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**MEMORIAL:
DAVID CURRIE AND GERMAN CONSTITUTIONAL LAW**

**Memorial: David Currie and German Constitutional Law
- Editorial**

*By Russell A. Miller**

On October 15, 2007, long-time University of Chicago law professor David P. Currie passed away. He has been rightly celebrated in the intervening year as one of the great lights of his generation in the American legal academy. He was best known for his comprehensive and highly respected work in American constitutional law, federal courts, conflict of laws and environmental law. Professor Currie's work with American law was lovingly recalled in the Chicago Law Review (vol. 75 - Winter 2008) and the Autumn 2007 issue of the Green Bag 2d (the engaging journal he helped reestablish in 1997). But for a generation of Americans and other English speakers who have come under the thrall of German constitutional law Professor Currie is better known as one of the two great American interpreters of the German Basic Law. As Peter Quint points out in his contribution to this memorial collection, Currie and Notre Dame's Donald Kommers produced the definitive scholarly treatments of German constitutional law in English. Their work remains essential today. It primarily was the publication of the 1994 book, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY (University of Chicago) that earned Currie his place amongst our leading comparativists. German Law Journal publishes this memorial to Professor Currie in recognition of this historic contribution. We are proud to publish two original notes on German constitutional law both of which reflect on Currie's influence in the field. We also are proud to republish Markus Dubber's review of Currie's book THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY. Finally, it is our honor to republish two of Professor Currie's seminal articles on German constitutional law. We have relied upon and admired Professor Currie's work and we hope to acknowledge with this memorial that the work of the German Law Journal, in no small degree, stands on his shoulders.

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**MEMORIAL:
DAVID CURRIE AND GERMAN CONSTITUTIONAL LAW**

David Currie and German Constitutional Law

*By Peter E. Quint**

A. Introduction

Without much doubt, the two great pillars of American scholarship on the German Basic Law and the jurisprudence of the Federal Constitutional Court are (in the order of first appearance) Donald Kommers's monumental casebook, *The Constitutional Jurisprudence of the Federal Republic of Germany*¹ and David Currie's magisterial treatise, *The Constitution of the Federal Republic of Germany*.² Professor Kommers's comprehensive work was a milestone in a long career that has been very substantially devoted to the study of German constitutional law. In the late 1960s, Kommers spent a research year at the German Constitutional Court and, drawing in part on personal interviews with the justices, he published the first major work in English on that court.³ Since then, Kommers has produced a steady stream of significant works on German constitutional law.

David Currie's treatise, on the other hand, came as more of a surprise. For several decades Professor Currie, who died in late 2007 at the age of 71, was an eminent figure in American public law. He was the author of an extraordinary number of notable works on American federal courts, conflict of laws, environmental law, and American constitutional law and history. These works included eminent casebooks, dozens of scholarly articles, and several important volumes on the history of constitutional interpretation by the Supreme Court and the history of

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¹ DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* (1st ed. 1989; 2nd ed. 1997; 3rd ed., with Russell Miller, forthcoming 2009).

² DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* (1994).

³ DONALD P. KOMMERS, *JUDICIAL POLITICS IN WEST GERMANY: A STUDY OF THE FEDERAL CONSTITUTIONAL COURT* (1976).

debates on the Constitution in Congress.⁴ Although Currie had also published articles discussing topics in German constitutional law,⁵ these articles had not really presaged a treatise of this extraordinary scope and depth. Indeed, it is nothing short of remarkable that, in the midst of his very full career concentrating on some of the most complex and difficult aspects of American public law, David Currie was able to produce this extensive and mature work on German constitutional law, which required mastery not only of a foreign constitutional system, but mastery of a foreign language as well.⁶

As pillars of the American study of German constitutional law, these works of Kommers and Currie focus on the German Basic Law and the German Constitutional Court. In many important respects, however, they are both very American products. Of course, the Kommers work is a casebook, and therefore it is an example of a genre which, since its "invention" at Harvard in 1871 by Christopher Columbus Langdell,⁷ has been thoroughly American in its style and development. Currie's treatise does not represent a distinctively American genre, but on the other hand, it does share many American traits.

To say this is by no means a criticism of Currie. It would be highly unreasonable to expect an American scholar, trained in the methods of the common law, to be able to "jump over his shadow" (to use a German expression) and fully internalize the methods of analysis and processes of thought of a different legal system. (Indeed Currie himself acknowledges as much when he disarmingly notes that American observers are "separated [from the German system] by a cultural gap as well as an ocean...").⁸ Moreover -- and this is the important point -- we would not necessarily want a comparativist to become completely assimilated in a foreign system, even if he or she were actually able to accomplish this improbable feat. Rather, one of the

⁴ See *infra* note 27. In addition to traditional legal articles, Currie contributed numerous shorter articles on constitutional history and other topics to the second series of the *Green Bag*, a journal of informal commentaries on the law.

⁵ David P. Currie, *Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany*, 1989 SUP. CT. REV. 333; David P. Currie, *Separation of Powers in the Federal Republic of Germany*, 41 AM. J. COMP. L. 201 (1993). These two articles are reprinted in this issue of the *German Law Journal*. See also David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

⁶ In addition to his attainments as a scholar, Professor Currie was, by all accounts, a great teacher in his decades at the University of Chicago Law School. According to friends and colleagues, he was also a notable performer in the operas of Gilbert & Sullivan. See generally, *In Memoriam: David P. Currie (1936-2007)*, 75 U. CHI. L. REV. 1 (2008).

⁷ See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 125 n. 3 (1977).

⁸ CURRIE, *supra* note 2, at 289.

most valuable aspects of comparative law -- and in this instance, comparative constitutional law -- is to subject the reasoning and decisions of one legal system to analysis and criticism animated, at least in part, by thought processes of another legal system. In this way, the material may yield unexpected insights -- both for the comparativist viewing another legal system, and also for the scholars of that system reading what "outsiders" have to say about their structures and doctrines. This is presumably at least part of what Currie himself meant by including, as the epigraph at the outset of his treatise, a thought-provoking remark of Thomas Mann from *Joseph and His Brothers*: "For only by making comparisons can we distinguish ourselves from others and discover who we are, in order to become all that we are meant to be."

B. Forms of Commentary

From this perspective, it may be useful to point up the significant ways in which Currie's work differs from standard German treatises on the same subject, and to try to suggest some insights that American techniques might yield in the study of German constitutional law.

First, it should be noted that Currie's treatise is a relatively compact work by a single author, and it divides the subject of German constitutional law into conceptual chapters, such as the Federal System, Separation of Powers, and Freedom of Expression. As might be expected, each of these chapters typically covers cases and ideas that arise from more than one constitutional provision.

In contrast, the major German treatises on constitutional law differ significantly in each of these respects. Instead of separating the material by conceptual chapters -- as does Currie -- the major German treatises begin at the Preamble and Article 1 of the Basic Law and then proceed systematically step by step through each succeeding Article, analyzing the provision in general, and then typically analyzing each sub-Article in a separate section or set of sections.⁹ (Indeed, at least one major

⁹ Currie cites particularly the vast Maunz-Dürig commentary, which is probably the most comprehensive, highly respected and frequently cited of all commentaries on the German Basic Law. GRUNDGESETZ KOMMENTAR (Theodor Maunz, Günter Dürig, Roman Herzog *et al.* eds., edition with looseleaf supplements 2008). Interestingly, Currie also frequently cites the "Alternative Commentary" (AK), a more left-wing work that is generally intended to counter the conservative centrism of commentaries such as Maunz-Dürig. See KOMMENTAR ZUM GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (REIHE ALTERNATIVKOMMENTARE) (Richard Bäuml *et al.*, 1984). Even today, the AK is ignored in much German constitutional writing and frequent citation of the AK, in the German literature, generally counts as a statement of dissent from the "prevailing view" (*herrschende Meinung*) of the traditional German constitutionalists. Currie notes that his "secondary sources" have been "selected in order to afford a variety of views." CURRIE, *supra* note 2, at xii. Other important commentaries on the Basic Law -- also proceeding systemically through the constitutional text -- include, for example,

commentary goes even further in this systematic method of analysis and sometimes analyzes important phrases or even words, in separate subsections).¹⁰ Typically, as discussed further below, commentaries of this sort employ lapidary general statements of doctrine, avoiding extended discussion of individual cases. Originally, this form of commentary was employed for the explication of legal codes, such as the civil, criminal, and procedural codes of German law. Whether this traditional form is as well suited for the study of constitutional law is a separate question that will be noted below.

Because of their scope and impressive level of detail, each of these standard German constitutional treatises is a major undertaking of several volumes, and the work is allocated among a number of different authors. Thus, while the authors may (or may not) share the same general point of view, the chapters contributed by one author may have their own distinctive qualities, differing from other chapters in the work.¹¹

Another typical product of German constitutional scholarship is the "Handbook" on constitutional law or on the law of the state. In these frequently-consulted works, which also may run to several volumes, the material is divided up into conceptual chapters, but -- here again -- separate chapters are typically contributed by different eminent specialists.¹² In the various chapters of a "Handbook," the distinct points of view of the respective authors are likely to vary even more widely than in the constitutional commentaries.

KOMMENTAR ZUM GRUNDGESETZ (Hermann v. Mangoldt, Friedrich Klein, Christian Starck eds., 5th ed. 2005); GRUNDGESETZ-KOMMENTAR (Ingo von Münch & Philip Kunig eds., 5th ed. 2000). In the American constitutional literature, a similar technique was employed, for example, in the classic constitutional commentary of Justice Story. See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (3d ed. 1858).

¹⁰ See von Münch & Kunig, *supra* note 9.

¹¹ To take one example, the contributions of Günter Dürig to the Maunz-Dürig treatise are frequently viewed as particularly distinctive and influential. See, e.g., KONRAD HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 137 (20th ed. 1995). In fact, the recent replacement of one of Dürig's original chapters with a new version by another scholar -- putting forth a considerably different view of human dignity -- drew an emotional public rebuke from a former Justice of the Constitutional Court. See Ernst-Wolfgang Böckenförde, *Die Würde des Menschen war unantastbar*, FRANKFURTER ALLGEMEINE ZEITUNG, Sept. 3, 2003.

¹² Currie cites particularly HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND (Josef Isensee & Paul Kirchhof eds., 1st ed. 1987; 2nd ed. 2003). For another such "Handbook," see HANDBUCH DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND (Ernst Benda, Werner Maihofer, Hans-Jochen Vogel eds., 2nd ed. 1994). This type of work was also produced under the Weimar Constitution of 1919. See HANDBUCH DES DEUTSCHEN STAATSRECHTS (Gerhard Anschütz & Richard Thoma eds., 1930).

There are, however, several books in the German literature that are more like Professor Currie's treatise. One of the most eminent of these is *Fundamental Principles of the Constitutional Law of the Federal Republic of Germany* by Konrad Hesse, a noted teacher of constitutional law and a former member of the Constitutional Court.¹³ This is a book that covers, in general, the same material that is discussed by Professor Currie and it is a volume by a single author that is approximately the same length as Professor Currie's treatise. Although it is intended principally as an introduction to constitutional law for students -- and therefore technically falls within the genre of *Lehrbuch* or textbook¹⁴ -- Hesse's volume is actually a work of considerable subtlety and complexity, and it is regularly cited in the German scholarly literature.

From our perspective, however, what is most interesting is the quite dramatic distinction between the method of analysis employed by Currie, and that which is more common in Hesse's *Fundamental Principles* -- and, indeed, in almost all of the longer German treatises as well.¹⁵ This is a difference that should come as no surprise, given the differing characteristics of the respective legal systems. The discussion in the German treatises tends to contain general statements of principle, of greater or lesser complexity. Although cases are regularly cited, they tend to be collected in non-textual footnotes and clearly occupy a subordinate role. The cases themselves, and the facts behind the cases, are not commonly discussed.

In contrast it is clear that, as a scholar educated in the Anglo-American case law system, Currie is primarily interested in cases -- and particularly, of course, the cases of the German Constitutional Court. Accordingly, these cases are frequently the primary focus of Currie's attention, and the language and context of the opinions are often very closely analyzed. There are many notable examples. This case-centered approach is clearly evident, for example, in Currie's long discussion of the famous *Parliamentary Dissolution Case*, which allowed the *Bundestag* to be dissolved, and a new election to be held, after Chancellor Kohl's bogus "loss" of a vote of no confidence in 1982.¹⁶ Currie discusses the case in the American style as a sort of story with accompanying analysis throughout. Currie presents the dramatic

¹³ HESSE, *supra* note 11. For another one-volume treatment by an eminent German law teacher, see, e.g., PETER BADURA, *STAATSRECHT* (3d ed. 2003).

¹⁴ Traditionally, the *Lehrbuch* or textbook has played a central role in legal education in Germany. Much more important than the American "hornbook," which it resembles in some respects, the *Lehrbuch* tends to be the form of source material that is most widely read by students in the course of their studies.

¹⁵ On this point, see also Markus Dirk Dubber, *Book Review*, 40 AM. J. LEGAL HIST. 107, 108 (1996). This review is reprinted in this issue of the *German Law Journal*.

¹⁶ BVerfGE 62, 1 (1983).

facts behind the decision, follows the twists and turns of the relevant arguments, finds some similarities between the Court's opinion and the American political question doctrine, and ultimately suggests that, in upholding the questionable dissolution, the Court was engaging in "strategic behavior."¹⁷ In the treatment of the same general topic by Konrad Hesse, in contrast, the results of this case are transmuted into general statements and the drama, and the nuances, of the specific decision disappear.¹⁸ Similarly, in a series of extended case analyses, Professor Currie examines the facts and argumentation of the major free expression cases in the German Constitutional Court, proceeding case by case and interlacing the analysis with illuminating American comparisons.¹⁹ As Currie remarks, "only an examination of actual decisions can give us an insight into the degree of freedom that prevails in Germany."²⁰ Later in the same chapter, Professor Currie presents three of the crucial Cold War cases in the Constitutional Court, analyzing them in a trenchant manner and including American comparisons throughout.²¹ Currie notes that, even though the United States has no constitutional provision authorizing the banning of political parties (such as that contained in Article 21 (2) of the German Basic Law), formulations employed by the Constitutional Court do not differ greatly from the doctrinal results reached in *Dennis v. United States*,²² a contemporaneous Cold War case in the United States Supreme Court. A close examination of the relevant cases makes this point considerably more vividly than would a general statement of principles or comparison of textual provisions.

Similarly, Currie's extremely sophisticated discussion of the problem of nondelegation (with numerous apt American comparisons) is basically an American-style discussion of cases which sets forth the underlying facts in each case -- including, particularly, the details of the statutory delegation -- and discovers and analyzes the relevant trends in the German decisions and the surprisingly diverse constitutional provisions on which the decisions are based.²³ In this discussion we see Currie, the American administrative lawyer, impressively transferred to the German realm.

¹⁷ CURRIE, *supra* note 2, at 113-16.

¹⁸ HESSE, *supra* note 11, at 268.

¹⁹ CURRIE, *supra* note 2, at 178-207. In particular, Currie discusses a number of important cases at some length: BVerfGE 7, 198 (1958) (*Lüth*); BVerfGE 25, 256 (1969) (*Blinkfüer*); BVerfGE 12, 113 (1961) (*Schmid-Spiegel*); BVerfGE 30, 173 (1971) (*Mephisto*); BVerfGE 34, 269 (1973) (*Soraya*).

²⁰ CURRIE, *supra* note 2, at 181.

²¹ *Id.* at 213-27.

²² 341 U.S. 494 (1951).

²³ CURRIE, *supra* note 2, at 125-34.

In this context, Currie's work may be enlightening for American and other non-German readers as an excellent introduction to the actual work of the Constitutional Court. But beyond that, Currie's work may also be enlightening for German readers as an indication of the flexibility and subtlety that can be achieved by the analysis of cases, in what has become in reality -- under the influence of the German Constitutional Court -- very much a case law system. Indeed, Currie's subtle and trenchant analysis of the cases might also raise a question about whether traditional techniques of German commentary -- which have arisen in the context of private law codification, where cases generally play a minor role -- can ultimately do justice to the complexity and often creative unruliness of a constitutional case law system.²⁴

C. Cases and Constitutional History

Currie's treatise has many additional virtues. As suggested above, one of the most notable is Professor Currie's apparently comprehensive mastery of hundreds of German decisions -- not only the famous cases that set the general outlines of German constitutional law, but also the subsequent cases which fill in the details and are frequently as important as the major cases themselves for the purpose of truly understanding the realities of the German system. In the preface, Professor Currie remarks that he has limited his reading of commentaries to a few of the most famous treatises "in the interest of finishing this book within the present [twentieth] century..."²⁵ But, significantly, there is no comparable indication of any limitation of Professor Currie's extraordinarily deep reading in the German *decisions*.²⁶ Currie regards the cases as *primary*, and the treatises and similar material as *secondary*. Certainly, any American observer would accept this view as self-evident; but it is an approach that may still be somewhat controversial in continental legal cultures.

Particularly in his later work, Professor Currie became an important legal historian, tracing the history of the American Supreme Court and the history of constitutional

²⁴ See Dubber, *supra* note 15, at 108: "It would have been unusual for a German book on the constitution to rely as heavily on opinions of the German constitutional court as does Professor Currie's. The German commentators are still having a hard time acknowledging that the deference to written law texts, characteristic of a formalistic civil law system that has developed marvelously complex interpretive techniques to subsume particular fact scenarios under statutory principles, goes out the window as soon as these techniques are applied to such texts as the guarantee of human dignity in Article 1(1) of the Basic Law."

²⁵ CURRIE, *supra* note 2, at xii.

²⁶ See *id.* at xi.

debates in Congress, in six comprehensive volumes.²⁷ His interest in constitutional history -- and his evident conviction that this history has strong illuminating power for the present -- also comes through very clearly in his work on the German Constitution. Thus, in order to provide background for the German cases, Professor Currie frequently introduces enlightening historical material from earlier German constitutions, such as the abortive Paul's Church Constitution of 1849, the Prussian Constitution of 1850, and Bismarck's Imperial Constitution of 1871, as well as early versions of the post-war German state constitutions. The Weimar Constitution of 1919 was clearly the most important predecessor of the German Basic Law, frequently providing useful examples to be followed but sometimes also containing cautionary mistakes to be avoided. Currie clearly immersed himself in the provisions of the Weimar Constitution as well as contemporaneous commentary on that constitution, and the treatise provides a particular depth of reference to this important historical material. There are also numerous illuminating references to the discussions at the Herrenchiemsee meeting and in the Parliamentary Council, where the Basic Law was drafted and then ultimately adopted.

In a trait that is particularly valuable for American readers, Currie's discussion of the German doctrine constantly refers back to comparable American problems. As one might expect, Professor Currie's knowledge of the German cases is certainly matched by his deep knowledge of the jurisprudence of the American Supreme Court -- again, not only the famous cases but many relatively obscure cases that nonetheless illustrate important points. The author of a two-volume constitutional history of the Supreme Court is certainly evident in these passages.

D. Comprehensive Treatment

Although Professor Currie does not cover all the topics of German constitutional law, the major areas are comprehensively treated. After an introductory chapter which outlines relevant aspects of German constitutional history and usefully surveys general traits of the Basic Law (Chapter 1), Currie turns to federalism and the separation of powers, structural issues that occupied much of his attention in American constitutional law as well. In two subtle and realistic chapters (Chapters 2 & 3), Currie notes the complementary effect of these and other doctrines in

²⁷ DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888* (1985); DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY, 1888-1986* (1990); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789-1801* (1997); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801-1829* (2001); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829-1861* (2005); DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829-1861* (2005).

checking excessive power in the German system. For example, Currie finds that aspects of German federalism, as well as the independence of the civil service, substantially compensate for the merging of the legislative and executive powers in a parliamentary system.²⁸ Moreover, the ability of a strong minority party to commence and to guide a parliamentary investigation provides another “important means of control of the executive.”²⁹ Currie also teases out certain “less obvious” aspects of the separation of powers -- such as the doctrine that, in many areas particularly relating to basic rights, the executive may not act in the absence of authorization by the legislature.³⁰

In the German system, the federal government has the authority to enact most legislation, but the strong legislative role of the *Bundesrat* (made up of representatives of the states), as well as the states’ major role in the execution of federal law, tends to redress what might otherwise be overwhelming federal power. The intertwining nature of the institutions of separation of powers and federalism in Germany -- both intended to work against undue concentration of power -- is strikingly encapsulated by Currie in the following passage:

State administration of federal law in Germany is motivated in part by the same considerations that underlie our separation of legislative and executive powers. The dangers of an all-powerful federal executive were all too vividly illustrated during the Nazi period; the risk of inadequate enforcement is the price of protection against prosecutorial abuse. The Basic Law goes beyond our Constitution by taking enforcement not only out of legislative hands but largely out of federal hands as well; in a parliamentary system this may be necessary to assure effective freedom from legislative control.³¹

Overall, Currie’s flexible discussion of separation of powers in the German system contrasts somewhat, in tone at least, with the more hard line conceptual position

²⁸ CURRIE, *supra* note 2, at 103.

²⁹ *Id.* at 110.

³⁰ *Id.* at 121-25.

³¹ *Id.* at 68.

that he tended to adopt in commenting on the separation of powers in the United States.³²

In a detailed chapter on German federalism, Currie perceptively expands the scope of his examination by including “additional layers”³³ of federalism that have no parallels in the constitutional law of the United States. On the one side, the Basic Law contains express guarantees of independence for municipal governments³⁴ and, on the other side, Germany is a constituent state within the more encompassing European Union, a relationship that is also expressly recognized and authorized in the German Basic Law.³⁵ These additional “layers” create a further network of constitutional rules that limit both the states and the federal government.

In Germany, as in the United States, the freedom of expression is a subject of absorbing interest, presenting no small measure of unresolved mysteries and conundrums. In his long chapter on the freedom of expression (Chapter 4), Currie examines the meaning and implications of the balancing test that the Constitutional Court has primarily used in cases in that area. Because a “balancing test is no more protective of expression than the judges who administer it,”³⁶ Currie’s examination takes the form of a long series of case analyses, accompanied by frequent references to the constitutional history of the Weimar Constitution and the drafting of the Basic Law. Currie sees these cases as falling into an early period in which the Constitutional Court “evinced a fierce attachment to the values of free expression,” followed by a significant period of lesser protection, which was in turn followed by a renewed period of greater protection.³⁷ Currie notes that the degree of protection extended by the Court is often related to the justices’ willingness or unwillingness to defer to the lower courts on the question of whether the balancing was properly undertaken. Currie’s sustained analysis of the cases in this chapter well reveals the often chaotic nature of a constitutional case law system, which cannot be wholly domesticated by general formulas, no matter how capacious.

³² See David P. Currie, *The Distribution of Powers after Bowsher*, 1986 SUP. CT. REV. 19.

³³ CURRIE, *supra* note 2, at 35; 81-100.

³⁴ GRUNDGESETZ [GG] [Constitution] art. 28(2) (F.R.G.).

³⁵ *Id.* art. 23 (F.R.G.).

³⁶ CURRIE, *supra* note 2, at 181.

³⁷ *Id.* Currie’s analysis ends of course in 1993, shortly before his treatise was published, but it seems fair to say in general that the period of greater protection has extended up to the present.

In the chapter on Church and State which follows (Chapter 5), Professor Currie assists American readers in making their way through the maze of relevant constitutional provisions (a number of which are drawn directly from the Weimar Constitution) by analyzing the cases under the familiar American rubrics of “establishment of religion” and “religious freedoms.”

In a final *tour de force* in his last substantive chapter (Chapter 6), Professor Currie surveys a broad range of other constitutional rights recognized in the jurisprudence of the German Constitutional Court. Some of these, such as rights of property and equality, are expressly mentioned in both the German and American constitutions; others, like rights of marriage, family, private schools and rights of illegitimate children, are expressly mentioned in the German Basic Law but not in the American Constitution -- although they have received at least some degree of protection from the American Supreme Court. Yet the Constitutional Court has protected several other important rights (whether or not specifically mentioned in the Basic Law) that go far beyond any rights now recognized by the Supreme Court. Indeed, overall, this final chapter emphasizes the much broader extension of rights under the Basic Law, as well as the degree of seriousness with which many “substantive” rights -- such as the right to choose an occupation -- are enforced in the German system.

E. Central Themes

Indeed, looking back over the work as a whole, the reader will note that a number of important themes (or one may say *leitmotifs*) wind their way through the volume. For example, the topic of “positive” rights of individuals (or constitutional obligations of the state) runs through the entire treatise as an important theme.³⁸ This is a topic of particular fascination for American observers, because the absence of social welfare rights and other affirmative governmental obligations is the trait that most dramatically distinguishes the eighteenth century Constitution of the United States from certain prominent twentieth century constitutions. In the late 1960s, at the end of the Warren Court period, there were notable (but unsuccessful) attempts to try to locate such affirmative governmental obligations in the broad language of the American fourteenth amendment.³⁹ Although the Basic Law contains only a few indications of the existence of such rights, the Constitutional Court has been rather receptive to the imposition of constitutional obligations on the state in various ways. In some instances these constitutional obligations require

³⁸ See also Currie, *Positive and Negative Constitutional Rights*, *supra* note 5.

³⁹ See, e.g., Frank L. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

the government to impose *burdens* on individuals (as in the abortion cases⁴⁰), and in some instances these obligations require the government to furnish *benefits* to individuals or groups (as in an important case providing subsidies for some private schools).⁴¹ Currie discusses several variations on these themes throughout the course of the treatise.

The legacy of the New Deal judicial crisis still haunts American constitutional law, and it particularly haunts those who -- like Professor Currie (and the present writer) -- were taught by those who had actually experienced that crisis. One of the important results of the New Deal crisis was the Supreme Court's withdrawal from judicial review of economic regulation under the doctrine of "substantive due process" as it was applied, for example, in the famous case of *Lochner v. New York*.⁴² Many spectres haunt German constitutional law, but, interestingly, this is not one of them. Accordingly, the German Constitutional Court has been much more willing to pass upon the substantive "reasonableness" of legislation under open-ended doctrines that resemble the American doctrine of "substantive due process." The extent to which the German Constitutional Court has applied doctrines of this kind, forms another of the major themes of Currie's treatise. Currie finds that a number of provisions of the Basic Law "have been employed to make the Constitutional Court ultimate censor of the reasonableness of all governmental action."⁴³ Although it is clear that Currie deplores this sort of tendency in the United States, he nonetheless seems to harbor some grudging admiration for this development in Germany, noting that "[u]nlike their American counterparts during the *Lochner* years, the German judges do not seem often to have blocked desirable or even fairly debatable reforms; they do seem to have spared their compatriots a flock of unjustified restrictions on liberty and property."⁴⁴ Yet ultimately Currie questions whether a power of this sort "is consistent with one's conception of democracy."⁴⁵

In another interesting general theme, Currie looks back with a measure of nostalgia on certain largely vanished or depreciated doctrines in American constitutional law, which, however, remain current and alive in the jurisprudence of the German

⁴⁰ BVerfGE 39, 1 (1975); BVerfGE 88, 203 (1993).

⁴¹ BVerfGE 75, 40 (1987).

⁴² 198 U.S. 45 (1905).

⁴³ CURRIE, *supra* note 2, at 337.

⁴⁴ *Id.* at 338.

⁴⁵ *Id.*

Constitutional Court. These include, for example, what Currie sees as the “inferior” status of property rights in American constitutional law -- rights that are not so “relegated” in the German cases.⁴⁶ Currie also approves the Constitutional Court’s active policing of the border-line between state and federal authority -- which, as Currie notes, has largely fallen by the wayside in American constitutional law. Interestingly, Currie’s treatise was published in 1994, the year before the Supreme Court decided *United States v. Lopez*,⁴⁷ the case in which the Court began to reimpose serious limits on congressional power under the Commerce Clause. It would have been interesting to know the extent to which Currie believed that *Lopez* and its progeny (for example, *United States v. Morrison*⁴⁸) brought the American decisions into closer alignment with the German approach to this subject. Certainly, in later writing, Currie welcomed the *Lopez* case and similar decisions, like *Printz* and *City of Boerne v. Flores*.⁴⁹ Similarly, in another nostalgic backward glance, Currie measures the rather vigorous enforcement of the nondelegation doctrine by the German Constitutional Court, against its virtual abandonment by the American Supreme Court, and comes to the conclusion “that we [in the United States] have lost something significant that the Germans have worked hard to maintain.”⁵⁰ Yet Currie’s own discussion of the nondelegation problem may suggest an important historical difference between the role of that doctrine in the two systems: In the United States the nondelegation doctrine has often been asserted in an attempt to thwart progressive economic regulation; in Germany, in contrast, unduly broad delegations may evoke unpleasant memories of the “*Ermächtigungsgesetz*”, the statute through which the Weimar Parliament in 1933 relinquished its power to the Hitler regime.⁵¹

F. Conclusion

As we move away in time from the publication of this extraordinary treatise -- and as the German Constitutional Court accumulates new decisions that may confirm, qualify, or alter the conclusions and analysis set forth by Professor Currie -- readers who are interested in the study of German constitutional law will increasingly miss

⁴⁶ *Id.* at 290.

⁴⁷ 514 U.S. 549 (1995).

⁴⁸ 529 U.S. 598 (2000).

⁴⁹ David P. Currie, *Subsidiarity*, 1 GREEN BAG 2ND SERIES 359, 361 (1998); *Printz v. United States*, 521 U.S. 898 (1997); *City of Boerne v. Flores*, 521 U.S. 507 (1997).

⁵⁰ CURRIE, *supra* note 2, at 133.

⁵¹ *See id.* at 125-26.

Professor Currie's commentary on these new developments. No similar work seems to be in the wings, and certainly it is unlikely that anyone else will achieve the depth of understanding of both the German and the American constitutional cases that was so uniquely possessed by David Currie. But this volume, approaching German constitutional law from a basically American perspective, will stand as a monument to the illumination that can be provided by the deep, comprehensive and perceptive comparison of constitutional systems.

**MEMORIAL:
DAVID CURRIE AND GERMAN CONSTITUTIONAL LAW**

German Equal Protection: Substantive Review of Economic Measures

*By Edward J. Eberle**

*“Denn nur durch Vergleichung unterscheidet man sich und erfährt, was man ist, um ganz zu werden, was man sein soll.” – Thomas Mann***

A. Introduction

David Currie devoted a substantial part of his scholarly work to exploring the intricacies of constitutional law, focusing intently on the United States and German constitutional orders. Along with Donald Kommers, Currie was among the first to closely examine the German constitutional system in a search for elucidation. As the quote by Thomas Mann (which he used in his seminal book, *The Constitution of the Federal Republic of Germany*) illustrates, if we truly want to aspire to realize our talents and ambitions, it is important to look outside national borders to see how things are done elsewhere to discover if there are ways in which we can improve. Staying within the “City upon a Hill,”¹ as many Americans identify the United States, may lead to insularity or, even, a sense of false confidence. Which is why the task of comparative law is so important: looking outside national borders to see what other perspectives are out there, and then comparing and contrasting the foreign and domestic to learn which, upon consideration, is better or worse and for what reasons.

* Distinguished Research Professor of Law, Roger Williams University School of Law. Copyright by Edward J. Eberle, 2007. All rights reserved. All translations are mine unless otherwise noted. Email: eeberle@rwu.edu.

** “For only by making comparisons can we distinguish ourselves from others and discover who we are, in order to become all that we are meant to be.” THOMAS MANN, JOSEPH IN AEGYPTEN (1933) (quoted and translated in DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* (1994)).

¹ John Winthrop, *The City Upon a Hill; the Covenant; The New Israel and the Separated Garden, Sermon on Christian Charity (1630)*, in *RELIGIOUS FREEDOM, HISTORY, CASES, AND OTHER MATERIALS ON THE INTERACTION OF RELIGION AND GOVERNMENT* 122-23 (John Noonan, Jr. and Edward McGlynn Gaffney, Jr. eds., 2001).

That is what David Currie did in his work, focusing on the German constitutional order in comparison to the American in a search for illumination and perspective. Currie observed a number of notable differences between the two systems. These included the idea of positive as well as negative rights.² Negative rights, of course, mean a fount of personal freedoms that individuals can exercise to delimit state power. Both the United States and Germany share this conception of rights. A difference in the two constitutional orders, however, is that the German system contains a positive dimension to rights as well, obliging the state to act proactively to protect its citizens. In substantial part, this idea is grounded in the *Sozialstaat* (social justice) principle of article 20(1) of the German *Grundgesetz* (GG - Basic Law), which obligates the state to provide a measure of social justice for all people.³ The commitment of Germany to a constitution of human dignity plays a significant role as well, as it is the obligation of the state to guarantee a certain minimum of material and mental security so that all citizens can realize their potential.⁴

The social justice principle influences a number of other provisions of the Basic Law. For example, Article 6(1) provides marriage and family rights, stating that "Marriage and family shall enjoy the special protection of the state." Article 6(2) provides that "The care and upbringing of children is the natural right of parents and a duty primarily incumbent upon them. The State shall watch over them in the performance of this duty." Article 6(4) states that "Every mother shall be entitled to the protection and care of the community." Article 6(5) provides that "Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage." Article 7(1) provides that "The entire school system shall be under the supervision of the state." Article 14(2) recognizes a communal obligation to property, establishing that "Property entails obligations. Its use shall also serve the public good." And Article 15 constitutionalizes the principle of socialization (that is, state control of resources), should the need arise: "Land, natural resources, and means of production may for the purpose of socialization be transferred to public ownership or other forms of public enterprise by a law that determines the nature and extent of compensation." Such positive state obligations are largely absent from the American constitutional

² See DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 13-17 (1994).

³ GRUNDGESETZ (GG - Basic Law/Constitution) art. 20(1), translated by Christian Tomuschat and David Currie and published by the Press and Information Office of the Federal Republic of Germany. "The Federal Republic of Germany is a democratic and social federal state."

⁴ GRUNDGESETZ (GG- Basic Law/Constitution) art. 1(1) ("Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.").

order.⁵

Other notable characteristic differences present in the German constitutional order include the idea of *Drittwirkung* (third party effect), pursuant to which the values of the Basic Law radiate out and influence the interpretation of private law. The effect also can flow in the other direction; private law norms can influence the interpretation of constitutional norms. This is known as the theory of *Wechselwirkung* (reciprocal effect).⁶ Under religious freedoms, rights extend to secular philosophical beliefs as well as faith-based beliefs, and “No person shall be compelled against his conscience to render military service involving the use of arms.”⁷ And, as observed by Currie in his book, “Among the more startling aspects of the Basic Law to an observer from the other side of the Atlantic is a set of provisions that appear to embody Milton’s view that the enemies of freedom are not entitled to its blessings.”⁸ This, of course, is the concept of *streitbare Demokratie* (militant democracy) whereby the state and its citizens can take measures to fight the enemies of democracy.⁹ Applying the concept of militant democracy, the German Constitutional Court has twice banned political parties.¹⁰

Another intriguing aspect of German constitutional law is the Constitutional

⁵ See, e.g., *DeShaney v. Winnebago County Dept. of Soc. Services*, 489 U.S. 189 (1989) (refusing to recognize any positive obligation of government to intervene to protect the life and well-being of a child who the state knew was being abused by his father.).

⁶ The decisive case is *Lüth* (BVerfGE 7, 198 (1957)), which involved a communication rights dispute over the right of a film director formerly closely associated with the Nazis to show his new films at a Hamburg film festival. In overturning an injunction prohibiting Lüth from continuing his call for a boycott of the film, the Court delineated the value order of the GG. “This value-system, which centers upon human dignity and the free unfolding of the human personality within the social community, must be looked upon as a fundamental constitutional decision affecting all areas of law, public and private. . . . Thus, basic rights obviously influence civil law too.” BVerfGE 7, 198 (205). By interpreting basic rights as establishing an “objective” ordering of values, the Court was stating that those values are so important that they must exist “objectively” – as an independent force, separate from their specific manifestation in a concrete legal relationship. So conceived, objective rights form part of the legal order, the *orde public*, and thereby possess significance for all legal relationships. For further consideration of the “Third Party Effect Theory,” see Edward J. Eberle, *Public Discourse in Contemporary Germany*, 47 CASE W. RES. L. REV. 797, 811-12 (1997); Peter E. Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 261 (1989).

⁷ GRUNDGESETZ (GG- Basic Law/Constitution) art. 4(1) and 4(3).

⁸ CURRIE, *supra* note 2, at 213.

⁹ GRUNDGESETZ (GG- Basic Law/Constitution) art. 21(2).

¹⁰ See BVerfGE 5, 85 (1956) (outlawing the Communist Party); see also BVerfGE 2, 1 (1952) (outlawing the Socialist Reich Party, successor to the Nazis).

Court's serious consideration of economic measures, a particular interest of Currie's. As he observes, "the Constitutional Court has achieved results reminiscent of those reached by the Supreme Court during the *Lochner* period."¹¹ The Constitutional Court judged the reasonableness of economic measures to see if they passed constitutional muster in a manner not unlike the Supreme Court during the *Lochner* period (1905-1936) where it invoked the due process clause to invalidate state measures¹² and applied a restrictive view of the Commerce Clause to invalidate federal measures.¹³ Under German law, the Constitutional Court has invoked Article 2 (personality freedoms), Article 3 (equality freedoms), Article 12 (occupational freedoms), and Article 14 (property freedoms) to scrutinize with care the reasonableness of state measures that affect economic matters along the lines of the *Lochner* Court.¹⁴

In this short article commemorating the life and work of David Currie, I will examine one aspect of the *Lochnerian* approach of the German Constitutional Court: the careful scrutiny of economic measures under the equality norms of Article 3. The article will proceed by laying out the judicial standards the Court applies to equality and then demonstrating how it applies them to economic measures. Standard socio-economic measures can be subject to a probing form of review if they present overt inequalities among similarly situated groups. That is, disparate treatment of different groups can only be justified by a convincing rationale. If no such disparity is present, the measure will be presumptively upheld if an evident reason is present. This is not unlike the low-level deferential standard of review of rational basis under United States law. So, let us pick up the threads of a piece of the fine work left by David Currie.

¹¹ David P. Currie, *Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany*, 1989 SUP. CT. REV. 333, 348. ("Lochner Abroad"). Republished in this issue of the *German Law Journal*.

¹² See, e.g., *Lochner v. New York*, 198 U.S. 45 (1905).

¹³ See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

¹⁴ See Currie, *supra* note 11, at 339-52.

B. German Equality Norms

The German Basic Law is quite concrete as to what equality means, providing much textual guidance to the German courts and legislatures, as is typical of post World War II constitutions. Article 3 of the Basic Law provides:

- (1) All persons shall be equal before the law.
- (2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.
- (3) No person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavored because of disability.¹⁵

As is apparent from the text of the German charter there are a fairly substantial number of personal traits demarcated as special equality norms, including gender, "sex, parentage, race, language, homeland and origin, faith, or religious or political opinions." All of these traits are immutable, except for those involving language, faith, religion or political opinion, over which a person can exert control. The wide number of demarcated personal traits present in the Basic Law contrasts with the open ended text of the United States Fourteenth Amendment, which provides "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws." As with much of American constitutional jurisprudence, it is up to the Supreme Court to identify traits it would regard as suspect. So far, despite over 60 years of Supreme Court jurisprudence, American equality jurisprudence recognizes only race or national origin¹⁶ and alienage as suspect classes.¹⁷

In spite of the difference in the textual foundations with which they have to work, both Courts employ a sliding scale of judicial scrutiny with the degree of scrutiny varying with the trait or personal interest affected by the governmental measure. Strict or extremely intensive scrutiny applies to measures targeting personal traits

¹⁵ GRUNDGESETZ (GG- Basic Law/Constitution) art. 3. Much of the discussion on equality is derived from Edward J. Eberle, *Equality in Germany and the United States*, San Diego Int'l L. J. (forthcoming).

¹⁶ See *Korematsu v. United States* 323 U.S. 214 (1944).

¹⁷ See *Sugerman v. Dougall*, 413 U.S. 634 (1973)(suspect class treatment for alienage status applies only to state governmental actions, and not federal governmental, and only when state governmental measures cannot be justified under public function doctrine.).

that affect especially a person's identity. Again, under U.S. law this includes race, national heritage or alienage in United States law. Under German law it includes race, sex, gender, language, national origin, disability or faith, religion and political opinion in German law.¹⁸ More deferential judicial review is reserved for matters involving socio-economic measures with an important difference present in German law. The German Constitutional Court probes rigorously even matters of a socio-economic dimension if the law under review affects different groups of people unequally and no persuasive justification for the disparity is evident. Let us turn now to examine the Constitutional Court's approach to enforcing the principle of equality to socio-economic measures.

C. Socio-Economic Measures

In socio-economic matters the level of review varies under German law. First, if the measure triggers a fundamental right other than equality and/or it results in disparate treatment of similarly situated groups, the Constitutional Court will intensify the degree of its scrutiny and sustain the measure only if quite convincing reasons are present; in essence, this is a form of intensive scrutiny. The closest parallel in United States equal protection jurisprudence to this heightened form of review might be the intermediate scrutiny it applies to gender-based discrimination. With regard to the German context I will refer to it as heightened review. It is a more rigorous examination of the state's justifications for drawing distinctions in socio-economic matters than the more standard form of rational basis review typically applied and pursuant to which the Constitutional Court probes the inequality resulting from the measure and sustains it if there is a sound reason to justify the difference. If neither a dramatic inequality exists nor any other right or group differential is present, the Constitutional Court will sustain the measure if there is a sound explanation.¹⁹ What these different levels of review applied to inequalities in socio-economic policy indicate is that the Court varies its scrutiny based on the degree of inequality present. Even review of socio-economic matters can be rigorous. We will now turn to an examination and explanation of the sliding scale variety of review applied to socio-economic matters, starting with heightened review.

¹⁸ See GRUNDGESETZ (GG- Basic Law/Constitution) art. 3.

¹⁹ See the *Transsexual II Case* (BVerfGE 88, 87 (96-97) (1993)) ("When only the simple prohibition against arbitrariness (*Willkuerverbot*) comes into play, a violation of article 3(1) can be established only when the lack of substantiation of the difference in treatment evident is."). This is generally known as the arbitrariness or evident standard, meaning that an evident reason must be present to justify the measure. It is the lowest level of review under German law. Its equivalent in United States law would be rational basis review.

The *Retirement Benefits Case*²⁰ concerned the formula for allocating retirement benefits between public employees and employees who previously had worked in the public sector but had then left to work in the private sector. The Court found the measure unconstitutional because the formula resulted in higher retirement income for public employees as compared to employees who had moved into the private sector. Even though this was a socio-economic regulation the Court nevertheless probed the measure quite intensely based on the unequal treatment of the two generally similarly situated groups and the implication of the policy for Article 12 occupational choice freedoms.

Another case involving heightened scrutiny concerned the computation of income levels of a separated married couple for purposes of obtaining state financial aid for university education.²¹ In the *Separated Couple University Aid Case* the couple had been separated for a long time. Under German law the couple's income in such cases ordinarily is counted separately, not jointly. That was not the case here. The applicant for state aid was denied a state grant based on the joint income of both spouses, notwithstanding that they long had been separated. The Constitutional Court invalidated the provision as a violation of Article 3 equality; the measure discriminated against a group of people, here separated couples, without a sound justification. The measure was especially dubious, the Court explained, because most other aspects of German law gave separate treatment to the incomes of long separated couples for purposes of qualifying for benefits. This was the case in areas like welfare or unemployment benefits, or salary or tax matters.²²

Heightened concern with the disparate treatment of essentially similarly situated groups of people led the Court to declare another socio-economic policy unconstitutional in the *Employee Termination Case*.²³ The case involved disparity in

²⁰ BVerfGE 98, 365 (1998).

²¹ See the *Separated Couple University Aid Case* (BVerfGE 91, 389 (1995)). Under German law, citizens are entitled to state subsidized support for university education when they do not have adequate financial means to support the costs of university education. The law is known as the federal education support law or *Bundesausbildungsfoerderungsgesetz*. The law is part of the social welfare net.

²² See BVerfGE 91, 335 (402-03) (1994). In another case, BVerfGE 99, 165 (1998), involving similar concerns regarding state funding of university education, the Constitutional Court found it unconstitutional to deny a student access to state grants for higher education when the student claimed a status independent of his parents, but the parents' income was nevertheless used as part of the calculation to see if the student would qualify for the state grant. In the case, the student was seeking a second education and, under the formula for calculating benefits, the parents' income was not high enough to cover the costs of the education. The Court found no justifiable reason for the difference in treatment of parent dependent and parent independent students. *Id.* at 178, 181.

²³ BVerfGE 82, 126 (1990).

length of notice of termination between physical (or blue collar) and nonphysical or mentally skilled workers (or white collar). Blue collar workers were entitled to two weeks' notice of termination; white collar workers received six weeks' notice of termination. The longer an employee's tenure with an employer the more the minimum length of notice of termination increased. For blue collar employees, ten years employment triggered two months' notice of termination and twenty years employment required three months' notice. For white collar workers, five years employment triggered three months' notice and ten years employment required five months' notice.²⁴ In the case that reached the Constitutional Court a woman worked as a tailor in an apparel store for fifteen years. The employer terminated her employment with eight weeks' notice, the length of termination having been established by a collective bargaining agreement. Under the collective bargaining agreement white collar employees employed for fifteen years received six months' notice.²⁵ Because of the differential in treatment of the two groups of employees the Court applied, again, heightened scrutiny.

An unequal treatment of several groups under the same norms is consistent with the general equality norm of Article 3(1) only when the difference between the groups can be justified by reasons of sufficient nature and weight. Disparity in treatment and justifiable grounds must stand in a proportionate relationship to one another. Thereby also to be considered in the balance is whether the inequality will have an effect on basic protected freedoms.²⁶

Perhaps a disparity in treatment might be justified when a "generalization impacts negatively only on a small group of people and the inequality is not very severe."²⁷ In this case there was no adequate justification for the disparate treatment. For example, the idea that white collar workers merit a longer notice of termination period because they are better educated, having invested more time in building a career, is simply not sufficient as a basis for the differential in treatment.²⁸ The

²⁴ *Id.* at 128-29 (citing BGB § 622).

²⁵ For coverage of the case, see Susanne Baer, *Equality: The Jurisprudence of the German Constitutional Court*, 5 COLUM. J. EUR. L. 249, 250 (1998-99).

²⁶ BVerfGE 82, 126 (146) (1990).

²⁷ *Id.* at 152.

²⁸ *Id.* at 148-49.

Court concluded that this justification may have worked in the past, but no longer.²⁹ The measure affected a large, not small, group of people; hence, it could not be justified on the second rationale either.

As David Currie observed,

the Constitutional Court has found fault with the exclusion of unemployment benefits for students and for persons formerly employed by their parents, limitations on aid for the blind or disabled, and the denial of retirement benefits to persons living abroad. Some of these decisions may be explainable on the ground that the classification impinged upon some other fundamental right; but the overall impression is that the Constitutional Court is rather strict in scrutinizing classifications in the distribution of welfare benefits as such.³⁰

Currie further observed that matters involving tax law also received heightened scrutiny from the Court when the law impacts disparately on people.

[C]lassifications made in tax laws require special justification because of the severity of their impact. A surprising number of such distinctions have been found wanting: discriminatory taxation of chain stores, preferential treatment of vertically integrated firms under the value-added tax, nondeductibility of partners' salaries and of child-care expenses, to name only a few. These decisions stand in sharp contrast to modern decisions in the United States; the Supreme Court has not scrutinized classifications in tax laws with much care since the New Deal Revolution.³¹

²⁹ *Id.* at 153.

³⁰ Currie, *supra* note 11, at 369. For citations to the German cases, *see id.*

³¹ Currie, *supra* note 11, at 368-69. For citations to the German cases, *see id.*

Furthermore, Currie noted that “the Constitutional Court has also applied the general equality clause of Article 3(1) to strike down an impressive variety of measures.”³² He went on, remarking that often the Court will invoke substantive provisions of other rights

to give content to the general prohibition of Article 3(1). Thus, the Court has been quick to condemn discrimination against married people or families with children under Article 3(1) in conjunction with the applicable paragraphs of Article 6. It has done the same in cases respecting inequalities affecting the academic and occupational freedoms guaranteed by Articles 5(3) and 12 (1), the traditional rights of civil servants under Article 33(5), the right to operate private schools under Article 7(4), and above all the right to participate in elections.³³

So, what we see under German equality jurisprudence is that mere economic matters may merit a more searching scrutiny than simple rational basis when either the measure impacts disproportionately on two relatively similar groups or when a fundamental right is impacted. In these cases the Court will uphold the measure only in the face of a demonstrable, convincing justification for the difference in treatment. It seems clear that German law possesses a degree of rigor that is more broadly applied than that of United States law. As Currie observes, “without intimating that the distinctions either embodied suspect classifications or impinged upon fundamental rights, for example, the Constitutional Court conjured up memories of the vigorous way in which the Equal Protection Clause was enforced in economic cases during the *Lochner* era in this country.”³⁴

By contrast, when no suspect class trait is involved or when no obvious disparity in treatment among groups of people is present, the Constitutional Court will apply the conventional, low-level review of rational basis to ascertain whether the measure in question is constitutional or not. Even here, however, the Court will require a convincing reason to justify disparate treatment of groups of people. The standard of rational basis review, therefore, is somewhat more demanding than the

³² *Id.* at 367.

³³ *Id.* at 367. For citations to the German cases, *see id.*

³⁴ *Id.* at 370.

conventional United States approach that calls for, simply, any plausible reason³⁵ or where “the question is at least debatable.”³⁶

A few cases will suffice to demonstrate the more rigorous nature of German rational basis review. In a case involving a pharmacy that wanted to continue operating in a railroad station, the Constitutional Court found that officials were justified in shutting down the pharmacy because it dealt in the dispersal of medicines and, therefore, was subject to more stringent pharmaceutical regulations. Other businesses that operated in the railroad station were not subject to this additional regulatory oversight.³⁷ The Court found this to be a sound reason for the difference in treatment among the businesses. In a case involving fees for children attending *kindergarten* the Constitutional Court ruled that a municipality was justified in applying a sliding scale of fees based on parental income levels.³⁸ Income levels were used in other social programs, the Court explained, such as social welfare benefits or income tax rates; thus, they could also be used for determining *kindergarten* fees.³⁹ In a case involving a 15 year old boy wanted to soup-up his bicycle by adding a motor so that he could travel as fast as 25 kilometers per hour, the Court determined that it was permissible for authorities to cite the boy under the criminal law, in contrast to the civil law that handles most traffic violations, because the boy did not qualify yet for a driver’s license, posing dangers to other moving vehicles and pedestrians.⁴⁰ In another case a veterinarian sued claiming that he was entitled to exemption from being required to testify under oath on the ground that he, like physicians and lawyers, needed to protect confidential information acquired in his practice. The Constitutional Court denied the claim, reasoning that veterinarians simply do not trade in sensitive personal matters like physicians and lawyers.⁴¹ This made eminent sense, after all, because veterinarians treat animals, not people. Thus, there are good reasons for the different treatment of veterinarians as compared to legal and medical professionals.⁴² In yet another case, this time involving the reunification of

³⁵ See, e.g., *Jefferson v. Hackney*, 406 U.S. 535, 546 (1972).

³⁶ *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 154 (1938)).

³⁷ See BVerfGE 13, 225 (1961).

³⁸ See BVerfGE 97, 332 (1998).

³⁹ See *Id.* at 344.

⁴⁰ See BVerfGE 51, 60 (1979).

⁴¹ See BVerfGE 312 (1975).

⁴² See *Id.* at 323.

Germany, the Court ruled that a difference in treatment of the debt burden of a former East German company as compared to a West German company could be justified by the difference in economic standards between the then two Germanies.⁴³

D. Conclusion

In this short survey of German equality norms as they apply to socio-economic measures, another difference between the German and American constitutional orders is revealed. German equality norms play a central role in society. The Constitutional Court strives to apply the principle of equality uniformly and consistently to all members of society. What comes to matter is evaluating whether different people or organizations are treated fairly. While those especially vulnerable within society get special judicial solicitude, equality matters for all people, even when it is just a run-of-the-mill socio-economic measure. The Court is in search of an “egalitarian notion of equality.”⁴⁴ “For better or worse, the German Constitutional Court is in the business of determining the reasonableness of governmental action—and, to a significant degree, of inaction as well.”⁴⁵ As this substantive notion of equality impinges upon economic interests, it is, as Currie observed, a bit reminiscent of the Supreme Court’s jurisprudence in the *Lochner* era.

What this means for U.S. constitutional law is a question to be debated. Does the German Court’s approach provide a model for the reintroduction of the *Lochner*-era jurisprudence?⁴⁶ Perhaps. The German Court’s approach has the advantage of promoting consistency in the application of equality across the board and to all those affected. This bespeaks a commitment to fundamental fairness in society: All people should have a fundamental claim to equality. But perhaps not. The *Lochner*-era jurisprudence focused primarily on the underlying ideology of *laissez faire* capitalism, using constitutional doctrines to favor private employers over those more vulnerable within society. German equality jurisprudence is, in fact, more concerned with protecting the most vulnerable.⁴⁷ But the German law is interested in the fair treatment of economic actors as well.

⁴³ See BVerfGE 95, 267 (1997).

⁴⁴ William B. Barker, *The Three Faces of Equality: Constitutional Requirements in Taxation*, 57 CASE W. RES. L. REV. 1, 49 (2006).

⁴⁵ Currie, *supra* note 11, at 371-72 (“More important for us is what the German decisions have to say about the desirability of empowering politically insulated judges to make open-ended judgments about the reasonableness of government action. Some may find in the German experience confirmation of the dangers of unchecked judicial intervention, others proof of the need for broad judicial review.”).

⁴⁷ See Edward J. Eberle, *Equality in Germany and the United States* (forthcoming 2009).

Thus we return to the mission of comparative law: evaluating, assessing and considering different patterns of legal orders, looking beyond our borders, in order to determine whether a domestic system works or whether it might be improved by learning lessons from abroad. That debate, of course, is one to be resolved by each society, often from one generation to another. But that is just what David Currie would have wanted, as his work continues to inspire us.

**MEMORIAL:
DAVID CURRIE AND GERMAN CONSTITUTIONAL LAW**

***Republicaiton - Book Review - David P. Currie's The
Constitution of the Federal Republic of Germany***

*By Markus Dirk Dubber**

[Editors' Note: This review originally appeared as Markus Dirk Dubber, *Book Review - David P. Currie, The Constitution of the Federal Republic of Germany*, 40 AM. J. LEGAL HIST. 107 (1996). It is republished here with the permission of the editors of the *American Journal of Legal History* and the author.]

[David P. Currie, *The Constitution of the Federal Republic of Germany*. University of Chicago Press, 1995. 448 pp. \$35]

Professor David Currie, chronicler of the United States Supreme Court,¹ has turned his attention to the German Constitutional Court. *The Constitution of the Federal Republic of Germany* provides an excellent introduction to the jurisprudence of one of the few courts in the world that rivals the U.S. Supreme Court in political significance. After briefly familiarizing his readers with the history and structure of the German constitution, which is still known by its blueprint title of "Basic Law" even after reunification, Professor Currie discusses a wide variety of subjects, including federalism, the separation of powers, freedom of expression, church and state, and fundamental rights. Drawing on his familiarity with the jurisprudence of both the U.S. Supreme Court and the German Constitutional Court, Professor

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¹ See DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST ONE HUNDRED YEARS 1789-1888* (1985); DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888-1986* (1990).

Currie repeatedly stops to explore illuminating differences and similarities between the two systems. As the book's many and detailed footnotes indicate, Professor Currie manages to pull off a feat all too rarely accomplished: a well-documented and well-balanced work of comparative legal scholarship that will be of interest to scholars of German law and of American constitutional law alike.

By focusing his interest on the doctrine of German constitution law as it has been developed by the Constitutional Court since World War II, Professor Currie also managed to avoid another cardinal sin commonly committed by scholars of comparative law: the futile effort to cram the theory and practice of an entire legal culture into a few hundred pages. As a result, Professor Currie is forced to leave the exploration of certain aspects of the German constitutional system for another day. One of these aspects comes to light when Professor Currie's approach to German constitutional law is contrasted with the approach of the German commentators of the Basic Law. It would have been unusual for a German book on the constitution to rely as heavily on opinions of the German constitutional court as does Professor Currie's. The German commentators are still having a hard time acknowledging that the deference to written law texts, characteristic of a formalistic civil law system that has developed marvelously complex interpretative techniques to subsume particular fact scenarios under statutory principles, goes out the window as soon as these techniques are applied to such texts as the guarantee of human dignity in Article 1(1) of the Basic Law. Occasionally the venerable authors of the German commentaries and treatises on the constitution can be heard grumbling over the encroachment of Constitutional Court opinions on the authority of the constitutional text that the Court is supposed merely to apply (preferably according to its true meaning as revealed in the tomes of the commentators).² Signed concurring and dissenting opinions were unknown until 1970 (when they were officially authorized by law and only for the Constitutional Court)³ and Constitutional Court opinions remain as cumbersome to keep track of as the published opinions of any other German court because they continue to be identified by volume and page number only (in a few cases they have acquired nicknames). The uninitiated therefore may never discover such gems of constitutional interpretation as the Constitutional Court's recent abortion decision, which illustrates the Court's rhetorical style.⁴ The issue before the Court was not, as

² The critical commentary on the growing significance of judicial opinions by Roman Herzog, erstwhile Chief Justice of the German Constitutional Court, is an example. See Roman Herzog, *Art. 20, in 2 GRUNDGESETZ: KOMMENTAR* 209 n.2, 222 (Maunz and Dürig eds., 1993).

³ See generally ROLF LAMPRECHT, *RICHTER CONTRA RICHTER* (1992).

⁴ BVerfGE 88, 203 (1993).

in the U.S., whether the state was constitutionally permitted to criminalize abortions, but whether the state was constitutionally permitted to *decriminalize* certain abortions. The Court concluded that the state must criminalize abortions to protect the fetus's constitutional right to life. Although the Basic Law was held to require that all abortions remain criminal acts, a woman can escape prosecution for a first trimester abortion if at least three days before the abortion she attends a counseling session designed to discourage abortions. A summary of the Court's reasoning in all its wordy complexity would exceed the scope of this review. Suffice it to say that, employing a curious mixture of philosophical speculation and moral communitarianism not uncharacteristic of its general approach to constitutional interpretation, the Court relied on the “twoness in oneness” of the mother-fetus relationship and on the detrimental effect that decriminalizing some abortions would have on the moral fibre of the community.

With this thorough and competent guide through some of the thickest thickets of the jurisprudence of the German Constitutional Court, Professor Currie has laid a solid foundation for further exploration in the fertile field of comparative constitutional law.

**MEMORIAL:
DAVID CURRIE AND GERMAN CONSTITUTIONAL LAW**

Republication - Separation of Powers in the Federal Republic of Germany

By David P. Currie[†]

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A. Introduction

The Federal Republic of Germany celebrated its fortieth birthday in 1989, and the sudden and unexpected accession of the former German Democratic Republic the following year has drawn the world's attention to the newly united nation. This article is the third installment in an effort to explain the basic features of the German constitution.¹

Adopted by the Germans themselves with the blessing of the three Western occupying powers in 1949, the Basic Law (Grundgesetz) sets up a democratic, federal, and social state under the rule of law, with an extensive bill of rights and

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¹ See also David Currie, *Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany*, 1989 SUP. CT. REV. 333 (1989); DAVID CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* (forthcoming).

comprehensive judicial review of both executive and legislative action.² I have written elsewhere about German federalism and about some aspects of the bill of rights;³ my present topic is the separation of powers.

The Basic Law is built upon the premise of popular sovereignty. "All governmental authority," says the second paragraph of Article 20, "emanates from the people." But the Federal Republic is after all a republic, not a direct democracy; the same paragraph goes on to say that the people shall exercise their power "by means of elections and voting" and through the organs of government.⁴ Most important for present purposes, it requires a separation of governmental powers; for it specifies that the people shall act through the agency of special, or particular, or separate ("besondere") legislative, executive, and judicial bodies.⁵

Separation of powers can serve to promote rational government by optimizing the conditions for making various decisions.⁶ Basic policy may be set by a deliberative assembly, administration may be entrusted to a unified executive, individual disputes may be resolved by independent judges.⁷ No less significant, however, is Montesquieu's famous argument for separation of powers as a fundamental safeguard of liberty.⁸ For when legislative, executive, and judicial powers are

² See GRUNDGESETZ [GG] [Constitution] art. 1-20, 28(1), 93, 100(1) (F.R.G.) [hereafter cited as GG].

³ See *supra* note 1.

⁴ For the view that history and the paucity of particular constitutional authorizations strictly limit the permissibility of such direct democratic devices as the initiative or referendum despite the language of Art. 20, see Roman Herzog, *Art. 20*, in 2 GRUNDGESETZ KOMMENTAR Para. Nr. 38-45 (Theodor Maunz, Günter Dürig, *et al.* eds.) [hereafter cited as Maunz/Dürig]. For the contrary argument, see Ekkehart Stein, *Art. 20(1-3)*, in 1 KOMMENTAR ZUM GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND (REIHE ALTERNATIVKOMMENTARE) Para. Nr. 39-40 (Erhard Denninger *et al.* eds.) [hereafter cited as AK-GG]. In reaching his conclusion Herzog places no reliance on the use of the term "Republik" in Art. 20(1); the Basic Law is understood to employ that term in opposition to monarchy, not to direct democracy. See Herzog, *Art. 20*, in 2 Maunz/Dürig, Para. Nr. 5-8.

⁵ "Alle Staatsgewalt geht vom Volke aus. Sie wird vom Volke in Wahlen und Abstimmungen und durch besondere Organe der Gesetzgebung, der vollziehenden Gewalt und der Rechtsprechung ausgeübt." See Herzog, *Art. 20*, in 2 Maunz/Dürig, Para. Nr. 37-43.

⁶ See KONRAD HESSE, *GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND* Para. Nr. (15th ed. 1985) ("eine Frage sachgemäßer Bestimmung und Zuordnung der staatlichen Funktionen").

⁷ See *id.*, Para. Nr. 488; *cf.* Currie, *The Distribution of Powers after Bowsher*, 1986 SUP. CT. REV. 19 (1986).

⁸ *L'esprit des Lois*, bk. 11, ch. 6 (1748).

divided, three distinct bodies must abuse their authority before the citizen's rights can be infringed.⁹

The allocation of governmental powers in Germany differs from that in the United States in a number of interesting ways. The most striking difference is that the Federal Republic has a parliamentary rather than a presidential system; federal ministers serve at the pleasure of the legislature.¹⁰ Thus at the outset there is less structural separation between legislative and executive organs in Germany than in the United States. The judges, on the other hand, are quite independent. Indeed in some respects they are better protected from executive or legislative influence than their counterparts in the United States.

Moreover, the lack of separation between the federal parliament and federal ministers is counterbalanced by a second interesting departure from the American model: a significant reduction in the powers of the ministers themselves. Most federal laws are carried out not by federal officials but by the constituent states (Länder), and even the federal administration is given a degree of independence from political pressure. Thus principles both of federalism and of civil service compensate to a significant extent for the structural symbiosis of the parliamentary model; even at the structural level there is more separation of powers in Germany than a first look at the parliamentary system might suggest.

Furthermore, the undeniable American advantage with respect to structural separation is matched by a marked German advantage in separation of functions. Only the legislature may make laws; only the executive may enforce them; only judges may adjudicate. Not only is the executive bound by the laws and in many respects permitted to act only on the basis of statutory authority; in Germany there are meaningful and judicially enforced limits to the delegation of legislative power. With rare exceptions there are no independent agencies with executive powers; most enforcement authority is ultimately subject to ministerial control. Finally, there are essentially no quasi-judicial agencies in the American sense of the term; if administrators decide concrete individual disputes, their decisions must be subject to de novo judicial review on questions of fact as well as law.

⁹ For a German version of this argument, see Herzog, *Art. 20*, in 2 Maunz/Dürig, Para. Nr. 2-12. For the analogous argument in support of federalism, see CURRIE, *FEDERAL REPUBLIC OF GERMANY*, *supra* note 1. As we shall see, in Germany federalism significantly complements the horizontal separation of powers.

¹⁰ The *Länder* constitutions likewise follow the parliamentary model, though the Basic Law does not require them to. See Matthias Herdegen, *Strukturen und Institute des Verfassungsrechts der Länder*, in 4 HANDBUCH DES STAATSRECHTS 479, Para. Nr. 16-37 (Josef Isensee & Paul Kirchhof eds., 1990) [hereafter cited as HANDBUCH DES STAATSRECHTS].

In sum, despite the parliamentary system there are significant structural as well as functional limits to the concentration of authority in Germany. These limits provide significant additional safeguards against arbitrary governmental action, and Article 79(3) protects their essential features from constitutional amendment.¹¹

B. Legislative Power

Federal statutes, Article 77(1) provides, are adopted by the Bundestag – the federal parliament. Through a separate body called the Bundesrat, the constituent states exercise a significant check on federal legislation – a veto power that in a surprising number of important instances cannot be overridden by the parliament itself.¹²

In conformity with the democratic principle of Article 20, members of the Bundestag are chosen in “general, direct, free, equal, and secret elections.¹³ Within the Bundestag, minority interests are protected. Each member is entitled to introduce bills,¹⁴ and the investigative machinery can be set in motion by as few as

¹¹ See GRUNDGESETZ [GG] [Constitution] art. 79(3) (F.R.G.); “Amendments of this Basic Law affecting . . . the basic principles laid down in Article[] . . . 20 shall be inadmissible.”

¹² See CURRIE, FEDERAL REPUBLIC OF GERMANY, *supra* note 1. Unlike the President of the United States (U.S. Const., Art. I, § 7), the executive in Germany has no general veto power. Laws increasing expenditures or reducing revenues, however, can be adopted only with Cabinet approval. See GRUNDGESETZ [GG] [Constitution] art. 113 (F.R.G.). The theory is that neither the legislature nor the executive can be trusted where the public’s money is concerned; each branch therefore acts as a check on the other. See Theodor Maunz, *Art. 113*, in 4 Maunz/Dürig, Para. Nr.1; Gunter Kisker, *Staatshaushalt*, in 4 HANDBUCH DES STAATSRECHTS, Para. Nr. 35, 48-51. In addition, legislative appropriations are interpreted only to authorize expenditures, not to require them. *Id.*, Para. Nr. 28, 52. *Contrast Train v. City of New York*, 420 U.S. 35 (1975). For an acerbic statement of the view that Art. 113 was doomed by political realities to be the dead letter it has apparently become, see Heiko Faber, *Art. 113*, in 2 AK- GG, Para. Nr. 1-4.

¹³ GRUNDGESETZ [GG] [Constitution] art. 38(1) (F.R.G.). In a series of significant decisions the Constitutional Court has done a good deal to ensure the directness as well as the equality of elections in support of the democratic principle. On the question of directness see BVerfGE 3, 45 (1953) (striking down a provision authorizing political parties to name substitutes for candidates who had withdrawn after election); BVerfGE 7, 77 (1957) (striking down a provision permitting parties to change the order in which candidates appeared on the electoral list in a similar situation). On equality, see the decisions cited in Currie, *Lochner Abroad*, *supra* note 1, at 367 n. 272.

¹⁴ See GRUNDGESETZ [GG] [Constitution] art. 76(1) (F.R.G.): “Bills shall be introduced in the Bundestag by the Federal Government [Bundesregierung] or by members of the Bundestag or by the Bundesrat.” This right may be subjected to reasonable procedural regulations but not substantively limited, even by the Bundestag itself. BVerfGE 1, 144 (1952). The length of speeches by individual members, however, may be limited in the interest of avoiding paralysis. BVerfGE 10, 4 (1959).

one fourth of the members.¹⁵ Article 28(1) requires the Lander to have similar legislative bodies.¹⁶

I. Autonomy and Stability

Various provisions of the Basic Law protect the Bundestag from interference by other organs of government.¹⁷ Members are elected for four-year terms¹⁸ and entitled to “remuneration adequate to assure their independence.”¹⁹ In proper Burkean fashion, they are bound “only by their conscience.”²⁰ For votes or debates

¹⁵ GRUNDGESETZ [GG] [Constitution] art. 44(1) (F.R.G.). The Constitutional Court has confirmed that this provision implicitly gives the same minority the right to control the agenda of the investigating committee. BVerfGE 49, 70 (79-88) (1978). The principle of full and equal membership implicit in the election provisions has been said to require in general that parties be represented on committees in proportion to their strength, but in one significant recent decision the Court held over two dissents that the overriding need for confidentiality justified creation of a five-member commission to consider the budget of secret service agencies even though none of its members represented the unorthodox Green Party. BVerfGE 70, 324 (362-66) (1986). This understandable limitation must be narrowly confined if it is not to impair the principle of representative government. See BVerfGE 80, 188 (1989), holding that Art. 38(1) of the Basic Law forbade the exclusion of a representative from all committees simply because he was not a member of any political party. BVerfGE 84, 304 (1991). Cf. *Powell v. McCormack*, 395 U.S. 486 (1969); *Bond v. Floyd*, 385 U.S. 116 (1966). These and other U.S. decisions cited in this article are discussed in DAVID CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS* (1985) and DAVID CURRIE, *THE SECOND CENTURY* (1990) [hereafter cited as *THE FIRST HUNDRED YEARS* and *THE SECOND CENTURY* respectively].

¹⁶ This requirement also applies to local governments (Kreise und Gemeinden), except that in Gemeinden the citizens themselves may act as a legislative assembly. *Id.*

¹⁷ See generally Maunz, *Art. 40, in 2 Maunz/Dürig*, Para. Nr. 1-2; Hans-Peter Schneider, *Art. 40, in 2 AK-GG*, Para. Nr. 2.

¹⁸ GRUNDGESETZ [GG] [Constitution] art. 39(1) (F.R.G.).

¹⁹ GRUNDGESETZ [GG] [Constitution] art. 48(3) (F.R.G.). The adequacy of their compensation is subject to review by the Constitutional Court. See BVerfGE 40, 296 (1975); BVerfGE 4, 144 (1955) (holding that individuals who are members of both federal and state legislatures need not be paid twice); BVerfGE 32, 157 (1971) (finding the retirement pension prescribed by law sufficient to satisfy Art. 48(3)); Maunz, *Art. 48, in 3 Maunz/ Dürig*, Para. Nr. 14-16. For criticism of the decisions, see Schneider, *Art. 38, in 2 AK-GG*, Para. Nr. 28; and Schneider, *Art. 48, in 2 AK-GG* Para. Nr. 11-12 (arguing that the transformation of legislators into salaried officials, while freeing them from reliance on external sources of income, has made them dependent upon the political parties that determine their chances for reelection). Cf. U.S. Const. art. 1, § 6 (“a Compensation. . . to be ascertained by Law”).

²⁰ GRUNDGESETZ [GG] [Constitution] art. 38(1) (F.R.G.). See generally Maunz, *Art. 38, in 3 Maunz/ Dürig*, Para. Nr. 9-16. For a glimpse into the ticklish relationship between this provision and Art. 21, which guarantees political parties a significant role in the political process, see HESSE, *supra* note 6, Para. Nr. 598-603. As in the United States, the party system significantly limits the practical significance of the separation of powers in Germany.

in the Bundestag they may not be questioned elsewhere;²¹ they may be prosecuted or arrested only with the consent of the Bundestag;²² they may not be required to divulge information received in the course of their duties.²³ To avoid undue bureaucratic influence, civil servants and salaried public employees may be required to resign their offices before assuming a seat in parliament.²⁴ The Bundestag decides for itself when to adjourn and reconvene,²⁵ chooses its own officers,²⁶ makes its own rules,²⁷ keeps its own order,²⁸ and resolves disputes

²¹ GRUNDGESETZ [GG] [Constitution] art. 46(1) (F.R.G.); see Maunz, *Art. 46, in 3 Maunz/ Dürig*, Para. Nr. 6. There is an exception for defamation. See also BVerfGE 60, 374 (1982) (holding that a representative might be subjected to censure ("Rüge") outside the Bundestag because the sanction had no legal effect). Cf. U.S. Const. art. I, § 6: "[F]or any Speech or Debate in either House, they shall not be questioned in any other Place."

²² GRUNDGESETZ [GG] [Constitution] art. 46(2)-(4) (F.R.G.); see Maunz, *Art. 46, in 3 Maunz/ Dürig*, Para. Nr. 26. Prior consent is not required if the representative is apprehended "in the commission of the offense or in the course of the following day," but even then the proceeding must be suspended at Bundestag request. Cf. the narrower protection afforded to members of the U.S. Congress from arrest "in all Cases, except Treason, Felony and Breach of the Peace," U.S. Const. art. I, § 6.

²³ GRUNDGESETZ [GG] [Constitution] art. 47 (F.R.G.); see Maunz, *Art. 47, in 3 Maunz/ Dürig*, Para. Nr. 2.

²⁴ GRUNDGESETZ [GG] [Constitution] art. 137(1) (F.R.G.). The implementing statute effectively so provides. See Herzog, *Art. 20, in 2 Maunz/Dürig*, Para. Nr. 45, arguing that repeal of this provision would be inconsistent with the general separation of powers requirement of Art. 20(2). Although the text of the Basic Law speaks broadly of restrictions on "[t]he right to stand for election" (see Maunz, *Art. 137, in 4 Maunz/ Dürig*, Para. Nr. 15), the Constitutional Court has held that Art. 137 authorizes only incompatibility and not ineligibility provisions; since legislative autonomy is endangered only when an individual holds executive and legislative offices at the same time, the civil servant is permitted to serve once he has resigned his administrative position. BVerfGE 57, 43 (62, 66-69) (1981). See also BVerfGE 58, 177 (1981) (finding no incompatibility in simultaneous service in county and city government). Moreover, the German system being a parliamentary one, there is no comparable limitation with regard to cabinet ministers. See GRUNDGESETZ [GG] [Constitution] arts. 63, 64 (F.R.G.); Herzog, *Art. 20, in Maunz/Dürig*, Para. Nr. 46. The analogous U.S. provision is broader and leaves nothing to legislative discretion: "[No] person holding any office under the United States shall be a member of either House during his continuance in office." U.S. Const. art. I, § 6. The Basic Law contains no equivalent of the further provision of this section that serves the distinct purpose of preventing legislators from lining their own pockets by appointment to offices created or made more lucrative during their tenure.

²⁵ GRUNDGESETZ [GG] [Constitution] art. 39(3) (F.R.G.). The preceding paragraph requires the Bundestag to meet initially within 30 days after its election. Cf. U.S. Const. amdt. 20, § 2 (requiring Congress to meet at least once a year and prescribing a presumptive date); art. I, § 6 (limiting the power of one House to adjourn without consent of the other); art. 2, § 3 (empowering the President to convene Congress "on extraordinary occasions" and to determine the date of adjournment if the two Houses cannot agree).

²⁶ GRUNDGESETZ [GG] [Constitution] art. 40(1) (F.R.G.). Cf. U.S. Const. art. I, § 2, 3.

²⁷ GRUNDGESETZ [GG] [Constitution] art. 40(1) (F.R.G.). See BVerfGE 44, 308 (1977) (upholding a rule permitting action without the normal quorum in the absence of objection). Cf. U.S. Const. art. I, § 5. The current Bundestag rules ("Geschäftsordnung") can be found in *Art. 38, in 2 Maunz/Dürig*, Para. Nr. 5.

respecting the election of its own members—subject in the last instance to review by the Constitutional Court.²⁹ In order to reduce its dependence on the executive for information necessary to the performance of its functions, the Bundestag has broad investigative powers.³⁰ Finally, in contrast to some other parliamentary systems, the Basic Law sharply limits the power of the executive to dissolve the assembly.

Under the Weimar Constitution the Reichspräsident could dissolve the assembly at will, so long as he did not do so more than once for the same cause.³¹ The results were instability, external control of parliament, and impairment of representative democracy. ³²In reaction to this unsatisfactory state of affairs, Article 68(1) permits the Chancellor to bring about dissolution only if the Bundestag refuses his request for a vote of confidence, and then only if the President of the Federation (Bundespräsident) agrees.³³

²⁸ See GRUNDGESETZ [GG] [Constitution] art. 40(2) (F.R.G.), which vests “proprietary and police powers” in the presiding officer of the Bundestag and forbids searches and seizures on its premises without her consent.

²⁹ GRUNDGESETZ [GG] [Constitution] art. 41(1)-(2) (F.R.G.). This authority extends also to the question whether a member has lost his seat. See BVerfGE 5, 2 (1956) (upholding the Bundestag’s decision to exclude a representative who had moved to East Berlin before it was a part of the Federal Republic). There is an obvious tension here between the principles of legislative independence and of democratic legitimacy. Contrast U.S. Const. art. I, § 5 (“Each House shall be the judge of the elections, returns and qualifications of its own members”); *Roudebush v. Hartke*, 405 U.S. 15 (1972) (Senate decision respecting election not subject to judicial review); *Powell v. McCormack*, 395 U.S. 486 (1969) (qualifications subject to House determination limited to those listed in the Constitution).

³⁰ GRUNDGESETZ [GG] [Constitution] art. 44(1) (F.R.G.). See BVerfGE 67, 100 (1967); BVerfGE 76, 363 (1987); BVerfGE 77, 1 (1987); Schneider, *Art. 44, in 2 AK- GG*, Para. Nr. 2-3. Cf. *Kilbourn v. Thompson*, 103 U.S. 168 (1881); *McGrain v. Daugherty*, 273 U.S. 135 (1927). The investigative power serves also as an important check on executive abuse, see n.166 *infra* and accompanying text. In light of the experience in this country (cf. *Watkins v. United States*, 354 U.S. 178 (1957)) there might be cause to fear that in prescribing that “the decisions of investigative committees are not subject to judicial scrutiny.” Art. 44(4) excessively subordinated individual rights to parliamentary autonomy; but fortunately the Constitutional Court has not taken this language at face value. See cases cited *supra*; Maunz, *Art. 44, in 3 Maunz/Dürig*, Para. Nr. 63-65 (explaining that this provision insulates only investigative findings, not sanctions against witnesses, from judicial review).

³¹ *Verfassung des Deutschen Reichs vom 11. Aug. 1919*, RGB1 S.1383 [hereafter cited as WRV], Art. 25.

³² See BVerfGE 62, 1 (41) (1983) (noting that not one Reichstag during the entire Weimar period was permitted to serve out its full constitutional term).

³³ The Chancellor is the head of the Cabinet (Bundesregierung); the President’s duties, except in this instance, are largely ceremonial. See text at nn.138-59 *infra*. His discretion with regard to dissolution under Art. 68 was confirmed by the Constitutional Court as an important check on improvident action: “This provision permits dissolution only when three supreme constitutional organs of government—the Chancellor, the Parliament, and the President—have each made their own independent political

The spirit of this provision was severely tested in 1982, when the Free Democratic Party (FDP), which held the balance of power in the Bundestag, decided to change horses in midstream—as in light of the express constitutional independence of the members it had a perfect right to do.³⁴ Abandoning the coalition with the Social Democrats (SPD) which both parties had promised the voters during the 1980 campaign, the FDP joined the so-called Union parties (CDU and CSU) in voting to replace Chancellor Helmut Schmidt with the Christian Democrat Helmut Kohl. All of this was in complete accord with the plain terms of Article 67(1).³⁵ The trouble began when the new coalition decided that it was desirable to hold new elections in order to obtain popular confirmation of the change.³⁶

The difficulty was that under Article 39(1) the next election date was two years away; the only practicable way to advance the schedule was to lose a vote of confidence under Article 68(1).³⁷ So the coalition decided to do just that—to ask its own adherents to deny it their support. Picking his way carefully through the constitutional thicket, the President approved the Chancellor's ensuing request to dissolve the assembly, and the case went to the Constitutional Court.³⁸

Literally the requirement of Article 68(1) was satisfied: The Chancellor had lost a vote of confidence.³⁹ But that, the Court responded, was not enough. The unmistakable purpose of the provision was to make dissolution more difficult, in the interest of parliamentary stability. Although the immediate aim of Article 68(1) was to prevent the executive from dissolving the legislature without its consent, the

decision." BVerfGE 62, 1 (35) (1983). *See also id.* at 50 (adding that the President was also obliged to determine—with appropriate deference to the Chancellor's decision—whether the conditions of Art. 68 itself were met).

³⁴ *See supra* note 20; BVerfGE 62, 1 (37-38) (1983).

³⁵ *See infra* notes 161-64.

³⁶ *See BVerfGE* 62, 1 (4-9) (1983).

³⁷ A constitutional amendment would have required a two-thirds vote of both Bundestag and Bundesrat under Art. 79(2) and was subject to the objection that the Constitution should not be lightly amended. The Social Democrats, who also wanted accelerated elections, argued that Kohl should resign in order to trigger Article 63(4)'s provision permitting dissolution if parliament is unable to agree on a new Chancellor; the coalition responded that this route would require delay as the members went through repeated ballots in an effort not to endorse his successor. *See BVerfGE* 62, 1 (11, 14-18) (1983).

³⁸ *See id.* at 9-19.

³⁹ *See id.* at 38 (arguing in effect that on its face "lack of confidence" meant only the unwillingness of a majority of the members to vote for the Chancellor or his program).

four-year term prescribed by Article 39(1) was meant to be the rule rather than the exception. Thus even if the Chancellor, the Bundestag, and the President all agreed, Article 68(1) permitted dissolution only if the political situation in the Bundestag was such that the Chancellor's "ability to govern" was "no longer adequately assured."⁴⁰

It might seem to follow, as two dissenting Justices argued, that the dissolution order was unconstitutional.⁴¹ As a general matter there was obvious force in the President's protestation that there was no way to determine whether a legislator's vote was sincere,⁴² but there was no doubt as to the members' motives in the actual case. No one arguing for dissolution had suggested any difference of opinion among the governing parties; both the Free Democrats and the Union had expressly proclaimed their intention to reinstitute after the election the Government they professed not to support.⁴³

Nevertheless the Court managed to uphold the dissolution. Breach of the campaign promise of a liberal-social coalition, the majority conceded, did not (as one Justice argued)⁴⁴ justify the action; there could be no lack of democratic legitimacy in a

⁴⁰ *Id.* at 40-44. There is much in the legislative history, as reported in Justice Rinck's dissenting opinion, *id.* at 86-102, to support his conclusion that Art. 68(1) was designed for the case in which a majority of the Bundestag was opposed to the Chancellor but unable to agree on his successor. *See, e.g.*, the official committee explanation to the Parliamentary Council (*id.* at 101): "The President's right of dissolution under Article 68 of the Basic Law is – apart from the right of emergency legislation [discussed *infra* note 160] – the principal weapon of the Government against an obstructive and destructive parliamentary majority." The Court, which took a somewhat less exacting position, found the record less plain and added that in any event legislative history was not entitled to much weight. *Id.* at 44-47.

⁴¹ *See id.* at 112-16 (Rottmann, J., dissenting) (adding that the coalition had agreed upon new elections before putting together its Government and that two days after the Chancellor had put the question of confidence the Bundestag had approved his budget by the largest majority on any controversial issue in thirteen years): "The parliamentary stability of the Government was completely beyond question." *See also id.*, at 108 (Rinck, J., dissenting).

⁴² *Id.* at 18. Justice Rottmann suggested in dissent that the best evidence of a Government's lack of actual support would be its inability to obtain passage of substantive legislation. *See id.* at 110.

⁴³ *See id.* at 13 (Chancellor Kohl) ("The coalition parties. . . are basically prepared to work together again after the election"), 15 (FDP leader Genscher) ("The [Government's] mandate shall be renewed, but only after the voters have spoken"). The Chancellor proudly insisted that he had never made a secret of his motives; to have resigned in order to precipitate elections under Art. 63(4), as the opposition urged, would have been in his view "manipulative." *See id.* at 13-14.

⁴⁴ *See id.* at 67-69 (Zeidler, J., concurring) (arguing that there was no popular mandate for the present Government because the people had voted for Schmidt, not for Kohl). Justice Zeidler's opinion contains an interesting argument for changing constitutional interpretation in the light of changed circumstances. *See also Herzog, Art. 68, in 3 Maunz/Dürig, Para. Nr. 76-77.*

government chosen by representatives exercising the discretion the Constitution gave them.⁴⁵ Yet the “extraordinary situation” in the Bundestag in 1982 had given the Government a plausible basis for concluding that it could not be confident of a lasting majority. The decision to abandon the old coalition had created serious discord among the Free Democrats. Prominent members had resigned from the party, and it had suffered dramatic reverses in subsequent state elections. The coalition had been established for limited purposes and a limited time; by insisting on early elections, the Free Democrats had made clear that they were not prepared to support the government until the end of the normal term.⁴⁶ Laying great stress on the deference due to the political branches in evaluating the realities of political power,⁴⁷ the Court concluded that their assessment was not clearly erroneous; there was no basis for finding that they had acted without substantive justification in order simply to advance the election.⁴⁸

The American observer may be reminded of occasions when our Supreme Court has spoken bravely while bowing to superior political force.⁴⁹ Strategic behavior of this nature may be more effective in the long run than charging the windmill; when Chancellor Kohl sought unsuccessfully to advance the date of elections following the East German accession in 1990, he rejected the dissolution option out of hand.

II. Supremacy

Article 20(3) of the Basic Law states the fundamental principle of statutory supremacy (Gesetzesvorrang): While the legislature itself is bound only by the

⁴⁵ BVerfGE 62, 1 (43) (1983).

⁴⁶ *Id.* at 51-62. For documentation of the view that none of the events recited by the majority had significantly affected the FDP's willingness or ability to continue the coalition, see *id.* at 115-16 (Rottmann, J., dissenting).

⁴⁷ *Id.* at 50. See Schneider, *Art. 68, in 2 AK - GG*, Para. Nr. 6 (applauding this exercise of judicial restraint and finding in it the seeds of a political-question doctrine).

⁴⁸ BVerfGE 62, 1 (62-63) (1983). See Herzog, *Art. 68, in 3 Maunz/Dürig*, Para. Nr. 78-84 (endorsing both the decision and the earlier suggestion of the Enquête-Kommission that the Basic Law be amended to permit the Bundestag to dissolve itself for any reason by a 2/3 vote). The Kommission was a panel of politicians and experts established by the Bundestag to consider possible constitutional amendments. For its recommendation, see BERATUNGEN UND EMPFEHLUNGEN ZUR VERFASSUNGSREFORM (SCHLUßBERICHT DER ENQUÊTE-KOMMISSION VERFASSUNGSREFORM DES DEUTSCHEN BUNDESTAGES) [hereafter cited as SCHLUßBERICHT DER ENQUÊTE-KOMMISSION], Zur Sache 3/76, pt. 1, 92, 102-07 (1976); for a dissenting view, see Schneider, *Art. 68, in 2 AK-GG*, Para. Nr. 17.

⁴⁹ See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944); *Brown v. Board of Education (II)*, 349 U.S. 294 (1955); compare *Watkins v. United States*, 354 U.S. 178 (1957) and *Barenblatt v. United States*, 360 U.S. 109 (1959).

constitutional order (“die verfassungsmäßige Ordnung”), the executive and the courts are bound by law (“Gesetz und Recht”). Just what is meant by “Recht” in this provision is unclear, as we shall see. What is generally understood is that the reference to “Gesetz” requires other branches, of government to respect statutes constitutionally enacted.⁵⁰

There is nothing surprising about this requirement. Indeed it would seem implicit in the grant of legislative power that statutes have the force of law. Despite the broader language of Justice Black’s majestic opinion for the Court in our *Steel Seizure* case, for four of the six majority Justices all that had to be said was that the President was bound by law.⁵¹ Statutory supremacy serves all the goals that led to the creation of a popularly elected legislative body in the first place: democratic self-government, representative deliberation, and the separation of powers.⁵²

The principle of statutory supremacy was most severely tested in the notorious *Soraya* decision of 1973.⁵³ Princess Soraya, former wife of the Shah of Iran, had brought an action for invasion of privacy, alleging that the defendants had written and published a fictitious interview in which she had purportedly revealed intimate details of her private life. The Civil Code expressly provided that damages for nonpecuniary injury could be awarded only in cases specified by statute.⁵⁴ No statute authorized such damages for invasion of privacy, but the Federal Court of Justice (Bundesgerichtshof) held they could be awarded anyway. The defendants argued that the court had disobeyed its constitutional obligation to respect the limitations imposed by the Civil Code; the Constitutional Court held the court had acted within its powers.

To an outside observer the Court of Justice seems indeed to have contradicted the statute. The Civil Code did not merely fail to authorize damages for emotional harm; it flatly forbade them in the absence of statutory authority, which admittedly

⁵⁰ See, e.g., Hans-Peter Schneider, *Die Gesetzmäßigkeit der Rechtsprechung*, 1975 DIE ÖFFENTLICHE VERWALTUNG [DöV] 443, 448.

⁵¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (opinions of Frankfurter, Jackson, Burton, and Clark). In the United States this conclusion is strengthened by Art. II, § 3, which requires the President to “take care that the laws be faithfully executed,” and by Art. VI, which makes statutes the “supreme law of the land.” See Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19, 24.

⁵² See *id.* at 21-23; Fritz Ossenbühl, *Vorrang und Vorbehalt des Gesetzes*, 3 HANDBUCH DES STAATSRECHTS 315, Para. Nr. 1-3, tracing the German principle to democracy and the rule of law.

⁵³ BVerfGE 34, 269 (1973).

⁵⁴ Bundesgesetzbuch (BGB), § 253: “Wegen eines Schadens, der nicht Vermögensschaden ist, kann Entschädigung in Geld nur in den durch das Gesetz bestimmten Fällen gefordert werden.”

did not exist.⁵⁵ Indeed the Constitutional Court began its discussion with a startling passage that seemed to suggest that the courts were not always bound by statute after all. By altering the traditional formulation so that judges were no longer bound simply by "Gesetz" but by "Recht" as well, the Basic Law had deliberately abandoned "a narrow statutory positivism." "Recht" within the meaning of Article 20(3) was not coextensive with statutory law; under some circumstances it could include additional norms derived by judges from "the constitutional legal order as a whole" and functioning "as a corrective to the written law." It followed, said the Constitutional Court, that the judges could fill gaps in the statutes "according to common sense and 'general community concepts of justice.'"⁵⁶

So far, so good; no Anglo-American observer would expect a court to hold that the supremacy of statutes deprived judges of the power to make interstitial common law. The problem was that there seemed to be no gap to fill. To get around this difficulty the Court proceeded to proclaim a most dynamic doctrine of statutory interpretation: As a codification grows older, the judge's "freedom to develop the law creatively" increases. "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.⁵⁷

This passage seems to come perilously close to saying that when a statute is perceived as outmoded a judge is under no obligation to follow it. Understandably, it has been severely criticized.⁵⁸ As the Court's rather cryptic opinion suggests, the root of the problem is Article 20(3)'s delphic reference to "Gesetz und Recht." Both terms can be translated as "law." "Gesetz" tends to be the narrower and more technical term; it is commonly, though not exclusively, used in connection with

⁵⁵ For similar assessments by German commentators, see Volker Krey, *Rechtsfindung contra legem als Verfassungsproblem (I)*, 1978 JURISTENZEITUNG [JZ] 361, 362 n. 14, and authorities cited.

⁵⁶ BVerfGE 34, 269 (287) (1973).

⁵⁷ "Einem hiernach möglichen Konflikt der Norm mit den materiellen Gerechtigkeitsvorstellungen einer gewandelten Gesellschaft kann sich der Richter nicht mit dem Hinweis auf den unveränderten Gesetzeswortlaut entziehen; er ist zu freier Handhabung der Rechtsnormen gezwungen, wenn er nicht sein Aufgabe, 'Recht' zu sprechen, verfehlen will." *Id.* at 289.

⁵⁸ See, e.g., Krey, *supra* note 55 (III), at 465; Schneider, *supra* note 50, at 445 ("most questionable extension of judicial decisionmaking authority," "devaluation of the obligation to follow the law," "first step toward 'unrestrained interpretation'"). But see Friedrich Kübler, 28 JZ 667, 667 (1973) (warning that a contrary decision would have turned every alleged misinterpretation of the BGB into a question for the Constitutional Court).

statutes.⁵⁹ “Recht” not only comprehends unwritten as well as written law; it often has the less positivist meaning of “justice.”⁶⁰

As the *Soraya* opinion suggests, one school of thought in Germany has been that the reference to “Recht” did more than broaden the categories of law that bound executive and judicial officers;⁶¹ in reaction to the calamitous positivism of the Nazi era, it bound judges in cases of conflict to follow justice rather than law. At a minimum, on this theory Article 20(3) constitutionalizes natural law by requiring the judge to reject fundamentally unjust laws.⁶² Some commentators have carried the argument further, as some language in *Soraya* seems to suggest: No law that is outmoded or misguided should stand in the way of a court’s reaching the just result.⁶³

The debates in the Parliamentary Council afford no evidence that the innocuous term “Recht” was intended to have any such sweeping consequences. As initially drafted, the provision would simply have bound executive and judicial officers to follow the law (“Gesetz”).⁶⁴ The reference to “Recht” and the further provision binding the legislature to the constitutional order were added by what we would call the Committee on Style (Rédaktionsausschul3) in order better to express “the

⁵⁹ See Fritz Ossenbühl, *Gesetz und Recht – Die Rechtsquellen im demokratischen Rechtsstaat*, in 3 HANDBUCH DES STAATSRICHTS 281, Para. Nr. 4-13. “Gesetzgebung” (lawmaking) is the term the Basic Law employs to describe the legislative process. See, e.g., GRUNDGESETZ [GG] [Constitution] arts. 70-77 (F.R.G.). See also GRUNDGESETZ [GG] [Constitution] art. Art. 78 (F.R.G.) (describing the processes by which a statute (“Gesetz”) passed by the Bundestag becomes law). On the other hand, the reference to “Gesetz” in Art. 97’s provision that judges are subject only to law (“nur dem Gesetz unterworfen”) is widely understood to refer to the entire corpus of positive law. See Ossenbühl, *id.* at Para. Nr. 15; Krey, *supra* note 55, at 465.

⁶⁰ The English version of the Basic Law published by the Press and Information Office of the German Federal Government confidently translates “Gesetz und Recht” as “law and justice,” thus glossing over the troublesome ambiguity of the original, as any translation would.

⁶¹ Indeed it has been doubted whether the inclusion of “Recht” was meant to make judicial precedents binding at all. See Krey, *supra* note 55, at 464.

⁶² See Krey, *supra* note 55, at 363-64, 465-66. Cf. *Loan Ass’n v. Topeka*, 87 U.S. 655 (1875). For the argument that fundamentally unjust laws that violate none of the other provisions of the Basic Law must be rare indeed, see Herzog, *Art. 20*, in 2 Maunz/Dürig, Para. Nr. 49-54. Ossenbühl, *supra* note 59, at Para. Nr. 18, views the reference to “Recht” as a reminder of past injustice (“Unrecht”) directed essentially to the law-makers.

⁶³ See the authorities cited Krey, *supra* note 55, at 364.

⁶⁴ See 1 JAHRBUCH DES ÖFFENTLICHEN RICHTS [JöR] (N.F.) 1959-99 (1951). After omission for stylistic reasons of references to the rule of law (“Herrschaft des . . . Gesetzes”) and to the requirement (redundant in light of Art. 3) that the laws themselves be equal, the provision read: “Rechtsprechung und Verwaltung stehen unter dem Gesetz.” *Id.* at 197.

rule of law as the foundation of the Basic Law.”⁶⁵ The defense of the original formulation was purely stylistic: Nothing had been said about “the constitutional order” because it went without saying that all organs of government were bound by the Constitution. That the courts were also bound by law, the same speaker added, was equally obvious from the very nature of judicial activity: The judiciary’s sole task was “to apply and interpret the law.”⁶⁶ To conclude that the ambiguous reference to “Recht” authorized judges (and presumably also administrators) to ignore constitutional statutes, it might be added, would contradict the plain command of the same sentence that they are bound by law (“Gesetz”)—and all the fundamental policies of democracy, predictability, and separation of powers that underlie that provision as well.⁶⁷

However difficult it may be to reconcile the result in the *Soraya* case with the principle of parliamentary supremacy, the fact remains that the Court was careful to couch its reasoning in terms of statutory interpretation, not of any right to defy the legislature. Its ultimate conclusion, however strained, was that there was indeed a gap in the legislation that the judges could properly fill by devising a new common law rule.⁶⁸ The new right to damages for intangible injuries attributable to the invasion of privacy, which served to promote the constitutionally protected interests in human dignity and the free development of personality, thus qualified as “Recht” within the meaning of Art. 20(3)—“not in opposition to but in elaboration and extension of the written law.”⁶⁹

⁶⁵ *Id.* at 200 (Delegate Dehler) (“zur besseren Kennzeichnung der Rechtsstaatlichkeit als der Grundlage des Grundgesetzes”).

⁶⁶ *Id.* (Delegate von Mangoldt) (“die Gesetze anzuwenden und auszulegen”).

⁶⁷ For arguments on the latter basis, see Krey, *supra* note 55, at 466-67. Such a conclusion would also create an irreconcilable conflict between Art. 20(3) and Art. 97(1), which says nothing about “Recht” and flatly declares the judges “subject to law.” See *supra* note 59; Krey, *supra* note 55, at 465-66.

⁶⁸ See BVerfGE 34, 269 (290) (1973): “Damit wurde eme Lücke im Blick auf die Sanktionen, die bei einer Verletzung dieses Persönlichkeitsrechts zu verhängen waren, sichtbar... .” See also BVerfGE 82, 6 (11-15) (1990) (applying the principles laid down in *Soraya* to uphold the extension by analogy to unmarried couples of a surviving partner’s right to assume the other’s lease after death, although the governing statute spoke only of spouses).

⁶⁹ BVerfGE 34, 269 (281, 291) (1973). The Federal Court of Justice, whose decisions are summarized in *id.* at 273-75, had taken the arguably more candid approach of holding that Arts. 1(1) and 2(1), which declare human dignity (“die Würde des Menschen”) inviolable (“unantastbar”) and guarantee the right to free development of the personality (“die freie Entfaltung [d]er Persönlichkeit”), required the state to provide redress for victims of invasions of privacy. For general discussion of these provisions, see Currie, *Lochner Abroad*, *supra* note 1, at 356-63; for discussion of the interesting problem of affirmative state obligations to protect one citizen from another, see Currie, *Positive and Negative Constitutional Rights*, 53 U CHI. L. REV. 864 (1986).

Later decisions have given no support to any suggestion in *Soraya* that courts might have power to disregard misguided but constitutional statutes. In 1978, for example, the Constitutional Court made clear that a court could not constitutionally “correct” a statute providing for damages for wrongful deprivation of personal liberty by restricting recovery to cases of intentional wrong: “It is not the business of a judge who is bound by the statute and laws to cut back claims for liability that the statutes afford. . .”⁷⁰ Whatever the authors of the earlier opinion had in mind, it seems clear today that both executive and judicial officers in Germany are bound by constitutional statutes, as Article 20(3) provides.

III. Exclusivity

Less obvious perhaps than the principle that legislation binds other organs of government is a second and almost equally fundamental corollary of the grant of lawmaking power to the legislature: its exclusivity. It should come as no surprise that in Germany, as in the United States, no one but the legislature may enact statutes. What may not be so obvious is that in many cases it follows that the executive may not act without statutory authority.

In Germany, as in the United States, this is not generally true of the courts. The one noncontroversial conclusion of the *Soraya* opinion was that Article 20(3) did not preclude the courts from creating common law when the statutes were silent.⁷¹ The authority to do so, the Court has persuasively argued, is implicit in the grant of jurisdiction to resolve disputes.⁷²

⁷⁰ BVerfGE 49, 304 (320) (1978). See also BVerfGE 41, 231 (1976) (holding that a member of a local governing body could not constitutionally be barred from representing an individual charged with crime since the relevant disqualification statute applied only to claims against the government); BVerfGE 65, 182 (1983) (holding that by giving priority to wage claims in an insolvency proceeding the Federal Labor Court had exceeded the limits on judicial lawmaking imposed by Article 20(3) since the bankruptcy state left no room for additional priorities). The opinion just cited distinguished *Soraya* by noting that the judicially created rule in the earlier case had “merely” afforded a remedy for a preexisting constitutional right and that it enjoyed widespread support among academic commentators. *Id.* at 194-95. Except to the extent that these passages may be taken to imply acceptance of the Court of Justice’s argument that damages for invasion of privacy were compelled by the Basic Law itself, they seem typical of what courts tend to say when they deal with precedents for which they have no sympathy.

⁷¹ German labor law, as the Court noted in *Soraya* (BVerfGE 34, 269 (288) (1973)), is mostly judge-made law. See BVerfGE 84, 212, (226-27) (1991) (upholding judicial authority to fashion rules respecting the legality of lockouts within the limits of Art. 9(3)).

⁷² See *id.* at 227; Ossenbühl, *supra* note 59, Para. Nr. 35-41; Krey, *supra* note 55, at 466. The Supreme Court’s decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), constitutes a narrow and convincing

Various provisions of the Basic Law, however, preclude the courts as well as the executive from acting without statutory authority. Recognizing that even such fundamental values as freedom of expression and of movement must yield on occasion to overriding countervailing concerns, the framers of the Basic Law expressly provided that a number of the basic rights that document guaranteed could be limited – but in most cases only by or on the basis of statute.⁷³

At first glance these provisions may appear to the American observer a shocking compromise of fundamental rights. A constitutional right to freedom of speech, it may be said, is of little value if it can be overridden by legislation. Any constitutional right worthy of the name would provide protection against the legislature itself.

Indeed the Basic Law *does* provide significant protection against legislative infringement of basic rights, even those which are explicitly subject to statutory limitation. A law limiting basic rights must expressly specify any right that is limited; it must be a general law that does not single out individuals for unfavorable treatment; and it may not impinge upon the essential content (“Wesensgehalt”) of the right.⁷⁴ Perhaps most significantly, it must satisfy the stringent test of proportionality (“Verhältnismäßigkeit”) that the Constitutional Court has found implicit in the rule of law and in the basic rights themselves: No limitation of a basic right is valid unless it is calculated to promote a legitimate governmental purpose, is the least restrictive means of attaining that goal, and imposes a reasonable burden.⁷⁵ It should be recalled that, although our rhetoric is different, our basic rights are not absolute either. The Supreme Court commonly engages in a similar balancing process to determine the extent of the constitutional

exception to this general rule based on the limited purposes of federal jurisdiction over controversies between citizens of different states.

⁷³ *E.g.*, GRUNDGESETZ [GG] [Constitution] art. 8(2) (F.R.G.), which permits restriction of the right of outdoor assembly “durch Gesetz oder auf Grund eines Gesetzes.” Similar provisions appear in connection with the right to life, personal liberty, and bodily integrity (Art. 2(2), reinforced by Art. 103(2), 104(1)), postal and telecommunications privacy (Art. 10(2)), freedom of movement (Art. 11(2)), occupational freedom (Art. 12(1)), and property (Art. 14(3)). The somewhat different provisions respecting expression (Art. 5(2)) and the right to free development of personality (Art. 2(1)) will be discussed in more detail below.

⁷⁴ GRUNDGESETZ [GG] [Constitution] art. 19(1), (2) (F.R.G.).

⁷⁵ *See* Currie, *Lochner Abroad*, *supra* note 1, at 353-54.

guarantee itself—and often without requiring a showing that no less restrictive means are available.⁷⁶

What then is the function of the German provisions permitting legislative limitation of basic rights? It is not merely to make explicit the unavoidable conclusion that even fundamental rights are not absolute, but also to protect the citizen by making clear that even when competing interests predominate basic rights can be limited only with the consent of the people themselves as represented in Parliament; not by some appointed bureaucrat subject only to indirect political control.⁷⁷ The provisions requiring a legislative basis for limitation of basic rights (Gesetzesvorbehalte) are therefore important elements both of democracy and of the separation of powers.⁷⁸ They have been vigorously enforced by the Constitutional Court.⁷⁹

But the principle that the executive may act only on the basis of statute is by no means limited to actions impinging on those basic rights which the Constitution expressly provides may be limited only on the basis of legislation. The general

⁷⁶ E.g., *Board of Trustees of SUNY v. Fox*, 109 S. Ct. 3028, 3032-35 (commercial speech); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298-99 (1984) (time, place, and manner restrictions). See generally Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987).

⁷⁷ See HESSE, *supra* note 6, Para. Nr. 314: “All reservation clauses empower only the legislature to limit basic rights.... A limitation of basic rights by executive or judicial authorities acting on their own is impermissible.”

⁷⁸ Of all our Bill of Rights provisions, only the neglected third amendment explicitly contains this important safeguard: “No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.” Cf. U.S. Const., Art. I, § 9: “No money shall be drawn from the Treasury, but in consequence of appropriations made by law...Subject to limited exceptions, the same principle is laid down in Art. 110-112 of the Basic Law. See Kisker, *supra* note 12, Para. Nr. 40-47; BVerfGE 45, 1 (1977) (holding that the Finance Minister had exceeded his authority under Art. 112 to authorize non-budgeted expenditures in cases of unforeseen and unavoidable necessity (“eines unvorhergesehenen und unabweisbaren Bedürfnisses”). For a summary of other explicit provisions of Basic Law reserving particular powers to the legislature, see Ossenbühl, *supra* note 52, Para. Nr. 26-30.

⁷⁹ Some of the decisions are collected in Currie, *Lochner Abroad*, *supra* note 1, at 340, 347-48 n.112. Most difficult to reconcile with the explicit requirement of a legislative basis for restriction of basic rights is once again the troublesome *Soraya* decision, where the Constitutional Court not only permitted the civil courts to invent a right to damages for invasion of privacy in the teeth of what appeared to be a plain legislative prohibition (see *supra* notes 53-69 *supra*) but went on to conclude without explanation (BVerfGE 34, 269 (292) (1973)) that this judicially made law qualified as a general law (“allgemeines Gesetz”) within the meaning of Art. 5(2), whose purpose, like that of the other provisions discussed in this section, seems to be to reserve the power to limit basic rights to the democratic and representative parliament. See Ossenbühl, *supra* note 52, Para. Nr. 13-14. The result might have been more convincingly explained by invoking Art. 5(2)'s further provision acknowledging that freedom of expression was also limited by the right to inviolability of personal honor (“Recht der persönlichen Ehre”).

freedom of action (“allgemeine Handlungsfreiheit”) that the Constitutional Court has found in Article 2(1),⁸⁰ for example, finds its limits according to the text of the Basic Law in “the rights of others, . . . the constitutional order, [and] the moral code”—a formulation that hardly seems restricted to acts of parliament. Nevertheless the Constitutional Court has made clear that the requirement of legislative authorization applies to limitations of this freedom as well.

In a 1981 decision, for example, an administrative court had disqualified the law partner of a member of the local governing council from acting as counsel in a lawsuit against the local government, on grounds of possible conflict of interest. The relevant statute, however, disqualified only the members themselves. Because there was no legal basis for the court’s action, said the Constitutional Court, it offended the basic principle of the rule of law embodied in Article 20(3). Thus it was not part of the “constitutional order,” and thus not a legitimate limitation of the general freedom of action guaranteed by Article 2(1).⁸¹

Article 20(3) is the provision that binds both executive and judicial officers to follow the law. On its face it does not appear to embody the additional requirement that they act only on the basis of law, though as the Court remarked both can be characterized as aspects of the rule of law (Rechtsstaatsprinzip). The rule of law itself, while imposed on the constituent states by Article 28(1),⁸² is not expressly made applicable to the central government; it is often said to be implicit in the basic structural provisions of Article 20, or in the Basic Law as a whole.⁸³ The subsidiary principle that liberty and property can be restricted only on the basis of legislation, which was created essentially out of whole cloth during the 19th century as a means of protection against the still autocratic executive, can perhaps best be explained as implicit in Art. 20(2), which enunciates the general principle of separation of powers.⁸⁴

⁸⁰ GRUNDGESETZ [GG] [Constitution] art. 2(1) on its face guarantees a right to the free development of personality (“die freie Entfaltung [d]er Persönlichkeit”). For its interpretation see BVerfGE 6, 32 (1957) (Elfes); Currie, *Lochner Abroad*, *supra* note 1, at 358-59.

⁸¹ BVerfGE 56, 99 (107-09) (1981) (adding that the further requirement of fair warning that had also been attributed to the rule of law had been offended as well).

⁸² “Die verfassungsmäßige Ordnung in den Ländern muß den Grundsätzen des republikanischen, demokratischen und sozialen Rechtsstaates im Sinne dieses Grundgesetzes entsprechen.”

⁸³ See, e.g., Herzog, *Art. 20*, in 2 Maunz/Dürig, Para. Nr. 30-35. For shrill criticism of the conventional learning, see Richard Bäumlein & Helmut Ridder, *Art. 20*, in 1 AK-GG, Para. Nr. 33-77.

⁸⁴ See Herzog, *Art. 20*, in 2 Maunz/Dürig, Para. Nr. 59, 76-80.

Finding the legal basis for the general Gesetzesvorbehalt not in the basic rights alone but in the structural provisions of Article 20 made it only a matter of time until it was extended beyond its historical roots to require statutory authority not only for the invasion of individual rights but also for actions taken in dispensing government benefits. In upholding a statutory provision reducing payments to war victims living outside the Federal Republic, for example, the Constitutional Court was careful to insist that the legislature itself was required “to determine in essence” under what circumstances and to what extent the normal payments should be reduced.⁸⁵

This is the basic principle of separation of powers on which Justice Hugo Black relied in concluding that President Truman could not seize the steel mills without statutory authorization.⁸⁶ It is the principle that Justice Jackson in the same case, contrasting Article II’s requirement that the President take care that the laws be faithfully executed, convincingly traced to the due process clause: “One [clause] gives a governmental authority that reaches so far as there is law, the other gives a private right that authority, shall go no further. These signify about all there is of the principle that ours is a government of laws and not of men.”⁸⁷ It is also a fundamental and undisputed principle of German constitutional law.⁸⁸

IV. Nondelegability

In March 1933 the Nazi-dominated Reichstag enacted a statute (Ermächtigungsgesetz) authorizing Adolf Hitler and his Cabinet to govern by decree.⁸⁹ Actions taken under this provision could be said literally to comply with any constitutional requirement that there be a statutory basis for executive action; the legislature had authorized the Reichsregierung to pass whatever laws it liked. Yet such an unlimited transfer of legislative power to the executive could scarcely be found consistent with the purposes of any such requirement, or with provisions vesting lawmaking powers in the popularly elected Parliament. As our own Justice

⁸⁵ BVerfGE 56, 1 (13) (1981). *See also id.* at 21, concluding that the legislature had fulfilled its duty.

⁸⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

⁸⁷ *Id.* at 643 (Jackson, J., concurring).

⁸⁸ *See Herzog, Art. 20, in 2 Maunz/Dürig, Para. Nr. 55.* As the Constitutional Court emphasized in a leading decision, there are many areas (not least involving foreign affairs) in which the Basic Law itself vests important policymaking authority in the executive. What is reserved to the legislature is basically the formulation of law. *See BVerfGE 49, 89 (124-27) (1978) (Kalkar).*

⁸⁹ “Reichsgesetze können außer in dem in der Reichsverfassung vorgesehenen Verfahren auch durch die Reichsregierung beschlossen werden.” RGB1. 1933, Teil I, S. 141.

Black observed not so many years ago, "Congress [like any other parliamentary body] was created on the assumption that enactment of this free country's laws could be safely entrusted to the representatives of the people in Congress, and to no other official or government agency."⁹⁰

Consequently, when the Germans turned to the task of drafting a new democratic constitution after the Second World War, they took care to prohibit the legislature from making any such sweeping transfer of authority in the future. In recognition of the obvious fact that legislators cannot be expected to regulate the details of every governmental program, Article 80(1) permits federal legislation to empower any federal minister, or the federal or state government as a whole, to promulgate regulations ("Rechtsverordnungen") having the force of law.⁹¹ It goes on to require, however, that the content, purpose, and extent ("Inhalt, Zweck und Ausmaß") of the authorization be specified by the statute itself.

From a transatlantic perspective the Constitutional Court seems to have taken this provision very seriously. In its very first substantive decision, the Court struck down on the basis of Article 80(1) a provision authorizing the Minister of the Interior to adopt any regulations "necessary for the execution" of a statute respecting the rearrangement ("Neugliederung") of Lander in what is now BadenWürttemberg. In contrast to the practice of the Weimar period, said the Court,

[t]he Basic Law in this as in other respects reflects a decision in favor of a stricter separation of powers. The Parliament may not escape its lawmaking responsibilities by transferring part of its legislative authority to the executive [Regierung] without considering and precisely determining the limits of the delegated authority. The executive, on the other hand, may not step into the shoes of Parliament on the basis of indefinite provisions authorizing the promulgation of regulations.⁹²

The authorization before them, the Justices concluded, was so indefinite that it was impossible to predict when and how it would be employed or what the resulting

⁹⁰ *Zemel v. Rusk*, 381 U.S. 1, 22 (1965) (dissenting opinion).

⁹¹ See HESSE, *supra* note 6, Para. Nr. 526, arguing that this delegation provision "frees the Parliament for its true task of carefully considering and deciding fundamental issues."

⁹² BVerfGE 1, 14 (60) (1951).

regulations might say. It therefore failed to specify the content, purpose, and extent of the authority conferred, as the Basic Law required.⁹³

This decision by no means stands alone. In 1958, for example, the Court invalidated a delegation of power to adopt regulations “to compensate for the differential burdens imposed by the transfer tax” upon firms that were or were not vertically integrated (einstufige and mehrstufige Unternehmen).⁹⁴ There were no generally accepted standards, said the Court, for determining whether a firm was vertically integrated; the statute left it to the executive to decide whether to achieve equalization by imposing a surtax on those firms the law favored or by reducing the tax on those it disadvantaged; indeed the statute did not even require the executive to exercise its authority at all.⁹⁵ The rule of law, the Court concluded, forbade the legislature to leave essential elements of the law (“das Wesentliche”) to be determined by regulation. The authorization had to be specific enough that one could determine from the law itself what might be demanded of the citizen; the legislature itself “must have made some conscious decision.”⁹⁶

If this seems a rather strict application of the nondelegation principle,⁹⁷ other early decisions went even further. In 1962 the Constitutional Court struck down a grant of authority to prescribe average values (“Durchschnittswerte”) for “specific articles or groups of articles” for purposes of a compensatory use tax on imported goods, in lieu of determining the value of each individual item.⁹⁸ In 1964 it struck

⁹³ *Id.*

⁹⁴ BVerfGE 7, 282 (1958). Since the tax was assessed every time a product changed hands, firms that processed and marketed their own products from start to finish enjoyed a significant cost advantage. *See id.* at 291-92.

⁹⁵ *Id.* at 292-301.

⁹⁶ “Der Gesetzgeber . . . muß . . . selbst schon etwas gedacht und gewollt haben.” *Id.* at 302, 304. Compare the requirement of a “primary standard” or “intelligible principle” formulated by our Supreme Court during the time when it too took seriously the provision vesting lawmaking powers in the legislature rather than in anyone else. *See* *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409-11 (1928). For alternative formulations of the governing standard in Germany, *see* Maunz, *Art. 80*, in 3 Maunz/Dürig, Para. Nr. 27-28.

⁹⁷ *Contrast* *Field v. Clark*, 143 U.S. 649 (1892) and *J.W. Hampton Co. v. United States*, 276 U.S. 394, 409-11 (1928) (upholding delegations of authority to adjust tariffs to compensate for unreasonable foreign duties and for low foreign production costs respectively); *Federal Energy Comm. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976) (upholding a delegation to the President of authority to “adjust . . . imports” in any way he deemed necessary to prevent them from endangering national security).

⁹⁸ BVerfGE 15, 153 (1962). The statute, said the Court, “neither determined how far back in time one might go .in determining the average value nor specified how long an average value remained in force once it had been established.” Both the purposes and the articles for which average values were to be

down an authorization to define the statutory term “ton-kilometer” for purposes of determining the amount of a tax on the transportation of freight.⁹⁹ In each of these cases one might have expected the Court to conclude that the lawmakers had left to the executive only the details of applying a policy that the legislature itself had determined.¹⁰⁰

The Court has not always been so hostile to delegation. In a leading 1958 decision the Justices went out of their way to salvage a delegation of authority to promulgate regulations by which “prices, rents, fees, and other charges for goods and services of all kinds, with the exception of wages, are established or approved, or price levels are maintained.”¹⁰¹ Article 80(1) did not require, said the Court, that the content, purpose, and extent of the delegation appear expressly in the statutory text; resort could be had to such ordinary interpretive tools as purpose, context, and legislative history to illuminate the legislative will.¹⁰² The purpose of the statute, as suggested by the last clause of the passage just quoted, was to preserve the general level of prices prevailing at the time of enactment. Intended as a temporary measure looking toward reestablishment of a free market economy, the statutory authority could be employed only to fend off “serious distortions with consequences for the price structure as a whole.”¹⁰³ Nor was the statute too indeterminate in specifying the content of the delegated authority, for in light of long practice the general authorization to adopt measures other than those fixing prices was construed to embrace only associated accounting and reporting provisions and equalization charges assessed on one category of providers for the

prescribed were left to executive discretion. Finally, the statute did not even say whether various articles grouped together had to be of approximately equal value, and thus the delegation enabled the executive “to introduce a different assessment principle . . . and thereby significantly to alter the basis” of the tax itself. *Id.* at 160-65.

⁹⁹ BVerfGE 18, 52 (1964). There were various ways of determining both weight and distance, the Court said, and the statute did not clearly choose among them. *Id.* at 63-64.

¹⁰⁰ “The legislature,” said the Court in the case last mentioned, “must provide its delegate with a ‘program.’” *Id.* at 62. In light of decisions such as those just noted, the Enquête-Kommission (*see supra* note 48) recommended in 1976 that Art. 80(1) be amended to require only the purpose (not the content or extent) of a delegation to appear in the statute, in order to spare lawmakers the burden of prescribing details. *See SCHLUßBERICHT DER ENQUÊTE-KOMMISSION, supra* note 48, at pt. 1, 190-93.

¹⁰¹ BVerfGE 8, 274 (278) (1958) (*Preisgesetz*).

¹⁰² *Id.* at 307.

¹⁰³ *Id.* at 310, 312-13.

benefit of another.¹⁰⁴ Finally, the extent of the delegated authority was restricted by the limited purposes of the statute.¹⁰⁵

This decision bears an uncanny resemblance to our own price-control case, *Yakus v. United States*,¹⁰⁶ which contrary to popular rumor was not inconsistent with meaningful limits on delegation of legislative power in the United States.¹⁰⁷ In each case the Court plausibly construed the statute in such a way that in administering it the executive was carrying out a legislative policy rather than imposing one of its own. In so doing the German Court expressly invoked the principle, familiar in both countries but not always taken seriously in delegation cases, that whenever possible a statute should be interpreted so as to make it consistent with the Constitution.¹⁰⁸

Later German decisions have tended to follow the price-control case rather than the less sympathetic decisions noted above.¹⁰⁹ The Constitutional Court has continued, however, to find delegations unconstitutionally broad.¹¹⁰ Most strikingly, it has

¹⁰⁴ *Id.* at 314-18.

¹⁰⁵ *Id.* at 318. It was not necessary, the Court added, that the delegation be "as specifically drafted as possible"; it must merely be "sufficiently specific." *Id.* at 312.

¹⁰⁶ 321 U.S. 414 (1944).

¹⁰⁷ See THE SECOND CENTURY, *supra* note 15, at 300-01.

¹⁰⁸ See BVerfGE 8, 274 (324) (1958) (noting that the price-control law could be sustained *only* on the basis of this "verfassungskonforme[n] Auslegung"). For instances in which the respective tribunals seem to have tried less hard to find an acceptable narrowing construction, see the German decisions cited *supra* notes 98 and 99, as well as *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and Justice Cardozo's more sympathetic dissent, *id.* at 437-38.

¹⁰⁹ See, e.g., BVerfGE 55, 207 (225-44) (1980) (exhaustively explicating history and tradition to find implicit limitations on a facially broad authorization to adopt regulations respecting moonlighting by public servants); BVerfGE 68, 319 (332-34) (1984) (upholding an authorization to set minimum and maximum fees for medical services because the statutory requirement that the regulations respect the legitimate interests of both doctors and patients required that fees be "neither too high . . . nor too low"); BVerfGE 76, 130 (142-43) (1987) (finding standards in the legislative history sufficient to save an otherwise unconfined grant of authority to determine the level of court costs payable by public institutions). See also HESSE, *supra* note 6, Para. Nr. 528; Maunz, *Art. 80*, in 3 Maunz/Dürig, Para. Nr. 29-31 (arguing that the Court's tendency to merge the three constitutional requirements of content, purpose, and extent into a single quest for a legislative "program" has led to a certain loosening of the standard); Ulrich Ramsauer, *Art. 80*, in 2 AK-GG, Para. Nr. 46-56 (concluding (as suggested in BVerfGE 76, 130 (142-43) (1987)) that the degree of specificity required has come to depend largely upon the degree of intrusiveness of the regulations authorized and on the complexity of the subject matter).

¹¹⁰ More recent examples include BVerfGE 38, 373 (381-83) (1975) (striking down an authorization to specify the professional duties ("Berufspflichten") of pharmacists); BVerfGE 58, 257 (279) (1981)

generally done so on the basis not of Article 80(1) itself but of other provisions that the Court has found to embody a similar nondelegation principle.

As recently as 1988, for example, the Court struck down a statute making it a crime to violate any condition of a permit for the erection, modification, or operation of broadcasting facilities.¹¹¹ Because of the lack of meaningful statutory limitations on the authority to impose the permit conditions themselves, the Court concluded, the statute “leaves it to the postal authorities to determine the elements of an offense by administrative action.”¹¹² Since the statute contemplated the issuance of permits rather than regulations, Article 80(1) did not apply. However, under Articles 103(2) and 104(1) one may be punished only for an offense previously defined by law (“gesetzlich bestimmt”) and imprisoned only on the basis of law in the formal sense (“auf Grund eines förmlichen Gesetzes”). Like Article 80(1) itself, said the Court, these provisions required the legislature itself basically (“grundsätzlich”) to determine for what offenses one might be punished or imprisoned.¹¹³

If the requirement that offenses be “defined by law” seems to say just what the Court said it meant, the requirement that imprisonment be “on the basis” of statute seems less clear. Article 12(1), for example, allows occupational freedom to be limited “by or on the basis of statute”; as the Court has acknowledged, this disjunctive formulation demonstrates that some delegation of authority is permissible.¹¹⁴ Moreover, the ubiquitous right to “free development of personality” guaranteed by Article 2(1) is limited not by statutes but by “the constitutional order,” which on its face does not seem to require that the legislature act at all. Nevertheless the Constitutional Court has found that the nondelegation principle applies to measures limiting *any* of the fundamental rights protected by the Basic Law, even in cases outside the scope of Article 80(1).

To begin with, Article 80(1) applies only to federal legislation. The Court had little difficulty with this limitation; as a crucial ingredient of democracy and the rule of law, both of which Article 28(1) requires the constituent states to respect, the

(invalidating an unconfined delegation of authority to determine which pupils should be expelled from school).

¹¹¹ BVerfGE 78, 374 (1988).

¹¹² *Id.* at 383-89.

¹¹³ *Id.* at 381-83.

¹¹⁴ See BVerfGE 33, 125 (155-56) (1972).

essence of Article 80(1) was applicable to the Lander as well.¹¹⁵ More interestingly, although Article 80(1) applies only to the delegation of authority to adopt regulations, the principle that it embodies has been held to apply to other delegations as well. For the doctrine that the legislature may not transfer its functions is understood as a corollary of the principle that the executive often may act only on the basis of legislation; both are aspects of a general reservation of legislative authority (“Gesetzesvorbehalt”) said to be implicit in the separation of powers and in the rule of law.¹¹⁶

The seminal case was the familiar *Price Control* decision. The governing statute authorized the executive to accomplish its purposes by issuing individual administrative orders (“Verfügungen”) as well as regulations. That the provisions respecting individual orders did not fall within Art. 80(1), the Court declared, did not insulate them from constitutional limitations on delegation; here too the content, purpose, and extent of the delegated authority must be determined by statute. This conclusion was traced to three basic aspects of the rule of law: the principle (Art. 20(3)) that the administration is bound by law (Gesetzmäßigkeit der Verwaltung), the separation of powers (Art. 20(2)), and the requirement (Art. 19(4)) that administrative action be subject to judicial review.¹¹⁷

The first and third of these arguments appear unconvincing. To say that the executive is bound by law seems to mean it must obey legal limitations on its discretion, not that its discretion must be limited. Similarly, judicial review is not an end in itself but a means of enforcing limitations on executive authority; if there are no limitations there is nothing to review.¹¹⁸ The separation of powers argument,

¹¹⁵ BVerfGE 41, 251 (266) (1976). See GRUNDGESETZ [GG] [Constitution] art. 28(1) (F.R.G.): *Die verfassungsmäßige Ordnung in den Ländern muß den Grundsätzen des republikanischen, demokratischen und sozialen Rechtsstaates im Sinne dieses Grundgesetzes entsprechen.* Obviously this provision gives the Court a good deal of latitude in determining which provisions applicable on their face only to the Bund are essential elements of republican democracy, the rule of law, and the social state. See Herzog, *Art. 20*, in 2 Maunz/Dürig, Para. Nr. 122-25.

¹¹⁶ See, e.g., BVerfGE 49, 89 (126-27) (1978) (Kalkar); Maunz, *Art. 80*, in 3 Maunz/Dürig, Para. Nr. 11; Ossenbühl, *supra* note 52, Para. Nr. 10, 41. Indeed most of the decisions respecting the general Gesetzesvorbehalt deal with the delegation question. The requirement that there be some statutory basis for executive action follows a fortiori from the principle that even when it delegates authority the legislature must make the basic policy decisions.

¹¹⁷ BVerfGE 8, 274 (325-26) (1958).

¹¹⁸ The argument that there must be limits to delegation in order that the judges may have something to review was no more persuasive when made by Chief Justice Stone in the *Yakus* case. *Yakus v. United States*, 321 U.S. 414, 426. In an introductory paragraph the German Court had hinted that the principle of fair warning might provide yet another basis for the specificity requirement, noting that the rule of law required that a delegation be definite enough to make administrative action predictable (“voraussehbar

however, is strong. "If the authority of the executive is not sufficiently restricted," said the Court, "then the executive is no longer executing the law . . . but making decisions in the legislature's place."¹¹⁹

In an important later decision the Court effectively traced the nondelegation doctrine to the constitutional guarantee of democracy as well.¹²⁰ By permitting restrictions of occupational freedom only by or on the basis of statute, the Court added, Article 12(1) made it basically the responsibility of the legislature "to determine which public interests are so weighty that the individual's right to liberty must take second place":

The democratic legislature may not abdicate this responsibility at its pleasure. In a governmental system in which the people exercise their sovereign power most directly through their elected Parliament, it is rather the responsibility of this Parliament above all to resolve the open issues of community life in the process of determining the public will by weighing the various and sometimes conflicting interests.¹²¹

Thus the implicit constitutional restrictions apply when authority is delegated not only to federal or state executive officers but also to legislative committees,¹²² to public corporations,¹²³ to local governments,¹²⁴ and to occupational associations.¹²⁵

und berechenbar") by the affected citizen. BVerfGE 8, 274 (325) (1958). Fair warning is indeed an important element of the rule of law in Germany, *see* BVerfGE 56, 99 (109) (1981), and the Constitutional Court recently confirmed that it was one of the purposes behind the specificity requirement for criminal statutes in Art. 103(2). BVerfGE 78, 374 (382) (1988). Fair warning could be provided by the adoption of administrative standards, *see* KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* 207-08 (2d ed. 1978), but that would not remove the basic objection to unbridled delegation of legislative authority.

¹¹⁹ BVerfGE 8, 274 (325) (1958). Since the terms of the delegation were the same as those of the authority to adopt regulations, which the Court had found sufficiently confining, they were upheld on the same reasoning. *Id.* at 326-227.

¹²⁰ BVerfGE 33, 125 (158) (1972) (Fachärzte).

¹²¹ *Id.* at 159.

¹²² BVerfGE 77, 1 (1987).

¹²³ BVerfGE 12, 319 (1961); BVerfGE 19, 253 (1965).

¹²⁴ BVerfGE 32, 346 (1972).

In some of these instances the standards applied are less stringent, in light of the fact that the delegation may be said to promote self-government by those most directly affected.¹²⁶ Moreover, the requisite specificity varies with the degree to which the delegated authority impinges upon fundamental rights. Thus while the crucial right to choose one's occupation can basically be limited only by the legislature itself, the power to regulate the conduct of those engaged in an occupation may be delegated to a professional association.¹²⁷ Even in the latter case, however, the legislation must set forth those provisions which "essentially [wesentlich] characterize the image of the professional activity as a whole."¹²⁸

The constitutional principle that emerged was neatly summed up in a major 1978 opinion upholding a grant of authority to license the construction and operation of a nuclear breeder reactor:

Today it is firmly established by the decisions that—without regard to any requirement of an incursion [into individual freedom]—in basic normative areas, and especially when the exercise of basic rights is at stake, the legislature is required. . . to make all essential decisions itself [alle wesentlichen Entscheidungen selbst zu treffen]... Articles 80(1) and 59(2) of the Basic Law, as well as the specific reservations of legislative power [in the catalog of fundamental rights] are particular instances of this general reservation [dieses allgemeinen Gesetzesvorbehalts].¹²⁹

¹²⁵ BVerfGE 33, 125 (1972). See also Reinhold Hender, *Das Prinzip Selbstverwaltung*, in 4 HANDBUCH DES STAATSRICHTS 1133, Para. Nr. 58.

¹²⁶ See, e.g., BVerfGE 33, 125 (159) (1972); Ramsauer, *Art. 80*, in 2 AK-GG, Para. Nr. 31-32. Cf. *United States v. Mazurie*, 419 U.S. 544 (1975) (applying especially lenient standards to a delegation of authority to an Indian tribe with governmental powers of its own); *City of Eastlake v. Forest City Enters.*, 426 U.S. 668 (1976) (holding ordinary delegation standards inapplicable to a provision for referendum).

¹²⁷ BVerfGE 33, 125 (158, 160) (1972). For the same differentiation in the context of Art. 80(1) itself see *supra* note 109. Cf. *Schneider v. State*, 308 U.S. 147, 164 (1939) (invalidating a grant of discretionary authority to issue permits for the door-to-door distribution of handbills).

¹²⁸ BVerfGE 33, 125 (160) (1972). At stake in this case was an authorization of the medical profession itself to set standards for practice by medical specialists (Fachärzte). Concluding that the challenged rules impermissibly contracted occupational freedom on the merits, the Court did not have to decide whether the delegation itself was too broad. See *id.* at 165; *Lochner Abroad*, *supra* note 1, at 349.

¹²⁹ BVerfGE 49, 89 (126-27) (1978) (Kalkar). For a later statement of the same principle in the context of public education see BVerfGE 58, 257 (268-69) (1981); for a brief description of the radical changes

The decisions are numerous and not all easy to reconcile. They document the difficulty and uncertainty of administering a requirement that is necessarily a matter of degree.¹³⁰ Yet in reading them it is difficult to escape the conclusion that we have lost something significant that the Germans have worked hard to maintain. For over the years the Constitutional Court has devoted itself diligently to the task of assuring that major policy decisions respecting the content of the law are made by the representative and popularly elected legislature, as they should be in a republican democracy—a task with which our Supreme Court has not seriously concerned itself since 1936.¹³¹

wrought by the Constitutional Court in this field since 1970 see Ossenbühl, *supra* note 52, Para. Nr. 43. Art. 59(2), to which the Court referred in the breeder case, requires legislative consent to any treaty affecting political relations or matters that are otherwise within legislative control. Such a treaty, however, need not specifically regulate everything that would be considered essential in the case of ordinary legislation; any such requirement, according to the Constitutional Court, would hamper the ability of the Federal Republic to deal with other nations. BVerfGE 77, 170 (231-32) (1987).

¹³⁰ Critical characterizations employing such terms as “bankruptcy” and “blind alley” are collected and gently dismissed in Ossenbühl, *supra* note 52, Para. Nr. 44.

¹³¹ The Basic Law contains, however, a variety of provisions—most of them added by constitutional amendment in 1968—designed to preserve order in extraordinary situations in which normal governmental processes are disrupted, and some of them envision the possibility of lawmaking outside the Bundestag. In case of a military emergency (“Verteidigungsfall”) brought about by actual or threatened external attack, federal legislative powers are not only expanded to include matters normally reserved to the Länder (GRUNDGESETZ [GG] [Constitution] art. 115c(1) (F.R.G.)); they may also be exercised by a joint committee made up of members of the Bundestag and Bundesrat (“Gemeinsamer Ausschuss,” GRUNDGESETZ [GG] [Constitution] art. 53a (F.R.G.)), if by a two-thirds vote the committee finds that the Bundestag is unable to fulfill its duties (Art. 115e). In the less critical case of a so-called legislative emergency (“Gesetzgebungsnotstand”), GRUNDGESETZ [GG] [Constitution] art. 81 (F.R.G.) authorizes the effective transfer of lawmaking powers from the Bundestag to the Bundesrat, *see* Herzog *Art. 81*, in 3 Maunz/Dürig, Para. Nr. 64-65, if after rejecting the Chancellor’s request for a vote of confidence under GRUNDGESETZ [GG] [Constitution] art. 68 (F.R.G.) the Bundestag is not dissolved. Defending emergency provisions in principle as preferable to extraconstitutional action, the respected former Justice Konrad Hesse has argued that the various clauses concerning physical interruption of government are too complicated and unconfined and that the whole idea of the legislative emergency is misguided: “The only thing that can be achieved on the basis of Art. 81 GG is thus to prolong the political crisis whose consequences it was designed to avoid.” Hesse, *supra* note 6, Para. Nr. 719-71. Those inclined to be smug about the absence of comparable provisions in the U.S. Constitution would be well advised to take another look at the extent of implicit military authority acknowledged in cases of true emergency by dicta in such brave and justly celebrated decisions as *Ex parte Milligan*, 71 U.S. 2 (1866), and *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

C. Executive Power

The principal focus of 19th-century constitutionalism in Germany was on democratization of the legislative process. Even the visionary Frankfurt Constitution of 1849 (Paulskirchenverfassung), which would have divided legislative authority between a council of states (Staatenhaus) and a popularly elected assembly, envisioned as head of state a hereditary Kaiser who would exercise executive powers through ministers of his own choosing.¹³² Thus this first step toward democracy, which was carried forward in Bismarck's 1871 Constitution, brought with it a significant separation of powers: The people had an increasing say in the making of laws, but it was still the monarch who enforced them.¹³³

The Weimar Constitution, adopted after the First World War, democratized the executive too but in so doing significantly diminished the separation of powers by making executive ministers dependent upon the popularly elected parliament.¹³⁴ At the same time, however, that Constitution vested in an independently elected President (Reichspräsident) extensive powers, not least the authority to take extraordinary measures whenever there was a serious threat to security or public order.¹³⁵ In fact this authorization enabled the President to rule much of the time without the interferences of Parliament, which he freely dissolved under another express constitutional provision.¹³⁶

¹³² Verfassung des deutschen Reichs vom 28. März 1849, RGBI S. 101, Abschnitte III-IV. § 101 gave the executive a suspensive veto that could be overridden by passing the same bill in three consecutive sessions. § 73 delphically described the ministers appointed by the Kaiser as responsible ("verantwortlich"); the extent to which this term implied parliamentary control of the executive was never clarified, since the constitution never took effect.

¹³³ See Verfassung des Deutschen Reichs vom 16. April 1871, RGBI. S. 63, Art. 5, 6, 11-20. At this point the German situation resembled that which Montesquieu had so admired in England, although at the time he wrote it had largely ceased to reflect reality. See 11 MONTESQUIEU, L'ESPRIT DES LOIS ch. 6 (1748); WALTER BAGEHOT, THE ENGLISH CONSTITUTION 69-72, 253-54, 303 (New York, Dolphin Books n.d.) (1872).

¹³⁴ Although ministers were chosen by the independent Reichspräsident, they also required the confidence of the Reichstag, which was given the express power to vote them out of office. WRV, *supra* note 31, Arts. 53, 54.

¹³⁵ WRV, *supra* note 31, Arts. 41, 48.

¹³⁶ *Id.* at Art. 25. "Of the fourteen years of the Weimar Republic, more than nine were definitively shaped [bestimmt] by extraordinary measures under Art. 48." 6 ERNST RUDOLF HUBER, DEUTSCHE VERFASSUNGSGESCHICHTE SEIT 1789 689 (W. Kohlhammer 1981) (1957). See also GOLO MANN, DEUTSCHE GESCHICHTE DES 19. UND 20. JAHRHUNDERTS 756-58, 766-67 (1958); Jürgen Jekewitz, *Art. 54, in 2 AK-GG*, Para. Nr. 5-10; BVerfGE 62, 1 (1983).

In conscious response to the imperial tendencies of popularly elected Presidents during the Weimar period,¹³⁷ the present Basic Law opts for a parliamentary system without a strong independent executive,¹³⁸ thus further reducing the separation of powers.

I. The President, the Chancellor, and the Cabinet

The Federal Republic does have an independent President (Bundespräsident), but he is not elected by the people,¹³⁹ and he performs a largely ceremonial role. Formally it is the President who represents the Federal Republic in its relations with other nations and concludes treaties,¹⁴⁰ who appoints cabinet ministers, judges, and other federal officials,¹⁴¹ and who exercises the power to pardon offenses.¹⁴² Most of his acts, however, require ministerial approval, which means that he cannot act on his own.¹⁴³ Moreover, in most cases the President has no

¹³⁷ "The debate in the Parliamentary Council [over the powers of the President] was shaped by the desire to depart from the principles of the Weimar Constitution." Klaus Schlaich, *Die Funktionen des Bundespräsidenten im Verfassungsgefüge*, in 2 HANDBUCH DES STAATSRECHTS 541, Para. Nr. 88.

¹³⁸ For comparison of the present provisions with those of the Weimar Constitution, see Herzog, *Art. 54*, in 3 Maunz/Dürig, Para. Nr. 8-12.

¹³⁹ The President is elected by a special convention ("Bundesversammlung"). All members of the Bundestag are members of this convention; the state legislatures choose an equal number of additional delegates "on the principle of proportional representation." GRUNDGESETZ [GG] [Constitution] art. 54(1), (3) (F.R.G.). For explanation of the reasons for this procedure, see Herzog, *Art. 54*, in 3 Maunz/Dürig, Para. Nr. 10-12, 28. The President's term is five years, and he may be reelected only once (GRUNDGESETZ [GG] [Constitution] art. 54(2) (F.R.G.)). On impeachment by a two-thirds vote of either the Bundestag or the Bundesrat, he may be removed from office if the Constitutional Court finds him guilty of deliberate violations of the Constitution or other federal law (GRUNDGESETZ [GG] [Constitution] art. 61 (F.R.G.)). Broad incompatibility provisions (GRUNDGESETZ [GG] [Constitution] art. 55 (F.R.G.)) promote the President's neutrality; immunities from arrest and prosecution (GRUNDGESETZ [GG] [Constitution] art. 60(4) (F.R.G.)) protect him from harassment. See Herzog, *Art. 55*, in 3 Maunz/Dürig, Para. Nr. 3; Herzog, *Art. 60*, in Maunz/Dürig, Para. Nr. 56.

¹⁴⁰ GRUNDGESETZ [GG] [Constitution] art. 59(1) (F.R.G.).

¹⁴¹ GRUNDGESETZ [GG] [Constitution] arts. 60(1), 63(2), 64(1) (F.R.G.). With respect to judges and nonministerial officials Art. 60(1) permits the appointment power to be vested elsewhere by law.

¹⁴² GRUNDGESETZ [GG] [Constitution] art. 60(2) (F.R.G.). It is also said that certain unexpressed ceremonial prerogatives, such as the establishment of national symbols and the award of medals, are inherent in the office. See Herzog, *Art. 54*, in 3 Maunz/Dürig, Para. Nr. 69.

¹⁴³ With certain exceptions including the appointment and dismissal of the Chancellor, Article 58 requires the countersignature ("Gegenzeichnung") of a responsible minister for presidential orders and decrees ("Anordnungen und Verfügungen"). This formulation, it is said, was meant to embrace all legally binding acts of the Bundespräsident, including pardons. See Schlaich, *supra* note 137, Para. Nr. 68,

discretion to *decline* to act either, but rather a duty to endorse whatever lawful course of action the political branches of government propose. In some instances this duty is made clear by the constitutional text;¹⁴⁴ in others it is said to be implicit in the decision to reject the Weimar model.¹⁴⁵

On the other hand, like other officials, the President is bound by the Constitution and, except when participating in the legislative process, by other laws as well.¹⁴⁶ Accordingly it has been argued that he has both the power and the duty to refuse to endorse any governmental action contrary to law, and thus that he must review the legality of every executive or legislative act he is requested to approve.¹⁴⁷

This issue has been extensively debated in the context of Article 82(1)'s requirement that "laws enacted in accordance with the provisions of this Basic Law" be certified or authenticated ("ausgefertigt") by the President.¹⁴⁸ Central to the President's action is the largely technical certification that the published text corresponds to an actual legislative decision; it is clear that he has no right to veto a measure on

79; Herzog, *Art. 58, in 3 Maunz/Dürig*, Para. Nr. 21-44 (listing exceptions). The principal function of the approval requirement is to prevent the President from "pursuing an independent policy contrary to the wishes of the Government" or "interfering with the unified conduct of public affairs." Schlaich, *supra* note 137, Para. Nr. 64.

¹⁴⁴ E.g. GRUNDGESETZ [GG] [Constitution] art. 63(2) (F.R.G.), which provides that the person chosen as Chancellor by the Bundestag shall be appointed by the Bundespräsident ("ist vom Bundespräsidenten zu ernennen"). Under Art. 63(1) it is the President who proposes the initial candidate, and in so doing he may exercise his own discretion, but the Bundestag is free to select someone else. See GRUNDGESETZ [GG] [Constitution] art. 63(3) (F.R.G.); Schlaich, *supra* note 137, Para. Nr. 14. Somewhat less plain is Art. 64(1), which provides that the President shall appoint and dismiss other ministers upon proposal by the Chancellor ("auf Vorschlag des Bundeskanzlers"). Nevertheless it is understood that while the President has the right to argue over the merits of a ministerial nomination he must ultimately bow to the Chancellor's demands. See Schlaich, *supra* note 137, Para. Nr. 28 (acknowledging "an indefinable power to correct abuses"); Herzog, *Art. 54, in 3 Maunz/Dürig*, Para. Nr. 85 (finding the text clear).

¹⁴⁵ In the foreign-affairs field, for example, it is said that the President has no policymaking authority whatever; even speeches are cleared with the Foreign Ministry. See Schlaich, *supra* note 137, Para. Nr. 50, 71. See also Herzog, *Art. 54, in 3 Maunz/Dürig*, Para. Nr. 86 (treaties), 87 (nonministerial appointments and general presumption against presidential discretion); Schlaich, *supra* note 137, Para. Nr. 29-30.

¹⁴⁶ See GRUNDGESETZ [GG] [Constitution] arts. 1(3), 20(3), 56, 61 (F.R.G.).

¹⁴⁷ See Herzog, *Art. 54, in 3 Maunz/Dürig*, Para. Nr. 74-77. The President's refusal to sign is not an "order" or "decree" and thus according to most observers does not require ministerial approval under See GRUNDGESETZ [GG] [Constitution] art. 58 (F.R.G.). See Herzog, *Art. 54, in 3 Maunz/Dürig*, Para. Nr. 84; Herzog, *Art. 58, in 3 Maunz/Dürig*, Para. Nr. 44 (adding that a countersignature requirement would defeat the purpose of providing a check on executive action).

¹⁴⁸ "Die nach den Vorschriften dieses Grundgesetzes zustande gekommenen Gesetze werden vom Bundespräsidenten nach Gegenzeichnung ausgefertigt und im Bundesgesetzblatte verkündigt."

purely policy grounds.¹⁴⁹ On the other hand, the language of the provision is generally understood to permit the President to refuse to certify a statute that has not been adopted in accordance with the procedural requirements of the Basic Law.¹⁵⁰ Whether he may also reject a statute on the ground that it offends substantive constitutional requirements is disputed, but Presidents have done so on rare occasions.¹⁵¹

The arguments are familiar from our own debates over judicial review of legislation: Neither the President's obligation to obey the Constitution nor his oath to uphold it¹⁵² necessarily tells us what the Constitution requires him to do; "in accordance with this Basic Law" might mean in conformity with its prescribed procedures.¹⁵³ In favor of the President's right to reject statutes on substantive constitutional grounds it has been argued with some force that such authority provides an additional check against infringement of the Constitution; that it would undermine the legitimating function of the authentication provision to require the President to sign an unconstitutional law; and that it would be intolerable to insist that the President knowingly countenance an unconstitutional act.¹⁵⁴

¹⁴⁹ See Schlaich, *supra* note 137, Para. Nr. 24-25.

¹⁵⁰ See *id.* at Para. Nr. 33.

¹⁵¹ *Id.* at Para. Nr. 31, found only five instances (as of 1987) in which a President had refused to certify laws on constitutional grounds, two of them for failure to comply with the procedural requirement of Bundesrat consent. For a more recent example see President von Weizsäcker's refusal to sign a law that would have transferred authority over air traffic controllers to a private corporation, on the substantive ground that Article 33(4) permitted governmental functions to be carried out in most cases only by government officials. *Der Staatsnotar bockt*, DIE ZEIT, Feb. 8, 1991, p. 5. "Der Staatsnotar bockt," says the headline – the notary refuses to sign.

¹⁵² GRUNDGESETZ [GG] [Constitution] art. 56 (F.R.G.) ("das Grundgesetz und die Gesetze des Bundes wahren und verteidigen"). See Herzog, *Art. 56*, in 3 Maunz/Dürig, Para. Nr. 21 (arguing that the oath adds a moral obligation to the legal one imposed by GRUNDGESETZ [GG] [Constitution] art. 20(3) (F.R.G.)).

¹⁵³ See Schlaich, *supra* note 137, Para. Nr. 35-36; Ramsauer, *Art. 82*, in 2 AK-GG, Para. Nr. 11-16. Cf. *Marbury v. Madison*, 5 U.S. 137 (1803); THE FIRST HUNDRED YEARS, *supra* note 15, at 72-73. For consideration of the analogous question whether executive officers in the United States are bound by unconstitutional laws see Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1989-90).

¹⁵⁴ See Schlaich, *supra* note 137, Para. Nr. 36, 37, 41. For arguments as to why Article 100(1)'s requirement that other judges who believe a statute unconstitutional certify the question to the Constitutional Court, see *infra* notes 287-89, does not implicitly require the President to sign unconstitutional laws, see Schlaich, *supra* note 137, Para. Nr. 38.

In a few instances, moreover, the President does exercise discretion of his own. It is said, for example, that he does so in pardoning offenders, in establishing national symbols, and in calling the Bundestag into special session.¹⁵⁵ Most important in this connection, however, are the powers of the President in times in which the normal political process has broken down. If the Bundestag cannot muster a majority for the election of a Chancellor, the President decides whether to accept a minority candidate or to dissolve the Bundestag and precipitate new elections.¹⁵⁶ If the Chancellor upon losing a vote of confidence seeks to dissolve the Bundestag, it is the President who decides whether to do so.¹⁵⁷ If he decides not to order new elections in this situation, it is he (on application of the Cabinet with Bundesrat consent) who decides whether to declare a legislative emergency (“Gesetzgebungsnotstand”) permitting the Cabinet and the Bundesrat to put a law into force without Bundestag action.¹⁵⁸ In all these instances the Basic Law employs the permissive word “may” (“kann”) or its equivalent, and it is understood that the President exercises his own discretion in determining what action to take.¹⁵⁹

Thus the Bundespräsident can exercise significant political power only in times of crisis in which the normal machinery of government does not function.¹⁶⁰ Ultimate

¹⁵⁵ See Schlaich, *supra* note 137, Para. Nr. 6-11; Herzog, *Art. 54*, in 3 Maunz/Dürig, Para. Nr. 86 (stressing that Art. 39(3) requires the Bundestag to convene at the request of either “the President or the Chancellor”).

¹⁵⁶ GRUNDGESETZ [GG] [Constitution] art. 63(4) (F.R.G.). In this case the normal countersignature requirement does not apply. See GRUNDGESETZ [GG] [Constitution] art. 58 (F.R.G.).

¹⁵⁷ GRUNDGESETZ [GG] [Constitution] art. 68(1) (F.R.G.).

¹⁵⁸ GRUNDGESETZ [GG] [Constitution] art. 81(1), (2), (3) (F.R.G.). See *supra* note 131.

¹⁵⁹ See Herzog, *Art. 54*, in 3 Maunz/Dürig, Para. Nr. 86. With respect to the vote of no confidence under Art. 68 the Constitutional Court confirmed the President’s discretion, as well as his authority to determine whether the legal requirements for dissolution had been met, in its famous opinion respecting the dissolution of Parliament in 1983. See BVerfGE 62, 1, (35, 50) (1983); Schlaich, *supra* note 137, Para. Nr. 15-21 (adding that as a practical matter the President’s discretion in the case of a vote of no confidence has been severely limited by the Court’s loose interpretation of the conditions justifying dissolution (see *supra* notes 33-48) and by its insistence, BVerfGE 62, 1 (50-51) (1983) that in assessing the political prospects for a viable Government the President is not to substitute his judgment for that of the Chancellor). See also Meinhard Schröder, *Bildung, Bestand und parlamentarische Verantwortung der Bundesregierung*, 2 HANDBUCH DES STAATSRICHTS 603, Para. Nr. 23 (arguing that the Bundespräsident is free to reject a minority Chancellor under Art. 63(4) only if he doubts that candidate’s ability to form an effective government).

¹⁶⁰ See Schlaich, *supra* note 137, Para. Nr. 58.

federal executive authority rests with the Cabinet (Bundesregierung) and the ministers of which it is composed.¹⁶¹

Though formally appointed by the President, the Chancellor is elected by the Bundestag, and as a practical matter it is he who selects the other ministers.¹⁶² Under Article 67 the Bundestag can remove the Chancellor—and with him his ministers¹⁶³—at any time and for any reason, but only if it simultaneously names his successor.¹⁶⁴ The purpose of this provision is to guard against the risk of an executive vacuum while ensuring ultimate parliamentary control.¹⁶⁵

Thus in theory the Bundestag can determine the direction of executive policy through its power to select and replace the Chancellor, and it has broad

¹⁶¹ See GRUNDGESETZ [GG] [Constitution] art. 82 (F.R.G.): “Die Bundesregierung besteht aus dem Bundeskanzler und aus den Bundesministern.”

¹⁶² GRUNDGESETZ [GG] [Constitution] arts. 63, 64 (F.R.G.); see Herzog, *Art. 63*, in 3 Maunz/Dürig, Para. Nr. 1-6. In fact the choice of both Chancellor and Ministers is worked out by negotiation among the coalition parties in advance of the formal steps prescribed by the Constitution. See Schröder, *supra* note 159, Para. Nr. 1-2. Except for those ministries expressly named in the Basic Law (Defense, Finance, and Justice), the Chancellor determines which positions shall exist as an incident to his authority to fill them. See Herzog, *Art. 64*, in 3 Maunz/Dürig, Art. 64, Rdnr. 3-5; Schröder, *supra*, Rdnr. 27-28 (arguing that the legislature is powerless to interfere). For early debates over the issue in the United States see Currie, *The Constitution in Congress: The First Congress, 1789-91* (forthcoming). That the Chancellor must nominate ministers and allot them significant areas of responsibility, however, is said to be established by Art. 62’s basic decision in favor of a cabinet system. See Herzog in 3 Maunz/Dürig, Art. 62, Rdnr. 3.

¹⁶³ GRUNDGESETZ [GG] [Constitution] art. 69(2) (F.R.G.). Parliamentary removal of individual ministers, or of the Chancellor alone, is not permitted; the Cabinet stands or falls as a whole. See Herzog, *Art. 67*, in 3 Maunz/Dürig, Par. Nr. 10-11; Herzog, *Art. 69*, in 3 Maunz/Dürig, Para. Nr. 44. Some of the Länder constitutions, in contrast, permit the Parliament to remove individual ministers. See Herdegen, *supra* note 10, Para. Nr. 30.

¹⁶⁴ Thus when the Cabinet has lost the support of Parliament there are three possibilities: The election of a new Chancellor under Art. 67 or (if the Chancellor resigns) Art. 63, the dissolution of Parliament under Art. 68 (see *supra* notes 33-48), and the continuation in office of a minority government. In the event of a race between Parliament to replace the chancellor and the Chancellor to seek the dissolution of Parliament, Art. 68(1) gives the legislature a trump card by providing that the right to dissolution is extinguished as soon as a new Chancellor is chosen. See Herzog, *Art. 68*, in 3 Maunz/Dürig, Para. Nr. 63 (explaining that it would make no sense to dissolve an assembly that was in a position to choose a viable cabinet).

¹⁶⁵ Schröder, *supra* note 159, Para. Nr. 33-35. But see HESSE, *supra* note 6, Para. Nr. 635 (doubting whether a minority government kept in power by virtue of Art. 67’s requirement of a constructive vote of no confidence (“konstruktives Mißtrauen- svotum”) is likely to be more effective than a caretaker government remaining in office in default of a successor, as under the Weimar Constitution); Herzog, *Art. 62*, in 3 Maunz/Dürig, Para. Nr. 80 and Herzog, *Art. 67*, in 3 Maunz/Dürig, Para. Nr. 16. For the argument that an attempt to force the Chancellor to resign by terminating his salary would amount to an unconstitutional circumvention of Art. 67, see *id.* at Para. Nr. 44.

investigative powers to enable it better to perform its oversight function.¹⁶⁶ In practice, it is often said, the situation tends to be reversed: By virtue of its superior access to information and its influence on the dominant political parties, the Cabinet effectively determines *legislative* policy.¹⁶⁷ In any event, there is far less structural separation between the legislature and top executive officers in the Federal Republic than there is in the United States.¹⁶⁸

Within the Cabinet, the Chancellor determines the general principles (“Richtlinien”) of executive policy.¹⁶⁹ Within these principles, however, each minister conducts the affairs of his department autonomously and on his own responsibility (“selbständig und unter eigener Verantwortung”).¹⁷⁰ Many

¹⁶⁶ GRUNDGESETZ [GG] [Constitution] art. 44 (F.R.G.). In accordance with this purpose, the implicit executive privilege of withholding confidential or sensitive information is narrowly interpreted. See BVerfGE 67, 100 (127-46) (1984); Maunz, *Art. 44*, in 3 Maunz/Dürig, Para. Nr. 57. In fact, since the Cabinet normally enjoys the support of a parliamentary majority, it is more commonly the opposition that acts as a watchdog. To this end Art. 44(1) requires the Bundestag to conduct an investigation whenever requested by one fourth of its members, and the Constitutional Court has held that the same quorum may basically determine the agenda of the investigation—an important check in a system without strict structural separation of executive and legislative bodies. See BVerfGE 49, 70 (79-88) (1978); Herzog, *Art. 62*, in 3 Maunz/Dürig, Para. Nr. 105-06.

¹⁶⁷ See, e.g., Herzog, *Art. 20*, in 2 Maunz/Dürig, Para. Nr. 64, 54-55 (noting the clear predominance (“deutliches Übergewicht”) of the Cabinet).

¹⁶⁸ Indeed, although the Chancellor and other ministers are forbidden to engage in most other remunerative activities in order to minimize conflicts of interest, they may serve simultaneously as members of Parliament, as is common in a parliamentary system. See Herzog, *Art. 66*, in 3 Maunz/Dürig, Para. Nr. 2-4, 33-36 (explaining that historically a legislative seat does not qualify as a “salaried” office within the meaning of the incompatibility provision of GRUNDGESETZ [GG] [Constitution] art. 66 (F.R.G.), and that therefore (strange as it may seem) a federal minister is free to serve as a state legislator as well).

¹⁶⁹ GRUNDGESETZ [GG] [Constitution] art. 65 (F.R.G.). These principles or guidelines, which have been defined as “binding, abstract, normative instructions,” have been compared to framework legislation (see CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY, *supra* note 1) in that they must leave sufficient discretion to the individual ministers to work out the details. See Norbert Achterberg, *Innere Ordnung der Bundesregierung*, 2 HANDBUCH DES STAATSRECHTS 629, Para. Nr. 18-19; Herzog, *Art. 65*, in 3 Maunz/Dürig, Para. Nr. 5-10 (invoking the same analogy but concluding that the Chancellor is free to resolve particular controversies of significant political import so long as individual ministers retain a significant degree of overall discretion).

¹⁷⁰ GRUNDGESETZ [GG] [Constitution] art. 65 (F.R.G.). This means, for example, that it is the individual Minister who makes hiring and firing decisions and issues instructions to administrators within his department. See Herzog, *Art. 65*, in 3 Maunz/Dürig, Para. Nr. 59-61. Differences of opinion over matters concerning more than one Ministry are resolved by the Cabinet as a whole. GRUNDGESETZ [GG] [Constitution] art. 65 (F.R.G.); see Achterberg, *supra* note 169, Para. Nr. 59. In normal times the Defense Minister is Commander in Chief of the armed forces (GRUNDGESETZ [GG] [Constitution] art. 65a (F.R.G.)); in a military emergency (see *supra* note 131), command passes to the Chancellor in the interest

significant powers, moreover, are given not to any individual minister but to the Cabinet as a whole.¹⁷¹ Thus the executive power is not only less independent but also less centralized in Germany than it is in the United States, although the Chancellor can exercise ultimate control through his power to set guidelines and effectively to hire and fire other Cabinet members.¹⁷² In so doing, of course, the Chancellor himself is subject to the threat of replacement and thus to a measure of parliamentary control.

II. The Limits of Parliamentary Control

Despite the structural symbiosis inherent in the parliamentary system, Article 20(2)'s insistence that legislative and executive powers be exercised by distinct governmental bodies is not without significance. In the first place, at the fundamental level, there are limits to the methods by which the legislature may exercise control over executive actions.

As a minimum, Article 20(2) must mean that the Bundestag cannot itself execute the laws.¹⁷³ Nor, as a general rule, can it tell the executive how to exercise its authority in a particular case;¹⁷⁴ the parliament controls policy at the wholesale rather than the retail level by passing laws and by replacing the Cabinet.

of unified policy (GRUNDGESETZ [GG] [Constitution] art. 115b (F.R.G.)). Under GRUNDGESETZ [GG] [Constitution] art. 112 (F.R.G.) expenditures not provided for in the budget may be made only with the Finance Minister's approval.

¹⁷¹ See, e.g., GRUNDGESETZ [GG] [Constitution] arts. 76, 81 (F.R.G.) (proposal for legislation in normal times and alter declaration of legislative emergency); GRUNDGESETZ [GG] [Constitution] arts. 84, 85, 86 (F.R.G.) (various devices for controlling officials engaged in actual administration of the laws); GRUNDGESETZ [GG] [Constitution] art. 115a, 115f (F.R.G.) (application for declaration of a military emergency and extraordinary powers once such a declaration is made). The Basic Law's allocation of authority between the Cabinet and its various Ministers was consciously patterned after that of the Weimer Constitution. See Achterberg, *supra* note 169, Para. Nr. 9-12. For a detailed breakdown of this allocation, see Meinhard Schröder, *Aufgaben der Bundesregierung*, 2 HANDBUCH DES STAATSRECHTS 585, Para. Nr. 17-24.

¹⁷² GRUNDGESETZ [GG] [Constitution] arts. 64, 65 (F.R.G.). See Achterberg, *supra* note 169, Para. Nr. 54; Herzog, *Art. 64*, in 3 Maunz/ Dürig, Para. Nr. 20 (finding that true basis of the Chancellor's preponderance in his power over the composition of the Cabinet). Contrast U.S. Const. art. II, § 1: "The executive power shall be vested in a President of the United States."

¹⁷³ See also Herzog, *Art. 20*, in 2 Maunz/Dürig, Para. Nr. 83, 111 (basing this conclusion on the requirement (partly codified in Art. 19(1)) that laws be of general applicability and on the general equality provision of Art. 3(1)).

¹⁷⁴ See Wolfgang Loschelder, *Weisungshierarchie und persönliche Verantwortung in der Exekutive*, 3 HANDBUCH DES STAATSRECHTS 521, Para. Nr. 26, 41.

There is one important qualification of this principle that should strike a familiar chord for the observer from the United States. In the ubiquitous *Price Control* case the Constitutional Court expressly upheld a statutory provision empowering the Bundestag alone, without meeting the constitutional requirements for legislation, to veto regulations adopted by the executive setting prices for various goods and services.¹⁷⁵ Relying heavily on a long history of similar statutory provisions, the Court also justified its conclusion on the ground (asserted unsuccessfully by Justice White in his dissent from *INS v. Chadha*)¹⁷⁶ that the legislative veto compensated for the increase in executive power brought about by the delegation itself.¹⁷⁷ The context of the decision, however, was one of general rulemaking, not of individual executive action. Moreover, in any case the legislative veto is purely negative; it permits the Bundestag to prevent but not to compel executive action. The crudeness of the tools of legislative control thus affords the Cabinet considerable practical autonomy within the confines of the parliamentary system.

A variety of structural principles, moreover, further limit the degree of parliamentary control over the actual administration of the laws. As already indicated, the Bundestag can remove individual ministers only by removing the Chancellor, and it can do that only if it chooses his successor at the same time. In addition, there are significant limits to the authority of the Cabinet itself, and correspondingly to the indirect authority of Parliament, over the administration (*Verwaltung*).

Even in those areas in which federal laws are administered by federal agencies directly responsible to one or another ministry,¹⁷⁸ some structural autonomy is

¹⁷⁵ BVerfGE 8, 274 (319-22) (1958).

¹⁷⁶ 462 U.S. 919 (1983).

¹⁷⁷ For an approving view see, Maunz, *Art. 80*, in 2 Maunz/Dürig, Para. Nr. 35, 60. As far as the U.S. Constitution is concerned, I have argued elsewhere that the Supreme Court was right: Once it is decided that the delegation is not too broad, the executive in acting under it is executing the law, and the legislature can interfere only by changing the law itself. *THE SECOND CENTURY*, *supra* note 15, at 591-93. Indeed the German Court acknowledged that a regulation approved by the Bundestag remained a regulation: The requirement of legislative approval did not make inapplicable the requirement of Art. 80(1) that the statute specify the content, purpose, and extent of the delegated authority. BVerfGE 8, 274, (322-23) (1958). See also BVerfGE 9, 268, 279-80 (1958), holding in contrast to *Buckley v. Valeo*, 424 U.S. 1, 109-43 (1976), that the fact that one member of a board with power to arbitrate disputes over public employment was a legislator did not disqualify him. The arrangement was invalidated, however, on the distinct ground that the executive was entitled to control of fundamental matters affecting its own composition. See text at nn.192-95 *infra*.

¹⁷⁸ Such areas include defense, foreign affairs, some federal taxes, postal and telecommunications services, and some aspects of transportation. See GRUNDGESETZ [GG] [Constitution] arts. 32, 87(1), 8Th,

provided by Article 33, which requires that most public servants be selected without regard for their political inclinations and that the public service be conducted with due regard for the traditional principles of the professional civil service (“unter Berücksichtigung der hergebrachten Grundsätze des Berufsbeamtentums”). These principles embrace appropriate remuneration (including pensions and allowances for child support) and even titles, the right to a hearing before discharge, and above all (in most cases) protection against dismissal without cause.¹⁷⁹

Because these provisions preserved the special privileges of public officers that Allied authorities had worked hard to eliminate, they were viewed as a victory for the civil servants’ lobby.¹⁸⁰ As the Constitutional Court has emphasized, however, they also serve the broader and more important purpose of promoting the rule of law by limiting political influence on the execution of the laws.¹⁸¹ Of course the politically responsible ministers exercise extensive control over the administration through their authority to appoint and instruct inferior officers.¹⁸² In most cases, indeed, civil servants are expected to accept their superiors’ decisions as to the legality of their orders. The official’s ultimate responsibility, however, is to the

87d, 108(1) (F.R.G.) Art. GG; CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY, *supra* note 1.

¹⁷⁹ See BVerfGE 7, 155 (1957); BVerfGE 8, 1 (22-28) (1958); BVerfGE 11, 203 (210-17) (1960); BVerfGE 43, 154 (165-77) (1976); BVerfGE 44, 249 (262-68) (1977); BVerfGE 62, 374 (382-91) (1982); BVerfGE 64, 323 (351-66) (1983). See also Helmut Lecheler, *Der öffentliche Dienst*, 3 HANDBUCH DES STAATSRECHTS 717, Para. Nr. 49-70; Currie, *Lochner Abroad*, *supra* note 1, at 351-52. Officers whose responsibilities involve the exercise of a discretion distinctively political, such as appointed mayors, may be discharged on political grounds. See BVerfGE 7, 155 (164-70) (1957); cf. *Elrod v. Burns*, 427 U.S. 347 (1976), drawing a similar distinction for purposes of determining when patronage dismissals offend the guarantee of free expression in the United States. For complaints about the increasing incidence of patronage hiring in Germany in the teeth of the nondiscrimination provision of Art. 33(3), see Lecheler, *supra*, Para. Nr. 20, 104, 107-09 (1988).

¹⁸⁰ See WOLFGANG BENZ, *VON DER BESATZUNGSHERRSCHAFT ZUR BUNDESREPUBLIK* 133-16, 208-09 (1984).

¹⁸¹ See BVerfGE 7, 155 (162-63) (19857), invoking the debates in the Parliamentary Council and emphasizing the virtues of stability, neutrality, and “a counterweight to the political forces” that determine public affairs; Meinhard Schröder, *Die Bereiche der Regierung und der Verwaltung*, 3 HANDBUCH DES STAATSRECHTS 499, Para. Nr. 31.

¹⁸² Technically all officers are appointed by the Bundespräsident under GRUNDGESETZ [GG] [Constitution] art. Art. 61(1) (F.R.G.). Like most of his actions, however, appointments require the countersignature of the responsible minister, who makes the actual decision. See GRUNDGESETZ [GG] [Constitution] art. 58 (F.R.G.); Lecheler, *supra* note 179, Para. Nr. 75. See also Walter Krebs, *Verwaltungsorganisation*, 3 HANDBUCH DES STAATSRECHTS 567, Para. Nr. 55, arguing that constitutional provisions for direct federal administration imply a high degree of centralized control.

nation, not to a particular government;¹⁸³ and in the extreme case he may even have a duty to resist illegitimate instructions.¹⁸⁴

The question of autonomy in the civil service exposes a tension between basic constitutional values, for freedom from political influence means freedom from democratic control. This tension is exacerbated by the existence of certain executive or administrative bodies, at both federal and state levels, that are situated outside the normal hierarchy of direct ministerial control.

A few such organizations can trace their pedigree to the Basic Law itself. Most significant perhaps is the Bundesbank, a close cousin of our Federal Reserve Board, which is entrusted with the issuance of paper money and stabilization of the currency.¹⁸⁵ Article 88 says nothing about the structure of this bank, but the history of central banks in Germany leaves no doubt that an institution independent of the Cabinet was contemplated.¹⁸⁶ Accordingly, the statute expressly insulates the Bundesbank from Cabinet direction, requiring the Bank to support the overall economic policy of the Government only to the extent consistent with its own particular obligations (“unter Wahrung ihrer Aufgabe”).¹⁸⁷ Similarly, Article 114 expressly envisions an even more independent auditing office (Bundesrechnungshof) to supervise public accounts.¹⁸⁸ The former provision reflects the teaching of experience that politically responsible governments cannot be trusted to give monetary stability the priority it deserves,¹⁸⁹ the latter the

¹⁸³ See Lecheler, *supra* note 179, Para. Nr. 91, 103. See also *id.* at Para. Nr. 51-53 (adding that objectivity on the part of the public servant is a constitutional command).

¹⁸⁴ See Loschelder, *supra* note 174, Para. Nr. 92-102. The entire executive authority, of course, is bound by law (“Gesetz und Recht”) under Article 20(3). Like the Bundespräsident’s oath to uphold the Constitution (see text at n.152 *supra*), however, this provision does not tell us what the law requires the individual officer to do.

¹⁸⁵ These powers are suggested by Art. 88 of the Basic Law itself, which speaks of a note-issuing and currency bank (“eine Währungs- und Notenbank”). To the end of controlling the money supply the Bundesbank has statutory authority among other things to fix interest and discount rates, to establish minimum reserve requirements for banks, and to make purchases and sales in the open market. See Maunz, *Art. 88*, in 3 MAUNZ/DÜRIG, Para. Nr. 29-40. Cf. 12 U.S.C. ch. 3 (Federal Reserve).

¹⁸⁶ See Maunz, *Art. 88*, in 3 MAUNZ/DÜRIG, Para. Nr. 16, 18-19.

¹⁸⁷ See *id.* at Para. Nr. 17, 20.

¹⁸⁸ Art. 114 expressly requires that members of the Bundesrechnungshof enjoy “the independence of judges,” which is discussed in the text at *infra* notes 219-73. See also Maunz, *Art. 114*, in 4 Maunz/Dürig, Para. Nr. 17-24; Krisker, *supra* note 12, Para. Nr. 125 (complaining of excessive executive influence in the selection of members).

¹⁸⁹ See Maunz, *Art. 88*, in 3 Maunz/Dürig, Para. Nr. 16.

conviction that public confidence in government requires auditing by a truly impartial outsider.¹⁹⁰

Article 87 contemplates additional federal administrative bodies outside the normal hierarchy of direct ministerial supervision. Paragraph (2) of that Article requires that social-insurance agencies with responsibilities transcending state lines be conducted as public corporations; paragraph (3) permits the erection of additional public corporations and institutions (“bundesunmittelbare Körperschaften und Anstalten des öffentlichen Rechtes”) in fields in which the Bund has legislative authority. The traditional concept of a public corporation or institution implies some degree of independence from ordinary ministerial control.¹⁹¹

As we move from modest civil service provisions to the more radical notion of autonomous administrative bodies, however, the tension between the desire for neutrality and the basic principles of parliamentary democracy becomes more acute. The difficulty was neatly illustrated by an important 1959 decision of the Constitutional Court.¹⁹² A statute of the state of Bremen gave public officials and employees a say in decisions affecting staffing and conditions of employment. If the agency and the representatives of its personnel (Personalrat) disagreed, the dispute was to be resolved by an arbitration panel on which the presiding officer of the state legislature held the balance of power.¹⁹³ Insofar as this measure applied to personnel decisions involving public officials (Beamte), the Court held it unconstitutional.

The fact that a member of the legislature was a member of the panel, the Court said, did not condemn the provisions. The heart of the separation of powers requirement, made applicable to the states by Article 28(1) of the Basic Law, was to enable the various branches of government to act as checks on one another; a

¹⁹⁰ In the field of higher education, Article 5(3)'s guarantee of academic freedom (“Wissenschaft, Forschung und Lehre”) has been held to require a significant degree of self-government by faculties of public universities. *E.g.*, BVerfGE 35, 79 (1973); *see* Krebs, *supra* note 182, Para. Nr. 71. *Cf.* BVerfGE 12, 205 (1961) (holding that the guarantee of broadcasting freedom in Art. 5(1) forbade state interference with the management and programming of public television stations).

¹⁹¹ *See* Krebs, *supra* note 182, Para. Nr. 55; Maunz, *Art. 87, in 3 Maunz/Dürig*, Para. Nr. 66. The same provision also expressly authorizes the establishment of autonomous higher federal agencies (“selbständige Bundesoberbehörden”) under the same conditions, but the term “autonomous” in this connection is understood to imply organizational distinctness rather than freedom from ministerial direction. *See id.* at Para. Nr. 83; Hans Peter Bull, *Art. 87, in 2 AK-GG*, Para. Nr. 28.

¹⁹² BVerfGE 9, 268 (1958);

¹⁹³ The agency and the Personalrat each chose three other members of the panel. *See id.* at 269, 271-72.

certain shifting of power in favor of the legislature was no cause for concern in a parliamentary democracy.¹⁹⁴

What was wrong with the provision, in the Court's view, was that depriving the state Cabinet of power to make its own personnel decisions was inconsistent with the principle of responsible government implicit in Article 28's prescription for democracy and the rule of law. "The autonomous authority of the Cabinet to make political decisions, its ability to carry out its constitutional duties, and its substantive responsibility to the people and to Parliament are obligatory requirements of the constitution of a democratic state characterized by the rule of law." Not every administrative function had necessarily to be subject to ministerial control.

Yet there are some duties which, because of their political significance [wegen ihrer politischen Tragweite], may not be generally taken out of the area of Cabinet responsibility and transferred to agencies independent of both Cabinet and Parliament. If this were not so, it would be impossible for the Cabinet to bear the responsibility imposed upon it [by the Basic Law], since unsupervised agencies responsible to no one would be in a position to influence the administration.

Control over personnel decisions respecting public officers, the Court concluded, was an essential attribute of Cabinet authority, since the reliability and disinterestedness of the public service depended largely upon them: "The appointment of a poorly qualified official can impair or paralyze the work of an entire branch of the administration for years to come...."¹⁹⁵

¹⁹⁴ *Id.* at 279-80. See *supra* note 177.

¹⁹⁵ BVerfGE 9, 268 (281-84) (1958). For similar reasons the statute was held to offend the traditional civil service principles that Art. 33(5) requires both state and federal authorities to respect: The public official's responsibility to obey the laws and the lawful orders of his superiors was incompatible with his dependency on anyone else. *Id.* at 285-88. The Court added, however, that decisions as to "social" matters not directly affecting the duties of public officers, as well as even employment decisions affecting employees with lesser responsibilities ("Angestellte" and "Arbeiter"), might constitutionally be entrusted to the arbitration panels in question. *Id.* at 284-85.

Knowledgeable commentators disagree as to 'the scope of the doctrine enunciated in this decision.¹⁹⁶ As already noted, the Basic Law itself modifies the principle of responsible government by requiring an independent auditor and permitting an autonomous central bank. It is sometimes said that these explicit provisions are narrow exceptions to a general constitutional prohibition of "ministerialfreie Räume" – areas of administration immunized from ministerial control. The constitutional guarantee of parliamentary democracy, it is argued, normally requires a chain of authority reaching from the people by way of parliament and cabinet to those engaged in administering the laws.¹⁹⁷ The Court itself, however, has subsequently endorsed the establishment of independent committees or examiners to resolve disputes over individual tax assessments or to determine which publications are harmful to minors, on the ground that such decisions fall outside the policymaking realm ("dem Bereich der politischen Gestaltung") that the Basic Law reserves to the Cabinet.¹⁹⁸ Other observers point to the proliferation of more or less independent agencies and suggest that parliamentary control need not imply cabinet control. Even those unwilling to limit autonomous agencies to those specifically contemplated by the Constitution, however, tend to conclude that there are narrow limits to the ability to remove important executive functions from political supervision entirely.¹⁹⁹ For as every student of government in the United States knows, the creation of independent agencies not only impairs democratic control of executive action; it also undermines the principle of unified executive

¹⁹⁶ On the one hand it can be argued that the decision is a narrow one: Of course the Cabinet must be in a position to carry out its responsibilities, but the Basic Law does not say what those responsibilities are. See GRUNDGESETZ [GG] [Constitution] art. 65 (F.R.G.), empowering each minister to conduct "the affairs of his department" on his own responsibility; Müller, *Ministerialfreie Räume*, 1985 JuS 497; Herzog, *Art. 65*, in 3 Maunz/Dürig, Para. Nr. 106 (stressing that the decision dealt only with administrative organization). On the other hand, one might respond that the framers of the Basic Law would hardly have bothered to ensure ministerial control of personnel decisions while permitting the entire subject being administered to be withdrawn from ministerial responsibility.

¹⁹⁷ See, e.g., Loschelder, *supra* note 174, Para. Nr. 20-22, 37-40, 59. The historical and functional test employed by the Constitutional Court in determining that a subsidiary role in the supervision of banks was implicit in the conception of a "currency and note-issuing bank" under Art. 88 (BVerfGE 14, 197 (215-19) (1962)), while serving in that case to delimit the boundary between federal and state powers, seems no less appropriate for determining the 'range of administrative activity that the same Article permits to be removed from ministerial control.

¹⁹⁸ BVerfGE 22, 106 (113) (1967); BVerfGE 83, 130 (150) (1990). Committee decisions in the first case were subject to review by the courts at the instance of the administration, but not by the administration itself.

¹⁹⁹ See, e.g., Krebs, *supra* note 182, Para. Nr. 80-83; Müller, *supra* note 196, at 508; Herzog, *Art. 65*, in 3 Maunz/Dürig, Para. Nr. 103 (analogizing the relinquishment of parliamentary control over executive action to the delegation of rulemaking authority and suggesting a similar test of "essential" executive functions).

policy implicit in constitutional provisions for parliamentary as well as presidential government.²⁰⁰

To the extent that federal agencies are free from ministerial direction, however, they are also relatively free from parliamentary interference. More significantly, additional structural separation between legislative and executive authority is provided by Article 83's requirement that most federal laws be carried out by the Länder.

As I have explained elsewhere,²⁰¹ the Cabinet is given a variety of tools for ensuring that the Länder actually fulfill their enforcement duties. Outside those few areas in which the Länder enforce federal laws as agents of the Federation ("im Auftrag des Bundes"),²⁰² however, direct federal supervision is basically limited to ensuring the legality of administrative action rather than controlling the exercise of discretion in particular cases.²⁰³ Moreover, the most effective of these tools can be employed only with the consent of the Bundesrat—that is, by a weighted vote of the states themselves.²⁰⁴ Thus in Germany the vertical principle of federalism

²⁰⁰ Cf. *Myers v. United States*, 272 U.S. 52 (1926), a decision sadly eroded by later developments. See *Humphrey's Executor v. United States*, 29 U.S. 602 (1935); *Morrison v. Olson*, 487 U.S. 654 (1988). When executive authority is delegated to public bodies composed of those most immediately affected (e.g., disciplinary proceedings before professional associations), the democratic concern for parliamentary control is counterbalanced by the equally democratic argument of self-determination. See Hendler, *supra* note 125, Para. Nr. 48-49, 56. The transfer of executive responsibilities to *private* organizations, on the other hand, is particularly problematic in light of Art. 20(2)'s provision that public authority be exercised by specified organs of government and Art. 33(4)'s command that governmental responsibilities be entrusted "as a rule" to civil servants. It was on this ground that the Bundespräsident recently refused to sign a law that would have privatized the business of air traffic control, which entails giving orders to pilots that have the force of law. See *supra* note 151. See also Krebs, *supra* note 182, Para. Nr. 10. For the impact of the organizational freedom guaranteed to workers by Art. 9(3) on the ability of workers and managers to set wages binding on nonparties, see BVerfGE 34, 307 (315-20) (1973).

²⁰¹ See CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY, *supra* note 1.

²⁰² GRUNDGESETZ [GG] [Constitution] art. 85 (F.R.G.). In these cases state agencies are subject to federal instructions respecting not only the legality ("Gesetzmäßigkeit") but also the appropriateness ("Zweckmäßigkeit") of their actions. See GRUNDGESETZ [GG] [Constitution] art. 85(4), (5).

²⁰³ See GRUNDGESETZ [GG] [Constitution] arts. 84(3) (F.R.G.): "The Federal Government [Bundesregierung] shall exercise supervision to ensure that the Lander execute federal laws in accordance with applicable law [dem geltenden Rechte gemäß]." See also Peter Lerche, *Art. 84, in 3 Maunz/Dürig*, Para. Nr. 152; Krebs, *supra* note 182, Para. Nr. 41. Länder discretion may be limited by the issuance of general administrative rules ("Verwaltungsvorschriften") (GRUNDGESETZ [GG] [Constitution] art. 84(2) (F.R.G.) or (if the statute so provides) by regulations that also bind third parties ("Rechtsverordnungen") (GRUNDGESETZ [GG] [Constitution] art. 80(1) (F.R.G.)). In either case the rule becomes part of the "law" that the state agency is required to apply in taking individual actions. See Lerche, *id.* at Para. Nr. 157.

²⁰⁴ GRUNDGESETZ [GG] [Constitution] arts. 37, 80(2), 84(2), (4), (5) (F.R.G.).

compensates to a significant extent for the lack of horizontal separation of powers that inheres in a parliamentary system.²⁰⁵ Since Länder agencies are generally subject to direction by ministers responsible to the state Parliament, it does to—in contrast to the creation of independent federal agencies—without impairing the important principle of democratic control.

In short, while there is less structural separation between the legislature and high executive officers in the Federal Republic than in the United States, those officers have less power over the administration than their counterparts in this country. Executive authority is divided among the Cabinet, the civil service, federal agencies and institutions outside the normal administrative hierarchy, and the Länder in such a way that the Bundestag has much less influence on those who actually enforce the law than one might expect in a parliamentary system.

D. Judicial Power

Unlike the executive, the German courts are independent. Indeed in several respects their power to act as a check on abuses of authority by other organs of government is better protected than that of courts in the United States.

In contrast to most of their counterparts in this country, German courts are organized by subject matter. The Basic Law provides for a Federal Constitutional Court (Bundesverfassungsgericht) and for a series of specialized federal supreme courts (“oberste Gerichtshöfe”) in the fields of administrative law (Bundesverwaltungsgericht), taxation (Bundesfinanzhof), labor (Bundesarbeitsgericht), and social security (Bundessozialgericht), as well as a more general supreme court for other civil and criminal matters (Bundesgerichtshof).²⁰⁶ With few exceptions, moreover, there are no lower federal courts. Just as most federal laws are administered in the first instance by state executive officers, most lawsuits based on federal law are brought initially in state courts, which are likewise organized on subject-matter lines.²⁰⁷ In the United States such an arrangement would raise fears both of distracting litigation over jurisdictional

²⁰⁵ See Otto Kimminich, *Der Bundesstaat*, 1 HANDBUCH DES STAATSRICHTS 1113, Para. Nr. 45; Herzog, *Art. 20*, in 2 Maunz/Dürig, Para. Nr. 28, 35.

²⁰⁶ See GRUNDGESETZ [GG] [Constitution] arts. 93-95 (F.R.G.).

²⁰⁷ See GRUNDGESETZ [GG] [Constitution] art. 92 (F.R.G.): “Judicial power. . . shall be exercised by the Federal Constitutional Court, by the federal courts provided for in this Basic Law, and by the courts of the Länder.” Apart from the Constitutional Court and the supreme courts listed in Art. 95, the only federal courts provided for are for industrial property (“Angelegenheiten des gewerblichen Rechtsschutzes”) and for disciplinary matters in the military and civil service. GRUNDGESETZ [GG] [Constitution] art. 96(1), (2), (4) (F.R.G.).

boundaries and of inadequate enforcement of federal rights.²⁰⁸ In Germany neither seems to have been a problem.²⁰⁹

In comparison with our Bill of Rights, the otherwise rather detailed Basic Law has surprisingly little to say about judicial procedure. Article 103 contains a ban on double jeopardy, a prohibition of ex post facto punishments, and a requirement that offenses be specifically defined by statute;²¹⁰ Article 104 requires that persons taken into custody be brought before a judge by the end of the following day and prescribes in some detail the components of the preliminary hearing.²¹¹ There is no explicit mention of the privilege against self-incrimination, the right to a speedy or public trial, the right to subpoena and confront witnesses, the right to counsel, or even the right to be informed of the nature and cause of the accusation.²¹²

This is not to say that there are no such rights, or that they exist at legislative pleasure.²¹³ Article 103(1) guarantees every litigant (in civil as well as criminal matters) a hearing in accordance with law (“rechtliches Gehör”). In determining the contours of this hearing the Constitutional Court has begun to constitutionalize some of the elements of what we would consider a fair trial.

²⁰⁸ For a humble example justifying the former concern, consider the horrors that have arisen in attempting to distinguish the jurisdiction of our Court of Appeals for the Federal Circuit under 28 U.S.C. § 1295 from that of the ordinary Courts of Appeals under §§ 1291-92, as hinted at in DAVID CURRIE, *FEDERAL COURTS* 601 (4th ed. 1990). For typical expressions of concern about the adequacy of appellate review to protect federal rights in the United States, see *Osborn v. Bank of the United States*, 22 U.S. 738, 822-23 (1824); *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 416 (1964). The well known benefits and costs of specialized courts in this country are discussed in hideous detail in David Currie & Frank Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1 (1975).

²⁰⁹ Art. 95 originally provided for creation of a separate tribunal to resolve differences of opinion among the various specialized judicial branches. So few conflicts arose, however, that no such court was ever established. The present Art. 95(3) substitutes a more practicable joint panel (“Gemeinsamer Senat”) composed of members of the various Supreme Courts. See Herzog, *Art. 95*, in 4 Maunz/Dürig, Para. Nr. 52-60. For discussion of the federalism aspect of this question, CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY*, *supra* note 1.

²¹⁰ GRUNDGESETZ [GG] [Constitution] art. 103(2), (3) (F.R.G.).

²¹¹ GRUNDGESETZ [GG] [Constitution] art. 104(2)-(5) (F.R.G.).

²¹² Cf. U.S. Const. Amdt. 5-6.

²¹³ Under the first clause of Art. 74 the Federation has concurrent legislative authority over the procedures of state as well as federal courts—subject, of course, to limitations found elsewhere in the Basic Law. See CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY*, *supra* note 1.

Central to Article 103's concept of a judicial hearing is the right to present one's case ("Äußerung") and have it considered ("Berücksichtigung").²¹⁴ To make this right meaningful, the Court has convincingly held that decisions may be based only on information that has been made available to the parties for possible rebuttal.²¹⁵ In addition, the Court has been quite aggressive in insisting that the right to be heard may not be forfeited by failure to file papers within the prescribed time period without some fault on the part of the party or of his attorney.²¹⁶

Interestingly, the Court has not gone much beyond these elementary principles in interpreting Article 103(1). For unexplained reasons it has tended in declaring other procedural rights to find them implicit either in the rule of law or in particular substantive provisions of the Bill of Rights. Thus, for example, both the right to an attorney and the right to a translator have been said to derive not from the explicit guarantee of a hearing but from the general principles of the rule of law,²¹⁷ while

²¹⁴ For a general statements of these two requirements *see, e.g.*, BVerfGE 64, 135 (143-44) (1983); Eberhard Schmidt-Aßmann, *Art. 103(1)*, in 4 Maunz/Dürig, Para. Nr. 66-67. Cf. the provisions of our Administrative Procedure Act, 5 U.S.C. § 553(b), (c), for so-called notice-and-comment rulemaking by administrative agencies. For particulars respecting the right to be heard, *see, e.g.*, BVerfGE 4, 190 (191-92) (1955) (adequate time to contest appeal of favorable decision); BVerfGE 5, 9 (11) (1956) (no constitutional right to oral argument); BVerfGE 60, 250 (252) (1982) (duty to hear all witnesses offered by the parties). Whether a judge has actually considered the submissions of the parties is obviously not always subject to proof, yet in a surprising number of cases the Constitutional Court has found that they were not considered. *E.g.*, BVerfGE 11, 218 (219-20) (1960) (where it was admitted that the judges were unaware of the submission); BVerfGE 18, 380 (383-84) (1965) (where the submission had been erroneously rejected as untimely).

²¹⁵ *E.g.*, BVerfGE 10, 177 (182-84) (1959); BVerfGE 12, 110 (112-113) (1961). Cf. *Ohio Bell Tel. Co v. Public Utilities Comm.*, 301 U.S. 292 (1937); *Portland Cement Ass'n v. Ruckelshaus*, 486 F.2d 375 393 (D.C. Cir. 1973).

²¹⁶ Thus late filings have regularly been excused on the ground that the defaulting party was on vacation when notice reached his home (BVerfGE 25, 158 (166) (1969)), that mail delivery was unusually delayed (BVerfGE 40, 42 (44-46) (1975)), that the party had relied on misleading official advice (BVerfGE 40, 46 (50-51) (1975)), or that he was unable to understand the German language (BVerfGE 40, 95 (99-100) (1975)). For the suggestion that the Court may have been overly generous in this regard, *see* Schmidt-Aßmann, *Art. 103(1)*, in 4 Maunz/Dürig, Para. Nr. 126. *Contrast* *Wainwright v. Sykes*, 433 U.S. 72 (1977) (permitting even constitutional rights in the context of a criminal proceeding to be lost for failure to raise them in time absent an affirmative showing of cause).

²¹⁷ The theory is that any interference with one's general freedom of action can be justified only by the constitutional order, the rights of others, or the moral code (Art. 2(1)); that any action inconsistent with the rule of law fails to satisfy these conditions; and that a fair trial is an element of the rule of law guaranteed by Art. 20(3). *See* BVerfGE 38, 105 (111-18) (1974) (attorney); BVerfGE 64, 135 (145-57) (1983) (translator). For criticism of these decisions, *see* Schmidt-Aßmann, *Art. 103(1)*, in 4 Maunz/Dürig, Para. Nr. 9, 103, 117-18 (arguing that the more specific provision of Art. 103(1) should take precedence and cogently rioting that in many cases the right to a hearing is meaningless without the aid of an attorney or translator). Cf. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

unreasonable procedural restrictions on a landlord's right to justify a rent increase have been held to offend Article 14's guarantee of property rights.²¹⁸

Taken all together, this case law has established an impressive battery of procedural rights of constitutional rank. The fact remains that the Constitutional Court has been much less preoccupied with procedural questions than has the Supreme Court of the United States.²¹⁹

I. Judicial Independence

With respect to the courts, the general separation of powers principle of Article 20(2) is reinforced by Article 92's flat statement that judicial authority is vested in judges of the various courts and by Article 97(1)'s unequivocal command that the judges be independent and subject only to law ("unabhängig und nur dem Gesetz unterworfen").²²⁰ The requirement that judges follow the law forbids them to play favorites or to impose their own personal preferences. The requirement of independence protects them against outside influence, especially by other branches of government.²²¹

²¹⁸ BVerfGE 53, 352 (358-61) (1980). See also BVerfGE 56, 37 (41-52) (1981) (tracing the privilege against self-incrimination to the provisions protecting human dignity (Art. 1(1)) and the right to development of personality (Art. 2(1))). For other examples, see Currie, *Lochner Abroad*, supra note 1, at 345 n.97, 351 n.147; Schmidt-Aßmann, *Art. 103(1)*, in 4 Maunz/Dürig, Para. Nr. 8. This approach has the advantage of permitting the Court to find constitutional requirements for administrative as well as judicial procedure—unlike that based on Art. 103(1), which is expressly directed to the courts. Art. 19(4), which guarantees judicial review of administrative action (see *infra* notes 273-82), is likewise understood to require procedures adequate to make such review effective. Its central focus, however, is on access to the courts; the quality of the judicial proceeding is principally governed by Art. 103(1). See Schmidt-Aßmann, *Art. 103(1)*, in 2 Maunz/Dürig, Para. Nr. 19-26, 7.

²¹⁹ Although it has been estimated that as many as 45% of all constitutional complaints before the Court have concerned the right to a hearing under Art. 103(1), the vast bulk of these complaints present no new question of law, and the Court functions essentially to correct plain violations of the established rules. See Schmidt-Aßmann, *Art. 103(1)*, in 4 Maunz/Dürig, Para. Nr. 157, 159.

²²⁰ In this context the term "Gesetz," despite its narrower alternative connotations, is understood to include all authoritative sources of positive law. See, e.g., Herzog, *Art. 97*, in 4 Maunz/Dürig, Para. Nr. 4-5; Gunther Barbey, *Der Status des Richters*, 3 HANDBUCH DES STAATSRICHTS 815, Para. Nr. 32. For the disputed significance of Art. 20(3)'s additional provision binding the judiciary to "Recht" as well as "Gesetz," see supra notes 53-69, discussing the *Soraya* case. For the argument that Art. 97(1) requires as a general rule that judges be trained in the law in order to be in a position to obey it, see Herzog, *Art. 92*, in 4 Maunz/Dürig, Para. Nr. 77-84.

²²¹ See Wilhelm Karl Geck, *Wahl and Status der Bundesverfassungsrichter*, 2 HANDBUCH DES STAATSRICHTS 697, Para. Nr. 29-30, 49-51.

Perhaps the most fundamental dimension of judicial independence is the organizational command of Article 20(2) that legislative, executive, and judicial functions be vested in distinct bodies (“besondere Organe”).²²² This not only means that no legislative or executive agency may exercise judicial functions as such;²²³ it also limits the ability of the same individual to serve simultaneously as both legislator or administrator and judge. Article 94(1) makes this incompatibility principle explicit as to members of the Constitutional Court;²²⁴ as to other judges the Court has found its core implicit in Article 20’s general requirement of separate judicial institutions. Emphasizing the obvious inherent conflicts of interest, for example, the Court held in 1959 that mayors, municipal administrators, and members of municipal councils could not constitutionally act as judges in criminal matters that might also affect their other official duties.²²⁵ Three years later, however, the Court gave notice that the incompatibility principle was not so absolute as one might have expected by permitting municipal officials to serve as judges in small-claims controversies between private parties in which the local government itself had no interest.²²⁶ Apart from the specific provision regarding

²²² See Herzog, *Art. 97*, in 4 Maunz/Dürig, Para. Nr. 10.

²²³ See BVerfGE 14, 56 (67) (1962) (deriving from Art. 20(2) the requirement that the courts be “sufficiently separate from administrative agencies in the organizational sense”); Karl August Bettermann, *Die rechtsprechende Gewalt*, 3 HANDBUCH DES STAATSRECHTS 775, Para. Nr. 5, adding that the Basic Law itself makes two exceptions to this rule: Art. 84(4) makes it the responsibility of the Bundesrat in the first instance to determine whether one of the Länder has failed in its duty to enforce federal law, and Art. 10(2) authorizes the legislature to substitute agencies of its own for courts in passing upon the legality of electronic and postal surveillance in national security cases. Added in 1968, the latter provision was upheld with some difficulty over the objection that it contradicted fundamental principles of Art. 20, which Art. 79(3) protects even against constitutional amendment. See *infra* notes 316-17. See also GRUNDGESETZ [GG] [Constitution] art. 41(1) (F.R.G.), noted in text *supra* notes 28-29, which in order to safeguard the independence of the Bundestag makes it basically the judge of the credentials of its own members.

²²⁴ “They may not be members of the Bundestag, the Bundesrat, the Federal Government, nor of any of the corresponding organs of a Land.” The universal understanding that this is only an incompatibility and not an ineligibility provision is reflected in the statute establishing the Constitutional Court, which after repeating the language of Art. 94(1) adds that the Justices cease to be members of the named governmental bodies upon their appointment to the Court. BVerfGG § 3(3). See also § 3(4) of the same statute, which extends the incompatibility principle further by barring the Justices from any professional activity except that of law professor at a German university.

²²⁵ BVerfGE 10, 200 (216-18) (1959). See also BVerfGE 18, 241 (255-56) (1964) (holding for similar reasons that members of the executive or policymaking branches of a professional association could not serve as judges in cases involving complaints of unprofessional conduct).

²²⁶ BVerfGE 14, 56 (68-69) (1962). Thus in the result the incompatibility doctrine the Constitutional Court has derived from the separation of powers is somewhat reminiscent of the limitations our Supreme Court has found in the due process clause in such cases as *Tumey v. Ohio*, 273 U.S. 510 (1927).

the Constitutional Court, the constitutional incompatibility doctrine thus appears to be one largely of neutrality rather than of separation.²²⁷

No less obvious is the conclusion that Article 97(1) affords the judges what the Germans call substantive (“sachliche”) independence: They are subject to no one else’s orders.²²⁸ Article 101(1) contains two further provisions designed to preclude either the legislature or the executive from affecting judicial decisions by determining which judges will hear a particular case. Ad hoc courts (“Ausnahmegerichte”) are flatly prohibited,²²⁹ and no one may be removed from the jurisdiction, of his lawful judge (“seinem gesetzlichen Richter entzogen werden”). The latter provision, though hardly self-explanatory, requires among other things that both jurisdiction and the assignment of judges within a multimember tribunal be fixed in advance as nearly as practicable—all in the interest of reducing the risk of outside influence on judicial decisions.²³⁰

²²⁷ *But see* Herzog, *Art. 20*, in 2 Maunz/Dürig, Para. Nr. 47, 49 (arguing that Art. 20(2) also forbids members of the Bundestag or of the Cabinet to serve simultaneously as judges). *See also* Deutsches Richtergesetz vom 8. Sept. 1961, BGBI I, S. 1665 [DRiG], § 4, which subjects judges to a broad statutory incompatibility rule.

On the related question of the extent to which judges may be entrusted with nonjudicial functions the Constitutional Court has been somewhat equivocal. In 1971 it held that an authorization to examine witnesses in conjunction with an administrative investigation did not compromise judicial independence precisely because in so doing the judge was not engaged in adjudication. BVerfGE 31, 43 (45-46) (1971). *See also* Wassermann, *Art. 92*, in 2 AK-GG, Para. Nr. 39 (concluding that the Basic Law does not forbid giving judges nonjudicial duties). Subsequent decisions, however, have upheld the grant of such arguably extracurricular functions as the correction of land registers only after concluding that they were closely related to some traditional judicial function. BVerfGE 76, 100 (106) (1987); *see also* BVerfGE 64, 175 (179-80) (1983) (computations incident to financial arrangements on divorce). For American analogies, *contrast* Hayburn’s Case, 2 U.S. 409, 410-14 n. (1) (1792), where five Justices on circuit convincingly concluded that federal judges as such could not exercise nonjudicial functions, with the troublesome decision in *Mistretta v. United States*, 488 U.S. 361 (1989) (permitting judges to serve as members of a sentencing commission with substantive rulemaking powers).

²²⁸ *See* BVerfGE 3, 213 (224) (1953); Herzog, *Art. 97*, in 4 Maunz/Dürig, Para. Nr. 9, 22-24; Geck, *supra* note 221, Para. Nr. 49.

²²⁹ As Art. 101(2) acknowledges, this provision does not preclude the creation of specialized courts for such subjects as labor law; Art. 95 expressly contemplates them. What Art. 101 requires is that their jurisdiction be specified by statute, in general terms, and in advance. *See* BVerfGE 3, 213 (223) (1953); Christoph Degenhart, *Gerichtsorganisation*, 3 HANDBUCH DES STAATSRICHTS 859, Para. Nr. 27.

²³⁰ *See* BVerfGE 4, 412 (416) (1956) (adding that the prohibition of extraordinary courts was designed to prevent evasion of this provision); BVerfGE 17, 294 (298-302) (1964); Degenhart, *supra* note 229, Para. Nr. 17-24. Art. 101(1) serves also as the procedural tool enabling individual litigants to challenge the status of those who pass upon their cases; for a judge who does not satisfy all the constitutional requirements for the exercise of judicial authority cannot be the “lawful judge” to whom every litigant is entitled. *See* BVerfGE 10, 200 (213) (1959); Barbey, *supra* note 220, Para. Nr. 62.

To make the guarantee of substantive independence a reality, however, the judges must be personally independent as well.²³¹ Other provisions of the Basic Law help to specify just what this means.

Not surprisingly, the judges are not free from political influence with respect to their appointment. In a country in which all power emanates from the people, the judges like other public servants require democratic legitimation.²³² In recognition of the political significance of the Constitutional Court's decisions, half of its members are chosen by the Bundestag and half by the Bundesrat, which represents the state governments.²³³ Judges of the five supreme courts are selected by the federal minister with responsibility over the subject matter in conjunction with a committee ("Richterwahlausschuß") on which the respective state ministers and the Bundestag have an equal voice.²³⁴ The appointment of state-court judges is regulated by the Lander, subject to more or less general principles that may be laid down in federal framework legislation (Rahmengesetze)²³⁵ and to Article 28's

²³¹ See Herzog, *Art. 97*, in 4 Maunz/Dürig, Para. Nr. 11, 47; Geck, *supra* note 221, Para. Nr. 50; Rudolf Wassermann, *Art. 97*, in 2 AK-GG, Para. Nr. 15: "The guarantee of freedom from instructions would be ineffective if the judge had to fear dismissal or transfer in the event of an unpleasing decision."

²³² See GRUNDGESETZ [GG] [Constitution] art. 20(1) (F.R.G.); Geck, *supra* note 221, Para. Nr. 6; Wassermann, *Art. 92*, in 2 AK-GG, Para. Nr. 13a-14. Thus the Constitutional Court has held that Art. 92, which vests judicial power in courts of the Bund and of the Lander, permits municipalities or public corporations to exercise such power only if the state itself has a decisive say in selecting the judges. See BVerfGE 10, 200 (214-15) (1959) (holding that municipal courts were Lander courts within the meaning of Art. 92); BVerfGE 18, 241 (253-54) (1964) (rejecting objections in principle to the exercise of judicial powers by a medical association organized as a corporation under public law but invalidating a provision for judicial selection by members of that body).

²³³ GRUNDGESETZ [GG] [Constitution] art. 94(1) (F.R.G.). The implementing statute provides for indirect election of those members chosen by the Bundestag, evidently in the interest of efficiency. The constitutionality of this departure has been questioned on the ground that election by the Bundestag itself would provide a greater measure of democratic legitimacy. The statute also requires a two-thirds vote for approval of each appointment, in the interest of assuring board popular support for the institution. Any implication that Justices were appointed to further the policies of a particular political majority, it is argued, could impair the public confidence, on which the Court's effectiveness depends. In practice the two major parties (SPD and CDU/CSU) have agreed to divide the seats equally, reserving one of those assigned to whichever party happens to be in the Cabinet for its inevitable coalition partner, the FDP. One of the consequences has been that most of the Justices have been either members of the major parties or very close to them—a situation which has also been called detrimental to the image of a disinterested Court. See Geck, *supra* note 221, Para. Nr. 7-20.

²³⁴ GRUNDGESETZ [GG] [Constitution] art. 95(2) (F.R.G.). Both the federal minister and the committee must agree on the choice. See Maunz, *Art. 95*, in 4 Maunz/Dürig, Para. Nr. 63.

²³⁵ GRUNDGESETZ [GG] [Constitution] art. 98(3) (F.R.G.). Herzog, *Art. 98*, in 4 Maunz/Dürig, Para. Nr. 1-2, 13-14, 34-40 (also noting that tradition of ministerial appointment of Länder judges and Art. 98(4)'s

requirement that they respect the principles of “republican, democratic, and social government based on the rule of law.”

Once appointed, however, the judges enjoy a significant measure of job security. In contrast to federal judges in the United States, who can be removed under extraordinary but unreviewable circumstances by the Senate,²³⁶ most German judges can be removed, suspended, transferred, or retired during their term of office only pursuant to the decision of other judges.²³⁷ By confining this protection to judges with full-time regular appointments (“die hauptamtlich und planmäßig endgültig angestellten Richter”), however, Article 97(2) implies that not all judges enjoy this protection. Indeed the perceived need for training positions, for nonlegal expertise, and for community participation has generated a longstanding assortment of probationary, part-time, and lay judges who fall outside the express limitations on premature removal.²³⁸ Acutely aware that abuse of this practice might undermine Article 97(1)’s more comprehensive requirement of substantive independence, the Constitutional Court has insisted that the use of nontenured

explicit permission for participation by a committee such as those which help to select most federal judges).

²³⁶ U.S. Const. Art. I, §§ 2, 3; Art. II, § 4.

²³⁷ GRUNDGESETZ [GG] [Constitution] art. 97(2) (F.R.G.) (“nur kraft richterlicher Entscheidung”). Thus even as it held that municipal officials could constitutionally sit as judges in cases involving small claims between private parties (*see supra* notes 225-26), the Constitutional Court found it contrary to Art. 97(2) to provide that they lost their position as judges when they left the local government, because this arrangement effectively enabled the municipality to fire the judge. BVerfGE 14, 56 (71-72) (1962). Further provisions for removal on the basis of criminal conviction or after a formal disciplinary proceeding were upheld since in both cases removal depended upon judicial decision. *Id.* at 71. *See also* BVerfGE 17, 252 (259-62) (1964) (holding Art. 97(2) offended by a selective assignment of cases that left a judge with essentially nothing to do even though he had not been formally transferred, retired, suspended, or removed). Art. 97(2)’s further provision permitting transfer or discharge of judges upon restructuring of the court system itself (“Veränderung der Gerichte oder ihrer Bezirke”) has an obvious practical explanation but has been criticized as a potentially significant gap in the guarantee of an independent judiciary. *See Herzog, Art. 97, in 4 Maunz/Dürig, Para. Nr. 53-54* (insisting that courts may not be abolished or otherwise altered in order to get rid of individual judges or influence a particular case). *Cf.* the Jeffersonian Judiciary Act of 1802, 2 Stat. 132, which is widely understood to have abolished the Circuit Courts created just a year before in order to put their Federalist judges out of a job; *Stuart v. Laird*, 5 U.S. 299 (1803), where the Supreme Court ducked the troublesome constitutional question; CURRIE, THE FIRST HUNDRED YEARS, *supra* note 15, at 74-75.

²³⁸ *See Barbey, supra* note 220, Para. Nr. 41-48; *Herzog, Art. 97, in 4 Maunz/Dürig, Para. Nr. 49-52* (terming the lack of any requirement that judges be given regular appointments one of the “open flanks” of the independent judiciary). Lay judges in administrative and criminal cases (called “Schöffen” in the latter case) serve a purpose somewhat analogous to that of the Anglo-American jury. *Cf.* GERHARD CASPER, THE JUDICIARY ACT OF 1789 AND JUDICIAL INDEPENDENCE (forthcoming).

judges be kept to a minimum and that absent extraordinary circumstances not more than one probationary judge at a time pass judgment on any particular case.²³⁹

In respect to the grounds on which judges may be removed or retired, the German Constitution is plainly less protective. The permissible grounds are not specified in the Basic Law itself. Article 97(2) requires that they be determined by statute, but they may also be altered by statute—subject once again, one assumes, to the fundamental requirement that they not be such as to impair the independence of the judge.²⁴⁰

Somewhat less satisfactory in terms of judicial independence are the provisions respecting the term of office itself. Unlike Article III of our Constitution,²⁴¹ the Basic Law does not prescribe life tenure expressly, and Article 97(2)'s explicit provision authorizing the legislature to fix a retirement age for those judges who are appointed for life forbids the conclusion that it does so by implication.²⁴² The current statute provides that members of the Constitutional Court—unlike most federal judges, who serve until they reach the age of 65²⁴³—be appointed for a term

²³⁹ See BVerfGE 14, 56 (70) (1962); BVerfGE 14, 156 (161-73) (1962) (invoking both GRUNDGESETZ [GG] [Constitution] art. 97(2) (F.R.G.) and GRUNDGESETZ [GG] [Constitution] art. 92 (F.R.G.)). See Barbey, *supra* note 220, Para. Nr. 53-55; Herzog, *Art. 97, in 4 Maunz/ Dürig*, Para. Nr. 62, 67-69. In conformity with the Constitutional Court's conclusion that most part-time and lay judges must partake of the protections that Art. 97(2) expressly affords their regular colleagues, the statute defining the status of judges (DRiG, § 44(2)) provides that. (unlike probationary judges under § 22) they can be removed only pursuant to judicial decision. See also § 29 of the same statute, which makes the Court's presumption against multiple probationary judges an absolute rule; Wassermann, *Art. 97, in 2 AK-GG*, Para. Nr. 68 (branding the whole idea of judges who are less than fully independent questionable ("fragwürdig")).

²⁴⁰ GRUNDGESETZ [GG] [Constitution] art. 97(2) (F.R.G.) ("nur aus Gründen und unter den Formen, welche die Gesetze bestimmen"). The statutes provide for retirement or removal on the basis of incapacity as well as misconduct. DRiG, §§ 21, 24, 34; BVerfGG, § 105. See Geck, *supra* note 221, Para. Nr. 24 (adding that the statutory procedure is so structured as to pose no threat to judicial independence and that (as of 1987) no member of the Constitutional Court had ever been subjected to these provisions); Herzog, *Art. 97, in 4 Maunz/Dürig*, Para. Nr. 58, 61 (concluding that the Constitutional Court has established a general principle of personal independence going beyond the specific terms of Art. 97(2)). Art. 98(2) additionally authorizes the Constitutional Court, on application of the Bundestag and by a two thirds vote, to remove any federal judge for infringement of the Basic Law or "the constitutional order of a Land." See Gerd Roellecke, *Aufgabe und Stellung des Bundesverfassungsgerichts in der Gerichtsbarkeit*, 2 HANDBUCH DES STAATSRICHTS 683, Para. Nr. (assimilating this provision to others designed to protect against subversion of the basic constitutional system and adding that it had never yet been invoked).

²⁴¹ "The judges, both of the supreme and inferior courts, shall hold their offices during good behavior." U.S. Const., Art. III, § 1.

²⁴² See BVerfGE 3, 213 (224) (1953); Herzog, *Art. 97, in 4 Maunz/Dürig*, Para. Nr. 55. 56.

²⁴³ See DRiG, § 48 (as amended Dec. 12, 1985, BGBI. I, S. 2226). Länder judges are subject to similar provisions. See Herzog, *Art. 97, in 4 Maunz/Dürig*, Para. Nr. 59. The mandatory retirement provision seems well designed to avoid the embarrassment of members who have passed their peak without posing any serious threat to judicial independence. For examples of difficulties experienced by our

of twelve years, with no possibility of reappointment.²⁴⁴ The abbreviated term is designed (at some cost in terms of lost experience) to avoid too great a gap between the Court and the country,²⁴⁵ the ban on a second appointment to eliminate the incentive to curry popular favor.²⁴⁶ If these prescriptions were written into the Constitution, they might be entirely adequate; there is more than one way to achieve judicial autonomy. Yet the legislature may revise the criteria at any time, and it has done so more than once. To shorten the terms much further, or to permit reappointment, as was done at one time,²⁴⁷ might significantly impair the independence of the judges.²⁴⁸

Nor does the Basic Law expressly regulate either the number of judges or the amount of their compensation. Hamilton's basic insight that "a power over a man's subsistence amounts to a power over his will" persuaded our Framers to forbid diminution of judicial salaries;²⁴⁹ Franklin Roosevelt's attempt to pack the Supreme Court with Justices of his own persuasion graphically exposed the dangers of their failure to fix their number.²⁵⁰ The Basic Law gives the legislatures authority over both the composition of the courts and the legal status of their judges.²⁵¹

Supreme Court for want of a similar requirement, *see* CURRIE, THE FIRST HUNDRED YEARS, *supra* note 15, at 320 n. 250; CURRIE, THE SECOND CENTURY, *supra* note 15, at 3.

²⁴⁴ BVerfGG § 4(1), (2), ¶ (3) of the same section adds that Justices must retire at age 68 even if their 12 years have not expired.

²⁴⁵ *Cf.* the New Deal crisis of the 1930's in the United States, CURRIE, THE SECOND CENTURY, *supra* note 15, at ch. 7.

²⁴⁶ For explication and criticism of this reasoning, *see* Geck, *supra* note 221, Para. Nr. 21-22 (noting that the age limit of 68 years provides significant protection against obsolescence and arguing that decisions may be influenced by the desire to obtain alternative employment at the end of the 12-year term).

²⁴⁷ Originally those Justices appointed from the various Supreme Courts served for life, other Justices for eight years subject to reappointment. *See* Franz Klein, § 4, in BUNDESVERFASSUNGSGERICHTSGESETZ KOMMENTAR Para. Nr. 1 [hereafter cited as Maunz/-Schmidt-Bleibtreu].

²⁴⁸ *See id.*, Para. Nr. 3; BVerfGE 14, 56 (70-71) (1962) and BVerfGE 18, 241 (255) (1964), finding terms of six and four years respectively "not so short as seriously to impair the personal independence" of judges not covered by the specific provisions of Art. 97(2); Herzog, *Art. 97*, in 4 Maunz/Dürig, Para. Nr. 66 (arguing that for professional judges eight years should be the constitutional minimum).

²⁴⁹ U.S. Const. Art. III, § 1; *see* THE FEDERALIST, No. 79.

²⁵⁰ *See* CURRIE, THE SECOND CENTURY, *supra* note 15, at 235-36.

²⁵¹ For the composition of ordinary federal and state courts, *see* GRUNDGESETZ [GG] [Constitution] art. 74 nr. 1 (F.R.G.); for that of the Constitutional Court, *see* GRUNDGESETZ [GG] [Constitution] art. 94(2) (F.R.G.). Article 98(1) authorizes federal regulation of the status of federal judges, Art. 98(3) state regulation of that of state judges subject to federal framework legislation and to the concurrent federal legislative authority over salaries granted by Art. 74a.

Like our own Congress, the German legislature has from time to time altered the number of Justices, presumably on neutral grounds.²⁵² Decisions of the Constitutional Court, however, have made clear that the general guarantee of judicial independence places strict limits on legislative power to tamper with judicial salaries. Compensation may not be left to executive discretion, lest it be manipulated to influence judicial decisions.²⁵³ Most significantly, the judge's salary must be adequate to assure an appropriate standard of living,²⁵⁴ though reductions are not per se prohibited.²⁵⁵ These decisions seem to afford a sound basis for predicting that the Court would be equally vigilant to invoke the general guarantee of Article 97 against any effort to undermine judicial independence by such devices as altering the term or number of Justices or the grounds for their removal.

Finally, judicial autonomy cannot be sidestepped in Germany by the creation of "legislative courts" or quasi-judicial administrative agencies, which our Supreme Court has so startlingly allowed in the teeth of Article III.²⁵⁶ The basic German provision (Art. 92) is similar on its face: "The judicial power shall be vested in the judges."²⁵⁷ It is common ground that, in light of its unmistakable purpose of assuring an independent arbiter, this provision means that judicial power may be exercised *only* by judges.²⁵⁸ Just what the judicial power in this context means, however, is disputed.

²⁵² See Geck, *supra* note 221, Para. Nr. 4.

²⁵³ See BVerfGE 12, 81 (88) (1961) (basing this conclusion on Art. 33(5)'s general requirement of respect for traditional principles of public service); BVerfGE 26, 79 (93-94) (1969) (explaining and following the earlier decision as an interpretation of the guarantee of judicial independence in Art. 97(1)).

²⁵⁴ See BVerfGE 12, 81 (88) (1961) (attributing to Art. 33(5)'s traditional public-service principles the requirement of a firm and appropriate salary (eine "angemessene—feste—Besoldung")); BVerfGE 26, 141 (157-58) (1969) (finding challenged judicial salaries consistent with Art. 97 because they were not so plainly insufficient as to threaten judicial independence). Indeed the Court has gone so far as to hold that traditional principles under Art. 33(5) require that judges be given a suitably dignified title as well. BVerfGE 38, 1 (12-14) (1974).

²⁵⁵ See BVerfGE 5, 372 (393) (1981).

²⁵⁶ See generally Currie, *Bankruptcy Courts and the Independent Judiciary*, 16 CREIGHTON L. REV. 441 (1983). Recent decisions upholding such tribunals include *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985), and *Commodity Futures Trading Comm. v. Schor*, 478 U.S. 833 (1986).

²⁵⁷ Cf. U.S. Const. Art. III, § 1: "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."

²⁵⁸ See, e.g., BVerfGE 22, 49 (73-75) (1967); Bettermann, *supra* note 223, Para. Nr. 4; Herzog, *Art. 92*, in 4 *Maunz/Dürig*, Para. Nr. 42.

At a minimum, Article 92 has been described as reaffirming that specific provisions such as Article 104(2), which requires that a “judge” pass upon the legality and length of incarceration, mean exactly what they say.²⁵⁹ The Constitutional Court, however, has held that Article 92 has an independent scope of its own. In an important 1967 decision the Court concluded that this provision reserved to the courts alone the decision of “at least the core of those duties traditionally entrusted” to their jurisdiction—specifically including the imposition of criminal fines (“Geldstrafen”), which fell outside the specific command of Article 104(2).²⁶⁰

At the same time, however, the Court made clear that not everything the courts did was an exercise of “judicial power” reserved by Article 92 to the judges alone.²⁶¹ What, made criminal fines such a serious matter as to require that they be entrusted from the start to independent judges was above all the stigma of moral blameworthiness (“ethischer Schuldvorwurf”) attached to them; once the criminal label was removed, administrative agencies could be empowered to impose money penalties (“Geldbußen”) for traffic violations and other civil offenses (“Ordnungswidrigkeiten”) not generally perceived to involve moral turpitude,²⁶² and similarly to suspend driving privileges temporarily in order to bring home to particular offenders the importance of conforming to the law in the future.²⁶³

Thus, like our Supreme Court, the Constitutional Court has divided the business of the courts into that which is inherently judicial and that which may be entrusted either to judges or to administrators at legislative discretion.²⁶⁴ Whatever may be the case in this country,²⁶⁵ however, the inalienable core of judicial power in the Federal Republic is not limited to serious criminal cases. Not only does it embrace a wide panoply of matters specifically assigned to the courts by other provisions of

²⁵⁹ *E.g.*, *id.*, Herzog, *Art. 92*, in 4 Maunz/Dürig, Para. Nr. 43-46. *See also* BVerfGE 22, 49 (76-77) (1967).

²⁶⁰ BVerfGE 22, 49 (77-81) (1967).

²⁶¹ *See id.* at 78.

²⁶² BVerfGE 27, 18 (28-32) (1969).

²⁶³ BVerfGE 27, 36 (40-44) (1969). For criticism of these criteria as too lenient, *see* Bettermann, *supra* note 223, Para. Nr. 20-22, as too strict, *see* Herzog, *Art. 92*, in 4 Maunz/Dürig, Para. Nr. 42-50 (finding it perverse to hold that only a judge could impose a trifling fine on a professional driver while permitting a bureaucrat to suspend his license and thus to “annihilate his civil existence”).

²⁶⁴ *Cf.* Murray’s Lessee v. Hoboken Land & Improv. Co., 59 U.S. 272 (1856); *Ex parte* Bakelite Corp., 279 U.S. 438 (1929).

²⁶⁵ *See supra* note 256.

the Basic Law;²⁶⁶ the Court has twice flatly stated in dictum that it also includes the entire field of civil law (“die bürgerliche Rechtspflege”).²⁶⁷

Moreover, even in those cases that may be decided by an administrative agency in the first instance, the litigant has a constitutional right to unrestricted judicial review. “Should any person’s rights be violated by public authority,” says Article 19(4), “recourse to the courts shall be open to him.”²⁶⁸ The Constitutional Court has made clear both that this provision guarantees access to judges who satisfy all the criteria of judicial independence prescribed by the Basic Law²⁶⁹ and that the reviewing court is free to take new evidence and to reexamine de novo any administrative conclusions of fact or of law.²⁷⁰ Under these circumstances the requirement of initial resort to the administration is not likely seriously to impair the right to an ultimate decision by an independent judge.²⁷¹ Thus in this respect too the Basic Law is more protective of the right to an independent adjudication than is the U.S. Constitution as interpreted by the Supreme Court.²⁷²

In short, although the Basic Law is not as explicit as one might wish with respect to the number and terms of the Justices or the grounds for their premature removal, the unequivocal guarantee that judicial power be wielded by independent judges

²⁶⁶ See BVerfGE 22, 49, (76-77) (1967)

²⁶⁷ BVerfGE 27, 18 (28) (1969). In support of this conclusion, see Bettermann, *supra* note 223, Para. Nr. 30-46 (arguing that applying the law to particular facts is an executive function only in matters to which the government is itself a party, and that therefore only a neutral judge can resolve disputes between private parties). Cf. the “public right” distinction embraced by the Supreme Court in *Ex parte Bakelite Corp.*, *supra* note 264, and watered down by *Crowell v. Benson*, 285 U.S. 22 (1932), and later decisions cited in *supra* note 256. This is not to deny that in Germany, as elsewhere, private parties may agree to resolve disputes by arbitration or that private associations may discipline their own members. The best explanation for such instances of private adjudication seems to be consent, cf. *Commodity Futures Trading Comm. v. Schor*, 478 U.S. 833 (1986), and even in such cases the Basic Law is said to require judicial review at least to prevent gross abuses (Mißbrauchskontrolle) if not also to ensure the legality (Rechtmäßigkeit) of the decision. See Herzog, *Art. 92, in 4 Maunz/Dürig*, Para. Nr. 145-69; Bettermann, *supra* note 223, Para. Nr. 77-79.

²⁶⁸ “Wird jemand durch die öffentliche Gewalt in seinen Rechten verletzt, so steht ihm der Rechtsweg offen.”

²⁶⁹ E.g., BVerfGE 22, 49 (77) (1967); see Bettermann, *supra* note 223, Para. Nr. 61.

²⁷⁰ See, e.g., BVerfGE 27, 18 (33-34) (1969); BVerfGE 27, 36 (43) (1967); Bettermann, *supra* note 223, Para. Nr. 50; Herzog, *Art. 92, in 4 Maunz/Dürig*, Para. Nr. 67, 70.

²⁷¹ Cf. *United States v. Raddatz*, 447 U.S. 667 (1980).

²⁷² See, e.g., *Crowell v. Benson*, 285 U.S. 22 (1932) (permitting limited judicial review of most factual matters decided by an administrative agency in workers’ compensation cases).

and the express provision that they can be displaced only by other judges may be construed to afford more comprehensive protection against attacks by other branches of government than the Constitution of the United States.

II. Judicial Review

The Basic Law does not leave judicial review to implication. As already noted, Article 19(4) guarantees judicial review of administrative action to anyone whose rights are infringed by public authority.²⁷³ In contrast, despite Chief Justice Marshall's famous dictum about the importance of the right to redress,²⁷⁴ the Supreme Court has never held that our Constitution requires judicial review of administrative action as a general matter.²⁷⁵ Moreover, it follows from the language and purpose of Article 19(4) that the reviewing court must determine both the law and the facts *de novo*; for otherwise it could not determine whether the complainant's rights had been denied.²⁷⁶

Indeed, in suggesting on several early occasions that the courts must also exercise independent judgment in applying the law to the facts²⁷⁷ the Constitutional Court

²⁷³ As the constitutional term "rights" suggests, it is necessary but not sufficient that the complainant be adversely affected by the action of which he complains; he must also be within a class of persons the law he invokes was designed to protect. See Schmidt-Aßmann, *Art. 19(4)*, in 2 Maunz/Dürig, Para. Nr. 118-20, 136-42. Cf. *Association of Data Processing Organizations v. Camp*, 397 U.S. 150 (1970). The text of Art. 19(4) also requires a present rather than a future invasion of right, but in some cases a threat of future action constitutes a present injury. See Schmidt-Aßmann, *Art. 19(4)*, in 2 Maunz/Dürig, Para. Nr. 164, 278-79. Cf. the treatment of this question in the context of the constitutional complaint, *infra* note 285.

²⁷⁴ "The very essence of civil liberty," said Marshall, "certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

²⁷⁵ On occasion the Court has held that in particular contexts due process re. quires judicial process, e.g., *Ng Fung Ho v. White*, 259 U.S. 276 (1922); *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287 (1920); *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936), and it once held that Article III required *de novo* review of jurisdictional facts decided by an administrative agency in a workers' compensation case. *Crowell v. Benson*, 285 U.S. 22 (1932). Beyond this, *Crowell* implied that Article III required review of questions of law decided by quasi-judicial agencies and of the reasonableness—not the correctness—of their factual findings. See generally LOUIS JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 381-89 (1965).

²⁷⁶ E.g., BVerfGE 15, 275 (283) (1963); BVerfGE 61, 82 (111) (1982) (quoted in *infra* note 281). Contrast the limited judicial review of fact findings typically afforded in the United States by the formula "supported by substantial evidence on the record as a whole." E.g., Administrative Procedure Act, § 10(e), 5 U.S.C. § 706(2)(E). In support of the constitutionality of this limited review in most cases, see *Crowell v. Benson*, *supra* note 275.

²⁷⁷ E.g., BVerfGE 8, 274 (326) (1958) (Preisgesetz): "Der durch [Art. 19 Abs. 4 GG] erteilte Rechtsschutzauftrag kann nur dann verwirklicht werden, wenn die Anwendung der Norm durch die...

may have gone further in this direction than the Basic Law warranted. For the use of imprecise statutory language (“unbestimmte Rechtsbegriffe”) may indicate a legislative desire to leave the details of regulatory policy to administrative discretion,²⁷⁸ and Article 19(4) seems to say nothing about the breadth of discretion that may be conferred on an executive agency.²⁷⁹ In providing a remedy for infringement of legal rights it helps to effectuate Article 20(3)’s command that the administration follow the law, and the law ends where discretion begins.²⁸⁰ More recent statements by the Court appear to acknowledge this limitation.²⁸¹

Despite its apparently all-encompassing reference to persons whose rights are infringed by public authority (“die öffentliche Gewalt”), Article 19(4) has been held to provide redress essentially only to victims of *executive* action.²⁸² Ever since the beginning, however, the statutes have authorized anyone whose constitutional rights are invaded by *any* branch of public authority to file a constitutional complaint (“Verfassungsbeschwerde”) with the Constitutional Court,²⁸³ and since

Exekutive von den Gerichten nachprüfbar ist.” See also BVerfGE 11, 168 (192) (1960) (suggesting that a statutory provision attempting to limit judicial review of such questions by placing them within agency discretion would raise a serious constitutional issue).

²⁷⁸ See *Chevron, USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

²⁷⁹ For limits on the delegation of lawmaking authority, see *supra* notes 88-131, discussing GRUNDGESETZ [GG] [Constitution] art. 80(1) (F.R.G.) and related doctrines.

²⁸⁰ See Bettermann, *Die Rechtsweggarantie des Art. 19 Abs. 4 GG in der Rechtsprechung des BVerfGE*, 96 ARCHIV DES ÖFFENTLICHEN RECHTS [AöR] 528, 543 (1971). GRUNDGESETZ [GG] [Constitution] Art. 19(4) “says nothing about the existence, content, or extent of the rights against whose infringement it promises judicial protection. It does not afford them; it assumes them.” See also Schmidt-Aßmann, *Art. 19(4)*, in 2 MAUNZ/DÜRIG, Para. Nr. 78; FRITZ SCHARPF, *DIE POLITISCHEN KOSTEN DES RECHTSSTAATS* 38-52 (1970) (criticizing the intrusiveness of German review in this regard in light of practice in the United States).

²⁸¹ See, e.g., BVerfGE 61, 82 (111) (1982), reaffirming that Art. 19(4) “basically precludes binding the judiciary to accept findings of fact or conclusions of law made by others branches of government” but “[w]ithout prejudice to areas of [administrative] latitude for the exercise of creativity, judgment, or discretion conferred by law [unbeschadet normativ eröffneter Gestaltungs-, Ermessens- und Beurteilungsspielräume.” The highest administrative court (Bundesverwaltungsgericht) has been even more explicit: “If two or more lawful decisions are possible, Art. 19(4) does not require that the choice among them be made on the ultimate responsibility of the court.” BVerfGE 39, 197 (205) (1971). See also Schmidt-Aßmann, *Art. 19(4)*, in 2 MAUNZ/DÜRIG, Para. Nr. 184-85.

²⁸² See BVerfGE 15, 275 (280) (1963) (“Art. 19(4) provides protection by the judges, not against the judges”); BVerfGE 24, 33 (49-51) (1968) (arguing among other things that the authors of the Basic Law would have used more explicit language if they had meant to overturn the traditional rule against direct challenges to legislation). *Administration* of the legislature or the courts, however, is subject to Art. 19(4); and the exclusion of statutes from that provision remains disputed. See Schmidt-Aßmann, *Art. 19(4)*, in 2 MAUNZ/DÜRIG, Para. Nr. 91, 93, 102; Wassermann, *Art. 19(4)*, in 1 AK-GG, Para. Nr. 37.

²⁸³ BVerfGE of Dec. 3, 1951, § 90 ff, BGBI. I, S. 243.

1969 this remedy has been anchored in the Basic Law itself (Article 93 I Nr. 4a).²⁸⁴ Though the language of this provision is no broader than that of Article 19(4), it was plainly intended to provide a remedy for unconstitutional legislative and judicial as well as administrative action, and it has consistently been so applied.²⁸⁵

There is no comparable provision in the U.S. Constitution. Even the incidental power of judicial review announced in *Marbury v. Madison*²⁸⁶ ensures only that the courts may not be used to help carry out unconstitutional laws; it provides no

²⁸⁴ As the Basic Law contemplates, the implementing statute requires in most cases that ordinary legal remedies be exhausted before a constitutional complaint is filed, and it permits the Court to decline jurisdiction over complaints that reveal neither a novel constitutional issue nor serious harm to the complainant. BVerfGE §§ 90(2), 93c. Although the constitutional complaint extends only to the vindication of certain specified rights (most particularly those contained in the catalog of fundamental rights in Part I of the Basic Law), those rights include the right to free development of personality, which as the Constitutional Court interprets it includes anything the individual might wish to do and which may be restricted only by a law satisfying all substantive and procedural requirements of the Basic Law. BVerfGE 6, 32, 41 (1957) (Elfes). Thus “every burden imposed on the citizen by the state has become the invasion of a fundamental right,” and thus the affected citizen may invoke the interests of third parties (Judgment of Jan. 28, 1992, Case No. 1 BvR 1025/82, 1992 NJW 964, 965 (not yet officially reported)) and may raise questions of federalism and separation of powers as well. See KLAUS SCHLAICH, DAS BUNDESVERFASSUNGSGERICHT 10-11, 107-08 (1985); Wolfgang Löwer, *Zuständigkeiten und Verfahren des Bundesverfassungsgerichts*, 2 HANDBUCH DES STAATSRICHTS 737, Para. Nr. 153. Nor is standing invariably restricted to those directly regulated by the challenged action, as it may infringe the rights of others as well. Thus customers have been permitted to argue that a law limiting the hours when stores could be open denied them their constitutional right to make purchases (BVerfGE 13, 230 (233) (1961)), and businesses to raise equal-protection objections to tax preferences granted their competitors (BVerfGE 18, 1 (11-14) (1964)).

²⁸⁵ See, e.g., BVerfGE 1, 97 (100-04) (1951) (complaint attacking statute); BVerfGE 7, 198 (203-12) (1958) (complaint attacking judicial decision); Maunz/Schmidt-Bleibtreu, § 90, Para. Nr. 68. Because a complaint is permissible only if the complainant is presently affected by the official action of which he complains, however, ordinarily no complaint may be filed directly against a statute whose impact on the complainant depends upon some further administrative act; in such a case no right is infringed until that act is taken. BVerfGE 1, 97 (102-03) (1951). Appropriately, however, the Court has recognized that it would be intolerable to require that one violate a criminal statute in order to test its validity; in such a case the enactment of the law itself is held to violate the complainant’s rights. See BVerfGE 13, 225 (227) (1961) (entertaining a pharmacist’s complaint against a statute that limited his hours of operation); BVerfGE 46, 246 (255-56) (1977) (entertaining a complaint by producers and sellers of margarine against a law regulating the composition of their product: “Under these circumstances the complainants cannot be expected to take the risk of violating the law”). Cf. *Steffel v. Thompson*, 415 U.S. 452 n.18 (1974): “The court, in effect, by refusing an injunction, informs the prospective victim that the only way to determine whether the suspect is a mushroom or a toadstool, is to eat it.” At the other end of the time scale, the Constitutional Court, like the Supreme Court, is willing to relax ordinary mootness principles in order to assure judicial review of measures whose effect on any individual is normally so fleeting that most cases would otherwise be mooted before a decision could be reached. See, e.g., BVerfGE 49, 24 (52) (1978) (entertaining a complaint against the temporary isolation of imprisoned terrorists after the challenged order had expired); BVerfGE 81, 138 (140-41) (1989). Cf. *Roe v. Wade*, 410 U.S. 113 (1973).

²⁸⁶ 5 U.S. 137 (1803).

guarantee of judicial intervention to protect the citizen from unconstitutional actions taken outside of the courts. Incidental review of the constitutionality of statutes sought to be applied in ordinary litigation in Germany (“konkrete Normenkontrolle”) is assured by Article 100(1), which requires that other tribunals refer such questions to the Constitutional Court if they believe a statute invalid.²⁸⁷ The Constitutional Court’s monopoly of the power to declare statutes unconstitutional expresses respect for the dignity of the legislature and adds legitimacy to the judicial determination; it also serves to promote uniformity and to reduce the risk of an erroneous or uninformed decision.²⁸⁸

The constitutional provisions for constitutional and administrative complaints, as noted, go further. Moreover, they are subject to no implicit limitations based on sovereign immunity, which would contradict their assurance of a remedy in whole or in part.²⁸⁹ On the contrary, Article 34 goes so far as to guarantee that the courts will be open even to claims for money damages against the state itself for injuries caused by violations of official duties²⁹⁰—a type of claim that lies at the core of

²⁸⁷ Incidental judicial review had been found implicit in the Weimar Constitution on grounds reminiscent of *Marbury v. Madison*. 111 RGZ 320 (1925).

²⁸⁸ See BVerfGE 1, 184 (197-201) (1952) (stressing the duty of every court to examine the constitutionality of each norm it is asked to apply); Löwer, *supra* note 284, Para. Nr. 66; SCHLAICH, *supra* note 284, at 73-74. Cf. the once general requirement in 28 U.S.C. §§ 1253, 2281, 2282 (1948 ed.) (present truncated version in *id.*, §§ 1253 and 2284 (198x)) of a three-judge district court, subject to direct and mandatory Supreme Court review, to pass upon the validity of state or federal statutes; Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964). From the first of these justifications for the Constitutional Court’s exclusive jurisdiction it follows that other courts may strike down statutes adopted before promulgation of the Basic Law or state laws that conflict with later federal statutes, for in neither case does the decision imply that the legislature has violated its constitutional duties. See BVerfGE 2, 124 (128-35) (1953); BVerfGE 10, 124 (127-28) (1959); Maunz, *Art. 100*, in 4 Maunz/Dürig, Para. Nr. 12-13.

²⁸⁹ Contrast U.S. Const., Amdt. 11; *Hans v. Louisiana*, 134 U.S. 1 (1890); *Edelman v. Jordan*, 315 U.S. 651 (1974). The Administrative Procedure Act’s recent waiver of immunity in nondamage actions challenging federal administrative action (5 U.S.C. § 702) rests on legislative grace alone (see *United States v. Lee*, 106 U.S. 196 (1882)), and it does not apply to suits against individual states. For some of the complex distinctions our Supreme Court has drawn in this unfortunate area, see David Currie, *Sovereign Immunity in Suits Against Officers*, 1984 Sup. Ct. Rev. 149; CURRIE, *THE SECOND CENTURY*, *supra* note 15, at 568-80.

²⁹⁰ See Hans-Jürgen Papier, *Art. 34*, in 2 Maunz/Dürig, Para. Nr. 12-13 (noting that Art. 34 not only requires the state to pay whenever the offending official is liable under private law but also contains “an institutional guarantee of government liability” as an important element of the rule of law); Helmuth Rittstieg, *Art. 34*, in 2 AK-GG, Para. Nr. 7-8.

sovereign immunity in this country and that the Supreme Court has never allowed in the absence of statute.²⁹¹

An even sharper contrast between the German and American systems of judicial review, however, is provided by a series of provisions in Article 93(1) of the Basic Law authorizing a variety of proceedings between governmental bodies that would not meet prevailing standards for a justifiable “case” or “controversy” in the United States. These proceedings include contests between various branches of the federal government (“Organstreite”), between the Federation and the individual states (“Bund-Länder Streitigkeiten”), and between two or more states (“föderalistische Streitigkeiten”) over the limits of their respective powers.²⁹² These provisions reflect the entirely plausible conviction that a governmental body itself is the most appropriate party to argue against any encroachment on its authority;²⁹³ they squarely repudiate the peculiar limitations on government standing erected by the Supreme Court in such cases as *Massachusetts v. Mellon*.²⁹⁴

Most foreign to the United States experience is the provision in the second clause of Article 93(1) for what is familiarly known as abstract judicial review (“abstrakte Normenkontrolle”), by which the Constitutional Court is authorized to resolve “differences of opinion or doubts” respecting the constitutionality of federal or state legislation. As the term itself suggests, abstract judicial review is not based upon the concrete facts of a particular case;²⁹⁵ the Constitutional Court determines the validity of a challenged statute on its face. Nor, strictly speaking, is there any requirement of adverse parties.²⁹⁶ The implementing statute does provide that jurisdiction lies only if one governmental body (or one third of the members of the

²⁹¹ See, e.g., *Edelman v. Jordan*, *supra* note 289; Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 HARV. L. REV. 1, 39 (1963).

²⁹² GRUNDGESETZ [GG] [Constitution] art. 93(1) Nr. 1, 3, 4 (F.R.G.). In a creative decision involving an analogous state constitutional provision the Constitutional Court concluded that political parties, because of their central role in the electoral process as recognized by Art. 21 of the Basic Law, were entitled to initiate Organstreit proceedings in certain cases. BVerfGE 1, 208 (223-8) (1952). See also BVerfGE 60, 53 (61-62) (1982); GRUNDGESETZ [GG] [Constitution] art. 93(1), cl. 1 (F.R.G.) (extending the Organstreit proceeding to controversies over the rights and duties not only of supreme federal organs but also of “other parties who have been vested with rights of their own by this Basic Law”).

²⁹³ See Löwer, *supra* note 284, Para. Nr. 11, 27-28 (arguing that as a substitute for the use of force the judicial remedy must be comprehensive).

²⁹⁴ 262 U.S. 447 (1923) (holding the state without standing to argue that a federal statute invaded powers reserved to the states).

²⁹⁵ See Maunz/Schmidt-Bleibtreu, § 76 Para. Nr. 1; Löwer, *supra* note 284, Para. Nr. 63.

²⁹⁶ See BVerfGE 1, 208, 220 (1952): “Thus there is no defendant in this proceeding.”

Bundestag) believes a statute enacted by another invalid, and other bodies likely to disagree with the complainant's position have a right to be heard;²⁹⁷ the likelihood that both sides of the question will be presented is therefore great.²⁹⁸ Moreover, the text of the Basic Law makes clear that only laws actually adopted can be subjected to abstract review; the Court cannot determine whether a mere proposal for legislation would be constitutional if enacted.²⁹⁹ Once an abstract review proceeding is begun, however, it is not necessarily mooted either by withdrawal of the complaint³⁰⁰ or by expiration of the challenged law—at least when, to use the terminology of our Supreme Court, the issue is one capable of repetition but otherwise evading review.³⁰¹ Moreover, in contrast to the various intergovernmental controversies noted above, the entity attacking a law need not be asserting an infringement of its own constitutional rights or powers,³⁰² often its contention is that the law invades individual rights.³⁰³

Indeed a large percentage of the abstract judicial review proceedings have been filed by members of the opposition in the Bundestag, as Article 93 expressly permits; the party that loses in the legislative process commonly pursues the controversy before the Constitutional Court.³⁰⁴ The same thing often occurs in Organstreite proceedings between branches of the central government, since a parliamentary caucus (Fraktion) is entitled to assert the rights of the Parliament

²⁹⁷ BVerfGG § 76, 77. For widespread reservations as to the constitutionality of the former provision in light of the fact that Art. 93 empowers the Court to resolve “doubts” as well as “differences of opinion,” see Maunz/Schmidt-Bleibtreu, § 76, Para. Nr. 50-52.

²⁹⁸ See Löwer, *supra* note 284, Para. Nr. 63.

²⁹⁹ BVerfGE 1, 396 (400-10) (1952). See Löwer, *supra* note 284, Para. Nr. 59. Some of the Länder, however, provide also for abstract review of merely proposed legislation, sometimes at the instance of any citizen. See Herdegen, *supra* note 10, Para. Nr. 49.

³⁰⁰ See BVerfGE 1, 396 (414) (1952) (insisting that the subject of the Court's inquiry was not the complaint but the constitutionality of the law).

³⁰¹ BVerfGE 79, 311 (327-28) (1989); cf. *Roe v. Wade*, *supra* n.285.

³⁰² See BVerfGE 1, 396 (407) (1952); BVerfGE 52, 63 (80) (1979) (upholding the right of a Land government to challenge the constitutionality of a federal law limiting the deductibility of political contributions). Contrast BVerfGG § 64(1), 69; BVerfGE 2, 143 (149-59) (1953).

³⁰³ The famous 1975 abortion case, for example, in which the Constitutional Court held the state had a duty to protect the unborn by making abortion generally a crime, was an abstract review proceeding brought by state governments and by the minority of the Bundestag. BVerfGE 39, 1 (1975).

³⁰⁴ See Löwer, *supra* note 284, Para. Nr. 54; SCHLAICH, *supra* note 284, at 68.

itself.³⁰⁵ Accordingly the provisions for intergovernmental controversies, and especially the provision for abstract judicial review, have been criticized as casting the Court into the heart of the political process.³⁰⁶ Yet the questions the Court must decide are inherently of political significance, and it can be argued that it is only appropriate that it be given full authority to decide them. Abstract judicial review can thus be defended as assuring the airtight (“lückenlose”) system of judicial review that the rule of law is said to demand;³⁰⁷ perhaps more than any other avenue of relief it epitomizes the role of the Constitutional Court as guardian of the Constitution (“Hüter der Verfassung”).³⁰⁸

In accordance with this point of view, it is commonly said that German law knows no equivalent of our political question doctrine: All constitutional questions presented must be decided by the Constitutional Court.³⁰⁹ Whether the law is otherwise in this country may be a matter more of semantics than of substance. It is entirely consistent with a judicial duty to say what the law is to conclude that the law commits a particular issue to the discretion or determination of another branch of government.³¹⁰ The German Court has done so a number of times,³¹¹ and it is not

³⁰⁵ See BVerfGG § 64(1); 1 BVerfGE 351, 359 (1952); SCHLAICH, *supra* note 284, at 49: “By virtue of the standing of party caucuses, the Organstreit has also become an instrument of control by the parliamentary opposition.”

³⁰⁶ E.g., Alfred Rinke, *Art. 93/94, in 2 AK-GG*, Para. Nr. 105.

³⁰⁷ See BVerfGE 8, 274, 326 (1958) (*Preisgesetz*) (discussing GRUNDGESETZ [GG] [Constitution] art. 19(4) (F.R.G.)).

³⁰⁸ See BVerfGE 1, 184 (1952). Decisions in abstract and concrete norm control proceedings, as well as those invalidating or upholding statutes on the basis of constitutional complaints, are declared by statute to have the force of law (“Gesetzeskraft”). BVerfGG § 31. This means that they not only bind the parties but constitute, as our Supreme Court said in *Cooper v. Aaron*, 358 U.S. 1 (1958), “the law of the land.” See Herzog, *Art. 94, in 4 Maunz/Dürig*, Para. Nr. 19-32. In the United States this conclusion was highly controversial in light of the fact that the judicial power extends only to the resolution of particular cases and controversies (U.S. Const. Art. III, § 2). In Germany it is expressly contemplated by the Constitution (Art. 94(2) GG: “Federal law. . . shall specify in which cases [the Court’s] decisions shall have the force of law”).

³⁰⁹ See, e.g., Rinke, *Art. 93/94, in 2 AK-GG*, Para. Nr. 85: “Within its jurisdiction the Constitutional Court has a duty to decide.” See also Wasserman, *Art. 19(4), in 1 AK-GG*, Para. Nr. 29; Schneider, *supra* note 50, at 451.

³¹⁰ See Gerald Gunther, *Judicial Hegemony and Legislative Autonomy: The Nixon Case and the Impeachment Process*, 22 UCLA L. REV. 30, 34 (1974). This seems to be all that Chief Justice Marshall had in mind when he disclaimed judicial authority to interfere with “questions, in their nature political, or which are, by the constitution and laws, submitted to the executive.” *Marbury v. Madison*, 5 U.S. 137, 170 (1803); see CURRIE, *THE FIRST HUNDRED YEARS*, at 67 n.19.

³¹¹ E.g., BVerfGE 2, 231 (224-25) (1953) (holding that the question whether there was a need for the exercise of concurrent federal legislative power under Art. 72(2) was “a question for the faithful exercise

clear that our political question doctrine means anything more.³¹² In one important respect, however, the German approach is quite convincing: A refusal to decide “political” questions that the Constitution does *not* commit to other branches would indeed be difficult to reconcile with the basic principle of judicial review.

Finally, whatever other indirect weapons other branches may have at their disposal for counteracting decisions of the Constitutional Court,³¹³ it is clear that they cannot undermine judicial review by enacting statutes that limit the Court’s jurisdiction. In the United States scholars determined to assure a meaningful check on unconstitutional legislation have struggled for decades to prove that Article III’s provisions giving Congress authority to define federal jurisdiction mean less than they plainly say;³¹⁴ in Germany every avenue of judicial review mentioned above is expressly guaranteed by the Constitution itself.³¹⁵

of legislative discretion that is by its nature nonjusticiable and therefore basically not subject to review by the Constitutional Court’); BVerfGE 4, 157 (174) (1955) (holding that whether a treaty with France respecting the Saarland impeded the integration of that territory into the Federal Republic and thus offended Art. 23 was “a question of political judgment not susceptible of determination as a matter of constitutional law.’); BVerfGE 25, 353 (361-63) (1969) (concluding 4-4, for want of the majority vote necessary to find the challenged action unconstitutional, that provisions vesting the pardon power in the executive implicitly excepted its exercise from judicial review and adding that there were no judicially manageable standards (“greifbare Maßstäbe”) to apply); BVerfGE 66, 39 (60-62) (1983) (refusing to decide whether the decision to station additional nuclear weapons on German soil increased the danger of war because there were no justiciably manageable standards for resolving the question (“es fehlt hierfür an rechtlich maßgebenden Kriterien”) and because the evaluation was committed to other branches of government (“Einschätzungen dieser Art obliegen den für die Außen- und Verteidigungspolitik der Bundesrepublik Deutschland zuständigen Bundesorganen”). *See also* Schneider, *Art. 68, in 2 AK-GG*, Para. Nr. 6 (finding the seeds of a political-question doctrine in the Court’s deference to the political branches in determining the constitutionality of a dissolution of the Bundestag under Art. 68 (note 47 *supra* and accompanying text)); Friedrich Klein, *Bundesverfassungsgericht und richterliche Beurteilung politischer Fragen* 10 (1966): “Political questions are those for whose decision there are no legal norms.”

³¹² *See* Henkin, *Is There a Political Question’ Doctrine?*, 85 YALE L.J. 597 (1976).

³¹³ *See supra* notes 219-73.

³¹⁴ For citations to the extensive literature, *see* CURRIE, *THE FIRST HUNDRED YEARS*, *supra* note 15, at 27.

³¹⁵ Art. 93(2) expressly empowers the legislature to add to the jurisdiction conferred by the Basic Law itself, but not to take it away. *See* BVerfGE 24, 33 (48) (1968), construing a statute to preclude only constitutional complaints (which at that time were authorized only by statute) and not the abstract or concrete norm control authorized by the Basic Law, in order to preserve its constitutionality: “The legislature cannot by ordinary statute preclude access to a Constitutional Court procedure authorized by the Basic Law itself.” *See also* Roellecke, *supra* note 240, Para. Nr. 2. For implicit limits on the power to *add* to the Court’s jurisdiction, *see* Maunz, *Art. 93, in 4 Maunz/ Dürig*, Para. Nr. 3.

It is true that the Basic Law can be amended by a process significantly less demanding than that prescribed in the Constitution of the United States.³¹⁶ Indeed in the aftermath of the radical activities of the late 1960's Article 10 of the Basic Law was amended to permit the preclusion of judicial review of the legality of postal and electronic surveillance measures in certain national security cases. The Constitutional Court in a controversial split decision managed to uphold this amendment against, the argument that Article 79(3) protected human dignity, the separation of powers, and the rule of law even from constitutional amendment, but only after insisting that the case was exceptional and that the alternative tribunal to which the review function was entrusted be as independent as the courts themselves.³¹⁷

In short, the Federal Republic is fully committed to independent judicial review of both executive and legislative action as an indispensable means of assuring that other branches of government not exceed the limits of their authority. Judicial review in both aspects is more extensive and in important respects more securely guaranteed by the Basic Law than by the Constitution of the United States.

E. Conclusion

Separation of powers has dramatically different contours in the Federal Republic and in the United States. A parliamentary system, which Germany shares with most other successful democracies, necessarily entails a sacrifice of separation to better coordination of official policy and more effective safeguards against the abuse of executive authority. Fundamental choices of this nature tend to reflect the varying crises that preceded adoption of a particular constitution. The United States opted for a strong and independent executive after a period of dissatisfaction with the excesses and inadequacies of populist legislatures; the Federal Republic strengthened legislative prerogatives after an era of executive tyranny.

³¹⁶ Compare U.S. Const., Art. V (proposal by 2/3 vote of each House of Congress and ratification by 3/4 of the individual states) with GRUNDGESETZ [GG] [Constitution] art. 79(2) (F.R.G.) (2/3 vote of the Bundestag and of the states as represented in the Bundesrat). A single extraordinary majority in the Bundesrat is likely to be easier to obtain than simple majorities in 38 separate assemblies.

³¹⁷ BVerfGE 30, 1 (23-29) (1970), criticized by Wassermann, *Art. 19(4), in 1 AK-GG*, Para. Nr. 62. See also Schmidt-Aßmann, *Art. 19(4), in 2 Maunz/Dürig*, Para. Nr. 30: "Judicial protection of individual rights against acts of public authority basically cannot be excluded even by constitutional amendment." For German views as to the importance of judicial review in assuring obedience to law, see HESSE, *supra* note 6, Para. Nr. 202; Maunz, *Art. 100(1), in Maunz/Dürig*, Para. Nr. 3. A judicially enforceable Bill of Rights had been a condition of Allied approval of the Basic Law. See ERNST RUDOLF HUBER, 2 QUELLEN ZUM STAATSRICHT DER NEUZEIT 209 (1951). But see Roellecke, *supra* note 240, Para. Nr. 30 (arguing that an amendment significantly contracting the Constitutional Court's jurisdiction might be consistent with Art. 79(3)).

Consistently with this historical development, the Germans have been more vigilant than we to enforce the principle that basic decisions as to the content of the law must be made by the democratic and representative parliament. Not only must the executive obey statutes once they have been enacted; there are great fields in which it may not act without statutory authorization, and there are meaningful limitations on the delegation of legislative power. Thus the three categories of executive action that Justice Jackson so carefully distinguished in our *Steel Seizure* case³¹⁸ have been conflated in Germany to a significant degree in accordance with a single guiding principle: The legislature, not the executive, shall make the law.³¹⁹

Safeguards against the abuse of executive authority in Germany include not only parliamentary control and strict limits on executive lawmaking but division of executive power itself—among the Cabinet, the administration, autonomous entities like the Bundesbank, and most significantly the constituent states. Federalism thus compensates in substantial measure for the lack of structural separation between the central legislative and executive powers, since freedom from the Cabinet means freedom from the Bundestag as well. At the same time, however, significant agencies as independent of centralized democratic control as our Federal Trade Commission are essentially limited to two special cases mentioned in the Basic Law itself; the Constitutional Court has been far more alert to prevent incoherence and unresponsiveness in executive policy than has our Supreme Court.

Finally, in establishing an independent judiciary crowned by a Constitutional Court with broad powers of judicial review and in anchoring in the Constitution itself a guarantee of judicial relief for every victim of illegal administrative action, the Federal Republic has gone even beyond the United States to ensure actual observance of the Constitution and to promote the rule of law.

³¹⁸ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

³¹⁹ See, e.g., HESSE, *supra* note 6, Para. Nr. 508, 524.

MEMORIAL:
DAVID CURRIE AND GERMAN CONSTITUTIONAL LAW

Republication - Lochner Abroad: Substantive Due Process and Equal Protection in the Federal Republic of Germany

By David P. Currie[†]

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[T]here exists some strange misconception of the scope of this [due process] provision. . . . [I]t would seem, from the character of many of the cases before us, and the arguments made in them, that the clause. . . is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant. . . of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded.¹

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¹ Davidson v. New Orleans, 96 U.S. 97, 104 (1878) (Miller, J.). This and other American decisions noted in this article are discussed in Currie, *The Constitution in the Supreme Court: The First Hundred Years*

A. Introduction

As Justice Miller's famous lament suggests, wishful thinkers have sought since the beginning to find a way of making the United States Supreme Court ultimate censor of the reasonableness of all governmental action. Justice Chase thought he had discovered the magic wand in natural law,² Justice Bradley in the Privileges or Immunities Clause,³ Justice Goldberg in the Ninth Amendment.⁴ Miller battled bravely, but he had lent significant support to the enemy with his freewheeling opinion in *Loan Association v. Topeka*.⁵ The fire was kept flickering in dissent⁶ and in majority opinions upholding laws against due process and equal protection challenges only because they were reasonable.⁷ It burst into full flame in *Lochner v. New York*⁸ in 1905, and for the next quarter century the Supreme Court was indeed what Justice Miller had denied it should be: ultimate censor of the reasonableness of all governmental action.⁹

In the mid-1930s substantive due process went into eclipse. As Justice Stone predicted in his celebrated footnote,¹⁰ for the next half century the Supreme Court limited itself largely to enforcement of the specific provisions of the Bill of Rights, protection of the integrity of the political process, and defense of discrete and insular minorities.¹¹

(1985) (cited below as *The First Hundred Years*), and Currie, *The Constitution in the Supreme Court: The Second Century* (forthcoming Univ. of Chicago Press 1990) (cited below as *The Second Century*).

² *Calder v. Bull*, 3 Dall. 386, 387(1798) (separate opinion). © 1990 by The University of Chicago. All rights reserved. 0-226-09571-1/90/1989-0011\$02.00

³ *Slaughter-House Cases*, 83 U.S. 36, 116–24(1873) (dissenting opinion).

⁴ *Griswold v. Connecticut*, 381 U.S. 479,486–93(1965) (concurring opinion).

⁵ 87 U.S. 655 (1875).

⁶ *E.g.*, *Munn v. Illinois*, 94 U.S. 113, 136–54(1877) (Field, J.).

⁷ *E.g.*, *Mugler v. Kansas*, 123 U.S. 623, 661–72 (1887); *Missouri Pac. Ry. v. Mackey*, 127 U.S. 205, 208–10 (1888).

⁸ 198 U.S. 45.

⁹ See *THE FIRST HUNDRED YEARS*, chs. 2, 4, 5, 7.

¹⁰ *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938).

¹¹ See generally *THE SECOND CENTURY*, chs. 8–16.

In the days of Chief Justice Warren, however, general reasonableness review began a cautious comeback – sometimes without much attention to the textual basis of the decision¹² or behind such smoke-screens as cruel and unusual punishment¹³ and the “penumbras” of actual constitutional provisions.¹⁴ The once dreaded specter of substantive due process was trotted out of the closet in *Roe v. Wade*,¹⁵ while serious enforcement of the equality principle was extended beyond race to other more or less “suspect” classifications such as sex, alienage, and illegitimacy,¹⁶ and to those affecting such “fundamental” interests as voting, free expression, and interstate travel.¹⁷

So far the genie has been kept partly in the bottle by the Court’s relative restraint in defining what is suspect or fundamental. Justice White may have sounded a welcome call for retreat with his reminder that “the Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.”¹⁸ Yet the debate over general judicial oversight is far from over, despite the once apparent finality of the New Deal resolution. It may therefore prove enlightening to examine the experience of another modern nation with somewhat similar constitutional traditions in wrestling with the same issue – the Federal Republic of Germany.

The Basic Law (Grundgesetz) of the Federal Republic was forty years old in 1989. It establishes a democratic federal state with a parliamentary system, judicial review by independent judges, and a bill of rights.¹⁹ In many fundamental respects it is similar to the Constitution of the United States, and the resemblance is not purely

¹² *E.g.*, *Slochower v. Board of Higher Education*, 350 U.S. 551, 558–59 (1956). See also the earlier decision in *Wieman v. Updegraff*, 344 U.S. 183, 190–92 (1952).

¹³ *Robinson v. California*, 370 U.S. 660, 666–68 (1962).

¹⁴ *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965).

¹⁵ 410 U.S. 113, 152–56 (1973).

¹⁶ *Craig v. Boren*, 429 U.S. 190 (1976); *Graham v. Richardson*, 403 U.S. 365 (1971); *Levy v. Louisiana*, 391 U.S. 68 (1968).

¹⁷ *Reynolds v. Sims*, 377 U.S. 533 (1964); *Carey v. Brown*, 447 U.S. 455 (1980); *Shapiro v. Thompson*, 394 U.S. 618 (1969).

¹⁸ *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

¹⁹ Art. 1–20, 28, 93, 97, 100(1) GG.

coincidental.²⁰ At the same time there are a great many differences in detail, which help to make the Basic Law a fertile field for comparative study.

The Bill of Rights (Grundrechtskatalog) is central to the Basic Law.²¹ It is more detailed than ours. In addition to familiar articles guaranteeing freedom of religion (Art. 4) and expression (Art. 5) and the sanctity of the home (Art. 13),²² there are specific provisions codifying some of the rights our Supreme Court has protected under more open-ended provisions: marriage and the family (Art. 6), private schools (Art. 7), travel (Art. 11), occupational freedom (Art. 12). I shall discuss some of these latter provisions at the outset. More interesting from the standpoint of the judicial function are decisions of the German Constitutional Court (Bundesverfassungsgericht) doing what our Supreme Court did in *Lochner*: protecting additional substantive rights on the basis of general provisions that correspond to our Due Process and Equal Protection Clauses.

There are several such provisions. Article 2(2) contains a general guarantee of life, limb, and (physical) liberty.²³ Article 14 not only imposes familiar limits on condemnation but also includes a general guarantee of property. Article 3 provides both general and specific assurances of equality. Article 1, which is commonly described as the central provision of the entire constitution²⁴ and which is explicitly protected from amendment,²⁵ declares that “[t]he dignity of man shall be inviolable.” Most interesting of all for present purposes is Article 2(1)’s enigmatically phrased right to “free development of personality,” which has been interpreted to embrace everything not dealt with more specifically elsewhere.

From these open-ended provisions, in conjunction with even more general conceptions derived from other articles of the Basic Law – in particular the “social state”

²⁰ See, e.g., STEINBERGER, 200 JAHRE AMERIKANISCHE BUNDESVERFASSUNG 32–39 (1987); GOLAY, THE FOUNDING OF THE FEDERAL REPUBLIC OF GERMANY (1958), *passim*.

²¹ See, e.g., SCHULZ, URSPRÜNGE UNSERER FREIHEIT 217 (1989), citing remarks by Carlo Schmid in the debates of the constitutional convention.

²² See also Art. 8 (freedom of assembly), 9 (freedom of association), 10 (privacy of telecommunications), 17 (right of petition).

²³ Detailed procedural protections for those taken into custody or accused of crime are provided in Articles 103 and 104.

²⁴ See, e.g., 6 BVerfGE 32, 41 (1957); Häberle, *Die Menschenwürde als Grundlage der Staatlichen Gemeinschaft*, in 1 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND 815, 860 (Isensee & Kirchhof eds., 1987) (cited below as HANDBUCH DES STAATSRECHTS).

²⁵ Art. 79(3) GG.

(Sozialstaat) and what may be literally but incompletely translated as the rule of law (Rechtsstaat)²⁶ – the Constitutional Court has fashioned a set of tools that constitute it as that which, notwithstanding Justice Miller’s warning, our Supreme Court was for the first third of this century: ultimate censor of the reasonableness of governmental action.

B. Marriage, the Family, and Private Schools

“Marriage and the family,” says Article 6(1), “shall enjoy the special protection of the state.” The paragraphs that follow contain specific provisions for parents and children, motherhood, and persons born out of wedlock. Thus Article 6 provides explicit protection for some of the interests our Supreme Court has accorded the benefits of heightened scrutiny under the Fourteenth Amendment.²⁷

Article 6 is commonly applied in conjunction with the general equality provision of Article 3 to assure intensive scrutiny of classifications disfavoring marriage or the family.²⁸ Sometimes Article 6 is applied independently to strike down discrimination against the classes it protects, as a more specific equality provision. Married couples may not be assessed higher income taxes than if they were single;²⁹ orphans may not be denied welfare benefits simply because they are married;³⁰ a broker who helps a prospective renter find an apartment may not be denied a fee because she is married to the landlord’s manager.³¹

Although Article 6(5) appears to entrust protection of illegitimates to the legislature,³² it was understood from the beginning to embody a principle that bound the

²⁶ See Art. 20, 28 GG.

²⁷ See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1978); *Zablocki v. Redhail*, 434 U.S. 374 (1977); *Levy v. Louisiana*, 391 U.S. 68 (1968).

²⁸ See text at notes 266–67.

²⁹ 6 BVerfGE 55, 70–84 (1957).

³⁰ 28 BVerfGE 324, 347–61 (1970). See *id.* at 356, finding in Art. 6(1) a “strict prohibition of differentiation respecting government benefits according to family status alone.”

³¹ 76 BVerfGE 126, 128–30 (1987). See *id.* at 128: “Article 6(1) forbids [the state] to disadvantage married persons simply because they are married.”

³² “Illegitimate children shall be provided by legislation with the same opportunities. . . as are enjoyed by legitimate children.” Not until 1969, under a threat by the judges to implement article 6(5) themselves, did the legislature comply with its mandate. See 25 BVerfGE 167, 172–88 (1969); BGBl. I, 1243 (1969). Cf. Art. 117(1) GG, which provided a four-year grace period for legislative correction before Article 3’s provisions for sex equality became enforceable. See 3 BVerfGE 225 (1953), discussing these latter provisions.

courts in their interpretation of existing laws,³³ and more recently the Court has begun to determine the consistency of statutory measures with the constitutional provision itself.³⁴ In accordance with its language, Article 6(5) has been held not only to limit outright discrimination against illegitimates³⁵ but also to justify³⁶ and even to require³⁷ special privileges to compensate for the disadvantages with which illegitimates are saddled; for otherwise they could not enjoy the actual equality of opportunity to which Article 6(5) entitles them.

The rights conferred by Article 6, moreover, go beyond mere protection against discrimination. Article 6(1) has been interpreted to permit parents who are separated to opt for joint custody of their children³⁸ and to allow people to visit relatives in jail.³⁹ Article 6(2)'s guarantee of parental rights has been read to ensure parents a significant role in determining which school their children attend and what course of study they pursue⁴⁰ as well as access to information about their educational performance.⁴¹ Furthermore, in the course of concluding that the excusable failure of a pregnant woman to meet a statutory deadline for notification did not justify denying her immunity from loss of employment, the Constitutional Court strongly hinted that Article 6(4)'s provision for the protection and care of mothers might require the state to provide such immunity if it did not do so on its own.⁴²

Article 7, which establishes the framework for public and private education in the Federal Republic, explicitly guarantees "the right to establish private schools" (Art.

³³ See 8 BVerfGE 210, 217 (1958).

³⁴ See, e.g., 44 BVerfGE 1, 22 (1976).

³⁵ E.g., 74 BVerfGE 33, 38–43(1986) (inheritance). Cf. the line of cases beginning with *Levy v. Louisiana*, 391 U.S. 68 (1968).

³⁶ See 17 BVerfGE 280, 283–86 (1964) (longer period of child support from father).

³⁷ See 8 BVerfGE 210, 214–21 (1958) (judicial proceeding to establish paternity).

³⁸ 61 BVerfGE 358, 371–82(1982) (insisting upon a "particular" (besondere) justification for such a limitation of parental rights and finding none). See also 36 BVerfGE 146, 161–69(1973) (marriage may not be forbidden because of husband's previous sexual relationship with bride's mother). In either of these cases the court could have reached the same result on equality grounds but did not.

³⁹ 42 BVerfGE 95, 100–103 (1976).

⁴⁰ 34 BVerfGE 165, 182–99(1972).

⁴¹ 59 BVerfGE 360, 381–82 (1982).

⁴² 52 BVerfGE 357, 366 (1979). See Art. 6(4) GG: "Every mother shall be entitled to the protection and care of the community."

7(4)).⁴³ Like the various provisions of Article 6, this paragraph has been invoked to justify intensive scrutiny of classifications affecting the exercise of the right.⁴⁴ More notable when viewed from this side of the Atlantic was the conclusion in the same case—in the teeth of contrary legislative history that informed the first half of the opinion—that Article 7(4) required the state to subsidize private schools. Otherwise, said the Court, the explicit right to establish such schools would be hollow; for the requirement of the same paragraph that private institutions not promote “segregation of pupils according to the means of the parents” made it impossible for them to survive without public support.⁴⁵

As some of these examples suggest, Articles 6 and 7 are among several provisions of the Basic Law that have been held to create not merely traditional rights against government intrusion (Abwehrrechte) but positive governmental duties to protect or support the individual (Schutzpflichten) as well. Other examples will be noted as we proceed, but despite their striking contrast with the prevailing understanding of our Constitution⁴⁶ they are not the principal focus of this paper.⁴⁷ What is most significant for present purposes is that Articles 6 and 7 explicitly codify some of the rights our Supreme Court has found to be “fundamental” for due process and equal protection purposes and thus add legitimacy to judicial review of governmental action affecting private education and the family.

C. Property

“Property and inheritance,” says Article 14(1), “are guaranteed.” Their “content and limits” are determined by statute (*id.*). “Property imposes duties,” and its “use

⁴³ Cf. *Pierce v. Society of Sisters*, 268 U.S. 510(1925) (finding such a right protected by the Due Process Clause). For special limitations on private elementary schools in Germany, see Art. 7(5) GG.

⁴⁴ See 75 BVerfGE 40, 69–78 (1987), finding preferential treatment of religious schools and the exclusion of subsidies for adult education contrary to Art. 7(4) in conjunction with Art. 3.

⁴⁵ *Id.* at 58–66. Contrast the Court’s conclusion, 20 BVerfGE 56, 96–112(1966), that general subsidies for political parties were inconsistent with Article 21(1)’s guarantee of party autonomy. Our Supreme Court is keenly aware of the danger that conditional subsidies can pose to individual freedoms (*see Speiser v. Randall*, 357 U.S. 513(1958)), but it has refused to outlaw spending itself simply because the power might sometime be abused. *See Buckley v. Valeo*, 424 U.S. 1(1976). There is some truth in the arguments that underlie both the private school and political party decisions; but there is a certain tension between the conclusions that subsidies are constitutionally forbidden and that they are constitutionally required.

⁴⁶ Cf. *DeShaney v. Winnebago County Department of Social Services*, 109 S. Ct. 988(1989); *Harris v. McRae*, 448 U.S. 297 (1980).

⁴⁷ For discussion of affirmative government duties under the two constitutions, *see Currie, Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864(1986).

should also serve the public weal" (Art. 14(2)). Condemnation is permitted only for the public good and pursuant to statutes providing just compensation (Art. 14(3)).

The right to property occupies a prominent position in German constitutional law. The Constitutional Court put the point most plainly in an important 1968 opinion:⁴⁸

Property is an elementary constitutional right that is closely connected to the guarantee of personal liberty. Within the general system of constitutional rights its function is to secure its holder a sphere of liberty in the economic field and thereby enable him to lead a self-governing life. . . . The guarantee of property is not primarily a material but rather a personal guarantee.

Thus property rights are by no means relegated to an inferior position in West Germany, as they have been in the United States.⁴⁹ Economic independence is understood to be essential to every other freedom,⁵⁰ and property rights are taken very seriously. The explicit constitutional references to the social obligations of property have been held to permit considerable regulation. Article 14 has nevertheless been applied not only to prevent unjustified takings in the narrow sense but also to prevent unreasonable limitations of property rights that fall short of a traditional taking.

I. Takings

The Constitutional Court has made clear that takings cannot be justified simply by providing adequate compensation. Article 14 is basically a guarantee of property itself, not of its equivalent in money.⁵¹ Consequently the Court has scrutinized at-

⁴⁸ Hamburg Flood Control Case, 24 BVerfGE 367, 389,400 (1968).

⁴⁹ Contrast *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) ("preferred position" for First Amendment rights); *Kovacs v. Cooper*, 336 U.S. 77, 95–96 (1949) (Frankfurter, J., concurring) ("those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements"). This is not to deny that even in Germany there are subtle differences in the levels of judicial scrutiny according to how intimately the right in question is bound up with the development of personality. See Denninger, *Art. 1*, in I KOMMENTAR ZUM GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND Para. Nr. 11, 14 (Schmidt-Bleibtreu and Luchterhand eds., 1984) (cited below as Luchterhand), and cases cited.

⁵⁰ Cf. HAYEK, *THE ROAD TO SERFDOM* 103–4(1944).

⁵¹ See 24 BVerfGE 367, 400 (1968).

tempted takings carefully to ensure that constitutional limitations other than the compensation provision have been observed.

The requirement that condemnation be authorized by statute (Gesetzesvorbehalt) reflects a fundamental principle that we shall encounter repeatedly in the course of this journey: Individual rights may be restricted, if at all, only in accordance with laws made by the popularly elected legislature. This principle is by no means unknown to Anglo-American law. It informed Justice Black's monumental opinion for the Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer*,⁵² and it represents an early and often neglected aspect of the Due Process Clauses.⁵³ In Germany it is explicit in a number of bill of rights provisions, and it has been found implicit as a general principle in the rule of law.⁵⁴ When takings have been attempted without adequate statutory authority, they have been struck down.⁵⁵

There have been few decisions of the Constitutional Court on the question of what constitutes the "public weal" (Wohl der Allgemeinheit) for which private property may be taken. On its face the term is broader than the "public use" formulation that American courts have so generously construed.⁵⁶ The Constitutional Court had no difficulty in upholding takings for the purpose of refugee settlement⁵⁷ and the transmission of private power to serve the general public.⁵⁸ More interesting challenges were posed by cases involving a private cable car for recreational purposes⁵⁹

⁵² 343 U.S. 579, 582–89 (1951).

⁵³ See *id.* at 646 (Jackson, J., concurring) (arguing that the President's duty to take care that the laws be faithfully executed and the Due Process Clause "signify about all there is of the principle that ours is a government of laws, not of men": "One [clause] gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther"); Corwin, *The Doctrine of Due Process of Law before the Civil War*, 24 HARV. L. REV 366 (1911).

⁵⁴ See 49 BVerfGE 89, 126 (1978): "The general principle that lawmaking authority is reserved to the legislature (Gesetzesvorbehalt) requires a statutory basis for executive acts fundamentally (wesentlich) affecting the freedom and equality of the citizen."

⁵⁵ 56 BVerfGE 249, 261–66 (1981) (cable car); 74 BVerfGE 264, 284–97 (1987) (automobile test track).

⁵⁶ See, e.g., *Berman v. Parker*, 348 U.S. 26 (1954); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

⁵⁷ 46 BVerfGE 268, 288–89 (1977).

⁵⁸ 66 BVerfGE 248, 257–59 (1984), explaining (at 257) that condemnation on behalf of a private enterprise was permissible at least "when the enterprise [was] subject to a statutory obligation promoting the general welfare and . . . conducted for the benefit of the public."

⁵⁹ 56 BVerfGE 249 (1981).

and a test track for a private automaker.⁶⁰ The first provoked a strongly worded separate opinion deploring years of inattention to the public weal requirement;⁶¹ approval in the second might seriously erode the distinction between private and public interest.⁶² Both cases, however, went off on the ground of lack of statutory authority; the limiting case has yet to be decided.⁶³

The Constitutional Court has also had little to say on the question of what constitutes just compensation. Article 14 provides that compensation is to be determined by “an equitable balance” between public and private interests;⁶⁴ not surprisingly, the Court has taken this to mean that full market value is not necessarily required.⁶⁵ More strikingly, the requirement that the statute itself provide for compensation has led the Constitutional Court to reject entirely the familiar American doctrine of inverse condemnation. If government action has the effect of taking property without compensation, the remedy is disallowance, not damages; for otherwise the state would have to pay compensation the legislature had not authorized, contrary to the constitutional allocation of powers.⁶⁶ The Constitutional Court therefore tests laws regulating property not under the taking provisions but for their consistency with

⁶⁰ 74 BVerfGE 264 (1987).

⁶¹ 56 BVerfGE at 266, 269–95 (separate opinion of Böhmer, J.), concluding (at 287) that the condemnation in question was “for the benefit of a private undertaking designed solely for private profit.” For Justice Böhmer’s narrow view of the permissible scope of condemnation for private companies, see *id.* at 293.

⁶² *Cf.* Charles Wilson’s notorious comment that “what’s good for General Motors is good for the country.” The argument in the German case was that the test track (for Daimler-Benz) would create jobs and stimulate the economy. “Condemnation for the benefit of private persons. . . that serves the public weal only indirectly and presents an enhanced danger of abuse to the detriment of the weak,” the Court observed, “poses particular constitutional problems.” 74 BVerfGE at 287.

⁶³ See generally Papier, *Art. 14*, in 2 GRUNDGESETZKOMMENTAR Para. Nr. 495–509 (Maunz, Dürig, *et al.* eds., rev. to 1989) (cited below as Maunz/Dürig).

⁶⁴ See Art. 14(3) GG: “Die Entschädigung ist unter gerechter Abwägung der Interessen der Allgemeinheit und der Beteiligten zu bestimmen.”

⁶⁵ See 24 BVerfGE 367, 420–22 (1968). For criticism of this conclusion see Leisner, *Eigentum*, in 6 HANDBUCH DES STAATSRECHTS § 149, Para. Nr. 180–83 (1989). For an introduction to the extensive jurisprudence of the civil courts on the question of the level of compensation, see Papier, *Art. 14*, in 2 Maunz/Dürig, Para. Nr. 510–60.

⁶⁶ See 4 BVerfGE 219, 230–37 (1955); 58 BVerfGE 300, 322–24 (1981). For discussion of the impact of the latter decision upon the civil courts’ practice of awarding common-law or statutory compensation for wrongful takings, see Papier, *Art. 14*, in 2 Maunz/Dürig, Para. Nr. 597–638; for criticism of the Constitutional Court’s position, see Leisner, in 6 HANDBUCH DES STAATSRECHTS § 149, Para. Nr. 173–79.

the general guarantee of property;⁶⁷ and nonconfiscatory taxes are generally held not to be limitations on property at all.⁶⁸

Even when the explicit requirements of statutory authority, public weal, and just compensation appear to be met, the Constitutional Court has made clear that condemnation is an exceptional remedy that may be employed only as a last resort. Property may not be taken until efforts to buy it on the open market have failed;⁶⁹ property that has been condemned reverts to its former owner when it is no longer needed.⁷⁰ Property thus may be condemned only when and to the extent necessary. These results might be justified by narrow interpretation of the explicit term “public weal.”⁷¹ It may be more appropriate, however, to view them as applications of the more general principles of proportionality and least burdensome means which—as we shall see—the Court has found implicit in the rule of law.⁷²

II. *Limitations on Property*

Less familiar to those versed in American law than the limitations on actual takings imposed by Article 14(3) are the restrictions on regulation imposed by Article 14(1)'s assurance that “property. . . [is] guaranteed.” The provision acknowledging the lawmakers' authority to determine the “content and limits” of property has not been taken to place property rights wholly at legislative disposal; the property guarantee is more than a mere Gesetzesvorbehalt. On the other hand, the further

⁶⁷ The civil and administrative courts, on the other hand, have developed an extensive jurisprudence for determining when regulation amounts to a taking; the problem has proved as refractory in Germany as it has in the United States. See Papier, Art. 14, in 2 Maunz/Dürig, Para. Nr. 291–450, arguing (Para. Nr. 449) for a test based upon the severity of the restriction (*cf.* *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)); Leisner, in 6 HANDBUCH DES STAATSRECHTS § 149, Para. Nr. 148–51, arguing that such a test should be complemented by special concern for those made to bear an undue share of the total burden (*Sonderopfertheorie*).

⁶⁸ See, e.g., 4 BVerfGE 7, 17 (1954) (upholding a special assessment for relief of the troubled iron, steel, and coal industries). Compare the dictum that the state of Hessen could demand free copies of all books published there in the interest of improving its library—so long as the burden of doing so was not disproportionate to the profitability of the publication. 58 BVerfGE 137, 144–52 (1981). See *id.* at 144, explaining that, like a tax, the law imposed no duty to convey a particular piece of property to the government. See also HESSE, GRUNDZÜGE DES VERFASSUNGSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND Para. Nr. 447 (15th ed. 1985), arguing that taxation is the “exposed flank” of the property guarantee.

⁶⁹ 45 BVerfGE 297, 335 (1977).

⁷⁰ 38 BVerfGE 175, 185 (1974).

⁷¹ See Leisner, in 6 HANDBUCH DES STAATSRECHTS § 149, Para. Nr. 170.

⁷² See Papier, Art. 14, in 2 Maunz/Dürig, Para. Nr. 507–9.

provisions that “property imposes duties” and that “[i]ts use shall also serve the public weal” make clear that property rights are by no means absolute.⁷³ Not surprisingly in light of the competing public and private interests recognized by the Basic Law itself, the Constitutional Court has applied a balancing test in determining the permissible scope of limitations on property: Like condemnation measures, definitions and limitations of property must conform with the proportionality principle.⁷⁴

As in the United States, the ownership of property does not include the right to cause a public nuisance; the state may prevent mining companies from depleting groundwater supplies⁷⁵ and may destroy dogs suspected of rabies.⁷⁶ But the social duties of property in Germany, like various public interests in this country, justify limitations that go far beyond the simple case of preventing affirmative harm to others. Renters may be protected from unusual or sudden rent increases⁷⁷ as well as against eviction⁷⁸ and the diversion of rental property to other uses.⁷⁹ Farm and forest lands may be protected against sales that appear detrimental to the interests of agriculture or forestry.⁸⁰ For the well-being of the wine industry, the legislature may forbid the growing of grapes on unsuitable soil.⁸¹ To promote recreation it may establish associations to administer private fishing rights and distribute the profits to their former owners.⁸² To assure an adequate and safe public water supply it may go so far as to abolish private rights to the use of groundwater, so

⁷³ These clauses are viewed as concrete applications of the general Sozialstaat principle of Articles 20 and 28. They were derived from more intrusive limitations in Articles 153–55 of the Weimar Constitution of 1919, in which social provisions were far more prominent. See Schneider, *Die Reichsverfassung vom 11. August 1919*, in 1 HANDBUCH DES STAATSRECHTS §3, Para. Nr. 37–38 (1987).

⁷⁴ See, e.g., 21 BVerfGE 150, 154–55 (1967).

⁷⁵ 10 BVerfGE 89, 112–14 (1959).

⁷⁶ 20 BVerfGE 351, 355–62 (1966). See also 25 BVerfGE 112, 117–21 (1969) (upholding a prohibition of construction on dike lands). Cf. *Mugler v. Kansas*, 123 U.S. 623, 661–72 (1887); *Miller v. Schoene*, 276 U.S. 272 (1928). On the issue of flood-plain zoning in this country, see Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971).

⁷⁷ 37 BVerfGE 132, 139–43 (1974); 71 BVerfGE 230, 246–51 (1985). Cf. *Block v. Hirsch*, 256 U.S. 135 (1921).

⁷⁸ 68 BVerfGE 361, 367–71 (1985).

⁷⁹ 38 BVerfGE 348, 370–71 (1975).

⁸⁰ 21 BVerfGE 73, 82–85 (1967); 21 BVerfGE 87, 90–91 (1967); 21 BVerfGE 102, 104–5 (1967).

⁸¹ 21 BVerfGE 150, 154–60 (1967).

⁸² 70 BVerfGE 191, 199–213 (1985).

long as landowners are given a grace period in which to phase out existing uses.⁸³ To promote industrial peace and democracy it may give workers the right to participate in management decisions (codetermination)⁸⁴ – but so far, at least, only because the owners retain ultimate control.⁸⁵ It may even redefine the balance of public and private interests in copyrighted material retroactively, by shortening the statutory period of protection of already copyrighted works from 50 to 25 years.⁸⁶

At the same time, however, the Constitutional Court has found in the general property guarantee substantive limits on regulation reminiscent of those imposed by our Supreme Court during the *Lochner* era. The public interest in protection of renters cannot justify depriving owners of the right to terminate garden leases⁸⁷ or to recapture rented premises for their own residential use.⁸⁸ The public interest in preserving a viable agricultural economy cannot justify prohibiting the purchase of agricultural land for investment purposes,⁸⁹ the breakup of large holdings as such,⁹⁰ or the use of trademarked place names on wine bottles.⁹¹

Of particular interest are decisions concluding, despite initial holdings to the contrary,⁹² that government benefits may constitute property for purposes of Article 14.⁹³ This conclusion is reminiscent of the Supreme Court's position, in the line of

⁸³ 58 BVerfGE 300, 338–53 (1981). *Cf.* Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

⁸⁴ 50 BVerfGE 290, 339–52 (1979) (stressing the social function and the impersonal nature of shareholder interests in industrial facilities).

⁸⁵ *Id.* at 351. *See* Papier, *Art. 14*, in 2 Maunz/Dürig, Para. Nr. 430, arguing that the power to decide how property is to be used is central to Art. 14 and thus that the owners must retain the last word. *Cf.* Trustees of Dartmouth College v. Woodward, 4 Wheat. 518 (1819).

⁸⁶ 31 BVerfGE 275, 284–85, 291–92 (1971). Retroactive redefinition of the date on which the period of protection began to run, however, was held impermissible. *Id.* at 292–95.

⁸⁷ 52 BVerfGE 1, 29–40 (1979).

⁸⁸ 68 BVerfGE 361, 374–75 (1985).

⁸⁹ 21 BVerfGE 73, 85–86 (1967).

⁹⁰ 26 BVerfGE 215, 221–28 (1969).

⁹¹ 51 BVerfGE 193, 216–21 (1979).

⁹² *E.g.*, 2 BVerfGE 380, 399–403 (1953) (compensation for victims of Nazi wrongs). Property, said the Court, did not include “claims that the state affords its citizens by statute in fulfillment of its duty to provide for their welfare,” for if it did welfare laws could never be repealed. *Id.* at 402.

⁹³ *E.g.*, 16 BVerfGE 94, 111–18 (1963) (retirement benefits); 53 BVerfGE 257, 289–94 (1980) (same); 69 BVerfGE 272, 298–306 (1985) (health insurance). For justification of this development, *see* HESSE, Para. Nr. 443–45.

cases beginning with *Goldberg v. Kelly*,⁹⁴ that certain “entitlements” to state assistance are protected by the Due Process Clauses. The test for determining which benefits qualify as property mirrors the Supreme Court’s insistence that the law give the claimant a right rather than leaving the matter to official discretion,⁹⁵ but the German cases are more restrictive; the benefits must also be based upon the claimant’s own contributions and must be designed to provide minimum conditions for survival.⁹⁶

The German decisions, however, do not merely insist upon a fair hearing before individuals are deprived of benefits that qualify as property. It is true that the Constitutional Court has found a requirement of fair procedure implicit in the substantive property guarantee.⁹⁷ But the decisions sometimes protect welfare rights against unreasonable legislative impairment as well. In one case, for example, the Court held that a new rule doubling the waiting period required to qualify for unemployment benefits could not constitutionally be applied to persons who had already satisfied the original requirement.⁹⁸ This is a step our Court has been unwilling to take, although we have had difficulty explaining why. Perhaps the answer is that the legislature meant to limit only administrative and not legislative

⁹⁴ 397 U.S. 254 (1970).

⁹⁵ *E.g.*, 63 BVerfGE 152, 174 (1983). *Cf.* *Board of Regents v. Roth*, 408 U.S. 564 (1972).

⁹⁶ *See* 69 BVerfGE 272, 300 (1985). *See id.* at 305–6 and 72 BVerfGE 9, 18–21 (1986), respectively applying this test to conclude that rights to medical and unemployment insurance constituted property. *Cf.* *Snidach v. Family Finance Corp.*, 395 U.S. 337, 341–42 (1969) (limiting pretrial wage garnishment on due process grounds because garnishment of wages may “drive a wage-earning family to the wall”).

⁹⁷ *See, e.g.*, 46 BVerfGE 325, 333–37 (1977) (transfer of property pursuant to judicial sale must be postponed to permit judicial challenge to adequacy of price); 53 BVerfGE 352, 358–61 (1980) (striking down unreasonable burden imposed upon landlord in showing that increased rent did not exceed prevailing rate). *Cf.* 35 BVerfGE 348, 36 1–63 (1973) (adequate opportunity for judicial review, including provision of counsel in cases of poverty, implicit in property provision). *Cf.* *Mapp v. Ohio*, 367 U.S. 643 (1961), and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971) (both suggesting that judicial remedies may be implicit in substantive constitutional provisions).

⁹⁸ 72 BVerfGE 9, 22–25 (1986). As in the case of conventional property, limitations on existing rights are not forbidden outright. *See, e.g.*, 53 BVerfGE 257, 308–11 (1980) (permitting application of a new provision for division of retirement benefits on divorce to persons married under the old scheme, subject to an extended hardship clause); 69 BVerfGE 272, 304–07(1985) (upholding increase in cost of medical insurance for those already insured). Yet the Court has gone so far as to suggest that the property guarantee may require the state actually to *increase* benefits to counteract inflation, which reduces their real value. *See* 64 BVerfGE 87, 97–103 (1983) (holding that such adjustments need not be made annually). *Contrast* *Legal Tender Cases*, 79 U.S. 457 (1871) (rejecting due process challenge to inflationary issue of paper money); *Atkins v. United States*, 556 F.2d 1028 (Ct. Cls. 1977) (concluding that Article III’s ban on reduction of judicial salaries did not require cost of living increases).

withdrawal of benefits; the legislature is after all still free under the American cases to define the substantive scope of the right.⁹⁹

Most interesting from the American point of view is the 1971 decision of the Constitutional Court striking down a statute that authorized schools to use copyrighted material free of charge.¹⁰⁰ This decision was not based upon impairment of preexisting rights conferred by statute or common law. Rather the Court seems to have found the right to profit from the fruits of one's labors secured by the Constitution itself: "In accord with the property guarantee the author has in principle the right to claim compensation for the economic value of his work..."¹⁰¹ The Constitution of the United States does not create property; the Due Process and Takings Clauses protect only against infringement of property rights created by other laws.¹⁰² The copyright decision suggests that, like "liberty" in our Due Process Clauses,¹⁰³ property in the Basic Law has a dimension independent of ordinary law; Article 14, the Court seems to be saying, constitutionalizes the Lockean principle of *Pierson v. Post*.¹⁰⁴

The text of the Basic Law lends support to this interpretation: Property is not merely protected against "deprivation" or "taking," it is "guaranteed." Of course the creator of economic values does not have an unlimited right to exploit them. The copyright decision itself, invoking the explicit legislative authority to determine the content and limits of property, acknowledged that the author's interests would prevail only "insofar as the interests of the general public do not take priority."¹⁰⁵

⁹⁹ For doubts as to whether an American legislature *could* bind itself not to revoke a welfare program, see *Crenshaw v. United States*, 134 U.S. 99, 104–8 (1890) (permitting Congress to repeal a law providing tenure for federal employees); *Stone v. Mississippi*, 101 U.S. 814, 815–20 (1880) (permitting modification of a twenty-five-year charter to conduct a lottery on the ground that the state had no power to promise not to exercise its police power). If government benefits are based upon contract, however, they may be protected by the Contracts Clause of Art. I, §10 – though under recent decisions only against unreasonable legislative impairments. See *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978) (striking down law impairing private pension contracts).

¹⁰⁰ 31 BVerfGE 229 (1971).

¹⁰¹ *Id.* at 243. See also *id.* at 240–41 (defining "the essential elements of copyright as property within the meaning of the Constitution"); Rittstieg, *Art. 14/15, in 1 Luchterhand*, Para. Nr. 110a.

¹⁰² See *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

¹⁰³ See *Ingraham v. Wright*, 430 U.S. 651, 672–74 (1977) (right to bodily integrity).

¹⁰⁴ 3 Cai. R. 175 (N.Y. Sup. Ct. 1805); see LOCKE, *SECOND TREATISE OF GOVERNMENT* 15 (Barnes & Noble ed. 1966).

¹⁰⁵ 31 BVerfGE at 243.

Indeed the same opinion held that the public interest justified permitting schools to use copyrighted material without the author's consent so long as adequate royalties were paid.¹⁰⁶ A later decision limited the applicability of Lockean theory by upholding a statute providing for state ownership of archeological discoveries,¹⁰⁷ and the Court in so holding seemed to say that the Constitution did not create property rights after all.¹⁰⁸ Whatever its current status or justification, however, the copyright case indicates one of several ways in which the German Constitutional Court has gone beyond current American practice in the constitutional protection of property.¹⁰⁹

D. Occupational Freedom

Article 12(1) codifies the occupational freedom once recognized by the Supreme Court in such cases as *Lochner*:

All Germans shall have the right freely to choose their trade, occupation, or profession, their place of work and their place of training. The practice of trades, occupations, and professions may be regulated by or pursuant to statute.

Like the right to property, occupational freedom is taken very seriously in Germany as an element of individual autonomy and an essential basis of other freedoms.¹¹⁰

¹⁰⁶ *Id.* at 242.

¹⁰⁷ 78 BVerfGE 205, 211–12 (1988). *Cf.* the English common law of treasure trove, noted in CASNER & LEACH, *CASES AND TEXT ON PROPERTY* 35 (3d ed. 1984).

¹⁰⁸ 78 BVerfGE at 211, citing earlier cases: Art. 14(1) "guarantees only those rights which the owner already has."

¹⁰⁹ See generally Rittstieg, *Art. 14/15, in 1 Luchterhand*, Para. 37, concluding that the judges have become more protective of property interests since the early 1970s; Leisner, *in 6 HANDBUCH DES STAATSRICHTS* §149, Para. Nr. 102–17, 133–42, arguing that the Court has done too little to protect property.

¹¹⁰ See, e.g., 7 BVerfGE 377, 397 (1958): "[Article 12(1)] guarantees the individual more than just the freedom to engage independently in a trade. To be sure, the basic right aims at the protection of economically meaningful work, but it views work as a 'vocation.' Work in this sense is seen in terms of its relationship to the human personality as a whole: It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person's existence through which that person simultaneously contributes to the total social product." *Cf.* text at note 48 *supra*, discussing property. In recent years our Supreme Court has not seen it that way. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955). Serious due process protection of the right to a livelihood in the United States has been limited to instances in which the individual's very existence was threatened, and then to a guarantee of fair hearing. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

The right extends to preparation for—as well as exercise of—an occupation.¹¹¹ Like property, it may be limited basically only in accordance with statute.¹¹² Even statutory limitations, moreover, have been subjected to sometimes demanding scrutiny under the pervasive proportionality principle, and quite a number of them have been struck down. Statutory limitations, moreover, have been subjected to sometimes demanding scrutiny under the pervasive proportionality principle, and quite a number of them have been struck down.

The leading case remains the seminal 1958 *Pharmacy* decision,¹¹³ which established varying degrees of judicial review (Stufentheorie) according to the severity of the intrusion. To begin with, regulation of how a profession is practiced is easier to justify than limitation of entry into the profession itself:¹¹⁴

The practice of an occupation may be restricted by reasonable regulations predicated on considerations of the common good. The freedom to choose an occupation, however, may be restricted only insofar as an especially important public interest compellingly requires. . .—[and] only to the extent that protection cannot be accomplished by a lesser restriction on freedom of choice.

Moreover, entry limitations such as educational requirements designed to protect the public from unqualified practitioners are easier to justify than those irrelevant to individual ability; and the desire to protect existing practitioners from competi-

¹¹¹ See, e.g., 33 BVerfGE 303 (1972) (striking down limits on admission to public universities). This case is discussed at notes 140–47 *infra*.

¹¹² For decisions invalidating limitations on occupational freedom not adequately authorized by statute, see, e.g., 22 BVerfGE 114, 119–23 (1967) (disqualification of attorney); 38 BVerfGE 373, 380–85 (1975) (ban on deposit boxes for prescriptions in outlying areas); 41 BVerfGE 251, 259–66 (1976) (expulsion from vocational school); 43 BVerfGE 79, 89–92 (1976) (ban on representation of codefendants by members of same law firm); 54 BVerfGE 224, 232–36 (1980) (ban on doctors' discussing disciplinary proceedings with patients); 63 BVerfGE 266, 288–97 (1983) (exclusion of Communist from bar); 65 BVerfGE 248, 258–64 (1983) (requirement that price be marked on goods offered for sale). The Court has also made clear, however, that limitations may be based upon customary law existing before the adoption of the Basic Law in 1949. 15 BVerfGE 226, 233 (1962). See also Scholzin, *Art. 12, in 1* Maunz/Dürig, Para. Nr. 315–16.

¹¹³ 7 BVerfGE 377 (1958).

¹¹⁴ *Id.* at 405.

tion, the Court said, could “never” justify an entry restriction.¹¹⁵ On the basis of this calculus the Constitutional Court has achieved results reminiscent of those reached by the Supreme Court during the *Lochner* period.

As under the reign of *Lochner*,¹¹⁶ a great many limitations of occupational freedom have been upheld—some of them rather intrusive. Compulsory retirement ages may be set for chimney sweeps¹¹⁷ and midwives.¹¹⁸ The sale of headache remedies may be restricted to pharmacists,¹¹⁹ and the latter may be forbidden to own more than one store.¹²⁰ Shops may be required to close on Saturday afternoons, Sundays, holidays, and in the evening;¹²¹ nocturnal baking may be prohibited.¹²² The legislature may outlaw the erection or expansion of flour mills¹²³ and limit the amount of flour produced.¹²⁴ The state may monopolize building insurance¹²⁵ and employment agencies.¹²⁶ It may require employers to hire the handicapped,¹²⁷ limit the

¹¹⁵ *Id.* at 406–8. The language of Article 12 might be taken to suggest that the mere exercise of a profession was subject to unlimited legislative regulation, the choice of profession to none at all. Citing the difficulty of drawing clear lines between choice and exercise, the explicit authorization to regulate access to certain professions in Art. 74(19), and the debates of the constitutional convention, the Court found that choice and exercise of an occupation constituted poles of a continuum: Art. 12 guaranteed a unitary freedom of occupational activity that was subject at any point to reasonable regulation, but what was reasonable varied according to the severity of the limitation. See *id.* at 400–403.

¹¹⁶ See THE SECOND CENTURY, chs. 2,4,5.

¹¹⁷ 1 BVerfGE 264, 274–75 (1952).

¹¹⁸ 9 BVerfGE 338, 344–48 (1959).

¹¹⁹ 9 BVerfGE 73, 77–81 (1959).

¹²⁰ 17 BVerfGE 232, 238–46 (1964).

¹²¹ 13 BVerfGE 237,239–42 (1961).

¹²² 23 BVerfGE 50, 56–60 (1968).

¹²³ 25 BVerfGE 1, 10–23 (1968) (stressing that these limitations were a temporary response to a serious glut on the flour market).

¹²⁴ 39 BVerfGE 210, 225–37 (1975).

¹²⁵ 41 BVerfGE 205, 217–28 (1976) (inferring from the limitation of federal legislative competence to “private” insurance in Art. 74(11) GG that provisions respecting public insurance were not to be measured against Art. 12).

¹²⁶ 21 BVerfGE 245, 249–60 (1967).

¹²⁷ 57 BVerfGE 139, 158–65 (1981).

number of notaries,¹²⁸ and require them to serve welfare applicants without charge.¹²⁹

At the same time, throughout its history the Constitutional Court has struck down as unwarranted infringements on occupational freedom an impressive array of restrictions that would pass muster without question in the United States today. The state may not limit the number of drugstores on the ground that there are already enough of them¹³⁰ or license taxicabs only in cases of special need.¹³¹ It may not require vending machines to be shut down after stores are closed¹³² or require barbers who close on Saturday afternoon to shut down on Monday morning too.¹³³ It may ban neither door-to-door sales of veterinary medicines¹³⁴ nor C.O.D. shipments of live animals.¹³⁵ It may not require that retailers be competent to practice their trade,¹³⁶ forbid doctors to specialize in more than one field or to perform services outside their specialties,¹³⁷ or ban the collection of dead birds for scientific purposes.¹³⁸ Finally, in perfect contrast to the decision that sealed the death of economic due process in the United States, it may not forbid the manufacture and sale of healthful food products on the ground that they might be confused with chocolate.¹³⁹

¹²⁸ 17 BVerfGE 371, 376–81 (1964) (stressing the public functions that notaries performed).

¹²⁹ 69 BVerfGE 373, 378–81 (1985) (finding the burden trivial).

¹³⁰ 7 BVerfGE 377, 413–44(1958).

¹³¹ 11 BVerfGE 168, 183–90 (1960). *Cf.* *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

¹³² 14 BVerfGE 19, 22–25(1962).

¹³³ 59 BVerfGE 336, 355–59(1982).

¹³⁴ 17 BVerfGE 269, 274–80(1964).

¹³⁵ 36 BVerfGE 47, 56–65 (1973).

¹³⁶ 19 BVerfGE 330, 336–42 (1965).

¹³⁷ 33 BVerfGE 125, 165–71 (1972).

¹³⁸ 61 BVerfGE 291, 317–19(1982).

¹³⁹ 53 BVerfGE 135, 145–47 (1980). *Cf.* *Carolene Products Co. v. United States*, 323 U.S. 18 (1944). The German court did concede that more stringent measures respecting margarine might be permissible to preserve the viability of the crucial dairy industry (53 BVerfGE at 146), but the second *Carolene Products* decision was based on the danger of confusion alone (323 U.S. at 27–31). The chocolate decision and others noted above demonstrate that, despite the suggestion of Scholz, *Art. 12, in I Maunz/Dürig*, Para. 322, that judicial review under Art. 12(1) has become less intensive than it was in the days of the drugstore case, it has by no means lost its bite. None of this is to say that there is actually more occupational freedom in West Germany than in the United States. Notwithstanding the lack of judicial interest in the area, legislators in this country seem somewhat less inclined to inhibit such freedom than

Here too, as in connection with familial rights and private schools, there are strong indications that the Basic Law may impose affirmative duties on government. The most notable decision is that in the so-called *Numerus Clausus* case,¹⁴⁰ where, despite insisting that it was not deciding whether Article 12(1) required the state to set up institutions of higher learning, the Constitutional Court flatly declared that the right to obtain a professional education was worthless if the state did not provide one, and therefore that access to public education was not a matter of legislative grace. "In the field of education," said the Court, "the constitutional protection of basic rights is not limited to the function of protection from governmental intervention traditionally ascribed to basic liberty rights."¹⁴¹

While recognizing that financial constraints limit any constitutional duty to expand educational facilities, and acknowledging the breadth of legislative discretion in this regard,¹⁴² the Court has applied Article 12(1) in conjunction with the general equality provision of Article 3 and the Sozialstaat principle¹⁴³ to scrutinize with great care any restrictions on access by qualified applicants to existing facilities. A university in one state is forbidden to discriminate against residents of another.¹⁴⁴ Even relatively poor grades are no excuse for excluding applicants who satisfy minimum standards when there is unused capacity,¹⁴⁵ and the Court has gone so far as to review the adequacy of teaching loads in order to determine whether there is

their German counterparts, as Americans seem more mistrustful of government in general. In Chicago, for example, it is possible to sell groceries after 2 P.M. on Saturday; it is basically illegal in Germany.

¹⁴⁰ 33 BVerfGE 303 (1972).

¹⁴¹ *Id.* at 330–32. "The more involved a modern state becomes in assuring the social security and cultural advancement of its citizens," the opinion added, "the more the complementary demand that participation in governmental services assume the character of a basic right will augment the initial postulate of safeguarding liberty from state intervention. This development is particularly important in the field of education." *Id.* See Scholz, *Art. 12, in 1 Maunz/Dürig*, Para. 63, explaining that where the state has a practical monopoly (as it has of higher education in West Germany), exclusion comes close in practical effect to prohibition.

¹⁴² See 33 BVerfGE at 332–36.

¹⁴³ See *id.* at 331. It is common practice for the Constitutional Court to base a decision on the combined effect of two or more provisions. See also Denninger, *Art. 1, in Luchterhand*, Para. Nr. 23–25, explaining that, although the Sozialstaat principle is not generally directly enforceable by private suit, it places upon the state "shared responsibility for the creation and maintenance of the factual conditions necessary for the exercise of freedoms guaranteed by the Bill of Rights."

¹⁴⁴ See 33 BVerfGE at 351–56.

¹⁴⁵ 39 BVerfGE 258, 269–74(1975).

room for additional students.¹⁴⁶ Thus the judges exercise a substantial degree of supervision over university administration in the interest of equal access to professional education.¹⁴⁷

Closely related to the occupational freedom guaranteed by Article 12(1) is the requirement of Article 33(5) that public employment be regulated “with due regard to the traditional principles of the professional civil service.” A major victory of the powerful civil servants’ lobby over Allied efforts at reform,¹⁴⁸ this provision preserves to a significant extent the privileged position of the German civil servant.

Article 33(5) requires only “due regard” for traditional principles, not unswerving adherence to them.¹⁴⁹ One of its basic components is “suitable compensation” for public service, which has led to invalidation of insufficient provisions for retirement benefits¹⁵⁰ and to a requirement of extra pay for civil servants with children.¹⁵¹ The Court has also employed Article 33(5) to reinforce the conclusion that other branches may not be given discretion to limit judicial salaries¹⁵² and to protect traditional prerogatives we might be inclined to think less significant: the right of judges, teachers, and professors to titles befitting their dignified positions.¹⁵³

Not long ago all of this (with the exception of matters affecting judges, whose independence is guaranteed by Article III) would have been a matter of legislative grace in the United States under the privilege doctrine.¹⁵⁴ Even today it is difficult to see

¹⁴⁶ 54 BVerfGE 173, 191–207(1980); 66 BVerfGE 155, 177–90(1984).

¹⁴⁷ Moreover, like other substantive provisions, Article 12(1) has been read to guarantee adequate procedures to assure vindication of the right itself. See, e.g., 39 BVerfGE 276, 294–301 (1975) (right to file complaint protesting rejection of application for university admission); 52 BVerfGE 380, 388–91 (1979) (right to warning as to the importance of answering questions during bar examination).

¹⁴⁸ See BENZ, VON DER BESATZUNGSHERRSCHAFT ZUR BUNDESREPUBLIK 113–16, 208–9 (1985).

¹⁴⁹ 3 BVerfGE 58, 137 (1953). For criticism of this conclusion, see Maunz, *Art. 33*, in 2 Maunz-Dürig, Para. Nr. 58.

¹⁵⁰ 8 BVerfGE 1, 22–28 (1958); 11 BVerfGE 203, 210–17(1960).

¹⁵¹ 44 BVerfGE 249, 262–68 (1977) (invoking Art. 3 3(5) in conjunction with Art. 6 and the Sozialstaat principle).

¹⁵² 26 BVerfGE 79, 91–94 (1969) (also invoking the guarantee of judicial independence in Article 97(1)).

¹⁵³ 38 BVerfGE 1, 11–17 (1974) (judges); 62 BVerfGE 374, 382–91 (1982) (teachers); 64 BVerfGE 323, 351–66 (1983) (professors). See also 43 BVerfGE 154, 165–77 (1976), holding that Article 33(5) required a hearing before dismissal even of probationary public workers.

¹⁵⁴ Cf. Holmes’s famous comment in *McAuliffe v. New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 (1892), that “there is no constitutional right to be a policeman.”

how an American court could have reached any of the results just noted, since none of the provisions struck down by the German Court involved indirect limitations on protected interests such as expression or religion.¹⁵⁵ Thus while Article 12(1) of the Basic Law specifically guarantees the freedom from state interference with private occupations that our Supreme Court once protected under the rubric of substantive due process, Article 33(5) goes beyond anything the Supreme Court ever did by affording significant substantive protections to public employees as well.

E. Life, Liberty, Dignity, and Personality

I. *Life and Liberty*

Article 2(2) contains a general guarantee of life, bodily integrity, and personal liberty:

Everyone shall have the right to life and to inviolability of his person. Personal liberty (*die Freiheit der Person*) shall be inviolable. These rights may be encroached upon only pursuant to statute.

The liberty protected by Article 2(2) is freedom from bodily restraint;¹⁵⁶ other liberties are protected by other provisions.

The last sentence of Article 2(2) should by now be familiar; only the legislature may authorize incursions on interests protected by this provision.¹⁵⁷ However, not every law suffices to justify physical restraint or invasion of bodily integrity. Article 104 specifies a number of procedural limitations on arrest and imprisonment. Article 103 requires courts to afford a hearing, permits punishment only on the basis of preexisting statutes that afford fair warning, and forbids double jeopardy. Article 102 abolishes the death penalty. Article 19(2) draws the outer boundary of legislative restriction of any basic right: "In no case may the essential content of a basic right be encroached upon."

¹⁵⁵ *Contrast Perry v. Sindermann*, 408 U.S. 593 (1972).

¹⁵⁶ See Dürig, *Art. 2(2)*, in I Maunz/Dürig, Para. Nr. 1, 49.

¹⁵⁷ See Lorenz, *Recht auf Leben und körperliche Unversehrtheit*, in 6 HANDBUCH DES STAATSRECHTS, § 128, Para. Nr. 36.

Despite early expectations,¹⁵⁸ this last provision has played little part in the decisions. It did form the principal basis of the Court's 1967 conclusion that a person could not be committed to a mental hospital for mere "improvement":¹⁵⁹

It is not among the tasks of the state to "improve" its citizens. The state therefore has no right to deprive them of freedom simply to "improve" them, when they pose no danger to themselves or to others. . . . Since the purpose of improving an adult cannot constitute a sufficient ground for the deprivation of personal liberty, [the statute] encroaches upon the essential content of the basic right....

The same opinion went on, however, to state an alternative ground that, because of its greater stringency, has generally made it unnecessary to inquire whether a restriction invades the "essential content" of a basic right. Quite apart from the limitation imposed by Article 19(2), the institutionalization of an individual who endangered neither himself nor others offended "the principle of proportionality (Verhältnismässigkeit), which is rooted in the rule of law."¹⁶⁰

The Basic Law nowhere mentions the proportionality principle, and the Court has equivocated as to its source. Some early decisions seemed to find it implicit in the basic rights themselves, or in the provisions permitting legislatures to limit them.¹⁶¹ One prominent commentator attributed it to the guarantee of "essential content" in Article 19(2).¹⁶² As the quotation above suggests, proportionality is now commonly understood to be one aspect of the Rechtsstaat principle implicit in the various provisions of Article 20 and made explicit as to the Länder in Article 28(1).¹⁶³

The basic idea behind the proportionality principle is that, even where the legislature is specifically authorized to restrict basic rights, the restrictions may go no

¹⁵⁸ See Dürig, *Art. 2(1)*, in I Maunz/Dürig, Para. Nr. 31–32, 62–63.

¹⁵⁹ 22 BVerfGE 180, 218–20(1967).

¹⁶⁰ *Id.* at 220.

¹⁶¹ See, e.g., 17 BVerfGE 108, 117 (1963): "Respect for the basic right of bodily integrity demands respect across the board for the principle of proportionality in passing upon the validity of incursions into this right."

¹⁶² See Dürig, *supra* note 158.

¹⁶³ See also 30 BVerfGE 1, 20 (1970); Hill, *Verfassungsrechtliche Gewährleistungen gegenüber der staatlichen Straf Gewalt*, in 6 HANDBUCH DES STAATSRICHTS §156, Para. Nr. 21.

further than necessary.¹⁶⁴ The decisions have broken down this general principle into three elements reminiscent of the American tests both for substantive due process and for the necessity and propriety of federal legislation: The limitation must be adapted (*geeignet*) to the attainment of a legitimate purpose; it must be necessary (*erforderlich*) to that end; and the burden it imposes must not be excessive (*unzumutbar*).¹⁶⁵ Necessity for this purpose is narrowly defined: As in certain instances of strict scrutiny in the United States, the legislature must choose the least burdensome means of achieving its goal.¹⁶⁶

The upshot is intensive scrutiny of the reasonableness of measures impinging upon the interests protected by Article 2(2). Pretrial incarceration is permitted only when necessary to investigate the case¹⁶⁷ or when there is a grave risk of recurrence,¹⁶⁸ and it may not last too long.¹⁶⁹ Persons accused of crime may be institutionalized to determine their mental competency¹⁷⁰ and subjected to an electroencephalogram¹⁷¹ but not to a spinal tap in connection with a relatively minor offense.¹⁷² One may not

¹⁶⁴ See 30 BVerfGE at 20. See also Denninger, *Art. 1*, in 1 Luchterhand, Para. Nr. 12, finding in the basic rights and the Rechtsstaat principle protection against unnecessary as well as nonstatutory limitations of protected interests and quoting from a property case that “the general welfare is not only the basis but also the limit” of governmental intrusion.

¹⁶⁵ See 78 BVerfGE 232, 245–47 (1988). Cf. *McCulloch v. Maryland*, 4 Wheat. 316, 421 (1819); *Mugler v. Kansas*, 123 U.S. 623, 661–62 (1887) (both stressing the legitimacy of the end and the appropriateness of the means).

¹⁶⁶ *Id.* at 245. Cf. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 (1951). This general formulation does not exclude varying levels of scrutiny according to the seriousness and intimacy of the intrusion. See Denninger, *supra* note 49; *supra* notes 113–15 (discussing the *Pharmacy* case).

¹⁶⁷ 19BVerfGE 342, 347–53 (1965).

¹⁶⁸ 35 BVerfGE 185, 190–92 (1973).

¹⁶⁹ 20 BVerfGE 45, 49–51 (1966).

¹⁷⁰ 1702 BVerfGE 121, 122–23 (1953).

¹⁷¹ 17 BVerfGE 108, 114–15 (1963).

¹⁷² 16 BVerfGE 194, 198–203 (1963). See also 17 BVerfGE 108, 117–20(1963).

be punished for another's wrongs,¹⁷³ put on trial when dangerously ill,¹⁷⁴ or evicted when suffering from depression.¹⁷⁵

Article 2(2) has also been the most prolific source of decisions recognizing the affirmative duty of the state to protect the individual from harm inflicted by third parties. The critical case was the famous abortion decision, which produced a result the polar opposite of that our Supreme Court had reached two years earlier in *Roe v. Wade*: Far from giving the woman a right to terminate her pregnancy, the Basic Law demands in principle that abortion be made a crime; the German constitution requires what our Constitution forbids.¹⁷⁶

Two conclusions at variance with the prevailing American understanding inform the German decision. The first is that life begins before birth,¹⁷⁷ the second that fundamental rights are not simply a guarantee against governmental intrusion.¹⁷⁸ Article 1(1) makes the latter point clear with regard to the right of human dignity, which the state is expressly directed to "respect and protect."¹⁷⁹ Article 1(1) was invoked along with Article 2(2) in the abortion case,¹⁸⁰ and since the more specific bill of rights provisions are commonly viewed at least in part as concrete aspects of

¹⁷³ Cf. 20 BVerfGE 323, 330–36 (1966), finding a violation of the general freedom of action guaranteed by Article 2(1) in the punishment of a faultless voluntary association, which had no rights protected by Art. 2(2).

¹⁷⁴ 51 BVerfGE 324, 343–50 (1979). This decision was based not on fair trial considerations but on the danger to the defendant's health.

¹⁷⁵ 52 BVerfGE 214, 219–22 (1979).

¹⁷⁶ See 39 BVerfGE 1 (1975); *Roe v. Wade*, 410 U.S. 113 (1973).

¹⁷⁷ See 39 BVerfGE at 37-42.

¹⁷⁸ *Id.* At 42-51. Contrast *DeShaney v. Winnebago County Department of Social Services*, 109 S. Ct. 998, 1003 (1989): "[N]othing in the language [or history] of the Due Process Clause...requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."

¹⁷⁹ In one of its very first opinions, while taking a narrow view of the protective duty imposed by Article 1(1), the Constitutional Court expressly acknowledged it: "The second sentence [of Article 1(1)...obliges the state indeed to the positive act of 'protection,' but that means protection against attacks on human dignity by other people, such as humiliation, stigmatization, persecution, ostracism, and the like-not protection from material want." 1 BVerfGE97, 104 (conceding that the social state principle of Art. 20 required the legislature to assure "tolerable living conditions" for the needy but insisting that "only the legislature can do what is essential to make the social state a reality" (*id.* at 105)). Later decisions respecting the government's obligation under more specific bill or rights provisions to support or provide education (see text at notes 44-45 and 140-42 *supra*) have cast considerable doubt upon this narrow interpretation. See generally Denninger, *Art. 1, in 1 Luchterhand*, Para. Nr. 23-28.

¹⁸⁰ 39 BVerfGE at 41, 51.

human dignity,¹⁸¹ the “protect and respect” clause may well have influenced the interpretation of Article 2(2) as well.¹⁸²

There were dissents in the abortion case, but the dissenting Justices conceded the state’s duty to protect fetal life, arguing only that criminal penalties were not an indispensable means to this end.¹⁸³ Moreover, subsequent decisions have affirmed the state’s constitutional duty to protect against the hazards of nuclear power plants,¹⁸⁴ aircraft noise,¹⁸⁵ terrorism,¹⁸⁶ and chemical weapons.¹⁸⁷ Acutely aware of the danger of constitutionalizing ordinary tort law as well as other matters basically committed to other branches, the Court has afforded legislative and executive organs wide leeway in determining how to fulfill their protective duties; not since the abortion decision has it found government action deficient to protect life and limb.¹⁸⁸ Moreover, even the abortion case permitted destruction of the fetus for medical, eugenic, ethical, and social reasons,¹⁸⁹ and there is reason to think that in practice the “social” exception may largely have swallowed the rule. Yet the positive duty to protect the individual against harm from third parties remains a vital principle of German constitutional law. Notwithstanding their strikingly contrasting outcomes,

¹⁸¹ See Art. 1(2) GG, declaring that the German people acknowledge human rights because of the inviolability of human dignity; Dürig, *Art. 1*, in 1 Maunz/Dürig, Para. Nr. 10, 55.

¹⁸² See *id.* at Para. Nr. 102.

¹⁸³ See 39 BVerfGE at 68-95 (Rupp-von Brünneck and Simon, JJ., dissenting). See also Denninger, *Art. 1*, in 1 Luchterhand, Para. Nr. 33-34.

¹⁸⁴ 49 BVerfGE 89, 140-44 (1978); 53 BVerfGE 30, 57-69 (1979)

¹⁸⁵ 56 BVerfGE 54, 73-86 (1981).

¹⁸⁶ 46 BVerfGE 160, 164-65 (1977). Cf. 55 BVerfGE 349, 364-68 (1980) (involving the adequacy of German efforts to secure the release of the aged Nazi leader Rudolf Hess from Allied imprisonment).

¹⁸⁷ 77 BVerfGE 170, 214-16, 222-30 (1987).

¹⁸⁸ See also 66 BVerfGE 39, 60–61 (1983) (rejecting an attack on the stationing of nuclear missiles in West Germany on the ground that, to whatever extent German officials were responsible for the decision, the question of how best to defend the country was committed to the discretion of the political branches). One may be tempted to conclude from the later decisions that the Court has effectively withdrawn from the position it took in the abortion case. However, the decisions may all be reconcilable on the merits. It is easy enough to disagree over the proper balance of interests in nuclear-safety cases or the best way to prevent harm to present and future kidnap victims; despite the obvious shortcomings of criminal penalties it is difficult to see how anything less would have a significant impact upon abortion. See 39 BVerfGE at 52–64.

¹⁸⁹ See 39 BVerfGE at 49–50.

both *Roe v. Wade* and its German counterpart are prime examples of intrusive judicial review based on open-ended constitutional provisions.¹⁹⁰

II. Human Dignity

Article 2(2) is indeterminate as to the limits of legislative intervention, but not as to the nature of the rights it protects. Articles 1(1) and 2(1) are indeterminate in both respects.

Article 1(1) provides that “[t]he dignity of man shall be inviolable.” Obviously this language leaves a great deal of latitude for interpretation. The Constitutional Court attempted to define its essence in a major 1977 opinion:¹⁹¹

It is contrary to human dignity to make the individual the mere tool [blosses Objekt] of the state. The principle that “each person must always be an end in himself” applies unreservedly to all areas of the law; the intrinsic dignity of the person consists in acknowledging him as an independent personality.

If this helps, well and good. Concrete examples may help too.

Earlier cases, the opinion continued, had established that it was inconsistent with human dignity to impose punishment without fault¹⁹² or to inflict cruel or disproportionate penalties.¹⁹³ Life imprisonment, the Court concluded, was permissible only on condition that the possibility of release was never foreclosed: “[T]he state strikes at the very heart of human dignity if [it] treats the prisoner without regard to the development of his personality and strips him of all hope of ever regaining his freedom.”¹⁹⁴ On other occasions the Court has invoked the dignity clause in

¹⁹⁰ See GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 33 (1987).

¹⁹¹ 45 BVerfGE 187, 228 (1977) (Life Imprisonment Case). For more detail along the same lines, see Dürig, *Art. 1(1)*, in 1 Maunz/Dürig, Para. Nr. 28.

¹⁹² 45 BVerfGE at 228, citing 20 BVerfGE 323, 331 (1966), which had based this conclusion on Art. 2(1) in conjunction with the Rechtsstaat principle.

¹⁹³ 45 BVerfGE at 228, citing 1 BVerfGE 332, 348 (1952); 25 BVerfGE 269, 285–86 (1969).

¹⁹⁴ 45 BVerfGE at 245; see also *id.* at 228–29. As the quotation suggests, this decision was not based entirely on Article 1(1). See *id.* at 223, noting the obvious involvement of Article 2(2)’s right to personal liberty; *id.* at 239, concluding that the “interest in rehabilitation flows from Article 2(1) in tandem with Article 1.” In early days doubts had been expressed whether Article 1(1) was directly enforceable at all,

conjunction with other bill of rights provisions to protect informational privacy¹⁹⁵ and the right to have birth records reflect the results of a sex-change operation. "Human dignity and the constitutional right to the free development of personality," said the Court in the latter case, "require that one's civil status be classified according to the sex with which he is psychologically and physically identified."¹⁹⁶

Commentators agree that human dignity also forbids such atrocities as torture, slavery, and involuntary human experiments; not surprisingly, they differ as to such matters as the death penalty (which at present Article 102 expressly forbids), artificial insemination, and suicide.¹⁹⁷ The open-endedness of the dignity provision is compounded by the Court's explicit conclusion that the meaning of human dignity may change over ¹⁹⁸

The history of criminal law shows clearly that milder punishments have replaced those more cruel in character and that the wave of the future is toward more humane and differentiated forms of punishment. Thus any decision defining human dignity in concrete terms must be based on our present understanding of it and not on any claim to a conception of timeless validity.

In short, human dignity is a rather flexible concept.

partly because Article 1(3) made only the "following" basic rights binding on government organs as "directly enforceable law." See, e.g., Dürig, *Art. 1(1)*, in 1 Maunz/Dürig, Para. Nr. 4, 7 (adding, in Para. Nr. 13, 16, that it hardly mattered since the dignity principle had to be employed as a standard in interpreting other constitutional provisions as well as the ordinary law). For the contrary view, see Podlech, *Art. 1(1)*, in 1 Luchterhand, Para. Nr. 61. To this date the Constitutional Court has never invalidated government action on the basis of Article 1(1) alone.

¹⁹⁵ See, e.g., 27 BVerfGE 1, 6(1969) (Microcensus): "It would be inconsistent with the principle of human dignity to require a person to record and register all aspects of his personality even though such an effort is carried out in the form of a statistical survey; [the state] may not treat a person as an object subject to an inventory of any kind." The census questions in issue, which pertained to vacation habits, were held permissible.

¹⁹⁶ 49 BVerfGE 286, 298(1978).

¹⁹⁷ Compare Dürig, *Art. 1(1)*, in 1 Maunz/Dürig, Para. Nr. 30-41; Podlech, *Art. 1(1)*, in 1 Luchterhand, Para. Nr. 43-55.

¹⁹⁸ 45 BVerfGE 187, 229 (1977). Cf. the discussion of changing standards of cruel and unusual punishment in *Furman v. Georgia*, 408 U.S. 238 (1972).

In the cases so far discussed, Article 1(1) was invoked in traditional fashion to protect the citizen against government intrusion. In the well-known *Mephisto* decision, on the other hand, the dignity clause provided the principal justification for permitting government limitation of the artistic freedom guaranteed by Article 5(3)—an injunction against publication of a novel impugning the memory of a deceased actor.¹⁹⁹ The later *Lebath* case took this reasoning a giant step further: As the abortion case had made clear,²⁰⁰ Article 1(1) directed the state not only to respect human dignity but affirmatively to protect it against third parties; it followed that the constitution not only permitted but required an injunction against publication of information respecting the plaintiff's past crimes.²⁰¹

III. *The Development of Personality*

We come now to Article 2(1), which epitomizes substantive due process in the Federal Republic:

Everyone shall have the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral code.

“Free development of personality” (die freie Entfaltung der Persönlichkeit) is no more self-defining in German than it is in English. Literally it seems to suggest something akin to a right of privacy, an intimate sphere of autonomy into which the state is forbidden to intrude. Various aspects of privacy are indeed embraced within Article 2(1), but any such limiting construction was firmly rejected in the seminal *Elfes* decision in 1957. The free development of personality, the Court argued, could not be limited to “that central area of personality that essentially defines a human person as a spiritual-moral being, for it is inconceivable how development within this core area could offend the moral code, the rights of others, or even the constitutional order. . . .” Rather the Court construed the provision to guarantee a “general right of freedom of action” (allgemeine Handlungsfreiheit)—citing the debates of the constitutional convention for the conclusion that “linguistic rather than legal considerations prompted the framers to substitute the current

¹⁹⁹ 30 BVerfGE 173 (1971). *See id.* at 195: “[T]he values embodied in Article 1(1) influence the guarantee [of artistic freedom.]” All Justices agreed on the general principle that in such a case the interest in artistic freedom must be balanced against that in reputation; the injunction itself was affirmed by an equally divided Court.

²⁰⁰ *See* 39 BVerfGE 1, 41, 51 (1975); *supra* notes 175–83.

²⁰¹ 35 BVerfGE 202 (1973) (relying on Art. 1(1) in conjunction with Art. 2(1)).

language for the original proposal” that “[e]very person is free to do or not to do what he wishes.”²⁰² Casting Article 2(1) loose from its restrictive terminology – like the freeing of “liberty” in the Fourteenth Amendment from its history in *Allgeyer v. Louisiana*²⁰³ – opened the door to judicial review of all restrictive governmental action.

What this review would produce in practice depended upon interpretation of the three limits Article 2(1) places upon freedom of action, “the rights of others, . . . the constitutional order, [and] the moral code.” The first and last are easy enough to understand, if not always to apply: The rights of others justify banning such activities as arson and trespass; the moral code has been held, as in the United States, to authorize punishment for sodomy.²⁰⁴ More difficult to determine was the meaning of the second limitation, which leaves unprotected those activities which “offend against the constitutional order.”

This term or something very like it appears in several other articles in connection with constitutional limitations on subversive activities.²⁰⁵ In those articles, in order not unduly to encroach upon legitimate political opposition, it has been given a restrictive meaning.²⁰⁶ In the quite different context of Article 2(1) “the constitutional order” has been interpreted more broadly. The general right to freedom of action, the Court stated in *Elfes*, was limited both by the Basic Law itself and “by every legal norm that conforms procedurally and substantively with the Constitution.”²⁰⁷

This interpretation, like the decision that the Privileges or Immunities Clause of our Fourteenth Amendment forbade impairment only of rights already protected by

²⁰² 6 BVerfGE 32, 36–37 (1957), citing the explanation given by Dr. von Mangoldt at the constitutional convention, PARLAMENTARISCHER RAT, VERHANDLUNGEN DES HAUPTAUSSCHUSSES 533 (1949). This interpretation has met with some criticism from the commentators. See, e.g., Hesse, Para. Nr. 425–28. For a more approving view, see Dürig, *Art. 2*, in 1 Maunz/Dürig, Para. Nr. 3, 10, 11.

²⁰³ 165 U.S. 578 (1897).

²⁰⁴ See 6 BVerfGE 389, 432–37 (1957); 36 BVerfGE 41, 45–46 (1973). Cf. *Bowers v. Hardwick*, 478 U.S. 186 (1986). For criticism of the German decisions, see Podlech, *Art. 2(1)*, in Luchterhand, Para. Nr. 64. *Contrast* 49 BVerfGE 286, 298–301 (1979), upholding the right to have birth records corrected to reflect a sex-change operation: “[T]he sexual change secured by the complainant cannot be considered immoral.”

²⁰⁵ See Art. 9(2), 18, 21(2) GG.

²⁰⁶ See, e.g., 5 BVerfGE 85 (1956) (Communist Party case). See also Art. 20(3), which in using similar language requires the legislature to follow only the constitution itself. See 6 BVerfGE at 38.

²⁰⁷ 6 BVerfGE 32, 38 (1957). See also *id.* at 38–40, invoking legislative history. For an argument in favor of a narrower interpretation, see Dürig, *Art. 2(1)*, in 1 Maunz/Dürig, Para. 18–25.

other federal laws,²⁰⁸ provoked the question whether Article 2(1) added anything at all. At a minimum, as the cases have shown, it provided affected individuals with standing to attack laws passed without legislative authority²⁰⁹ or delegating excessive rulemaking power to the executive.²¹⁰ More important and more interesting was the reminder in *Elfes* that a law qualified as part of the constitutional order only if it conformed with “the principles of the rule of law and the social welfare state.”²¹¹

While the Sozialstaat principle standing alone has never yet been held to invalidate governmental action or inaction, the rule of law has given Article 2(1) much of its bite. As we have seen, even in the absence of express provisions such as those applicable to bodily restraint, condemnation, and occupational freedom, the Rechtsstaat principle has been held to permit restrictions of liberty only in accordance with statute,²¹² and limitations on general freedom of action lacking a sufficient legal basis have been struck down.²¹³ The Rechtsstaat principle also contains a significant limitation on delegation of policymaking authority that goes beyond that made explicit by Article 80(1),²¹⁴ requires fair warning²¹⁵ and fair procedure,²¹⁶ and imposes meaningful limitations on retroactivity.²¹⁷ Most important, as

²⁰⁸ *Slaughter-House Cases*, 83 U.S. 36 (1873).

²⁰⁹ *E.g.*, 26 BVerfGE 246, 25 3–58 (1969) (striking down statute for want of federal competence to regulate use of the title of Engineer).

²¹⁰ *E.g.*, 20 BVerfGE 257, 268–7 1 (1966) (invalidating a provision for fees in antitrust proceedings for violation of the delegation limits of Art. 80(1)).

²¹¹ 6 BVerfGE 32, 41 (1957).

²¹² *See supra* notes 51–54.

²¹³ *E.g.*, 56 BVerfGE 99, 106–09 (1981) (reversing a decision that forbade a lawyer to appear as counsel against a municipality if his partner was a member of the municipal council for want of “a legal basis in the governing provisions of ordinary law”).

²¹⁴ *See, e.g.*, 8 BVerfGE 274, 324–27 (1958), most pertinently invoking the separation of powers provision of Art. 20(2): “If the authority of the executive is not sufficiently defined, it no longer can be said to execute the law. . . but takes over [the legislature’s] function.” *See also* 49 BVerfGE 89, 126–30 (1978), enunciating the strict requirement that the legislature itself make all “essential” decisions regarding the peaceful use of nuclear power. Article 80(1) applies only to the delegation of authority to adopt regulations under federal law. Despite the plain words and purpose of Art. I, § 1 of our Constitution, the Supreme Court has struck down none of the numerous essentially unlimited delegations of federal legislative power since *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

²¹⁵ *See* 5 BVerfGE 25, 31–34 (1956). *Cf.* *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921).

²¹⁶ *E.g.*, 26 BVerfGE 66, 71–72 (1969) (permitting victim to intervene in criminal proceeding); 38 BVerfGE 105, 111–18 (1974) (affirming a witness’s right to counsel under certain circumstances); 57 BVerfGE 117, 120–21 (1981) (relying on the rule of law in conjunction with the explicit guarantee of a judicial hearing

we have also seen, the German conception of the rule of law embodies the pervasive principle of proportionality.²¹⁸ It is this principle, in connection with the broad interpretation of “personality” in *Elfes*, that has enabled the German Court to act as censor of the reasonableness of all governmental action.

As in the United States during the *Lochner* era, most challenged measures have passed muster. National security was held to justify the law limiting issuance of passports in *Elfes*;²¹⁹ price regulations were upheld because they were reasonable.²²⁰ At the same time, a number of restrictions on the general freedom of action have been struck down for want of proportionality. The state may not prohibit intermediaries from seeking to match willing drivers with people who are looking for rides.²²¹ A person in pretrial custody may not be denied a typewriter.²²² As noted in connection with the human dignity provision, persons who have undergone sex change operations are entitled to have birth records corrected to reflect their new

in Art. 103(1) to hold that a filing deadline was satisfied when the document arrived at court); 64 BVerfGE 135, 145–57 (1983) (discussing to what extent proceedings must be translated for a defendant who cannot communicate in German); 65 BVerfGE 171, 174–78 (1983) (no appellate argument in the absence of defense counsel). Why these opinions did not rely solely on Article 103(1) was not always made clear. But see 38 BVerfGE at 118: “Art. 103 (1) basically guarantees only a hearing as such, not a hearing with the assistance of counsel”; 64 BVerfGE at 145–46 and cases cited, explaining that the essence of an Article 103(1) hearing was the right to know the basis of the charge and to respond. Cf. *Goss v. Lopez*, 419 U.S. 565 (1965), stressing the same elements in determining what constituted due process in connection with a suspension from school.

²¹⁷ See, e.g., 13 BVerfGE 206, 212–14 (1961) (invalidating a law increasing the tax on land sales previously made); 21 BVerfGE 173, 182–84 (1967) (holding that a prohibition on combining tax counseling with certain other activities could not be applied immediately to persons who had been engaged in both before the statute was passed). Retroactivity in the first of these cases was in the Court’s terms “genuine” (*echt*), since the law attached consequences to past acts themselves. In the second it was “spurious” (*unecht*), since the law merely disappointed expectations by diminishing the value produced by past actions. Not surprisingly, the Court has been considerably more lenient in passing upon spurious than upon genuine retroactivity. See, e.g., 19 BVerfGE 119, 127–28 (1965) (permitting taxation of securities that had been tax-exempt when purchased). Also not surprisingly, there have been difficulties in distinguishing genuine from spurious retroactivity. E.g., 72 BVerfGE 175, 196–99 (1986) (upholding increase in interest payable in the future on preexisting loans). For criticism of the distinction as engendering more confusion than clarity, see 48 BVerfGE 1, 23 (1978) (Steinberger, J., dissenting).

²¹⁸ See especially *supra* notes 159–66.

²¹⁹ 6 BVerfGE 32, 41–44 (1957).

²²⁰ 8 BVerfGE 274, 327–29 (1958).

²²¹ 17 BVerfGE 306, 313–18 (1964).

²²² 35 BVerfGE 5, 9–11 (1973). A television set, however, is not required. 35 BVerfGE 307, 309–10 (1973) (rejecting a claim based upon the freedom to inform oneself from generally available sources, Art. 5(1)).

gender.²²³ Parents may not be given power to bind minor children by contract;²²⁴ the filing of criminal charges in good faith may not be treated as a tort.²²⁵ In one of the best known cases of this nature the Constitutional Court found it unreasonable to require those who sought to hunt with falcons to demonstrate competence in the use of firearms. Not only did the required skills have “no connection either with the care of falcons or with the practice of falconry,” but any hunter who discharged a weapon during the chase would frighten away his own falcon.²²⁶

Article 2(1) and the proportionality principle have also been employed on a number of occasions to secure a general right of “informational self-determination” (informationelle Selbstbestimmung), or freedom from unwarranted publicity. First elaborated in the *Microcensus* case in 1969,²²⁷ this right has been held to limit divulgence of divorce files,²²⁸ medical records,²²⁹ and private recordings of conversations.²³⁰ Most recently it has led the Court to require greater restraint and confidentiality in connection with both the census²³¹ and legislative investigations,²³² and even to forbid general dissemination of the names of individuals who had been stripped of contracting authority as spendthrifts²³³ — although one might have thought publicity essential to protection of those with whom the spendthrift might deal. In this as in so many other respects the German Court has gone beyond its American counterpart; while freedom from certain disclosures is afforded in this country by the First, Fourth, and Fifth Amendments,²³⁴ we have as yet no general right to informa-

²²³ 49 BVerfGE 286, 298–301 (1979).

²²⁴ 72 BVerfGE 155, 170–73 (1986) (giving a correspondingly narrow interpretation to the countervailing provision for parental rights in Article 6(2)).

²²⁵ 74 BVerfGE 257, 259–63 (1987) (making the Lockean argument that the citizen, having surrendered his natural right to self help, is entitled to seek state protection).

²²⁶ 55 BVerfGE 159, 165–69 (1980).

²²⁷ 27BVerfGE 334, 350-55 (1970).

²²⁸ 27 BVerfGE 344, 350–55 (1970).

²²⁹ 32 BVerfGE 373, 378–86 (1972).

²³⁰ 34 BVerfGE 238, 245–51 (1973).

²³¹ 65 BVerfGE 1, 41–70 (1983).

²³² 77 BVerfGE 1, 38–63 (1987).

²³³ 78 BVerfGE 77, 84–87 (1988).

²³⁴ See U.S. Const., Amend. 4 (“The right of the people to be secure. . . against unreasonable searches and seizures shall not be violated”), 5 (“nor shall any person. . . be compelled in any criminal case to be a witness against himself”); *NAACP v. Alabama*, 357 U.S. 449 (1957).

tional privacy—much less a governmental duty to prevent private revelations of past crimes, such as the German Court established in the *Lebach* case in 1973.²³⁵

Article 2(1), in conjunction with the proportionality principle, is thus the heart of substantive due process in Germany.

F. Equality

“All persons,” says Article 3(1), “shall be equal before the law.” Relying on Article 1(3)’s statement that the Bill of Rights binds legislative as well as executive and judicial authorities, the Constitutional Court made clear at the outset that—in contrast to a similarly worded clause in the 1850 Prussian Constitution—Article 3 forbade not only unequal administration of the laws but unequal legislation, too.²³⁶

It could hardly have been the intention of those who wrote this provision to forbid all distinctions between persons—to require that murderers go unpunished or blind children be allowed to practice brain surgery. Taking a cue from decisions interpreting predecessor provisions, the Court in its very first substantive decision concluded that Article 3(1) required equal treatment only when inequality would be arbitrary (*willkürlich*).²³⁷ Thus, as in the United States, the equality provision forbids only those classifications which are without adequate justification; but the Constitutional Court has taken the need for such justification very seriously.

²³⁵ 35 BVerfGE 202, 218–44 (1973), also noted at note 201 *supra*. Cf. *Briscoe v. Reader’s Digest*, 93 Cal. 866, 483 P.2d 34 (1971) (permitting but not requiring damages for a strikingly similar disclosure on strikingly similar grounds). It seems questionable whether our Supreme Court would even permit the assessment of damages in such a case after *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) (holding the state could not forbid publication of the name of a rape victim identified by public judicial record). As in the case of occupational freedom, however, it would be dangerous to conclude from the more extensive constitutional protection of informational privacy in the Federal Republic that Germans are in fact freer than Americans in this regard. Citizens of the Federal Republic are required both to possess identity cards and to register their place of residence; a legislator who voted for either measure in this country might well find himself out of a job. See *Gesetz über Personalausweise vom 21. April 1986*, BGBl. I S. 548; *Velderechtsrahmengesetz vom 16. Aug. 1980*, BGBl. I S. 1429, in 1 VERFASSUNGS-UND VERWALTUNGSGESETZ DER BUNDESREPUBLIK DEUTSCHLAND Para. Nr. 255–56 (Sartorius ed.)

²³⁶ 1 BVerfGE 14, 52 (1951) (Southwest Reorganization Case). Cf. Constitution for the Prussian State (1850), Art. 4. See also the 1925 decision of the Reichsgericht (111 RGZ 320, 322–23), recounting the earlier understanding and leaving open the question whether the comparable provision in Art. 109 of the 1919 Weimar Constitution should be more broadly construed; Stein, *Art. 3*, in 1 Luchterhand, Para. Nr. 5–6.

²³⁷ 1 BVerfGE 14, 52 (1951). See also 111 RGZ 320, 329 (1925) (reaching the same conclusion under the analogous clause of the Weimar Constitution). For the suggestion that the inspiration for this interpretation came from the United States and from Switzerland, see Stein, *Art. 3*, in 1 Luchterhand, Para. Nr. 6.

I. Classifications Expressly Prohibited

Article 3(3) gives specific content to the general equality requirement by listing a number of bases of classification that basically cannot be justified: “No one may be prejudiced or favored because of his sex, his parentage, his race, his homeland and origin, his faith, or his religious or political opinions.”²³⁸ In contrast to the United States, where race decisions have formed the heart of equal protection jurisprudence, the sex discrimination provision is the only one of these specific prohibitions that has played a significant role in the German cases.²³⁹

There have been many sex discrimination decisions, and they long antedate our Supreme Court’s first forays into the field.²⁴⁰ Article 117(1) gave legislatures until 1953 to eliminate gender distinctions from the civil code and other laws, but in that year the Constitutional Court affirmed its authority to strike down nonconforming provisions as soon as the grace period expired.²⁴¹

The Court has made clear from the beginning that the specific requirement of sex equality demands heightened scrutiny of classifications based on gender. Merely rational grounds that might suffice under the general equality provision cannot

²³⁸ Article 3(2) reinforces the ban on sex discrimination by adding that “[m]en and women shall have equal rights.” See Dürig, *Art. 3(3)*, in 1 Maunz/Dürig, Para. Nr. 4, equating the meanings of the two sex equality provisions and explaining their origins.

²³⁹ See 2 BVerfGE 266, 286 (1953) (upholding restrictions on travel by East German refugees because based not on their homeland (Heimat) but on the social and economic difficulties presented by a large influx of persons); 5 BVerfGE 17, 21–22 (1956) (permitting reference to East German law to determine age of majority for East German); 48 BVerfGE 281, 287–88 (1978) (permitting relief for Spanish Civil War veterans to be limited to those living in the Federal Republic on the ground that “Heimat” meant geographical origin and “Herkunft” (origin) social class); 63 BVerfGE 266, 302–05 (1983) (Simon, J., dissenting) (complaining that the ban on political discrimination had been largely ignored). See also Dürig, *Art. 3(3)*, in 1 Maunz/Dürig, Para. Nr. 75, 87, 46, confirming that the “homeland” provision was designed to protect refugees and that “origin” refers to social class, and explaining that the inclusion of “ancestry” forbids nepotism, among other things. Contrast *Kotch v. Pilot Commissioners*, 330 U.S. 552 (1947) (rejecting an equal protection challenge to a system under which only “relatives and friends” of established pilots were accepted as apprentices). Thus the list of suspect classifications is somewhat longer in West Germany than it is in the United States.

²⁴⁰The Supreme Court first invalidated sex discrimination in *Reed v. Reed*, 404 U.S. 71 (1971) (striking down a preference for males to administer decedents’ estates).

²⁴¹ 3 BVerfGE 225, 237–48 (1953) (rejecting objections, which look strange to American eyes, that judicial enforcement of the constitutional prohibition might offend higher-law principles of predictability and separation of powers). For development of the interesting notion of unconstitutional constitutional provisions, see 1 BVerfGE 14, 32–33 (1951); 3 BVerfGE at 230–36.

justify sex discrimination; a “compelling” reason is required.²⁴² Compelling reasons for this purpose have been specifically defined: “Differential treatment of men and women. . . is permissible only if sex-linked biological or functional differences so decisively characterize the matter to be regulated that common elements can no longer be recognized or at least fade completely into the background.”²⁴³

The reference to biological differences is readily understandable and would justify sex distinctions for such purposes as procreation and marriage.²⁴⁴ Recognition of the legitimacy of “functional” distinctions, on the other hand, seemed to create the risk of perpetuating stereotypes based on traditional male and female roles.²⁴⁵

In fact, some early decisions applying the gender provision were not promising. The Court permitted the state to limit the work done by women in the interest of protecting their health,²⁴⁶ place the primary duty of financial support of illegitimate children on fathers,²⁴⁷ and require widowers but not widows to prove dependency in order to obtain benefits upon the death of a spouse.²⁴⁸ In accordance with explicit language now found in Article 12a,²⁴⁹ the Court upheld a military draft of men only.²⁵⁰ Most strikingly, in 1957 the Justices went so far as to uphold a law that punished homosexual activity only between men—on the armchair sociological ground that female homosexuals tended to be quiet about it and thus posed less of a threat to society.²⁵¹

²⁴² See, e.g., 15 BVerfGE 337, 343–44 (1963); 48 BVerfGE 327, 337 (1978).

²⁴³ 39 BVerfGE 169, 185–86 (1975).

²⁴⁴ See Dürig, *Art. 3(2)*, in 1 Maunz/Dürig, Para. Nr. 13; Stein, *Art. 3*, in 1 Luchterhand, Para. Nr. 81.

²⁴⁵ See the criticism of the “functional” criterion in Dürig, *Art. 3(2)*, in 1 Maunz/Dürig, Para. Nr. 18.

²⁴⁶ 5 BVerfGE 9, 11–12 (1956) (finding differential treatment justified by “the objective biological and functional differences between men and women”).

²⁴⁷ 11 BVerfGE 277, 281 (1960).

²⁴⁸ 17 BVerfGE 1, 17–26 (1963). *Contrast* *Frontiero v. Richardson*, 411 U.S. 677 (1973) (striking down a similar provision in the United States several years later).

²⁴⁹ “Men who have attained the age of eighteen years...”

²⁵⁰ 12 BVerfGE 45, 52–53 (1960 (invoking Art. 12(3) and 73 Nr. 1, which then contained the limitation later placed in Article 12a). *Cf.* *Rostker v. Goldberg*, 453 U.S. 57 (1981) (upholding a similarly selective draft without benefit of such an explicit provision).

²⁵¹ 6 BVerfGE 389, 420–32 (1957). The Court adhered to this decision as late as 1973. See 36 BVerfGE 41, 45–46 (1973) (upholding ban on homosexual acts between men and boys). Apparently it did not occur to anyone to argue that it was unequal to permit men to have sexual relations with women but not with other men; the distinct contention that the prohibition infringed Article 2(1)’s right to free development

From a very early date, however, the Court also began to strike down gender classifications, and the trend has intensified with the passage of time. As early as 1959 the Justices invoked Article 3 in conjunction with the familial rights guaranteed by Article 6 to invalidate a law giving fathers the last word on childrearing;²⁵² four years later they gave legislators two years to do away with a preference for men in the inheritance of farms.²⁵³ Later decisions have established that mothers must sometimes share the cost of child care,²⁵⁴ that a father's citizenship cannot determine that of his child,²⁵⁵ that married couples may elect the wife's maiden name,²⁵⁶ and that a "housework day" for single workers may not be prescribed for women only.²⁵⁷ In 1967 the Court struck down a dependency requirement for widowers' benefits in the civil service, distinguishing its earlier decision on the ground that here, in contrast to the private sector, pensions were generally based upon services rendered rather than need.²⁵⁸ In 1975 it added that changing patterns of women's employment would soon require a similar conclusion in the case of other pensions as well.²⁵⁹

Sex classifications continue to be upheld in some cases. A 1976 decision permitted men for the time being to receive greater retirement benefits than women because their wages were higher.²⁶⁰ Mothers may still be given preferential custody of children born out of wedlock.²⁶¹ Most recently, invoking the Sozialstaat principle,

of personality was rejected on the ground that "homosexual activity unmistakably offends the moral code." 6 BVerfGE at 434. See text at note 204 *supra*.

²⁵² 10 BVerfGE 72–89 (1959).

²⁵³ 15 BVerfGE 337, 342–46, 352 (1963).

²⁵⁴ 26 BVerfGE 265, 273–77 (1969). The Court specifically reaffirmed its earlier decision (see note 247 *supra*) that fathers could generally be required to support illegitimate children as a counterweight to the mother's duty to rear them; but it saw no reason to distinguish between parents when the child lived with neither one.

²⁵⁵ 37 BVerfGE 217, 244–59 (1974). Nor may it determine the law governing marital property (63 BVerfGE 181, 194–96 (1983)) or divorce (68 BVerfGE 384, 390 (1985)).

²⁵⁶ 48 BVerfGE 327, 337–40 (1978).

²⁵⁷ 52 BVerfGE 369, 373–79 (1979).

²⁵⁸ 21 BVerfGE 329, 340–54 (1967).

²⁵⁹ 39 BVerfGE 169, 185–95 (1975).

²⁶⁰ 43 BVerfGE 213, 225–230 (1977). For the limits of this holding, see 57 BVerfGE 335, 342–46 (1981).

²⁶¹ 56 BVerfGE 363, 387–90 (1981).

the Court has expressly endorsed a variant of affirmative action in this field: Women may be given special benefits to compensate for disadvantages having a biological basis.²⁶² As in the United States, however, sex is treated as a relatively suspect classification in Germany – along with race, religion, and the other bases of distinction enumerated in Article 3(3).

II. *The General Equality Provision*

The list of forbidden bases of classification in Article 3(3) is not exhaustive. Despite its initial definition of forbidden distinctions as those that were arbitrary²⁶³ and repeated professions of judicial restraint,²⁶⁴ the Constitutional Court has also applied the general equality clause of Article 3(1) to strike down an impressive variety of measures.

To begin with, the Court has scrutinized with especial care those classifications affecting interests specifically protected by other provisions of the Basic Law. Often it has done so on the basis of the other provisions themselves.²⁶⁵ On other occasions the substantive provisions have been drawn upon to give content to the general prohibition of Article 3(1). Thus the Court has been quick to condemn discrimination against married persons²⁶⁶ or families with children²⁶⁷ under Article 3(1) in conjunction with the applicable paragraphs of Article 6. It has done the same in cases respecting inequalities affecting the academic²⁶⁸ and occupational²⁶⁹ freedoms guaranteed by Articles 5(3) and 12(1), the traditional rights of civil servants under

²⁶² 74 BVerfGE 163, 178–81 (1987) (upholding earlier optional retirement for women on the ground that their traditionally disadvantaged position in the workplace was attributable in part to anticipated and actual interruptions during pregnancy, birth, and childrearing and raising the question whether such a measure might even be constitutionally *required*). Cf. the explicit requirement of Article 6(5) (discussed *supra* notes 31–38) that the legislature act affirmatively to assure equality of actual opportunity for illegitimate children.

²⁶³ See *supra* 237.

²⁶⁴ E.g., 12 BVerfGE 326, 337–38 (1961).

²⁶⁵ See, e.g., the marriage and family decisions discussed *supra* notes 28–31.

²⁶⁶ E.g., 13 BVerfGE 290, 295–318 (1962) (deductibility of salary paid to owner's spouse); 67 BVerfGE 186, 195–99 (1984) (unemployment compensation when both spouses out of work).

²⁶⁷ See 61 BVerfGE 319, 343–44, 351–54 (1982) (requiring cost of child care to be considered in determining taxable income).

²⁶⁸ E.g., 56 BVerfGE 192, 208–16 (1981). See also the cases discussed *supra* notes 142–46 *supra*.

²⁶⁹ E.g., 37 BVerfGE 342, 352–60 (1974).

Article 33(5),²⁷⁰ the right to operate private schools under Article 7(4),²⁷¹ and above all the right to participate in elections.²⁷² In several of these cases,²⁷³ as in those passing upon classifications made suspect by Article 3(3), the Court explicitly required an unusually strong justification for discrimination. In 1986 it expressly generalized the principle: “If the rule to be tested under Article 3(1) affects other interests protected by the Bill of Rights, the legislature’s freedom of action is more narrowly circumscribed.”²⁷⁴ These decisions closely resemble those reached under the fundamental rights strand of equal protection analysis in the United States.²⁷⁵

As in the United States, there is some tendency to extend this heightened scrutiny to classifications affecting other interests deemed fundamental—such as the right to have birth records altered to reflect a sex-change operation—which are not specifically enumerated in the Basic Law.²⁷⁶ Indeed it has often been said that classifications made in tax laws require special justification because of the severity of their impact.²⁷⁷ A surprising number of such distinctions have actually been found

²⁷⁰ 56 BVerfGE 146, 161–69 (1981).

²⁷¹ 75 BVerfGE 40, 71–78 (1987).

²⁷² *E.g.*, 1 BVerfGE 208, 241–60 (1952) (exclusion of party receiving less than 7.5% of vote from proportional representation in legislature); 3 BVerfGE 19, 23–29 (1953) (requirement of 500 petition signatures for Bundestag candidate of party not already represented); 6 BVerfGE 273, 279–82 (1957) (nondeductibility of contributions to unrepresented parties); 7 BVerfGE 99, 107–08 (1957) (denial of public television time to unrepresented party); 16 BVerfGE 130, 138–44 (1963) (unequal population of election districts); 41 BVerfGE 399, 412–23 (1976) (exclusion of independent candidate from reimbursement of election expenses); 44 BVerfGE 125, 138–66 (1977) (government propaganda for parties in ruling coalition). Some of these decisions were based in part upon the explicit guarantee of “equal” Bundestag elections in Article 38 or on Article 21(1)’s guarantee of the rights of political parties; others add references to the guarantee of democracy in Articles 20 and 28. *Cf.* Justice Stone’s suggestion—which has been followed—of heightened scrutiny of measures impairing the integrity of the democratic process. *United States v. Carolene Products Co.*, 304 U.S. 144, 152–53 n.4 (1938).

²⁷³ *E.g.*, 1 BVerfGE 208, 249, 255, 256 (1952) (elections); 37 BVerfGE 342, 352–54 (1974) (occupational freedom); 67 BVerfGE 186, 195–96 (1984) (marriage).

²⁷⁴ 74 BVerfGE 9, 24 (1986).

²⁷⁵ *See, e.g.*, *Carey v. Brown*, 447 U.S. 455, 461–62 (1980) (freedom of speech); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (free exercise of religion).

²⁷⁶ 60 BVerfGE 123, 133–35 (1982) (striking down a provision limiting this right to persons at least 25 years old). *Cf.* *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964) (subjecting limitations on the value of votes to strict scrutiny although the right to vote was nowhere generally guaranteed).

²⁷⁷ *See, e.g.*, 21 BVerfGE 12, 27 (1966); 35 BVerfGE 324, 335 (1973). For a rare protest against the notion of strict scrutiny in tax cases generally, see 15 BVerfGE 313, 318 (1963).

wanting: discriminatory taxation of chain stores,²⁷⁸ preferential treatment of vertically integrated firms under the value-added tax,²⁷⁹ nondeductibility of partners' salaries²⁸⁰ and of child-care expenses,²⁸¹ to name only a few.²⁸² These decisions stand in sharp contrast to modern decisions in the United States; the Supreme Court has not scrutinized classifications in tax laws with much care since the New Deal revolution.²⁸³

Moreover, although the Constitutional Court has sometimes said that legislatures have particularly broad discretion in determining how to spend public funds,²⁸⁴ one dissenting Justice, in language reminiscent of that of Justice Thurgood Marshall, has argued for heightened scrutiny of discriminatory welfare provisions under the influence of Article 20's social state principle.²⁸⁵ Indeed, in contrast to the American cases, the German decisions lend her considerable support. Among other things, the Constitutional Court has found fault with the exclusion of unemployment benefits for students²⁸⁶ and for persons formerly employed by their parents,²⁸⁷ limitations on aid for the blind²⁸⁸ or disabled,²⁸⁹ and the denial of retire-

²⁷⁸ 19 BVerfGE 101, 111–18 (1965). But see 29 BVerfGE 327, 335–36 (1970) (permitting discriminatory taxation of multiply owned saloons).

²⁷⁹ 21 BVerfGE 12, 26–42 (1966).

²⁸⁰ 13 BVerfGE 331, 338–55 (1962).

²⁸¹ 68 BVerfGE 143, 152–55 (1984).

²⁸² Note also the intensive scrutiny practiced in an early decision striking down an exaction for support of the fire department that was imposed only upon men between the ages of 18 and 60 who had not served as firemen, 9 BVerfGE 291, 302 (1959): “[A]s a special assessment [the exaction] would have to be limited to those who derived special benefits from the fire department; as a substitute for service it could reach only those under a duty to serve; as a general tax it could not be imposed only on men between 18 and 60 years of age.” A revised exaction limited to those who were eligible for fire duty but had not served was later upheld, 13 BVerfGE 167 (1961).

²⁸³ See, e.g., *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973), upholding a personal property tax imposed on property not owned by individuals without a serious effort to justify the distinction. See generally Gunther, *Foreword: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972). For a recent exception to this pattern, see *Allegheny Pittsburgh Coal Co. v. County Commission*, 109 S.Ct. 633 (1989).

²⁸⁴ E.g., 17 BVerfGE 210, 216 (1964).

²⁸⁵ See 36 BVerfGE 237, 248–50 (Rupp-von Brünneck, J., dissenting). Cf. *Dandridge v. Williams*, 397 U.S. 471, 520–23 (1970) (Marshall, J., dissenting).

²⁸⁶ 74 BVerfGE 9, 24–28 (1986).

²⁸⁷ 18 BVerfGE 366, 372–80 (1965) (noting the severity of the exclusion and the impact of the Sozialstaat principle).

²⁸⁸ 37 BVerfGE 154, 164–66 (1974).

ment benefits to persons living abroad.²⁹⁰ Some of these decisions may be explainable on the ground that the classification impinged upon some other fundamental right; but the overall impression is that the Constitutional Court is rather strict in scrutinizing classifications in the distribution of welfare benefits as such.

Indeed, without regard to the various categories of heightened scrutiny already discussed, recent opinions have exhibited a marked tendency to replace the deferential arbitrariness standard originally enunciated with the apparently more aggressive search for a reason “sufficient to justify” the challenged distinction.²⁹¹ Decisions in the past few years suggest that, whatever formulation is employed, review under the general equality provision is never as toothless as it has become in economic cases in the United States. In striking down limitations on the assessment and award of agency or court costs²⁹² without intimating that the distinctions either embodied suspect classifications or impinged upon fundamental rights, for example, the Constitutional Court conjured up memories of the vigorous way in which the Equal Protection Clause was enforced in economic cases during the *Lochner* era in this country.²⁹³

Furthermore, in more recent decisions the notion of arbitrariness has tended to come loose from its moorings and to enjoy an independent life of its own. Originally a test for the legitimacy of legal distinctions, arbitrariness began to appear, despite cogent warnings in dissent,²⁹⁴ as a ground for condemning official action—especially judicial action—without mention of inequality at all.²⁹⁵ Thus the equality

²⁸⁹ 39 BVerfGE 148, 152–56 (1975) (finding such a limitation not yet unconstitutional but warning that it soon may be).

²⁹⁰ 51 BVerfGE 1, 23–29 (1979) (holding that they must at least be given their contributions back).

²⁹¹ See, e.g., 74 BVerfGE 9, 29–30 (1986) (dissenting opinion) (pointing out the general and unannounced change in the governing standard).²⁹¹

²⁹² 50 BVerfGE 217, 225–33 (1979); 74 BVerfGE 78, 94–96 (1986). See also 54 BVerfGE 277, 293–97 (1980) (holding in contrast to our certiorari practice that the highest civil court could not decline jurisdiction of meritorious cases simply because of its overloaded docket).

²⁹³ Cf., e.g., *Gulf, C. & S.F. Ry. v. Ellis*, 165 U.S. 150 (1897) (striking down a provision that imposed attorney fees in actions for livestock losses only if the defendant was a railroad). See generally THE SECOND CENTURY, chs. 2, 5, 7.

²⁹⁴ See 42 BVerfGE 64, 79–83 (1976) (Geiger, J., dissenting).

²⁹⁵ E.g., 57 BVerfGE 39, 41–42 (1981); 58 BVerfGE 163, 167–68 (1981); 62 BVerfGE 189, 191–94 (1982); 62 BVerfGE 338, 343 (1982); 71 BVerfGE 202, 204–05 (1985). A plausible explanation may be that to deviate from the law in a particular case is to apply it unequally. See 54 BVerfGE 117, 124–26 (1980); Dürig, *Art. 3(1)*, in 1 Maunz/Dürig, Para. Nr. 52.

clause of Article 3(1) bade fair to become a guarantee of substantive and procedural due process as well—though there was hardly any need for another such provision in view of the broad interpretation already given the right to free development of personality under Article 2.

Finally, although the Constitutional Court has sometimes said that Article 3 imposes no duty to rectify inequalities existing apart from governmental action,²⁹⁶ other opinions have more than hinted that it may outlaw de facto inequality under some circumstances. The first was an opinion, reminiscent of *Griffin v. Illinois*, relying on Article 3(1) to require the assignment of counsel to an indigent party at state expense²⁹⁷—one of the very few areas in which our Supreme Court has come close to recognizing positive rights to government support. Most arresting in this regard was the decision that allowing taxpayers unrestricted deductions for political contributions gave an unfair advantage to wealthy contributors and the parties they tended to support²⁹⁸—with an explicit dictum to the effect that progressive taxation was constitutionally required.²⁹⁹ This is but one more example of the ways in which the equality clauses, like other provisions of the Basic Law, have been employed to make the Constitutional Court ultimate censor of the reasonableness of all governmental action.

G. Conclusion

What is one to make of all this? What one will; my aims are descriptive and comparative. For better or worse, the German Constitutional Court is in the business of determining the reasonableness of governmental action—and, to a significant degree, of inaction as well. In exercising this authority the Court has delved repeatedly into details of the organization and practices of higher education³⁰⁰ and broad-

²⁹⁶ See, e.g., 1 BVerfGE 97, 107 (1951).

²⁹⁷ 2 BVerfGE 336, 339–41 (1953). Cf. *Griffin*, 351 U.S. 12 (1956). See also 1 BVerfGE 109, 111 (1952) (finding assignment of counsel required by the more general requirements of democracy and the social state); 54 BVerfGE 251, 266–73 (1980) (requiring state-assigned guardian forward without funds).

²⁹⁸ 8 BVerfGE 51, 63–69 (1958).

²⁹⁹ *Id.* at 68–69: “[I]n the tax field a formally equal treatment of rich and poor by application of the same tax rate would contradict the equality provision. Here justice requires that in the interest of proportional equality a person who can afford more pay a higher percentage of his income in taxes than one with less economic power.”

³⁰⁰ In addition to the cases on university admissions noted above, see the line of decisions beginning with 35 BVerfGE 79 (1973), invoking Art. 5(3)’s guarantee of academic freedom to assure faculty control of basic questions relating to research and curriculum.

casting,³⁰¹ passed upon such minutiae as the appropriate titles of teachers and judges, and joined our Supreme Court in composing a detailed (though strikingly different) abortion code. Moreover, while the German court has so far generally been deferential to other branches in determining how and how far to protect citizens against want or third parties, the abortion and private school subsidy cases demonstrate the potential for constitutionalizing vast additional areas of tort, criminal, and welfare law. The tendency of the German decisions has been progressive rather than reactionary, and the notion of affirmative rights to governmental protection is essentially foreign to our jurisprudence; but the basic principle of free-wheeling judicial review is reminiscent of that which gave us *Scott v. Sandford*, *Lochner v. New York*, and *Roe v. Wade*.

Whether the German judges were justified in finding that the Basic Law conferred such sweeping judicial authority I leave to those brought up in the system. I have explained at some length elsewhere why I believe our Constitution does not,³⁰² but both the language and the history of the two documents differ significantly. That familial and occupational rights are entitled to some constitutional protection in Germany, for example, is obvious from the text; so is the disfavored position of discrimination on grounds of sex. Only to a limited extent, therefore, are the German decisions directly relevant to the interpretation of our Constitution.

More important for us is what the German decisions have to say about the desirability of empowering politically insulated judges to make open-ended judgments about the reasonableness of government action. Some may find in the German experience confirmation of the dangers of unchecked judicial intervention, others proof of the need for broad judicial review. Unlike their American counterparts during the *Lochner* years, the German judges do not seem often to have blocked desirable or even fairly debatable reforms; they do seem to have spared their compatriots a flock of unjustified restrictions on liberty and property. Whether this record affords a basis for confidence that either American or German judges would exercise such a power wisely in the long run is another matter; so is the question whether so broad a power, however wisely exercised, is consistent with one's conception of democracy. Phil Kurland had a word for it, as he has on so many important matters: "Essentially because [the Supreme Court's] most important function is anti-majoritarian, it ought not to intervene to frustrate the will of the majority ex-

³⁰¹ The seminal decision on broadcasting was 12 BVerfGE 205 (1961), where the Court interpreted Art. 5(1)'s provision that "freedom of reporting by means of broadcasts. . . [is] guaranteed" to require the state to regulate broadcasting in such a way that various social and political interests had the opportunity to utilize the medium and to participate in its governance. For later decisions applying and refining these requirements, see, e.g., 57 BVerfGE 295 (1981); 73 BVerfGE 118 (1986).

³⁰² See generally THE FIRST HUNDRED YEARS and THE SECOND CENTURY.

cept where it is essential to its functions as guardian of interests that would otherwise be unrepresented in the government of the country.”³⁰³ Reasonable people will continue to differ on this fundamental question; their ability to do so is an important aspect of the free democratic order established by the constitutions both of the United States and of the Federal Republic.

³⁰³ KURLAND, POLITICS, THE CONSTITUTION, AND THE WARREN COURT 204 (1970).

Parliamentary Consent to the Use of German Armed Forces Abroad: The 2008 Decision of the Federal Constitutional Court in the AWACS/Turkey Case

By Helmut Philipp Aust & Mindia Vashakmadze*

A. Introduction

Since the German Federal Constitutional Court's 1994 decision on the deployment of AWACS surveillance aircraft over the Adriatic Sea¹, it is one of the cornerstones of German constitutional law that Parliament (the *Bundestag*) needs to consent to the external use of German Armed Forces in situations where imminent involvement in hostilities is likely.² However, the *Bundestag* may neither determine "the modalities, the dimension and the duration of the operations, nor the necessary coordination within and with the organs of international organizations."³ As the requirement of constitutive parliamentary approval is not directly set out in the German Basic Law, the Federal Constitutional Court (in the following: FCC or the Court) derived it from the general constitutional framework.⁴ The concept of "parliamentary army", designed by the Court, attempts to strike a balance between executive effectiveness and parliamentary participation.

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¹ *AWACS/Somalia Case*, BVerfGE 90, 286; other aspects of the case pertained to the deployment of German soldiers to Somalia.

² For a general assessment of the legal, historical and political issues see Georg Nolte, *Germany: ensuring political legitimacy for the use of military forces by requiring constitutional accountability*, in *DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW* 231 (Charlotte Ku & Harold K. Jacobson eds., 2003).

³ BVerfGE 90, 286, 389.

⁴ BVerfGE 90, 286, 383-384; on this decision see Georg Nolte, *Bundeswehreinätze in kollektiven Sicherheitssystemen – Zum Urteil des Bundesverfassungsgerichts vom 12. Juli 1994*, 54 *ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT* 652, 673 (1994).

The increasing involvement of Germany in international military structures is a challenge to parliamentary control: almost by definition, operations by NATO's envisaged (rapid) Response Force will be difficult to subject to previous parliamentary scrutiny.⁵ While the executive has broad leeway in implementing foreign policy goals including military cooperation⁶, the FCC has made it clear that the legislature's approval of German membership in a system of mutual self-defence such as NATO is not a generalized substitute for parliamentary authorization of the concrete deployment of the armed forces.⁷ However, the Court's broad interpretation of the executive's treaty-making powers in other cases is, according to some, bound to erode parliamentary scrutiny over large areas of German foreign policy.⁸ In 2001, the Constitutional Court decided that the 1999 NATO Strategic Concept, which allowed for so-called "non-Article 5 missions" beyond the North Atlantic area, did not require a renewal of parliamentary approval of the NATO Treaty.⁹ The stance taken by the Court in a 2007 decision concerning the use of German Tornado aircraft in Afghanistan underlined the Court's unwillingness to require a greater role of Parliament in the processes of treaty-interpretation and development.¹⁰

At the moment, a number of states are considering to extend parliamentary rights in the control of the armed forces. This is the case with the United Kingdom where Prime Minister Gordon Brown has ventilated the idea to leave it to the House of Commons to decide when the British armed forces should be used in an armed

⁵ ROMAN SCHMIDT-RADEFELDT, PARLAMENTARISCHE KONTROLLE DER INTERNATIONALEN STREITKRÄFTEINTEGRATION (2005); Roman Schmidt-Radefeldt, *Parliamentary Accountability and Military Forces in NATO: The Case of Germany*, in THE 'DOUBLE DEMOCRATIC DEFICIT': PARLIAMENTARY ACCOUNTABILITY AND THE USE OF FORCE UNDER INTERNATIONAL AUSPICES 147 (Hans Born & Heiner Hänggi eds., 2004).

⁶ BVerfGE 68, 1, 89, 106; BVerfGE 104, 151, 207; see Andreas L. Paulus, *Quo vadis Democratic Control? The Afghanistan Decision of the Bundestag and the Decision of the Federal Constitutional Court in the NATO Strategic Concept Case*, 3 GERMAN LAW JOURNAL (GLJ), No. 1 (2002); Markus Rau, *NATO's New Strategic Concept and the German Federal Government's Authority in the Sphere of Foreign Affairs: The Decision of the German Constitutional Court of 22 November 2001*, 44 GERMAN YEARBOOK OF INTERNATIONAL LAW 544 (2001).

⁷ BVerfGE 90, 286, 387.

⁸ See, e.g., Andreas Fischer-Lescano, *Bundeswehr als globaler Sicherheitsdienstleister? Grenzen der Zustimmungsfähigkeit von bewaffneten Streitkräfteeinsätzen*, in FRIEDEN IN FREIHEIT - PEACE IN LIBERTY - PAIX EN LIBERTÉ. FESTSCHRIFT FÜR MICHAEL BOTHE ZUM 70. GEBURTSTAG 81 (Andreas Fischer-Lescano et al. eds., 2008).

⁹ *New Strategic Concept Case* - BVerfGE 104, 151.

¹⁰ *Tornado Case* - BVerfGE 118, 244.

conflict.¹¹ France has amended its Constitution with a reformulated Article 35. According to this provision, the National Assembly is now to vote on the use of the armed forces, but only once four months have passed since the start of the respective mission. In general, an international trend towards more parliamentary scrutiny over the use of the armed forces has been noticed by some in recent years.¹² Against the background of these developments, a new judgment of the German Federal Constitutional Court may be of interest for an international audience. Its decision of 7 May 2008 on the deployment of NATO AWACS aircraft to Turkey in March 2003 deals with important questions of parliamentary consent to the use of armed forces.¹³ In the constitutional dispute (*Organstreit*), which was brought by the Parliamentary Group of the Liberal Democrats on behalf of the *Bundestag* against the Federal Government, it was at issue at which threshold the requirement of constitutive parliamentary consent would be triggered. Hence, the questions of whether, when and why Parliament should consent to the deployment of Federal Armed Forces abroad were examined in greater detail than before: Whether in the concrete case it was necessary for Parliament to give its assent to the deployment of the aircraft, when such a vote should take place, and finally why the rights of Parliament would need to be preserved in a time which has been described by some as one of “de-parliamentarization”.¹⁴

In this article, we would like to present the essentials of the 2008 AWACS decision (section B). Following that, we will analyze its relationship with some aspects of the 2007 Tornado case (section C) and the general impact of the decision on the flexibility of the executive in the conduct of the Federal Republic’s external relations (section D). In section E, we will provide our conclusions.

¹¹ See, Gordon Brown, Constitutional Reform Statement of 3 July 2007, available at: <http://www.number10.gov.uk/Page12274>, last accessed, 20 November 2008.

¹² See, in this sense Lori F. Damrosch, *The interface of national constitutional systems with international law and institutions on using military forces: changing trends in executive and legislative powers*, in DEMOCRATIC ACCOUNTABILITY, *supra*, note 2, 39, 59.

¹³ *AWACS/Turkey Case* – BVerfG, 2 BvE 1/03, Decision of 7 May 2008; DEUTSCHES VERWALTUNGSBLATT 770 (2008); 35 EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT 312 (2008); NEUE JURISTISCHE WOCHENSCHRIFT 2018 (2008); not yet reported in the official collection.

¹⁴ See, e.g., Matthias Herdegen, *Informalisierung und Entparlamentarisierung politischer Entscheidungen als Gefährdungen der Verfassung?*, 62 VERÖFFENTLICHUNGEN DER VEREINIGUNG DEUTSCHER STAATSRECHTSLEHRER 7 (2003); see also Armin von Bogdandy, *Parlamentarismus in Europa – eine Verfalls- oder Erfolgsgeschichte?*, 130 ARCHIV DES ÖFFENTLICHEN RECHTS 445 (2005); see also the speech of Judge Papier which triggered this discussion: Hans-Jürgen Papier, *Reform an Haupt und Gliedern. Eine Rede gegen die Selbstentmachtung des Parlaments*, FRANKFURTER ALLGEMEINE ZEITUNG 8 (31 January 2003).

B. The 2008 AWACS Decision: The Essentials

I. Factual Background

Prior to the attacks of the US-led coalition of States against Iraq in March 2003, Turkey requested consultations of NATO and its Member States under Article 4 of the NATO Treaty¹⁵ which provides that the Member States will consult each other when the political independence or the security of one of them is threatened. On the basis of these consultations, the Defence Planning Committee of NATO launched "Operation Display Deterrence" on 19 February 2003. Pursuant to this scheme, four AWACS airplanes that allow for the surveillance of large areas of airspace were deployed to Turkey as of 26 February 2003. They were operated by military personnel of various NATO Member States. Soldiers of the German Armed Forces accounted for about a third of the crews of the AWACS airplanes. The operation lasted until 30 April 2003.

Under the NATO Rules of Engagement Applicable in Times of Peace and a subsequent modification for the specific operation on 20 March 2003¹⁶, the AWACS airplanes were not entitled to surveillance measures affecting Iraqi territory or to support military units engaged in the armed conflict in Iraq. Instead, they were meant to allow for the protection of Turkish territory and airspace against impending attacks from Iraq by providing the relevant information to the allies involved in the armed conflict. In a statement to the German Parliament, the German Federal Government emphasized that no support for operations in or against Iraq would be furnished.¹⁷ Before and after the outbreak of hostilities in Iraq on 20 March 2003, no violations of the Turkish airspace by Iraqi airplanes occurred.

The deployment of the German military personnel was not voted on by the *Bundestag*. While both the applicant, the Parliamentary Group of the Liberal Democratic Party (*Freie Demokratische Partei*) and the respondent in this constitutional dispute (*Organstreitverfahren*), the Federal Government, agreed in general that it is for the *Bundestag* to decide on the use of German Armed Forces in "armed operations", the contours of the latter concept gave rise to differing interpretations. While the Liberal Democrats favoured a wider understanding, the

¹⁵ The North Atlantic Treaty, 4 April 1949, UNTS, Vol. 34, 243; UNTS, Vol. 126, 350; UNTS, Vol. 243, 308 (ratified through to present by 26 Member States).

¹⁶ *Statement of NATO Secretary General, Lord Robertson* (20 March 2003), available at: <http://www.globalsecurity.org/military/library/news/2003/03/mil-030320-usia01.htm>, last accessed, 7 August 2008.

¹⁷ *Statement of the German Chancellor Mr. Gerhard Schröder*, in: Protocol 15/34, Preliminary version, 2727.

Government pledged that “Operation Display Deterrence” was a mere routine operation which would not require the consent of the *Bundestag*. In the meantime, the Court declared a motion for a temporary injunction of the applicant as unfounded on 25 March 2003.¹⁸ This finding was based on a balancing between “the consequences that would arise in the event that the temporary injunction is not issued but the underlying measure were later on declared unconstitutional” with “the negative effects that would arise if the measure does not enter into force but proves constitutional in the main action.”¹⁹ In the face of the “critical situation in foreign policy” which represented the situation in Turkey at the time, the Court did find that ordering a parliamentary vote in the proceedings concerning the motion for a temporary injunction could “constitute a considerable encroachment upon the core area of the federal government's responsibility in the fields of foreign and security policy.”²⁰

The case had to be resolved by means of constitutional interpretation as the “Parliamentary Participation Act” of 2005²¹ had not yet entered into force.²² At any rate, this statute, regulating the procedures under which the *Bundestag* exercises its right of control over the external use of the Federal Armed Forces, does not satisfactorily clarify the concept of armed operations.²³ Consequently, the Court has made it clear that the relevant constitutional principles will continue to determine whether the use of the Federal Armed Forces is subject to a parliamentary vote.

II. The Main Findings of the Court

At the outset, the Court noted that under the Basic Law, decisions on war and peace are entrusted to the *Bundestag*, including the use of armed forces within systems of collective security in the meaning of Article 24(2) of the Basic Law.²⁴ A

¹⁸ BVerfGE 108, 34; an English translation of this decision is available at: http://www.bverfg.de/en/decisions/qs20030325_2bvq001803en.html, last accessed, 15 September 2008.

¹⁹ *Id.*, para. 28.

²⁰ *Id.*, para. 39.

²¹ *Gesetz über die parlamentarische Beteiligung bei der Entscheidung bewaffneter Streitkräfte im Ausland (Parlamentsbeteiligungsgesetz – ParlBG)*, 1 BUNDESGESETZBLATT (FEDERAL LAW GAZETTE) 775 (2005).

²² For an overview on the *Parliamentary Participation Act, 2005* see Dieter Wiefelspütz, *Das Parlamentsbeteiligungsgesetz vom 18.3.2005*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 496 (2005).

²³ See, *supra*, note 21 at art. 2: “If the circumstances indicate that the armed forces may be engaged in armed operations, the military deployment has to be approved by the legislature.”

²⁴ *AWACS/Turkey Case, supra*, note 13, para. 57.

parliamentary vote on the deployment of German soldiers would be required when the concrete circumstances of the case warrant the assumption that a participation of German soldiers in armed operations is to be expected.

Some uses of armed forces clearly fall out of the category of “armed operations”: relief missions do not need to be approved by Parliament provided that the soldiers carrying out these missions are not involved in any kind of armed undertakings.²⁵ A mere possibility that armed operations will occur is also not sufficient to trigger the requirement of parliamentary consent. Rather, two further conditions have to be met. First, there is the requirement of sufficiently concrete factual indications that a mission will eventually entail the use of military force. In this regard, its purpose, the concrete political and military circumstances as well as the rules of engagement would need to be taken into account. Hence, a concrete situation of military danger (*konkrete militärische Gefahrenlage*) would need to exist.²⁶ Second, for this “qualified expectation” to materialize, it is required that there is a certain imminence of the use of military force. Such imminence can either be given due to the time factor alone – a military conflict being on the horizon – or to a more general assessment of the rules of engagement that can indicate the probability of the use of military force.²⁷ An indication that the German soldiers may become engaged in hostilities can, *inter alia*, be found in the level of armament of the troops and the authorization to make use of them. An authorization to self-defence (in the sense of self-defence of the individual unit of the Federal Armed Forces) and the deployment of armed forces which is of a non-military character does not require parliamentary approval. Yet, a mission has a military character if it has been launched to defend a given territory against foreign attacks. Under these circumstances the military operation has to be voted on by Parliament even if the soldiers are not armed and do not constitute part of an integrated military unit. The decision whether or not an involvement in armed operations has taken place, is subject to full judicial review by the FCC.²⁸

In the concrete case, to which the Court then did turn, it was to be expected with the requisite degree of concreteness that an engagement of German soldiers in armed operations would take place. According to the Court, the measures in which “Operation Display Deterrence” engaged did not amount to mere deterrence as was the case, in comparison, with routine flights of AWACS aircraft along the

²⁵ *Id.*, paras. 59.

²⁶ *Id.*, para. 78.

²⁷ *Id.*, para. 79.

²⁸ *Id.*, para. 82.

border of NATO States during the Cold War. Rather, the 2003 mission concerned concrete measures to prevent a possible attack against Turkey. The possibility of such attacks was given as the Iraqi President Saddam Hussein had previously indicated his willingness to attack all US allies in the region. That the deployment of the AWACS aircraft did not amount to mere routine business would also be evidenced by the consultations of the NATO Member States under Article 4 of the Washington Treaty which were so far without precedence in the practice of the organization.²⁹ Accordingly, the Court considered the danger of an involvement of German soldiers in hostilities to be imminent.³⁰

III. Summary of the Court's Argument

In sum, the Court laid great emphasis on the protection of the rights of the *Bundestag*. It stressed that the requirement of parliamentary consent is compensatory for the losses of influence the *Bundestag* suffers with respect to the increasing role the executive plays in processes of evolutionary development of the NATO collective security system.³¹ It also emphasized that, given a certain probability that German soldiers will become involved in armed operations, parliamentary consent needs to be given fairly early, as otherwise the right of Parliament to give its avail to the operation in context would become meaningless. At the same time, the Court underlined that it was also in the interests of the executive to have Parliament decide on the deployment in question at an early stage – otherwise the government would face the risk of Parliament recalling the soldiers in the midst of a military operation; a decision which would have far reaching foreign policy implications.

C. The 2007 *Tornado Case*, the Requirement of Peacefulness and the Support for Turkish Defence against Iraq

A relevant point of comparison for the decision is the *Tornado Case* the FCC decided a year earlier.³² Some political commentators have noticed an interesting contrast between the two cases: whereas the executive would enjoy considerable freedom to

²⁹ *Id.*, para. 85.

³⁰ *Id.*, para. 90.

³¹ *Id.*, para. 70; see also BVerfGE 104, 151, 208. This emphasis of the compensatory effect was a departure from the Court's earlier reasoning in BVerfGE 89, 155: see Volker Röben, *Der Einsatz der Streitkräfte nach dem Grundgesetz*, 63 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 585, 594 (2003).

³² BVerfGE 118, 244.

independently contribute to changes in the conceptual outlook of a whole international organization according to the Tornado judgment, the AWACS decision requires parliamentary approval to deployments of relatively small contingents of German soldiers.³³ In the *Tornado Case*, the FCC was asked to determine whether a renewal of parliamentary consent to the NATO Treaty was called for in the face of alleged subsequent changes to NATO's overall mission and policy outlook. The applicants – the Parliamentary Group of the Left Party – also raised possible international law violations to which the Federal Republic was allegedly contributing through the close cooperation between ISAF and OEF in Afghanistan.

The Court affirmed that, in general, it is for the executive to contribute to processes by which an international treaty undergoes evolutionary development.³⁴ Without wanting to enter into the details of the case here, suffice it to say that the FCC highlighted two limits the executive would need to respect while participating in collective security efforts such as NATO. First, the structural limits of the original treaty shall not be trespassed by subsequent changes to the modes of cooperation within the respective organization; were this to occur, a renewal of parliamentary consent through the adoption of a new federal law according to Article 59(2) of the Basic Law would be called for.³⁵ Second, by virtue of Article 24(2) of the Basic Law, only participation in systems of mutual collective security is authorized which respect the requirement of peacefulness. It is for the Federal Government to participate in transformation and evolutionary development of such systems. However, the executive's margin of discretion in foreign affairs ends where the use of armed force is at stake.³⁶ While the FCC refused to control compliance with this requirement on a case-by-case basis, it nevertheless affirmed that the use of force in violation of international law in individual cases could be an indication that NATO is departing from the requirement of peacefulness. The FCC did, however, not find any such violations in the case at hand.³⁷

³³ See, e.g., Heribert Prantl, *Das Karlsruher Trostpflaster*, SÜDDEUTSCHE ZEITUNG 4 (8 May 2008), available at: <http://www.sueddeutsche.de/deutschland/artikel/921/173406/>, last accessed, 20 November 2008.

³⁴ One can think here of subsequent practice and subsequent agreement as modes of treaty interpretation, see the Vienna Convention on the Law of Treaties, 23 May 1969, Art. 31(3)(a), UNTS, Vol. 1155, 331 (ratified by 108 Member States).

³⁵ BVerfGE 118, 244, 270.

³⁶ *AWACS/Turkey Case*, *supra*, note 13, paras. 63-70.

³⁷ The Court dealt with these issues only on a very limited basis. It examined whether the six Tornado surveillance jets that Germany deployed to Afghanistan would pass on information to OEF. On the basis of evidence supplied by the Federal Armed Forces, it came to the conclusion that this was generally not the case. Furthermore, it noted the recurrent call of the UN Security Council on ISAF and OEF to cooperate.

This second criterion could have been of potential relevance for the 2008 AWACS decision. The issue could have been raised as to whether the *Bundestag* could have validly consented to the mission. This is not the right place to re-enter the discussions on the legality of the 2003 Iraq war.³⁸ Nonetheless, it may be asked whether “Operation Display Deterrence” conformed to the spirit and purpose of Article 4 of the NATO Treaty. Although the Iraqi Government did indeed threaten to attack US allies in the region before the outbreak of hostilities on 20 March 2003, this threat needs to be seen in the context that the very same US allies allowed the use of their territory (Kuwait) or airspace (Turkey) by the United States in order to attack Iraq.³⁹ The NATO Rules of Engagement for “Operation Display Deterrence” affirmed that the AWACS aircraft had no right to engage in surveillance of Iraqi airspace and that they were not meant to be used in the context of the attacks on Iraqi territory. The same was made clear by various statements of the governments of Belgium, France and Germany.⁴⁰ However, especially from an Iraqi perspective, it appears questionable whether a clear distinction could be drawn between aircraft which only engage in the protection of Turkey and those which engage in attacks on Iraqi territory. After all, the latter aircraft would need to enter Iraqi airspace from the very same territory the AWACS aircrafts were meant to protect. Another important factor which should also be taken into account is the alleged presence of Turkish soldiers in Northern Iraq at the time.⁴¹

While we do not argue that the deployment of the AWACS aircraft to Turkey did amount to a threat of force in the meaning of Article 2(4) of the UN Charter⁴², attacks by the US on Iraq emanating from Turkish airspace made it at least debatable whether Iraq could have responded in self-defence against Turkey once

³⁸ For a concise overview see Andreas L. Paulus, *The War Against Iraq and the Future of International Law: Hegemony or Pluralism?*, 25 MICHIGAN JOURNAL OF INTERNATIONAL LAW 691 (2004).

³⁹ On the Turkish position see the coverage in the *New York Times*, Section A, Column 1, 11 (5 March 2003), Section A, Column 1, 15 (19 March 2003); for a brief legal assessment, see OLIVIER CORTEN, *LE DROIT CONTRE LA GUERRE* 280 (2008).

⁴⁰ CORTEN, *supra* note 39, 287.

⁴¹ The factual assessment is difficult in this regard: see *AWACS/Turkey Case*, *supra*, note 13, para. 17, on the one hand, and Andreas Fischer-Lescano, *Konstitutiver Parlamentsvorbehalt: Wann ist ein AWACS-Einsatz ein “Einsatz bewaffneter Streitkräfte”?*, *NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT* 1474, 1476 (2003) on the other. See also, *War in the Gulf: Turkish Troops Enter Northern Iraq*, *THE GUARDIAN* 2 (22 March 2003), available at: <http://www.guardian.co.uk/world/2003/mar/22/iraq.turkey>, last accessed, 20 November 2008.

⁴² On the prohibition of threat of force see the study of NIKOLAS STÜRCHLER, *THE THREAT OF FORCE IN INTERNATIONAL LAW* (2007).

these attacks had taken place.⁴³ From this perspective, it is doubtful whether the operation could have been authorized under the NATO Treaty.⁴⁴ At least, there is a shadow of doubt over the legality of “Operation Display Deterrence”.⁴⁵ Due to the factual circumstances, the AWACS case could have given rise to more serious interrogations on the conformity of the NATO mission with the constitutional requirement of peacefulness than the German participation in the ISAF mission in Afghanistan. While the latter is based on repeated Security Council authorizations⁴⁶ and the consent of the Afghan Government, a closer look at the 2003 deployment of the AWACS aircraft reveals a rather troublesome relation between “Operation Display Deterrence” and the 2003 attacks on Iraq. This is also implicitly shown by the reasoning of the Court: only the proximity of the build-up to the attacks on Iraq and the subsequent start of these attacks did create the requisite imminence of the use of force. It is thus difficult to detach the deployment of the AWACS aircraft from the main theatre of conflict in Iraq.

D. Potential Impacts on German Foreign Policy: Is the executive’s flexibility diminished?

With respect to the potential impact of the case on German foreign policy, two particular aspects should be highlighted which are however interrelated. The first one pertains to the question how the relationship between the executive and the legislature is affected by this decision.

The judgment of 7 May 2008 broadened parliamentary options to control military operations abroad. According to this new line of jurisprudence, one can now say that in cases of doubt, Parliament should vote on the deployment of the armed forces.⁴⁷ There will not be a great many deployments of German soldiers which will

⁴³ The complexity of this question is evidenced by the response of Professor Bothe to it who wrote that it would be difficult to give a negative answer, yet he would be inclined to do so. He then mentioned the example of the Tanker War in the Iran-Iraq Conflict of 1980-1988 in which the US never accepted a right of Iran to exercise self-defence against Saudi-Arabia and Kuwait which supported Iraq in the conflict. Bothe, who was a counsel for Iran in the *Oil Platforms Case*, mentions that Iran ultimately did not rely on such a right in the ICJ proceedings; see Michael Bothe, *Der Irak-Krieg und das völkerrechtliche Gewaltverbot*, 41 ARCHIV DES VÖLKERRECHTS 255, 268 (2003).

⁴⁴ The primacy of the UN Charter is not only guaranteed by its Article 103 but also emphasized by Article 1 of the NATO Treaty.

⁴⁵ See, Andreas Fischer-Lescano, *supra*, note 41, 1475-1476.

⁴⁶ See, SC Res. 1368 of 20 December 2001 and subsequent resolutions.

⁴⁷ Christian M. Burkiczak, *AWACS II - In dubio pro Bundestag*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 752, 754 (2008); see also, Volker Epping, *Die Evakuierung Deutscher Staatsbürger im*

not have the requisite features to trigger the requirement of parliamentary consent. It is, however, rather questionable to what extent the judges clarified the meaning of the concept of “armed operations” and determined the threshold at which the constitutional requirement of parliamentary approval shall be triggered. The notion of a “qualified expectation” appears to be rather vague.⁴⁸ This uncertainty is likely to increase the number of operations to which Parliament will need to give its approval. Otherwise, the Federal Government will always face the risk of an unfavourable judgment from the FCC, a political risk that not many governments will want to take.

The Court also confirms the right of Parliament to consent to the deployments of German Armed Forces that acquired a military character in the course of their deployment. It is, however, unclear at what point the respective deployment acquires such a military character. Parliament is not in a position to analyse the circumstances on the ground. It will have to rely on the information submitted by the executive without being able to verify the quality of this information. Accordingly, the executive may still have a certain leeway with respect to the question when it wishes to ask for parliamentary consent in such cases. Parliament cannot be politically responsible for the changing operational modalities of military missions that it is not able to control. It should be noted in this context that the Court did not question the ruling of the *Tornado Case* that the use of armed forces which is part of a previous military operation already agreed to by Parliament does not require fresh parliamentary approval.

The second aspect concerns the question how a “premature” vote of Parliament on the use of the Federal Armed Forces may be perceived abroad – is it likely to be regarded as a modern form of a “declaration of war”? Parliament voting on the deployment of the armed forces could signal a country’s willingness to opt for a military solution instead of diplomatic avenues. From this perspective, one may argue that the rather strict jurisprudence of the FCC could critically reduce the room of manoeuvre for the government and could curtail its ability to positively influence the settlement of international crises which may sometimes require a swift response including the build-up of a military scenario. However, this concern appears unwarranted. The German practice of deployment of its soldiers does not usually occur in a setting which would easily lend itself to the interpretation that a parliamentary vote equals a “declaration of war”. Moreover, the international partners of the Federal Republic are aware of the existing constitutional restraints

Ausland als neues Kapitel der Bundeswehrgeschichte ohne rechtliche Grundlage? Der Tirana-Einsatz der Bundeswehr auf dem rechtlichen Prüfstand, 124 ARCHIV DES ÖFFENTLICHEN RECHTS 423, 455 (1999).

⁴⁸ See, Florian Schröder, *Anmerkung*, DEUTSCHES VERWALTUNGSBLATT 778, 779 (2008).

on the external use of the Federal Armed Forces. Additionally, the German Armed Forces are mainly used within the context of UN Security Council mandated missions.

For the case of Security Council authorizations, a parliamentary vote was already mandatory under the previous jurisprudence of the Court.⁴⁹ Before the 2008 AWACS decision, it was thus easier for the executive to deploy the armed forces in cases which did not involve such authorization. As a UN Security Council authorization clears almost all concerns on the lawfulness of the use of the armed forces – at least in terms of the *jus ad bellum* – deployments without such authorization should, in comparison, meet higher standards of parliamentary scrutiny. It can thus only be welcomed that the Court has made it clear that a strict scrutiny standard must apply which requires a fairly early vote from the *Bundestag*.

All this may sound as if the executive has been heavily burdened by this decision. This is, however, not necessarily the case. First, an early vote on the deployment of German soldiers increases the political responsibility of Parliament and makes it less likely that a recall of the German Armed Forces will occur. Parliament will presumably be reluctant to pay such a high price anyway unless there are compelling reasons to end the military operation against the will of the government. The strict standards for early parliamentary participation the Court has now established are susceptible to reduce this danger even further.

Second, the decision preserves enough leeway for the executive in cases of urgency. The role of Parliament remains rather limited in situations where a rapid military response to an existing external threat is required. The decision of the Court does not explain how to understand immediacy⁵⁰ and leaves it to the executive branch to choose a reasonable interpretation. It can be assumed that the government will decide on the issues of self-defence if need be and will have to justify its decision in Parliament *ex post facto* according to section 5, para. 3 of the “Parliamentary Participation Act.” A prior parliamentary approval in the situation of extreme urgency would not always be feasible and the executive should retain its flexibility to use armed forces in order to prevent immediate security threats to the Federal Republic. The Court has also indicated that situations of urgency are not limited to individual self-defence but can encompass measures taken within mutual systems

⁴⁹ BVerfGE 89, 286, 387.

⁵⁰ On the concept of immediacy see Markus Rau, *Auslandseinsatz der Bundeswehr: Was bringt das Parlamentsbeteiligungsgesetz?*, 44 ARCHIV DES VÖLKERRECHTS 93, 105 (2006); Hans-Hugo Klein, *Rechtsfragen des Parlamentsvorbehalts für Einsätze der Bundeswehr*, in RECHT IM PLURALISMUS – FS FÜR WALTER SCHMITT GLAESER ZUM 70. GEBURTSTAG 262 (Hans-Dieter Horn, ed., 2003).

of collective defence.⁵¹ Hence, the new jurisprudence of the Court is not necessarily a barrier towards effective participation in NATO's Response Force. Germany's ability to participate quickly in NATO operations would only be constrained if the requirement of parliamentary approval will be extended to various operational details of a military mission.

Third, the Federal Government may even welcome having such a powerful bargaining tool at hand in some instances. International interlocutors are well aware of the restrictions German constitutional law puts upon the government in matters which involve the use of the German Armed Forces. In the face of ever increasing calls for stronger German participation in Afghanistan or post-war Iraq, the German Federal Government may not be too outraged at the prospect of having to go to Parliament before being able to promise the deployment of German soldiers to these international hotspots.

E. Concluding Observations

In sum, the decision of the Constitutional Court should be seen as a welcome step towards more effective democratic control over the government's use of armed forces. The Court can, of course, be criticized for the time lapse before its decision intervened. It was only five years after the 2003 Iraq war that the Court finally rendered its decision. This cannot be explained alone by the Court's workload. The 2007 *Tornado Case* shows that the Court can decide complex foreign relations cases in a timely manner. Although there can be no universal answer to the question as to whether the courts should remain silent in times of crisis⁵², it can be positively mentioned that the FCC finally raised its voice in a controversial matter which is likely to be of high relevance for the future practice of the branches of government. It is for the judiciary to induce the branches of government to cooperate if they fail to do so according to the principle of a functional separation of powers.⁵³ On the face of it, the Court's reasoning may appear to be contradictory to it denying the motion for a temporary injunction in 2003. However, this denial was based on the reasoning that the Court needs to be careful in interfering with complicated foreign

⁵¹ *AWACS/Turkey Case*, *supra*, note 13, para. 58.

⁵² See, for a variation of this theme, HCJ 769/02, *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.*, Judgment of 11 December 2006, para. 61 (Opinion by President (Emeritus) A. Barak).

⁵³ See also, Andreas L. Paulus & Mindia Vashakmadze, *Parliamentary Control over the Use of Armed Forces Against Terrorism – In Defence of the Separation of Powers*, 38 NETHERLANDS YEARBOOK OF INTERNATIONAL LAW 113, 159 (2007).

policy issues. Now that the Court has spent more attention to the criteria under which Parliament needs to consent to the use of the German Armed Forces, it can be expected that the Court would, were it seized with a similar matter again, interfere with the political process at a potentially earlier stage.

DEVELOPMENTS

The Brand New Version of Article 301 of Turkish Penal Code and the Future of Freedom of Expression Cases in Turkey

By *Bülent Algan**

A. Introduction

Article 301 of the Turkish Penal Code (TPC),¹ much debated at both national and international levels, has recently been subject to an amendment aimed at clarifying its meaning and averting more distressing cases related to freedom of expression. It should be noted that the former article 301 was an amended version of article 159 of the former TPC of 1926. As Türkan Sancar rightly states in her comprehensive book on both articles 159 and 301, article 159 is an article which has been revised many times.² It was amended seven times after coming into effect in 1926³ (in 1936,⁴ 1938,⁵ 1946,⁶ 1961,⁷ twice in 2002,⁸ and 2003⁹). The new TPC was introduced as a package of penal-law reform prior to the opening of negotiations for Turkish

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¹ Turkish Penal Code (Türk Ceza Kanunu / TCK), Law no: 5237 of 26 September 2004.

² See TÜRKAN Y. SANCAR, TÜRKLÜĞÜ, CUMHURİYETİ, MECLİSİ, HÜKÜMETİ, ADLİYİYİ, BAKANLIKLARI, DEVLETİN ASKERİ ve EMNİYET MUHAFAZA KUVVETLERİNİ" ALENEN TAHKİR ve TEZYİF SUÇLARI (ESKİ TCK M. 159/1 - YENİ TCK M. 301/1-2) 46 (2006).

³ Law no: 765 of 1 March 1926.

⁴ Law no: 3038 of 11 June 1936.

⁵ Law no: 3531 of 29 June 1938.

⁶ Law no: 4956 of 20 September 1946.

⁷ Law no: 235 of 5 January 1961.

⁸ Law no: 4744 of 6.2.2002 and Law no: 4771 of 3 August 2002. These laws were adopted as a result of the efforts for EU membership aimed at harmonizing Turkish laws with EU standards. The first one is known as the 1st Adjustment Law/Package, while the latter as the 2nd Adjustment Law/Package. See Türkan Yalçın Sancar, *Türk Ceza Kanunu'nun 159. ve 312. Maddelerinde Yapılan Değişikliklerin Anlamı*, 52 ANKARA ÜNİVERSİTESİ HUKUK FAKÜLTESİ DERGİSİ (AÜHFHD) 88, 88-89 (2003).

⁹ Law no: 4963 of 30 July 2003.

membership of the European Union, and came into effect on 1 June 2005. Article 301 stated the following:

1. A person who publicly denigrates Turkishness, the Republic or the Grand National Assembly of Turkey, shall be sentenced a penalty of imprisonment for a term of six months to three years.
2. A person who publicly denigrates the Government of the Republic of Turkey, the judicial bodies of the State, the military or security organizations, shall be sentenced to a penalty of imprisonment for a term of six months to two years.
3. Where denigrating of Turkishness is committed by a Turkish citizen in another country, the penalty to be imposed shall be increased by one third.
4. Expressions of thought intended to criticize shall not constitute a crime.¹⁰

Although this text of the law did not draw attention initially, article 301 loomed large both in Turkey and the European Union after a number of conspicuous cases and criminal investigations of well-known novelists and journalists such as Nobel Laureate Orhan Pamuk, Hrant Dink, Perihan Mağden, Elif Şafak, and even Joost Lagendijk, chairman of the EU-Turkey Joint Parliamentary Committee.¹¹ Such

¹⁰ The translation of the article was as follows in an OSCE document:

(1) A person who explicitly insults being a Turk, the Republic or Turkish Grand National Assembly, shall be imposed a penalty of imprisonment for a term of six months to three years.

(2) A person who explicitly insults the Government of the Republic of Turkey, the judicial bodies of the State, the military or security organisation shall be imposed a penalty of imprisonment for a term of six months to two years.

(3) Where insulting being a Turk is committed by a Turkish citizen in a foreign country, the penalty to be imposed shall be increased by one third.

(4) Expression of opinions with the purpose of criticism does not require penalties.

See Miklos Haraszti, *Review of the Draft Turkish Penal Code: Freedom of Media Concerns* (2005), 20 November 2008, available at: http://www.osce.org/documents/rfm/2005/03/14223_en.pdf, last accessed 26 November 2008. For another translation, see EDWARD GRIEVES & VAHIT BIÇAK, TÜRK CEZA KANUNU 165-166 (2007).

¹¹ Orhan Pamuk was tried because he said that "30,000 Kurds and one million Ottoman Armenians were killed in Turkey." The case was then dropped by the court. Elif Şafak was tried because of her expressions in her book "Father and Bastard." She said "I am the grandchild of genocide survivors who lost all their relatives to the hands of the Turkish butchers in 1915, but I myself have been brainwashed

harsh applications of this article by the Turkish judiciary compelled the government to revise it¹² but the government did not espouse the idea of annulling it forever.¹³ Instead, they settled for bringing article 301 in line with the European standards designated by the European Convention of Human Rights.¹⁴ Consequently, article 301 has been revised again, coming into force on 8 May 2008 and signifying the ninth revision since it was first adopted. The new article 301 reads as follows:

Denigrating the Turkish Nation, the State of the Turkish Republic,
the Institutions and Organs of the State

1. A person who publicly denigrates Turkish Nation, the State of the Republic of Turkey, the Grand National Assembly of Turkey, the Government of the Republic of Turkey or the judicial bodies of the State, shall be sentenced a penalty of imprisonment for a term of six months and two years.
2. A person who publicly denigrates the military or security structures shall be punishable according to the first paragraph.
3. Expressions of thought intended to criticize shall not constitute a crime.

to deny the genocide because I was raised by some Turk named Mustafa." She was acquitted at the first hearing, as there were no elements of the crime envisaged in article 301. For a number of well-known cases emanating from article 301 and their summaries, see *Document - Turkey: Article 301: How the Law on "Denigrating Turkishness" Is an Insult to Free Expression*, AMNESTY INTERNATIONAL, 10 May 2008, available at: <http://www.amnesty.org/en/library/asset/EUR44/003/2006/en/dom-EUR440032006en.html>, last accessed 26 November 2008.

¹² According to the Turkish Minister of Justice, 1,189 people were being taken before a court by the first quarter of 2007 alone for article 301 violations. The number of total cases in the same period was 744. See TBMM TUTANAK DERGİSİ, 23. Dönem 2. Yasama Yılı 81. Birleşim, 25 March 2008.

¹³ The attitude of opposition parties was patterned. Nationalists stated positively that they were against any change while the Kurdish-oriented Democratic Society Party strongly espoused abolition of the article. Similar views were also available among the Turkish jurists. See TÜRKİYE BAROLAR BİRLİĞİ (Turkish Bar Association), TCK 301 35-36 (2007).

¹⁴ The need to bring Turkish legislation in line with European standards was emphasized in The European Commission's Progress Report on Turkey. See Commission of the European Communities, *Commission Staff Working Document, Turkey 2006 Progress Report* (November 2006). According to the Report, certain provisions of the TPC, especially article 301, have been used to restrict the expression of non-violent opinions. See p. 14-15.

4. The prosecution under this article shall be subject to the approval of the Minister of Justice.¹⁵

This essay aims to determine whether the amended version can really decrease the number of cases that arise due to the breach of this article and thus make freedom of expression more “practicable” in Turkey. The essay shall proceed by (Part B) examining the viability of the latest amendments to article 301 which include (i) references to Turkish nation and the State of the Turkish Republic instead of Turkishness and the Republic; (ii) reduced punishment and (iii) the approval requirement from the Minister of Justice as a condition for trial. The essay shall then (Part C) examine the ongoing problems with the keyword denigrate by (i) examining the ambiguities of the word and (ii) the judicial interpretation of the word.

B. The Latest Version of Article 301: What’s New?

The answer to the question of why article 159 and now article 301 have been subject to so many adjustments lies in its essential character and content. In a nutshell, article 301 has great importance for not only its juridical aspect, but also political.¹⁶ In other words, its application can vary dramatically subject to changes in political atmosphere and legal or interpretative attitudes in the field of civil and political rights, especially in the field of freedom of expression. Legal texts in such content can easily be interpreted by adjudicators in a liberticidal and draconian manner. Its application, then, is strictly related to the structure of the state and how basic rights and their limits are understood by the sovereign powers, especially by the judiciary.¹⁷

The former article 301 was formulated to embrace several “values” and to protect governmental bodies from attacks. The text was very comprehensive; Turkishness, the Republic, the Parliament, the Government, the judicial institutions, the military and security structures were protected against “public denigration.”¹⁸ As the

¹⁵ Law no: 5759 of 30 April 2008. Published in the Official Gazette [Resmi Gazete] on 8 May 2008.

¹⁶ According to one author, the crimes regulated by articles 159 and 301 are generally characterized as “political crimes.” See KÖKSAL BAYRAKTAR, *SIYASAL SUÇ* 103 (1982).

¹⁷ The interpretation of article 301 by the Turkish judiciary has been sharply criticized by many authors. According to one of them, article 301 functioned as a “political weapon of the judiciary against freedom of expression.” See Erol Önderoğlu, *301: İfade Özgürlüğüne Karşı Yargının Politik Silahı*, 65 ANKARA BAROSU DERGİSİ 19, 19-23 (2007).

¹⁸ The key word in the article, *aşağılamak* was translated into English differently by the authors. Apart from denigration, the words “humiliate,” “insult,” “deride” and “degrade” are also used. See, *inter alia*,

Government was determined to protect and preserve these values and governmental institutions, they preferred revising the article to leaving them wholly “indefensible” by annulment.

The amendment can be analyzed along three lines. First of all, the terms “Turkishness” and “Republic” have been replaced by the terms “Turkish Nation” and “State of the Republic of Turkey.” The second change signifies a reduced maximum imprisonment for those found guilty and excludes consideration of any aggravating circumstances. The final amendment to the previous form of the article is that any prosecution under the law shall be subject to approval of the Turkish Minister of Justice. The purpose of this amendment is, evidently, to hinder public prosecutors in filing suits arbitrarily under article 301.

Although the drafters of the TPC had never espoused the idea of excluding an article with similar content to that of article 301, they were well aware that such an article could potentially give rise to controversial cases and heated debates about freedom of expression. The paragraph emphasizing that expressions of thought intended to criticize should not constitute a crime was incorporated in the article as a result of that concern. This statement had also been drafted to bring to law enforcement personnel’s attention that “denigration” should be demarcated from free expression. Seen from this angle, it was an open warning directed to the public attorneys and to the judges.

I. From “Turkishness” to “Turkish Nation”; From “Republic” to “the State of the Turkish Republic”

According to a major change in the article, public denigration of the “*Turkish Nation*” and “*the State of the Turkish Republic*” shall be punishable instead of denigrating “*Turkishness*” and the “*Republic*.” As these terms have been the basis for numerous cases under the article, an analysis of this amendment would be useful.

It seems that this change mainly aims at crystallizing some of the notions cited in the article so as to dispel the ambiguity in the wording of the article giving rise to conspicuous cases, in whole or at least in part. It should also be noted why the

Anthony Lester, *Redefining Terror*, INDEX ON CENSORSHIP 103, 105 (2007); Thomas W. Smith, *Leveraging Norms: The ECHR and Turkey’s Human Rights Reforms*, in HUMAN RIGHTS IN TURKEY, 262, 272 (Zehra F. Kabasakal Arat); Gabriel Noah Brahm Jr., *Reading City of Quartz in Ankara: Two Years of Magical Thinking in Orhan Pamuk’s Middle East*, 11 RETHINKING HISTORY 79, 85 (2007); GRIEVES & BIÇAK (note 10), 165. However, the word *aşağılamak* is not fully synonymous with the words *tahkir* and *tezyif*, which were used in article 159 of the former TPC. This will be explained below.

drafters of the former article 301 preferred the term “*Turkishness*” to “*Turkish Nation*.” As they noted in the rationale for the former article 301:

“What is meant by the term “*Turkishness*” in the article is, a common entity which has come into being as a result of the common culture peculiar to the Turks living anywhere around the world. This entity is wider than the term “*Turkish Nation*” and it encompasses the societies who live outside Turkey and who are participants of the same culture. What is meant by the term Republic is, the State of the Republic of Turkey.”¹⁹

It is obvious that the wider the scope of the article, the more limited the freedom of expression is. In this way, it can be said that replacement of “*Turkishness*” by the term “*Turkish Nation*” by the 2008 amendment to the article would broaden the frontiers of freedom of expression according to the lawmakers. On the other hand, the drafters also admitted above that there was no noteworthy difference between the terms “*Republic*” and “*the State of the Turkish Republic*.” In this context, the change signifies a clarification in the wording, but not in the content, and so does not contribute to expanding the enjoyment of freedom of expression.²⁰

Not only had the drafters of the TPC, but also a number of jurists dealt with the meaning of Turkishness and the Turkish Nation. On the one hand, there were authors arguing that the terms “*Turkish Nation*” and “*the State of the Republic of Turkey*” should be used because of their concrete nature and content, while “*Turkishness*” and “*Republic*” were abstract in nature and their inclusion in the Penal code would prove problematic.²¹

According to a second view, both “*Turkishness*” and the “*Turkish Nation*” have the same meaning. From this perspective, “[w]hat is meant with Turkishness is Turkish society and nation. The lawmaker intended to protect both Turkishness and the sense of being attached to the Turkish Nation” by means of article 301.²² It is

¹⁹ TBMM, 22. Dönem, Yasama Yılı 2, Sıra Sayısı 664, 688.

²⁰ This view is supported by a decision of the Turkish Supreme Court of Appeals: “It was seen indispensable to safeguard the Republic... against any attack in terms of common good and it has been added to article 159 for that reason. “The Republic” and the word “State” are synonymous. Therefore, denigration of the state is, on account of its character, constitutes the denigration of the Republic”. CGK, E. 1998-9/70, K. 1998/156, judgment of 5 May 1998.

²¹ See İZZET ÖZGENÇ, TÜRK CEZA KANUNU GAZİ ŞERHİ (GENEL HÜKÜMLER) 1075 (2006).

²² DOĞAN SOYASLAN, CEZA HUKUKU ÖZEL HÜKÜMLER 666-667 (1999). Similarly, it is obvious that “*Turkishness*” is related to a component of the state, the “people” of the state, and corresponds to the “*Turkish nation*.” See SANCAR, *supra* note 2, 83-84.

noteworthy that the Italian Penal Code, which was the main source or reference of the Turkish Penal Code of 1926, punished the denigration of the "*Italian Nation*," but not of "*being Italian*."²³ Therefore, it may be assumed that there is no reason for interpreting Turkishness and Turkish Nation differently from each other.

From this viewpoint, a change in the wording really changed nothing in the content of the article. This can be determined considering the practice of the Turkish criminal courts.

According to the Turkish Supreme Court of Appeals, there is no major difference between "*Turkishness*" and the "*Turkish Nation*." In the *Hrant Dink* case, they interpreted what Turkishness meant in the former article 159 and stated:

The term "*Turkishness*" is related to a component of the state, namely the people, and, what is meant with this term is the Turkish Nation. Turkishness means "humanitarian, religious and historical values constituting the Turkish nation and an entirety of national and moral values composed of national language, national feelings and customs."²⁴

On the one hand, this interpretation of the judiciary, which is contrary to that of the legislative organ, may be seen as contributing to freedom of expression because Turkish courts have not favored the idea that Turkishness is more extensive than the Turkish nation. On the other hand, now that both terms are understood in the same manner, the amendment is meaningless as the wording of the article is still as ambiguous as it was. In other words, nothing changed despite the change in the wording.

Another problem, which is not less bothersome than the problem mentioned above, is the ambiguity of both terms. They are too vague to be taken as a base for punishing those expressing opinions, and the amendment has not corrected this. Many definitions can be found for "nation," "Turkish Nation," and "Turkishness." Vagueness is the common character for all.²⁵

²³ According to article 291 of the Italian Penal Code, a person who publicly denigrates the Italian Nation shall be sentenced a penalty of imprisonment for a term of between one year and three years. This crime was added to the Italian Penal Code in 1939.

²⁴ See Yargıtay Ceza Genel Kurulu, E.2006/9-169, K. 2006/184, judgment of 11 July 2006.

²⁵ See SANCAR, *supra* note 2, 70-86.

In conclusion, article 301 remains problematic despite the amendment. That is, the values protected are still as vague as they were before and, as a result, the ongoing ambiguity of the article still constitutes a threat to citizens' rights to freedom of expression. Whenever such an article is preserved in the Penal Code, subsistence of the problem is natural.

II. The Reduced Punishment

A second change in the article is the reduction of the envisaged sanction. It has two aspects. According to the new text of the article, firstly, those found guilty of publicly denigrating the Turkish nation, state, parliament, legal bodies, government, military or police can be sentenced to a term of imprisonment of up to two years, while previously the judges were allowed to charge the guilty to up to three years of imprisonment. This change is important as imprisonment up to two years opens the way for suspension of the jail term.

According to a second change, no aggravating circumstances are envisaged in the new article 301. In other words, when the activity of denigrating the Turkish Nation is committed by a Turkish citizen in a foreign country, this does not increase the punishment anymore.

Although these changes do not bring about a guarantee for the enjoyment of freedom of expression, it may be useful in satisfying the fulfillment of the proportionality principle by fairly punishing unlawful aggression toward the values and institutions enumerated in the article, including expressions which can in any way come within the limits of freedom of expression.

III. Approval of the Ministry of Justice as a Condition for Trial

According to the last change in the article, public prosecutors will have to get authorization from the Ministry of Justice in order to file suits under article 301. Paragraph 4 states that "[t]he prosecution under this article shall be subject to the approval of the Minister of Justice."²⁶ It must be noted that such a pre-condition for opening the proceedings is, in fact, not new for this article. Premises of today's article 301 also required the assent of various official channels. For example, in the

²⁶ During the drafting stage of the amendment, it was planned that the President of the Republic be authorized for this approval instead of the Minister of Justice. Later, considering that such a duty was incompatible with the position of the President of the Republic, the Minister of Justice was authorized. The Turkish Head of State, according to article 101 of the Turkish Constitution, has to remain impartial. Although article 101 implies that his impartiality is mainly in the political area, it was supposed that his involvement with judicial affairs would shade his impartiality.

first version of Turkish Penal Code, approval of the Chairmanship of the Turkish Grand National Assembly was necessary to start the process in its article 160. The competent authority then was changed in 1936²⁷ as competence was divided between the Ministry of Justice and Ministry of National Defense. In 1938, the Ministry of Justice was made fully competent, as division of the above-mentioned competence was seen as inappropriate by the lawmakers. However, this mechanism was excluded in the new TPC until the most recent amendment.

The basis for this amendment is, obviously, to prevent public prosecutors from opening the proceedings arbitrarily under the cloak of protecting the values and state institutions specified in the article. This supposed breakthrough is intended to prevent or at least diminish the criticisms directed to the government at both national and international levels, as this article is seen as a threat to freedom of expression. Thus, this measure, which apparently looks like an administrative treatment, may well be seen as a political interference of the essential character and content of the article, which is not only legal, but also political, as mentioned above.

In reality, approval of the Ministry for opening proceedings does not provide us a reliable and continuous guarantee. It largely depends on the manner of the political authority. Any change in the ruling political will or changing political balances in EU-Turkey relations may impede this guarantee from functioning. It is stressed that as long as article 301 remains on the statute book, it will be exploited by nationalist elements in Turkish society and by the state apparatus.²⁸ At least, this will remain as a bothersome possibility so long as this provision is conserved in the Penal Code.

C. The Ongoing Problem with the Article: The Meaning of “Denigrate”

I. Ambiguity or “suspect flexibility” of the word “denigrate”

It has been shown above that, despite the amendment, the content of article 301 still remains problematic. Another issue with the article is the vagueness of the word “denigrate.” A chronic problem with the article is how the word is understood by public prosecutors and the judges of Turkish Criminal Courts.

The prohibited action in article 301, namely “*public denigration*,” constitutes the *corpus delicti* of the crime. In other words, the sanctions apply when the values and

²⁷ Law no: 3038 of 11 June 1936.

²⁸ Amanda Akçakoca, *EU-Turkey Relations 43 Years on: Train Crash or Temporary Derailment?*, EUROPEAN POLICY CENTRE, EPC ISSUE PAPER NO. 50 (2006) 13.

state institutions are publicly denigrated. The drafters of the article diligently asserted that expressions of thought intended to criticize should not constitute a crime and inserted a paragraph emphasizing this thought. This was, as said above, an open warning from the lawmakers to the judicial organs underlining that judicial bodies should make a distinction between criticism as an integral part of freedom of expression, and denigration which constitutes a breach of that right. Considering that in the mind of the Turkish legislature, the values and state bodies enumerated in the article deserve protection by law against any aggression and that they preferred to keep article 301 as a guard in the Penal Code, the meaning attributed to the word "denigrate" by the Turkish courts is of vital importance.

An important difference between article 301 and article 159 is exclusively phraseological. In other words, how the two forms of the article denote "denigrate" differ. Article 159 embraced the terms *tahkir* (to offer an insult) and *tezyif* (to deride) to correspond with "denigrate," while the drafters of article 301 preferred to use the word *aşağılamak* (to denigrate) instead. According to one view, this change in the wording introduced nothing new. It was only for simplifying or purifying the text of the article, as the former words were of the origin of Arabic language, while the latter was Turkish to the core. By this change, it is asserted that only the text of the article was changed and the wording was formulated to be more understandable, but the content was still the same.²⁹

Nevertheless, this change is strongly criticized by other groups. In their view, this change can not be interpreted as merely a linguistic matter; *tahkir* and *tezyif* on the one hand, and *aşağılamak* on the other, are not synonymous in reality. The terms *tahkir* and *tezyif* were adopted as the translation of *vilipendio* (denigration), the corresponding term in the *Zanardelli Act* of Italy. There was no definition for those terms in either the former TPC or the Italian Penal Code.

The term *aşağılamak* nearly connotes *tezyif* conceptually,³⁰ but excludes *tahkir*. In other words, when an expression is assessed by a court as deriding, its owner could face a sanction under article 301 even though that expression does not imply an insult. The meaning of *aşağılamak*, then, may cover more moderate expressions contrary to or compared with *tahkir* and *tezyif*. Thus, it is alleged that this amendment dangerously expanded the scope of applicability of the article.³¹ The

²⁹ For this view, see, for example, Hakan Hakeri, *Yeni Ceza Kanunu'nda ve Yargıtay'ın Yeni Kararlarında Düşünceyi Açıklama Özgürlüğü'ne Aykırılıklar*, 15 HUKUK DÜNYASI 9, 10 (2005).

³⁰ SANCAR, *supra* note 2, 168.

³¹ YAŞAR SALIHPAŞAOĞLU, *TÜRKİYE'DE BASIN ÖZGÜRLÜĞÜ* 182 (2007).

term *tahkir* is still used in other provisions of TPC.³² If the drafters of TPC as a whole had really aimed to exclude originally non-Turkish words from the text of the law, they would have excluded the word *tahkir* from other provisions too. To conclude, the use of *aşağılamak* instead of *tahkir* and *tezyif* signifies the deterioration of freedom of expression.

II. How the Word “Denigrate” is to be Interpreted by the Courts

In a democratic society, legal provisions have to be interpreted in light of the principle of *in dubio pro libertate* (if in doubt favor liberty). Considering this principle, the interpretation must be in favor of the rights as much as possible. *In dubio pro libertate* is a principle of interpretation which is indispensable for a true democratic society.³³ This principle functions to steer the thoughts of the interpreter in the direction of expanding basic rights.³⁴ Beside constitutional norms, hierarchically lower norms too can be understood in the light of this principle. Application of this principle becomes more important when legal provisions are formulated vaguely and need clarification by the judges. If article 301 is interpreted by the courts in this way, its problem is solved to a large extent.

Obviously, replacement of the word *tahkir* and *tezyif* with *aşağılamak* by the Turkish legislative organ is not satisfying for the sake of freedom of expression. Denigration, like the meanings of values and institutions under protection by the article, remains too vague and needs interpretation for law enforcement personnel. Yet the Turkish courts may change this by interpreting the article in a liberal manner in the future. As it is impossible for the legislative bodies to formulate legal texts in absolute clarity, it is often expected that courts interpret and demystify ambiguous terms. It is especially important in the field of human rights.

The European Court of Human Rights, which is recognized by the Turkish Republic as a State Party to the Convention, accepts that it is impossible to formulate legal provisions in absolute precision.

The Court has, however, already emphasised the impossibility of attaining absolute precision in the framing of laws, particularly in fields in which the situation changes according to the prevailing views of society (see the Barthold judgment of 25

³² Article 341, for example. See *Id.*, 182.

³³ Mithat Sancar, TEMEL HAKLARIN YORUMU 324-325 (1995).

³⁴ *Id.*, 330.

March 1985, Series A no. 90, p. 22, § 47). The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague (see, for example, the Olsson judgment previously cited, *ibid.*).³⁵

The Court has also already stated precisely how freedom of expression and its limits set by article 10 of the Convention are to be interpreted. The Court gives us a hint in its *Müller and Others* judgment on how to read the provisions similar to article 301. The Court states as follows:

Such measures, which constitute "penalties" or "restrictions", are not contrary to the Convention solely by virtue of the fact that they interfere with freedom of expression, as the exercise of this right may be curtailed under the conditions provided for in paragraph 2 (art. 10-2). Consequently, the two measures complained of did not infringe Article 10 (art. 10) if they were "prescribed by law", had one or more of the legitimate aims under paragraph 2 of that Article (art. 10-2) and were "necessary in a democratic society" for achieving the aim or aims concerned.³⁶

On the other hand, the Court says that the limits of permissible criticism are wider with regard to political bodies than in relation to a private citizen.³⁷ The court also stressed that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress, and that the enjoyment of freedom of expression is applicable not only to information or ideas that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that *offend, shock or disturb*.³⁸ Thus, such ideas should be tolerated to achieve a truly democratic society, of which pluralism, tolerance and broadmindedness are hallmarks in the Court's view.

³⁵ Eur. Court H.R., *Müller and Others v. Switzerland*, Judgment of 24 May 1988, Series A no. 133, para. 29. See also *Sunday Times v. the United Kingdom (no. 1)*, Judgment of 26 April 1979, Series A no. 30, para. 49; *Hertel v. Switzerland*, Judgment of 25 August 1998, *Reports of Judgments and Decisions* 1998-VI, para. 35.

³⁶ Eur. Court H.R., *Müller and Others*, para. 28.

³⁷ Eur. Court H.R., *Castells v. Spain*, Judgment of 23 April 1992, para. 46.

³⁸ See Eur. Court H.R., *Handyside v. the United Kingdom*, Judgment of 7 December 1976, Series A no. 24, para. 49. See also *Lingens v. Austria*, Judgment of 8 July 1986, Series A no. 103, para. 41; *Jersild v. Denmark*, Judgment of 23 September 1994, Series A no. 298, para. 37; *Zana v. Turkey*, Judgment of 25 November 1997, *Reports of Judgments and Decisions* 1997-VII, para. 51.

However, the practices and the interpretations of the Penal Code by the Turkish judiciary organs are not very encouraging. Considering the decisions of the Turkish Court of Appeals at length, it can be said that they are not very stable or analogous. Some do look promising, while other decisions are quite restrictive of freedom of expression. For example, the Turkish High Court held rightfully in 1976 that:

[a]s taking the fascist words “dry-throated and bloodthirsty” and “if they have tanks, rifles, panzers, fascism” at the end, then interpreting them as denigrating (*tahkir* and *tezyif*) the spiritual personality of the Government by simple analogy and inference is impossible, ...the crime described in article 159 of TPC does not come into being... in view of choosing an ...exaggerated way of expression.³⁹

In addition, the Court of Appeals contends that they adopt the case law of the European Court of Human Rights on article 10 (freedom of expression) of the Convention. Admittedly, numerous examples where the Turkish Court of Appeals refers to or simply repeats the opinion of the ECHR regarding freedom of expression can be found. According to the Court:

Freedom of expression indeed embraces the rights of not thinking the same as the majority, questioning or even criticizing the established régime. Moreover, the ideas which are traumatic nature, which irritate the majority of the society and direct them towards debates are under the protection of freedom of expression.⁴⁰

In another case, a criminal court of first instance almost repeated the quotation above and acquitted a writer that said “the state should cease being a criminal organization and should be based on law.”⁴¹

Paradoxically, in a considerable number of cases, the Turkish Court claims that the European Court’s case law on freedom of expression is considered in the process of adjudication, and that the final decisions are unequivocally in conformity with those of the European Court of Human Rights. However, this is seen to be misleading even by the dissenting minority members of the Court. This attitude of

³⁹ See, Yargıtay Ceza Genel Kurulu, E. 1976-9/247, K. 1976-258, Judgment of 24 May 1976.

⁴⁰ See, Yargıtay 8. Ceza Dairesi, E. 2003/2930, K. 2004/5686, Judgment of 22 June 2004.

⁴¹ Bakırköy 2. Ağır Ceza Mahkemesi, Judgment of 20 January 1997. See SANCAR, *supra* note 2, 217. For other similar decisions of Turkish Court of Appeals, see also p. 218.

the Turkish Court of Appeals can be evidenced by the Court's statement of reasons in the Hrant Dink case, a typical example. In this case, the Court first defined the scope of freedom of expression similar to the European Court of Human Rights:

Freedom of expression is applicable to the information or ideas which are not only favorably received or regarded as inoffensive or as a matter of indifference, but also to those that are in opposition with the state or a part of the society and which disturb them. It is a necessity for a democratic society system and pluralism. Criticism too emanates from this freedom. Harshness emanating from the essential character of criticism does not constitute a crime, and since criticism is not complimentary, it can naturally be rigid, offensive and distressing.⁴²

But later, having emphasized that freedom of expression is not unlimited and is subject to limitations both in article 10, paragraph 2 of the ECHR and in national law, the majority of the members of the Court regarded Dink's column as violating the limits of freedom of expression.⁴³

In sum, Turkish Courts very often pretend to consider the case law of the European Court of Human Rights, but then conclude that national laws and their interpretation of the present case is in full conformity with them.⁴⁴ When Turkish courts relinquish this interpretation of freedom of expression and its limits, the problem will be automatically solved to a large extent. In plain words, Turkish Courts should bring their understanding of freedom of expression in line with that of the European Court of Human Rights. Otherwise, no amendment of law will contribute to the protection of that freedom. The solution to the problem mainly depends on a change in mentality, not in the law.

⁴² Yargıtay Ceza Genel Kurulu, E.2006/9-169, K. 2006/184, Judgment of 11 July 2006.

⁴³ *Id.* For a similar decision of the Court of Appeals, see Yargıtay Ceza Genel Kurulu, E. 20048-201, K. 200530, Judgment of 15 March 2005 and the dissenting opinion thereafter.

⁴⁴ For an example of articles 10 and 11 of the European Convention of Human Rights, see Yargıtay 9. Hukuk Dairesi, E. 2004/28345, K. 2004/24792, Judgment of 15 September 2004. In this case, the closure of a trade union, Eğitim-Sen was demanded because of the opinions declared in its statute. The Court of Appeals concluded that non-closure of the trade union by the court of first instance was unlawful. Eğitim-Sen survived by extracting the controversial part of the statement from the statute.

D. Conclusion

It has been shown above that article 301 (and article 159 of the former TPC) has been subject to continuous debates and several amendments since it was first adopted in 1926. Although the enactment of the new TPC was first approved of in EU circles, it appeared that the formulation of article 301 was a total failure in terms of the exercise of freedom of expression. After long controversies, the Government decided to revise the article.

The 2008 amendment has not solved the controversial elements of the article. It remains cloudy not only because of the ambiguity of the meanings of the values and state bodies protected by the article, but also by the meaning of “denigration.” How “denigration” is interpreted by Turkish Courts is of vital importance for the enjoyment of freedom of expression, as the condition of approval of the Minister of Justice is not always a reliable guarantee because of the political character of the article.

The interpretation of the article as a whole in favor of liberties would also confute the idea that the 2008 changes on the article are only cosmetic. European Court of Human Rights decisions can lead the Turkish courts on this matter. However, the Turkish Courts, which ignored the criteria on freedom of expression and its limits set by the Strasbourg organs, will have to resolve their restrictive apprehension urgently.

Finally, it should be kept in mind that even if the amended article 301 is deemed satisfactory in terms of freedom of expression, there are other freedom-curbing laws in the Turkish Penal Code that need to be changed, too. The Turkish judicial bodies, provided that they adapt their decisions to those of the European Court, can broaden the frontiers of freedom in Turkey as a whole, including, but not limited to, article 301 and freedom of expression.

DEVELOPMENTS

Review Essay - “Contemporary Comparative Law: Between Theory And Practice” - Review of Esin Örüçü & David Nelken’s Comparative Law: A Handbook

*By Jennifer Hendry**

[Esin Örüçü & David Nelken, *Comparative Law: A Handbook*, Hart Publishing, UK, (2007) ISBN: 9781841135960, pp. 449]

A. Introduction

Contemporary comparative law¹ is perhaps one of the most awkward of all legal academic areas, being as it is contested from all sides and even from within. Much of this contestation revolves around questions of scope, purpose and utility, not to mention considerations of methodology, epistemology and applicability. In short, it could be said that, whether they consider themselves to be comparative lawyers or comparatists-at-law, proponents of the discipline agree on little other than the innate importance of undertaking comparative work.

While comparatists appear to “love to wail about the state of their discipline,”² reports of an “explosion” in comparative law over the past 25 years have certainly not been exaggerated; it has arguably inched from the periphery of the legal academy to a much more central position. This is undoubtedly the result of a marked increase in globalisation, Europeanisation and governance processes, which in turn have served to engender a shift in perceptions regarding the importance of the nation state, the viability of the “unit” of a legal system, and what

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¹ Throughout this review article I will use the term “comparative law” to denote the full discipline with as little exception as possible; the more particular intra-discipline approaches shall be referred to specifically.

² Mitchel De S.-O.-l’E. Lasser, *The Question of Understanding* in COMPARATIVE LEGAL STUDIES: TRADITIONS & TRANSITIONS, 197 (Pierre Legrand & Roderick Munday eds., 2003).

constitutes “law” itself.³ Also contributing to this escalation, however, is the fact that any remotely comparative endeavour regarding any legal feature tends to fall under the umbrella term “comparative law”. In its broadest interpretation, “comparative law” could include within its subject matter the study and research of all the laws of all the legal systems as well as covering their interrelations, shared or diverse genealogies, similarities and differences – in effect, anything “with law as its object and comparison as its process.”⁴

It is not difficult, therefore, to see why this is a burgeoning field,⁵ nor why there have been numerous recent attempts to delimit and clarify the discipline in order to discover what can realistically be considered its “disciplinary identity.”⁶ For example, should mere analyses of “foreign law” come under the auspices of comparative law, and what about critical second-order investigations into its methodology and epistemology? Similarly, disagreements are also raging over the extent to which other disciplines – such as the sociology of law, jurisprudence, legal history, international law, comparative politics, anthropology, and even linguistics⁷ – overlap with or can be included within the ambit of comparative law. These questions serve to spark a cascade of additional queries: does this interdisciplinarity strengthen or weaken the discipline?; can comparative law actually be considered to be a discipline in its own right, or is it more suited to being on the margins?; is comparative law perennially parasitic, peripheral, and always an extraneous afterthought to the real business of law?⁸ Alternatively, should it be thought of as a “central element of legal method”⁹ or is it best

³ The debates on legal pluralism provide a good example of this. See, among others, John Griffiths, *What Is Legal Pluralism?*, 24 JOURNAL OF LEGAL PLURALISM (J. of Leg. Pluralism) 1, 38 (1986); Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOCIETY REVIEW (Law & Soc’y Rev.) 869 (1988); and Brian Z. Tamanaha, *A Non-Essentialist Version of Legal Pluralism*, 27 JOURNAL OF LAW & SOCIETY 296 (2000).

⁴ AN INTRODUCTION TO COMPARATIVE LAW, 3rd ed. (Konrad Zweigert & Hein Kötz eds., 1998) at 2.

⁵ Although some commentators have touted the notion that comparative law as a discipline has already reached its peak and is now beginning to decline; see Mathias M. Siems, *The End of Comparative Law*, 2 JOURNAL OF COMPARATIVE LAW 133 (2007).

⁶ See RETHINKING THE MASTERS OF COMPARATIVE LAW (Annelise Riles ed., 2001) at 3.

⁷ PIERRE LEGRAND, FRAGMENTS OF LAW-AS-CULTURE (1999) at 9.

⁸ See H. Patrick Glenn, *Com-paring* in COMPARATIVE LAW: A HANDBOOK, 91 (Esin Örüçü & David Nelken eds., 2007).

⁹ William Twining, *Globalisation and Comparative Law* in COMPARATIVE LAW: A HANDBOOK, 69, 84 (Esin Örüçü & David Nelken eds., 2007).

described as being “a big tent, encompassing lots of different types of scholarship”?¹⁰

It is perhaps not unusual that the discipline of comparative law should spend much of its time both in questioning its own position as regards other academic fields and attempting to define its own contours and boundaries – after all, this drawing of distinctions and differentiating on the basis of them is a fundamental tenet of the discipline. Problematic with this, however, is that comparative law often seems to be a discipline with more questions than answers.¹¹ Indeed, it is often unclear exactly what the point of the whole comparative endeavour, in fact, is. If, like Legrand says, comparative legal research ought to involve “a proclivity on the part of the comparatist toward an acknowledgement of ‘difference,’”¹² should it not also have a concrete end *in itself*? As mentioned above, the main proponents of the discipline appear to be in concordance on very little other than the comparative analysis of law is a Good Thing, but its actual usefulness could and should be called into question. Even Sir Basil Markesinis has voiced the criticism that comparative law tends to concern itself with “ideas and notions that cannot be put to practical use,” which are more often than not only of interest to those “who spend their time devising them and then quoting each other with self-satisfaction.”¹³ An allegation of preaching to the converted is certainly too strong here, but the question of utility does tend to hover in the background.

In light of these questions, therefore, the very endeavour of masterminding and compiling such an ambitious volume on Comparative Law should be commended; there is no doubt that the discipline has been crying out for a catch-all text that could be used as both an introduction and a course textbook. However, while such a text is definitely required, it is debatable as to whether *this* volume actually does fill the recognised gap in the market. My purpose in this review article, therefore, is essentially threefold. First, I hope to give a brief critical overview of this edited collection, although the scale and complexity of the volume dictates that this must

¹⁰ David Kennedy, *The Methods and the Politics in COMPARATIVE LEGAL STUDIES: TRADITIONS & TRANSITIONS*, 345 (Pierre Legrand & Roderick Munday eds., 2003).

¹¹ Nelken says much the same about the concept of legal culture, posing the question: “is legal culture the name of the question or the answer?” See David Nelken, *Defining and Using the Concept of Legal Culture* in *COMPARATIVE LAW: A HANDBOOK*, 109, 114 (Esin Örüçü & David Nelken eds., 2007).

¹² See *supra* note 7, 10.

¹³ See SIR BASIL MARKESINIS, *COMPARATIVE LAW IN THE COURTROOM AND CLASSROOM* (2003) at 53; see also Sir Basil Markesinis, *Comparative Law – A Subject in Search of an Audience*, 53 *MODERN LAW REVIEW* (MLR) 1 (1990).

be, at best, somewhat cursory. Second, I will attempt to sketch the development of the discipline in order to show how it has arrived at its current fractured (some say fractious) state. Finally, the last section of this review article will then look at the professed aims of this volume both as an introductory text and a teaching tool in order to ascertain whether or not it can be said to have achieved them.

B. Understanding Legal Alterity?

The purpose of this Handbook, as stated by the editors in the Preface, is to “fill the gap in comparative law teaching and study resulting from changes in the scope and composition of the subject,” and one of the methods relied upon to achieve this ambitious aim is the selection of specific subject matter outside what could be considered the “comfort zone” of the discipline. The traditional, usually private law, areas have been downplayed and even omitted in favour of some new fields and fresh debates, both theoretical and substantive, while significant attention is also paid to questions of methodology and categorisation. As David Nelken says in the introduction to this Handbook, the reason behind the selection of certain topics and approaches over others (aside from straightforward pragmatism – as it would be impossible to cover everything) is “to unsettle the normal contents of what would be thought appropriate for a handbook on comparative law.”¹⁴

On the balance of things, this can be considered to be a successful approach – for one thing, it is refreshing that this introductory text on comparative law does not feel the urge to provide an overview of, for example, German, French and English contract law and the interrelations between these legal “cultures” in terms of this substantive area. Many books on the topic of comparative law or that claim to follow a comparative method are packed predominantly with detailed descriptions of laws in particular countries, penned by national experts, after which comes an attempt at comparison, sometimes almost by way of supplement.¹⁵ While there is obviously a time and a place for this type of detail-rich analysis, a huge plus point for this book is that it avoids the temptation of covering old ground or sticking with tried-and-tested, which serves to give it a much more contemporary flavour.

Something that is not new, although not immediately apparent on perusal of the titles on the contents page, is the Euro-centrism of the book. There is the token

¹⁴ David Nelken, *Comparative Law & Comparative Legal Studies* in *COMPARATIVE LAW: A HANDBOOK*, 3, 4 (Esin Örüçü & David Nelken eds., 2007).

¹⁵ For example see *supra*, note 4, and *ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW* (Jan Smits ed., 2006).

“beyond Europe” article,¹⁶ plus one on globalisation¹⁷ and another that engages with primarily international law concerns but, specific subject matter aside, the perspectives and methodological approaches are essentially European in character. This is perhaps a somewhat unfair criticism considering both the historical genesis of the discipline¹⁸ and the fact that many of its main contemporary debates concern the legal integration process in Europe;¹⁹ nevertheless, and especially in light of the professed aim at the start of the Handbook – to “unsettle” established notions of what should be included in such a volume – the failure to take the opportunity to present a distinctively non-European (and non-Western, for that matter) perspective alongside the European one can go down as a missed chance.

In the same vein, another minor reservation I have is the scant attention paid by the Handbook to a couple of important contemporary topics such as, for example, the post-modern perspective on comparative legal studies as furthered by, among others, Günter Frankenberg and Pierre Legrand.²⁰ While in the introduction Nelken does acknowledge this lack of dedicated focus on post-modern theorising,²¹ explaining instead that it is touched upon by some of the contributions to the volume, these references are few and far between and serve to make this a somewhat striking omission – especially considering the high incidence of the post-modern approach in current harmonisation debates.²² A more detailed or explicit investigation of the context-in-law approach could have acted as a natural counterpoint to the law-in-context perspective that much of this Handbook is written from.

¹⁶ Werner Menski, *Beyond Europe* in *COMPARATIVE LAW: A HANDBOOK*, 189 (Esin Öricü & David Nelken eds., 2007).

¹⁷ *Supra*, note 9.

¹⁸ The birth of the discipline is universally recognised as occurring in 1900 in Paris, at the first congress held by the *Société de Législation Comparée*.

¹⁹ Obvious examples here include the civil/common law split, the notion of legal *mentalité* and constitutional borrowing, to name but a few.

²⁰ See for example the seminal piece by Günter Frankenberg, *Critical Comparisons: Re-Thinking Comparative Law*, 26 *HARVARD INTERNATIONAL LAW JOURNAL* (HARV.INT'L.L.J.) 411 (1985) and *infra*, note 22.

²¹ *Supra*, note 11, at 4, 24 and 33.

²² See, most obviously, Pierre Legrand's anti-harmonisation standpoint as argued in, for example, Pierre Legrand, *European Legal Systems are not Converging*, *INTERNATIONAL AND COMPARATIVE LAW QUARTERLY* (ICLQ) 45, 52-81 (1996); and Pierre Legrand, *Antivonbar*, 1 *JOURNAL OF COMPARATIVE LAW* (JCL) 13 (2006), among others.

The law-in-context approach can be considered as being the natural consequence of the increasingly widespread rejection of the once mainstream²³ positivist process of comparison;²⁴ in essence, it is this progression that provides the basis for the schism between what have come to be known as the comparative law and comparative legal studies approaches (or, more loosely phrased, theoretical and substantive discussions), which I will discuss in more detail later. Legal positivism tends to view law in instrumental terms, which in positivist comparative law came to be articulated in terms of the purpose or *function* of a given legal rule. The discipline's focus, therefore, has in the past rested upon the analysis of posited rules (namely those enacted or declared by human law makers in official processes), while other things not officially posited, such as ultimate and emotional values, traditions and customs²⁵ were disregarded. This "dreary positivism," as Legrand terms it, had the effect of "relegat[ing] comparative legal studies to [being] a technical exercise whose output is deeply flawed and which ... remain[s] largely irrelevant to the matter of understanding alterity in the law".²⁶

In fact, it is upon this notion of *understanding* legal alterity that the debate can be said to turn, as the two approaches have very different aims in this regard. The law-as-rules positivist approach is interested in the purpose or function of a given law, and so the process of comparison here is intended to identify the most fitting or efficacious rule in achieving particular goals or effects; as Roger Cotterrell says, "the search for the most efficient rule to serve a given social or economic function has been the primary technique for unifying law in comparative legal studies."²⁷ Nevertheless, the popularity of this approach can now arguably be said to be on the wane - not least because of a sea change in attitudes concerning both the desirability and even possibility of identifying similarities across legal systems (or

²³ It should be noted here that the positivist (instrumentalist/functionalist) approach really only occupied the mainstream in Europe. While legal realism and functionalism were also popular in the U.S., they were rarely utilised in terms of comparative law. See Ralf Michaels, *Functional Method* in THE OXFORD HANDBOOK OF COMPARATIVE LAW, 339, 351 (Mathias Reimann & Reinhard Zimmermann eds., 2006).

²⁴ See Mathias Reimann, *Stepping Out of the European Shadow: Why Comparative Law in the United States Must Develop Its Own Agenda*, 46 AMERICAN JOURNAL OF COMPARATIVE LAW (AM. J. COMP. LAW) 637 (1998), where he critiques the classical edifice of mid-century comparative legal scholarship.

²⁵ Roger Cotterrell, *Is It So Bad To Be Different? Comparative Law and the Appreciation of Diversity* in COMPARATIVE LAW: A HANDBOOK, 133, 135 (Esin Öricü & David Nelken eds., 2007).

²⁶ Pierre Legrand, *The Same and the Different* in COMPARATIVE LEGAL STUDIES: TRADITIONS & TRANSITIONS, 240, 277 (Pierre Legrand & Roderick Munday eds., 2003).

²⁷ *Supra*, note 25, 136.

cultures) - and is being increasingly replaced by an approach that argues for a more contextual consideration of the law.

This development is, however, not without its own complication; the positivist hangover is still clearly evident in the work of some proponents, a number of whom have contributed to this Handbook,²⁸ where the reliance is still upon a predominantly functionalist approach. This attachment to what Nelken refers to as the “*putting law-in-context*” model serves to engender a subsequent split within the law-in-context movement, as well as giving rise to some of the confusion throughout the discipline by “confusing purposes with effects,” overlooking the cultural and social construction of said problems, and assuming too great a degree of equivalence across various legal contexts.²⁹

On the other side of this split - as one may have expected - one finds a model that is more aware of these potential tripwires and pitfalls, and seeks to avoid them by means of a *second-order* approach. This “*finding law-in-context*” model has substantial representation in (particularly the first part of) this volume, not least due to the editors’ own clear preference for it; the contributions of Cotterrell, Glenn³⁰ and Nelken himself are excellent exemplars of this model. However, being aware of the hazards does not necessarily translate into an avoidance of them; the recognition that law is “an indissoluble amalgam of historical, social, economic, political, and psychological data, a compound, a hybrid, a ‘monster’, an ‘outrageous and heterogeneous collag[e]’”³¹ is an insightful but perhaps not particularly useful one.

An additional difficulty relevant to utilising either of these law-in-context models is the weighty burden of justification that must be faced regarding any contextual selection - indeed, this is the main bugbear for any comparative analysis relying on

²⁸ See, for example, the contributions of Masha Antokolskaia, *Comparative Family Law: Moving With the Times?* in *COMPARATIVE LAW: A HANDBOOK*, 241 (Esin Örüçü & David Nelken eds., 2007); John Bell, *Administrative Law In Comparative Perspective* in *COMPARATIVE LAW: A HANDBOOK*, 287 (Esin Örüçü & David Nelken eds., 2007); Nicholas H.D. Foster, *Comparative Commercial law: Rules or Context?* in *COMPARATIVE LAW: A HANDBOOK*, 263 (Esin Örüçü & David Nelken eds., 2007); Werner Menski, *Beyond Europe* in *COMPARATIVE LAW: A HANDBOOK*, 189 (Esin Örüçü & David Nelken eds., 2007); see also, *supra*, note 4.

²⁹ *Supra*, note 14, 19

³⁰ *Supra*, note 8, 91-108

³¹ *Supra*, note 7, 5

contextual considerations.³² While taking account of context is recognised by proponents as being the optimum way of looking at a legal unit (its history, development, peculiarities, etc), providing as it does much more texture than a mere superficial snapshot, there are always question marks over what is omitted from any given analysis. For example, the selection of the relevant unit(s), namely *which* legal system, legal tradition, legal culture, legal family, region, etc. is to be studied, requires explanation - as does the chosen legal feature; why has one been chosen over another? Is that not an arbitrary choice? Has the context been taken properly into account? Can the comparatist be sure that they are not projecting onto the observed? And so on and so forth. I shall not attempt to supply answers here but, then again, neither does this Handbook, and this is my essential point - while Nelken discusses these first and second (order) law-in-context models in his introductory article, there is little further elaboration on the *specifics* of these models throughout the volume, no clear declaration that a particular one is being applied, and no signposted route to follow from these models to arrive at the more complex "comparative law" and "comparative legal studies" approaches that I mentioned earlier.

The stand-off between the two separate camps that wear the respective colours of comparative *law* and comparative *legal studies* is less clear-cut than one might think, considering that this schism goes right to the heart of the discipline and concerns the very contours of the field - namely, what is meant when we refer to comparative law, and what is its purpose? In its simplest articulation the split can be described as being between theoretical and substantive concerns: the former camp sees itself as having more lofty concerns than its more empirically-oriented, practical counterpart. In effect, those of a more theoretical bent consider comparative law to be an activity in its own right, whereas those in the latter camp are more interested in undertaking comparison from the perspective of affecting things on the ground, such as law reform.³³ While this appears to be a rather clean distinction, on closer inspection it appears that the lines are frequently blurred in terms of the degree to which certain tenets are upheld, most notably in terms of the contextual approaches outlined above.

Considering, then, that this is a fundamental debate regarding the scope and boundaries of the field itself, it is very difficult to condone the somewhat slapdash use of these categories throughout this volume. While each author maintains a

³² For an account of the logistical differences of a contextual study, see Foster, *supra*, note 28, 280.

³³ See Sjeff van Erp, *Comparative Law in Practice: The Process of Law Reform* in *COMPARATIVE LAW: A HANDBOOK*, 399 (Esin Örüçü & David Nelken eds., 2007).

certain rigidity as regards the concepts that they themselves employ, the apparent interchangeability of the terms “comparative law,” “comparative legal studies,” and “law-in-context” throughout the volume is downright confusing. This lack of clarity is obviously a consequence of a general lack of consensus in the discipline, but an introductory text such as this should really have consistent application of conceptual terminology.

C. Conclusion

This leads to the consideration of whether or not this Handbook can be said to have achieved its broad aims, which from the start are clearly laid out as: a) the presentation of a contemporary perspective on the topic subsequent to major changes in its scope and composition; b) the facilitation of an engagement with “the challenges and controversies found in comparative law” by students of the subject; and c) the plugging of the recognised gap in the market for an introductory textbook.³⁴

The verdict? Well, it *sort of* manages. Put simply, the Handbook copes valiantly with the former two self-posed challenges, but struggles somewhat to be convincing in accomplishing the latter. I should say that this is not a criticism as such; in particular, the second and third aims appear to be mutually exclusive, as a successful engagement with some of the complex issues inherent to contemporary comparative law cannot be done in the same breath as a general introduction to the key principles of the discipline. Some of the papers in the volume are clearly intended to be introductory, outlining the background to, the main tenets of, and the current state of play in the given field,³⁵ whereas others appear to pitch it at a higher level and assume a substantial knowledge of the literature and debates. Again, this is by no means a criticism of specific papers, merely an observation of a disjunction between the target audiences that causes the volume to lack both cohesion and any clear progression from section to section.

³⁴ For the stated aims, see both Esin Özücü & David Nelken, *Preface* in *COMPARATIVE LAW: A HANDBOOK*, (Esin Özücü & David Nelken eds., 2007) and the description on the back-cover.

³⁵ Good illustrations of this type are the papers by, for example, Esin Özücü, *A General View of 'Legal Families' and of 'Mixing Systems'* in *COMPARATIVE LAW: A HANDBOOK*, 169 (Esin Özücü & David Nelken eds., 2007); Jan Smits, *Convergence of Private Law in Europe: Towards A New Ius Commune?* in *COMPARATIVE LAW: A HANDBOOK*, 219 (Esin Özücü & David Nelken eds., 2007); and Andrew Harding & Peter Leyland, *Comparative Law in Constitutional Contexts* in *COMPARATIVE LAW: A HANDBOOK*, 313 (Esin Özücü & David Nelken eds., 2007). Roger Cotterrell also has helpful clarifications of difficult or advanced terminology throughout his text: see *supra*, note 25.

In a similar vein, the fact that the Handbook is an edited collection means that there is no common thread running through it. Although, to be fair, Nelken does acknowledge this in the introduction,³⁶ conceding that the authors are by no means singing from the same hymn sheet regarding either the contemporary debates or the historical development of the discipline. Nevertheless, and while these often contradictory arguments serve to exemplify some of the real battles in the field, they tend to leave the reader at somewhat of an impasse. Although there are evident benefits to presenting a comprehensive overview of the field, disagreements included, it does have the unintended “irritant” effect of failing to provide a clear path for the reader. If the book is read as an edited collection then this is unproblematic and even stimulating; however, if the book is intended to be utilised as a textbook and/or an introduction, then this variety could be pointed to as a flaw.

Correspondingly, the repeated, albeit accurate, assertion that the inherent complexity of today’s (global) legal environment makes the very process of comparison a difficult one is increasingly tiresome as the Handbook progresses. While obviously also a result of the compilation nature of this text, the repetition has the effect of being rather disheartening for the reader, who may end up coming to the pessimistic conclusion that effective comparison is either impossible or so fraught with difficulty that it is not worth the effort it requires. A nod or two to the necessity of *selecting* certain legal units or features, as mentioned above, might be a helpful inclusion; for example, Boaventura de Sousa Santos’ work on maps, and their necessary simplicity compared to the sheer *unrepresentability* of reality springs to mind.³⁷

If these points seem like nitpicking, however, then that is because they are. When it comes down to it, this Handbook is a worthy attempt to provide an accessible and useful overview of the fluid, contested and generally infuriating discipline of comparative law. Its shortcomings are less that it fails to provide this overview and more that it does it so well – it actually reflects a lot of the fundamental problems with the discipline and as such is very informative, although one does occasionally

³⁶ It should be said here that a minor gripe on my own part is that the vast majority of criticisms I (would) have raised in reviewing this volume have been pre-empted and on the whole both explained and justified by Nelken’s excellent introductory chapter, especially as I followed his suggestion to read it both at the beginning and end of the Handbook; see David Nelken, *supra*, note 14

³⁷ See for example, Boaventura de Sousa Santos, *Law: A Map of Misreading*, 14 JOURNAL OF LAW & SOCIETY 279 (1987) and BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW LEGAL COMMON SENSE* (2002).

wonder whether this is less by design than by accident. It may end up being the case that its employment as a course textbook could have more to do with its format (the inclusion of key concepts, questions for discussion, and further reading at the end of each chapter) than with its content but, in terms of that content, this volume is undoubtedly a beneficial contribution to the literature in the field.

DEVELOPMENTS

Book Review - The Quest for a Founding Norm: Constitutionalization of International Law Revisited - A Review of Nicholas Tsagourias, ed., *Transnational Constitutionalism: International and European Models* (2007)

*By Lucas Lixinski**

[Nicholas Tsagourias ed., *Transnational Constitutionalism: International and European Models* (2007) Cambridge University Press: Cambridge, ISBN: 978-0-521-87204-1, pp. 377]

A. Introduction: The Project of Constitutionalization of International Law

The topic of constitutionalization of international law (with European law to be considered for the present purposes as also being part of international law) has been under intense debate for at least the last couple of years,¹ and is the topic of the book edited by Nicholas Tsagourias, from the University of Bristol,² which I will review here. While there has been a lot of discussion on the subject, it still seems to be unclear whether the constitutionalization of international law can be labeled a “project” – meaning something that is being designed and yet to be accomplished – or a “phenomenon” – indicating something that already exists, and is only being described, or at worst refined by scholarship. The title of this section makes my stance on the subject clear: at the present moment there are in reality

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¹ See for instance the seminal book *TOWARDS WORLD CONSTITUTIONALISM: ISSUES IN THE LEGAL ORDERING OF THE WORLD COMMUNITY* (Ronald St. John MacDonald and Douglas M. Johnston eds., 2005).

² *TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN MODELS* (Nicholas Tsagourias ed., 2007).

clear elements of a certain type of constitutionalization in international law, but these elements have not reached the maturity for one to speak of “phenomenon”, at least not a generalized one.

One of the reasons for my having such an opinion is the lack of an overarching value-based fundamental norm (*Grundnorm*). This is naturally related to a rather thick version of constitutionalism, to use Tsagourias’ distinction in the book’s Introduction.³ If one chooses a thinner version of constitutionalism to talk about the international level, then there probably are more elements to argue for the existence of constitutionalism as a phenomenon, even though I still believe a *Grundnorm* – or at least a version of it – is essential for both thick and thin versions of constitutionalism.

In this review, thus, I will outline the main points advanced by the various contributors. The structure of the review will be somewhat different from that of the book. I will first of all analyze the question of the comparison between municipal and international constitutionalism (with some regard to the notion of sovereignty), to subsequently look at the role that legal principles as abstract, generalized norms play in this project. I will also look at the institutional interfaces both at the European and general international levels, and finally I will briefly outline some of the main contrasts between European and general international constitutionalism. My main argument, outlined in the last part of this review, is that human rights should fill the void caused by the lack of a fundamental norm. In this sense, general international constitutionalism is to play a larger role, as European constitutionalism is, to a large extent, still oriented towards the achievement of economic goals, and, even when economic integration processes are pursuing non-economic goals, they are forced by their own discourse, upon which the European integration process was built, to translate other values into economic goals, or at least to highlight their effects on economic goals.

B. Internal and International Constitutionalism

A common feature of works examining international constitutionalism is that they try to compare international constitutionalism with state constitutionalism. As Tsagourias properly points out, though, the state should not be the standard for comparison, as the dynamics of post-state spaces are very different, and even state-

³ Nicholas Tsagourias, *Introduction – Constitutionalism: a theoretical roadmap* in TRANSNATIONAL CONSTITUTIONALISM, 1, 2-3 (Nicholas Tsagourias ed., 2007).

based accounts of constitutionalism are often based on abstract and unreal models.⁴ Furthermore, “the international has no ‘demos’ in the sense of a body-politic that can bind its members”, and “in a polyvalent order such as the international, constitutionalism may be more about normative neutrality and accommodation of differences than about the projection of a common value system.”⁵

These differences between the national and international systems are remarkable and cannot be overlooked, but the drawing of comparisons can be useful for understanding the processes of the international society, at least at an abstract and theoretical level, if these differences are taken into account. In many ways, these differences relate as well to the concept of sovereignty, the erosion of which is one of the main foundations for the project of the constitutionalization of international law. As the Westphalian concept of sovereignty is overcome, or at least re-invented, one can inquire into the possibility of establishing one universal state. The basic premise of Westphalian sovereignty is that states are self-enclosed units, and that states behave towards one another in constant mistrust, similar to the “state of nature” that precedes the social contract in municipal constitutional theory.

This is what Patrick Capps examines in his chapter.⁶ He analyzes the nature of legal obligations and how they can contribute to re-creating a sort of “social contract” in international law. He starts by affirming that international obligations are not generally binding on states as an objective set of norms, but rather that as a rule states voluntarily bind to the norms they choose to, and not to the whole body of them.⁷

He affirms next that the foundational norm of the international order is one that affirms that consent is law-creating for states, and that this foundational norm must have been consented to at some point.⁸ While this fundamental norm seems to be what it takes to “rescue” the international legal order from a “state of nature-like” status, Hobbes, according to Capps’s reading, argues that it is actually states’ self-interest that causes states to act civilly towards one another, creating a minimum

⁴ *Id.*, 4-5.

⁵ *Id.*, 6.

⁶ Patrick Capps, *The rejection of the universal state*, in *TRANSNATIONAL CONSTITUTIONALISM*, 17 (Nicholas Tsagourias ed., 2007).

⁷ *Id.*, 19.

⁸ *Id.*, 20.

sociability, and thus a minimum social order.⁹ However, this self-interest gives rise to mistrust, which will eventually spiral out of control and will only be ameliorated when a social contract is established.¹⁰

The minimum requirements of what the social contract is meant to achieve can also be seen, from a Lockean perspective, in the horizontal international society, namely, the existence of guarded co-operation (because of the mistrust amongst states) and government by a minimum set of rules (natural or positive), which are neither created nor enforced by a universal state.¹¹ But the logic that justifies the sovereign state does not necessarily imply the universal state, and this is referred to by Capps as the “discontinuity thesis”.¹²

The discontinuity thesis offers three arguments in its favor. The first one is that the universal state is “impractical against standards of effectiveness or legitimacy”. This means saying that a centralized rule-making authority, universal membership and a hierarchy of institutions cannot always be found in the international legal order.¹³ The second is that the state behaves differently from natural individuals. This proposition can acquire several meanings: it can be interpreted as saying that states can auto-limit themselves in a way the impulsive human being cannot (partly because the states’ legal order emanates from self-regulation, and is not imposed on them); that states can co-exist without a universal state; and that states are not as vulnerable as flesh and blood human beings.¹⁴ The third argument presented to rebut the universal state is that the state cannot be perceived as an agent in the same fashion as individual human beings.¹⁵

Capps concludes his analysis by invoking the Kantian cosmopolitan ideal, and by affirming that, even if a full social contract in the fashion of those celebrated within individual states cannot be reached at the international level, the next best thing, or a “surrogate” to the idea of a universal state must be sought.¹⁶ That is to say, while

⁹ *Id.*, 23.

¹⁰ *Id.*, 24-25.

¹¹ *Id.*, 27-28.

¹² *Id.*, 28.

¹³ *Id.*, 30.

¹⁴ *Id.*, 32.

¹⁵ *Id.*, 29.

¹⁶ *Id.*, 41.

Westphalian sovereignty, and the “state of nature-like” situation created by it still exists, alternatives can and must be sought, at the expense of re-interpreting the boundaries of state sovereignty.

Another look at the municipal/international constitutionalism distinction is offered by Pavlos Eleftheriadis.¹⁷ He essentially argues that analogies with internal constitutional efforts in the context of the European Union (EU) mislead people into neglecting the complexity of the EU. He defends a new and unique cosmopolitan framework for determining the role of states in the EU’s institutional system.¹⁸ He looks at four models of decision-making: (1) formal equality, in which states have equal representation on the formal basis of their sovereignty; (2) criterial equality, according to which states are represented based on some feature other than sovereignty; (3) formal inequality, in which states are treated differently independent of substantive criteria to justify the distinction; and (4) criterial inequality, in which some state is given less power based on some substantive criterion.¹⁹

Eleftheriadis transposes this general theory into the specific context of the EU, and uses it to come to the conclusion that the EU uses more than one of these categories in different areas of action.²⁰ He also concludes that the treaties are complied with based not only on a theory of constitutional legal positivism, but also on the idea of a duty of respect and solidarity towards the other parties.²¹ In a way, this recalls Capps’s argument that it is not subordination, but coordination and self-regulation that characterize the international legal order.

The issue of sovereignty also occupies Bardo Fassbender in the book.²² He argues that to discuss the idea of an international constitutional order necessarily means discussing sovereignty.²³ The transfer of constitutional ideas and language has

¹⁷ Pavlos Eleftheriadis, *The standing of states in the European Union*, in TRANSNATIONAL CONSTITUTIONALISM, 44 (Nicholas Tsagourias ed., 2007).

¹⁸ *Id.*, 45-46.

¹⁹ *Id.*, 50-53.

²⁰ *Id.*, 69.

²¹ *Id.*, 57.

²² Bardo Fassbender, *The meaning of international constitutional law*, in TRANSNATIONAL CONSTITUTIONALISM, 307 (Nicholas Tsagourias ed., 2007).

²³ *Id.*, 308.

become almost uncontroversial nowadays,²⁴ and it is understood that one can speak of international constitutionalism without meaning a “world state”.

Fassbender concludes that the project of constitutionalization of international law is not necessarily a threat to state sovereignty. If anything, a constitution of the world community protects the legal authority and autonomy of states against unlawful interventions, similar to the protection of fundamental rights and freedoms of individuals at the municipal constitutional level.²⁵

Wouter Werner also discusses the project of international constitutionalism in light of municipal constitutional language.²⁶ He argues that the “way of using the language of constitutionalism is based on two desiderata: to remain within the boundaries of positive law, and to contribute to a normative, internationalist project.”²⁷ Werner suggests that international constitutionalism draws on national constitutionalism and borrows “the notion of the constitution as the foundation of a hierarchically structured legal order that unifies a community and regulates (limits) the exercise of political power”.²⁸

C. The Role of Principles

In the debate over municipal and transnational constitutionalism, Elfteriadis mentions the importance of the principles of subsidiarity and proportionality in determining the roles to be played by states in the European Union.²⁹ A closer look at the role of principles in general is given by Nicholas Tsagourias.³⁰

²⁴ *Id.*, 309.

²⁵ *Id.*, 326.

²⁶ Wouter Werner, *The never-ending closure: constitutionalism and international law*, in TRANSNATIONAL CONSTITUTIONALISM, 329 (Nicholas Tsagourias ed., 2007).

²⁷ *Id.*, 330.

²⁸ *Id.*, 353.

²⁹ See, *supra*, note 17, 56-62.

³⁰ Nicholas Tsagourias, *The constitutional role of general principles of law in international and European jurisprudence*, in TRANSNATIONAL CONSTITUTIONALISM 71 (Nicholas Tsagourias ed., 2007).

Tsagourias starts by offering a typology of general principles of law. After saying that these principles often refer to legal technique or logic,³¹ he goes on to explore the nature of these principles. According to one view expressed by the European Court of Justice (ECJ), general principles of law are not the lowest common denominator amongst states, but rather solutions that best advance the goals of the legal system in which they operate.³² Even though this view was expressed in the specific context of the EU, it is clear that it can be transplanted to the municipal and general international spheres.

General principles, according to Tsagourias, are “primary propositions that refer to values or goals”,³³ which “represent, define and explain the constitution of a polity and when they enter its constitutional conscience as legal precepts they become general principles of law in the sense that they translate in legal terms the normative and organisation [sic] principles of the polity”.³⁴ These principles can be either normative-ideational or structural-organizational. The first category refers to the creator spirit behind a certain legal order (such as humanity, human rights and peace), while the second type refers to coordinates of a particular order to better organize the relations in it (such as equality, non-intervention and self-determination). Structural-organizational principles derive from normative-ideational principles and maintain some order in the general structure.³⁵ The *Grundnorm* that is necessary for the project of constitutionalization to get even closer to being a reality must be a normative-ideational principle. According to Tsagourias, though, international constitutionalism is more structural than normative.³⁶

Tsagourias then looks at the use of general principles of law in the jurisprudence of the ECJ and the International Court of Justice (ICJ). He affirms that the choice to apply or not to apply a certain principle in many instances comes down to a question of whether to prioritize politics or law in a certain case. He suggests that the affirmation of a certain principle in political fora helps in its application in

³¹ *Id.*, 72.

³² *Id.*, 73.

³³ *Id.*, 75.

³⁴ *Id.*, 76.

³⁵ *Id.*, 76-77.

³⁶ *Id.*, 81.

judicial practice.³⁷ Based on this use of principles, he concludes that both the EU and the international legal order possess “constitutional mindsets”, but to different degrees.³⁸

Julian Rivers also examines principles, but focuses on proportionality and discretion.³⁹ He examines the way in which discretion, or “discretionary devices”, have been used to soften the use of the principle of proportionality.⁴⁰ Discretion is an “inevitable component” of a proportionality analysis, but the extent to which it is used varies tremendously, from the strict use of proportionality to the complete abandonment of some parts of the proportionality test.⁴¹ He outlines three different types of discretion: (1) policy-choice discretion; (2) cultural discretion; and (3) empirical discretion.⁴²

Policy-choice discretion is at least partly based on considerations of efficiency or Pareto-optimality,⁴³ thus being connected to a “Law and Economics” approach to the issue. Cultural discretion, on the other hand, is related to differences in substantive equality within a given polity. Respect for diversity is the interest that may lead an international court to make use of this type of discretion.⁴⁴ And empirical or evidential discretion is based on the assumption that the judiciary simply cannot assume that harm will not occur in a given case if the state of affairs is not changed by the judicial decision.⁴⁵ She finally argues that loosely connected communities, such as the international one, will tend to make more use of policy-choice and cultural discretion, while evidential discretion is a tool typically adopted by the ECJ, which is the judicial body of a more closely bound community of states.⁴⁶

³⁷ *Id.*, 98.

³⁸ *Id.*, 103.

³⁹ Julian Rivers, *Proportionality and discretion in international and European law*, in TRANSNATIONAL CONSTITUTIONALISM 107 (Nicholas Tsagourias ed., 2007).

⁴⁰ *Id.*, 107.

⁴¹ *Id.*, 108.

⁴² *Id.*, 114.

⁴³ *Id.*, 115.

⁴⁴ *Id.*, 119.

⁴⁵ *Id.*, 120.

⁴⁶ *Id.*, 124-127.

A different take on a specific principle is offered by Achilles Skordas.⁴⁷ He starts by distinguishing two separate dimensions of the principle of self-determination, the self-determination of peoples and the self-determination of regimes, the latter a feature of global governance.⁴⁸ Self-determination is a foundational principle, as it guarantees the reproduction of the system's internal operations, as well as the maintenance of its distinction and separation from its environment.⁴⁹

Skordas analyzes the structural elements of self-determination (state, people, "self"),⁵⁰ and uses this as a platform to discuss external and internal self-determination.⁵¹ He then looks at the principle of self-determination as an "emerging" principle of the global society, precisely because of its mutating character.⁵² By virtue of globalization, self-determination must be redefined in a broader sense, accommodating state and non-state global actors alike. The interactions of these actors give rise to a much more general application of self-determination to the construction of a global polity.⁵³

D. The Institutional Interfaces

The institutional dimension is essential if one is to think of supranational constitutionalism. There can be no overarching normativity without appropriate institutions; if this happens, the normativity will be void of force. However, one recurring phenomenon in international law is the multiplicity of international organizations, and to understand the way in which they relate is essential for the project of constitutionalization. Nigel D. White offers an excursus into the idea of hierarchy between regional bodies and the United Nations (UN).⁵⁴

⁴⁷ Achilles Skordas, *Self-determination of peoples and transnational regimes: a foundational principle of global governance*, in TRANSNATIONAL CONSTITUTIONALISM 207 (Nicholas Tsagourias ed., 2007).

⁴⁸ *Id.*, 208.

⁴⁹ *Id.*

⁵⁰ *Id.*, 209-220.

⁵¹ *Id.*, 220-238.

⁵² *Id.*, 238.

⁵³ *Id.*, 241-242.

⁵⁴ Nigel D. White, *Hierarchy in organisations: regional bodies and the United Nations*, in TRANSNATIONAL CONSTITUTIONALISM 135 (Nicholas Tsagourias ed., 2007).

White speaks of “UN constitutional laws” in the field of economic, social and human rights matters, developed from the customary obligations of article 2 of the UN Charter.⁵⁵ In response to the idea that only states can be bound by international law, he argues that, especially in the field of human rights, the fact that the UN was the main motor force behind these treaties (as were many other international organizations) means necessarily that it is bound by these treaties “in a constitutional sense”, even if not formally party to them.⁵⁶ He argues that in general the UN creates the closest possible thing to a “world constitution”, and article 103 determines the primacy of the UN over international arrangements. In his view, then, the fact that the UN Charter takes precedence over the constitutive charters of other international organizations offers sufficient elements to see in the UN the seed of the world institution that shall govern the project of international constitutionalism.⁵⁷

Fassbender argues that constitutionalization is a solution to the so-called “fragmentation” of international law,⁵⁸ and he cites Habermas in affirming that the UN Charter is central for the project of constitutionalization.⁵⁹ Fassbender suggests that the UN Charter, even though originally conceived only as a treaty, has evolved in the last 60 years to become the substantive and formal constitution of the international community.⁶⁰ Referring to Pierre-Marie Dupuy, he calls the UN Charter a “founding act of a new international order”.⁶¹

He also argues that, even though there is in theory some room for international law existing outside the UN Charter, to consider the UN Charter to be “the” constitution of the world community offers the great advantage of clearly determining the set of rules upon which the international community is built.⁶² To have a clear set of rules is essential for accomplishing greater normativization of the international space, even if subsidiarity is to play a much greater role than in

⁵⁵ *Id.*, 142.

⁵⁶ *Id.*, 143.

⁵⁷ *Id.*, 158-159.

⁵⁸ See, *supra*, note 22, 311.

⁵⁹ *Id.*, 314-315.

⁶⁰ *Id.*, 322.

⁶¹ *Id.*, 323.

⁶² *Id.*, 324.

national constitutions, precisely because there is no need for the replication of such an exhaustive allocation of competencies as one normally sees in national constitutions.⁶³

Ramses A. Wessel looks at how institutionalism plays out in the relations between an international organization and other international actors, mainly states.⁶⁴ He uses Verdross's concept of constitution - "a sustainable institutional basis of a legal community" - as a starting point to inquiring whether there are constitutional elements in the EU, an international organization "that increasingly starts to look like a state".⁶⁵ He considers European external relations as a core element to the emergence of a multilevel constitution in Europe, to the extent it means that the EU is exercising foreign relations, which is traditionally one of the constitutive elements of statehood.⁶⁶

Wessel concludes by affirming that both states and international organizations are sub-systems of an "overall supranational order",⁶⁷ and that the principles of information and consultation,⁶⁸ loyalty⁶⁹ and subsidiarity⁷⁰ serve as the foundations for the supranational constitutional arrangements between the EU and member states. Similarly, the direct effect of external relations norms in national legal systems serves as further evidence of this integration.⁷¹

⁶³ *Id.*, 325.

⁶⁴ Ramses A. Wessel, *The multilevel constitution of European foreign relations*, in TRANSNATIONAL CONSTITUTIONALISM 160 (Nicholas Tsagourias ed., 2007).

⁶⁵ *Id.*, 161-162.

⁶⁶ *Id.*, 167-169.

⁶⁷ *Id.*, 177.

⁶⁸ *Id.*, 179-181.

⁶⁹ *Id.*, 181-183.

⁷⁰ *Id.*, 183-186.

⁷¹ *Id.*, 189-195.

E. European v. International Constitutionalism

The best exercise in comparing these two types of transnational constitutionalism is done by Nicholas Tsagourias.⁷² He begins by describing the international constitutional order with respect to general principles of law, affirming that international constitutionalism is more reticent towards the use of normative principles, and prefers structural principles, which are more value-neutral and thus less debatable, to build its legitimacy.⁷³ The European legal order, on the other hand, has borrowed elements from the international order but subsequently closed itself in an autochthonous and self-contained regime, which finds in the relatively homogeneous constitutional traditions of its member states the support to search for normative principles and build the foundations of the European constitutional project around them.⁷⁴ The international order, on the other hand, tries to deflect national influences, as these may threaten its legitimacy as a total legal order.⁷⁵

This structural difference is at least partly reflected in the role of adjudicatory bodies in each system. According to Tsagourias, the ICJ cannot claim for itself a clear constitutional role, precisely because the international order is acentric and there is no place for a central court to adjudicate disputes. The ICJ cannot assert its authority because it lacks links with national courts, and cannot thus mobilize internal actors to force compliance with its decisions.⁷⁶ The ECJ, on the other hand, has internalized concepts of international law such as *jus cogens* and applied them in a much more pungent manner than its international counterpart.⁷⁷

Another difference between European and International constitutionalism is that, while the latter sees security issues to be at the very core of constitutionalism (due to the normative principle of peace), the European Union does not see its security and foreign affairs regime as constitutional.⁷⁸

⁷² See, *supra*, note 30.

⁷³ *Id.*, 80-81.

⁷⁴ *Id.*, 84.

⁷⁵ *Id.*, 83.

⁷⁶ *Id.*, 88-89.

⁷⁷ *Id.*, 94-95.

⁷⁸ See, *supra*, note 64, 205-206.

One must take into consideration what is perhaps the key difference between the EU and the international system. While the international system is usually political and security-oriented, the EU is based on economic linkages, and is market-oriented, which “arm[s] the regime with strong auto-constitutional structures”.⁷⁹ Therefore, international economic integration regimes are presumably stronger in relation to other regimes that arise solely out of norms of international legal co-operation and existence.⁸⁰

Some of these same constitutional elements can also be seen in the World Trade Organization’s (WTO) regime,⁸¹ but to find stronger constitutionalism there than in other international regimes would imply acknowledging that economic welfare is closer to being the *Grundnorm* of the international system than other competing values, a proposition which I reject. I will now look at other suggestions related to the fundamental norm of the project of international constitutionalism.

A slightly different perspective on the debate between European and global constitutionalism is provided by Tonia Novitz’s study of the corporatism and deliberative governance in labor standards.⁸² She discusses the idea of interest groups and their influence in policy-making,⁸³ using the International Labor Organization (ILO) as a case study at the global level. Deliberative democracy and governance, she argues, has grown as a response to legitimacy crises faced by modern states, and challenges several of the assumptions of corporatism.⁸⁴ For one, it is more inclusive and allows for society as a whole – as opposed to only representatives of certain sectors – to be involved in the process. Also, it transcends the interests of these groups and aims at reaching solutions based on consensus, and attending to the interests of all.⁸⁵

The ILO’s tripartite system of composition (in which each state is represented by diplomats of the state, as well as representatives of employers and employees) is

⁷⁹ See, *supra*, note 47, 243.

⁸⁰ *Id.*

⁸¹ *Id.*, 243-244 and 250-267.

⁸² Tonia Novitz, *Challenges to international and European corporatism presented by deliberative trends in governance*, in *TRANSNATIONAL CONSTITUTIONALISM* 269 (Nicholas Tsagourias ed., 2007).

⁸³ *Id.*, 270.

⁸⁴ *Id.*, 272-273.

⁸⁵ *Id.*, 274.

the best example of the operation of the ILO, as related to its standard-setting capacity.⁸⁶ It does, however, resemble a classic form of corporatism, which is not in consonance with emerging concerns for deliberative participation and governance. This is more inclusive and takes into account the interests of the whole of society, and not only the few main parties directly involved.⁸⁷ However, once one considers the alternatives for more deliberative participation (that is, the inclusion of civil society through NGOs), it might be the case that representativeness is in fact diminished, since NGOs tend to come from industrialized countries, and thus increasing their role would alter the geographical balance within the ILO.⁸⁸

On the EU's side, there are two versions as to why employers and employees get involved in decision-making: the first, related to external scrutiny and democratic structures within the EU, defends that this participation is a regulatory strategy to influence the content of laws binding on the member states; the second, related to accountability of employers and employees towards those they represent, says that this inclusion is simply the recognition of collective bargaining at the European level.⁸⁹ Regardless of the version adopted, what matters is that the democratic deficit in EU governance has been diminished in this sector, and that this is attributable to inclusive participation. Even though EC social dialogue has received criticisms as to its democratic deficit,⁹⁰ this has been addressed by the Commission and a version of "horizontal" subsidiarity, according to which decisions should be taken as close to the employers and employees as possible, has been adopted.⁹¹ This has eliminated the "state" element, and a bipartite model involving only employers and employees has been adopted.

This implies, unfortunately, that the democratic representativeness at the EU level is not as effective as within the ILO,⁹² or at least that it does not contribute nearly as significantly to the project of constitutionalization as one might expect. If the institutional element is dispensed with, and everything is better resolved at the

⁸⁶ *Id.*, 281.

⁸⁷ *Id.*, 283.

⁸⁸ *Id.*, 288.

⁸⁹ *Id.*, 289.

⁹⁰ *Id.*, 295.

⁹¹ *Id.*, 299.

⁹² *Id.*, 299-300.

local level, then it might be the case that transnational constitutionalism might not be the best alternative in this specific case.

Novitz's analysis can also serve as a reminder that it is not always that the European experience of transnational constitutionalism takes the lead in the matter. Her chapter shows one instance in which global constitutionalism is more developed and more prepared to deal with matters of representativeness, essential for the very idea of constitutionalism. It does not, however, address the idea of the fundamental norm of the transnational society, which is the discussion I undertake next.

F. Finding the Fundamental Norm

In his contribution, Wessel suggests that the rule of *pacta sunt servanda* should be the *Grundnorm* of the international community.⁹³ This represents to a certain extent a return to voluntarism and the social contract theory at the international level that has also been analyzed by other contributors in the book.⁹⁴ However, this norm is only a structural-organizational principle, and as such cannot serve as the fundamental norm for the international community.

It has also been suggested that norms of *jus cogens* should play the role of a *Grundnorm* in the international legal system.⁹⁵ However, as Tsagourias observes, *jus cogens* norms are structural-organizational principles, and not normative-ideological ones.⁹⁶ As such, they lack the strength to become a fundamental norm to justify the foundation of an entire constitutional system, even if only a thin form of it.

However, a critique of the role of *jus cogens* norms as a foundation for a constitutional international legal order does not mean the project should be given up altogether. There is still the idea of human rights, at least inasmuch as human rights derive from the principle of humanity, which, as suggested by Tsagourias, is

⁹³ See, *supra*, note 64, 178.

⁹⁴ See, notably, Nicholas Tsagourias's Introduction and Patrick Capps's chapter.

⁹⁵ See, Axelle Reiter, *Going Global: Individual Rights, Universal Norms and the Existence of an Overarching Normative Hierarchy in International Law*, 2 EUROPEAN JOURNAL OF LEGAL STUDIES, 87 (2008).

⁹⁶ See, *supra*, note 30, 93.

a normative-ideological principle.⁹⁷ The fact that *jus cogens* norms are structural-organizational principles does not mean there are not normative-ideological principles that can serve as this *Grundnorm*. In fact, as Fassbender reminds us, *jus cogens* norms very often serve human rights purposes.⁹⁸ Using human rights does not necessarily imply a thick version of constitutionalism, especially if one considers the role of cultural discretion in human rights adjudication explored by Rivers.⁹⁹

Furthermore, as Werner points out, the idea of a “world order” challenges a more traditional reading of international law precisely through the sphere of human rights protection.¹⁰⁰ He comes to the point of suggesting that the International Covenant on Civil and Political Rights (ICCPR) is a constitutional by-law to the UN Charter, which is “the” constitution of the world (agreeing with Fassbender).¹⁰¹

G. Concluding Remarks

Transnational constitutionalism is an uneven project, which in several instances is already a reality. To the extent that the UN Charter is considered to be the constitution of the world community, and regional economic integration processes advance in promoting commonly shared values inside and outside of those merely related to trade, the world (or at least parts of it) seems to be walking towards a new type of global society. What seems to be missing at the moment is a fundamental norm, an overarching idea that can ethically guide and bind all the members of the world community.

Value-free legal orders cannot exist for long, as past constitutional experience has shown (an experience that has precisely led to the creation of the United Nations). As the UN in its own foundation rejects the idea of an order not guided by strong ethic commitments, and the idea of human rights increasingly offers the ethical backbone for international action, it is to be expected that a fuller embrace of human rights in international constitutional debates will finally offer the *Grundnorm* needed for a just, truly cosmopolitan phenomenon.

⁹⁷ *Id.*, 76.

⁹⁸ See, *supra*, note 22, 318.

⁹⁹ See, *supra*, note 39, 122-126.

¹⁰⁰ See, *supra*, note 26, 338.

¹⁰¹ *Id.*, 352-353.

The Case of *Laval* in the Context of the Post-Enlargement EC Law Development

Uladzislau Belavusau*

A. Introduction

This article does not envisage an overwhelming goal to present a detailed X-ray of the recently much-discussed ECJ decisions in the field of social law, namely *Laval*¹ and *Viking*². One could find several very profound papers whose authors thoroughly explore the various issues at stake, including the trade unions strategies in the frame of the EC Law, the role of the Posted Workers Directive, a horizontal direct effect in the context of the service-providing, the negotiation of wages and the Scandinavian social model.³ Therefore, the goal of this piece is to put *Laval*⁴ into

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¹ Case 341/05, *Laval un Partneri Ptd v. v Svenska Byggnadsarbetareförbundet et al.*, 2007 ECR I-5751. The case is often referred to as *Vaxholm* case because the industrial action was undertaken on a building site in Vaxholm, a town not far from Stockholm (see Kerstin Ahlberg, Niklas Bruun, and Jonas Malmberg, *The Vaxholm Case from a Swedish and European Perspective*, 12 TRANSFER 2/06, 155, 155-166 (2006).

² Case 438/05, *International Transport Workers' Union Federation et al. v. Vikingline ABP et al.*, 2007 ECR I-000.

³ See for example, Norbert Reich, *Free Movement v. Social Rights in an Enlarged Union – the Laval and Viking Cases before the ECJ*, 2 GLJ, 125, 125-161 (2008); Bruno Mestre, *The Ruling Laval un Partneri: Clarification and Innovation*, 1 ELR, 2, 2-9 (2008); Brian Bercusson, *The Trade Union Movement and the European Union: Judgement Day*, 13 ELJ, 279, 279-308 (2007); Patrick Chaumette, *Les actions collectives syndicales dans le maillage des libertés communautaires des entreprises*, 2 OBS. SUR CJCE, DR. SOC., 210, 210-220 (2008).

⁴ The focus of this paper is on *Laval* due to the fact that in *Viking* the ECJ offered a less articulated feedback on the status of social provisions. In *Viking*, the Luxembourg jury leaves it to the national courts to decide on the outcomes. Besides, the issue of the flag of convenience would need a separate thorough analysis in the context of Private International Law, especially with the implications for the taxation system.

the macroflora of a wider context, inherent to the effects of the post-enlargement labour conflict and its implications for the fundamentalization of social rights in the Union.

One of the most delicate issues which the eastward enlargement brought into the EU agenda has become the discussion on the modifications in the regulation of labour market in the *EU-25* (or *EU-27* after 1st of January, 2007). The majority of pre-accession commentators (including economists, political scientists, journalists as well as lawyers) focused on the quantitative analysis of the enlargement implications, i.e. on the potential influx of workers from Central and Eastern Europe (referred to below as – *EU-10*, or *CEEC*). This approach echoes a particular concern of certain old member states (referred to below as – *EU-15*) about the protection of national labour markets vis-à-vis the newcomers.

Michael Dougan named three ‘potentially adverse consequences’ for the existing member states in his remarkable ‘pre-accession’ article⁵: “That the enlargement might lead to large-scale benefit migration towards western countries which have established generous welfare systems; that a massive influx of workers from the CEEC would seriously disrupt labor markets in the EU-15; that difference between wages and other compliances costs might lead to social dumping in favor of undertakings from the CEEC”.⁶

Since, on the one hand, initially only three countries from the EU-15 opened their labor markets to the newcomers, and on the other hand, the post-accession reality in those three countries demonstrates that first two fears did not check out⁷, the increasing concern is being raised towards the problem of social dumping⁸. The

⁵ Michael Dougan, *A Spectre is Haunting Europe...Free movement of Persons and the Eastern Enlargement*, in *EU ENLARGEMENT: A LEGAL APPROACH*, 111-142 (Christophe Hillion, ed., 2004).

⁶ *Id.*, 112.

⁷ Nicola Doyle, Gerard Hughes and Eskie Wadensjo, *Freedom of Movement for Workers from Central and Eastern Europe: Experiences in Ireland and Sweden*, 5 *SWEDISH INSTITUTE FOR EUROPEAN POLICY STUDIES* (2006).

⁸ The notion of ‘social dumping’ will be analyzed with regard to the EC Social Law. It is a theoretical construction which is described neither in EC/EU Treaties, nor sufficiently defined in the case-law. In the enlargement context the term ‘dumping’ is often referred to describe the influx of cheap goods on the EU-15 market. See PAUL BRENTON, *ANTI-DUMPING, DIVERSION AND THE NEXT ENLARGEMENT OF THE EU* (1999). In *Laval* both the Advocate General in his opinion and the Court in its decision address the notion of *social dumping* on several occasions without setting a general definition (For further discussion, see especially para. 103, 113 in the decision; see also numerous references to the “combat of social dumping” in the Opinion of AG Mengozzi: para. 246, 249, 251, 273, 280, 307, 309). The anti-dumping measure is interpreted strictly in the context of the Swedish Law on Workers’ Participation in Decisions

latter is proved by the discussion around the long-awaited pronouncements of the ECJ in *Laval* and *Viking*, and has acquired a deep resonance both in media⁹ and legal literature¹⁰. The decision in *Laval* is acute precisely due to the popular expectation (realistic or not) that it sheds light on whether social standards could serve as appropriate derogations under internal market, analogous to the derogations developed by the ECJ to safeguard fundamental rights.

Brief Facts:

A Latvian construction company Laval accused a Swedish trade union of forcing it out of business after the industrial action aimed at enforcing the Latvian company to conclude a collective agreement. This turned to be a real blockage by the Swedish Building Workers' Union supported by the Electricians' Union through a secondary action. Sweden did transpose the Posted Workers Directive however it did not set a national minimum wage, relying instead on collective pay agreements arranged by the country's powerful trade unions. By paying the Latvian workers almost two times less the average wage for similar construction jobs done by the Swedish workers (average-salary-calculation-scheme), the Latvian company was arguably capable of undermining Swedish social standards.

One should bear in mind that for the purposes of this paper, 'economic freedoms' shall not be read in conjunction with 'social freedoms' in a way to establish a legal fiction of 'economic and social rights' traditionally referred to in juridical literature with an accent on the rights of workers.¹¹ Hereby 'economic freedoms'¹² are used to

(*Medbestämmändelagen*). Further the paper will attempt to find, at least, an adequate description of social dumping in the post-enlargement context.

⁹ Michael Herman and Agencies, *ECJ hears landmark labor case*, TIMES ON-LINE (9 January 2007). Available at: <http://business.timesonline.co.uk/tol/business/law/corporate/article1291012.ece> (last accessed on 18 November 2008); Nikki Tait, *A Viking sea battle to rock the EU boat*, THE FINANCIAL TIMES (1 January 2007). Available at: http://us.ft.com/ftgateway/superpage.ft?news_id=fto010120071237549438 (last accessed on 18 November 2008).

¹⁰ See further, Gorce Gaëtan, *L'Union européenne face aux risques de dumping social*, 7 ASSEMBLE NATIONALE, 2000; Ronnie Eklund, *The Laval Case. Swedish Labour Court Decision 2005 No. 49*, 35 ILJ 203 (2006).

¹¹ For an example, see TAMARA K. HERVEY AND JEFF KENNER, *ECONOMIC AND SOCIAL RIGHTS UNDER THE EU CHARTER OF FUNDAMENTAL RIGHTS: A LEGAL PERSPECTIVE* (2003); MATTHEW C.R. CRAVEN, *THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: A PERSPECTIVE ON ITS DEVELOPMENT*, (1995).

¹² When these rights referred to in the literature as 'fundamental rights' (*les droits fondamentaux*), it is usually done with the aim to distinguish them from the 'fundamental freedoms' (*les libertés fondamentales*). Within this approach the former are meant to be synonymic with human rights. And the latter are those which come under the scope of internal market. See in particular, Alberto Alemanno, *A la recherche d'un juste équilibre entre libertés fondamentales et droits fondamentaux dans le cadre du marché*

describe the provisions of the EC internal market covering free movement of workers (Article 39 EC), freedom of establishment (Article 43 EC) and freedom to provide services (Article 49 EC). The terms 'human rights' and 'fundamental rights' are used synonymously.¹³

The first part of this article will address the evolution of the relevant internal market provisions and social law with a separate accent on the effect of previous enlargements. The second part will put *Laval* into the realm of fundamental rights in the Union. The attention will be focused on the pre-enlargement debate and labour safeguards negotiated before the enlargement. The conclusions will try to identify the degree to which *Laval* is an indicator of the fundamentalization of social rights.

B. *Laval* in the Context of the Internal Market

I. Evolution of the Internal Market through a Social Dimension

Three pivotal EC Treaty provisions concerned, namely Article 39 EC (free movement of workers), Article 43 EC (freedom of establishment) and Article 49 EC (freedom to provide services), are to be discussed in conjunction with each other and within a larger-scale debate on the free movement of persons.¹⁴ Nonetheless, one should bear in mind that the case-law approach towards those particular freedoms is not identical and a profound detachment is required when discussing the scope of Treaty clauses. E.g., Article 39 EC embraces exclusively natural persons

intérieur: Quelques réflexions à propos des arrêts « Schmidberger » et « Omega » », 4 Revue du droit de l'Union européenne [RDUE] 709 (2004).

¹³ This synonymous approach has become traditional for EC law doctrine; in particular, see Armin Von Bogdany, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union*, 37 CML REV. 1307, 1307-1338 (2000). It should be noted that sometimes the terminology of 'fundamental rights' is used to embrace even a wider scope of rights and freedoms, including civil, cultural, economic, social and political rights (For an example, see John Morijn, *Balancing Fundamental Rights and Common Market Freedoms in Union Law: Schmidberger and Omega in the Light of the European Constitution*, 12 ELJ 15, 15-40 (2006) which is inadmissible in the light of the present paper, since it distinguishes 'fundamental' (human) and 'social' rights in order to answer the question whether the latter has acquired (or might acquire) a similar 'derogation' status which human rights do enjoy now in EC law.

¹⁴ For a more comprehensive analysis see CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS* (2006); ROBIN C.A. WHITE, *WORKERS, ESTABLISHMENT AND SERVICES IN THE EUROPEAN UNION* (2004).

whereas Article 43 EC is also applicable to companies.¹⁵ Despite all differences, these provisions are interpreted in a very similar way since the development of EC Law on the case-by-case basis has led to the approximation of conditions of entry, residence and expulsion for all EU nationals.¹⁶ This stance also had implications on the family rights of workers and the standardisation of access to social benefits.¹⁷ Thus, a trendy approach in legal literature is to describe these rights within a wider notion of the right to pursue an occupation in another Member State.¹⁸

1. Genesis and Evolution

The genetic core of the pursuit of occupation is embraced by the legal matrix of free movement of persons. Similarly to the domain of free movement of goods, it was the ECJ who has been incubating this specific legal ground for European mobility. Fifty years of European judicial-making involved the controversy on refusal of entry and deportation, theoretical delimitation of direct and indirect discrimination as well as a rigid application of the principle of proportionality.¹⁹ The latter permitted the Court to prevent an abusive interpretation of derogations under public policy by particular member states. Fundamental human rights served as an argument in safeguarding broad scope of the right to move freely within the European Community.²⁰ This genetic ('free movement of persons') approach finds its extension in a very wide judicial definition of a worker as well as of the rights conferred on workers by EC Law (the rights to depart the home state, the right to enter the host state and the right of residence in the host state). Furthermore, with regard to workers the Court continued to define employment and family rights within the concept of equal treatment though significantly narrowing their scope in

¹⁵ For a more detailed distinguishing analysis between workers and services providers in the context of free movement see Marc De Vos, *Free Movement of Workers, Free Movement of Services and the Posted Workers Directive: a Bermuda Triangle for National Labour Standards?* ERA-Forum, N 3/2006, 357, 357-359 (2006).

¹⁶ EUROPEAN UNION LAW: TEXTS AND MATERIALS, 705 (DAMIAN CHALMERS ED. 2006)

¹⁷ Consider Case 85/96, *Martinez Sala*, 1998 ECR I-2691; Case 314/99, *Baumbast*, 2002 ECR I-07091; Case 60/00, *Carpenter*, 2002 ECR I-6279; Case 148/02, *Garcia Avello*, 2003 ECR I-11613; Case 200/02, *Chen*, 2004 ECR I-09925.

¹⁸ Chalmers, *supra* note 16, 697.

¹⁹ Florence Hartmann-Vareilles and María Pilar Nunez Ruiz, « *Le travailleur communautaire: quelques réflexions sur un élément inachevé du marché intérieur* », ERA, 3/2006 326, 326-344 (2006).

²⁰ Consider Case 168/91, *Konstantinidis*, 1993 ECR I-1191; Joint Cases 493/01 and C-482/01, *Orfanopoulos*, 2004 ECR I-05257; Case 109/01, *Arkich*, 2003 ECR I-09607.

comparison with the rights of European citizens to move for the purposes of tourism, study or exercise of medical services.²¹

Another legal paradox in the genesis of the European labour market is that freedom of movement was initially introduced in the Treaty for the specific categories of economically active people. One could hardly expect that ECJ would extend this doctrine so far as to stretch the pre-existing notions²² towards such categories as students²³ and other non-economic actors²⁴. On the other hand, the notion of economic activity²⁵ received a very broad interpretation in case practice.²⁶ Even sport was acknowledged as a subject of community law since sportsmen could exercise economic activities.²⁷ The Court rejected attempts by the Member States to extend *Keck* formula²⁸ beyond the limited scope pertinent to the free movement of goods. It is no accident that the free movement of persons has now become a major motor of integration.

Thus, the choice of the Court in *Laval* was either to keep in line with the logic of the maximum safeguard of the economic freedoms or to frame "social rights" into the list of the essential derogations for the internal market. It seems like the ECJ has decided to stay perfectly in line with its systematic refusal to interpret derogations

²¹ See Pedro Cabral, *La libre circulation des soins médicaux dans l'Union européenne*, Sean Van Raepenbusch, *Libre circulation et sécurité sociale*, and Pablo Dengler, *Libre circulation des personnes et imposition directe*, in *LA LIBRE CIRCULATION DES PERSONNES : ÉTATS DES LIEUX ET PERSPECTIVES*, CAHIERS DU COLLEGE D'EUROPE N° 5, ACTES D'UN COLLOQUE ORGANISÉ EN 2003 À LIÈGE (2007), 203-268.

²² Francesca Strumia, *Citizenship and free movement: European and American features of a Judicial Formula for Increased Comity*, (2006) *CJEL*, Vol. 12, 3/2006. 714-715.

²³ Case 209/03, *Bidar*, 2005 ECR I-02119 (para. 83).

²⁴ Case 200/02, *Chen*, 2004 ECR I-09925.

²⁵ Interestingly enough, in his *Opinion in Case C-96/04, Standesamt Stadt Niebull (name of Leonhard-Matthias)* AG F. Jacobs goes even further to admit that one should not look for economic actor any longer.

²⁶ The Court even found the link between economic activities and the language (Case 281/98, *Angonese*, [2000] ECR I-4139; Case 378/87, *Groener*, 1989 ECR I-3967 etc) or between economic activities and the name (*Konstantinidis*, *supra* note 21, *Garcia Avello*, *supra* note 18, 2003 ECR). Moreover, the prostitution was acknowledged being an economic activity (Joined Cases 115 and 116/81, *Adoui & Cornuaille*, 1982 ECR I-1665).

²⁷ Case 415/93, *Bosman*, 1995 ECR I-4921.

²⁸ Cases 267/91 and 268/91, *Keck & Mithouard*, 1993 ECR 1993 I-06097.

widely.²⁹ Further we shall see whether this stance could have been informed by the deliberation at the particular post-enlargement context.

2. The Potential in the Light of the EU Citizenship

The very project of European citizenship is rather young though the discussion traces back to the early 1970s.³⁰ The notion of EU citizenship was introduced to *acquis* only in 1992 by the Maastricht Treaty and provoked a hearty debate in the milieu of European lawyers on the differences in the perception of this ambiguous term. The debate went on to analyze whether EU citizenship is supplementary to national one. This debate has asked whether the introduction of ‘citizenship’ towards the basic instruments of the EU as a supranational organization leads to the creation of European *demos* and what effects it may have for national *folks*.³¹ The debate has also looked at whether that legal model should be perceived as a market citizenship (focusing on the rights of economic actors), social citizenship (emphasizing the social-welfare elements of citizenship), or a republican citizenship (based on an active citizen participation).³²

Finding an answer to these open questions is an on-going task for the ECJ. Thus, in a series of student cases³³ the Court introduces the idea that EU citizenship is “destined to be the fundamental status”.³⁴ In fact, the Court gives the projection into the future without regard for the reality of the moment. This is a remarkable

²⁹ Para. 98: “[...] The abolition, as between Member States, of obstacles to the freedom to provide services would be compromised in the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organizations not governed by public law”.

³⁰ This notion was first introduced in the German legal doctrine in the 1960s. For an analysis of the evolution of the term see Dominik Hanf, *Le développement de la citoyenneté de l’Union européenne*, in *LA LIBRE CIRCULATION DES PERSONNES : ETATS DES LIEUX ET PERSPECTIVES*, CAHIERS DU COLLEGE D’EUROPE N° 5, ACTES D’UN COLLOQUE ORGANISE EN 2003 A LIEGE, (2007), 16-17.

³¹ Joseph H.H. Weiler, *Does Europe Need a Constitution? Reflections on Demos, Telos and the German Maastricht Decision*, *ELJ* 219 (1995).

³² BARNARD, *supra* note 14, 402-403.

³³ Case 293/83, *Gravier*, 1985 ECR I-00593; Case 184/99, *Grzelczyk*, 2001 ECR I-07091; Case 209/03, *Bidar*, 2005 ECR I-02119. Michael Dougan, *The Constitutional Dimension to the Case Law on Union citizenship* 31 *E.L. REV.* 613 (2006).

³⁴ *Grzelczyk*, *supra* note 34, 2001 at para. 31. See also an unusual (in terms of legal rhetoric) recent Opinion of AG Colomer in Joint Cases 11/06 and 12/06, *Rhiannon Morgan v Bezirksregierung Koln* and *Iris Bucher v Landrat des Kreises Duren*, 2007 (para. 37-68), where he refers to historical aspects of this particular destiny of European citizenship.

statement since the Court did not word it like “supplemental to fundamental”. The way the Court phrases this idea reveals certain evolutionary and even constitutional implications, setting a road map (*indication de voies*) for the future of European integration. In this respect, the essential conflict in *Laval* (which brings the jury into the new reality of the EU-27) fitted the case-line with a quasi-constitutional potential.

What is even more interesting in the context of transition upon recent enlargements is whether ‘social citizenship’ is an appropriate construction to describe a legal phenomenon of a supranational EU citizenship. If so, does this approach have consequences for the internal market of the EU-27? Moreover, whether this ‘EU citizenship’ approach has implications for the freedom of establishment and services, i.e. whether it embraces a new perception of legal entities in EC Law is another question to consider. There is a danger that companies could perceive this legal incentive in a way to simplify their conduct of business through evading local company law and tax law requirements. The latter would provoke an overflow of capital to Member States with a less onerous regime.³⁵ The judgement in *Kaba*³⁶ with regard to individuals demonstrates limitations of Community law on citizen’s right to free movement and residence though no clear criteria are established so far to limit the influx of non-economic actors to generous welfare states.³⁷ Finally, the solidarity is another notion, which is to be interpreted in conjunction with citizenship.³⁸

When analyzing *Laval*, one should bear in mind that the decision is taken in the specific post-enlargement context, where the Court is expected to rule not just on the legitimacy of the way some country is transposing the EU legislation (the question of the “minimum wages” avoidance in Sweden, stemming from the Posted Workers Directive), but to shed light onto the status of the internal market for the ever biggest EU citizenship. Interestingly enough, the vocabulary of the Luxembourg judges carefully avoids any references to the enlargement context in this case. The sanctuary of the internal market cannot afford those enlargement connotations. The Court avoids the risk of bringing the political debate on the

³⁵ Barnard, *supra* note 14, 402-403.

³⁶ Case 356/98, *Kaba I*, 2000 ECR I-2623 and Case 466/00, *Kaba II*, 2003 ECR I-2219.

³⁷ Dougan, *supra* note 6, 114.

³⁸ The question of ‘European solidarity’ has been profoundly treated in a series of European Law Review: Editorial, *The unbearable heaviness of European citizenship*, 31 E.L. REV. (2006). Also, Oxana Golyner *Jobseekers’ rights in the EU: challenges of changing the paradigm of social solidarity*, 30 E.L.REV., 111, 111-123 (2005).

necessity of the affirmative support for the newcomers into the text of its decision. The leitmotif of the pure case-law-sufficient-derogations-test (which the Swedish legislature failed to pass) declines the incentives to discuss the fragmentation of the European citizenship due to the danger of social dumping. Such delicate wording is particularly important taking into account the safeguard restrictions on the working markets negotiated before the enlargement.

II. Social dumping as a Phenomenon of Previous Enlargements

1. Scope of the Problem

There exist a number of factors that might encourage a process of social dumping within the enlarged EU³⁹: labour mobility; labour costs; employer's cost burden and then different welfare standards in terms of a minimum wage and a rest period; minimum workplace safety; health standards; and non-discrimination measures. The question then to be posed is whether the exercise of labour competition is fraught with a temptation for the enterprises and individual workers to seek better employment opportunities abroad⁴⁰ and thus, is able to provoke a social dumping through the indirect lowering of wages and labour standards in the countries with traditionally more generous wages. Thus, the notion of social dumping with regard to workers and services could be arguably compared to 'welfare tourism' in the context of free movement of persons. Three factors which need to be taken into consideration when speaking about the risks of social dumping are as follows: the price of work, regulation of work and the role of social partners.⁴¹ Interestingly enough, there is evidence that during the last twenty years certain states, in agreement with social partners, deliberately practiced policy of salary moderation in order to acquire a competitive advantage (e.g., the Netherlands, Finland and Ireland). This approach permitted them to accumulate extra benefits and significantly reduce their unemployment rate.⁴²

³⁹ Further enumeration is based on the article of Prof. Dougan, *supra* note 5.

⁴⁰ *Id.*, 7.

⁴¹ *Id.*, 17.

⁴² *Id.*

2. Case Law Upon the Enlargement(s)

In the seminal⁴³ case of *Rush Portuguesa*⁴⁴ the ECJ faced the dilemma for the first time upon the accession of Portugal and Spain to the EC. The accession instrument foresaw a transitional phase for the free movement of workers though did not preview any derogation for the movement of services. A Portuguese construction company tried to benefit from this situation and offered its services simultaneously bringing cheap Portuguese labour force into the French construction market.

The decision of the Court is quite ambiguous. On the one hand, the ECJ took a rather defensive position with regard to safeguarding internal market upon the enlargement and ruled that the Portuguese company had to perform services in the host country under the same conditions as imposed by that state on its own nationals. On the other hand, in Paragraph 18 of the judgement ECJ made a revolutionary statement that Community Law does not preclude Member States from extending their labour legislation and collective labour agreements to “any person who is employed, even temporarily, within their territory”.⁴⁵ Thus, the effect of the Court dictum is astonishing since it permitted to impose national labour regulations on foreign service providers even though their temporarily post workers could not be regarded as host country’s workers.⁴⁶ This approach found its enforcement in the so-called Posted Workers Directive⁴⁷ which turned this mechanism to extend national regulation from a mere possibility into an essential requirement. The Posted Workers Directive gives a certain discretion to host states vis-à-vis posted workers in establishing minimum wages, working time and equal treatment.⁴⁸ Further in *Laval* the Court will face the problem of the imposition of the Posted Workers Directive into the Swedish legislation where the regulation of the

⁴³ De Vos, *supra* note 15, 361.

⁴⁴ Case 113/89, *Rush Portuguesa v. Office national d’immigration*, 1990 ECR I-1417.

⁴⁵ *Id.*, para. 18.

⁴⁶ De Vos, *supra* note 15, 362. See also Markus Kahmann, *The posting of workers in the German construction industry: responses and problems of trade union action* and Bruno Lefebvre, *Posted workers in France*, 12 TRANSFER 183-196, 197-212 (2006).

⁴⁷ EC Directive 1996/71 of the European Parliament and of the Council, of 16 December 1996, concerning the posting of workers in the framework of the provision of services, O.J. L18/1.

⁴⁸ CATHERINE BARNARD, *EC EMPLOYMENT LAW*, Third Edition, 278 (2007). See also Olaf Deinert, *Posting of Workers to Germany: Previous Evolutions and New Influences Throughout EU Legislation Proposals*, 16 INT. J. COMP. L.L.I.R. 217-234 (2000)

“minimum wages” is traditionally avoided. It is the matter of labour bargaining with the trade unions.⁴⁹

In a series of ‘German’ cases it appeared that the Court took a protective stance with regard to the workers from Southern and Eastern Europe enjoying benefits from a particular regulation of the labour conditions for temporary staff being adjudicated to the rules and conditions of the home country.⁵⁰ In the recent edition of her book, Catherine Barnard identifies the four-stage test applied by the Court in the subsequent case law.⁵¹ The Court analyzes (1) whether there is a restriction on the freedom to provide services, (2) whether a justification could be applied (worker protection, interests of the posted workers), (3) whether the same interest is already protected in the home country, and finally (4) whether the measure could be regarded as proportionate.⁵² Thus, in *Mazzoleni*⁵³ the Court finds that Belgian authorities imposed on posted workers a minimum wages measure which is evidently disproportionate since the application of Belgian law to service providers in the frontier region could result in an extra administrative burden to individual service provider, including a complicated system of an hour-by-hour wage calculation upon each crossing of the border and threat to good working relations within a particular undertaking.⁵⁴ The same four-stage test is applied in *Laval*, where the court finds a complicated system of wage negotiation with trade unions in Sweden to be disproportionate as it actually contradicts the logic of minimum wages, inherited to the Posted Workers Directive.⁵⁵

⁴⁹ For a comprehensive analysis see Reich, *supra* note 3.

⁵⁰ Case 43/93, *Vander Elst v. Office des Migrations Internationales*, 1994 ECR I-3803. See also Case 244/04, *Commission v. Germany*, 2006 ECR I-000. The reference should be made to the rules of *Rome Convention on rules concerning the law applicable to contractual obligations* OJ 1980 L266/1.

⁵¹ BARNARD, *supra* note 48, 278-280.

⁵² *Id.*, 278.

⁵³ Case 165/98, *Criminal proceedings against André Mazzoleni and Inter Surveillance Assistance SARL*, 2001 ECR I-2189.

⁵⁴ BARNARD, *supra* note 48, 279. See also Jean-Philippe Lhernould, *Le principe de non-discrimination à l'égard des frontaliers en matière de sécurité sociale*, ERA, 3/2006 381 (2006). The author provides an analysis of the specific rules of coordination in the fields of social security applicable to frontier workers.

⁵⁵ In fact, in para. 103 of *Laval* the Court directly refers to *Mazzoleni*, so the “internal market reasoning” of the ECJ seems to be quite consistent.

In *Finalarte*⁵⁶ the Court held that the construction companies based in the UK and Portugal who posted workers to Germany should adhere to the 'holiday standards' of Germany even if the number of holidays exceeds the four weeks' paid leave fixed in the Working Time Directive 2003/88.⁵⁷ Although this measure is in breach of the internal market, it is still proportionate. In *Portugaia Construções*⁵⁸ the Court ruled that the measure to reduce the allegedly unfair competitive wages was, in itself, incapable of constituting a "valid imperative requirement due to its protectionist economic nature".⁵⁹ In *Commission v. Luxembourg*⁶⁰ the Court found proportionate the measure which required a service provider to report in advance on the presence of posted worker(-s), the anticipated duration of this presence and justification of the deployment. However, in this line of cases the Court took a very negative view on the requirement of establishing minimum employment time⁶¹, granting individual work permits only if labour situation was favourable enough⁶², securing bank guarantee to cover costs in case a worker comes back home and licensing posted work⁶³.

In *Laval* the Court accepts that "social dumping may constitute an overriding reason of public interest within the meaning of the case-law of the Court which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty"⁶⁴ and further refers to the case-law upon previous enlargements to support its view.⁶⁵ Hence, although it does not frame social derogations into the "fundamental rights exception", the Court nevertheless leaves an essential potential for the fundamentalization of social rights in the future, similar to the one in the seminal case of *Rush Portuguesa*.

⁵⁶ Case 68-71/98, *Finalarte*, 2001 ECR I-7831.

⁵⁷ EC Directive 93/104 of the Council, of 23 November 1993, concerning certain aspects of the organisation of working time, OJ L 307.

⁵⁸ Case 164/99, *Portugaia Construções*, 2002 ECR I-787.

⁵⁹ Dougan, *supra* note 5, 137.

⁶⁰ Case 445/03, *Commission v. Luxembourg*, 2004 ECR I-10191.

⁶¹ *Commission v. Luxembourg*, 2004 *supra* note 60, and, *Commission v. Germany*, 2006, *supra* note 50.

⁶² *Commission v. Luxembourg*, 2004 *supra* note 60, and, *Vander Elst*, 1994, *supra* note 50.

⁶³ *Id.*, para. 30 and 47.

⁶⁴ Para. 103.

⁶⁵ In particular, Case 376/96, *Arblade and Others*, 1999 ECR I -8453, *Mazzoleni & ISA*, 2001 *supra* note 53, *Finalarte & Others*, 2001 *supra* note 56.

III. Legal Implications of the Pre-Accession Period

1. Economic Concerns and Diverging Practice of Legal Approximation

In particular, it was argued that the enlargement is capable of diverting foreign direct investment from the EU-15 into the acceding states.⁶⁶ Naturally enough, the popular expectation was a so-called 'displacement effect' for national workers based on a mistaken belief that the number of jobs in the economy is fixed.⁶⁷ Another widespread fear is that a massive influx of workers from the EU-10 will lead to a dumping effect for wages (that rhetoric was especially efficient in the volatile days of Le Pen, Pym Fortuyn and Jörg Haider).⁶⁸

'Wage effect' expectations were perhaps the most sound since wages in the CEEC (EU-8, i.e. with an exception of Malta and Cyprus) amounted only to 9% of the EU-15 average and the situation seemed to be especially vulnerable for particular industries (textiles and footwear), as well as for particular countries neighbouring with EU-10 (Germany, Austria).⁶⁹

The economists used regional income differentials as the key variable in determining the probable scale of international labour migration.⁷⁰ This approach showed that income differentials between EU-15 and EU-10 (and especially between EU-15 and EU-8) were, by no means, higher than those between Portugal and Greece, on the one hand, and the then member states, on the other hand.⁷¹

⁶⁶ Dougan, *supra* note 5, 133.

⁶⁷ Doyle, *supra* note 7, 10.

⁶⁸ Dougan, *supra* note 5, 121.

⁶⁹ HEATHER GRABBE, PROFITING FROM EU ENLARGEMENT, 43 (2001).

⁷⁰ Another trend is to concert wage levels at PPP (purchasing power parity). This approach shows that for some countries (especially Baltic States) the absolute gap in per capita incomes to the EU-15 is still capable of provoking large labour migration potential. For other countries (Slovenia and Czech Republic) PPP was quite comparative to the countries of previous enlargement. For a thorough economic analysis see Frigyes Ferdinand Heinz and Melanie Ward-Warmedinger, *Cross-Border Labour Mobility Within An Enlarged EU*, 52 OCCASIONAL PAPER SERIES, 16-17 (2006). For a more politics-oriented study see Marat Kengerlinsky, *Restrictions in EU Immigration Policies Towards New Member States 2* Journal of European Affairs (2004). For detailed analysis of legal implications dating back to the economic fears see Orsolya Farkas and Olga Rymkevitch, *Immigration and the Free Movement of Workers after Enlargement: Contrasting Choices* 20(3) INT.J.COMP.L.L.I.R. 369 (2004); Adelina Adinolfi *Free Movement and Access to Work of Citizens of the New Member State: The Transitional Measures* 41 CML REV. 469 (2005).

⁷¹ Doyle, *supra* note 7, 121-122.

Nonetheless, the experience of previous enlargements was rather a positive example since it demonstrated that the enlargement itself did not provoke significant disruptions for labour market and social standards of old member states.

Another debate which needs a brief overview with regard to its legal implications is the distinction between the aggregate and the regional impact of enlargement, since it was evident that neighbouring countries are far more likely to be flooded with migration.⁷² Economic and statistical analysis revealed, in particular, that migrants often tend to choose a neighbouring country (being influenced by linguistic, cultural and transport fees considerations). On the other hand, old member states with English as the official language are more popular among migrants with high levels of education.⁷³ One more contradiction to the widespread beliefs is that European migrants, in fact, tend to be young, well-educated and single.⁷⁴ Moreover, linguistic, cultural and social barriers, as well as high transaction costs of migration itself are usually capable of preventing the flood of migration.⁷⁵ Economic analysis also concentrated on the so-called 'welfare magnets', i.e. on researching the hypothesis that migrants tend to pick up the countries with more sound welfare traditions.⁷⁶ Perhaps, it was rather sensitive for such countries as Sweden or Ireland in their motivation to open labour market, but finally the research identified that 'welfare tourism' could hardly be a serious pull factor. In general, the social aspect was of particular importance due to another hypothesis, namely that organised crime and unscrupulous employees would be able to use social security system in order to keep wages costs down. The studies also demonstrated that an increased supply of labour may also induce new investments.⁷⁷ The latter is capable of counteracting wage decline, thus proving that 'benefit tourism' could only have limited consequences. In general, one could observe a spill-over effect⁷⁸ in countries' motivation to open the markets with regard to social policy (especially in

⁷² Dougan, *supra* note 5, 122.

⁷³ Doyle, *supra* note 7, 10.

⁷⁴ *Id.*, 20-21.

⁷⁵ Dougan, *supra* note 5, 121-122.

⁷⁶ Doyle, *supra* note 7, 10.

⁷⁷ *Id.*, 19.

⁷⁸ In other literature described as 'domino effect', see in particular, Samantha Curie, "Free" movers? *The post-accession experience of accession – 8 migrant workers in the United Kingdom*, 31 E.L. REV. 211 (2006).

case of Ireland) since often the enlargement debate was much more concentrated on protecting the welfare system than on labour market issues.⁷⁹

Economic analysis revealed that a small number of workers tend to migrate to old member states which shall not cause a long-term disruption of labour markets.⁸⁰ One of the most interesting economic arguments put forward not to postpone the enlargement was that business is already exposed to global competition and EU business can maintain profitability by using acceding Europe as a 'low-cost production site'.⁸¹

Thus, one could conclude that the pre-enlargement fears provoked a specific socio-economic debate which has proven that enlargement in itself is not capable to disrupt Western European labour markets as such but, on the other hand, it could have much more serious consequences for the neighbouring countries. This motivation line led to the legal consequences of imposing restriction period in the majority of EU states with particularly strong derogations for Austria and Germany. On the other hand, EU-15 also accepted certain concessions permitting the acceding states to introduce seven-year restrictions for the foreigners to acquire land in those countries.⁸²

2. Transitional Arrangements and other Sage-Guard Measures: Implications for the Accession Treaty

The economic considerations demonstrated in the previous sub-chapter were echoed in the *Act of Accession 2003* (Athens) by way of transitional arrangements.⁸³ Interestingly enough, those arrangements dealt only with 8 acceding states (Poland, Hungary, the Czech Republic, the Slovak Republic, Slovenia, Estonia, Latvia and Lithuania) since Malta and Cyprus did not pose an evident problem for the labour market of EU-15. Old Member States were permitted to derogate from Articles 1-6

⁷⁹ Doyle, *supra* note 7, 23.

⁸⁰ Grabbe, *supra* note 69, 4.

⁸¹ *Id.*

⁸² *Id.*, 14.

⁸³ Kirstyn Inglis, *Treading the Tightrope between Flexibility and Legal Certainty: The Temporary Derogations from the Acquis on the Freedom of Movement of Workers and Safeguard Measures under the Accession Treaty*, in *LA LIBRE CIRCULATION DES PERSONNES : ETATS DES LIEUX ET PERSPECTIVES*, CAHIERS DU COLLÈGE D'EUROPE N° 5, ACTES D'UN COLLOQUE ORGANISÉ EN 2003 À LIÈGE, (2007) 99-124.

of Regulation 1612/68⁸⁴, thus restricting in time the access to their labour market. This derogation was shaped in the so-called '2+3+2' formula, i.e. old member states were permitted to restrict the principles of internal market with regard to labour vis-à-vis EU-8 following three-stage pattern: (1) from May 1, 2004 until April 30, 2006; (2) from May 1, 2006 until April 30, 2009 and, finally, (3) from May 1, 2009 until April 30, 2011. The third derogation is the most serious one since in order to justify itself it requires evidence of 'serious disturbances' or a 'threat of serious disturbances' for labour market (the so-called 'standstill clause').

Moreover, those states within EU-15 who already opened their markets could still invoke another provision (the so-called 'safeguard clause') which permits them to impose restrictions up until the ultimate terms if there is an evident threat of serious disturbances in their labour markets. This provision is especially interesting in the light of *Laval* since the proof could be based on the threat for the standard of living or the level of employment in a given region or occupation. That was the argumentation leitmotif of the Swedish government. Hence, theoretically social dumping could constitute a legal basis for this back-manoeuvre.

During the already completed first stage only three countries opened their labour market for EU-8, namely Sweden, Ireland and the United Kingdom. Upon the accomplishment of the first phase the Commission presented a Report on the Functioning of the transitional arrangements in the first phase which made some other countries follow open-labour model (Spain, Finland, Greece, Portugal and Italy) and yet more countries open their labour market only partially (Belgium, Denmark, France, Luxembourg and the Netherlands)⁸⁵. Austria and Germany still keep on restricting their market.⁸⁶ Upon accession of Bulgaria and Romania the model of graduality has now shifted to '1+2+1' formula, i.e. the stages in opening labour market are now as follows: (1) January 1, 2007 until December 31, 2008; (2) January 1, 2009 until December 31, 2011, and finally, (3) January 1, 2012 until December 31, 2013.

⁸⁴ Regulation 1612/68 of the Council, of 15 October 1968, on freedom of movement for workers within the Community, OJL 257, 2-12.

⁸⁵ In Denmark labour market is fully covered, in Belgium, France, Luxembourg and the Netherlands flexible provisions cover only certain sectors or certain professions.

⁸⁶ Initially German and Austrian governments insisted on transitional derogations for certain sensitive sectors (e.g., construction, industrial cleaning, home nursing and security activities). This logic certainly dates back to consequences of the previous enlargements. Michael Dougan expressed an interesting opinion that the better alternative for Germany and Austria would be to require payment of their national minimum wage for posted workers from EU-8, despite the judgement in *Mazzoleni*. See Dougan, *supra* note 5, 138-139.

As far as the recent enlargement from EU-25 to EU-27 is concerned, of the former EU-15 only Finland and Sweden totally opened their labour markets, which made, respectively, *Viking* and *Laval* to be the pioneer case-law in the field. France and Italy agreed to open their markets partially. The other countries (Austria, Belgium, Denmark, Germany, Ireland, Greece, Luxembourg, the Netherlands, Spain, Portugal and the United Kingdom) imposed restrictions. Among EU-10 only Malta restricted its labour market while Hungary imposed partial restrictions (getting a work permit depends on the sector). These cautions explain why so many governments submitted their observations before the Court in *Laval*.⁸⁷ One could hardly stay impartial when the most essential issue of the European integration (free movement of the economically active population) is at stake.

It should be underlined that the transitional arrangements deal only with migrant workers from the newly accepted states. They do not allow old members to limit the free movement of other categories of the EU citizens (students or persons with independent means)⁸⁸. Moreover, no derogation is possible once the worker had been legally employed for the first time in an old member state.

Hence, the key elements with regard to the labour market protection upon the enlargement are flexibility and graduality.⁸⁹ The pre-enlargement debate embodied the joint venture of solidarity and conditionality⁹⁰ in a legal *telos* of the accession *acquis*.

IV. Laval: a Clear Statement of the New Tendency?

The approach of the Court is that neither economic nor social arguments are excluded but the crucial question is the one of balancing. The Court follows its traditional sufficient-derogation-test-analysis and recognizes the existence of the conflict without any reference to the affirmative support of the newcomers for the unity of the internal market (*Para. 95, 108*). Nevertheless, the Court emphasizes that the European integration is indeed not exclusively about providing the efficiency of

⁸⁷ Austria, Belgium, Czech Republic, Denmark, Germany, Estonia, Finland, Ireland, Spain, France, Lithuania, Poland, UK. Even Norway and Iceland did not stay apathetic.

⁸⁸ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions - Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty (period 1 May 2004 - 30 April 2006), COM (2006) 0048 final, 8 February 8 2006.

⁸⁹ Curie, *supra* note 78, 210.

⁹⁰ Marise Cremona, *EU Enlargement: solidarity and conditionality*, 30 E.L.REV. 3, 3-22 (2005).

the economic freedoms. (*Para. 104*). The due respect should be paid to social rights. The question behind the judicial vocabulary is to what extent the decision is informed by social factors and a broader social context of the community legal order.

Horizontal effect is made applicable towards the trade unions but the particular benefits of this stance are vague. It is unclear whether the Court will keep on its iron logic of the internal market body-guarding, or whether in the future (where there is no conflict with the imposition of the EU norms on the national level) the horizontal effect has the potential to set up an actual derogation for the internal market, shaped into the social rights protection. Otherwise, it is not a big step for the recognition of the direct horizontal application since in judicial reasoning the trade unions could be easily substituted with the state authorities who do not undertake any efficient measures to stop the trade unions (the reasoning pattern of "*Angry Farmers*"⁹¹).

The notion of solidarity behind the lines acquires an extra value. Being traditionally regarded as a labor and social value, it encompasses a non-discrimination logic not only before (at the stage of the enlargement negotiation) but also after the enlargements. The implicit message from the Court could be formulated as follows: "The fear of social dumping is not an excuse to discriminate the eastward workers!" The internal market, thus, obtains an additional reinforcement in the context of the EU-27.

C. *Laval* in the Context of Fundamental Rights

I. Evolution and Scope of Fundamental Rights in EC Law

The status of fundamental rights in EC Law has for a long time been rather uncertain since initially the Community was established to pursue the goals of economic integration and did not presuppose a separate human rights policy. The situation is even more aggravated by the fact that on the European level there are at least two global systems of human rights observance with separate dispute resolution mechanisms, namely, national courts and national constitutional courts (on the level of states), and the European Court of Human Rights (on the level of the Council of Europe).⁹² In combination with a wide range of NGOs dealing with

⁹¹ Case 265/95 *Commission v. France*, 1997 ECR I-443.

⁹² "Détriplement fonctionnel" as Prof. Douglas-Scott nicely phrases it. See Douglas-Scott, *infra* note 95, 639.

human rights, this mechanism leaves small room for the EC manoeuvres in the field. Nonetheless, the evolution of the internal market revealed an over-whelming need to distinguish a separate human rights *acquis* in the Community.⁹³ That policy required establishing a comprehensive legal ground for institutional decision-making and dispute-resolution with regard to fundamental rights in the ECJ. This uneasy task revealed several problems including delineation of the frontline between Strasbourg and Luxembourg, particular positioning of fundamental rights vis-à-vis economic freedoms in the Community and, what turned to be even a greater challenge, defining the scope of fundamental rights common for constitutional traditions of all member states.⁹⁴ One could seriously doubt in the middle of the 1950s that European integration would reach these horizons,⁹⁵ especially taking into account the fact that a separate jurisdiction in the field of fundamental rights was established on a pan-European level which turned to be a success story of Strasbourg.

This institutional contradiction finds its roots and reflection in the bulk of legal instruments which a relatively recently shaped EU citizen could invoke, in particular, national legal norms and principles (first of all, including those of constitutional character), European Convention on Human Rights and Fundamental Freedoms, and *acquis communautaire* including EU and EC Treaties.⁹⁶

⁹³ One could argue that human rights steadily gained their importance from the late 1960s on (Armin Von Bogdany, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union*, 37 CML REV. 1307 (2000)). On of the first cases (often taken as a reference point) in which the Court explicitly refers to fundamental rights is traced back to the 1970s, namely Case 11/70, *Internationale Handelsgesellschaft*, 1970 ECR I-1125. Active reference to the case-law of Strasbourg started only in the mid 1990s. It is interesting to note in the context of present paper (tacking fundamentalization of social rights) that mere in the 1970s one could observe the recognition of social and labour rights in the decisions of the ECJ.

⁹⁴ For a profound analysis of the role of the ECJ in filling the empty box of fundamental rights in EC Law see Bruno De Witte, *Le rôle passé et futur de la cour de justice des communautés européennes dans la protection des droits de l'homme in L'UNION EUROPEENNE ET LES DROITS DE L'HOMME* 895-935 (Pilip Alston, Mara Bustelo and James Heenan (eds.) 2001). In particular, 905-920 (for a comprehensive evaluation of the Court's role vis-à-vis national systems, access to jurisdictions, degree of protection, etc).

⁹⁵ One could also recall declaration of the Charter of Fundamental rights, adoption of non-discrimination directives under Article 13 EC, and incorporation of human rights initiatives into policies such as the European Neighbouring policy (Cf., Sionaidh Douglas-Scott, *A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis*, 13 C.M.L. Rev. (2006). With regard to Article 13 EC in the context of European citizenship see also Catherine Barnard, *Article 13: Through the Looking Glass of Union Citizenship* in LEGAL ISSUES OF THE AMSTERDAM TREATY, 75 (David O'Keeffe and Patrick Twomey (eds.) 1999).

⁹⁶ For a detailed review see PIET EECKHOUT, EXTERNAL RELATIONS OF THE EUROPEAN UNION, LEGAL AND CONSTITUTIONAL FOUNDATIONS, 465-484 (2005).

Nonetheless, the specification of that range of applicable *acquis* is important, first of all, for the internal purposes of the European Union where the progress of internal market is still a priority. The problem which demands a particular concern is whether one could observe a clash between economic (freedoms of movements) and fundamental (human rights) principles of the Community.⁹⁷ This clash is analyzed as an interaction between the European Court of Human Rights and the European Court of Justice.⁹⁸ The very analysis of this specific interface between the ECtHR and the ECJ has become a popular approach in the bibliography on judicial review of the ECJ since early 1990s.⁹⁹ This is not surprising taking into account the peculiarities of the ECJ case-law which has constantly referred to the European Convention of Human Rights and Fundamental Freedoms.¹⁰⁰

This specific reference to fundamental rights could also be found in other numerous domains of the EC law, in particular, with regard to free movement of persons¹⁰¹, competition law¹⁰², social and employment law¹⁰³ etc. The latter is especially

⁹⁷ TREVOR C. HARTLEY, *EUROPEAN UNION LAW IN A GLOBAL CONTEXT* 332-352 (2004)

⁹⁸ For a comprehensive description of the situations, where the ECtHR found jurisdiction over actions involving the EU, as well as about interaction between two courts see Douglas-Scott, *supra* note 95, 629-665, (in particular, 632-639).

⁹⁹ See Francis G. Jacobs, *Human Rights in the EU: the Role of the Court of Justice* 26 *E.L. REV.* 331 (2001), Gráinne De Búrca, *Fundamental Human Rights and the Reach of the EC Law* 13 (3) *O.J.L.S.* 283-319 (1993), Rick Lawson, *Confusion and Conflict? Diverging Interpretations of the ECHR in Strasbourg and Luxembourg*, in *THE DYNAMICS OF THE PROTECTION OF HUMAN RIGHTS IN EUROPE* 219 (Rick Lawson and Matthijs de Bloijs (eds.) 1994), and D. Spielman, *Human Rights Case Law in Strasbourg and Luxembourg Courts: Inconsistencies and Complementarities*, in PHILIP ALSTON (ED.), *THE EU AND HUMAN RIGHTS* 770 (1999).

¹⁰⁰ In recent literature among other ways-out the following ones were proposed: (1) a solution "à la Keck" (with an interesting parallel to the revolutionary limits established by the Court in case *Keck & Mithouard*, 1993, *supra* note 28), (2) introduction of *de minimis* rule (exclusion from application of human rights derogation in the situations when no significant economic effect is evident), (3) "Cassis de Dijon solution" (with reference to Case 120/78, *Cassis de Dijon*, 1979 ECR I-649, where the Court elaborated a compatibility test on the basis of the restrictive effects' analysis under Article 28 EC escaping from the derogation of Article 30 EC). See Alberto Alemanno, *À la recherche d'un juste équilibre entre libertés fondamentales et droits fondamentaux dans le cadre du marché intérieur: quelques réflexions à propos des arrêts « Schmidberger » et « Omega »*, RDUE 4/2004, 709-751 (2004).

¹⁰¹ Especially with regard to the discussion on the role of Article 6 ECHR which often affects the third countries nationals. Cédric Chenevière, *Régime juridique des ressortissants d'Etats tiers membres de la famille d'un citoyen de l'Union*, in *LA LIBRE CIRCULATION DES PERSONNES: ETATS DES LIEUX ET PERSPECTIVES*, CAHIERS DU COLLEGE D'EUROPE N° 5, ACTES D'UN COLLOQUE ORGANISE EN 2003 A LIEGE, (2007), 125-144.

¹⁰² Sybe De Vries, *Public Service, Diversity and Freedom of Expression and Competition Law*, ERA, 1/2005, 46-57 (2005).

¹⁰³ Prechal, *infra* note 111.

interesting in the context of the present article since it shapes the ground of the discussion on the *fundamentalization of social rights*'.¹⁰⁴

In order to discuss the potential for this fundamentalization of social rights, we need to identify the very legal grounds for fundamental rights in the Community legal order. Nowadays within (and even outside) the EU one could distinguish, at least, eight platforms to protect fundamental rights which are as follows (*infra* these sources will be exemplified with the models of judicial reasoning in *Laval*):

- Article 6 (Par. 1-2) EU with a reference to fundamental rights as guaranteed by the ECHR and constitutional traditions common to the Member States, as general principles of Community law (*amicus curiae* submissions)
- Article 13 EC (on non-discrimination)¹⁰⁵
- The established case-law of the ECJ (especially with regard to a situation of a clash with the internal market)
- Human rights as an inherent part of constitutional traditions of member states (*ius commune* of human rights¹⁰⁶)
- Judicial dialogue between ECJ and ECtHR (mostly by way of preliminary rulings)
- General acceptance of International Human Rights Law (it is the EU which promotes the *instrumentalization* of human rights under political frame of the UN)
- The mechanism of human rights clauses vis-à-vis third countries
- Charter of Fundamental Rights¹⁰⁷

The Charter is a unique mechanism merging two freedoms, namely fundamental (human rights) and social (including labour) ones. The implicit question brought by *Laval* is whether one could observe the emergence of social human rights and which implications it could produce in the transitional (post-accession) context where social rights represent another clash with the internal market.

¹⁰⁴ Philip Alston, *Labour Rights as Human Rights, The Not so Happy State of the Art in Labour Rights as Human Rights*, Volume XIV/1, OUP, 2006, 1-24. Also, Regina Kreide, *The Range of Social Human Rights*, 18 GLJ (2001), available at: <http://www.germanlawjournal.com/article.php?id=116> (last accessed on 18 November 2008).

¹⁰⁵ Barnard, *supra* note 95.

¹⁰⁶ Douglas-Scott, *supra* note 95, 665.

¹⁰⁷ The EU Charter of Fundamental Rights of the European Union, O.J. 2000 c 364/01.

EC Social Law is the domain which has been even more influenced, if not outright created, by the Court than freedom of movement under the internal market. The decision-making process in the EC has been consistently reflecting the reluctance of particular states to broaden EC powers to harmonize the domain of labour and social relations. This is an extremely sensitive area since, on the one hand, social and labour models in Europe differ significantly, and on the other hand, amendments in the sphere of social and employment rights lead to a risk of essential financial losses for particular states.¹⁰⁸ Recent trends in the area of social policy demonstrate an "increase in the use of complementary or rather alternative methods of regulation to the Community Method"¹⁰⁹ which leads to a 'transverse form of policy making'.¹¹⁰

In fact, it was the ECJ who has been giving impulses for harmonisation of working time, parental leave, equal opportunities, and mechanisms of social dialogue.¹¹¹ Another trend is a so-called *soft acquis*, which reveals a shift from legislative initiatives towards policies aimed at fostering employment creation, social protection and social inclusion.¹¹²

Art. 137 (Par. 4) EC sets limitations for the uniform labour standards with an effect that harmonization, holding that standards "shall not affect the right of Member State to define fundamental principles of their social security systems and must not significantly effect the financial equilibrium thereof;" and "shall not prevent any Member State from maintaining and introducing stringent protective measures compatible with EC Treaty."

¹⁰⁸ For a detailed analysis of the stages in the development of social and labor rights in EC Law see Stefano Giubboni, *SOCIAL RIGHTS AND MARKET FREEDOM IN THE EUROPEAN CONSTITUTION: A LABOUR LAW PERSPECTIVE* (2006).

¹⁰⁹ Samantha Velluti, *The European Employment Strategy and the Challenges of Enlargement* in TAKIS TRIDIMAS (EDS.), *EU LAW FOR THE 21ST CENTURY: RETHINKING THE NEW LEGAL ORDER* 415-436 (2004).

¹¹⁰ *Id.*

¹¹¹ Sasha Prechal, *Equality of Treatment, Non-Discrimination and Social Policy: Achievements in Three Themes*, 41 CMLREV. 533, 533-551 (2004); Bernard Ryan, *The Private Enforcement of European Union Labour* in THE FUTURE OF REMEDIES IN EUROPE, 141, 141-147 (Claire Kilpatrick, Tonia Novitz and Paul Skidmore (eds.) 2000); Eugenia Caracciolo Di Torella and Annick Masselot, *Pregnancy, Maternity and the Organization of Family Life: an Attempt to Classify the Case Law of the Court of Justice* 26 E.L.REV. 239, 239-260 (2001); Lisa Waddington and Mark Bell, *More Equal Than Others: Distinguishing European Union Equality Directives* 38 CMLREV. 587, 587-611 (2001).

¹¹² Velluti, *supra* note 110.

Moreover, the Community lacks competence in harmonizing the right of association, the right to strike or the right to impose lock-outs¹¹³, which (as we shall see *infra*) has an implication for safeguarding national social standards upon enlargement.

II. A Clash Similar to the Effects of Fundamental Rights?

The eastward enlargement revealed that the danger for labour markets of EU-15 lies not obviously in the influx of workers from CEEC but rather in the difference in wages, social standards and systems of labour relations in the West and East of Europe. The 'social dumping' is the term which is acquiring broader recognition both in doctrine and in the judgements of the Court.

Two other factors suggest that things could have been otherwise. First is that collective bargaining seems to be the popular direction of activity coordination at the EU level.¹¹⁴ Second is that the Charter is arguably enjoying a potential to break new ground by incorporating social and economic rights (including the collective labour rights¹¹⁵ affecting the laws of Member States on trade unions¹¹⁶) into the realm of fundamental rights.

Notwithstanding these arguments, in *Laval* the Court sets out a traditional internal market test, where social rights motivation of Swedish trade unions does not pass the proportionality assessment. The Community enjoys a limited competence to pursue harmonization in the social sphere since Article 137 EC specifically excludes harmonization of national wages from the Community's competence over social policy and Article 95 EC does not apply to employment matters.¹¹⁷ Thus, the field for fundamentalizing manoeuvre is restricted. Another way to interpret this ambiguity is to claim that precisely because the harmonization in the field is impossible, the Member States are free to safeguard their social policy traditions, thus limiting the potential for the intervention both from Brussels and Luxembourg. The Court, however, does not seem to approve such a stance. Par. 88

¹¹³ Anne Davies, *Should the EU Have the Power to Set Minimum Standards for Collective Labor Rights in the Member States?* in *LABOUR RIGHTS AS HUMAN RIGHTS*, 177-213 (Philip Alston (ed.) 2006).

¹¹⁴ *Id.*, 316.

¹¹⁵ Davies, *supra* note 113. Cf. also Erika Kovacs *The right to strike in the European Social Charters*, 26 *COMPARATIVE LABOUR LAW & POLICY JOURNAL*, 445, 445-475 (2005).

¹¹⁶ *Id.*, 321.

¹¹⁷ *Id.*

explicitly states that “[...] the fact that Article 137 EC does not apply to the right to strike or to the right to impose lock-outs is not such as to exclude collective action such as that at issue in the main proceedings from the domain of freedom to provide services”.

Although the Advocate General thoroughly analyzes the current stance of the ECtHR with regard to industrial actions (*Gustafsson v. Sweden* and *Sørensen v. Rasmussen*)¹¹⁸, the Court is not inclined to go into the detailed comparative study of Strasbourg's case load. Nevertheless, the decision in *Laval* can be implicitly informed by the latter, considering that both main ECtHR cases originate from Scandinavia with its particular trade unions' status. Moreover, in those two cases Strasbourg took a manifest support of the negative right to association, i.e. the right of an employer not to be forced into a collective bargaining agreement. Thus, ECJ contributes to the “fight” against Nordic model of industrial relations, characterized by such features as self-regulation, non-intervention and wide autonomy of social partners.

Another ambiguous question steps from the hypothesis that if Sweden transposed the Posted Workers Directive with the acceptance of the minimum wages model, the outcome of *Laval* could have been different. In this sense, *Laval* is not the hardest nut for the ECJ who managed both: to proclaim that the EU integration is not only about economic efficiency¹¹⁹ and simultaneously to safeguard the sanctuary of economic freedoms¹²⁰. The argumentation of the court is based on the wages calculation and not on balancing social rights versus fundamental freedoms *stricto sensu*.

Nonetheless, even if presuming that such hypothetical situation checks out, I doubt if the decision could be different. In order to bring the social rights (in particular, the right to industrial action) into the realm of fundamental rights derogations, the Court will need either to establish a sound link with Strasbourg (as it has been demonstrated *supra*, such manoeuvre is hardly possible) or to address the

¹¹⁸ Para. 275, 303 in the *Opinion of AG Mengozzi* (Eur. Court H.R., *Gustafsson*, Judgement of 25 April 1996, Report of Judgements and Decisions 1996-II; Eur. Court H.R., *Sørensen v. Rasmussen*, Judgment of 11 January 2006, unreported). In para. 302 AG discusses another Strasbourg case in the context of the overpowered Swedish trade unions (Eur. Court H.R., *Evaldsson and Others v. Sweden*, Judgement of 13 February 1996, Application no. 75251/01).

¹¹⁹ Para. 104, 105 (social purpose of the Community), para. 91 (the right to take a collection action is indeed a fundamental right as a general principle of EC Law).

¹²⁰ Para. 108 (the obstacle at stake cannot be justified by the social purpose), para. 95 (collective action should be balanced against the internal market).

constitutional traditions of 27 Member States where the recognition of social rights differs tremendously. Following the other bases identified in the previous sub-chapter for fundamental rights, Article 13 EU should rather suggest a non-discrimination logic against Swedish trade unions who block the pursuit of the economic freedoms for the foreigners. The right to collective action is, above all, not boundless. To give an example, it is hardly legitimate to raise it, for instance, to prevent racial minorities or women to work at a certain enterprise. The established case law will suggest the path of *Schmidberger* to which Scandinavian commentators implicitly tended to compare *Laval* when awaiting for the decision.¹²¹ However, the pattern of the aggressive protest (with the total blockage towards the exercise of fundamental freedoms) rather fits the logic of “Angry Farmers” in France.¹²² Similarly to the French case, the police are asked to intervene but they refuse on the ground of the constitutional protection for the collective action.

However, one could arguably state that the constitutional safeguard of bargaining model in Scandinavia is a part of the constitutional tradition comparable to the status of human dignity in German *Grundgesetz*, thus linking the case to *Omega*¹²³. This line is the most controversial since the differentiation of what constitutes a constitutional tradition, i.e. what *deserves* the Community protection, is highly problematic. The comparison here lacks explicit legal grounds.

The Court does not swim deep to those numerous cavities, avoiding the fundamentalization of social rights complexity. The implicit reasoning of *Laval* is informed by the post-enlargement context. The ECJ produced a judgement whose main goal is to confirm as firm as possible the sanctuary of the inviolability of the economic freedoms, thus, protecting the rights of the workers from the newly acceded states against the discrimination. As it has been demonstrated previously, the opening of the internal market(s) is a gradual process where the EU-15 enjoy quite a few relieves. The Court does not seem willing to broaden those privileges which have already put the new-comers into not exactly equal positions.

¹²¹ Ahlberg, Bruun and Malmberg, *supra* note 1. In particular, 163-164 (the reasoning pattern is to frame the right to strike into a public policy derogation to free movement of services, strong enough to pass the proportionality assessment). Thus, the authors hastily predicted that the Swedish model will not be endangered.

¹²² Further the juxtaposition is done to *Commission v. France*, [1997] *supra* note 91.

¹²³ Case 36/02 *Omega*, 2004 ECR I-9609. The Court refers to *Omega* briefly in para. 93, 94 of *Laval*.

The position of the Court is definitely not accidental. The very recent case *Dirk Rüffert v. Land Niedersachsen*¹²⁴ in the German-Polish context confirmed the logic of non-admissibility of the wage imposition (through “contractual” legislation at the case of Lower Saxony) which could impede or render less attractive the provision of services by workers from the new member states.

D. Conclusions: a Step Back - a Step Forward. Paving the way for the Fundamentalization of Social Rights

The enlargement created a unique moment for the ECJ to display the status of the social rights in the Community order, since it brought into judicial agenda a hard-nut which the Court has been quite reluctant to shell so far. Namely, the enlargement articulated the problem of social rights vis-à-vis the internal market.¹²⁵ The question is whether social rights are capable of creating derogations similar to those established by fundamental rights.

The first part of this article demonstrated that the internal market provisions on free movement have undergone a revolutionary circle of development where the ECJ has been filling the empty box of EU citizenship with a wide spectrum of legal benefits. The preservation of the internal market interests in *Laval* perfectly fits the case-law pattern of Luxembourg. On the other hand, it became evident that the scope of social rights has also been expanded by the Court to the horizons one could hardly expect half a century ago. Nonetheless, the status of particular social rights (as the right to industrial action) in Community law is rather unclear.

The pre-accession economic fears made the majority of the EU-15 adopt limitations for the access of labour from CEEC. The key word in that system of limitations is graduality. Old member states negotiated the plan of gradual opening of their markets to avoid serious disturbances. Sweden became one of the countries who fully opened their labor markets for the service providers from the EU-10. As time has shown, the potential disturbance for the labour markets of EU-15 lays not in the danger of massive influx of workers from the newly accepted states, but rather in

¹²⁴ Case 346/06 *Dirk Rüffert v. Land Niedersachsen*, 2008. In para. 42 the Court states: “[...]it does not appear from the case-file submitted to the Court that a measure such as that at issue in the main proceedings is necessary in order to avoid the risk of seriously undermining the financial balance of the social security system, an objective which the Court has recognised cannot be ruled out as a potential overriding reason in the general interest”.

¹²⁵ See Manfred WEISS, *Enlargement and Industrial Relations: Building a New Social Partnership*, 20 INT.J.COMP.L.L.I.R. 5 (2004).

differences of labour costs and social standards. This problem is acquiring a wider recognition under the term of 'social dumping', virtually recognized by the ECJ. In *Laval* the Court framed the industrial action into the framework of a possible derogation which turned to be disproportional when balanced with the purposes of the internal market. Nevertheless, the ECJ pronounced explicitly on the potential of social rights to be perceived as fundamental rights under the general principles in the EC Law.

Hence, *Laval* is indeed an evasive indicator of the fundamentalization of social rights. However, I could hardly share the opinion that *Laval* significantly undermined the position of social rights in Europe. Careful analysis of the "blockage" situation reveals that the ECJ is actually consistent with the reasoning of the ECtHR. Implicitly following Strasbourg, the ECJ sets a lesson for the modification of the Nordic industrial model and limits the tyranny of trade unions. "Good manners" are imposed through the non-discrimination logic of the European integration. The arbitrariness of the wage calculation by social partners is an aspect which does not enjoy the cover of fundamental social rights.

The Court delicately avoids the rhetoric of the *post-enlargement solidarity*; however a deeper insight into the pre-enlargement negotiation reveals an implicit motivation of the Court. The sanctuary of economic freedoms as the foundation of European integration is reinforced in the context of the EU-27. Old member states have negotiated the graduation system as a pill against social dumping. The Court does not permit further fragmenting of the internal market through social provisions as a charlatan charter for the back-manoeuvre against the *EU citizens*¹²⁶ from the new member states.

The decision in *Laval* has significant legal, financial and demographic implications both for old and new member states.

Firstly, as far as a graduality system of market opening is concerned, the decision could either give impetus to final liberalization vis-à-vis CEEC or slow down the process, especially in Germany and Austria.

¹²⁶ Similarly Moreau induces the progress of 'fundamental social rights' from the perspective of "citizen-workers". She demonstrates that the internal market is actually structured by social rights, including the right to collective bargaining. Marie-Ange Moreau, *European Fundamental Social Rights in the Context of Economic Globalization*, in SOCIAL RIGHTS IN EUROPE (Gráinne De Búrca and Bruno de Witte (eds.) 2005), esp. 370-371. In *Laval* the Court tackles the abuses of such structuring.

Secondly, the Nordic model of salary bargaining is proclaimed contradictory to the EC Law as far as it applies to the service providers from other member states. One way out for the Swedish government is to reform radically the whole system which forms an essential tradition of labour relations in this country. Alternatively and most probably, it could keep an old system of the wage bargaining for the pure internal situation and change the rules vis-à-vis the external EU-based context. The major form of the judicial activism is the limitation of the trade union omnipresence. Notwithstanding the fact that a horizontal direct effect applies to them, the trade unions are prohibited to substitute the state. The burden of proof is also set on trade unions.

Thirdly, *Laval* indicates a strong impulse for the EU to keep on developing clear rules in the social sphere through the harmonization instruments. Otherwise a purely political failure to reach the compromise goes to the ECJ for which economic freedoms are obviously holy commands.

Fourthly, it may change the strategy of the old member states in the period of the future EU enlargements. The situation gives an incentive to negotiate an average-salary-protection-clause into the accession instruments.

Fifthly, the decision contributes to a further-migration-encouragement effect. The populist claim will be to question whether this stance shapes a “second sort of *EU citizenship*” – ready to work for the indecently minimum salaries. Around 70 000 people have already left two-million Latvia¹²⁷. Thousands people have been leaving one-million Estonia for labour migration. Not to mention a huge work migration from Lithuania or 1.5 million of Polish workers in the EU-15.

Sixthly, in the context of the British opt-out from the Nice Charter a decision alleviates the anxieties of the British government that further “labour and social law integration” is capable to enforce a union authoritarianism into the UK legislature. The Court avoids explicit references to the Nice Charter. Social rights seem to be imposed on the UK in full effect without regard to the Charter – as the fundamental rights inherent to the general principles of the EC Law.

¹²⁷ There are symptoms that Latvia itself experiences the lack of the construction workers due to the mass influx of the population to the EU-15. Also, see *Migration and the Latvian Labor Market* at <http://latviaeconomy.blogspot.com/2007/08/migration-and-latvian-labor-market.html> (last accessed on 18 November 2008).

Hence, in the Luxembourg gallery of the fundamentalization canvas *Laval* decision is portrayed as a dance pavilion with the pan-European media audience. The distinguished judges make *un pas en avant*, accepting the fundamental status of social rights. Then they elegantly step back, giving a bow of respect towards the EU-27 internal market and teach trade unions a lesson of good behaviour on the dance floor. The tango continues.

