic of Germany were EU citizens. The share of foreigners from former Yugoslavia has been constantly rising, achieving a new peak with the large number of Kosovo-Albanians taking up a permanent residence in Germany before or during the recent military conflict.

In 1997 about 30 percent of all foreigners had already lived for twenty years or longer in Germany, 40 percent for more than fifteen years and almost 50 percent for more than ten years. Nowadays almost two thirds of all foreign children were born in Germany and will spend most of their youth there. Statistically they are registered as foreigners although they may well be in the third generation in Germany. There have been relatively few naturalizations although recently, due to some efforts to facilitate naturalization procedures, naturalizations have substantially increased. The rate of naturalizations has increased from 0.3 percent to 1.2 percent in 1996, which means that 1.2 percent of the foreign population acquired citizenship. Asylum seekers account for a large part of the immigration into Germany. In 1992 at the peak of the asylum seeker movement Germany, with 438,000 asylum seekers, admitted more than two thirds of all asylum seekers coming to the European Union. Although Germany has reformed its law, it is still one of the primary destinations of asylum seekers. In 1998 98,700 asylum seekers were registered in Germany compared to 21,800 in France, 4,700 in Italy and 57,700 in Great Britain.

The fathers of the Basic Law could hardly foresee such a development. Nobody could have imagined a large immigration into a country destroyed by the war and deeply shattered by its recent history. Germany, with its record of human rights violations and genocide, would become a major European country

of immigration! And yet, it was precisely this history of totalitarianism, war and separation and expulsion of large parts of the German population from Eastern Europe which prompted the constitutional rules for migration, asylum and citizenship. Anybody persecuted on political grounds was granted a right of asylum. Unlike many other basic rights the right of asylum was granted without any limitation or statutory reservation. The freedom of movement of all Germans, including those Germans living outside the Federal Republic, which was to become the constitutional basis for German nationals and persons suffering expulsion due to their German ethnic origin, was however not granted without limits. The fathers of the constitution were aware of the danger of a large uncontrolled migration. Therefore, freedom of movement was granted only subject to restrictions in case of financial burdens arising for the community from such migration.

As to migration of foreigners to the newly founded republic, the Basic Law made no explicit provision. Therefore admission and residence of aliens remained within the prerogative of the legislature and the executive. This does not mean that the Basic Law is completely silent on issues of migration and the rights of aliens. Basic human rights and institutional guarantees like the provision whereby marriage and family shall enjoy the special protection of the state became very soon an important constitutional guideline for issues of family reunion and expulsion. As a rule, however, the Basic Law reserved some important constitutional rights to Germans, in particular the freedom of movement, the right to choose occupation and profession and the right to assemble peacefully and to form associations. Foreigners were not included in such constitutional guaranties although with the development of Germany into a de facto immigration country constitutional attempts were made to assimilate long-term residents to Germans in relation to their constitutional rights.

Citizenship remained a major concern of the Basic Law since German nationality law had been one of the major instruments of totalitarian rule to dispel ethnically and racially unwanted Germans. On the other hand, the law had to make provision for the large number of Germans living outside the Federal Republic. German nationality thus became an indispensable element of German unity beyond the territorial division.

MIGRATION

The Basic Law had very little reason to be particularly concerned about foreigners. There were very few foreigners in Germany and those refugees who came were almost immediately admitted to German citizenship due to their ethnic, cultural or linguistic affiliation to Germany as persons belonging to the

German "nation" in the sense of an ethno/cultural community.[3] By reserving some constitutional rights the Basic Law has opted for a distinction between general human rights granted to anybody and constitutional rights reserved to citizens. In accordance with traditional theory, migration and the legal status of aliens, with exception of political asylum, were to be left to the discretion of the legislature.

The distinction between human rights and constitutional rights reserved to Germans has, however, never played a significant role in favor of a restrictionist policy for two reasons: first, there has never been a serious constitutional attempt to limit parliament to granting equal or similar statutory rights to resident aliens. With the recruitment of foreign labor and the gradual, although not planned, development of Germany into a de facto immigration country, social rights of aliens, equal treatment in social insurance as well as a right to assemble and to form associations was extended to foreigners without any major political problem. The Constitutional Court, by interpreting Art. 2 of the Basic Law giving everybody a right to self-fulfillment as a subsidiary human rights clause, permitted aliens to have access to the Constitutional Court challenging statutory or administrative restrictions of their legal rights.[4]

Secondly, the Basic Law's openness to international law, reflected in its Article 25 granting priority for the general rules of public international law and its commitment to international treaties, became in time a substantial factor in establishing a constitutional framework for determining migration issues.[5]

The implications of public international law were by no means free of conflicts. There have been and there still are divergent opinions on the interpretation of international treaties, relevant to migration issues, most recently for instance on the interpretation of the term "inhuman treatment" in Article 3 of the European Convention on Human Rights.[6] On the whole, however, international legal norms as interpreted by the European Court of Human Rights in matters of protection of the family or of aliens facing torture or inhuman treatment were incorporated in German legal theory and practice. Although international treaties as such do not have the rank of constitutional law under the Basic Law, the Constitutional Court has constantly applied a doctrine of presumption in favor of compliance with the international law obligations of the Federal Republic.[7]

Finally, however, the European integration based upon Article 23 of the Basic Law had by far the largest impact on migration and asylum issues. Not only with the establishment of the freedom of movement of union citizens and their relatives, but also with the transfer of sovereignty in almost all matters of immigration and asylum. The Amsterdam Treaty has irrevocably put an end to national immigration and asylum policy.[8] We do not know as yet what a

European immigration policy will eventually be like in five or ten years time. The Amsterdam Treaty has only now just entered into force and it will require tremendous efforts to complete on the basis of unanimity within a five-year term what the Treaty has put on the agenda of the member states. It is evident that even at the present state, when there still is a German migration policy, European implications are predominant for any major political decision in migration and asylum issues. This will also affect if not determine the Basic Law parameters for migration and asylum law.

GERMAN MIGRATION LAW AND POLICY

If we take a closer look at the German migration policy we will find a similar pattern of development towards a more or less unwanted immigration, partly as a result of the guest-worker recruitment, partly as a result of subsequent family reunification and somewhat uncontrolled economically driven mass migration movements.[9] One could forever speculate whether it would have been possible and morally acceptable to maintain a rotation system as originally planned but never enforced. The fact is that with the admission of large numbers of recruited workers and subsequently their family members immigration did occur in fact although every German government has insisted that Germany is not an immigration country, meaning that its migration policy is not directed towards immigration. Germany, a "reluctant land of immigration" as Philip Martin has called it,[10] had difficulties to legally cope with the situation of a large number of migrant workers who had been staying so long in Germany that Germany could properly be described as their homeland although they remained in their large majority foreign citizens.

The Aliens Law of 1965 was still very much preoccupied with the legal status of aliens under the aspect of protection of public order and security. Rights of aliens and immigration as such were more or less disregarded. The different situation of permanent residents and their family members was not recognized.[11] Aliens were in principle considered as temporary visitors who were permitted to remain in the country as long they were not raising public concerns like labor market needs or the general interest to prevent immigration.

But with the Aliens Law of 1990[12] different categories of aliens, temporary visitors, students and seasonal workers, permanent residents, family members, and humanitarian refugees receiving temporary protection were recognized. Although the law still did not provide for an immigrant status as such, it indirectly acknowledged an immigrant status by providing for individual rights to obtain a permanent resident status and substantially reducing administrative

discretion to terminate the residence of long term aliens or those who had been born or brought up in Germany.

The Constitutional Court has played a significant role in the development of a diversified pattern of residence rights, primarily by using the Basic Law's protection clauses in favor of marriage and family and general constitutional principles of proportionality. In 1987 the Court had to deal with the requirement that a spouse had to wait for three years until he or she would receive a residence permit.[13] The Court argued that although Article 6 of the Basic Law protecting marriage as such did not establish an individual right of foreign spouses or children to family reunification in the Federal Republic of Germany, the courts and alien authorities were obliged to properly consider the protection of marriage and family in every decision on family reunification. Therefore, a requirement of a three-year waiting period enacted to check the growing family reunification was considered unconstitutional. The court, however, did not challenge a one-year waiting period in order to prevent sham marriages, and the requirement that family reunification is only possible if a foreigner has already spent a period of eight years in Germany.[14] The Court explicitly rejected any quota regulations with regard to family reunification. It argued that a treatment of family members according to a "waiting-in-line principle" would be hardly compatible with the constitutional protection of marriage and family under Article 6 of the Basic Law since such a principle would not allow for sufficient consideration of the individual circumstances of every case.[15] This decision has been the basis of numerous court decisions on the implications of Article 6 of the Basic Law on questions of entry, residence and expulsion.[16]

The protection granted under constitutional principles has been gradually extended to any kind of family relationship, including adopted minor children or the right of a father to maintain a family relationship with his illegitimate child.[17] Although the Court has always insisted that marriage or family as such do not grant an unlimited right of residence or of family reunification, the constitutional requirement to draw a proper balance between private and public interests substantially contributed to reducing the traditional concept of a state's sovereign right to decide on the entry and residence of foreigners. Eventually the new Aliens Law of 1990 granted the right of family reunification without any waiting period subject to certain conditions. In general, requirements for the subsequent immigration of dependents are that a foreigner who has been living in Germany has a residence permit or a right of unlimited residence, that

- there is sufficient living space for the family, and that
- the maintenance of the dependents is secured from the gainful employment of the foreigner, their assets or other means of their own.

Spouses of foreigners of the first generation who hold a right of unlimited residence, had been living in Germany and held a residence permit when the new Act came into effect will be granted a residence permit, provided the marriage already existed and was confirmed at the time the foreigner came to Germany.[18] Foreigners of the second and following generations (i.e., that born or grown up in Germany), provided the foreigner holds an unlimited residence permit or a right of unlimited residence, has lived in Germany for eight years and is of age, may also bring their spouses to Germany. Where a foreigner had no legal right to come to Germany in order to join his or her foreign spouse, he or she may be admitted at the discretion of the competent authorities provided that the other spouse holds a residence permit or a residence title for specific purposes provided the general requirements for the subsequent immigration of dependents (sufficient living space, independent means of support) are fulfilled.[19] Foreigners may be admitted in order to join a family member holding a residence title granted for exceptional reasons only on urgent humanitarian grounds.

Unmarried children from non-EU states are legally entitled to immigrate subsequently in order to join their parents living in Germany until they reach the of age sixteen. This requires in principle that both parents lawfully reside in Germany.[20] However, on urgent humanitarian grounds children may be permitted to immigrate subsequently in order to join parents holding an exceptional residence title. In special cases unmarried children may immigrate subsequently until they attain age eighteen or come to Germany to live with a single parent.[21]

A major issue of German migration policy has been the right of spouses after a divorce or separation. Originally, spouses lost their right of residence in this situation. The new Aliens Law of 1990 provided for an independent residence right of spouses regardless of separation or divorce if the marriage had lasted for at least four years of if the husband had died during the marriage. A hardship clause has been introduced in such cases in which it would have been unacceptable to terminate the residence of a husband. This provision is continuously being challenged by human rights advocates, who argue that women in particular are risking a loss of residence right in case of a divorce.

The Federal Administrative Court was recently faced with the issue whether unmarried couples or homosexual couples should receive the same constitutional protection as is granted to married couples. The Federal Administrative Court decided that although of quasi marriages cannot be brought under the constitutional protection of marriage, they still may enjoy the constitutional protection given to a family.[22] The exact implications of this decision are yet to be examined. The European Parliament as well as the

European Commission, proposals on a European Union Policy on migration, have suggested to include into the scope of family reunion for EU citizens unmarried couples when the host member state recognizes the legal status of unmarried couples for its own nationals.[23] The question arises whether equal treatment would substantially raise the number of foreigners arguing for a right of family reunification. In order to enjoy equal treatment a formal registry procedure would seem to be an indispensable requirement for a privileged residence right.

General constitutional principles on proportionality[24] have frequently been used by the Constitutional Court to curtail the administrative power to refuse a renewal of a residence right or expel a foreigner for reasons of public order. The Federal Administrative Court in 1979 had already pointed out that a foreigner after many years of lawful residence could not be expelled for minor offences. There must be serious reasons to deprive a foreigner of his economic and social existence established in Germany.[25] A large jurisprudence dealing with the issue of balancing legitimate interests of foreigners with public order interest has deeply influenced the new provisions in the Aliens Law of 1990 on expulsion. The general power to expel a foreigner for public order violations has been substantially restricted in the case of foreigners enjoying a secure residence status or an unlimited residence permit. The law now provides for a complicated system of protection for foreigners who have been born in Germany or immigrated as children of migrant workers. Generally speaking, only serious offenses may justify expulsion.[26] The Parliament, however, has not yet followed a recommendation also put forward by the European Parliament and supported by a minority of the judges of the European Court of Human Rights[27] whereby foreigners born or brought up in the host country enjoy absolute protection against expulsion. But even in cases of very serious criminal offenses the European Court of Human Rights has seriously restricted the right of contracting states to expel foreigners who have lost their ties with their home country.[28]

The jurisprudence of the Federal Administrative Court and Constitutional Court, however, did not fundamentally challenge the Basic Law's distinction between basic rights of Germans and human rights granted to everybody, although various attempts have been made to argue that the Basic Law could not possibly have foreseen the development of Germany into a de facto immigration country and that therefore the constitutional distinction between foreigners and Germans had become obsolete.[29] The Constitutional Court has never taken up this line of argument. A somewhat more moderate approach tried to argue in favor of a gradual constitutional assimilation of foreigners ending up eventually in equal constitutional rights of immigrants. Article 3 of

the Basic Law granting equality before the law was therefore used to argue in favor of a constitutional recognition that Germany had become a country of immigration, and that its immigrants should receive equal social and, at least on the regional level, even political rights. The predominant constitutional theory, however, has insisted that in spite of Germany's development into a de-facto immigration country, there was no obligation to provide for a constitutional rights assimilation of foreigners.[30] It was rightly argued that the Constitution did not prohibit the granting of equal rights, but the factual situation of foreigners did not, as a matter of "superior constitutional principles," imply a "constitutional rights assimilation."

The Constitutional Court, in a landmark decision of October 31, 1990, on the granting of political rights on the communal level to foreigners in Hamburg, struck down the Hamburg law as unconstitutional, which provided for a right of foreigners to vote in local elections.[31] The court argued that according to Article 20 of the Basic Law all public authority emanates from the people. This provision requires that the "people," in the sense of the Constitution, comprise German citizens. The Court has explicitly refused the argument that the factual immigration into Germany had changed the constitutional concept of democracy and exercise of political rights by the people. The Constitutional Court recognizes that there is a basic democratic requirement of convergence between those possessing political rights and those persons subject to the exercise of state power. This convergence, however, is a task for the legislator; by reforming the citizenship law the legislator can react to factual changes in the population of the Federal Republic of Germany.

As a reaction to the fact that Germany has become a de facto country of immigration, there have been increasing demands by political parties in the *Bundestag*, particularly by the Liberal Party and the Social Democratic Party, for an immigration law.[32] The basic idea behind such a demand is that the previous political doctrine, whereby Germany is not a country of immigration, is to be replaced by a comprehensive immigration policy determining different quotas, special categories of immigrants, possibly in combination with an overall limitation of immigration. Another goal of such drafts concerns a policy of integration for those persons who would receive immigrant status. By establishing a special immigrant status, immigrants should then be granted special rights and obligations. They should therefore also receive individual rights for financial assistance, a special residence permit and the right of naturalisation.

Enactment of an immigration law, at least insofar as immigration is to be regulated by quota, is an illusion. In the best case, a large bureaucracy will administer quotas which have no practical relevance at all for factual

immigration. In the worst case, the creation of an immigrant status will create substantial attraction and induce economic migrants to move to Germany and apply for an immigrant status. As a matter of fact, there will be a substantial immigration with or without immigration legislation, by way of family reunification, admission of refugees, and freedom of movement within the European Union, particularly from the newly acceding eastern European states. There is no possibility whatsoever to prevent or substantially regulate such immigration. Every serious economic analysis shows that in the foreseeable future there will be no demand for unskilleed labor in a situation of high unemployment in Germany as well as in almost all western European neighboring states.

It is also questionable whether the goal of a better regulation of immigration may be achieved with the instrument of quota and the establishment of an immigrant status. The real reason for such scepticism is that the legal and political scope of discretion, not the least because of EU laws and policy, is substantially lower than would be necessary for an effective control and limitation of further economically unwanted immigration. Contemporary Germany is in a much different situation than the Germany of forty years ago when a rapidly expanding economy urgently needed new labor. Immigration control based on economic factors would have to substantially change the legal and political parameters, restricting for instance family reunification or humanitarian admission of de facto refugees or the individual constitutional right of asylum seekers. Proponents of an immigration legislation have indicated that they are prepared to accept such conclusions. If there is to be a more effective control of immigration, it would have to be precisely determined which categories of de facto immigrants should be restricted in order to replace such immigrants with economically better suited immigrants according to a point system based on professional qualifications. Otherwise, every immigration legislation would simply remain an illusion, not being in reality applicable due to a permanent exhaustion of quotas. The coalition agreement between the Social Democratic Party and the Greens therefore did not take up the idea of a control of immigration by quota in spite of previous legislative proposals and resolutions by the Social Democratic Party.

There is a legitimate interest to give foreigners immigrating into Germany a perspective guaranteeing their gradual integration into the political and social system of Germany. To that extent, Germany's migration policy lacks rules. It is necessary to provide clear guidelines concerning the integration policy and to provide a perspective of acquiring equal rights by the foreign population living permanently in Germany. The correct way is by changing the citizenship law as well as by facilitating naturalization. Likewise, there have to be substantially

increased possibilities to improve the educational level and professional training of foreigners, and to guarantee equal opportunities.

CITIZENSHIP

Unlike migration the regulatory competence for citizenship has remained within the sovereignty of member states. The Amsterdam Treaty has made clear that the political structure as well as citizenship do not fall within the competence of the European Union. There have been arguments in connection with the recent reform of the citizenship law that a substantial increase of dual nationals, by introducing a *jus soli* for children of immigrants, may violate the basic principle of community law to respect the interests of the community and the other member states.[33] It is argued that an increase in German citizens as a result of the German citizenship reform does have substantial consequences by enlarging the personal scope of application of the Union treaty by granting a substantial number of former third country nationals Union citizenship. A closer analysis of the European Court's rulings shows that this argument is without any merit. The Court in the case Micheletti[34] has clearly emphasized the right of every member state to regulate its own citizenship law and the obligation of every other member state to recognize such regulations. Thus, an Italian-Argentine dual national, born in Argentina and living in Argentina must be recognized as a Union citizen by Spain. The somewhat casual remark of the court that every member state is entitled to determine its own citizenship "subject to community law" can hardly be used as an argument against the extension of German citizenship to children of immigrants born in Germany. Acquisition of nationality by *jus soli* has been introduced in a majority of EU member states.[35] There is no solid basis for the assumption that community law implicitly is based on the *jus sanguinis* principle.

The Basic Law, in Article 16 and Article 116, has relatively little to say on the content of citizenship legislation except that nobody may be deprived of German citizenship. The Basic Law, however, makes clear that loss of citizenship may only occur pursuant to a law and against the will of those affected only if they do not thereby become stateless.

Again, German history has clearly been at the cradle of this provision.[36] The drafting history shows that the clause was intended to prevent any repetition of legislative or administrative acts, similar to Nazi legislation depriving Jews of their German citizenship.[37] Applied today in a very different context, the general prohibition of deprivation of German citizenship raises extremely difficult issues of interpretation. There are a number of different theories where to draw the line between a constitutionally admissible involuntary loss of

German citizenship and the unconstitutional deprivation of citizenship. The Constitutional Court has decided already that loss of German citizenship as a result of an intentional acquisition of a foreign nationality is constitutionally admissible. It may well be seized with the issue of deprivation of German citizenship by the new citizenship law, providing for a loss of German citizenship for those dual nationals who, having acquired German citizenship by birth on German territory (*jus soli*), cannot show that by the age of twenty-three foreign citizenship has been renounced.

The July 15, 1999 law reforming the nationality law of 1913 passed by the *Bundestag* and *Bundesrat*[38] with the consent of the *Bundesrat* does not change the basic rule that German nationality is acquired by descent. As a matter of fact, the principle of acquisition of nationality by descent is an inherent part of all western European countries as well as of the United States. The major point of reform is that in the future children of foreign parents born in Germany acquire by birth German citizenship, provided that one parent has been a permanent resident in Germany for at least eight years and has a permanent residence permit. It follows that with the acquisition of German nationality by *jus soli* children of immigrants will as a rule acquire dual nationality since they will acquire regularly one or more of the nationalities of their parents. Contrary to a previous draft of the federal government the law which has been passed now does not provide for a permanent dual nationality. According to the "option model" those dual nationals who have acquired German nationality by *jus soli* have to chose between the German and their foreign nationality when they reach the age of adulthood. German nationality is lost automatically if a dual national cannot show the renunciation of their foreign citizenship by the age of twenty-three. There are exceptions for those persons who may for legal or factual reasons not be able to renounce their citizenship, for instance when their home state makes renunciation dependent on unacceptable conditions.

The option can be exercised only by *jus soli* nationals while other dual nationals like children of mixed marriages or even children of a *jus soli* dual national do not have to opt. This may lead to the somewhat strange result that the parents lose their German nationality by the age of twenty-three while their children never loose their German nationality even if they move immediately after birth to their home country.

The law also provides for substantial facilitations of naturalisation. Foreigners with a secure residence permit have a right to acquire German citizenship already after eight years of residence instead of fifteen years. The right is dependent on sufficient German language knowledge and a formal commitment to respect the Basic Law. The principle, however, to renounce foreign citizenship is maintained although there are various exceptions. A

major exception concerns the clause that renunciation of foreign citizenship would imply serious economic or financial disadvantages.

The new law provides for a special rule concerning renunciation of foreign citizenship for Union citizens. Subject to reciprocity Union citizens may be naturalised without being obliged to give up their former nationality.

The extension of German citizenship to children of foreigners born on German territory means a substantial conceptional change. For proponents of the reform legislation it is a modernisation of a historical dimension, for their adversaries a fundamental change endangering the identity of the German nation—a kind of revolution by which the government selects the people from which it derives its legitimacy rather than the people electing the government.[39]

German nationality law is based upon the pre-revolutionary nationality law of 1914. The very general argument in the political debate has been that German nationality law is antiquated, a relict of an exaggerated nationalism. As a matter of fact, German nationality law has been repeatedly amended not only because of the prohibition of gender-related discrimination but also as a consequence of the factual development of Germany into a country of immigration. The Aliens Law of 1990 and 1992 already created rights of naturalisation for the first generation of recruited migrant workers as well as for the second generation of immigrants born or brought up in Germany.[40] The usual identification of German nationality law with ethnicity is frequently based upon a superficial knowledge or misunderstanding of German nationality law. The equation of the German people with ethnical affiliation was only introduced by Nazi legislation depriving Jews of German citizenship. After the Second World War the maintenance of the term "German" as different from the term "German citizen" has served as an instrument for granting freedom of movement and fundamental rights to all persons who were expelled because of their cultural and ethnical affiliation with the German nation. With the liberalisation of emigration laws in the former Soviet Union, 200,000 "ethnical Germans" and their descendants made use of that privileged access to German citizenship every year, with the numbers substantially reduced by now to approximately 100,000 per year.

Additionally, the concept of German citizenship based on descent has served as an important link for all Germans whether they were lucky enough to live in the Federal Republic of Germany or whether they became citizens of the newly established German Democratic Republic which was desperately trying to get its nationality law recognized.

The migration movement which since the recruitment period had largely changed the composition of the population in Germany did produce results in German nationality law well before the reform of 1999. In 1997 approximately 42,000 Turkish nationals were naturalized, a large part of them being dual

nationals.[41] This shows that dual nationality is not such a fundamental novelty in German citizenship law as is sometimes argued.

Nevertheless the acquisition of German nationality by *jus soli* will fundamentally change the basis of German nationality. One may well argue under what conditions *jus soli* can be considered as sufficient criteria for admission to the community of citizens. Traditional immigration societies like the United States do not have to deal with this question. There is no alternative to identification with a community almost exclusively founded and developed by immigrants. In Germany, like in many other western European countries, the situation is somewhat more complicated. Language, culture and traditional values do play a substantially larger role for shaping the "identity" of the nation than is the case in a society which has always been multi-, or should I say "pluricultural." It is not only legitimate but also politically desirably to consider carefully the implications of a reform of nationality law for the concept of "nation." In the German situation it is, however, important to recognise that the elements determining the identity of a nation, like German language, culture and tradition cannot be interpreted statically. The identity of the nation can only be maintained if factual changes of the population are duly taken into account. Identity is defined also by a consensus on fundamental values and principles on living peacefully together as laid down in the Basic Law. Or to put it differently, exclusion of a substantial part of the population from the political and implicitly social community increases the danger of segregation. Only those foreigners who are accepted in the political community can be expected to act responsibly and to engage fully into the political and social life of the Federal Republic.

Therefore, constitutional objections based on the concept of nation and the principle of democracy[42] are unfounded. The Basic Law does not contain explicit criteria for the regulation of German citizenship law. This does not mean, however, that the legislature is not subject to certain constitutional requirements in determining who may acquire German citizenship. From the concept of nation and democracy laid down in the Basic Law fundamental requirements may be derived for the reform of German citizenship law.

It does, however, amount to an unacceptable *petitio principii* to argue from the historical content of German citizenship law that *jus soli* acquisition of German citizenship is constitutionally prohibited since it does not constitute a part of the traditional German citizenship law.[43] The concept of the German nation is not fixed by traditional criteria of citizenship. The Constitutional Court has convincingly stated that the Basic Law does leave it to the legislature to determine the criteria for acquisition and loss of German citizenship. By changing the citizenship law the legislature may react to changes in the composition of the population of the Federal Republic of Germany in order to

take account of the basic democratic principle that the population permanently living on German territory should be able to exercise its political rights.[44] One may even argue that under the principle of democracy the legislature must not remain inactive in the face of a growing gap between those possessing political rights and those living permanently on German territory. The Constitutional Court therefore indicated that rather than extending political rights to foreigners, German citizenship law may be extended to foreigners who have established permanent residence on German territory and are therefore subject to the state in a similar way as German citizens.[45] It follows that a basic constitutional criteria must be that foreigners acquiring German citizenship are subject to the state in a similar way as are native German citizens. One may derive from this principle further criteria concerning a genuine link to Germany. There can be hardly any doubt, however, that the granting of German citizenship to persons born on German territory, provided that their parents have established themselves permanently in Germany does constitute a sufficient link for acquisition of German citizenship.[46]

We have to acknowledge that we do not yet know whether the new nationality legislation will contribute to achieve the goals connected with the extention of German citizenship. We will know the answer only in decades. However, some of our neighboring states in western Europe have gone similar ways by granting nationality in extension of the *jus sanguinis* principle.[47] The experience in France, Belgium and the Netherlands does not indicate that reform of nationality law has been a hundred percent success. It is not fully discouraging either. The risks of a temporary or permanent dual nationality with respect to legal uncertainty, conflict of loyalties and multiplication of political rights have not substantially materialized.

The final test will be whether a reform of nationality law will contribute to maintain the elements stabilising the "identity" of the nation. The law would be a fundamental failure if it would lead to the establishment of national ethnic minorities with privileged political and social rights. The reform legislation makes clear that together with the requirement for sufficient German language knowledge and a commitment to the principles of the Basic Law admission to the political community is dependent on the intention to integrate into German society.

There are also objections to the reform legislation based on constitutional arguments against the duty to opt.[48] The requirement to opt at the age of eighteen to twenty-three in favor of one of the different nationalities does not violate the constitutional provision against deprivation of German citizenship. The clause must be interpreted on the basis of German historical experience with the arbitrary deprivation of citizenship. Loss of citizenship related to intentional

and voluntary acts to opt for a permanent affiliation to a foreign state at the age of adulthood can hardly be equated to acts which the founders of the Basic Law had in mind when drafting Article 16 of the Basic Law.

ASYLUM

The amendment of the Constitution in 1993, providing the basis for the reform of the asylum law, has been almost as controversial as the reform of the citizenship law, only with different political proponents and adversaries. Following a serious political crisis in 1992, with 438,000 asylum seekers and more than two-thirds of all asylum seekers registered in the member states of the European Union, major political parties finally agreed to change Article 16 providing for an individual right of persons persecuted for political reasons to enjoy asylum in the Federal Republic of Germany.[49] Whereas Article 16 a (1) of the Basic Law still provides for an individual right to enjoy asylum in Germany, Article 16 a (2) incorporates the concepts of "safe third country" and "safe country of origin" into the constitution. Since all EU member states and countries neighboring Germany are deemed safe third countries, the constitutional right of asylum in principle is no longer applicable to refugees who come to Germany by land. According to Article 16 a (3) the list of safe countries of origin must be approved by parliament. The amendment of the Constitution and its subsequent restriction of the right of asylum has been confirmed in all essential parts by three Federal Constitutional Court decisions of May 14, 1996.[50]

Simultaneously, the law of asylum procedure was subsequently amended, providing for a detailed regulation on the right of asylum. Under the new provisions both the request for recognition as a victim of persecution and the need for protection against deportation to a state in which the refugee is facing persecution are taken into consideration when an asylum application is processed. In addition a new status was introduced for persons fleeing war and civil war situations. This status for civil war refugees has only recently been applied with regard to Kosovo-Albanians because the federal government and the *Länder* have not been able to agree on the payment of housing and welfare costs for those granted temporary protection. The law also provides for a possibility to order a temporary deportation waiver for groups of people staying within the country, either based on a reason of public international law or on humanitarian grounds. To extend the validity of the deportation waiver the agreement of the Federal Ministry of the Interior must be obtained.

Finally, according to Section 53 of the Aliens Act the federal office for the recognition of foreign refugees must examine whether the applicant is facing a

risk of torture, death penalty or any violation of the rights laid down in the European Convention on Human Rights in case of return to his/her country of origin. If such a risk exists, an asylum seeker is granted a tolerated residence by the aliens office.

The law on asylum procedure has also introduced a special accelerated procedure for airport cases which used for asylum seekers coming from safe countries of origin or those without valid passports. In such cases, applicants awaiting a decision on entry into the territory must remain at the airport. A decision on entry must be reached within two days or the applicant will automatically be allowed to enter the territory. If the claim is rejected as manifestly unfounded, entry is refused. The applicant may, however, file an appeal with an administrative court within the next three days with suspensive effect. The administrative court must reach a decision within fourteen days and if it does not, the applicant is allowed to enter the country.

Based on the amendment of the constitutional law, the Asylum Procedure Act also provides for a substantial reduction of judicial remedies and court injunctions. Asylum seekers arriving from safe third countries cannot challenge in court the safety of a safe third country. In addition, according to paragraph 4 of Article 16 a of the Basic Law the implementation of measures terminating a persons sojourn in case of a manifestly improper asylum application may be suspended by a court only when serious doubts exist as to the legality of the measures.

The constitutional amendment depriving asylum seekers arriving from "safe third countries" has been criticized heavily as a factual abolishment of the individual right of asylum granted in Article 16, Section 1. Since Germany is surrounded by safe third countries, no asylum seeker could theoretically reach Germany claiming access to the asylum procedure except by air or sea or parachuting from an air plane. Nevertheless, approximately hundred thousand asylum seekers are registered every year in Germany due to the fact that in most cases the safe third country clause cannot be applied since the safe third country through which an asylum seeker has arrived cannot be identified properly. Asylum seekers usually destroy all documents indicating their travel route and will argue that they have no precise knowledge how they got into Germany. In such cases return is impossible due to the lack of a country which would be willing to accept an asylum seeker. It may be easier to grant access to the asylum procedure in such cases rather than referring the asylum seeker to the legal status of a tolerated person.

For basically the same reasons the internal EU systems[51] for attributing exclusive responsibility of one EU country for processing asylum seekers (Dublin Agreement) has not functioned satisfactorily. Although within the EU

system there are clear rules as to which state is exclusively responsible (primarily the state which has issued a visa or a residence permit; lacking a residence permit or visa it is the state of first entry). The Dublin Agreement frequently cannot be applied due to the lack of willingness of asylum seekers to identify their travel route. The situation may eventually change once the somewhat exaggerated requirements concerning proof of nationality of an asylum seeker and his/her travel route are facilitated and bureaucratic barriers overcome.

The most essential step in the direction of a system of exclusive competence, however, will be the introduction of a European data system, laid down in the Eurodac Draft Convention. Once a Eurodac Regulation[52] will be in operation, every EU member state will be obliged to register every foreigner claiming asylum and other foreigners to be found illegally in the country. On the basis of an easily accessible fingerprint identification system it would be possible within very short time to find out whether a foreign person claiming asylum has been registered elsewhere for an asylum application regardless of any travel documents or statements concerning the travel route. It will, however, take a long time until such a system can be fully operative, particularly since those states that are geographically close to countries of origin of asylum seekers will not be particularly interested to ensure the efficient functioning of such a system.

A more fundamental objection, however, to the safe third country concept is that it challenges to some extent the idea underlying traditional refugee law that everybody who has somehow managed to get to a safe country will have access to the asylum procedure.[53] The safe third country concept defers basically the responsibility for dealing with the refugee problem to those European countries bordering crisis areas. With the enlargement of the European Union this will be Poland, Hungary and the Slovak and Czech Republics. It is frequently argued that these countries are not able to cope with large numbers of refugees.

The political objections raised against the safe third country concept make clear that a European and even an international regime of coping with refugee movements is needed. It is obvious that in the long run no viable solution can be found in simply deferring responsibility. This clearly calls for the establishment of a European system of distributing burdens and attributing responsibility for processing refugees. On the other hand, the idea underlying the Geneva Convention of 1951 and upheld for many decades until the collapse of the Soviet Union, whereby protection may be found in far distant regions, cannot be maintained anymore. The situation of Kosovo Albanians shows that even in a situation of ethnic cleansing and massive violations of human rights the solution

cannot be permanent admission of large numbers of refugees. Only temporary protection, primarily in the region, should be granted to prevent the expulsion and resettlement of large populations. On the other hand, some of the ideas underlying the Geneva Convention, and particularly the distinction between individual political persecution and a general situation of massive human rights violation do not sufficiently reflect the realities of today's migration movements.

The individual right of asylum granted by the Basic Law and maintained even in the recent constitutional amendment of 1993 has generated substantial restrictions—to an extent that one may argue that Article 16, Section 1 amounts to an hypocrisy. It would have been wise indeed not to disguise the fact that an individual right of asylum in Germany, as in most other western European countries, cannot be maintained anymore even if it is assumed that only a relatively small percentage of asylum seekers are indeed fulfilling the criteria required for recognition as political refugees. As a constitutional individual right every foreigner should obtain from the individual right of asylum at least a claim to access to a asylum procedure, temporary residence permit and possibly a judicial remedy in case of a refusal of an application. It is very doubtful whether this system will survive the 20th century. It has already been substantially eroded by the referral to alternative protection in a safe third country. It will eventually be replaced by a European system of monitoring, granting temporary protection, military and political intervention in case mass refugee movements are generated, and finally burden sharing for those who will not be able to return. One of the prominent clauses of the Basic Law brought about by German history, the right of political asylum, will eventually become obsolete. It has already been replaced to a large extent by other concepts. It would have been more convincing if the *Bundestag* would have decided to abolish the concept of an individual right of asylum and replaced it by a general commitment to a European international regime of granting refugee protection, thereby leaving it to the legislature to enact the necessary laws and regulations. The historical commitment of Germany to the idea of protection against totalitarian regimes could thus have been upheld in a modified way adapted to the reality and rules of today's world. This does not mean disrespect for the founders of the Basic Law.

The Basic Law, although undoubtedly one of the most impressive political achievements in modern German history, is man-made and like any other human product subject to a change of circumstances. To recognise the need for a constitutional reform is an indispensable requirement for maintaining the spirit and basic humanitarian content of the Basic Law after fifty years of its existence.

Annex:

The following table shows the share of foreigners in the population of the EU States as well as in Norway and Switzerland in 1992:

State	Overall population	of those foreigners	%
EU countries			
Belgium	**10,068,300**	909,200	9.0
Germany	**80,974,600**	6,495,800	8.0
Denmark	**5,180,600**	180,100	3.5
France	**56,652,000**	3,596,600	6.3*
Greece	**10,350,300**	200,300	1.9
Great Britain	**57,221,900**	2,019,700	3.5*
Ireland	**3,563,300**	89,900	2.5
Italy	**56,950,300**	913,600	1.6
Luxemburg	**400,600**	128,600	32.1
Netherlands	**15,239,200**	757,400	5.0
Portugal	**9,864,600**	121,600	1.2
Spain	**39,048,000**	393,100	1.0
Austria	**7,795,800**	517,700	6.6
Finland	**5,055,000**	46,300	0.9
Sweden	**8,692,000**	495,900	5.7
further information:			
Switzerland	**6,908,000**	1,243,600	18.0
Norway	**4,299,200**	154,000	3.6

* It has to be taken into account that in France and Great Britain there are in addition a great number of persons having domestic resident status who have immigrated from the former colonies.

The number of foreigners broken down by nationality has developed as follows in recent years:

Nationality	**30.9.1978**		**31.12.1982**		**31.12.1993**	
		%		**%**		**%**
Total	3,981,100	100	6,495,500	100	6,878,100	100
Europe	3,642,300	89.5	5,361,900	82.5	5,678,400	82.6
EU States	1,444,100	36.3	1,507,300	23.2	1,535,600	22.3
of those:						
France	61,200	1.5	90,900	1.4	94,200	1.4
Greece	305,500	1.7	345,900	5.3	352,000	5.1
Great Britain and Northern Ireland	67,000	1.7	107,100	1.6	111,700	1.6
Italy	572,500	14.3	557,700	8.5	563,000	8.2
Netherlands	105,600	2.7	113,600	1.7	113,900	1.7
Portugal	109,900	2.8	96,900	1.5	105,600	1.5
Spain	188,900	4.7	133,800	2.1	133,200	1.9
Austria	159,300	4.0	185,300	2.9	186,300	2.7
Turkey	1,165,100	29.3	1,854,900	28.6	1,918,400	27.9
Poland	48,000	1.2	285,600	4.4	260,500	3.8
former Yugoslavia	810,200	15.3	1,026,200	15.8	1, 238,900	18.0
of those:						
Fed.Rep. of Yugoslavia	**		915,600	14.1	929,600	13.5
Bosnia-Herzegowina	**		19,900	0.3	139,100	2.0
Croatia	**		82,500	1.3	153,100	2.2
Slovenia	**		8,100	0.1	14,400	0.2
Macedonia	**		**		2,600	0.1

Nationality	**31.12.1994**		**31.12.1995**		**31.12.1996**	
		%		**%**		**%**
Total	6,990,500	100	7,173,800	100	7,314,000	100
Europe	5,780,200	82.7	5,917,100	82.5	6,000,800	82.1
EU States	1,554,600	22.4	1,808,400	25.5	1,836,600	25.1
of those:						
France	97,000	1.4	99,100	1.4	101,700	1.4
Greece	355,600	5.1	359,600	5.0	362,500	5.0
Great Britain and Northern Ireland	113,800	1.6	112,500	1.6	113,400	1.6
Italy	571,900	8.2	586,100	8.2	599,400	8.2
Netherlands	112,900	1.6	113,100	1.6	113,300	1.6
Portugal	117,500	1.7	125,100	1.7	130,800	1.8
Spain	132,400	1.9	132,300	1.8	132,500	1.8
Austria	185,100	2.6	184,500	2.6	184,500	2.6
Turkey	1,965,600	28.1	2.014,300	28.1	2,014,300	28.1
Poland	263,400	3.8	276,800	3.9	276,800	3.9
former Yugoslavia	1.,98,000	18.6	1.350,200	18.8	1,353,300	18.5
of those:						
Fed.Rep. of Yugoslavia	834,800	11.9	797,600	11.1	754,300	10.3
Bosnia-Herzegowina	249,400	3.8	316,000	4.4	340,500	4.7
Croatia	176,300	2.5	185,100	2.6	202,000	2.8
Slovenia	16,200	0.2	17,300	0.2	17,800	0.2
Macedonia	22,300	0.3	34,000	0.5	38,800	0.5

Nationality	**30.9.1978**		**31.12.1982**		**31.12.1992**	
		%		**%**		%
Africa	79,500	2.0	283,900	4.4	302,100	4.4
of those:						
Morocco	28,900	0.7	80,300	1.2	82,800	1.2
Tunisia	19,200	0.5	28,100	0.4	28,100	0.4
America	102,700	2.6	168,800	2.6	176,500	2.6
of those:						
Brazil	4,800	0.1	13,300	0.2	14,600	0.2
United States	71,600	1.8	104,400	1.6	107,800	1.6
Asia	147,200	3.7	598,800	9.2	644,600	9.4
of those:						
Afghanistan	1,900	0.0	41,500	0.8	46,500	0.7
Iran	19,500	0.5	99,100	1.5	101,500	1.5
Japan	12,200	0.3	26,500	0.4	27,100	0.4
Lebanon	6,800	0.2	53,500	0.8	55,100	0.8
Pakistan	17,900	0.4	32,300	0.6	34,400	0.5
Sri Lanka	1,200	0.0	43,900	0.7	46,500	0.7
Viet Nam	2,700	0.1	85,700	1.3	95,500	1.4
Australia and Oceania	6,100	0.2	8,400	0.1	8,800	0.1
Stateless	30,100	0.8	21,900	0.3	20,900	0.3
Unclear, no information	47,800	1.2	54,100	0.8	45,900	0.7

Nationality	**31.12.1994**		**31.12.1995**		**31.12.1996**	
		%		**%**		%
Africa	292,100	4.2	291,200	4.1	298,700	4.1
of those:						
Morocco	82,400	1.2	81,900	1.1	82,900	1.1
Tunisia	27,400	0.4	26,400	0.4	25,700	0.4
America	179,700	2.6	183,100	2.6	189,500	2.6
of those:						
Brazil	15,700	0.2	16,800	0.2	18,400	0.3
United States	108,300	1.5	108,400	1.5	109,600	1.5
Asia	662,400	9.5	705,400	9.8	745,800	10.2
of those:						
Afghanistan	51,400	0.7	58,500	0.8	63,100	0.98
Iran	104,100	1.5	107,000	1.5	111,100	1.5
Japan	27,100	0.4	27,300	0.4	28,100	0.4
Lebanon	54,300	0.6	54,800	0.8	55,600	0.5
Pakistan	34,500	0.5	36,900	0.5	37,900	0.5
Sri Lanka	49,400	0.7	54,600	0.5	58,300	0.8
Viet Nam	96,700	1.4	96,000	1.3	92,300	1.3
Australia and Oceania	8,900	0.1	9,900	0.1	10,100	0.1
Stateless	20,100	0.3	19,900	0.3	18,600	0.3
Unclear, no information	47,200	0.7	48,000	0.7	50,400	0.7

** No information

ENDNOTES

[1] See "Beauftragte der Bundesregierung für Ausländerfragen," *Daten und Fakten zur Ausländersituation*, 18th ed., June 1999, p. 7. For the share of foreigners in the population of the EU see Annex.

[2] For the statistical survey see: "Mitteilungen der Beauftragten der Bundesregierung für Ausländerfragen," *Daten und Fakten zur Ausländersituation*, March 1998; Bundesministerium des Inneren, Ausländer in Deutschland – Zahlen, Statistiken, Fakten, December 1997.

[3] See Art. 116(1) of the Basic Law: Deutscher im Sinne dieses Grundgesetzes ist vorbehaltlich anderweitiger gesetzlicher Regelung, wer die deutsche Staatsangehörigkeit besitzt oder als Flüchtling oder Vertriebener deutscher Volkszugehörigkeit oder als dessen Ehegatte oder Abkömmling in dem Gebiete des Deutschen Reiches nach dem Stande vom 31. Dezember 1937 Aufnahme gefunden hat; cf. Hailbronner/Renner, *Staatsangehörigkeitsrecht*, 2nd ed., 1998, Article 116 GG, No. 5.

[4] Decisions of the Federal Constitutional Court (FCC), Vol 35, 382, 399; 49, 168, 180 et seq; 78, 179, 196; cf. Menswiek, in: Sachs, *Grundgesetz Kommentar*, 1996, No. 139 et seq.

[5] For the minimum standard of protection of aliens see FCC Vol. 59, 280, 283; 63, 332, 338; 60, 253, 303; 67, 43, 63.

[6] See for the jurisprudence of the Federal Administrative Court (FAC) decision of 15 April 1997, *Neue Zeitschrift für Verwaltungsrecht* 1997, 1127; for the controversy between the European Court of Human Rights and the Federal Administrative Court see Hailbronner, *Die Öffentliche Verwaltung* 1999, 617, 620.

[7] FCC, Vol. 6, 309, 362; 41, 88, 120.

[8] For a survey see Hailbronner, *European Journal of Migration and Law*, Vol. 1 (1999), 1 et seq; Bank, *Nordic Journal of International Law*, Vol. 68 (1999), 1 et seq.

[9] Cf. Philip Martin, *Germany: Reluctant Land of Immigration*, German Journal, American Institute for Contemporary German Studies, 1998, 4 et seq.

[10] Op. cit.

[11] For a survey of the historical development see G. Renner, *Ausländerrecht im Stillstand*, München 1998, 27 et seq.

[12] Cf. G. Renner, "Ausländerrecht," *Kommentar*, 7th ed., 1999; K. Hailbronner, "Ausländerrecht," *Kommentar*, 3 Vol., 20th Suppl., August 1999.

[13] FCC, Vol. 76, 1.

[14] Vol. 76, 1, 65.

[15] Op. cit. at p. 65, 66.

[16] Cf. G. Renner, *Ausländerrecht in Deutschland*, op. cit., 438; Göbel-Zimmermann, *Zeitschrift für Ausländerrecht und Ausländerpolitik* 1995, 170.

[17] FCC, Vol. 80, 81; Jarass/Pieroth, *Grundgesetz*, 2nd ed., München 1992, Article 6, No. 4.

[18] Sec. 18 para. 1 No. 3.

[19] Sec. 18 para. 2

[20] Sec. 20 para. 2

[21] Sec. 20 paras. 3-5

[22] Federal Administrative Court, Collection of Decisions, Vol. 100, 287; cf. also Administrative Appeal Court of Hessen, *Neue Zeitschrift für Verwaltungsrecht*, 1994, 55; for a right of equal treatment Wegner, *Die nichteheliche Lebensgemeinschaft im deutschen Ausländerrecht*, 1998, 106 et seq.

[23] Communication from the Commission to the Council and the European Parliament of 1 July 1998, COM (1998), 403 final, 9 and Proposal for a Council Regulation of 22 July 1998, COM (1998) 394 final, 12.

[24] See FCC, Vol. 35, 382, 49, 168; 50, 166; 51, 386; cf. Renner, *Ausländerrecht in Deutschland*, 603 et seq.

[25] Federal Administrative Court of November 13, 1979, Collection of Decisions, Vol. 59, 112, 114; see also Hailbronner, *Ausländerrecht*, 2nd ed. 1989, 362 et seq.

[26] For details see Sec. 47, 48 of the Aliens Law.

[27] See corresponding opinion of Judge Martens in Beljoudi v. France, 26 March 1992, Series A No. 234.

[28] See European Court of Human Rights in the case of Moustaquim v. Belgium, 18 February 1991; Series A No. 193; Berrehab v. Netherlands, 21 June 1988, Series A No. 138; for a comparative study of law and practice in European countries see Groenendijk, Guild and Dogan, *Security of Long-Term Residents*, Strasbourg 1998.

[29] For a comprehensive discussion of the constitutional rights of aliens see K Doehring and J Isensee, *Die staatsrechtliche Stellung der Ausländer in der Bundesrepublik Deutschland*, 32. Veröffentlichung der Vereinigung Deutscher Staatsrechtslehrer (1974), 7, 50 et seq; Quaritsch, in: J. Isensee/P. Kirchhof (eds.), *Handbuch des Staatsrechts*, Vol. V (1992), 664 et seq., R. Hofmann, Fn. 45, 212; C. Tietze, in: Starck (ed.), *Constitutionalism, Universalism and Democracy – A Comparative Analysis*, 1999, 199.

[30] See for instance J. Isensee, "Die staatsrechtliche Stellung der Ausländer in der Bundesrepublik Deutschland," *Veröffentlichungen der Deutschen Staatsrechtslehrer*, Vol. 32 (1974), 50, 81 et seq.

[31] Decision of October 31, 1990, Vol. 83, 60; decision of October 31, 1990, Vol. 83, 37, concerning the Statute of Schleswig-Holstein.

[32] For a discussion of the different legislative proposals see Hailbronner, *Aus Politik und Zeitgeschichte, Beilage zu "Das Parlament,"* B 46/97; cf. Bade (ed.), "Das Manifest der 60," *Deutschland und die Einwanderung*, München 1994; A. Weber (ed.), "Einwanderungsland Bundesrepublik Deutschland in der Europäischen Union," *Schrift des Instituts für Migrationsforschung*, Osnabrück 1997.

[33] See Scholz/Uhle, *Neue Juristische Wochenschrift* 1999, 1514 at fn. 58.

[34] European Court of Justice Reports 1992, I-4239; see also Zimmermann, *Europarecht* 1995, 54.

[35] See F. Sturm, *Das Standesamt* (StAZ) 1999, 225; Renner, *Zeitschrift für Ausländerrecht und Ausländerpolitik* 1993, 49; Hailbronner, *Einbürgerung von Wanderarbeitnehmern und doppelte Staatsangehörigkeit*, Baden-Baden 1992.

[36] For a comment on the Basic Law's provision on citizenship see Renner, *Zeitschrift für Ausländerrecht und Ausländerpolitik* 1993, 50.

[37] See Hailbronner/Renner, "Staatsangehörigkeitsrecht," *Kommentar*, 2nd ed., München 1998, Article 16, No. 26 et seq.

[38] *Bundesgesetzblatt* 1999 I, 1618.

[39] See Scholz/Uhle, *Neue Juristische Wochenschrift* 1999, 1510 with further references.

[40] Sec. 85-91 of the Aliens Law, see Hailbronner/Renner, *Staatsangehörigkeitsrecht*, 2nd ed. 1998, 505 et seq.

[41] See "Bericht der Bundesbeauftragten für Ausländerfragen," *Daten und Fakten zur Ausländersituation*, 18th ed., June 1999; Das Standesamt 1999, 211.

[42] Scholz/Uhle, op. cit.

[43] See, however, Scholz/Uhle, op. cit.

[44] See Federal Constitutional Court, Vol 83, 37, 52.

[45] Vol. 83, 37, 52.

[46] See Hailbronner, *Neue Zeitschrift für Verwaltungsrecht* 1999, (forthcoming)

[47] See Sturm, *Das Standesamt* 1999, 225; Hailbronner, *Einbürgerung von Wanderarbeitnehmern und doppelte Staatsangehörigkeit*, 1992.

[48] Scholz/Uhle, op. cit.

[49] Hailbronner, *Current Asylum Issues in Germany*, UCL, Center for German and European Studies, August 1995, Paper 4.6.

[50] Vol. 94, 49, 115, 166, et seq; Frowein/Zimmermann, 1996, 753 et seq.

[51] For a description of the Dublin system see Hailbronner/Thiery, 34 CMLR, 957.

[52] See the proposal for a Council regulation concerning the establishment of "Eurodac" for the comparison of the fingerprints of applicants for asylum and certain other aliens, COM (99) 260 final; CNS 99/0116.

[53] For a discussion of the safe third country concept see Hailbronner, in: Hailbronner/ Martin/Motomura (eds.), *Immigration Control*, Berghahn, Vol. 4 (1998), 199 et seq.

STATE AND MARKET IN THE CONSTITUTIONAL ORDER

Fritz Ossenbühl

I. THE MARKET AS A CONSTITUTIONAL ISSUE

The state relies upon a functioning economy, and the economy, even the free market economy, cannot fulfil its function without state protection and the infrastructure of a legal order. This connection suggests that the constitution, as the basic legal order of a state, makes the relationship between the state and the economy one of its subjects by making a direct statement on it.[1] The German Basic Law, however, remains silent. The Bonn Constitution does not contain any specifically shaped economic order, or any explicit statement on the institutionalization of a particular economic system.

The fact that the Basic Law does not explicitly declare a particular economic order part of the constitution has its obvious reason in the history of the origin of the Basic Law. Its drafters, of course, did recognize the importance of an economic order for the state. However, among the various political forces involved, namely among the political parties but also within them, there was an irreconcilable disagreement on how an economic order should be developed so that—on the basis of the experiences and views at that time—no consensus on that issue could be reached.[2] Thus, the absence of a constitutional provision on the economic order is not the result of a mistake on the part of the constitutional legislator, is not an involuntary gap in the Basic Law, but rather an "eloquent silence" of the drafters of the constitution, rather a conscious non-decision, a deliberate leaving open of a controversial question. While it is true that the Basic Law has not explicitly installed a particular economic order as a whole, it does contain a lot of single provisions that are relevant to the economy. These provisions show themselves to be constituent elements of a market order, its brick and corner stones that give clear and constitutionally well-founded instructions for the development of an economic system.

These constituent elements encompass contractual liberty, economic freedom, the guarantee of private property, the freedom of price fixing, the freedom of competition, the freedom of movement, the freedom of expression, and the freedom to advertise. These elements and foundations, which make the market possible and constitute it at the same time, are guaranteed by corresponding constitutional civil rights in the Basic Law. The civil rights that are relevant to the economy ensure the market as a "spontaneous order" (von Hayek) and contain the basic pattern of an economic system that constitutes a "model of a free market order." Without prejudice to the legislator's discretion in its economic policy, the Federal Constitutional Court seems to be right in

formulating it thus: "The existing economic constitution contains, as one of its basic principles, free competition between the entrepreneurs acting as supplier and demander."[3]

The discussion on the economic order, which, in particular, took place in the early period of the Basic Law,[4] was curtailed in the following years and, in accordance with the adjudication of the Federal Constitutional Court, shifted to the individual economic rights, in particular occupational liberty and economic freedom protected by Article 12, Section 1, of the Basic Law. In the light of the developments in the last decade, it is not to be expected that this discussion will witness a renaissance. Two developments need to be mentioned that historically overtook each other and showed that the issue of economic order cannot be viewed only from the perspective of a national constitution, which, in the case of Germany, is the Basic Law. These two historical events are the reunification of Germany and the advanced European integration by the Maastricht Treaty of 1992.

One of the main problems of German reunification, apart from restoring legal unity, was integrating the east German states (*Länder*) into the economic order of the Federal Republic. The collapse of the former German Democratic Republic was not only a political but also an economic bankruptcy. The socialist economic system with its emphasis on a centrally controlled market had led the German Democratic Republic into bankruptcy. The revolution of 1989 was not only a vote for a free democratic but also an economic order as it existed in West Germany and was seen as the economic system of constitutional democracy. The transition of the ruined socialist economic system of the German Democratic Republic to a free market order was thus one of the central subject-matters of the Treaty on Monetary, Economic, and Social Union of May 18, 1990[5] that preceded reunification. Article 1, Section 3, of this treaty between the Federal Republic of Germany and the German Democratic Republic states: "The economic union is based on the principle of social market economy[6] as the economic order of both parties." Seven elements of social market economy were listed in a common protocol that became part of the treaty pursuant to Article 4, Section 1.[7] The protocol thus laid down in a legal form those components that are commonly considered characteristic elements of a social market economy.

Superimposed on this is the European development. To further develop the European Union by creating a distinct economic and monetary union the Maastricht Treaty of February 7, 1992, inserted Article 3a into the EC Treaty. This provision obliges both the European Community and its member states to adopt an economic policy that is "conducted in accordance with the principle of an open market economy with free competition."[8] While it is true that the

member states keep the responsibility for their "own" economic policy, Article 102a EC Treaty reaffirms the obligation set up in Article 3a by repeating that the member states shall conduct their economic policy "in accordance with the principle of an open market economy with free competition." This statement ranks as so-called primary community law; its application has, therefore, priority over the Basic Law of the Federal Republic of Germany. At the same time, Article 3a, Section 1, of the EC Treaty restricts the national constitutional legislator in that it bars constitutional changes that would lead away from the "open market economy with free competition." It follows that the Basic Law cannot be interpreted other than for the purposes of an "open economic market with free competition."

II. STATE INFLUENCE ON THE MARKET

1. State and Market – Two Sides of the Existence of Polity

A basic feature of German constitutional history and theory is the differentiation between state and society.[9] The terms "state" and "society" describe two distinct systems and legal structures. The term "state" stands for the exercise of constitutionally legitimated power, the term "society" for the exercise of self-determination in freedom. The society's system of order is rooted in the principle of freedom and autonomy. In a society the "*societas*" of free men convenes as opposed to the principle of constituted state order. In an ideal conceptual generalization "state" understood as an enforced order, is put in contrast to the freedom of "society."[10] In this contextual system the market belongs to society. It represents the institutionalized embodiment of economic freedom in society, a part of social freedom and autonomy.

According to classical theory, market and society alike are subject to their own, quasi-natural rules. The nice picture of free interplay of economic forces that, guided by an "invisible hand" (Adam Smith), automatically lead to an acceptable economic order is a mere metaphor, which is long since outdated. It is true that the state can become the enemy of the market. In a democratic constitutional system, however, its purpose makes it a friend and a promoter of the market.

The state's task is to take care and provide for the preservation and functioning of the market. State influence is therefore necessary as long as it serves as market protection. If it is to control the market itself, it leads to market intervention, which can turn into state dirigisme.

2. Reasons for and Objectives of State Influence

The reasons for and objectives of exercising state influence on the market are quite different. The state assumes its original function when it protects the working of the market mechanisms[11] in that it protects and preserves, in particular, a workable competition and constituent elements of a free market order. This involves, above all, the prevention of monopolies and the combat against unfair competition.

A delicate question is, however, what kind of further corrections of the market mechanisms are justified or even necessary under the Basic Law. An essential element of free market economy is the inequality of property and income.[12] The inequality of the market as a result of the exercise of freedom contradicts a basic element of the constitutional order: the principle of equality. This results in a conflict between economy and law. How much inequality on the market can the constitutional principle of equality endure? According to the German Constitutional Court, one of the main commitments of civil law is "to balance disturbed parity between contracting parties."[13] The Court deduces from the constitutionally guaranteed contractual liberty, a constituent element of the market, the legislator's obligation to restore the equilibrium of the parties in their negotiations in case of a "structural inferiority of one contracting party." Otherwise, the Court explains, self-determination of the contracting party would not be ensured.[14] At this point, the constitutional principle of equality and market freedom oppose each other. This conflict is resolved through state corrections by re-defining market mechanism: freedom is leveled out by equality.

The traditional protection of vocation and branches of business, typical for the German legal system, seems to be questionable from a constitutional point of view. In the light of economic principles it must be considered as being contrary to the system. Protecting branches of business can be indirectly expressed in completely different statutes, for example, in prohibiting baking at night, in Acts on Discount, or tax provisions. The German Constitutional Court has declared that these statutes, which are intended to protect the middle classes, in particular the small and medium sized bakeries, against competition from large enterprises, give no cause for concern from a constitutional point of view.[15] The protection of particular professions is accomplished through impeding access or merging to organizations under public law which are cut off from the outside (so-called *Verkammerung*). These are remnants of old guilds and corporations which fiercely defend themselves against any change. The main protective instrument is impeding access to particular professions which resulted in only 10 percent of all industrial or commercial enterprises in the Federal Republic of Germany being conducted without a licence in the 1950s;[16]

and there is no indication that this number has now considerably increased. Furthermore, state influence can be motivated by socio-political objectives. A well-known verdict says: the market is anti-social. This assessment is based, in particular, on the inequality of property and income, which is inherent in the market. In that respect the state can make corrections of market results and decide in favor of a distribution of income and goods that deviates from the market. The constitutional basis for such an intervention is the principle of social justice and the welfare state (*Sozialstaatsprinzip*), which the constitutional law considers to be a binding basic policy clause of the constitution that is to be further defined and implemented by the legislator.[17]

Another legitimate socio-political objective is, for example, health protection of employees, which is left untouched by the constitutional principle of equality. The Federal Constitutional Court has, for example, declared the prohibition on baking at night being justified because of the "protection against health-endangering night work,"[18] even though protecting the middle class against large enterprises has actually played a significant role. It must be added that the combination of different explanations leads or may lead to obscuring legal justifications and to pretexts.[19] Thus, the Shop Closing Act, for example, can no longer be justified on grounds of protecting work hours of employees.

3. Approaches and Forms of State Influence

The number of the various approaches and forms of state influence on the economy has considerably increased over the years due to different economic developments and different ideas about economic policy; they threaten to overpower the market. They are heterogeneous as are their motives, intentions, and objectives. That is why every effort to systematize them must inevitably fail; only a few spotlights can, thus, be put on the network of "market regulation."

a) Global Control through Counter-Cyclical Conjunctural Policy (Fiscal Policy)

By the end of the sixties, at the time of the grand coalition, the minister of economics, Schiller, believed that the state could—at least globally—effectively control market conditions and economic crises. Accordingly, in 1967 Article 109 of the Basic Law was revised to provide a basis for global state control of the economy. Pursuant to the new provision both the federal government and the states (*Länder*) are obliged to take into account the requirements of the macro-economic equilibrium in budgetary matters. This constitutional amendment was accompanied by the adoption of the Act To Promote Stability And Economic Growth of June 8, 1967.[20]

It was based on the economic theory of J.M. Keynes who believed that the continuous economic cycles that could be observed in the second half of the 19th century could be influenced through fiscal measures. According to Keynes it was—in particular in modern industrialized countries—economically necessary and politically mandatory to adjust state fiscal and budgetary policy to a counter-cyclical control of economic cycles and to provide for the necessary legal instruments.[21]

The question as to whether such global control measures fall into the scope of civil rights, which are (only) to protect against concrete and individual encroachments, is to be assessed on a case to case basis but is likely to be answered in the negative.[22]

Further considerations are unnecessary because the fiscal-political approach in practice was not of a significance worth mentioning.

In addition, it should be noted that the stability-oriented political influence of the state does have a vulnerable flank. Because of the guarantee of trade union freedom and collective bargaining autonomy in Article 9, Section 3, of the Basic Law the influence on wages, which are usually reflected in the prices of goods and services, remains beyond state control and is handed over to both sides of industry: management and labor, employers and employees.[23]

b) Supervision of Economy

As noted before, the borderline between the state as protecting guard on the one hand and deciding guardian on the other hand can easily be overstepped without even noticing it. Grey areas and intermediate zones can be found, in particular, in the ramified regulations concerning the supervision of economy, which are typical for the Federal Republic of Germany.[24]

As such, supervision is, in principle, distinct from measures to control economy. Supervision is not intended to control or influence the market but rather to protect individual and common interests that are inherent in the market mechanisms against specific endangering.[25]

However, the difference between theory and practice can be considerable and supervision can easily turn into control.

In Germany, state supervision of economy has been a tradition for centuries.[26] At the outset it was only concerned with the mining industry (as a result of state supreme authority over mining), pharmacies, restaurant industry, railroads, shipping, and fishing industry. With an increasing economic development the range of supervised industries became broader and broader; today it also covers areas like banks, trade, aviation, antitrust, passenger transport, trucking, energy supply, nuclear power, emission control, and insurances. State supervision of the economy has a variety of possible measures

at its disposal, such as information gathering, inspections, controlling, licensing, and approval of prices. Its objectives are not restricted to protecting against endangering; it also aims at meeting the state's expectations with regard to its policy for the improvement of regional structure and for the promotion of economic growth. From a constitutional point of view state supervision of the economy reflects the conflict between economic rights and freedoms as guaranteed in the Basic Law on the one hand and the principle of social justice and the welfare state on the other hand. In this area of conflict it is up to the legislator to define and determine the balance between the rights and principles involved. However, because legislators are incapable to regulate, the competence to resolve the conflict is often transferred to the administration through the use of ambiguous regulations and—correspondingly—general terms in statutes.[27]

This leads to considerable constitutional and practical problems because the supervisory bodies are thus given the opportunity to overstretch their mandate and to regulate the economic dispositions of enterprises as well. If this, like in the case of the Federal Banking Supervisory Board, is done with reference to incorrect and legally unfounded assessment criteria, state supervision turns not only into guardianship but also into a bureaucracy of constraint and prevention.

c) Market Regulation

In this context, one should mention the privatization of the postal service and telecommunication as well as the economic implications of this process. Postal service and telecommunication are traditionally assigned to the state. The Basic Law made them part of the functions of the federal government.[28]

However, due to increasing stress of competition in the globally-oriented postal and telecommunication market, the German Postal Service (*Deutsche Bundespost*) was closed down in several steps, and the postal service and telecommunication became part of the private sector.[29]

By adding Article 87f to the Basic Law in 1994, the services of *Deutsche Bundespost,* which until then had been services of the federal administration, were transformed into private services, which hence were rendered by private enterprises as successors of *Deutsche Bundespost*. This constitutes a real privatization of functions: The state has given up one of its functions that was assigned to it in the constitution and put it under the rules of the market; the market has thus been opened also in the field of postal service and telecommunication.[30]

However, this fundamental change of system in a field that concerns and influences the whole economy does involve risks. Due to the traditional

monopolistic structure a functioning market cannot exist right from the beginning. Furthermore, there are some apprehensions that, in view of the now cost-oriented enterprises, gaps in supply might occur in rural regions. That is why Article 87f, Section 1, of the Basic Law obliges the state to guarantee that "in the field of postal service and telecommunication services are adequately and sufficiently rendered in all areas." This constitutional obligation to guarantee a sufficient infrastructure (in European law terminology "guarantee of universal services") leads to residual state functions in this field, which are assumed by a newly established regulatory agency (*Regulierungsbehörde*).[31]

Regulation is sometimes considered to be a form of supervision of the economy;[32] however, keeping in mind its intention one has to admit that it goes beyond mere supervision.[33] Regulation not only involves ensuring fair competition in that it protects against monopolies, it also aims at securing a particular economic result, that is maintaining a sufficient communication infrastructure through a "basic supply in all areas," which must not be sacrificed to the cost-oriented management of private enterprises. That is why the regulation agency is vested with a broad range of far-reaching instruments, which encompass licensing, supervising part performances, and price fixing. The legal literature has already created new expressions for this kind of function, such as "state infrastructure responsibility" and "guarantee state."[34]

From a consumer's perspective, who in particular in the field of telecommunication has benefited from dramatic price reductions, this development has proved to be a promising start. One can only hope that this will not be diluted again through a "solicitous siege" by the state.

d) Market Control

Some final remarks on market control: Market control can occur in the form of direct and indirect behavior control. Both kinds of state influence on the market have their own constitutional problems and aspects.

State market control through direct behavior control concerns, in particular, market access, or, in terms of civil rights, the freedom to choose one's profession, as guaranteed in Article 12, Section 1 of the Basic Law. In most cases, career choice and, thus, market access is made dependent on individual qualifications and characteristics. In that sense it is subject to a particular access control in the form of a prohibition with the reservation on the granting of permission. In trade and industry law personal "reliability" plays an important role, the term being defined in relation to the concrete business concerned. However, access to a particular commercial activity can not only be impeded through personal prerequisites that one needs to meet; it can also be hampered by regulating the management (quota restrictions, numerous clauses,

monopolizing) in various fields such as passenger transport, admission as social health insurance doctor, or access to municipal markets.[35]

In addition numerous provisions regulate the exercise of professions to ensure quality standards in order to protect the consumer or to regulate prices.

The Federal Constitutional Court applied the standard of Article 12, Section 1, of the Basic Law when reviewing statutes that are relevant for professions. Its adjudication started powerfully and courageously in 1957 with the "pharmacy-judgement,"[36] which redressed the public need test and was therefore regarded a landmark decision. It, however, weakened soon with the so-called "handicraft-decision,"[37] which involved the question whether a master craftsman's qualifying examination is a necessary prerequisite for conducting an independent trade. In general, from today's point of view the Federal Constitutional Court's adjudication is considered to be too favorable toward the legislator.[38]

In these days, the old instrument of indirect behavior control has come into fashion again. It can be found, in particular, in environmental law.[39] Through financial incentives a certain desired behavior is promoted whereas undesired behavior is hoped to be prevented. Public duties and taxes, e.g., in the form of taxes linked to production or emissions, are supposed to make the use of the environment a factor of internal corporate costs. Thus, the use of the environment becomes part of the market mechanisms, which follows that, through product prices, competition mechanisms and preventive effects are triggered. This concept of internalization of environmental costs as a method of environmental policy that is in conformity with the market is generally accepted today. It, however, involves considerable problems as to its legal implementation. The tax state as an element and the basis of the constitutional state dedicated to social justice contradicts, in principle, the vision of an "environment state."[40]

The tax state guarantees liberty and equality of its citizens in that it does not force them to behave in a particular manner but rather levies taxes on them according to their individual ability to bear public costs. There is a fundamental conflict between the exercise of personal freedom and environmental protection. Effective environmental protection can call for far-reaching interferences with civil rights and freedoms and can lead, through environmental taxes, to behavior control, which not only limits the exercise of freedom but also is likely to contradict the principle of equality and the principle of social justice and the welfare state. These, however, are dangers that depend on the design of concrete concepts of control. Also feasible are effective instruments that work in a way that gives no cause for concern from a constitutional point of view.[41]

One of the instruments of indirect behavior control is state subsidies. Here, the constitutional problems are less severe. The "giving state" can much easier be justified than the "taking state." In the economic sector subsidies to individual enterprises can lead to distortion of competition or, in terms of civil rights, to an infringement of competitive equality and freedom of competition.[42] This, however, does not mean that subsidies as such are excluded. It rather depends on the extent of preferential treatment of the individual enterprise and, respectively, on the degree to which its competitor is put at a disadvantage. Since there is no concrete constitutional criterion for this extent or degree, everything depends on the assessment by the court.[43] Economic subsidies are less a constitutional problem than a financial problem. According to figures provided by the Institute of World Economy state subsidies have reached the amount of DM 290 billion, which is more than one third of public revenue.[44]

4. Review of State Market Intervention by the Federal Constitutional Court

Judicial review of state market intervention primarily takes place through the Federal Constitutional Court.[45] Its adjudication is very extensive, encompassing in 98 volumes of official records 300 decisions involving interferences with occupational liberty.[46]

a) Constitutional Criteria for Judicial Review

Constitutional criteria for judicial review are economic rights and freedoms, such as contractual liberty, freedom of competition, occupational liberty, liberty to establish and carry on any trade and industry, freedom of opinion, freedom of movement, and freedom of association. The most important criterion is occupational liberty, as guaranteed in Article 12, Section 1, of the Basic Law. Less important is the constitutional guarantee of the right to property, as embedded in Article 14 of the Basic Law.

The Federal Constitutional Court only concerns itself with state market intervention by means of statutes adopted by parliament. Statutes that interfere with occupational liberty or other economic rights and freedoms also include tax statutes if the latter have an "objective tendency to regulate professions,"[47] which means that their actual effects must relate to the exercise of a profession. Market interventions in the form of profession-regulating statutes need a sufficient justification under the Basic Law. Such a justification is possible if public interests are concerned, as long as both the interference and public interests are appropriate under the principle of proportionality.[48] The more intensive the interference is, the more important and obvious justifying public interests must be. This way of justification, as a rule, refers to the entire sector

of the economy concerned, rather the concrete and individual case. Thus, a generalizing and typifying approach of the legislator is possible.[49]

b) Standard of Review Formula and Discretion of the Legislator

Economic policy is particularly ambivalent in terms of constitutional law. On the one hand, the Basic Law does not contain any guideline as to the economic policy, thus leaving a maximum of political discretion to the legislator. On the other hand, almost all economically relevant statutes involve interferences with economic rights and freedoms. Economic discretion and responsibility of economic policy on the one hand conflict with the protection of civil rights and freedoms on the other hand. This conflict cannot be resolved by a simple "Economic-Question-Doctrine," as is sometimes evoked in legal literature.[50] The Federal Constitutional Court has always seen the Basic Law as a constitution that is normative through and through. It has also emphasized this normativity where constitutional standards of review can hardly be translated into applicable formulas, as is the case, for example, in the constitutional financial system.[51] This view has also been taken in the field of economic law. The question is not whether but to what extent economic law is subject to judicial review by the Federal Constitutional Court. This review cannot be conducted according to a standardized scheme. It rather depends on the rationality of the particular statute that is subject to review; and it also depends on other circumstances, such as the intensity of interference or the uncertainty of economic predictions that form the basis of the statute.

Such a flexibility of judicial review adjusted to the subject matter and statute in question can easily be achieved through the use of review formulas. This kind of review essentially involves the question of whether the statute under review can be justified by public interests. These interests, however, are not defined in the Basic Law[52] but rather subject to the disposition of the legislator, who decides on his or her own what does and what does not serve public interests.

In this way, even the "preservation of a productive domestic wine growing industry" assumes the status of constitutionally relevant public interests that may justify interferences with civil rights. Furthermore, economic laws are often based on economic predictions and assessments that are not undisputed and that can be endlessly debated on. In that case, it depends on the reviewing judge to what extent he is willing to get involved in the irrationality of predictions.

In view of the standards and formulas of review the standard of review of economic laws is restricted in two respects: First, the Federal Constitutional Court has repeatedly emphasized that the legislator "in the fields of labor

market and social and economic order . . . has a particularly wide discretion in assessment and prediction."[53] This discretionary power, however, depends on various factors, in particular on the peculiarities of the subject matter in question, the possibility to form a sufficiently well-founded opinion, and the significance of the rights at stake.[54] Thus, the adjudication of the Federal Constitutional Court so far shows different degrees and standards of review of predictions. They include a review standard that restricts the court to ask whether the statute in question is evidently faulty, a review standard merely involving the question of whether the statute is acceptable, and a review standard that enables the court to thoroughly scrutinize the content and the objectives of the statute.[55] In other words, judicial review goes as far as it can be rationally and plausibly conducted in the light of subjectively verifiable criteria and standards. As to economic predictions its emphasis is on the review of the methodological approaches that the predictions are based on, rather than on their results.

In addition, by constituting monitoring and follow-up obligations of the legislator the Federal Constitutional Court has created a certain corrective for predictions that afterwards has proved to fail to accurately reflect the future development.[56]

c) The Problem of the "Individual Interference Approach"

A judicial review of statutes in the light of civil rights necessarily restricts the constitutional review to the assessment of the interference in the individual case. Subject of assessing whether or not economic rights are justified and not unproportionally restricted is always (only) the concrete challenged statute that regulates market access, the exercise of a profession, or the fixing of prices. There is no "collective reflection" on all statutes that restrict economic rights and freedoms. In other words, the cumulative or synergetic effects of all statutes restricting occupational liberty remains outside of consideration.[57] Thus, nobody can define the exact scope of economic freedom that actually remains. It is only perceptible in each individual case, for example, when a new enterprise shall be started, an exercise that often leads to the complaint about the path to economic independence being a "bureaucratic hurdling." However, it is also possible that this picture has the effect of playing down the issue and that in some cases quantity has already changed into quality. One needs to recognize that the "individual interference approach" leads to a somewhat hidden overgrowth of economic rights and freedoms by state regulations. It would be important to uncover this overgrowth and to find methods to avoid such restrictions of freedom.

d) Previous Leading Cases

The standard of review formulas and review schemes for a constitutional review of economic laws show that everything depends on how firmly the Federal Constitutional Court tightens the reins. At the beginning of the Court's adjudication stands the already mentioned "pharmacy decision,"[58] which declared the public need test for choosing a profession to be unconstitutional and which was, therefore, seen as a sign of liberty. That was in the year 1958. Today, more than forty years later, the feeling prevails that the Federal Constitutional Court has missed the chance to broaden the scope of economic freedoms.[59]

If one considers the numerous and extensive regulations in the field of economic law, one might have some doubts about the German legal system fully meeting the requirements of an "open market order with free competition," as postulated by European law. Also in economic policy not only lobby and group interests but also sticking to tradition has taken its toll. The endless and much disputed question as to how much state influence the market can endure, or is even necessary, will hardly ever lead to a consensus. That is why defining borderlines will always be subject to political battles. In the Federal Republic of Germany the reduction in measures of exercising influence on the market only makes slow progress. The necessity of such a reduction is not always completely realized because economic laws are always seen individually in terms of their effects on economic rights and freedoms. What we need are empirically well-founded and proven data on the cumulative effects of all laws that do restrict the market, regardless of the time of their enactment, their different motives, and their different objectives. Such an empirical study would be both necessary and likely to verify the general uneasiness about the statutory restriction of economic rights and freedoms and to promote efforts in achieving a substantial deregulation.

ENDNOTES

[1] For a constitutional market theory, see Peter Häberle, *Soziale Marktwirtschaft als "Dritter Weg"*; ZRP 1993, 383.

[2] See Martin Kriele, *Wirtschaftsfreiheit und Grundgesetz*, ZRP 1974, 105 ff.

[3] BVerfGE 32, 311 (317); see also Rupert Scholz, *Entflechtung und Verfassung* (1981), p. 90 ff.

[4] See Reiner Schmidt, *Öffentliches Wirtschaftsrecht* (1990), p. 68 ff.

[5] BGBl. II p. 537 (Federal Law Gazette); printed in Klaus Stern/Bruno Schmidt-Bleibtreu, *Staatsvertrag zur Währungs-, Wirtschafts- und Sozialunion* (1990).

[6] The term "social market economy" must not be confused with "socialist market order." While the latter is based on the concept of a state controlled market, the former means a free market economy with social elements, such as minimum wages, minimum social security benefit, pension plans, protection against unfair dismissal, etc; see Horst Siebert, "Principles of the Economic System in the Federal Republic - An Economist's View," in: Paul Kirchhof/Donald B. Kommers (eds.) *Germany and Its Basic Law*, Series Dräger Foundation, vol. 14 (1993), p. 293 ff.

[7] Printed in Klaus Stern/Bruno Schmidt-Bleibtreu (note 5). These elements are:

1. Economic production and services shall primarily be made and rendered by private enterprises and in a competitive market.
2. Contractual liberty is guaranteed. The freedom of commercial activities shall be restricted as little as possible.
3. Entrepreneurial decisions are unrestricted by plan targets (i.e., in terms of production, supply, delivery, investments, employments, prices, and the allocation of the net profit).
4. Private enterprises and free professions shall not be treated less favourably than state enterprises and co-operative enterprises.
5. Price fixing is free, unless there are urgent and compelling reasons concerning the national economy to allow the state to fix prices.
6. The freedom to acquire, to dispose of, and to use land and other means of production for commercial activities is guaranteed.
7. Enterprises that are directly or indirectly owned by the state are managed in accordance with the principle of profitability. They are to be structured as competitors on the market and to be transferred into private property as soon as possible. By doing that, in particular smaller and medium-sized enterprises shall get their chances.

[8] BGBl. II p. 1253 (in French: principle d' une économie de marché ouverte).

[9] Ernst-Wolfgang Böckenförde, *Die verfassungstheoretische Unterscheidung zwischen Staat und Gesellschaft als Bedingung der individuellen Freiheit* (1973); "Die Bedeutung der Unterscheidung zwischen Staat und Gesellschaft im demokratischen Sozialstaat der Gegenwart," in: *Festgabe für Wolfgang Hefermehl* (1972), p. 11 ff.; Hans Heinrich Rupp, "Die Unterscheidung von Staat und Gesellschaft," in: Josef Isensee/Paul Kirchhof (eds.), *Handbuch des Staatsrechts*, vol. I (1987), § 28.

[10] Josef Isensee, "Steuerstaat als Staatsform," in: *Festschrift für Hans Peter Ipsen* (197), p. 409 ff; Klaus Vogel, "Der Finanz- und Steuerstaat," in: Josef Isensee/Paul Kirchhof (eds.), *Handbuch des Staatsrechts*, vol. I (1987), § 27 annotation 52.

[11] For the term "workable competition," see Christian Koenig, *Die öffentlich-rechtliche Verteilungslenkung* (1994), p. 36 ff.

[12] Ludwig von Mises, "Artikel Markt," in: *Handbuch der Sozialwissenschaften*, vol. 7 (1961), p. 135.

[13] BVerfGE 89, 214 (232 f.).

[14] BVerfGE 89, 214 (232).

[15] BVerfGE 41, 360 (372); 87, 363 (382); additional references are given in: Fritz Ossenbühl, *Die Freiheit des Unternehmers nach dem Grundgesetz*, AöR 115 (1990), p.

1 (8); see also Friedhelm Hufen, *Berufsfreiheit – Erinnerung an ein Grundrecht*, NJW 1994, 2913 (2920 f.).

[16] Egon Tuchtfeldt, *Gewerbefreiheit als wirtschaftspolitisches Problem* (1955), p. 64.

[17] Hans F. Zacher, "Das soziale Staatsziel," in: Josef Isensee/Paul Kirchhof (eds.), *Handbuch des Staatsrechts*, vol. I (1987), § 25 annotations 80 ff.

[18] BVerfGE 23, 50 (58); 41, 360 (370); 87, 363 (385).

[19] Friedhelm Hufen, *Berufsfreiheit – Erinnerung an ein Grundrecht*, NJW 1994, 2913 (2920).

[20] BGBl. I p. 582

[21] BVerfGE 79, 311 (331).

[22] See Klaus Stern/Paul Münch/Karl-Heinrich Hansmeyer, *Gesetz zur Förderung der Stabilität und des Wachstums der Wirtschaft*, second edition (1967), p. 87.

[23] See Ulrich Scheuner, in: Scheuner (ed.), *Die staatliche Einwirkung auf die Wirtschaft* (1971), p. 54 ff. However, it should be noted that the law of collective (wage) agreements has come under pressure due to increasing globalization; see Manfred Löwisch, *Arbeitsrecht und wirtschaftlicher Wandel*, RdA 1999, 69 (75 ff.).

[24] See Martin Bullinger, *Staatsaufsicht in der Wirtschaft*, VVDStRL 22 (1965), 264 ff.; Ekkehard Stein, *Die Wirtschaftsaufsicht* (1967); Peter J. Tettinger, *Rechtsanwendung und gerichtliche Kontrolle im Wirtschaftsverwaltungsrecht* (1980); Heinz Mösbauer, *Staatsaufsicht über die Wirtschaft* (1990).

[25] Martin Bullinger (note 24), p. 286 f.; Ulrich Scheuner, *Die staatliche Einwirkung auf die Wirtschaft* (1971), p. 71.

[26] Martin Bullinger (note 24); p. 286 f.; Heinz Mösbauer (note 24), p. 16.

[27] See Peter J. Tettinger (note 24).

[28] Article 87, section 1 (old version).

[29] See Klaus Stern, *Postreform zwischen Privatisierung und Infrastrukturgewährleistung*, DVBl. 1997, 309 ff.; Peter Badura, "Wettbewerbsaufsicht und Infrastrukturgewährleistung durch Regulierung im Bereich der Post und Telekomunikation," in: *Festschrift für Bernhard Großfeld* (1999), p. 35 ff.; Martin Bullinger, "Von administrativer Daseinsvorsorge zu privatwirtschaftlicher Leistung unter staatlicher Rahmengarantie," in: *Festschrift für Hans F. Zacher* (1998), p. 85 ff.

[30] See Klaus Stern (note 29), p. 310.

[31] See Peter Badura (note 29), p. 47.

[32] Peter Badura (note 28), p. 40.

[33] See Jens-Peter Schneider, *Liberalisierung der Stromwirtschaft durch regulative Marktorganisation* (1999), p. 37.

[34] Georg Hermes, *Staatliche Infrastrukturverantwortung* (1988); Wolfgang Hoffmann-Riem, *Telekommunikationsrecht als europäisiertes Verwaltungsrecht*, DVBl. 1999, 125 ff.

[35] See Rüdiger Breuer, "Die staatliche Berufsregelung und Wirtschaftslenkung," in: Josef Isensee/Paul Kirchhof (eds.), *Handbuch des Staatsrechts*, vol. IV (1989), § 148 annotations 47 ff.

[36] BVerfGE 7, 377.

[37] BverfGE 13, 97.

[38] See Friedhelm Hufen, *Berufsfreiheit – Erinnerung an ein Grundrecht*, NJW 1994, 2913 ff.

[39] See Michael Kloepfer, *Umweltrecht*, second edition (1998), p. 263 ff.

[40] Michael Kloepfer, "Droht der autoritäre ökologische Staat?," in: ... *Baumeister* (ed.), Wege zum ökologischen Rechtsstaat (1994), p. 42 ff.

[41] For example: waste water levy; see Michael Kloepfer (note 39), p. 316.

[42] Rüdiger Breuer (note 35), annotation 77; Peter-Michael Huber, *Konkurrenzschutz im Verwaltungsrecht* (1991), p. 135.

[43] See Rüdiger Breuer (note 35), annotation 77, as to the so-called "strangulating subsidies."

[44] Wolfgang Mulke, *Der schwere Kampf gegen die Subventionitis*, Bonner Generalanzeiger of 24/25 April 1999, p. 32.

[45] This, in particular, is true for market intervention by means of a statute. As to market interventions through individual regulation (e.g., subsidies, warning of particular products) legal protection can be sought of administrative courts or civil courts (e.g., in case of violations of the Act Against Unfair Competition). Judgements of administrative or civil courts of last instance can be brought to the Federal Constitutional Court by means of a constitutional complaint based on allegation of infringement of constitutional rights.

[46] See Winfried Kluth, *Bundesverfassungsgericht und wirtschaftlenkende Gesetzgebung*, ZHR 1998, 657, who counts 299 decisions in 96 volumes of official records. In the meantime further judgments involving occupational liberty have been rendered.

[47] BVerfGE 95, 267 (302).

[48] See Fritz Ossenbühl, *Die Freiheiten des Unternehmers nach dem Grundgesetz*, AöR 115 (1990), p. 10 ff.

[49] BVerfGE 68, 193 (219).

[50] See Horst Ehmke, *Wirtschaft und Verfassung* (1961), p. 467 f.; Hans Spanner, *Zur Verfassungskontrolle wirtschaftspolitischer Gesetze*, DÖV 1972, 217 ff.; contra: Peter J. Tettinger, *Rechtsanwendung und gerichtliche Kontrolle im Wirtschafts-verwaltungsrecht* (1980), p. 332 f.; Reiner Schmidt, "Staatliche Verantwortung für die Wirtschaft," in: Josef Isensee/Paul Kirchhof (eds.), *Handbuch des Staatsrechts*, vol. III, second edition (1996), § 83 annotation 34.

[51] BVerfGE 72, 330 (388).

[52] See Fritz Ossenbühl (note 48), p. 11.

[53] BVerfGE 87, 363 (373).

[54] BVerfGE 50, 290 (332 f.).

[55] BVerfGE 50, 290 (332 f.).

[56] Christian Mayer, *Die Nachbesserungspflicht des Gesetzgebers* (1996).

[57] See Winfried Kluth (note 46), p. 673; Friedhelm Hufen, *Berufsfreiheit – Erinnerung an ein Grundrecht*, NJW 1994, 2913 (2916).

[58] BverfGE 7, 377.

[59] See Friedhelm Hufen (note 57); Peter J. Tettinger, *Verfassungsrecht und Wirtschaftsordnung*, DVBl. 1999, 679 (684).

Thursday, June 10, 1999

Welcome Speech: **Prof. Dr. Jutta Limbach**, President, Federal Constitutional Court

Friday, June 11, 1999

PART I: THE BASIC LAW TODAY

Session 1: **The Development of the Basic Law**
Chair: **Dieter Feddersen**, Attorney, Feddersen Laule Ewerwahn Scherzberg Finkelnburg Clemm, Frankfurt/Main; Member of the Board, Dräger Foundation, Lübeck
Presenter: **Prof. Dr. Donald P. Kommers**, Law School, University of Notre Dame
Comment: **Prof. Dr. Helmut Steinberger**, Law School, University of Heidelberg

Session 2: **The Basic Law and the Process of Unification**
Chair: **Prof. Dr. Dr. Rudolf Dolzer**, Director, Institute for International Law, University of Bonn
Presenter: **Prof. Dr. Udo Steiner**, Judge, First Senate, Federal Constitutional Court, Karlsruhe
Comment: **Jörg Schönbohm**, Chairman, Christian Democratic Union of the State of Brandenburg, Potsdam; Former Senator of the Interior of Berlin

Luncheon Speach: **Sandra Day O'Connor**, Judge, Supreme Court of the United States

Session 3: **The Role of the Federal Constitutional Court**
Chair: **Prof. Dr. Dick Howard**, School of Law, University of Virginia
Presenter: **Prof. Dr. Jutta Limbach**, President, Federal Constitutional Court, Karlsruhe
Comment: **Antonin Scalia**, Judge, Supreme Court of the United States

Session 4: **The Protection of Human Dignity (Art. 1 of the Basic Law)**
Chair: **Prof. Dr. David Beatty**, Law School, University of Toronto
Presenter: **Prof. Dr. Ernst Benda**, Former President, Federal Constitu tional Court, Karlsruhe
Comment: **Prof. Dr. John Attanasio**, Dean, Law School, Southern Methodists University, Dallas, Texas, USA

Saturday, June 12, 1999

PART II: FOREIGN RELATIONS UNDER THE BASIC LAW

Session 5: **Migration, Citizenship, and Asylum**
Chair: **Prof. Dr. Susan Martin**, Director, Institute for the Study of International Migration (ISIM), Georgetown University
Presenter: **Prof. Dr. Kay Hailbronner**, Law School, University of Konstanz
Comment: **Prof. Dr. Phil Martin**, Department for Agricultural and Resource Economics, University of California, Davis

Session 6: **The Allocation of Competencies: Foreign Relations between the EU and the Federal Republic of Germany**
Chair: **Prof. Dr. Ronald L. Watts**, Director, Institute of Intergovern mental Relations
Presenter: **Prof. Dr. Torsten Stein**, Director, Europe-Institute, University of Saarland
Comment: **Prof. Dr. John Kincaid**, Director, Meyner Center for the Study of State and Local Government, Lafayette College

PART III: ECONOMY AND THE CONSTITUTION THE NEW INTER-DEPENDENCE

Session 7: **The Government, the Market, and the Constitution**
Chair: **Prof. Dr. Peter Russell**, Department of Political Science, University of Toronto
Presenter: **Prof. Dr. Fritz Ossenbühl**, Director, Institute for Public Law, University of Bonn
Comment: **Prof. Dr. Frederick Schauer**, J. F. K. School of Government, Harvard University

Session 8: **A Global Economy, Lean Budgets, and Public Needs**
Chair: **Dr. Jackson Janes**, Director, AICGS, Washington, D.C., USA
Presenter: **Prof. Dr. Matthias Herdegen**, Institute for Public Law, University of Bonn
Comment: **Dr. Claudia Dziobek**, Senior Economist, International Monetary Fund

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American Institute for Contemporary German Studies
1400 16th Street, N.W.
Suite 420
Washington, D.C. 20036-2217
Tel: 202.332.9312 Fax: 202.265.9531

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