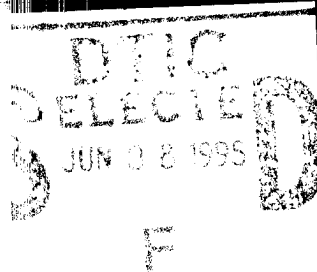


# AND THE FEDERAL CONSTITUTIONAL IMPACT ANALYSIS

U.S. KALLMAN



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THE GERMAN BASIC LAW AND THE FEDERAL CONSTITUTIONAL

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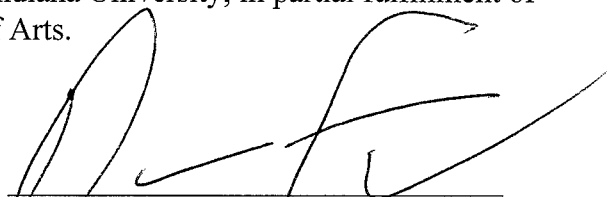
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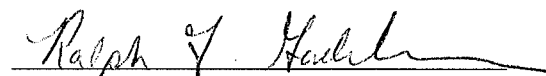
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To my wife, Tressea, for being my best friend, my advisor, and my inspiration. Thank you for everything, especially for our son Samuel.

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## INTRODUCTION

The end of this century has seen a myriad of events unfold in Europe that have drastically altered the political, economic, and social orders of Germany and many of its neighbors. The revolutionary changes in the German Democratic Republic (GDR) from autumn 1989 to its eventual reunification with the Federal Republic of Germany (FRG) have sparked renewed interest in Germany, as well as some anxiety as to its potential threat to its European brethren. How stable is the government? How firm is its commitment to democracy and freedom? Will Germany's new power become a threat to its own citizens or those of its neighbors?

Authors have addressed many of these issues, focusing on Germany's recent past to reassure those who may have doubts. The GDR (East Germany) was the model of the Soviet state until its people ended the Communists' control in 1989. The FRG (West Germany) adopted a Basic Law (Grundgesetz) after World War II based on democracy, freedom, and the rule of law. This Basic Law served as West Germany's constitution for over forty years, and is now the constitution of all Germany. Germany not only has a constitution, but a Federal Constitutional Court (Bundesverfassungsgericht) as well,

charged with the protection of the constitutional rights of Germany's citizens and the democratic order.

This thesis addresses the role of the Constitutional Court in Germany's political system; in particular, it attempts to examine the political and social influences that have motivated the Court's decisions, and whether these influences will also impact future Court decisions. Although there is a voluminous literature both in German and English about the formal powers and procedures of the Constitutional Court, very few English works have dealt with the Court's political evaluation since Donald P. Kommers' book Judicial Politics in West Germany appeared nearly twenty years ago.

Chapter one discusses the creation of the Basic Law and the establishment of the Constitutional Court, focusing on the influence that German legal history and the effects of the Nazi regime exerted on the founding of the Federal Republic. The atrocities committed by the Nazis during their 'Reign of Terror' had special significance for the framers of the Basic Law and subsequently feature prominently in the decisions of the Court.

The Court's role is discussed in greater detail in chapter two, with particular emphasis on the development



of its method of constitutional interpretation and the operationalization of its expanded powers. The affirmation that the Basic Law is an ordered value system by the Court provides the groundwork for the examination of the forces influencing the Court's impact.

Chapter three illustrates this broadened judicial power in two case studies. The case studies involve the issues of abortion and immigration/asylum, chosen for their present political importance in Germany. Also, the abortion issue gives the opportunity to compare the strict German interpretation of abortion law with the policies of some of its European neighbors. By examining the Court's decisions on the issues of abortion and immigration/asylum, this chapter demonstrates how the members of the Court have become prominent players in the political process, balancing the constitutional interests of the Basic Law and the political and social issues of the present day.

Based on this political prominence, chapter four addresses the issues which will almost certainly come before the Court in the near term, and tries to spell out the direction the Court's members will take. The focus for this investigation is the final report of the

Constitutional Commission appointed to review and recommend changes to the Basic Law. Finally, the paper concludes with a look at the prospects for the future of the Basic Law itself and whether it will survive or be replaced by a new constitution. Issues such as abortion and immigration will definitely require further declaration by the Court, and the new topic of genetic engineering, with its parallels to the development of Hitler's 'master race' will surely be on the agenda in the near term. The evidence discussed here suggests that the members of the Court will not only continue to balance individual and governmental rights, but will also continue to address the socio-economic influences surrounding such decisions.

## CHAPTER ONE

This chapter addresses the historical context within which the German Basic Law and the Federal Republic of Germany were founded. From a chronological perspective, the Allies were the first ones to influence the establishment of West Germany and its Basic Law after World War II. This chapter, however, focuses on the German role, making three major points: (1) The Allies' influence on the creation of West Germany pales in comparison to the role that the Germans themselves played, both through their own history and the actions of the Parliamentary Council which drafted the Basic Law. (2) The German system of justice, the creation of the Federal Constitutional Court, and the concept of judicial review had their basis in German history, rather than being ideas imported from the United States. And finally, (3) the structure, organization and judicial selection process of the Constitutional Court produces, in effect, politically sensitive Justices. That is to say, the Justices are selected more for their political orientation than for their ideological beliefs.

## The Creation of the Federal Republic of Germany and the Basic Law

The establishment of the Federal Republic of Germany and the creation of its Basic Law resulted from a number of factors, the first one being the relationship between the four victorious powers- Great Britain, France, the United States, and the Soviet Union - and their concerns about the future role of Germany in Europe. The incompatibility of purposes and interests held by the occupying powers prevented Germany's treatment as an economic and political whole.<sup>1</sup>

Ultimately, the withdrawal of the Soviet military governor from the Allied Control Council in Berlin on March 20, 1948, ended quadripartite government in Germany and accelerated the move by the United States and Britain to establish a government in western Germany.

The London Conference of 1948 met to consider tri-zonal fusion, the establishment of a West German government, the future status of the Ruhr, and security controls. The last two conditions were ultimately

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<sup>1</sup> The Potsdam Agreement of August 2, 1945, Sec. III, par. 14, called for Germany to be treated as a single economic unit, but the results were quite the opposite. See K. Pollock and J.H. Meisel, Germany Under Occupation, Ann Arbor: George Wahr Publishing Co., 1947, pp. 79-92.

fulfilled by agreements to establish an International Authority for the Ruhr, to maintain occupation troops in Germany, and to establish an Allied Military Security Board to administer Allied laws prohibiting western Germany's rearmament and limiting her industrial production. The agreements on the political organization of western Germany gave only the most general guidance to the ministers-president of the western German Laender, and it was through these agreements that the United States, Britain, and France exerted their influences on the subsequent creation of the Basic Law. The fourth agreement, given to the Germans in the form of an Aide Memoire, set out the criteria which were to guide the military governors in determining whether the Germans had produced an acceptable constitution.<sup>2</sup> This agreement was in part a result of substantial concessions made by the French to the American and British views, and in part the omission or postponement for future settlement of those points on which the delegations could not agree.<sup>3</sup>

The ministers-president were not initially in agreement with the results of the London conference and preferred to wait on the calling of a constituent

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<sup>2</sup> K. Pollock and J.H. Meisel, pp. 80-101.

<sup>3</sup> For a more detailed discussion of the differing positions each country held, see J.K. Pollack and J.H. Meisel, pp. 250-293. Also John Ford Golay, The Founding of the Federal Republic of Germany, Chicago: University of Chicago Press, 1958, pp. 1-17.

assembly and the drafting of a constitution until the conditions for an all-German government existed and German sovereignty had been restored.<sup>4</sup> To the Germans, the advantages of improved economic prospects which the promise of American aid on a large scale afforded and the increased share in the management of their own affairs were offset by the thought that establishment of a Western German government must confirm the division of Germany and indefinitely defer a peace settlement for all of Germany. The leaders of both the major Western German political parties, the Christian Democrats and the Social Democrats, were reported to be unwilling to identify themselves with any step which would set the seal on a partitioning of Germany.<sup>5</sup> After further negotiations, the ministers-president agreed that a Parliamentary Council would be selected by the Landtage to draft a basic law, or constitution, for the western German Laender, until such time as Germany was reunified.

The issue of the interchangeable use of the terms "basic law" and constitution should be briefly addressed here. Several historians and political scientists have debated the question of whether the German Basic Law is

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<sup>4</sup> Konrad Adenauer, Erinnerungen, 1945-53, Stuttgart: Deutsche Verlags-Anstalt GmbH., vol. 1, 1965, pp.146-173.

<sup>5</sup> Golay, p. 14.

in fact a constitution. The German understanding of the term "constitution" is a framework for the permanent organization of a particular nation-state.<sup>6</sup> The Basic Law, on the other hand, specifically expresses in the Preamble the goal "to achieve in free self-determination the unity and freedom of Germany." Also, the Basic Law was drafted to conform, not only to the ideals of the people of Germany, but to the guidelines set forth by the military governors as acceptable standards for a democratic constitution.<sup>7</sup> In addition, West Germany operated within the context not only of the Basic Law, but of the Occupation Statute as well. The German leaders wanted a treaty-like agreement between themselves and the Allies that would give the Germans the sufficient sovereignty they needed to establish a constitution.<sup>8</sup> The eventual compromise was the Basic Law, and for the purposes of this paper, the terms mean the same thing.

It was at this stage of the process that the most important influence, Germany's own history, had its greatest impact on the creation of the Basic Law and the

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<sup>6</sup> Rainer Wahl, "Die Entwicklung des deutschen Verfassungsstaats bis 1866," Handbuch des Staatsrechts, 1987, pp. 24-33.

<sup>7</sup> This also refers to the guidelines set forth in the fourth document of the London Conference, the Aide Memoire. See Documents on German Unity, vol. 1, Berlin: Office of the U.S. High Commissioner for Germany, 1951, pp. 80-101.

<sup>8</sup> For a discussion of the negotiations, see Edward H. Litchfield, Governing Postwar Germany, Ithaca: Cornell University Press, 1953, pp. 43-50. The text of the Occupation Statute itself is found on pp. 616-618.

idea of constitutional review. To that extent it is safe to say that the Basic Law, first and foremost, is a reactive constitution; that is, the Basic Law was designed to prevent a reoccurrence of both the ill-functioning, weak and helpless democracy of the Weimar government and the cruel despotism of the Hitler years.

Four fundamental conclusions were drawn from these memories, the most important of which was that the constitution had to effectively protect individual rights. Second, parliamentary democracy had to be institutionalized in such a way that strong and effective government was possible. The third conclusion was that democracy must be enabled to defend itself against its enemies; and last but certainly not least, Germany had to be definitively tied to the idea of peaceful cooperation among nations.<sup>9</sup>

The idea of individual rights was embodied in the first nineteen articles of the constitution, commonly called the Bill of Rights. There is also the Constitutional Court, entrusted with the ultimate responsibility for enforcing the constitution and protecting the rights of individuals against all three branches of government, the legislative, the judicial, and, most importantly, the executive. The Parliamentary

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<sup>9</sup> Peter Graf Kielmannsegg, "The Basic Law - Response to the Past or Design for the Future?" in Forty Years of the Grundgesetz, Washington: German Historical Institute, 1990, p. 6.



Council demonstrated its willingness to subordinate all state power to constitutional restrictions by including a clause which prohibits amendments to the Basic Law, as far as the fundamentals are concerned.<sup>10</sup> This means that the constitution gives the concept of protection of individual rights so deeply entrenched in the Basic Law priority over the democratic idea of majoritarianism. The strength of this concept is demonstrated in Article 19, which states that whatever public authorities do is subject to judicial control if individual rights might be affected.<sup>11</sup>

The Parliamentary Council's plan for strong and effective parliamentary government took shape in several ways. One of the most often cited examples is the constructive vote of no-confidence, which requires the Bundestag to select a new Chancellor before they can replace the current one. At the same time, the Parliamentary Council balanced its effort to strengthen government by limiting the possibilities for dissolving parliament by defining the conditions for dissolution in extremely narrow terms. Finally, although not part of the Basic Law, the later introduction of the five percent clause, modifying the basic rule of proportional

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<sup>10</sup> Basic Law (Grundgesetz), Article 79, (3). [Hereafter cited as GG.] It is interesting to note that the Basic Law has no provision preventing the amendment of this article.

<sup>11</sup> GG, Article 19, (4), states: "Should any person's rights be violated by public authority, recourse to the courts shall be open to him".

representation by denying parliamentary representation to parties that do not receive at least five percent of the total vote, prevented fragmentation of the party system and supported the formation of stable majority coalitions.<sup>12</sup>

The conclusion that democracy ought to be able to defend itself against its enemies was addressed in the Constitutional Court's right to ban political parties actively trying to subvert or overthrow the constitution, although the initiative has to be taken by government or the parliament.<sup>13</sup> The Constitutional Court can also declare certain individual political rights forfeit if they are misused for the purpose of fighting against democracy.<sup>14</sup>

The Parliamentary Council's determination to make it impossible for Germany ever again to disturb the international peace took several forms. The Constitution expressly forbade the use of military force except in very limited circumstances.<sup>15</sup> The Constitution also authorizes parliament to transfer rights of sovereignty to supranational institutions and it

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<sup>12</sup> Kielmannsegg, p. 8.

<sup>13</sup> GG, Article 21, (2).

<sup>14</sup> GG, Article 18.

<sup>15</sup> GG, Article 87a, (2), states: "Apart from defense, the Armed Forces may be employed only to the extent expressly permitted by this Basic Law". GG, Article 26, (1), forbids among other things, preparation for any "war of aggression".

encourages the Federal Republic to join a system of collective security as the best way to promote peace.<sup>16</sup>

### Origins of Constitutional Review, the Constitutional Court and Judicial Review

The Federal Constitutional Court and the German notion of constitutional review have historical legal precedents which influenced their structure in the Basic Law. Constitutional review in modern form emerged from nineteenth century efforts to preserve the confederation of German states established by the Congress of Vienna in 1815.<sup>17</sup> Articles later formulated by the Congress demanded that the states submit their constitutional disputes to the Reich Assembly. The Reich was even obligated to intervene in a constitutional dispute within a state if necessary to protect the latter's constitution. When deciding such cases, however, the Assembly had to resolve itself into something resembling

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<sup>16</sup> GG, Article 24, specifically deals with German entry into a collective security system and the necessary transfer of sovereign powers. GG, Article 23, deals with Germany's role in the European Union and the possibility for the transfer of additional powers to the EU.

<sup>17</sup> It is important to understand the difference between the German notions of constitutional and judicial review. See Donald P. Kommers, Judicial Politics in West Germany, Beverly Hills: Sage Publications, 1976, p. 29. [Hereafter cited as Jud. Pol.] Constitutional review is a judicial procedure for the resolution of disputes between units or levels of government about their respective rights and duties under the constitution. Disputes concerning the legitimacy of elections, ministerial impeachments, and the separation of powers between the federal and state governments are examples. Judicial review is a procedure by which courts determine the constitutionality of laws in the ordinary course of litigation.

a judicial forum. Although it was not a court as we know it, the Assembly was required to afford the conflicting parties a complete hearing and to support its decision with a doctrinal rationalization.<sup>18</sup>

Article 61 of the May 15, 1820, Vienna Accords also permitted the states to submit their internal constitutional disputes to the Assembly.<sup>19</sup> This provision also appears in the 1871 Imperial Constitution's Article 76, empowering the Bundesrat to settle state constitutional conflicts.<sup>20</sup> The emergence of Germany's democratic constitutions brought these disputes into the independent law courts: The Federal Supreme Court under the Frankfurt Constitution of 1849<sup>21</sup>, the High State Court under the Constitution of 1919<sup>22</sup>, and the Federal Constitutional Court under the Basic Law of 1949<sup>23</sup>.

Unlike constitutional review, judicial review had little basis in German law prior to 1945. The predominant German teaching during the nineteenth century was that courts did not have the authority to

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<sup>18</sup> Ernst R. Huber, Deutsche Verfassungsgeschichte seit 1789, Stuttgart: W. Kohlhammer Verlag, 1957, p. 622.

<sup>19</sup> Huber, Dokumente zur deutschen Verfassungsgeschichte, Stuttgart: W. Kohlhammer Verlag, vol. 1, 1961, pp. 248-252.

<sup>20</sup> The Imperial Constitution of April 16, 1871, is found in Edwin H. Zeydel's work, Constitutions of the German Empire and the German States, Washington: Government Printing Office, 1919, pp. 8-27.

<sup>21</sup> Article 126, Frankfurter Reichsverfassung, in Huber, note 18, pp. 316-317.

<sup>22</sup> Huber, note 18, vol. 3, 1966, pp. 112-142.

<sup>23</sup> GG, Article 93.

nullify legislative acts. The supremacy of parliament was supported by the doctrine of parliamentary sovereignty and the doctrine of separation of powers. Traditional German thought held that statutes alone were the sole source of law. The judge's first and only duty was to enforce the law as it was written.

In the second half of the century, however, German legal scholars began to accept a limited form of judicial review. They distinguished sharply between a law's formal and material constitutionality; the formal implied the enactment and promulgation of a statute in strict accordance with the procedures laid down in the constitution, while the material aspect implied the compatibility of the statute's content with substantive constitutional norms. The concept of judicial review of material constitutionality gained support throughout the 1860s and, in 1875, the Hanseatic Appeals Court struck down a local tax law as violative of the right to property protected by Article 19 of the Bremen Constitution.<sup>24</sup>

Several years later, however, the Imperial Court overruled the decision, stating:

"[It is said that] the ordinance should be denied the force of binding law,

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<sup>24</sup> Kommers, Jud. Pol., p. 36.

because it is only an act of ordinary legislation, while the constitution is a law of higher order... This view cannot be acceded to... [The] correct view is as follows: the constitutional provision that well-acquired rights must not be injured, is to be understood only as a rule for the legislative power itself to interpret, and does not signify that a command given by the legislative power should be left disregarded by the judge because it injures well-acquired rights."<sup>25</sup>

Later, the liberal democratic state established under the Weimar Republic created an environment which allowed the concept of judicial review to spread. It was during this period that the Freirechtsschule or "free law" school of judicial interpretation gained prominence, believing that the judge was not bound to the letter of the law, rather, he was free to follow its true spirit and even to create new law if warranted by the circumstances of a case.<sup>26</sup> Many members of the Weimar National Assembly also favored the idea of judicial review as an important principle of limited government, inspired by the American experience and the growing acceptance of judicial review by several other

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<sup>25</sup> Decision of the German Imperial Court, February 17, 1883. This decision has been translated in Brinton Coxe, An Essay on Judicial Power and Unconstitutional Legislation, Philadelphia: Kay and Brother, 1893.

<sup>26</sup> Albert S. Foulkes, "On the German Free Law School (Freirechtsschule)," Archiv fuer Rechts- und Sozialphilosophie, vol. 55, 1969, pp. 367-417.

European countries. Opponents of the idea ultimately prevailed, but they did not expressly deny to the courts authority to review legislation, and the debate continued until Hitler's rise to power.<sup>27</sup>

Judicial review finally emerged as a concrete principle in Germany in the Basic Law.<sup>28</sup> The argument as to whether the idea is an American import or not is unresolved<sup>29</sup>, but the evidence in the documents I have read suggests that both the Americans and the Germans influenced the insertion of judicial review into the Basic Law. The western Allies required judicial independence, but it appears that the Germans were more influenced by their own history and their desire to more efficiently organize judicial review.

### Structure and Organization of the Court System

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<sup>27</sup> For information on the debate in the constitutional committee on judicial review, see Walter Jellinek, "Verfassungswidriges Reichsgesetzes," Deutsche Juristenzeitung, vol. 26, 1921, pp. 751-763. For material on the practice of judicial review in the Weimar Republic, see J.J. Lenoir, "Judicial Review in Germany Under the Weimar Constitution," Tulane Law Review, vol. 14, 1940, pp. 361-383.

<sup>28</sup> GG, Article 93 (1).

<sup>29</sup> There are many sides to the question of outside influence on German judicial review. For arguments in support of the "American import" idea, see Helmut Bader, "Impact of the American of Judicial Review Upon Austrian and German Constitutional Law", Ph.D. Thesis, University of Southern California, 1957. Staunch opponents of this viewpoint include C.J. Friedrich, "Rebuilding the German Constitution", American Political Science Review, vol. 43, 1949, pp. 461-482, and Gottfried Dietze, "Judicial Review in Europe", Michigan Law Review, vol. 55, 1957, pp. 539-566. Those straddling the fence include Taylor Cole, "Three Constitutional Courts: A Comparison", American Political Science Review, vol. 53, 1959, pp.963-984, and Heinrich Nagel, "Judicial Review in Germany", American Journal of Comparative Law, vol. 3, 1954, pp. 233-241.

The German court system is characterized by both its uniformity and its specialization. Court organization, the basic structure of which is fixed by federal law, is the same throughout the country. Federal codes of civil and criminal procedure govern the practice and proceedings of all regular German courts. National law also provides for the jurisdiction and procedures of public law tribunals. But there is no separate system of federal courts. All courts, except the highest appellate courts in the nation, are state courts. The specialization of jurisdictions is present in both private law and public law. The supreme courts of appeal for each of these areas of basic jurisdiction are federal tribunals. They include the Federal Supreme Court (*Bundesgerichtshof*), the Federal Administrative Court (*Bundesverwaltungsgericht*), the Federal Labor Court (*Bundesarbeitsgericht*), The Federal Social Court (*Bundessozialgericht*), and the Federal Finance Court (*Bundesfinanzhof*).<sup>30</sup>

#### The Federal Constitutional Court

The Federal Constitutional Court is separate from those courts listed above and derives practically all of

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<sup>30</sup> Wolfgang Heyde, The Administration of Justice in the Federal Republic of Germany, Bonn: Press and Information Office of the Federal Government, 1971, p. 115.



its authority directly from the Basic Law.<sup>31</sup> In addition, the Basic Law authorizes the Court to decide other cases as may be assigned by statute.<sup>32</sup> Until 1969 the right of ordinary citizens to bring constitutional complaints - the largest source of the Court's business - had been conferred by statute.<sup>33</sup> This right is now anchored in the Constitution. Thus, subject to rare exceptions, all of the Court's jurisdiction is protected by fundamental law.<sup>34</sup>

The Constitutional Court Act of 1951 describes the Federal Constitutional Court as "an autonomous court of the Federation, independent of all other constitutional organs." Yet the Court Justices were administratively subject to the supervisory authority of the Federal Ministry of Justice. This controversy sparked a heated debate and set off several years of skirmishing before the Court achieved its objectives, "nothing less than the same institutional independence enjoyed by the Parliament, the federal government, and the federal president."<sup>35</sup>

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<sup>31</sup> GG, Article 93 (1).

<sup>32</sup> GG, Article 93 (2).

<sup>33</sup> Gesetz ueber das Bundesverfassungsgericht vom 12. Marz 1951, (Otherwise known as the Federal Constitutional Court Act of 1951), Sec. 13. [Hereafter cited as BverfGG].

<sup>34</sup> GG, Articles 93 (1). 4a and 4b, inserted by federal statute on January 29, 1969.

<sup>35</sup> Memorandum of the Federal Constitutional Court, June 27, 1952. Excerpts from the memorandum are in Kommers, Jud. Pol., Chapter 2.

The 1951 act established a Court composed of two chambers, called senates, which have virtually become two separate constitutional courts with mutually exclusive jurisdictions. Justices are specifically elected by Parliament to either the First or the Second Senate, and they may not sit in the other panel. Both "Chief Justices" are wholly independent with respect to judicial matters before their respective senates, and the Court's division was in part a compromise between those who wanted a fluid system of twenty-four justices rotating on a smaller panel and those who wanted a fixed collegial body like that of the United States Supreme Court.<sup>36</sup>

The original statute provided for two senates with twelve judges each. In 1956, the number was reduced to ten; in 1962, it was further reduced to eight, fixing the total number at sixteen. Because of the large number of individual complaints brought to the Court, the senates were authorized by law to create three-judge committees for the purpose of deciding constitutional cases.

The tenure provisions of the 1951 Act stated that four of each senate's twelve judges would be selected from the high federal courts. These Justices were

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<sup>36</sup> Kommers, Jud. Pol., p. 96.

appointed for the duration of their terms on the federal court, which was usually for life. The other members were chosen for eight-year terms, but were eligible for reelection regardless of age. Due to amendments in 1970, all Justices serve twelve-year terms with no possibility of reelection.<sup>37</sup>

### Eligibility Criteria and the Judicial Selection Process

In order to be eligible for selection to the Court, a person must be at least forty years of age, eligible for election to the Bundestag, and have passed the first and second major state examinations in law. Once selected, a Justice cannot simultaneously hold office in the government, Bundesrat, Bundestag, or in a corresponding branch of a state government. In addition, all professional activities, with the single exception of teaching law at a German university, are seen as incompatible with the office of Constitutional Court Justice, and the law states that a Justice's judicial duties shall take precedence over his professorial activity.<sup>38</sup>

The judicial selection process for those eligible consists of both formal and informal rules. The formal

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<sup>37</sup> BVerfGG, Sec. 4 (1)

<sup>38</sup> BVerfGG, Sec. 3 (4).

process is defined in general terms by the Basic Law, which directs that half of the Court's members be elected by the Bundestag and half by the Bundesrat. Under the 1951 Act, a twelve-person judicial selection committee (JSC) elects the Bundestag's quota, while the Bundesrat votes for its share as a whole, a majority of two-thirds being necessary. The JSC membership is proportionally based on each party's strength in the Bundestag, and a two-thirds majority (eight votes) is also required.

Each house elects four members of each senate, but they alternate in selecting the Court's president and vice president. Prior to selecting a federal judge to the Constitutional Court, the Minister of Justice is required to compile a list of all federal judges who meet the qualifications for appointment. He must also prepare a list of candidates submitted by the parliamentary parties, the federal government, or a state government. The lists are delivered to the electing bodies at least one week before they convene. If either house fails to elect a Justice within two months, the chairman of the JSC or the president of the Bundesrat, depending on the house involved, must request the Constitutional Court itself to submit a list of names for consideration. But Parliament is not

obligated to choose the appointee from this or any other list submitted to it.<sup>39</sup>

The Parliamentary Council justified the formal rules mentioned above on the grounds that they are likely to produce the best persons for the job of Constitutional Court Justice, and that parliamentary selection rather than executive recruitment gives "democratic legitimacy" to the election of the Justices. The result, however, has been a highly politicized process with intensive bargaining between the political parties. Because of the two-thirds rule, among other things, the selection system ensures that political parties will play a decisive role in the recruitment of Justices and that the Court will be widely representative of parliamentary interests.<sup>40</sup>

In the Bundestag, the JSC is made up mainly of party leaders. The parties seek to influence the selection process through the lists that they present when the committee is chosen by the whole house. Since no single party or governing coalition in the JSC has ever attained the strength to elect a Justice over opposition party objections, negotiations are mandatory.

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<sup>39</sup> BVerfGG, Sec. 7 (2).

<sup>40</sup> A further description of the politics and mechanics of the selection process is found in Hans Trossmann, Parlamentsrecht und Praxis des deutschen Bundestages, Bonn: Wilhelm Stollfuss Verlag, 1971, pp. 284-287. For a more detailed explanation of the formal rules governing the selection process, see Kommers, Jud. Pol., chapter 3.

Also, many members of the JSC are also members of the Judiciary Committee or the Federal Judges Committee (FJC), responsible for the recruiting of all federal judges other than Constitutional Court Justices.<sup>41</sup> The FJC is not made up exclusively of Bundestag members, but includes the federal and state ministers within whose competence a federal judge is being selected.<sup>42</sup> For example, if a judge of the Federal Finance Court is being chosen, the FJC will include finance ministers from the state and federal governments. Also, the JSC conducts its business behind closed doors after extensive consultations with the Bundesrat.

In the Bundesrat, the selection process has even more players. The parties in the Bundesrat must bargain, just as in the JSC, but negotiation with the JSC is also necessary. In addition, the states, many of which have coalition governments, vote as a bloc. This further hinders one party or coalition from achieving two-thirds strength. Negotiations with the JSC have been handled through a special ad hoc committee made up largely of the justice ministers of the individual states. As a rule the committee recruits Justices from the Bundesrat's own state constituencies. The justice

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<sup>41</sup> Kommers, Jud. Pol., pp. 113-116.

<sup>42</sup> Glen A. Schram, "The Recruitment of Judges for the West German Federal Courts", American Journal of Comparative Law, Vol. 21: (1973), pp. 691-711.

ministers on the committee, like certain state governors and members of the Bundestag's JSC, are often themselves leading candidates for seats on the Constitutional Court. Informal agreements emerge from the committee's proceedings, specifying which states shall choose prospective justices and in what order.<sup>43</sup> Justice ministers usually consult with their respective state governments before voting in committee, causing even more negotiations. The partisan adjustments required by this general situation may be one reason why the Bundesrat has often nominated its own members for an open judgeship. Throughout this process the committee must closely coordinate its work with that of the JSC, both to avoid duplicate judicial selections and to agree on the particular senate seats each house is going to fill, as well as which seats are to be filled with justices recruited from the federal high courts.<sup>44</sup>

The results of the selection process have been a mix of liberal and conservative justices, whose liberalism or conservatism varies from issue to issue. Collectively, they are well-bred, university-educated, law-trained, middle-aged people. Before going to the Constitutional Court, they have had varied careers in

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<sup>43</sup> Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany, Durham: Duke University Press, 1989, pp. 24-25. (Hereafter cited as Const. Jur.)

<sup>44</sup> *Ibid*, pp. 25-26.

government, politics, a high position in the civil service, judiciary, or legislature of a state or the national government. Politically, the Justices are middle-of-the-roaders; ideologically, they evince little or no tendency toward dogmatism; juristically, they seem rather pragmatic and, almost universally, are aware of and sensitive to the political nature of their work and the power they have as Constitutional Court Justices.<sup>45</sup>

The next chapter will deal with this power, covering the jurisdiction of the Court, the development of its method of interpretation, and the operationalization of its powers since its establishment in 1951. The discussion will illustrate how the Nazi legacy has influenced the Court's members and their perceptions of the Court's role in Germany's political system.

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<sup>45</sup> Kommers, Jud. Pol.. Professor Kommers presents an extensive background of the individual members of the Court in Chapter 4.



## CHAPTER TWO

The previous chapter illustrated the influence that Germany's recent past had on the architects of the German system of government. The creators of the constitution and the Federal Constitutional Court supported a strong judiciary with the distinct and autonomous powers necessary to balance those of the legislative and executive branches of government. Article 92 of the Basic Law, which states: "The judicial power shall be vested in judges.", is similar in its wording to our own constitution.<sup>46</sup> But unlike our Supreme Court, which has allowed the creation of quasi-judicial administrative agencies or "legislative courts"<sup>47</sup>, the Federal Constitutional Court has ruled that judicial power may be exercised only by judges.<sup>48</sup>

It is the exercise of these judicial powers and the resulting creation of the Court's broad jurisdiction that this chapter discusses, beginning with the original jurisdiction of the Constitutional Court. This chapter also highlights some differences and similarities between Germany's Constitutional Court and the United

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<sup>46</sup> Article III, Sec. 1 of the U.S. Constitution reads: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

<sup>47</sup> *Crowell v. Benson* 285, U.S. 22 (1932).

<sup>48</sup> 22 BVerfGE 49, 73-75 (1967).

States Supreme Court with regard to these competencies. Most importantly, the chapter will examine how the powers of the Constitutional Court have grown since 1951, focusing on the judicial competencies of individual constitutional complaints and abstract norm control (abstrakt Normenkontrolle), and the development of the Court's method of constitutional interpretation.

The analysis indicates that the members of the Court have created a wide area of judicial discretion through the decisions they have handed down. The history of Nazi tyranny and disregard for human dignity weighed heavily in the Court's delineation of its role in the political system. Through this role the justices have the opportunity to allow their individual political beliefs to influence the Court's decision-making process.

#### The Judicial Competencies of the Federal Constitutional Court

As mentioned in Chapter One, the Constitutional Court's jurisdiction is divided between the two senates, each of which decides different matters. The original division of jurisdiction showed that the senates were intended to be very different 'courts'. The First

Senate's jurisdiction was comprised of all matters pertaining to the basic rights of individuals and groups,<sup>49</sup> its main function being to review questions of legislation and other official acts, raised mainly in the course of litigation. In short, the First Senate was to serve as a court of judicial review.

The Second Senate's original jurisdiction dealt exclusively with conflicts between government institutions. This included: (1) constitutional disputes between high federal organs (Art. 93(1)), (2) constitutional controversies between the Federation and the Laender (Arts. 84(4) and 93(3)), (3) constitutional disagreements within the Laender (Art. 99), (4) complaints by certain governmental agencies against the federal president or federal judges for violations of the Basic Law (Arts. 61 and 98(2)), and (5) disputes over whether a rule of international law is an integral part of federation law (Art. 100(2)). The Second Senate, then, was originally designed to perform many of the functions formerly reserved for the High State Court of the Weimar Republic.<sup>50</sup>

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<sup>49</sup> The Basic Rights are found in Articles 1-17 of the Basic Law and include: (1) Protection of human dignity, (2) Liberty, (3) Equality before the law, (4) Freedom of faith, conscience, and creed, (5) Freedom of expression, (6) Protection of marriage and the family, (7) Education, (8) Assembly, (9) Association, (10) Privacy of letters, posts and telecommunications, (11) Freedom of movement, (12) Freedom of Occupational choice, (13) Inviolability of the home, (14) Property and inheritance, (15) Socialization, (16) Citizenship and asylum, and (17) Right of Petition.

<sup>50</sup> Kommers, Jud. Pol., pp. 100-101.

Largely because of gross imbalances in the workloads of the two senates, but also in part for political reasons,<sup>51</sup> this division of jurisdiction has been modified over the years. The BVerfGG originally authorized the Plenum to hand down advisory opinions whenever it received a joint request from the Bundestag, Bundesrat, and the federal government.<sup>52</sup> The Court was keenly aware of the potential for political manipulation of its advisory opinion jurisdiction, and recommended that the Parliament repeal such jurisdiction. The Parliament agreed and repealed the advisory opinion capacity of the Court in 1956.<sup>53</sup>

As Table 1<sup>54</sup> shows, the First Senate now deals mainly with judicial review of legislation and with the substantive rights of persons, while the Second Senate is primarily concerned with the procedural rights of individuals and with constitutional disputes between governmental agencies.

The U.S. Supreme Court, by comparison, has appellate jurisdiction for the lower federal courts and from state courts of last resort if a case involves a federal question. It has original jurisdiction over

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<sup>51</sup> Members of the Bundestag and Bundesrat raised the concern that the wide division of the two senates had resulted in two separate courts, something which the Basic Law did not authorize. The debate was part of the resulting 1956 Amendment.

<sup>52</sup> BVerfGG, sec. 97(2).

<sup>53</sup> Plenum Defense Treaty Case, 3 BVerfGE 40 (1954).

<sup>54</sup> See p. 94.

cases involving foreign ambassadors, ministers, consuls, and cases in which a state is a party. The three most common types of cases to reach the Supreme Court are cases involving litigants from different states, the interpretation of federal law, and the interpretation of the Constitution.

Of the sixteen areas listed in Table 1, well over ninety-five percent of the Court's caseload consists of individual constitutional complaints. It is in this area of its judicial competence that the Court has taken the greatest strides in widening its jurisdiction. Any person who claims that his or her rights under the Basic Law have been violated by an action of the state may file a constitutional complaint in the Federal Constitutional Court. The petitioner must use all other legal remedies unless "recourse to other courts would entail a serious and unavoidable disadvantage to the complainant."<sup>55</sup>

The person must file the complaint within a certain time, identifying the offending action or omission and the responsible agency, specifying the constitutional right that has been violated. If a person challenges a judicial decision, he or she must file the complaint within one month of his or her notification of the

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<sup>55</sup> BVerfGG, Sec. 90 (2).

decision. If a statute is the object of the complaint, the petition must be filed within one year of the law's enactment. The Court has insisted on numerous occasions, however, that the right to a judicial hearing may not be forfeited by failure to file papers within the prescribed time period with some fault on the part of the petitioner or of his attorney.<sup>56</sup> In contrast, the U. S. Supreme Court has ruled that even constitutional rights in the context of a criminal proceeding were forfeit for failure to raise them in time.<sup>57</sup>

The Constitutional Court's own standards require that the complainant "must personally suffer a clear, present and cognizable injury directly resulting from the governmental action complained of."<sup>58</sup> Laws and ordinances, however, are subject to direct challenge if they require no independent act of execution. For example, a person challenging a criminal statute does not have to violate the law to contest its validity.

Even though the constitutional complaint was designed to protect certain specified rights, those

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<sup>56</sup> The Court has regularly excused late filings on the ground that the defaulting party was on vacation when notice reached his home (25 BVerfGE 158, 166(1969)), that mail delivery was unusually delayed (40 BVerfGE 42, 44-46 (1975)), that the petitioner had relied on misleading official advice (40 BVerfGE 46, 50-51 (1975)), or that he was unable to understand the German language (40 BVerfGE 95, 99-100 (1975)).

<sup>57</sup> *Wainwright v. Sykes*, 433 U.S. 72 (1977).

<sup>58</sup> Michael Singer, "The Constitutional Court of the German Federal Republic: Jurisdiction over Individual Complaints", *International and Comparative Law Quarterly*, vol. 31, 1982, pp. 331-336.

rights include the vague right to "free development of personality"<sup>59</sup>, which the Court has broadly interpreted to include anything the individual might wish to do.<sup>60</sup> Respected political analyst Klaus Schlaich has thus noted that "every burden imposed on the citizen by the state has become the invasion of a fundamental right."<sup>61</sup> As a consequence of the Court's interpretation of this right, the 'affected citizen' may invoke the interests of third parties as well.<sup>62</sup>

The U.S. Constitution does not have as broad a provision on third party standing<sup>63</sup>, although more exceptions to the rule have been allowed in the last twenty years.<sup>64</sup> Nor does our Constitution guarantee judicial review of administrative action like the Basic Law (Article 19(4)). The power of concrete judicial

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<sup>59</sup> GG, Article 2 (1).

<sup>60</sup> 6 BVerfGE 32, 41 (1957).

<sup>61</sup> Klaus Schlaich, Das Bundesverfassungsgericht, 1985, p. 107

<sup>62</sup> 85 BVerfGE 191, 205-206 (1992). The Court allowed an employer to argue that a ban on nocturnal employment discriminated against female employees. 26 BVerfGE 246, 253-258 (1969). See also Schlaich, note 59, pp. 10-11. The Court ruled that the right to redress in this area is not restricted to those directly regulated by the challenged action, stating that the action may infringe on the rights of others. Thus the Court allowed customers to argue that a law limiting the hours when stores could be open denied them their constitutional right to make purchases (13 BVerfGE 230, 233 (1961)), and businesses to raise equal protection objections to tax preferences granted to their competitors (18 BVerfGE 1, 11-14 (1964)).

<sup>63</sup> Third party standing is explained by the following example. Generally, party A does not have standing to raise the legal rights of party B. The basis for the rule is grounded in a 'best plaintiff' concept. In the normal course of events, B is deemed the most appropriate person to litigate with respect to claims affecting him, and the most likely person to ensure that the case is adequately presented. A more detailed discussion of third party standing is found in Jerome A. Barron, Constitutional Law in a Nutshell, St. Paul: West Publishing Company, 1990, pp. 39-41.

<sup>64</sup> Singleton v. Wulff (1976); Craig v. Boren (1976); and Hunt v. Washington State Apple Advertising Com'n (1977).

review announced in *Marbury v. Madison*<sup>65</sup> ensures only that the courts may not be used to carry out unconstitutional laws. Despite Chief Justice Marshall's famous remark about the importance of the right to redress<sup>66</sup>, the Supreme Court has never held that our Constitution requires judicial review of administrative action as a general matter.<sup>67</sup> Nor has the Supreme Court allowed claims for money damages against the state itself for injuries caused by violations of official duties (the concept of sovereign immunity) in the absence of statute.<sup>68</sup> On the other hand, Article 34 of the Basic Law goes so far as to guarantee the right of recourse against both the state and the official in question<sup>69</sup>, and the Court has included these areas under the jurisdiction of constitutional complaint.

In addition to constitutional complaints, the court's most significant areas of jurisdiction include the authority to hear cases on unconstitutional political parties, disputes between high federal organs, conflicts between federal and state governments, concrete judicial review and, most importantly, abstract

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<sup>65</sup> 5 U.S. 137 (1803).

<sup>66</sup> Ibid. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the law, whenever he receives an injury."

<sup>67</sup> The Court has held that in particular situations, due process requires judicial process. See *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920) and *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936).

<sup>68</sup> See *Edelman v. Jordan*, 315 U.S. 651 (1974).

<sup>69</sup> Article 34, GG (Liability in the Event of a Breach of Official Duty).



judicial review.<sup>70</sup> With the exception of concrete judicial review, these competencies are in almost total opposition to the prevailing standards for justiciable cases or controversies in the United States. Although many of these provisions reflect the reasonable conviction that a governmental body itself is the most appropriate party to argue against any encroachment on its authority, the Supreme Court has directly rejected this notion by placing limitations on government standing in such cases as *Massachusetts v. Mellon*.<sup>71</sup> The actual number of cases in these areas is small, but the enormity of their political significance has had a major impact on German government and the political system as a whole. As such, a more detailed explanation of these major areas of jurisdiction follows.

The legal basis for the banning of political parties is found in the constitution. The Basic Law states:

"Parties which, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany shall be

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<sup>70</sup> GG, Article 93 (1).

<sup>71</sup> 262 U.S. 447 (1923). The Supreme Court held that the state had no standing to argue that a federal statute invaded powers reserved to the states.

unconstitutional. The Federal Constitutional Court shall decide on the question of unconstitutionality."<sup>72</sup>

The Court must receive an Article 21 action from either the Bundestag, the Bundesrat, or the federal government (the chancellor and his cabinet).<sup>73</sup> This provision of the BVerfGG minimizes the chance for abuses of Article 21 to occur. In fact, the Court has used this jurisdiction only two times: to ban the neo-Nazi Socialist Reich party in 1952, and in 1956 to declare the Communist party unconstitutional.<sup>74</sup>

Constitutional disputes between the highest organs of the government, known as *Organstreit* proceedings are also under the Court's jurisdiction. The Court supervises the operation and internal procedures of the executive and legislative organs and maintains the proper institutional balance between them.<sup>75</sup> Federal organs eligible to initiate *Organstreit* cases include the federal president, the Bundesrat, the federal government, the Bundestag, and units of these organs granted independent rights by their rules of procedure

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<sup>72</sup> GG, Article 21 (2).

<sup>73</sup> BVerfGG, Sec. 43.

<sup>74</sup> See Socialist Party Reich Case, 2 BVerfGE 1 (1952); and Communist Party Case, 5 BVerfGE 85 (1956).

<sup>75</sup> Kommers, Const. Juris., p. 13.

or the Basic Law.<sup>76</sup> Units in the Bundestag eligible to bring cases include the Foreign Affairs and Defense committees (BVerfGG, Article 45a.), the Defense Commissioner of the Bundestag (BVerfGG, Article 45b.), and the Petitions Committee (BVerfGG, Article 45c.). Individual deputies deprived of their rights or entitlements under Articles 47, 48, and 116 can also bring cases. Parliamentary political parties may initiate an Organstreit case to vindicate their status as a legitimate parliamentary party, and even non-parliamentary political parties may invoke this jurisdiction in some cases.<sup>77</sup> If a political party is denied a place on the ballot, or if its right to mount electoral activity is infringed by one of the high organs of the Federal Republic, the party can initiate an Organstreit proceeding against the organ in question. Such action is not available, however, to administrative agencies, governmental corporations, churches, or other corporate bodies with quasi public status.<sup>78</sup>

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<sup>76</sup> Kommers, Const. Juris., p. 528.

<sup>77</sup> The Court ruled on the specific circumstances in Plenum Jurisdiction Case, 4 BVerfGE 27 (1954), and Party Finance Case 1, 20 BVerfGE 56 (1966).

<sup>78</sup> Kommers, Const. Juris., p. 14. A very good general discussion of the Organstreit procedures and the Court's jurisdiction is found in Gerhard Leibholz and Reinhard Rupprecht, Bundesverfassungsgerichtsgesetz, Cologne-Marienburg: Verlag Dr. Otto Schmidt, 1968, pp. 169-207.

Constitutional dispute cases involving the Laender and the national government usually occur because of conflicts in state enforcement of federal law and federal supervision of that enforcement. Only the state or federal government, acting on behalf of its cabinet, can bring such a case. In addition, the court may hear "other public law disputes" between the federation and the states, between different states, or within a state if no other legal recourse is provided. As in Organstreit proceedings, the complaining party must assert that the act or omission in question has directly infringed on a right or duty assigned by the Basic Law.<sup>79</sup> For its part, the Constitutional Court is obliged by law to declare whether the act or omission infringes the Basic Law and, if so, to specify the provision violated. In the process of deciding such a case, the Court "may also decide a point of law relevant to the interpretation of the provision of the Basic Law."<sup>80</sup>

Concrete judicial review (konkrete Normenkontrolle) is another important jurisdiction of the Court, arising out of an ordinary lawsuit. If a German court is convinced that a relevant federal or state law under

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<sup>79</sup> Kommers, Const. Juris., p. 14.

<sup>80</sup> BVerfGG, Sec. 67.

which a case has arisen violates the Basic Law, it must refer the constitutional question to the Federal Constitutional Court before the case can be decided. Judicial referrals do not depend on the issue being raised by one of the parties in the case. A lower court is obliged to make such a referral when convinced that a law under which a case arises is in conflict with the constitution. The judge (or a majority of the judges if it is a collegial court) must sign a petition with a statement of the legal provision at issue, the Basic Law provision allegedly violated, and the extent to which a constitutional ruling is necessary to decide the dispute.<sup>81</sup>

The last major area of the Court's competency is abstract judicial review (abstrakt Normenkontrolle). In contrast to the United States Supreme Court, which can only exercise jurisdiction in the context of litigation, the Constitutional Court has the power to decide differences of opinion about the compatibility of a state or federal law with the Basic Law, merely on the request of a state government, the federal government, or one-third of the members of the Bundestag.<sup>82</sup> The

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<sup>81</sup> BVerfGG, Secs. 63-67.

<sup>82</sup> Ibid, Sec. 76.

Court requires the parties raising the question to submit written briefs, but the petitioners also have the opportunity to submit oral arguments if they so desire.<sup>83</sup> Either way, the Court must examine the validity of the law in question, and a decision against its validity makes the law null and void.<sup>84</sup>

### The Operationalization of Judicial Power

The Federal Constitutional Court stated the basis for its authority and laid the foundation for the future expansion of its powers in its very first decision, the Southwest Case of 1951.<sup>85</sup> The Court specified five fundamental elements of constitutional policy in a free and democratic system. First, the Federal Constitutional Court is absolutely supreme in the interpretation of the Basic Law. Second, the Court's function is to examine the legality or validity, not the wisdom, of public policy. The Legislature has wide discretion to make policy under the Basic Law; yet the extent of that discretion, said the Court, is a constitutional question on which it reserves finality of

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<sup>83</sup> BVerfGG, Secs. 22 and 25.

<sup>84</sup> Ibid, Sec. 80 (2).

<sup>85</sup> 1 BVerfGE 14 (1952).

decision. Third, constitutional provisions are to be interpreted not as independent rules standing alone, but within the context of the Basic Law as a whole. No constitutional right, duty or power is absolute; it is to be measured instead by competing rights and responsibilities under the Basic Law. Fourth, there are certain fundamental principles, such as democracy, federalism, and the rule of law, which can be deduced from the Basic Law as a whole and to which all other constitutional provisions are subordinate. Finally, certain higher law principles constitute standards against which positive law and the actions of public officials are to be reviewed.<sup>86</sup>

The appeal to higher law principles was a complete juridical break with the recent historical past and indicated a judicial need to stand up firmly in support of a free society after the atrocities that occurred during the Nazi regime.<sup>87</sup> The major influences for this reasoning were the Roman Catholic law doctrines which laid the foundation for German constitutional thought in the eighteenth and nineteenth centuries. The major representatives of the Christian - natural law tradition

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<sup>86</sup> 1 BVerfGE 14 (1952).

<sup>87</sup> Supra note 83, pp. 32-40. It is interesting to note that this case was decided by the Second Senate, which included several Catholic jurists and several Justices who fled Nazi Germany.

in the Federal Republic have been the Christian Democratic Party (CDU) and its Bavarian affiliate, the Christian Social Union (CSU). The substantive natural law values found in the Basic Law include provisions dealing with social morality, religious education, and the rights associated with marriage and family.

The Constitutional Court not only acknowledged the common German perception that the Basic Law is a value - oriented constitution, but it declared in the Elfes Case,<sup>88</sup> that the Basic Law contained an "objective order of values." According to the Court, the Constitution incorporates the "basic value choices" of its framers, arranged in a hierarchical order. The most important value is "a free and democratic order" crowned by the principle of "human dignity." The framers froze the highest of their values permanently in the Basic Law, requiring all organs of government to make them a reality. In addition, the Court declared that all constitutional provisions "must be interpreted in such a way as to render them consistent with the fundamental principles of the Basic Law and its value order."<sup>89</sup> Thus, even a constitutional amendment is subject to

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<sup>88</sup> 6 BVerfGE 32, 40 (1957).

<sup>89</sup> Klass Case, 30 BVerfGE 1, 19 (1970).



review on constitutional grounds if it offends or abrogates one of these principles, giving rise to the possibility of an "unconstitutional constitutional norm."<sup>90</sup>

The Court has also formulated other "unwritten constitutional principles" believed to have their source in the organizing ideas of the Basic Law's founding fathers. One of these is the *Bundestreue* principle or "federal comity", which the Court has held requires federal and state governments not only to observe the prescribed rules of the Basic Law which govern their relationship, but also requires them to exercise restraint as well and to give due regard to each other's interests in the planning and execution of policy.<sup>91</sup> The Court also linked the *Bundestreue* principle to the explicit declaration in Article 20(1) that the Federal Republic is a federal state, concluding:

"the constitutional principle of federalism that governs in a federal state thus embraces the legal duty of the Federation

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<sup>90</sup> Civil Servant Case, 4 BVerfGE 294, 296 (1956).

<sup>91</sup> The first statement of this doctrine appeared in the Interstate Financial Adjustment Case, 1 BVerfGE 131 (1952). The case involved a request from Bavaria for an injunction against the distribution of federal funds for public housing without unanimous consent of the *Laender*, which the governing statute required. The Court upheld the federal legislature's power to require such consent, and went on to say that the *Laender* could not withhold their consent arbitrarily; the duty to respect the interests of the other states required the objecting Land to have some objective justification.

and all its members to act in a manner consistent with the federal principle."<sup>92</sup>

The Parliamentary Council members who drafted the Basic Law described the principle of federal comity as an essential element of federalism,<sup>93</sup> and the Court wasted little time in using the principle.

In the Bavarian case the principle was invoked against the Laender; in the Federal Television Case, 12 BVerfGE 205 (1961), it was applied against the Federation. Before setting up a second network in 1960, the federal government consulted with the prime minister of only one state, promulgating the plan without responding to a counterproposal from the other Laender. The Court ruled that the Federation violated its constitutional duty by dealing with only one state on an issue involving all of them.<sup>94</sup>

The Court expanded its definition of the Bundestreue principle during the controversy over nuclear weapons being stationed in Germany in the late 1950s. After losing the vote in the Bundestag to ban

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<sup>92</sup> 1 BVerfGE 131 at 315. In plain English the federal principle simply means that the federal government must take into consideration the opinions and interests of the individual states when forming a policy which affects them, and vice versa.

<sup>93</sup> Herrenchiessee Bericht, 2 Akten und Protokolle, pp. 504, 533.

<sup>94</sup> 12 BVerfGE 205, 254-259.

atomic weapons, the Social Democratic Party (SPD) organized referenda in several cities and states to pressure the government to change its policy. The Court not only ruled that the referenda interfered with the federal government's exclusive authority in defense matters,<sup>95</sup> but that fidelity to the federal system required the Laender not merely to refrain from infringing federal interests themselves, but to actively prevent local governments from doing so as well.<sup>96</sup>

As these examples suggest, the Bundestreue principle gives the Court significant leeway in determining whether one government has failed to pay sufficient respect to the interests of another. Constitutional theorists and legal scholars have urged caution in invoking this principle to prevent encroachment by the Court on the discretion conferred upon various governmental bodies by the Basic Law.<sup>97</sup> Perhaps in response to such criticism, the justices had rarely invoked the Bundestreue principle as the basis for unconstitutionality in recent years.

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<sup>95</sup> 8 BVerfGE 104, 116-118 (1958).

<sup>96</sup> 8 BVerfGE 122 (1958).

<sup>97</sup> Among others, see Konrad Hesse, Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 18th ed., 1991, p. 221: "What the Laender have lost in terms of autonomous power to formulate policy they have made up for in terms of influence on the central state."

After many years with little use, however, the Bundestreue principle made a dramatic reappearance in 1992, when the Court ruled that the Federation and the other Laender had a duty to help the nearly bankrupt states of Bremen and the Saarland that went beyond the normal limits of the equalization envisioned by Article 107.<sup>98</sup> The justices held that the federal government violated the principle by favoring the Saarland over Bremen in providing emergency assistance.<sup>99</sup> Although there was no occasion to say anything about the financial condition of the eastern states, it cannot have escaped the Court's attention that the new Laender were far worse off than either Bremen or the Saarland. By invoking the Bundestreue principle in this case, the justices have laid the groundwork for ensuring that the more comfortable western Laender fulfill their moral obligation to share their resources with their compatriots in the east.

The Court has also developed the principle of the "social welfare state" (*Sozialstaatprinzip*) from Article 20 of the Basic Law, declaring Germany to be "a democratic and social federal state." The concept of

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<sup>98</sup> 86 BVerfGE 148, 258-270 (1992). Article 107 (2) of the Basic Law states in part: "Such statute shall ensure a reasonable equalization between financially strong and financially weak Laender."

<sup>99</sup> 86 BVerfGE 148, pp. 271-276.

the social welfare state, however, goes back well before the Basic Law. Its origins lie in the Lutheran notion that the people owe allegiance to the prince, and the prince in turn is bound to see to the welfare of his people.<sup>100</sup> Backed by strong socialist influences, the social state as a concept of political order found its way into the Weimar Constitution, and today is regarded as an essential part of the German constitutional tradition.<sup>101</sup> The focus of this principle rests primarily in Articles 6 and 7 of the Basic Law; for the purposes of this paper only Article 6 is addressed here. Article 6 directs the federation to promote marriage, protect the family and watch over parental childcare. The Court has directly enforced the affirmative requirement of Article 6(4) that "every mother is entitled to the protection and care of the community", making clear in 1972 that the wording of Article 6(4) not only imposed a legal obligation on the legislature but also expressed a constitutional value judgment with binding force throughout the field of public and private law.<sup>102</sup>

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<sup>100</sup> Ernst Forsthoff, Rechtsstaatlichkeit und Sozialstaatlichkeit, Darmstadt: Wissenschaftliche Buchgesellschaft, 1968.

<sup>101</sup> Ernst Benda, "Der soziale Rechtsstaat" in Handbuch des Verfassungsrechts, Berlin: Walter de Gruyter, 1984, pp. 477-544.

<sup>102</sup> See 32 BVerfGE 273, 277 (1972).

Under the Weimar Republic, federal statute prohibited the discharge of both public and private employees during or within four months after a pregnancy.<sup>103</sup> Although the Court held in 1972 that an employer did not have to extend this protection to an employee who had negligently failed to give her employer the requisite notification of her condition,<sup>104</sup> it reversed itself seven years later by stating that Article 6(4) forbade the state to make excusable failure to meet the notice requirement a ground for denying the statutory immunity from loss of private employment.<sup>105</sup> The Court went even further in 1991, declaring that an expectant or recent mother could not be discharged even when her services were no longer required in light of the abolition of many offices of the former East German government.<sup>106</sup>

The Court has even gone so far as to require state subsidies for children by holding that Article 6(1) ("marriage and the family shall enjoy the special protection of the state"), in conjunction with

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<sup>103</sup> Article 119 of the Weimar Constitution discussed in Louise W. Holborn (ed.), German Constitutional Documents Since 1871, New York: Praeger Publishers, 1970, pp. 160-167.

<sup>104</sup> 32 BVerfGE 273, 277 (1972).

<sup>105</sup> 52 BVerfGE 357, 359-360 (1979).

<sup>106</sup> 84 BVerfGE 137, 155-156 (1991); also 85 BVerfGE 360 (1992). The Court ruled that Article 6(4) applies to the period of pregnancy, birth, and nursing. It would be interesting to see the statistics on the length of nursing among working mothers subsequent to this decision.

traditional civil service principles (Article 33(5)) and the Sozialstaatsprinzip demanded that public officers with children receive additional compensation and that child care expenses be deductible from taxable income.<sup>107</sup>

In addition to taking care of mothers and families, Article 6 directly addresses the rights of children, especially illegitimate ones.<sup>108</sup> The Court has held that Article 6(5) not only limits outright discrimination against illegitimate children,<sup>109</sup> but justifies and even requires special privileges to compensate for the disadvantages suffered by illegitimate children;<sup>110</sup> otherwise they could not enjoy the actual equality of opportunity to which they are entitled.

The Court's approach to constitutional interpretation has developed through a combination of these principles and some of the traditional theories of judicial reasoning.<sup>111</sup> Several general theories exist,<sup>112</sup>

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<sup>107</sup> 44 BVerfGE 249, 262-268 (1977); 61 BVerfGE 319 (1982); and 82 BVerfGE 60 (1990).;

<sup>108</sup> Article 6(5) states: "Illegitimate children shall be provided by legislation with the same opportunities for their physical and mental development and for their place in society as are enjoyed by legitimate children."

<sup>109</sup> 41 BVerfGE 1, 18 (1976) and 74 BVerfGE 33, 38 (1986).

<sup>110</sup> 17 BVerfGE 280, 283-286 (1964) requiring a longer period of child support from the father; 8 BVerfGE 210, 214-221 (1958) upholding a judicial proceeding to establish paternity; and 79 BVerfGE 243, 251-253 (1988) guaranteeing an illegitimate child's right to know his father's identity.

<sup>111</sup> Although factions based on party affiliation appear in attitudes toward religion in public life and questions of social welfare, no significant differences on broad questions of constitutional interpretation have been apparent. The only clear difference in interpretation has been that the Second Senate has exercised its authority with less restraint than the First. See Kommers, Jud. Pol., pp. 113-160.

but the Court's most common method is the "teleological method", which seeks to specify the present purpose or function of certain rules laid down in the Basic Law; that is, the Court interprets the Basic Law in light of changing social conditions.<sup>113</sup> The teleological method, like the other theories, assumes that there is, here and now, a "right" meaning of the constitutional text. But because the standards used in discovering this meaning are unclear, the teleological method is prone to subjectivism. As noted legal scholar and constitutional theorist Karl Heinrich Friauf observed, the teleological method is a "gateway through which consideration of social policy and even the political philosophy of the judges flow into the interpretation of the Constitution."<sup>114</sup>

### Conclusion

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<sup>112</sup> G. Leibholz and J.J. Rinck, Grundgesetz fuer die Bundesrepublik Deutschland: Kommentar an Hand der Rechtsprechung des Bundesverfassungsgericht, 4th ed., Cologne-Marienburg: Verlag Dr. Otto Schmidt KG, 1971, pp. 3-16.

<sup>113</sup> Princess Soraya Case, 34 BVerfGE 269 (1973). The Court's decision stated: "The interpretation of a statutory norm cannot always remain tied to the meaning it had at the time of its enactment. ... as social conditions and attitudes change, so under certain circumstances does the content of the law. In such a situation the judge may not simply take refuge in the written text; he must deal freely with the statute if he is to meet his obligation to declare the law."

<sup>114</sup> Karl Heinrich Friauf, "Techniques for the Interpretation of Constitutions in German Law", in Proceedings of the Fifth International Symposium on Comparative Law, Ottawa: University of Ottawa Press, 1968, p. 9.



This rather broad method of interpretation, applied in conjunction with the unwritten constitutional principles declared by the Court, has left significant room in which the Court can maneuver. The relative lack of divergence among the justices as to constitutional interpretation supports the premise that who sits on the Court makes little significant difference to the decision making process. The few early confrontations can be attributed to the equal representation of the opposing parties in the post-war construction of the Court and its search for an identity. More importantly, the development of a hierarchy of values against which the Court evaluates constitutional questions has focused the operation of the Court on its role in the political system as the protector of individual rights. At the same time, the Court balances these rights against the interests of the government in the context of the present social conditions, political conditions, and the Basic Law's own history through the use of the teleological method of interpretation.

The questions of how the Court balances these factors and what conditions effect their decisions are the subject of the next chapter.

### CHAPTER THREE

Before dealing with the case studies in this chapter, it will be useful to reiterate the key elements of the preceding chapters as a basis for the more detailed analysis to follow. One of the most important aspects of the creation of the Basic Law is the influence of Hitler's twelve year 'Reign of Terror'. The destruction of human life, the scorn for justice or any restraint on power, and the subjugation of whole races of people by Nazi Germany left an indelible mark on German society and compelled the framers of the Basic Law to insure that such a phenomenon could never again occur inside the borders of the Federal Republic.

In the Constitutional Court the founders of postwar Germany created the "supreme guardian of the constitution", vested with far-reaching powers of control vis-à-vis all other governmental bodies. The framers charged the Court with protecting the rights of the individual against infringement by any public authority, and with ensuring the free and democratic social order of the state. In defining its role in the political system and developing its method of constitutional interpretation, the members of the Court

have endeavored to confirm the hierarchy of values present in the Basic Law. The result is a balancing, not only between the rights of the individual and the authority of the state, but between the legal issues and the socio-political environment in which the Court must decide the case in question.

It is within this context that the chapter addresses the contentious issues of abortion and immigration/asylum. With the recent moves by Germany to relax its abortion law and tighten its asylum policy, along with the Court's decisions on these issues, the two case studies have significant political importance. They also provide the opportunity for comparison with the policies in other European countries. The results of this analysis indicate that the Court, even with the individual political and religious orientations of its justices, has generally followed a path of constitutional interpretation which has balanced its role in the German political system with historical and social influences. The result is a Constitutional Court with more political influence than it originally possessed.

## The Issue of Abortion

The issue of abortion came before the Constitutional Court as a result of an abstract judicial review procedure initiated by the CDU and some of the state governments, who questioned the constitutionality of the newly passed Penal Code Reform Act of 1974. Since the German Empire first adopted its Penal Code in 1871, Section 218 had forbidden all abortions. The only exception, in case of a serious threat to the mother's life, was judicially created in 1927 by the Supreme Court of the Weimar Republic.<sup>115</sup> Under the new law, abortion, except in certain circumstances, remained a crime after the thirteenth day of conception. These exceptions, however, were much broader than the original law and were the main reason for the constitutional challenge.

The plaintiffs argued that the Reform Act violated the right to life of the unborn child as protected by Article 2(2) of the Basic Law, which reads: "Everyone shall have the right to life and to physical integrity." This constitutional provision posed the same questions as the "life" provision in Section 1 of the U.S.

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<sup>115</sup> Judgement of March 11, 1927, 61 RGSt 242.

Constitution's 14th Amendment: Is the embryo/fetus an "everyone" or "person" within the meaning of Article 2(2), and does "life" include the life or potential life of the unborn child?

#### The Constitutional Court's Decision<sup>116</sup>

After eight months of deliberations, the Court struck down Section 218a of the Abortion Reform Act by a vote of 6-2, effectively directing parliament to reinstate the criminal sanctions under the Penal Code. Until parliament enacted the necessary law, the Court announced the following rules to govern public policy on abortion: First, Section 218b authorized abortions within the first twelve weeks for medical or eugenic indications; second, pregnancy resulting from criminal assault could be terminated by a licensed doctor within the first twelve weeks without sanctions; finally, the courts would have discretionary power to withhold penalties for abortions in the first twelve weeks in situations where abortion was the only reasonable

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<sup>116</sup> 39 BVerfGE 1 (1975). The citations of the decision are taken from translations in Mauro Cappelletti and William Cohen, Comparative Constitutional Law, Indianapolis: Bobbs- Merrill Co., 1979, and Kommers, Const. Juris. .

alternative to relieve a pregnant women of a "grave hardship."<sup>117</sup>

The Court's decision included a lengthy discussion of the history of the penal provisions on abortion and the legislative background of the new law. It then summarized the arguments advanced on both sides of the dispute and noted:

"The statutory regulation of the Fifth Statute to Reform the Penal Law can be examined by the Constitutional Court only from the standpoint of whether it is compatible with the Basic Law. The decision regarding the standards and limits of legislative freedom of decision demands a total review of the constitutional norms and the hierarchy of values contained therein."<sup>118</sup>

The discussion which followed in the next 120 or so pages detailed the legal points that the members of the Court found applicable to the case, as well as an examination of abortion as a socio-political problem. The Court found that the Abortion Reform Act did not

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<sup>117</sup> Cappelletti/Cohen, p. 587. The Court's authority to issue such orders or regulations is derived from BVerfGG, Sec. 35, which states: "The Federal Constitutional Court is authorized to designate who shall implement its judgment; in individual cases it may also regulate the manner of its execution." The notion of a 'grave hardship' was defined by the Court as 'a severe condition of social, economic, or psychological distress.'

<sup>118</sup> Kommers, Const. Juris., p. 349.

meet constitutional standards in several areas. First, it failed to express disapproval of abortion. The justices confirmed that the protection of life also encompasses potential human life, noting that all parties in the debate that led to the Abortion Reform Act had unanimously agreed that life growing in the womb enjoyed the protection provided by Article 2(2). The law must make clear, said the Court, that abortion is "an act of killing." Second, the statute failed to distinguish between valid and invalid abortions. Third, the counseling provisions were flawed because they failed to deter abortion. The Court noted that the counseling boards provided in the statute were required only to convey information, not to dissuade women from procuring abortions. Finally, the statute allowed the physician who informed the pregnant woman of available social assistance to also perform the abortion.<sup>119</sup>

However, the justices were not prepared to rule that the Basic Law required the protection of unborn life regardless of the cost to the mother. "Some balancing between the rights of the mother and fetus is permissible," noted the Court, "as long as both constitutional values be perceived in terms of their

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<sup>119</sup> Kommers, Const. Juris., p. 355.

relationship to 'human dignity', which is the heart of the political value system under the Constitution."<sup>120</sup> The rights of the unborn child and mother may be balanced, the justices emphasized, so long as the rightful claims of both are pondered within a framework of respect for the supreme value of human life. In closing, the Court referred to the death and destruction of the Nazi era and noted that the Basic Law was a reaffirmation that:

"human life is the highest value of the political order. Moreover, the Federal Constitutional Court was created so that this value would be observed by all organs of the state. Thus, in striking down the Abortion Reform Act, the Court is doing nothing less or more than upholding the Federal Republic's constitution."<sup>121</sup>

### Analysis

The decision by the members of the Court appears, upon further analysis, to be the product of judicial balancing between the legal issues of the case and other influences. In seeking to understand the Court's

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<sup>120</sup> Kommers, Const. Juris., p. 630.

<sup>121</sup> Cappelletti/Cohen, pp. 642-643.



decision, critics have offered many opinions on possible extra-legal influences and motivations which could have affected the reasoning process. These factors can be grouped into political, social, and historical influences, and it is in these groups that this chapter addresses the Court's ruling.

Of the three groups, the political reasons are probably the weakest arguments for explaining the outcome of the case. Some critics contend that CDU representatives engaged in "manipulation of the constitutional process rather than a sincere quest for constitutional interpretation",<sup>122</sup> because the Social-Free Democratic coalition government supported the new statute. But since a majority of abstract judicial review proceedings are initiated against the government by minority or opposition parties, such a charge has little merit. Critics also note that five out of the six justices in the majority were identified with the Christian Democratic Party, but tension between parties cannot explain the decision for two reasons. First, the justices had no doctrinal disagreements over the right to life of the fetus at all stages of pregnancy.

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<sup>122</sup> Gerstein and Lowry, "Abortion, Abstract Norms, and Social Control: The Decision of the West German Federal Constitutional Court", Emory Law Journal, vol. 25, 1976, pp. 849-880.

Instead, the dissenting opinion dealt with the proper scope of judicial review.<sup>123</sup> Second, the majority of Christian Democrats in the Bundestag supported permitting abortions for social reasons, a solution originally appearing in a bill introduced by the Social Democrats.<sup>124</sup> The argument that political reasons were the motivation for the Court's decision, then, is an oversimplification of the genuine complexity of the issues facing the members of the Court in the abortion controversy.

Before addressing the social influences, it is useful to compare the differences between the German and American concepts of society and the role of the individual. German ideas of individuality differ greatly from those in the United States; in fact, the Basic Law itself sets limits on the development of an individual's personality which are not present in the U.S. Constitution. Limitations found in Article 2(2) include the "moral code", the "constitutional order", and the "rights of others". The compilation of these limits emphasizes the social nature of the individual in Germany. As the Court noted:

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<sup>123</sup> Cappelletti/Cohen, p. 5 .

<sup>124</sup> Gerstein and Lowery, pp. 856-858.

"The concept of man in the Basic Law is not that of an individual; rather, the Basic Law has decided in favor of a relationship between individual and community in the sense of a person's dependence on and commitment to the community without infringing upon a person's individual value."<sup>125</sup>

In addition, the term "constitutional order" found in Article 2(2) embraces the concept of the "social welfare state" discussed in Chapter 2. When combined with the protective nature of Article 6 concerning the family and its fundamental commitment to children, this principle imposes an affirmative duty on the state to establish an environment within which the family can survive and flourish.

In the United States, on the other hand, the focus is on the individual as an autonomous moral agent, a totally independent and unbounded private being. The community may not officially impose itself on an individual, but rather it consists of free individuals who are the sole basis for resolving issues of moral significance. This current of thought is reflected in the rights-oriented constitutionalism of scholars like

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<sup>125</sup> 30 BVerfGE 1 (1970), p. 20.

R.S. Dworkin, Dave Richards, Roger Smith, and Michael Perry, who base their theories on a cold rationality that excludes all human feeling and personal identity from constitutional interpretation.<sup>126</sup>

In the realm of social motivations, the members of the Court directly mentioned the widespread incidence of illegal abortion in Germany, but reasoned that this phenomenon was due to the original law's lack of clarity in differentiating between valid and invalid abortions. This acknowledgment of the problem indicated the Court's desire to address the situation, and can be seen as the major impetus for allowing abortions for social reasons. It is the only plausible reason for the apparent legal contradiction in the Court's ruling; specifically, the Court's major premise that the unborn child's right to life outweighs the mother's individual interests, unless her own life is threatened. By allowing abortions for 'social indications' (serious financial or psychological hardship), the members of the Court contradicted their doctrinal approach, allowing protection against unreasonable deprivations of the women's future life plans.

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<sup>126</sup> See R.S. Dworkin, Taking Rights Seriously, (1977); D. Richards, The Moral Criticism of Law, (1977); R. Smith, Liberalism and the American Constitutional Law, (1985); and M. Perry, The Constitution, the Courts, and Human Rights, (1982).

In parallel with the discussion of illegal abortions in West Germany, the members of the Court addressed the abortion policies of other Western countries. The constitutional courts of Canada, Austria, Italy, and France were less inclined than the German justices to recognize the rights of the unborn during early stages of pregnancy.<sup>127</sup> Even so, they were more inclined than the U.S. Supreme Court to recognize unborn life as a fundamental value deserving constitutional protection.<sup>128</sup> The Federal Constitutional Court, in referring to these 'modernized or 'liberalized' penal regulations emphasized that the judicial standards of these countries were quite different from West Germany, and pointed out the significant rise in the numbers of abortions after the implementation of those policies. The justices went on to say that "the legal standards of those countries do not apply to West Germany."<sup>129</sup>

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<sup>127</sup> In every case except Canada, the challenged statute decriminalized abortion when performed by a physician with the pregnant woman's consent in the first 10-12 weeks of pregnancy. For a detailed discussion of the French, Italian, and Austrian cases, see M. Nijsten, Constitutional Law and Practice: A Comparative European-American Study, 1985 (Doctoral Thesis, Department of Law, European University Institute, Florence, Italy). The Canadian case is listed as *Morgentaler v. The Queen*, 53 D.L.R.3d 161 (Can. 1975).

<sup>128</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>129</sup> Cappelletti/Cohen, P. 641.

Another argument of social influence is that the religious affiliations of the justices played a major role in the Court's decision. Contrary to some critical opinions,<sup>130</sup> the religious backgrounds of the justices, especially Catholicism, does not appear to be the primary factor in the Court's rulings. Only three of the eight justices who decided the cases were Catholic. Half of the justices in the majority, including President Ernst Benda, who occupied a critical role in the decisional process, were Protestants. Moreover, the principles of the cases were incompatible with Catholic doctrine, which holds that the soul is present at fertilization; the Court ruled that the fetus assumes personhood at implantation. The Court also held that abortions are constitutionally permissible in cases of severe hardship, whereas Catholic theology holds that abortion is never permissible. It is interesting to note in this argument that it was the minority opinion that appealed to theology and canon law in partial support of its conclusion that abortion in the early months of pregnancy did not constitute conduct deserving of criminal punishment.

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<sup>130</sup> Among others, see Henry W. Ehrmann, Comparative Legal Cultures, Englewood Cliffs, N.J.: Prentice-Hall, 1976.

The final group of extra-legal arguments concerns the historical influence on the Court's decision. As the Court stated in its decision, the right to life contained in the Basic Law "may be explained principally as a reaction to the 'Destruction of Life Unworthy to Live', the 'Final Solution', and the 'Liquidations' carried out by the Nazis."<sup>131</sup> The justices went on to say that the Basic Law was founded on principles of state organization which were "explainable only in the historical experience and spiritual and moral confrontation with the previous system of Nazism."<sup>132</sup> The framers of the Basic Law included an extensive discussion of these events in their search for a constitution which would prevent such inhuman brutalities from ever occurring again. The Court also pointed to the abolishment of the death penalty set forth in Article 102 as an "affirmation of the fundamental value of human life."<sup>133</sup> In light of the 'social indications' provision of their decision, however, the historical influence does not seem to be the major factor in the reasoning of the Court, but did play a supporting role in the justices' decision.

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<sup>131</sup> Cappelletti/Cohen, p. 587.

<sup>132</sup> Ibid, p. 587.

<sup>133</sup> Ibid, p. 588.

## Abortion Revisited

In the summer of 1992, after reunification, Germany adopted a new abortion statute liberalizing the law along the same lines as those rejected by the Court in 1975. Once again, the justices struck down the abortion law by a vote of 5-3, only allowing abortion for the medical, eugenic, ethical and social reasons outlined in their earlier decision.<sup>134</sup> In one significant respect, however, the Court modified its position: Article 2(2) did not require that either the woman or her doctor be punished criminally for an abortion performed in the first twelve weeks of pregnancy if she adhered to her decision after undergoing counseling designed to change her mind. The practical result is that a woman who wants an early abortion can effectively get one if she can afford it; but she does not have a constitutional right to have the state foot the bill.<sup>135</sup> The three partial dissents in the case once again dealt with the scope of judicial review, finding no fault with the

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<sup>134</sup> 88 BVerfGE 203 (1993).

<sup>135</sup> Ibid, pp. 321-322. Although the Court prohibited insurance payments for 'illegal' abortions, social assistance payments for the poor were specifically continued to allow poor women to seek medical help.



"state's constitutional obligation to protect unborn human life from its inception."<sup>136</sup>

The reasoning process appears nearly identical to the initial decision, and it is relatively easy to contend that the social influences which impacted the earlier ruling played a similar role in motivating the Court's ruling. The modification regarding criminal sanctions is directly related to the guidance that the majority justices gave concerning the counseling provisions of the 1975 decision; that is, that the counseling provided to the woman have a pro-life orientation and be administered by a qualified individual who is not the doctor performing the abortion. This modification can be seen as a result of the social ramifications of the reunification of East and West Germany. Since abortion was a legal and widespread method of birth control in East Germany, it would seem rather unfair for the pregnant women who were able to get abortions prior to reunification to no longer have that option and face the possibility of criminal punishment.

This examination of the abortion issue and the two major decisions by the Court indicate that the members

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<sup>136</sup> 88 BVerfGE 203, p. 339.

of the Court have in fact used their broad jurisdiction to allow other extra-legal issues to influence the constitutional process. The same result can be seen in the following analysis of Germany's immigration and asylum policy.

### The Issue of Immigration and Asylum

Although Germany has used the principle of nationality by descent (*jus sanguinis*) since 1870, it featured most prominently in Germany's early post-war history, as West Germany granted refuge to more than eight million German expellees and refugees from Eastern Europe after World War II. In the following years there was a constant influx of refugees from East Germany (more than three million). The same legislation that governed these arrivals has continued to allow people claiming German descent from Eastern Europe to enter Germany, even though the reasons for the legislation - expulsion and persecution of German speaking communities in the aftermath of Hitler's war against the Soviet Union- no longer apply. In 1991 and 1992 almost one million people made use of this right.<sup>137</sup>

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<sup>137</sup> Federal Ministry of the Interior Report of May 1, 1993.

The other form of immigration has been migrant laborers who were recruited to work in Germany during the fifties and sixties; they were not expected to immigrate but to return home after some years. Instead, the migrant laborers stayed and brought their families. The result is an immigrant community totaling over seven percent of the population, with regional percentages as high as thirty percent in some towns.<sup>138</sup>

German law divides these immigrants into two groups; ethnic Germans are German citizens under nationality law, while all others are considered foreigners without political rights. Following the example of other European countries three German states, Hamburg, Schleswig-Holstein, and Bremen extended voting rights in local government elections to foreign residents in 1993.<sup>139</sup> The Constitutional Court, in an abstract judicial review, struck down the state laws as unconstitutional.<sup>140</sup>

The main thrust of the Court's reasoning was that the definition of "the people" as it appears in the text of the Basic Law refers to "the German people"; voting

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<sup>138</sup> Federal Ministry of the Interior Report of May 1, 1993.

<sup>139</sup> According to the Minister of the Interior Report for June, 1994, Germany has a resident foreign population of approximately 6.49 million out of a total population of about 79.36 million.

<sup>140</sup> 83 BVerfGE 37 (1994) Schleswig-Holstein; 83 BVerfGE 60 (1994) Hamburg.

rights for people not members of "the people" would therefore be undemocratic: "An election in which foreigners take part," said the justices, "cannot provide democratic legitimacy to government."<sup>141</sup>

But while overruling these attempts at enfranchising the immigrant minority, the Court did hold out two possible alternatives. First, the justices inferred that a constitutional amendment would be possible.<sup>142</sup> This option appears remote upon further inspection, because of Article 79's restrictions on amending the basic principles of the constitution, among them the principle of democracy. This is the same principle that the Court used as the basis for their ruling against voting rights for foreigners. The second point that the justices cited is based on their agreement with the proponents of enfranchisement, namely that "in a democracy those enjoying political rights and those subject to government should not fall permanently apart."<sup>143</sup> The Court argued that this democratic defect could not be remedied by extending voting rights to foreigners, however, but only by extending citizenship. This statement gave a powerful boost to the proponents

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<sup>141</sup> 83 BVerfGE 60, p. 81.

<sup>142</sup> 83 BVerfGE 37, p. 59.

<sup>143</sup> 83 BVerfGE 60, p. 84.

of nationality law reform, which is addressed briefly below.

In January, 1991, parliament eased restrictions on obtaining German citizenship with the intent of facilitating the integration of long-term foreign residents and their families. Foreigners between the ages of sixteen and twenty-three will be naturalized "as a rule"<sup>144</sup> if they meet the following conditions: (1) have legally resided in Germany for eight years, (2) have visited a school in Germany for six years, (3) have renounced or lost their previous citizenship, and (4) have not been convicted of a major felony. Foreigners who have legally resided in Germany for fifteen years will be naturalized if they: (1) renounce or lose their previous citizenship, (2) have not been convicted of a major felony, and (3) are able to support themselves and their family. The spouse and underage children can also be naturalized with the original applicant without having to fulfill the fifteen-year residency requirement.<sup>145</sup>

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<sup>144</sup> In December, 1992, the government and opposition agreed to further facilitate naturalization by giving foreigners the "unrestricted right" as opposed to the "as a rule" right if they fulfill the conditions mentioned above.

<sup>145</sup> Conditions for naturalization taken from an information paper produced by the German Information Center, New York, 1993.

The most contentious way into Germany, however, is the claim for asylum. Article 16(2) of the Basic Law afforded the right to asylum to any person "persecuted on political grounds" anywhere in the world.<sup>146</sup> Those who claimed asylum were entitled to an individual hearing to determine their eligibility. Table 2 shows the tremendous increase in the number of asylum seekers from 1983-1993, which resulted in a severe backlog of several years in determining the merits of a case. The Court ruled that while waiting for their asylum hearings, asylum seekers could legally stay in Germany, and that the state must continue to feed, house and provide assistance to them until the courts reached a final decision on their cases.<sup>147</sup>

The Court has ruled several times on the issue of immigration and asylum, expanding the definition of political persecution to include religious and racial discrimination.<sup>148</sup> The justices further broadened the scope of Article 16(2) to include private persecution of

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<sup>146</sup> The broad wording of the Basic Law was a generous humanitarian reaction to the plight of German citizens and others driven out by the Nazis. See Albert Randelzhofer, "Asylrecht", Handbuch des Staatsrechts, vol. 6, pp. 185-196.

<sup>147</sup> 56 BVerfGE 216, 242-244 (1981).

<sup>148</sup> 54 BVerfGE 341, 357-358 (1980) qualified religious persecution for historical reasons associated with Hitler's actions against the Jews. 76 BVerfGE 143, 156-159 (1987) added racial discrimination as long as it was inconsistent with human dignity.

individuals in the event that the state from which asylum is sought is unwilling to provide protection.<sup>149</sup>

The resulting financial burden and the rise of extremist violence against both asylum seekers and foreign residents compelled the parliament to change the asylum law. The new legislation retains the constitutional guarantee of protection against political persecution, but seeks to exclude persons who come to Germany for economic reasons. It considerably speeds up the administrative procedures and sets up a two-tier system of "safe third states" around Germany and "safe countries of origin". The government may turn back a person entering Germany from one of these countries without a hearing as to the merits of his claim to asylum.

"Safe third states" are the member states of the European Union and states which guarantee the application of the Geneva Convention on the Status of Refugees and the European Human Rights Convention. In addition to the EU members, countries in this category include Norway, Poland, Switzerland, and the Czech Republic. This conveniently means that all of Germany's neighbors qualify for this status.

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<sup>149</sup> 83 BVerfGE 216, 235-236 (1991).

"Safe states of origin" are countries in which, on the basis of such factors as government stability, the general political situation, and observance of human rights, the German government feels it is safe to assume that neither political persecution nor inhumane or degrading practices take place. These states include Bulgaria, Gambia, Ghana, Romania,<sup>150</sup> Senegal, Hungary, and the Slovak Republic.

Finally, the government can reject applications for asylum outright if the officials judge the request to be "manifestly unfounded." This refers to an application containing unsubstantiated claims, claims based on false evidence, false information about the applicant's identity, or refusal to provide such information.

The new asylum legislation also speeds up the hearing process in two ways. First, the states will create special asylum law chambers in the courts so that applications do not pile up in the administrative courts. Second, officials can render judgements of "apparently unjustified" which allows for repatriation of the applicant unless he applies for a suspension of

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<sup>150</sup> The federal government concluded a separate agreement with Romania in September, 1992, in which Romania agreed to accept deported asylum seekers from Germany in exchange for German aid.



the repatriation in an "express" hearing, not to exceed one week in duration.

In their first case concerning the new asylum law, the justices halted the deportation of a Sikh from India, stating that the government had not included the country on its list of safe countries.<sup>151</sup> The following week, the Court ruled twice more, both times in favor of the new legislation. The cases involved two individuals from Ghana, a "safe country" on the government's list. The justices upheld the government's contention that the new policy "did not violate the plaintiffs' constitutional rights to protection from persecution."<sup>152</sup>

A more controversial case arose in September 1993, when the Court heard the appeal of two Iranian asylum seekers of the Baha'i faith who entered Germany through Greece, an EU member country.<sup>153</sup> The justices ruled that the two men could not be deported even though Greece is on the list of safe third countries. The Court agreed with the Iranians' claim that they should receive asylum, because Greek law does not provide the right to asylum for religious reasons, and the two men would be sent back to Iran where Baha'i followers suffer

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<sup>151</sup> Decision of July 14, 1993, reported in the Reuter Library Report of July 21, 1993.

<sup>152</sup> Decisions of July 18 and July 20, 1993, as reported in the Reuter Library Report.

<sup>153</sup> Reuter Library Report, September 21, 1993.

persecution. Although they did not nullify the legislation, the justices' narrow decision concluded by saying that "the constitutionality of several points in the new laws is still unclear,"<sup>154</sup> leaving the door open for more challenges to the asylum legislation.

### Analysis

As in the abortion cases, the justices have engaged in interest balancing as they analyze the issues of immigration and asylum. The Court acknowledges that human rights embodied in the Basic Law not only protect individuals against actions by the state, but they serve as objective principles which obligate the state to take active measures to ensure their protection. In the immigration and asylum cases, the justices concerned themselves with the question of whether the new legislation provided sufficient statutory provisions to guarantee the constitutionally protected right to asylum. By refusing to declare the legislation either totally valid or unconstitutional, the Court balanced the right of the individual with the right of the state

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<sup>154</sup> Reuter Library Report, September 21, 1993.

to maintain a free democratic social order.<sup>155</sup> The justices promise future clarifications of the law, assuming a greater role in the legislative process. As they did in the abortion cases, the Court implied that it would dictate the manner in which the legislature fulfills its duty to act on this issue. This once again contradicts the concept of separation of powers, which calls upon the Court to ensure that the state's action is capable of protecting a constitutional right, but not to determine what the content and detail of such action might be; the politicians decide the specific means to discharge their duty to act.

### Summary

The net result of these judicial decisions, in addition to the numerous other cases adjudicated by the Constitutional Court, is that the Court has balanced its duty to protect the constitutional rights of the individual with its role as interpreter of the Basic Law, allowing itself the leeway to consider extra-legal issues in its decisional process. The next chapter will apply the Court's 'balancing power' to the future of

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<sup>155</sup> Article 73 (10b), GG.

Germany, addressing the major issues which will likely come before the Court. Many of them, like abortion and asylum, will be questions that the Court has already dealt with in some manner. Others, such as genetic engineering, will be new topics for the members of the Court to reconcile with the Basic Law. The paper will discuss the prospects for a new constitution based on these issues, and conclude with a summary of the overall impact that the extra-legal influences have had on the Constitutional Court and its role in the political system in Germany.

## CHAPTER FOUR

As we have seen, the Constitutional Court has played a major role in Germany's political process. The Constitutional Court's positive image and prestige as seen by both the voting population and political elites have increased since its establishment, marking it as one of the most trusted institutions in the German political system.<sup>156</sup> Members of parliament who fail to achieve their political aims in the course of policy debate appear more willing than ever to bring the issue to the Court in the form of a constitutional question, which the Court must answer.<sup>157</sup> Many of the Court's future decisions may deal with questions initiated by the Constitutional Commission (Verfassungskommission), established by the Treaty of Unification. The Commission is composed of members of the Bundestag and Bundesrat, whose task it was to reexamine the entire

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<sup>156</sup> Professor Kommers has a revised edition of Judicial Politics forthcoming. It contains several updated opinion polls and surveys on the Court's popularity. For example, over 95 percent of the respondents rated the Court's performance as either 'excellent', 'good', or 'satisfactory', while barely 5 percent labeled it 'unsatisfactory'. The Court ranked second in the list of most trusted institutions, ahead of both the Chancellor, the Bundestag, and the Bundesrat. Only the Laender scored higher. The original data appears in Kommers, Jud. Pol., pp. 262-270.

<sup>157</sup> Once an abstract review proceeding is begun, it is not necessarily mooted either by the withdrawal of the complaint or by the expiration of the challenged law. See 1 BVerfGE 396, (1952), p. 414; and 79 BVerfGE 311 (1989), pp. 327-328. For discussion of the increasing propensity for referring political questions to the Court, see Wolfgang Loewer, "Zustandigkeiten und Verfahren des Bundesverfassungsgerichts," Handbuch des Staatsrechts, vol. 2, pp. 737-762; Klaus Schlaich, *supra* note 71, pp. 68-79.

Basic Law with a view toward additional amendments.<sup>158</sup> The Commission's work initiated the most fundamental constitutional debate since the Basic Law was adopted in 1949. In its final report in November 1993, the Commission discussed future contentious issues and recommended several amendments, but rejected calls for changes to the Basic Law's central principles.<sup>159</sup>

This chapter examines these issues and assesses their outcomes based on the Court's current method of constitutional interpretation. It will further discuss the subsequent impact of the Court's decisions on the future of the Basic Law. From all indications, the members of the Court will validate many of the proposed amendments that may be referred to them, but will stop short of calling for a new German constitution.

### Contentious Issues

The issues enumerated by the Constitutional Commission fall into three main groups, the first being fundamental rights and basic principles. Within this group abortion and asylum have already appeared in

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<sup>158</sup> Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik ueber die Herstellung der Einheit Deutschlands, approved September 23, 1990. The treaty is found in The Official Publication of Federal Session Laws (BGBl). Article 5, p. 885, deals with the Commission.

<sup>159</sup> Bericht der Gemeinsamen Verfassungskommission (Hereafter cited as Bericht der VerfKomm), BT/Drucksache 12/6000, 1993, pp. 15-18.

previous cases before the Court. As discussed in chapter three, the members of the Court left room for further interpretation and clarification in their rulings on these issues. The Court's members have also addressed the issue of equality as it pertains to women in the professions,<sup>160</sup> but the Commission has proposed that a directive for state encouragement should be inserted into the Basic Law, because the language of the Court's 1992 decision "would not give rise to judicially enforceable private rights."<sup>161</sup> Another directive would strengthen the obligation of the state for full employment, the procuring of housing, and equal opportunity in education to be combined with social rights.<sup>162</sup> Yet another recommendation would amend the Basic Law to further specify the states' responsibilities in protecting the environment and the public health. This proposal is based on both the growing attention to environmental policies in the European Union and concerns raised in Article 34 of the Treaty of Unification. East Germany requested that a unified Germany address the pollution problems in their

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<sup>160</sup> Among others, see 5 BVerfGE 9 (1956); 15 BVerfGE 337 (1963); 39 BVerfGE 169 (1975); and 85 BVerfGE 191 (1992). The 1992 decision stated in part: "The state shall promote the de facto realization of equal rights for men and women and shall take steps to eliminate existing disadvantages."

<sup>161</sup> Bericht der VerfKomm, pp. 49-51.

<sup>162</sup> The proposals are discussed in detail in Hans-Peter Schneider, "Die Zukunft des Grundgesetzes", in Frankfurter Allgemeine Zeitung, November 16, 1990, p. 14.

territory as a condition for agreement.<sup>163</sup> A further discussion in the area of fundamental rights covered ways to strengthen the direct participation of the people in the political process, including more use of popular initiatives and referendums.<sup>164</sup> This "direct democracy" proposition refers to the supposed "democratic deficit" in the Basic Law, spurred by the negotiations on unification. Proponents of this initiative argued that reunification should be used as an opportunity for more or less substantial amendments and that the Constitution should be submitted to a referendum.<sup>165</sup> The Commission, however, declined to propose amendments to the Basic Law to permit more "direct democracy".<sup>166</sup> The final recommendation discussed dealt with the issue of genetic engineering (Gentechnologie). The Commission acknowledged that this topic will undoubtedly be the subject of much debate and proposed that the federal and state governments exercise concurrent legislative authority under Article 74.<sup>167</sup>

With the exception of Gentechnologie, all of the proposals face serious debate in the Bundestag and may

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<sup>163</sup> The latest discussions are in Bernd Bender, Umweltrecht, 2nd Ed., Heidelberg, 1990, and Karl-Peter Sommermann, "Staatziel Umweltschutz", Deutsche Verwaltungsblatt, 1991, p. 34.

<sup>164</sup> The Basic Law provides for such devices as initiative or referendum only in connection with the rearrangement of state boundaries (Arts. 29 and 118, GG).

<sup>165</sup> See Schneider, *supra* note 162; Ulrich Storost, "Das Ende der Uebergangszeit", Der Staat, vol. 29, 1990, p. 321.

<sup>166</sup> Bericht der VerfKomm, pp. 83-86.

<sup>167</sup> *Ibid*, pp. 59-62.



very well end up in the Constitutional Court. Opponents of these proposed directives argue that new constitutional provisions will be superfluous if their contents do not essentially differ from the present state of law. They cite the directives for state action with respect to the protection of health and the environment as examples, stating that current enforcement of existing legislation in these areas makes any amendments unnecessary. Also, the fact that Article 75 only grants the federal government authority to pass framework legislation, while the directives would infringe upon the states' rights to determine their own particular means of meeting the national framework objectives.

Another argument is that some of the proposed amendments are impractical, comprising promises which the government cannot keep. The social rights directive is the main target of this criticism, based in part on the financial argument that implementing such an amendment would bankrupt the country.<sup>168</sup>

Government officials and constitutional historians oppose the proposals for popular initiatives and

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<sup>168</sup> The members of the Court held in 75 BVerfGE 40 (1987), that: "Private schools must be generally accessible... in the sense that pupils can attend them essentially without regard to their economic situation." The states' argument that the financial burden of supporting private schools could not be met caused the Court to limit its decision only to those private schools "which are approved as substitutes for public institutions."

referendums, arguing that historical experience demonstrates the danger of such amendments.<sup>169</sup> The danger lies in the real possibility that such amendments would weaken the responsibility of parliament and burden the people with complex decisions about which they have insufficient technical knowledge to make an informed choice. They also point to the success and stability of the German democracy which has guided the country through nearly fifty years of peace and prosperity, and which has achieved reunification and the end to Communist rule in the former East Germany.

In all of these issues, the determination of the opposition to prevent the proposed changes to the Basic Law could result in the questions' referral to the Constitutional Court, bringing consequences similar to the 1993 abortion case discussed in chapter three. Although the abortion law passed with a vast majority of the Bundestag's members in support of the legislation, the losing parties ultimately won the political battle in the Court.

The second group of issues addressed by the Commission can be described as reform of the federal system. This group is made up of two types of recommendations; the first is amendments to Articles

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<sup>169</sup> Theodor Maunz and Guenter Duerig, Grundgesetz Kommentar, Bonn, 1987, pp. 127-142.

104a - 115 governing financial relations in Germany. The Commission drafted these proposals based in large part on the vast differences in financial status between the western Laender and the newly added Laender in the east. The virtual bankruptcy of the eastern Laender after reunification and the increased flow of funds out of the west to prop up their economies have raised concerns about the procedural requirements in the Basic Law regarding the apportionment of expenditures between the federation and the Laender, as well as between the Laender themselves.<sup>170</sup> On the other hand, the Commission raises renewed arguments for a reorganization of the federal territory based on the enlarged number of Laender. The recommendations would strengthen the local states and the decision-making process in federal institutions. These recommendations are based on the original debate over the creation of the Basic Law, in which Delegate Schmid argued that a "healthy federal system" was possible only if the Laender were reasonably comparable in size and wealth.<sup>171</sup> Article 29 of the Basic Law empowers the Federation on the basis of referendum to reorganize state boundaries "to ensure

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<sup>170</sup> Several good accounts of this debate are available. Among others, see Hans-Ernst Boettcher, "Wir brauchen eine neue Finanzverfassung", Zeitschrift fuer Rechtspolitik, 1989, pp. 340-377; and Peter Bohley, "Neugliederung - Gefahr fuer die Identitaet des Laender", Frankfurter Allgemeine Zeitung, February 19, 1991, p. 12.

<sup>171</sup> Stenographischer Bericht des Parlamentarischen Rates (Transcript of the debates in the Parliamentary Council), 1949, p. 16.

that the Laender by their size and capacity are able effectively to fulfill the functions incumbent upon them." This authority has never been exercised, although the present Land of Baden-Wuerttemberg originated as an artificial union of occupational zones after World War II under the provisions of Article 118. The Allies blocked further attempts at reorganization,<sup>172</sup> the Constitutional Court also prevented reorganization,<sup>173</sup> and the voters of Baden-Wuerttemberg themselves defeated a proposal to divide the Land into its traditional parts.<sup>174</sup>

Opponents of financial reform are much fewer in number and have been less vehement in their arguments than those opposing other amendments. While conceding the need for some changes in the finance structure, however, these opponents believe that the changes can be made through federal statutes rather than constitutional amendments. In addition, the political parties are unwilling to call for such reform in fear of alienating their constituencies in the western Laender. The debate over redefining the territorial boundaries of the

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<sup>172</sup> Ernst Rudolph Huber, Quellen zum Staatsrecht der Neuzeit (Collection of source materials on the constitutional law of postwar Germany), vol. 2, 1951, p. 217.

<sup>173</sup> 13 BVerfGE 54 (1961). The members of the Court ruled against the reorganization by strictly limiting the standing of the parties involved.

<sup>174</sup> Popular opinion demonstrated that the citizens had adapted to the arbitrary boundaries. The Court ruled that the people could not be forced to accept new divisions. See 37 BVerfGE 84 (1974).

Laender is stronger and carries the weight of popular opposition as mentioned above.

The members of the Court appear willing to enforce financial equalization should the argument come before them.<sup>175</sup> As the preceding discussion indicates, however, the Court does not have the same willingness to support state boundary changes.

The final group of initiatives dealt with Germany's international relationships. The Commission proposed that parliament change Article 24(1) governing the transfer of sovereign powers to constitutionalize the participation of the Laender in the elaboration of European policy by the federal government.<sup>176</sup> The basis for these amendments lies in the fact that the EU is increasing the number of areas over which it exercises legislative authority. The Laender hold either exclusive or concurrent authority in many of these same areas. In addition, the Commission recommended changes to the Basic Law to ensure the participation of the armed forces (Bundeswehr) in UN-peace-keeping activities. These proposals grew out of the debate over the Gulf-crisis and the requests by NATO and the United

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<sup>175</sup> See 72 BVerfGE 330 (1986) and 86 BVerfGE 148 (1992). The Court struck down various provisions of the implementing statutes principally on the grounds that they resulted in miscalculations of the relative strength of the Laender.

<sup>176</sup> Some of the proposed amendments have already been added to the Basic Law. See the discussion which follows.

States for German participation in the coalition action.<sup>177</sup> In June 1993 the members of the Court granted a preliminary injunction against German participation in the humanitarian action in Somalia without parliamentary approval, leaving open for the time being the question of whether Germany could participate at all. A ruling later that year clarified the use of German troops in humanitarian operations, requiring such use to be approved by a majority vote of the Bundestag.<sup>178</sup> The justices did not agree, however, that the Basic Law needed amendment before German troops could be deployed outside NATO's area of operation.

Arguments against these recommended amendments center on the theme that such restrictions on basic decisions of international importance would unfairly tie the hands of the government in conducting foreign affairs. Opponents also point out that the Court has already ruled on the constitutionality of the Maastricht Treaty and the 1992 amendments that gave the Bundesrat (and therefore the Laender) an unprecedented position of

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<sup>177</sup> Thomas Giegerich, "The German Contribution to the Protection of Shipping in the Persian Gulf", Zeitschrift fuer auslaendisches oeffentliches Recht und Voelkerrecht, vol. 49, 1989. For additional arguments on the question of military deployments, see Hans-Georg Franzke, "Art. 24II GG als Rechtsgrundlage fuer den Ausseneinsatz der Bundeswehr?" Neue Juristische Wochenschrift, 1992, pp. 3075-3102; Karl Doehring, "Systeme kollektiver Sicherheit," Handbuch des Staatsrechts, vol. 7, pp. 669-701.

<sup>178</sup> BVerfG, Judgement of June 23, 1993, Case No. 2BvQ 17/93, Neue Juristische Wochenschrift, 1993, pp. 2038-2092.

influence in European affairs.<sup>179</sup> Indeed, the members of the Court went so far as to give controlling weight to the Bundesrat's position on subject matters in which the Laender hold exclusive legislative power.

### The Continuity of the Basic Law

The process of reunification highlighted the arguments in favor of rewriting the Basic Law, strengthening particular aspects of German constitutional law through the creation of a new German Constitution. The Basic Law in its original version (before reunification) outlined two different ways to achieve reunification. The first option, contained in Article 23, called for the incorporation of East Germany into the FRG, and the enforcement of the Basic Law as the constitution in the new eastern states. Under Article 146, however, the Basic Law would be replaced by a new constitution to be elaborated and accepted by the reunited German people. Besides these two options, it is easy to imagine that the two sovereign governments negotiating the Treaty of Unification could have opted for a new constitution accepted after completing the

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<sup>179</sup> BVerfG, Decision of October 12, 1993, Case No. 2BvR 2134/92.

negotiations in the normal procedure of constitutional amendments in the separate countries.<sup>180</sup>

The governments quickly chose the procedure of Article 23, the principal reason stated being to keep the Basic Law as an order guaranteeing freedom and the stability of the political system.<sup>181</sup> Much more likely, however, is that Chancellor Kohl's government did not wish to do anything which might hurt its chances in the coming elections. Reunification under Article 23 promised a quicker transformation into a united Germany, and this 'promise' helped Kohl win the popular votes necessary in the eastern Laender. Nevertheless, the choice for Article 23 faced many critics.<sup>182</sup> Probably with regard to the critics' counterproposals Article 4 of the Treaty of Unification rewrote Article 146 of the Basic Law as follows: "The Basic Law, in force after the achievement of reunification, expires the day a constitution enters into force freely consented by the German people."<sup>183</sup>

Article 5 of the Treaty also recommends a reconsideration of the application of Article 146 and of

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<sup>180</sup> See Christian Tomuschat, "Wege zur deutschen Einheit," Deutschlands aktuelle Verfassungslage, Berlin, 1990, pp. 70-97.

<sup>181</sup> Joseph Isensee, "Staatseinheit und Verfassungskontinuität," Deutschlands aktuelle Verfassungslage, pp. 38-69.

<sup>182</sup> Schneider, *supra* note 162; Storost, *supra* note 165, pp. 343-357.

<sup>183</sup> Article 146 before the revision stated: "This Basic Law shall cease to be in force on the day on which a new constitution adopted by a free decision of the German people comes into force."



the referendum within two years. Although it has now been nearly five years, the sensitivity of the issue has kept politicians from addressing this recommendation.

### The Direction of the Court

Looking at these provisions, the efforts to preserve the Basic Law may appear dubious. Many critics interpret the stated provisions as an invitation to replace the time tested Basic Law.<sup>184</sup> But I believe that the members of the Court, while acknowledging the changing economic conditions and social attitudes in Germany, will continue to see the Basic Law as the foundation of the country's political stability.

This belief is rational for several reasons, the first of which deals with the selection process for the justices. As discussed in Chapter 1, the justices are keenly aware of the political process in Germany and their role in the system. The sensitive political nature of any recommendation for a new constitution limits the Court's willingness to advocate the

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<sup>184</sup> Klaus Stern, "Der Verfassungsändernde Charakter des Einigungsvertrages," Deutsch - Deutsche Rechtszeitschrift, 1990, pp. 289-293; Richard Bartlsperger, "Verfassung und Verfassungsgebende Gewalt in vereinten Deutschland," Deutsche Verwaltungsblatt, 1990, pp. 1285-1311; Walter Schmitt - Glaeser, "Die Stellung der Bundesländer bei einer Vereinten Deutschland," Deutsche Verwaltungsblatt, 1990, pp. 41-64; and Morten Kriele, "Art. 146 GG: Brücke zu einer neuen Verfassung," Zeitschrift fuer Rechtspolitik, vol. 24, 1991, pp. 1-37.

replacement of the Basic Law in the course of its decisional process.

More importantly, the Court has done the best that it could under the circumstances. In using the teleological method of constitutional interpretation (remember that this method seeks to specify the present purpose of the rules in the Basic Law) the members of the Court have been generally both effective in protecting individual rights and acceptable to the other branches of government. The justices themselves appear comfortable with the Basic Law, allowing for the minimal amendments necessary to further Germany's integration with the EU. Not one of the decisions since reunification in 1990 have contained statements by the members of the Court in favor of a new constitution. On the contrary, the Maastricht Treaty decision in 1993 reaffirmed the Court's view that "the Basic Law continues to be the cornerstone of political and social order in Germany."<sup>185</sup>

Although the Constitutional Court does not have the power to unilaterally declare a new constitution invalid, it does have the power to review any new constitution in ensure that the parliament followed the necessary steps outlined in Article 146, especially the

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<sup>185</sup> Supra note 179.

requirement of "a free decision of the German people." The possibility for such an event to occur is remote at best, and there is no political will for such a change because popular sentiment for a new constitution does not appear strong. Although dissatisfaction with the government exists, moreso in the new eastern Laender, the overall indications are that Germans support the Basic Law and its provisions.<sup>186</sup> Unless there is a drastic shift in popular opinion, no apparent reason exists which might cause the change in the political environment necessary for the creation of a new constitution. For the foreseeable future, then the Basic Law will continue to be the written expression of the organizational and ideological principles which guide the Federal Republic of Germany.

### Conclusion

This thesis has attempted to determine how the Constitutional Court in Germany has impacted the political process and what factors have influenced the Court's decision making process. The evidence is clear that the Court has become a powerful force in the

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<sup>186</sup> Donald P. Kommers and Paul Kirchhof, Germany and Its Basic Law, Heidelberg: C.F. Mueller Juristische Verlag, 1993. Chapter 4 deals with popular support for both the Basic Law and the institutions of government, including the Constitutional Court.

democratic order, drawing heavily from the historical legacies of the Nazi regime. The reaction to Hitler's racism and campaign of murder materialized in the Parliamentary Council's establishment of human dignity as the supreme value of the Basic Law, crowned by the right to life. In defining the rights and obligations of both individuals and government institutions in Germany, the members of the Court have developed a teleological method of constitutional interpretation which has allowed them to consider both the legal and sociopolitical issues of a case. As the analysis of the abortion and asylum issues suggests, the Court has balanced governmental and individual rights within the prevailing socio-economic environment, keeping in mind the historical experience which shaped the creation of the Federal Republic of Germany. Although critics have expressed concerns about the Court's increased role in political decisions, the members of the Court appear to have remained sensitive to these concerns, gaining influence through the actions of the parliament. The referrals to the Court by the Bundestag and the government have given the Court the opportunity to define its vision of the future for Germany's Basic Law. The Court's direction appears clear, indicating that the justices will continue to hold on to the Basic Law as

the basis for Germany's future political system, albeit with some possible amendments to deal with issues which its creators did not envision fifty years ago.

**Table I**  
**Jurisdictions of the Constitutional Court**

<u>First Senate</u>	<u>Second Senate</u>
1. Concrete Judicial Review (Article 100(1)) This area of jurisdiction applies to Articles 1-17, (Basic Rights)	1. Concrete Judicial Review (Art. 100(1)) covering Arts. 19(4), 33, 101, 103, and 104
2. Constitutional Complaints (Article 93, (4a) and (4b)) This portion of its jurisdiction also covers the Basic Rights listed in Articles 1-17	2. Constitutional Complaints Art. 93(4a), (4b) covering same as above 3. Forfeiture of Basic Rights (Art. 18) 4. Political Parties (Art. 21) 5. Conflicts between high federal organs (Article 93(1)) 6. Abstract Judicial Review (Art. 93(2)) 7. Fed-State Conflicts (Art. 93(3), 93(4)) 8. Other Public Law Disputes (Art. 94(4)) 9. Const. Disputes Within States (Art. 99) 10. Int'l Law Disputes (Art. 100(2)) 11. State Const. Disputes (Art. 100(3)) 12. Complaints vs. Fed. Pres. (Art. 61) 13. Complaints vs. Federal Judges (Article 98(2)) 14. Election Disputes (Art. 41(2))

Information for the above table appears in Kommers, Judicial Politics, p. 102.

**Table II**  
**Number of Asylum Seekers (1983-1993)**

1983	19,737
1984	35,278
1985	73,832
1986	99,650
1987	57,379
1988	103,076
1989	121,318
1990	193,063
1991	256,112
1992	438,191
1993	322,842

Statistics from "Foreigners in Germany and the New German Asylum Law", June 1994, a Fact Sheet provided by the German Information Center.